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Report of the Human Rights Committee

Volume I

General Assembly

Official Records · Fiftieth Session
Supplement No. 40 (A/50/40)

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NOTE

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I. ORGANIZATIONAL AND OTHER MATTERS

A. States parties to the Covenant

1. As at 28 July 1995, the closing date of the fifty-fourth session of the Human Rights Committee, 131 States had ratified or acceded or said they would accede to the International Covenant on Civil and Political Rights and 94 States had ratified or acceded or said they would accede to the Optional Protocol to the Covenant. Both instruments were adopted by the General Assembly in resolution 2200 A (XXI) of 16 December 1966 and opened for signature and ratification in New York on 19 December 1966. They entered into force on 23 March 1976 in accordance with the provisions of their articles 49 and 9, respectively. Also as at 28 July 1995, 44 States had made the declaration envisaged under article 41, paragraph 1, of the Covenant, which came into force on 28 March 1979.

2. The second Optional Protocol, aiming at the abolition of the death penalty, which was adopted and opened for signature, ratification or accession by the General Assembly in resolution 44/128 of 15 December 1989, entered into force on 11 July 1991 in accordance with the provisions of its article 8. As at 28 July 1995, there were 28 States parties to the second Optional Protocol.

3. A list of States parties to the Covenant and to the Optional Protocols, with an indication of those which have made the declaration under article 41, paragraph 1, of the Covenant, is contained in annex I to the present report.

4. Reservations and other declarations made by a number of States parties in respect of the Covenant or the Optional Protocols are set out in document CCPR/C/2/Rev.4 and in notifications deposited with the Secretary-General.

B. Sessions and agenda

5. The Human Rights Committee has held three sessions since the adoption of its previous annual report. The fifty-second session (1358th to 1386th meetings) was held at the United Nations Office at Geneva from 17 October to 4 November 1994, the fifty-third session (1387th to 1415th meetings) at United Nations Headquarters from 20 March to 7 April 1995 and the fifty-fourth session (1416th to 1444th meetings) at the United Nations Office at Geneva from 3 to 28 July 1995.

C. Election, membership and attendance

6. At the fourteenth meeting of States parties, held at United Nations Headquarters on 8 September 1994, nine members of the Committee were elected, in accordance with articles 28 to 32 of the Covenant, to fill the vacancies resulting from the termination of some terms of office on 31 December 1994. Mr. Prafullachandra Natwarlal Baghwati, Mr. Thomas Buergenthal, Mr. Eckart Klein, Mr. David Kretzmer and Mrs. Cecilia Médina Quiroga were elected for the first time. Mr. Nisuke Ando, Mrs. Christine Chanet, Mr. Omran El Shafei and Mr. Julio Prado Vallejo were re-elected. A list of the members of the Committee appears in annex II to the present report.

7. All the members of the Committee participated in the fifty-second session.

Mr. Rajsoomer Lallah attended only part of that session. Mrs. Chanet did not attend the fifty-third session. Mr. Tamás Bán and Mr. Baghwati attended only part of that session. Mrs. Rosalyn Higgins attended only part of the fifty-fourth session.

D. Solemn declaration

8. At the 1387th, 1397th and 1416th meetings of the Committee (fifty-third and fifty-fourth sessions), the members of the Committee who had been elected or re-elected at the fourteenth meeting of States parties to the Covenant made a solemn declaration in accordance with article 38 of the Covenant before assuming their functions.

E. Election of officers

9. At the 1387th and 1399th meetings of the Committee (fifty-third session), held on 20 and 28 March 1995, the Committee elected its officers for a term of two years, in accordance with article 39, paragraph 1, of the Covenant: they are listed in annex II.

10. The Committee expressed its sincerest appreciation to Mr. Nisuke Ando, the outgoing Chairman, for the contribution which he had made to the success of the Committee's work by presiding over it so competently.

F. Working groups

11. In accordance with rules 62 and 89 of its rules of procedure, the Committee established working groups which were to meet before its fifty-second, fifty-third and fifty-fourth sessions.

12. The working group established under rule 89 was entrusted with the task of making recommendations to the Committee regarding communications received under the Optional Protocol. At the fifty-second session, the working group was composed of Mr. Bán and Mr. El Shafei, Ms. Elizabeth Evatt, Mr. Andreas V. Mavrommatis and Mr. Prado Vallejo. It met at the United Nations Office at Geneva from 10 to 14 October 1994 and elected Mr. Mavrommatis as its Chairperson/Rapporteur. At the fifty-third session, the working group was composed of Mr. Ando, Mr. Laurel Francis, Mrs. Higgins, Mr. Mavrommatis and Mr. Prado Vallejo. It met at United Nations Headquarters from 13 to 17 March 1995 and elected Mrs. Higgins as its Chairperson/Rapporteur. At the fifty-fourth session, the working group was composed of Mr. Baghwati, Mr. El Shafei, Mr. Mavrommatis, Mr. Fausto Pocar and Mr. Prado Vallejo. It met at the United Nations Office at Geneva from 3 to 7 July 1995 and elected Mr. Pocar as its Chairperson/Rapporteur.

13. The working group established under rule 62 was mandated to prepare concise lists of issues concerning the second, third and fourth periodic reports to be considered by the Committee at its fifty-second, fifty-third and fifty-fourth sessions. At the fifty-second session, the working group was composed of Mr. Francisco José Aguilar Urbina, Mr. Vojin Dimitrijevic, Mr. Waleed Sadi and Mr. Francis. It met at the United Nations Office at Geneva from 10 to 14 October 1994 and elected Mr. Aguilar Urbina as its Chairperson/Rapporteur. It had the task of studying the Committee's methods of work as well as a draft general comment on issues relating to reservations made by States parties upon

ratification of or accession to the Covenant or the Optional Protocols thereto or in relation to declarations made under article 41 of the Covenant. The members of the working group also held a joint meeting with the members of the working group established under the note relating to questions related to the structure of annual reports and the procedure to be followed by the Committee in response to emergency situations. At the fifty-third session, it was composed of Mr. Bán, Mr. Marco Tulio Bruni Celli, Ms. Evatt and Mr. Lallah; it met at United Nations Headquarters from 13 to 17 March 1995 and elected Mr. Bán as its Chairperson/Rapporteur. It had the task of studying a draft general comment on article 25 and of considering the Committee's methods of work. In addition, pursuant to a decision taken at the Committee's 1384th meeting (fifty-second session) (see paras. 40 and 41), the working group held a closed meeting on 13 March with representatives of specialized agencies in order to obtain advance information on reports to be considered at the fifty-third session; the meeting was attended by representatives of the International Labour Office, the Office of the United Nations High Commissioner for Refugees (UNHCR) and the World Health Organization (WHO). At the fifty-fourth session, the working group was composed of Mr. Aguilar Urbina, Mr. Francis, Mr. Klein and Mrs. Médina Quiroga. It met at the United Nations Office at Geneva from 3 to 7 July 1995 and elected Mr. Klein as its Chairperson/Rapporteur. It had the task of studying the Committee's methods of work and of considering general comments already adopted in the past in order to determine which of them warranted updating. Pursuant to a decision taken at the 1384th meeting (fifty-second session), the working group held a meeting on 3 July with representatives of the International Labour Office, UNHCR and WHO in order to obtain advance information on reports to be considered by the Committee at its fifty-fourth session.

G. Other matters

1. Fifty-second session

14. The Assistant Secretary-General for Human Rights referred to the aim of treaty universalization, as established by the Declaration and Programme of Action adopted by the World Conference on Human Rights held at Vienna, and emphasized that the Secretary-General had addressed a request to Heads of State and Government calling for the universal ratification of the principal human rights instruments and, in particular, the Covenant and its two Optional Protocols. In his report on the work of the Organization, the Secretary-General had called for better synergy between the work of the treaty bodies and the programme of advisory services and technical assistance of the Centre for Human Rights. The members of the Committee were also informed of the work of the fifth meeting of persons chairing the human rights treaty bodies held in September 1994, as well as the recent sessions of the Committee on the Rights of the Child and the Committee on the Elimination of Racial Discrimination.

2. Fifty-third session

15. The Committee was informed by the representative of the Secretary-General of the recent activities of the General Assembly in regard to human rights, particularly its resolution 49/178 of 23 December 1994 concerning effective implementation of international instruments on human rights, in which the Assembly noted with appreciation the initiatives taken by treaty bodies in respect of urgent measures to prevent human rights violations. The Assembly also urged them to amend their reporting guidelines so as to request gender-

specific information from States parties. The recommendation of the meeting of persons chairing the human rights treaty bodies that such meetings should in future be held on an annual basis was also endorsed by the Assembly. In addition, the members were informed of developments at the fifty-first session of the Commission on Human Rights and of the activities of the Committee on Economic, Social and Cultural Rights, the Committee against Torture, the Committee on the Rights of the Child and the Committee on the Elimination of Discrimination against Women.

16. The United Nations High Commissioner for Human Rights stressed the importance he attached to the Committee's work and, in particular, emphasized the leading role it played in the human rights treaty system. Further efforts were, however, needed in order to publicize the results of its work more widely and bring them to the attention of the competent national authorities. At every one of his meetings with government representatives, he had systematically drawn their attention to the comments adopted by the Committee following its consideration of the reports of States parties. Although it was too early to draw any firm conclusions about that practice, he had been struck by the fact that Governments were extremely sensitive to the issues raised and had on the whole given assurances that they would take steps to apply the Committee's recommendations.

17. The High Commissioner also stressed the importance of the treaty system in the international protection of human rights, saying that an unprecedented meeting had just been held between the persons chairing human rights treaty bodies and the Secretary-General. That meeting, which the High Commissioner had made a point of attending in person, had been the result of an initiative taken at the most recent meeting of the persons chairing such bodies in September 1994. Among the subjects discussed had been the action taken by the different committees to prevent human rights violations, such as early warning measures and urgent procedures.

18. The Committee also had an exchange of correspondence with the Federal Republic of Yugoslavia (Serbia and Montenegro) concerning the submission of reports in conformity with the Covenant (see paras. 53 and 54 and annex VIII to the present report).

H. Staff resources

19. The greater complexity and more intensive pace of the Committee's operations, resulting from the increased number of States parties to the Covenant as well as from qualitative changes in the Committee's methods of work, have added significantly to the workload of the Secretariat in providing substantive servicing to the Committee in relation to the monitoring of States parties' reports. The number of communications submitted to the Committee under the Optional Protocol has also grown (see chap. VIII). The Committee noted that under the terms of article 36 of the Covenant the Secretary-General of the United Nations was to provide the necessary staff and facilities for the effective performance of the functions of the Committee under the Covenant. It accordingly requested the Secretary-General to take the necessary steps to ensure a substantial increase in the specialized staff assigned to service the Committee in relation both to the monitoring of States parties' reports and to consideration of communications submitted under the Optional Protocol.

I. Publicity for the work of the Committee

20. The Chairman gave press conferences at each of the Committee's three sessions. The Committee expressed the wish that the information services should be associated more closely with its work so as to give it greater publicity. The Committee noted with appreciation the great interest in its work taken by the non-governmental organizations and thanked them for the information provided.

J. Publications relating to the work of the Committee

21. The Committee noted that the Official Documents (Yearbooks) of the Human Rights Committee had been published until 1991. Given the resources on hand, the Committee said that publication of the Official Documents (Yearbooks) should be expedited in order to liquidate the backlog and eliminate the delay in issuing the French version.

22. The Committee once again urged that the work be speeded up for the purpose of publishing volume III of the selection of decisions taken under the Optional Protocol so as to reduce the backlog as soon as possible. In future, the selected decisions should be issued in a regular and timely fashion.

23. The Committee also insisted on the need for its annual report together with its annexes to be submitted to the General Assembly on time.

24. The Committee wishes to draw attention to the fact that it was deprived of summary records at its forty-ninth session for financial reasons, but that the Secretariat undertook to produce them from the recorded tapes, in English only.[1] That has not yet been done, and the Committee therefore wishes to reiterate its request.

K. Facilities

25. The Committee expressed a wish for additional facilities to be made available during its sessions. It would like to have a room in which members could receive delegations, meet in informal groups, or work between meetings. In due course, all the documentation members of the Committee might need in preparing their work could be kept in the room in question, which could be used by other treaty bodies (see decision along those lines adopted at the most recent meeting of persons chairing human rights treaty bodies in September 1994 (see A/49/537, annex)).

L. Future meetings of the Committee

26. At its fifty-third session, the Committee confirmed the following schedule of meetings for 1996-1997: the fifty-sixth session will be held at United Nations Headquarters from 18 March to 5 April 1996, the fifty-seventh session at the United Nations Office at Geneva from 8 to 26 July 1996, the fifty-eighth session at the United Nations Office at Geneva from 21 October to 8 November 1996, the fifty-ninth session at United Nations Headquarters from 24 March to 11 April 1997, the sixtieth session at the United Nations Office at Geneva from 14 July to 1 August 1997 and the sixty-first session at the United Nations Office at Geneva from 20 October to 7 November 1997. In each case, the working groups of the Committee will meet during the week preceding the session.

M. Adoption of the report

27. At its 1443rd and 1444th meetings, on 27 and 28 July 1995, the Committee considered the draft of its nineteenth annual report, covering its activities at the fifty-second, fifty-third and fifty-fourth sessions, held in 1994 and 1995. The report, as amended in the course of the discussion, was adopted unanimously.

II. ACTION BY THE GENERAL ASSEMBLY AT ITS FORTY-NINTH SESSION AND BY THE COMMISSION ON HUMAN RIGHTS AT ITS FIFTY-FIRST SESSION

28. At its 1415th meeting, on 7 April 1995, the Committee considered the agenda item in the light of the relevant summary records of the Third Committee, General Assembly resolution 49/178, Commission on Human Rights resolutions 1995/18 and 1995/22 of 24 February 1995 and Commission on Human Rights decision 1995/110 of 3 March 1995.

29. The Committee noted that, in accordance with General Assembly resolution 45/175 of 18 December 1990, substantive resolutions on the human rights treaty bodies should be adopted every two years (in uneven years) and that, consequently, at its forty-ninth session, the Third Committee had limited itself to taking note of its report.

30. With reference to the discussion in the General Assembly relating to the effective implementation of international instruments on human rights, including reporting obligations under those instruments, and the effective functioning of the treaty bodies, the Committee noted with satisfaction that the Assembly had once again stressed the importance of compliance by States parties with their reporting obligations. The Committee took note of the importance attached by the Assembly to the final comments on the reports considered by the human rights treaty-monitoring bodies. The Committee noted that the conclusions and recommendations of the 5th meeting of persons chairing the human rights treaty bodies had been endorsed by the General Assembly, particularly the recommendation that their meetings should be held annually.

31. The Committee discussed the relevant resolutions adopted by the Commission on Human Rights at its fifty-first session. It wholeheartedly endorsed the resolution on succession of States in respect of international human rights treaties as well as that on the Covenants, in particular the recommendation that countries having difficulties in introducing changes in their legislation that might be necessary for the ratification of international instruments on human rights should be encouraged to request appropriate support from the Centre for Human Rights on advisory services and technical cooperation programmes, as well as the recommendation stressing the importance for States parties to observe the agreed conditions and procedure for derogation under article 4 of the International Covenant on Civil and Political Rights. The Committee noted with satisfaction the Commission's request that the recent periodic reports of States parties to the human rights treaty-monitoring bodies, the summary records of Committee discussions pertaining to them, and concluding observations and final comments of the treaty bodies should be made available to the United Nations information centres.

32. The Committee considered Commission on Human Rights decision 1995/110 on the right to a fair trial and noted that, as recommended by the Subcommission on Prevention of Discrimination and Protection of Minorities in its resolution 1994/35 of 26 August 1994, the Commission was considering the establishment of an open-ended working group to draft a third optional protocol to the International Covenant on Civil and Political Rights aiming at guaranteeing under all circumstances the right to a fair trial and to a remedy. In that regard, the Committee recalled that it had submitted its own recommendations to the Subcommission on Prevention of Discrimination and Protection of Minorities. In those recommendations, adopted at its 1314th meeting (fiftieth session), on 6 April 1994,[2] the Committee had concluded

that it was inadvisable to pursue the elaboration of a draft optional protocol to the Covenant with the aim of adding article 9, paragraphs 3 and 4, as well as article 14 to the list of non-derogable rights enumerated in article 4, paragraph 2, of the Covenant.

33. The Committee again noted that the purpose of the possible third optional protocol was to add article 9, paragraphs 3 and 4, and article 14 to the list of non-derogable provisions in article 4, paragraph 2, of the Covenant. Based on its experience derived from the consideration of States parties' reports submitted under article 40 of the Covenant, the Committee wishes to point out that, with respect to article 9, paragraphs 3 and 4, the issue of remedies available to individuals during states of emergency has often been discussed. The Committee is satisfied that States parties generally understand that the right to habeas corpus and amparo should not be limited in situations of emergency. Furthermore, the Committee is of the view that the remedies provided in article 9, paragraphs 3 and 4, read in conjunction with article 2, are inherent in the Covenant as a whole. Having this in mind, the Committee believes that there is a considerable risk that the proposed draft third optional protocol might implicitly invite States parties to feel free to derogate from the provisions of article 9 of the Covenant during states of emergency if they do not ratify the proposed optional protocol. Thus, the protocol might have the undesirable effect of diminishing the protection of detained persons during states of emergency.

34. The Committee is also of the view that it would simply not be feasible to expect that all provisions of article 14 can remain fully in force in any kind of emergency. Thus, the inclusion of article 14 as such in the list of non-derogable provisions would not be appropriate.

III. METHODS OF WORK OF THE COMMITTEE UNDER ARTICLE 40 OF THE COVENANT: OVERVIEW OF PRESENT WORKING METHODS

35. This section of the Committee's report aims at providing a concise and up-to-date overview of the modifications recently introduced by the Committee in its working methods under article 40 of the Covenant and is particularly designed to make the current procedure more transparent and readily accessible to all, so as to assist States parties and others interested in the implementation of the Covenant. A detailed account of the methods of work usually applied by the Committee for the consideration of reports submitted by States parties appears in the Committee's last annual report.[3]

A. The Committee's procedures in dealing with emergency situations and in cases of reports that have been overdue for a very long period

36. Since April 1991 (forty-first session), and in the light of recent or current events indicating that the enjoyment of human rights protected under the Covenant has been seriously affected in certain States parties, the Committee has resorted to the practice of requesting the States parties concerned to submit urgently reports on the situation (generally within three months). Such decisions have been taken regarding, in chronological order, Iraq (11 April 1991), the Federal Republic of Yugoslavia (4 November 1991), Peru (10 April 1992), Bosnia and Herzegovina, Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro) (6 October 1992), Angola and Burundi (29 October 1993), Haiti and Rwanda (27 October 1994).

37. The situation regarding overdue reports has grown worse over the years, seriously jeopardizing the attainment of the objectives of the Covenant and hampering the ability of the Committee to monitor the implementation of the Covenant in the States parties concerned. As at 28 July 1995, a total of 106 reports (27 initial, 21 second periodic, 37 third periodic and 21 fourth periodic reports), involving a total of 85 States parties, were outstanding.

38. In view of the foregoing, the Committee decided at its fifty-second session that in future States parties that had not replied favourably to a special request or to a decision by the Committee and whose reports were overdue by five years or more should be sent a strongly worded note verbale requesting them to submit their reports as soon as possible. Such notes verbales were sent for the first time on 12 December 1994.

39. At the same session, the Committee also decided that, where the consideration of a report revealed a grave human rights situation, the Committee could request the State party concerned to receive a mission composed of one or more of its members in order to re-establish dialogue with it, explain the situation better and formulate appropriate suggestions or recommendations.

B. Participation by specialized agencies and other United Nations organs in the Committee's work

40. At its fifty-second session, the Committee modified its working methods so as to enable the specialized agencies and other United Nations organs to take a more active part in its activities. The Committee accordingly decided that a meeting would be scheduled at the beginning of each session of the pre-sessional

working group so that it might suitably receive oral information provided by those organizations. Such oral information should thus relate to the reports to be considered during the Committee's session and, if need be, supplement the written information already provided.

41. Consequently, starting with the fifty-third session, the Working Group on Article 40 devoted a meeting to listening to such statements by specialized agencies and other United Nations organs concerning the reports to be considered during the plenary session. The Committee was highly appreciative both of the wealth of the oral or written information received and of the level of representation of the specialized agencies or other United Nations organs participating in such exchanges of views, in particular the International Labour Office and UNHCR.

42. On the basis of this experience and noting that the special rapporteurs or representatives and the working groups of the Commission on Human Rights were tending to make increasingly frequent reference to its comments, the Committee, at its fifty-third session, expressed the wish that they should also be allowed as far as possible to avail themselves of the procedure described in the previous paragraph. It therefore decided that, whenever possible, the special rapporteurs or representatives and representatives of working groups of the Commission on Human Rights that had drafted country reports or thematic reports would be invited to attend the aforementioned meeting of the Working Group on Article 40.

C. Equality and human rights of women

43. The Committee took note of the various recommendations made by the World Conference on Human Rights concerning the integration of a component regarding equality of status and human rights of women in the activities of the human rights treaty bodies (principles 36 to 42 of the Declaration of the Vienna Programme of Action).[4] The Committee stressed in that connection that the lists of issues to be dealt with during the Committee's consideration of States' reports submitted under article 40 of the Covenant systematically included practical matters concerning equality of status and the human rights of women. Furthermore, general comment No. 4 (13) was devoted to matters concerning measures to be taken to give effect to article 3 of the Covenant, while general comment No. 18 (37) covered all the provisions against discrimination under articles 2, 3 and 26 of the Covenant. The Committee is envisaging the possibility of supplementing these two texts by a specific general comment.

44. At its fifty-third session, the Committee decided to amend paragraph 4 (c) of the Committee's guidelines concerning the initial reports submitted by States parties as follows:

> "4. The part of the report relating specifically to parts I, II and III of the Covenant should describe in relation to the provisions of each article:
>
> "...
>
> "(c) Any other factors or difficulties affecting the enjoyment of the right by persons within the jurisdiction of the States, including any factors affecting the equal enjoyment by women of that right".

45. Paragraph 6 (e) of the Committee's guidelines for periodic reports is amended accordingly. The guidelines as amended are reproduced in annex VII to

the present report.

IV. SUBMISSION OF REPORTS BY STATES PARTIES UNDER ARTICLE 40 OF THE COVENANT

46. Under article 2, paragraph 1, of the International Covenant on Civil and Political Rights, each State party undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized and enumerated in Part III of the Covenant. In connection with this provision, article 40, paragraph 1, of the Covenant requires States parties to submit reports on the measures adopted and the progress achieved in the enjoyment of the various rights, and on any factors and difficulties that may affect the implementation of the Covenant. States parties undertake to submit reports within one year of the entry into force of the Covenant for the States parties concerned and thereafter whenever the Committee so requests. In order to assist States parties in submitting reports, the Human Rights Committee approved, at its second session, general guidelines regarding the form and contents of initial reports (see annex VII).

47. Furthermore, in accordance with article 40, paragraph 1 (b), of the Covenant, the Committee adopted a decision on periodicity at its thirteenth session requiring States parties to submit subsequent reports to the Committee every five years.[5] At the same session, the Committee adopted guidelines regarding the form and contents of periodic reports from States parties under article 40, paragraph 1 (b), of the Covenant (see annex VII).

48. At its thirty-ninth session, the Committee adopted an amendment to its guidelines for the submission of initial and periodic reports relating to reporting by States parties on action taken in response to the issuance by the Committee of views under the Optional Protocol.[6] At its forty-second session, the Committee revised its general guidelines for the submission of initial and periodic reports to take into account the consolidated guidelines for the initial part of the reports of States parties to be submitted under the various international human rights instruments, including the Covenant (HRI/CORE/1).[7] In addition, at its fifty-third session, the Committee further amended its guidelines with a request to States to include in their reports information on any factors affecting the equal enjoyment by women of the rights protected under the Covenant (see para. 44 and annex VII).

A. Reports submitted by States parties under article 40 of the Covenant during the period under review

49. During the period covered by the present report, the Committee received 16 initial or periodic reports, representing a significant increase by comparison with previous years. Initial reports were submitted by Brazil, Estonia, Guatemala, Latvia, Switzerland and Zambia; Cyprus, Denmark, Iceland, Mauritius, the Netherlands and Peru submitted their third periodic reports; and Belarus, the Russian Federation, Sweden and the United Kingdom of Great Britain and Northern Ireland submitted their fourth periodic reports.

50. The Committee noted that the reports submitted by States parties under article 40 of the Covenant increasingly reproduced the texts of legislation in extenso, which made the reports extremely bulky. The Committee noted that the States concerned adopted this practice with the clear intention of complying with the Committee's guidelines on initial reports (CCPR/C/5/Rev.2), which refer, inter alia to a description of the legislative, administrative or other measures in force relating to each right. The Committee nevertheless considers

that States should include only necessary information in their reports, and in particular avoid simply paraphrasing the law without describing its practical application; this would obviate the huge increase in the volume of information furnished to the Committee, and consequently the growing constraints faced by the Secretariat in translating and reproducing documents as well as the inevitable delays occasioned in the consideration of reports.

51. The Committee received a communication from the Government of Mexico, dated 18 July 1994, regarding the consideration of its third periodic report by the Committee in March 1994 (fiftieth session).[8] The communication included replies to certain oral questions to which the delegation had been unable to reply during the consideration of that report, as well as comments on the observations of the Committee contained in document CCPR/C/79/Add.32. The Government's communication is reproduced in document CCPR/C/108.

52. The Committee also received a communication dated 27 July 1995 from the Government of Latvia concerning consideration of its initial report (see paras. 334-361). It contained replies to certain oral questions which the delegation could not answer when its report was considered. In addition, in a communication of the same date, the Government of Ukraine made a number of observations about the Committee's final comments reproduced in paragraphs 305-333 below. The Government's communication appears in document CCPR/C/109.

53. In a letter dated 26 January 1995 addressed to the Chairman of the Committee, the Permanent Representative of the Federal Republic of Yugoslavia to the United Nations Office at Geneva stated, inter alia, that in view of the fact that the rights of Yugoslavia under the Covenant, particularly the right to equitable participation in the meetings of States parties, had been denied, its Government would only submit its fourth periodic report to the Committee when the Federal Republic of Yugoslavia was treated as an equal party to the Covenant.

54. In his reply on behalf of the Committee, on 13 July 1995, the Chairman underlined that the submission of reports under the Covenant constituted a solemn legal obligation assumed by each State party and was indispensable for carrying out the Committee's basic function of establishing a positive dialogue with States parties in the field of human rights. Therefore, non-submission of reports greatly hindered the process of dialogue and seriously undermined the objectives of the Covenant by hampering the Committee's ability to monitor the implementation of the Covenant. He further recalled that in an earlier decision the Committee had emphasized that all the people within the territory of the former Yugoslavia were entitled to the guarantees of the Covenant and that the Federal Republic of Yugoslavia was bound by the obligations under the Covenant. While it was not for the Committee to take a position on the action of the meeting of States parties with regard to the Federal Republic of Yugoslavia (Serbia and Montenegro), the Committee would continue to proceed on the basis of that understanding and expressed the hope that the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) would reconsider its decision and submit its report to the Committee as soon as possible (the contents of the letter are reproduced in annex VIII to the present report).

B. Special decisions by the Human Rights Committee concerning reports of particular States

55. In view of the special difficulties encountered by Haiti and Rwanda in the implementation of the Covenant, the Committee adopted, at its 1374th meeting (fifty-second session), on 27 October 1994, the following special decisions:

"Haiti

"The Human Rights Committee,

"Deeply concerned at the difficulties encountered by Haiti in regard to protection of the human rights set forth in the International Covenant on Civil and Political Rights,

"Acting under article 40, paragraph 1 (b) of the Covenant,

"1. Decides to request the Government of Haiti to submit its initial report without delay for discussion by the Committee at its fifty-third session, to be held from 20 March to 7 April 1995, and, in any event, to submit not later than 31 January 1995 a report, in summary form if necessary, relating in particular to the application of articles 6, 7, 9, 10 and 14 of the Covenant;

"2. Requests the Secretary-General to bring this decision to the attention of the Government of Haiti."

"Rwanda

"The Human Rights Committee,

"Deeply concerned at the difficulties encountered by Rwanda in regard to protection of the human rights set forth in the International Covenant on Civil and Political Rights,

"Acting under article 40, paragraph 1 (b) of the Covenant,

"1. Decides to request the Government of Rwanda to submit its third periodic report without delay for discussion by the Committee at its fifty-third session, to be held from 20 March to 7 April 1995, and, in any event, to submit not later than 31 January 1995 a report, in summary form if necessary, relating in particular to the application during the present period of articles 6, 7, 9, 10, 14 and 27 of the Covenant;

"2. Requests the Secretary-General to bring this decision to the attention of the Government of Rwanda."

C. Reports submitted by States parties in accordance with a special decision of the Human Rights Committee

56. Burundi submitted a special report pursuant to a decision to that effect adopted by the Committee on 29 October 1993 at its forty-ninth session.[9] Haiti submitted a special report, which was considered at the Committee's fifty-third session (see paras. 55 and 224-241).

V. STATES THAT HAVE NOT COMPLIED WITH THEIR OBLIGATIONS UNDER ARTICLE 40

57. States parties to the Covenant must submit the reports referred to in article 40 of the Covenant on time so that the Committee can duly perform its functions under that article. These reports are the basis of the dialogue between the Committee and States parties, and any delay in their submission means an interruption of this process. However, serious delays have been noted since the establishment of the Committee. During the period covered by the present report, the Committee took various measures to induce States parties effectively to carry out their reporting obligation under article 40 of the Covenant. Reminders were sent on 12 December 1994 and 29 June 1995 to States parties whose reports had not been submitted as scheduled. In addition, at the session of March/April 1995, the members of the Bureau met in New York with the Permanent Representatives of all States parties whose initial report, periodic report or report under a special decision of the Committee had been overdue for more than four years. Such contacts were made with the Permanent Representatives of all the States concerned with the exception of Angola, the Gambia and the Democratic People's Republic of Korea.

58. After reviewing the situation with respect to the late submission both of initial and periodic reports, the Committee noted with regret that 85 States parties to the Covenant, or more than two thirds of all States parties, were in arrears with their reports. The Committee again considered itself duty-bound to express its serious concern about the fact that so many States parties are in default of their obligations under the Covenant. This state of affairs seriously impedes the Committee's ability to monitor the implementation of the Covenant, and it therefore decided to list in the core of its annual report to the General Assembly, as it had already done in its previous annual report, the States parties that have more than one report overdue. The Committee wishes to reiterate that these States are in serious default of their obligations under article 40 of the Covenant.

State party	Type of report	Date due	Years overdue	Number of reminders sent
Gabon	Initial Second Third	20 April 1984 20 April 1989 20 April 1994	11	23 12 3
Syrian Arab Republic	Second Third	18 August 1984 18 August 1989	11	23 12
Gambia	Second Third	21 June 1985 21 June 1990	10	21 10
Lebanon	Second Third Fourth	21 March 1986 21 March 1988 21 March 1993	9	20 15 3
Suriname	Second Third	2 August 1985 2 August 1990	10	20 10
Kenya	Second Third	11 April 1986 11 April 1991	9	19 9
Mali	Second Third	11 April 1986 11 April 1991	9	19 9
Jamaica	Second Third	1 August 1986 1 August 1991	9	15 8
Guyana	Second Third	10 April 1987 10 April 1992	8	17 7
Democratic People's Republic of Korea	Second Third	13 December 1987 13 December 1992	8	15 5
Equatorial Guinea	Initial Second	24 December 1988 24 December 1993	7	13 3
Central African Republic	Second Third	9 April 1989 7 August 1992	6	12 6
Congo	Second Third	4 January 1990 4 January 1995	5	11 1
Trinidad and Tobago	Third Fourth	20 March 1990 20 March 1995	5	11 1
Saint Vincent and the Grenadines	Second Third	31 October 1991 8 February 1993	4	8 5
Panama	Third Fourth	31 March 1992 6 June 1993	3	7 4
Madagascar	Third Fourth	31 July 1992 3 August 1993	3	6 4
Angola	Special	31 January 1994	1	2
Rwanda	Special	31 January 1995	-	1

VI. CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 40 OF THE COVENANT

59. At its 1314th meeting (fiftieth session), the Committee decided to discontinue its practice of including in its annual report summaries of the consideration of the reports submitted by States parties under article 40 of the Covenant. In accordance with that decision, the annual report shall contain, inter alia, the final comments adopted by the Committee at the end of the consideration of States parties' reports. Accordingly, the following paragraphs, arranged on a country-by-country basis in the sequence followed by the Committee in its consideration of the reports, contained the final comments adopted by the Committee with respect to the States parties' reports considered at its forty-ninth, fiftieth and fifty-first sessions.

A. Nepal

60. The Committee considered the initial report of Nepal (CCPR/C/74/Add.2) at its 1359th and 1363rd meetings, on 17 and 19 October 1994, and adopted[10] the following final comments:

1. Introduction

61. The Committee welcomes the initial report (CCPR/C/74/Add.2) and the core document (HRI/CORE/1/Add.42) of Nepal and expresses its appreciation to the State party for the opening of a constructive dialogue. The Committee regrets, however, that the information provided in the report was in many respects incomplete and did not follow the Committee's guidelines regarding the form and contents of initial reports (CCPR/C/5/Rev.1). The lack of information on factors and difficulties impeding the implementation of the Covenant prevented the Committee from gaining a clear idea of the real human rights situation in the country.

62. The Committee expresses its appreciation to the State party for taking part in the dialogue and for responding to the questions raised by members of the Committee. The valuable information provided orally supplemented to a certain extent the report, thereby providing a sound basis for a frank and fruitful dialogue between the Committee and the State party. It, however, regrets that the delegation could not include representatives of the various ministries concerned with the implementation of the Covenant, in particular of the Ministry of Justice.

2. Factors and difficulties affecting the implementation of the Covenant

63. The Committee recognizes that Nepal is emerging from a long period of isolation, and that the remnants of authoritarian rule have not yet been overcome. Steps remain to be taken in engaging, consolidating and developing democratic institutions for better implementation of the Covenant. Economic depression, extreme poverty and widespread illiteracy constitute obstacles to the effective implementation of the Covenant.

3. Positive aspects

64. The Committee welcomes the efforts undertaken by the State party to establish democratic institutions and multipartism as well as its declared commitment to the rule of law and the independence of the judiciary. It takes note, in particular, of the adoption of a new Constitution that provides the basis for a parliamentary system of government based on multi-party democracy as well as for an independent Supreme Court. The right of citizens to petition the Supreme Court to challenge laws which violate human rights and the use of this right is particularly welcomed. The Committee also notes with satisfaction that Nepal has recently acceded to a number of international human rights instruments, including the First Optional Protocol to the Covenant.

4. Principal subjects of concern

65. The Committee notes that the status of the Covenant within the legal system is unclear and that the necessary steps to adopt legislative and other measures to give effect to the rights recognized in the Covenant have not yet been taken. Furthermore, a significant gap exists between provisions of the Constitution and other legal norms, on the one hand, and their application in practice, on the other. Accordingly, there is a need to define clearly the place of the Covenant within the Nepalese legal system to ensure that domestic laws are applied in conformity with the provisions of the Covenant and that the latter can be invoked before the courts and applied by the other authorities concerned. The lack of publicity given to the provisions of the Covenant and the Optional Protocol is also a matter of concern. Since provisions of the Constitution seem to provide rights and freedoms to citizens only, the Committee draws the State party's attention to its obligations to ensure to all individuals within its jurisdiction the rights and freedoms recognized in the Covenant.

66. The Committee notes that the non-discrimination clauses in article 11 of the Constitution do not cover all the grounds provided for in articles 2 and 26 of the Covenant. It is particularly disturbed by the fact that the principle of non-discrimination and equality of rights suffers serious violations in practice and deplores inadequacies in the implementation of the prohibition of the system of castes. The persistence of practices of debt bondage, trafficking in women, child labour, and imprisonment on the ground of inability to fulfil a contractual liability constitute clear violations of several provisions of the Covenant.

67. The Committee expresses its concern about the situation of women who, despite some advances, continue to be de jure or de facto the object of discrimination as regards marriage, inheritance, transmission of citizenship to children, divorce, education, protection against violence, criminal justice and wages. The Committee is also concerned that the average life expectancy of women is shorter than that of men. It regrets the high proportion of women prisoners sentenced for offences resulting from unwanted pregnancies.

68. The Committee deplores the lack of clarity of the legal provisions governing the introduction and administration of a state of emergency, particularly article 115 of the Constitution, which would permit derogations contravening the State party's obligations under article 4, paragraph 2, of the Covenant.

69. The Committee is deeply concerned about the cases of summary and arbitrary executions, enforced or involuntary disappearances, torture and arbitrary or

unlawful detention committed by members of the army, security or other forces during the period under review that have been brought to its attention. It deplores that those violations were not followed by proper inquiries or investigations, that the perpetrators of such acts were neither brought to justice nor punished and that the victims or their families were not compensated. It regrets that the draft laws against torture and ill-treatment of the person and on the compensation of victims of torture have not yet been adopted. Moreover, the quasi-judicial authority of the Chief District Officer and the insufficient protection of the independence of the judiciary undermine the efforts aimed at preventing the recurrence of such acts.

70. The Committee notes with concern the excessive restrictions on the right to freedom of expression and information and the restrictions that apply to the manifestation of religion and to change of religion.

5. Suggestions and recommendations

71. The Committee recommends that the legislative reforms presently under way in Nepal be expanded and intensified in order to ensure that all relevant legislation is in conformity with the Covenant. It emphasizes the need for the provisions of the Covenant to be fully incorporated into domestic law and made enforceable by domestic courts. The necessary steps should be taken to give effect to the rights recognized in the Covenant. The text of the Covenant and the First Optional Protocol should be translated into all languages spoken in Nepal, widely publicized and included in school curricula, to ensure that the provisions of these instruments are widely known to members of the legal profession, the judiciary and law enforcement officials, as well as to the general public. The legal profession and non-governmental organizations should be encouraged to contribute to the process of reform.

72. The Committee stresses the need to take appropriate action in order to ensure the effective application of articles 2 and 3 of the Covenant, particularly through the adoption of administrative and educational measures designed to eliminate traditional practices and customs detrimental to the well-being and status of women and vulnerable groups of Nepalese society.

73. The Committee recommends that appropriate information be gathered and educational measures be taken to eradicate practices of debt bondage, trafficking in women and child labour. Prison reforms now envisaged should be accelerated.

74. The Committee recommends that the authorities adopt legislation to bring its domestic legal regime into harmony with its obligations under article 4, paragraph 2, of the Covenant.

75. The Committee urges the Government of Nepal to take all necessary measures to prevent extrajudicial and summary executions, enforced or involuntary disappearances, torture and degrading treatment and illegal or arbitrary detention. The Committee recommends that all such cases be systematically investigated in order to bring those suspected of having committed such acts before the courts and that the victims be compensated.

76. The Committee recommends that Nepal study measures directed towards the abolition of the death penalty, and give consideration to accession to the Second Optional Protocol.

77. The Committee also recommends that the necessary measures be taken by the Government to give effect to the separation of executive and judicial functions and to ensure the full independence and proper functioning of the judiciary. The texts of the draft laws against torture and ill-treatment of the person as well as on compensation of victims of torture should be brought into line with the provisions of the Covenant and adopted as soon as possible. Specifically targeted training courses on human rights for law enforcement officials, members of the judiciary and members of the police and security forces should be organized.

78. The Committee calls upon the State party to prepare its second periodic report in compliance with the Committee's guidelines regarding the form and contents of State party reports (CCPR/20/Rev.1). The report should, in particular, include detailed information on the specific laws applicable to each right protected under the Covenant and the extent to which each right is enjoyed in practice, and refer to specific factors and difficulties that might impede its application. In undertaking this obligation, the State party may avail itself of the Advisory Services and Technical Assistance Programmes of the Centre for Human Rights.

B. Tunisia

79. The Committee considered the fourth periodic report of Tunisia (CCPR/C/84/Add.1) at its 1360th to 1362nd meetings, on 18 and 19 October 1994, and adopted[10] the following comments:

1. Introduction

80. The Committee welcomes the timely submission of the fourth periodic report of Tunisia and appreciates the promptness with which the State party continues to meet its reporting obligations under the Covenant. The report contains useful and detailed information on measures taken by the Government, particularly with regard to legislative reform and institutional developments affecting the application of the Covenant. However, the Committee notes that the report does not contain sufficient information on factors and difficulties encountered in the implementation of the Covenant.

81. The Committee also welcomes the presence, during the examination of the report, of a high-level and competent delegation of experts knowledgeable in the implementation of the Covenant in Tunisia. The delegation provided much useful and updated information which facilitated a constructive dialogue with the State party.

2. Factors and difficulties affecting the implementation of the Covenant

82. The Committee is aware that Tunisia is in a period of economic, political and social transition and that it has to face the challenge of extremist movements.

3. Positive aspects

83. The Committee notes with satisfaction the attempt to build a comprehensive constitutional and legal framework for the promotion and protection of human rights. The Committee welcomes recent progress in enhancing and strengthening that framework, notably the establishment of a number of human rights posts, offices and units within the executive branch with a view to ensuring greater conformity of Tunisian law and practice with the Covenant and other international human rights instruments.

84. The Committee also notes with satisfaction recent legislative reforms aimed at bringing Tunisian law into closer harmony with the requirements of the Covenant. In this connection, the Committee welcomes changes in the Penal Code, which have reduced the duration of preventive detention and strengthened sanctions in cases of family violence directed against women. The Committee also welcomes recent reforms in the Personal Status Code and other laws aiming to guarantee and reinforce the equal rights of women in a number of areas, including divorce, custody and maintenance, and to strengthen the protection of women against violence.

4. Principal subjects of concern

85. The Committee cannot conceal its disappointment with the deterioration in the protection of human rights in Tunisia in the period under review. It is concerned, in particular, about the growing gap between law and actual practice with regard to guarantees and safeguards for the protection of human rights. Although there is now in place an impressive array of State organs for the promotion and protection of human rights at various levels, the Committee notes that they have been concentrated exclusively within the executive branch of the Government. Consequently, it is not clear whether there are sufficiently independent mechanisms within the public administration and the judiciary to effectively monitor and enforce the implementation of existing human rights standards, including the investigation of abuses.

86. The Committee is particularly concerned about continuing reports of the abuse, ill-treatment and torture of detainees, including deaths in custody under suspicious circumstances. In this connection, it appears that Tunisian regulations are not strictly adhered to with respect to the prompt registration of persons arrested, the immediate notification of family members, the limitation of pre-trial detention to the 10-day maximum, the requirement of medical examinations whenever allegations of torture or other abuse are made and the carrying out of autopsies in all cases of death in custody. It is also not clear whether these and other requirements are being systematically monitored or whether investigations are automatically undertaken in all cases where there are either allegations or suspicious circumstances indicating that torture may have taken place. The Committee is also concerned that present laws are overly protective of government officials, particularly those concerned with security matters; it is particularly concerned that those government officials who have been found guilty of wrong-doing remain anonymous to the general public, becoming immune from effective scrutiny.

87. The Committee is concerned about the independence of the judiciary. It is also concerned by the reports on harassment of lawyers who have represented clients accused of having committed political offences and of the wives and families of suspects. With respect to article 6 of the Covenant, the Committee is concerned about the large number of crimes in Tunisia for which the death

penalty may be imposed.

88. The Committee regrets that, despite the significant progress that has been achieved regarding the equal rights of women, there remain a number of outdated legal provisions that are contrary to the Covenant. Those provisions concern the status of married women and their equal rights in matters of child custody, the transmission of nationality and parental consent for the marriage of minor children. The Committee is also concerned about legal discrimination against non-Muslims with respect to eligibility for public office.

89. The Committee is concerned that dissent and criticism of the Government are not fully tolerated in Tunisia and that, as a result, a number of fundamental freedoms guaranteed by the Covenant are not fully enjoyed in practice. In particular, it regrets the ban on the publication of certain foreign newspapers. The Committee is concerned that those sections of the Press Code dealing with defamation, insult and false information unduly limit the exercise of freedom of opinion and expression as provided for under article 19 of the Covenant. In this connection, the Committee is concerned that those offences carry particularly severe penalties when criticism is directed against official bodies as well as the army or the administration, a situation which inevitably results in self-censorship by the media when reporting on public affairs. The Committee also notes with concern that it is not clear how procedures ensure independent review on the merits, including judicial appeal, in cases where those provisions of the Press Code have been invoked.

90. The Committee is concerned that the Associations Act may seriously undermine the enjoyment of the freedom of association under article 22, particularly with respect to the independence of human rights non-governmental organizations. In this connection, the Committee notes that the Act has already had an adverse impact on the Tunisian League for Human Rights. The Committee believes that the Political Parties Act and the conditions imposed on the activities of political parties are not in conformity with articles 22 and 25 of the Covenant. The Committee is also concerned that, under the Passport Act, the grounds for refusing a passport are not clearly specified by law in a way that complies with article 12 of the Covenant, leaving open the possibility of refusal on political or other unacceptable grounds.

91. The Committee is concerned that, while generally there is a well-protected freedom to practise and manifest one’s religion, this right is not made available in respect of all beliefs.

5. Suggestions and recommendations

92. The Committee recommends that steps be taken to strengthen the independence of human rights institutions in Tunisia and thereby close the gap between law and practice and enhance the confidence of the public in those institutions. The Committee emphasizes that the work of the "médiateur administratif", the Presidential Human Rights Commissioner and any commission investigating reports of human rights abuses should be transparent and the results should be made public. The Committee notes that a better balance is needed between State and private institutions concerned with human rights and, in that connection, suggests that steps be taken to provide more encouragement to human rights non-governmental organizations in Tunisia. The Committee also recommends that steps be taken to strengthen the independence of the judiciary, particularly from the executive branch.

93. The Committee strongly recommends that the State party consider ratifying or acceding to the First Optional Protocol to the International Covenant on Civil and Political Rights. Acceptance of the First Optional Protocol would strengthen the capacity of the Government with respect to inquiries into allegations of human rights abuses and also in regard to further elaborating jurisprudence relating to human rights matters.

94. With respect to reports of torture and abuse of detainees, the Committee strongly recommends closer monitoring of the arrest and detention process; systematic, prompt and open investigation into allegations; prosecution and punishment of offenders; and the provision of legal remedies for victims. There should be strict enforcement of registration procedures, including prompt notification of family members of persons taken into custody, and the 10-day limit to preventive detention. Steps should also be taken to ensure that medical examinations are automatically provided following allegations of abuse and that thorough autopsies are performed following any death in custody. In all cases where investigations are undertaken, the findings should be made public.

95. The Committee also recommends that the State party take steps to reduce the number of crimes for which the death penalty may be imposed and envisage acceding to the Second Optional Protocol to the Covenant.

96. With respect to discrimination, the Committee recommends that a further review of relevant legislation be undertaken with a view to amending the law where necessary in order to bring it into conformity with the requirements of the Covenant. Such a review should focus on the equal rights of women, particularly in regard to their parental and custodial rights and the transmission of nationality, as well as on existing legal impediments to the equal participation of non-Muslims in presidential elections.

97. The Committee recommends that measures be taken to ensure the exercise of freedom of opinion and expression in accordance with article 19 of the Covenant. In particular, there should be a review and, where appropriate, amendment of those provisions of the Press Code which unduly protect government policy and officials from criticism. Provision should also be made for independent judicial review of all sanctions imposed under the relevant act.

98. The Committee also recommends that a review be undertaken of the Associations Act, the Passport Act and the Political Parties Act to ensure that they are in full conformity with the requirements of the Covenant. With respect to freedom of religion, the Committee recommends that there be close and independent monitoring of the exercise of that right by all groups in Tunisia. The Committee emphasizes that its general comment on article 18 should be reflected in government policy and practice.

C. Morocco

99. The Committee considered the third periodic report of Morocco (CCPR/C/76/Add.3 and Add.4) at its 1364th to 1366th meetings, on 20 and 21 October 1994, and adopted[11] the following comments:

1. Introduction

100. The Committee welcomes the opportunity to resume its dialogue with the State party and thanks the Government for its report (CCPR/C/76/Add.3 and Add.4) and core document (HRI/CORE/1/Add.23). The Committee regrets, however, that although the report contained detailed information on laws and regulations giving effect to the Covenant, it did not include sufficient information about the implementation of the Covenant in practice or about factors and difficulties affecting the application of the Covenant.

101. The delegation provided valuable additional information on a number of issues not covered in the report, which enabled the Committee to obtain a better understanding of the human rights situation in Morocco. This enhanced the dialogue between the delegation and the Committee.

2. Factors and difficulties affecting the implementation of the Covenant

102. The Committee recognizes that the State party has embarked on a wide-ranging process of amending its domestic legislation to bring it into line with the Covenant. The process has not yet been completed and steps remain to be taken to harmonize the Constitution with the Covenant and develop democratic institutions and human rights machinery for better implementation of the Covenant. The remnants of certain traditions and customs constitute an obstacle to the effective implementation of the Covenant, particularly with regard to equality between men and women.

3. Positive aspects

103. The Committee recognizes that the attitude of the Government has recently changed towards a greater openness in its handling of human rights issues, including its reporting obligations under the Covenant. In the latter regard, some frank oral answers given during the consideration of the report to questions raised by members regarding issues such as disappearances, the existence of the Tazmamart detention centre, the whereabouts of persons previously detained therein and the fate of the Oufkir family were appreciated.

104. The Committee welcomes the numerous measures taken during the period under review to improve democracy and institute a legal environment more favourable to the promotion and protection of human rights. The Committee notes with satisfaction the promulgation in 1992 of an amended Constitution and the amnesty of a number of political prisoners. Compensation is being paid to certain persons illegally detained. The Committee was also glad to learn of the commutation of death sentences to life imprisonment sentences, the establishment of the Constitutional Council and the Economic and Social Council, the holding on 27 September 1993 of parliamentary elections and the holding of a national symposium on problems affecting the news, information and communication services to recommend modifications in the legislation to, inter alia, bring it into line with international human rights standards, which constitute steps to consolidate the rule of law. Some progress has been made in the promotion of the status of women and women have been elected to Parliament for the first time. The Committee also welcomes the information that measures have been taken to teach the Covenant and other international human rights instruments to members of the judiciary and the police. The freedom now given to non-governmental organizations to be active in the country is also a matter of appreciation.

4. Main subjects of concern

105. The Committee notes that the Constitution does not contain specific provisions as to the relationship between international treaties and domestic law. Accordingly, there is a need to define better the place of the Covenant within the Moroccan legal system to ensure that domestic law is applied in conformity with the provisions of the Covenant.

106. The Committee is concerned about Morocco's role with regard to the persistent problems regarding self-determination in Western Sahara.

107. The Committee regrets that, although some improvement has been achieved as regards the status of women, the State party has not yet embarked on all the necessary reforms to combat the difficulties still impeding equality between men and women. The Constitution provides for equality only in the area of political rights, and the situation of women in both public and private law continues to be de jure or de facto the object of discrimination as regards the right to leave the country, freedom to pursue commercial activities, personal status, marriage, divorce, inheritance rights, transmission of nationality, education, access to work and participation in the conduct of public affairs.

108. The Committee is concerned that the categories of crimes punishable by the death penalty include crimes in respect of which, by reference to article 6 of the Covenant, the death penalty should not be imposed.

109. Despite the amnesty of political prisoners and the destruction of certain unregistered places of detention, the Committee continues to deplore that a large number of cases of summary and arbitrary executions, enforced or involuntary disappearances, torture and arbitrary or unlawful detention committed by members of the army, including cases concerning persons previously detained in Tazmamart, have not yet been investigated. Furthermore, the perpetrators of such acts were neither brought to justice nor punished. The Committee deplores that measures of clemency adopted during the period under review were generally not extended to Western Sahara.

110. The Committee is concerned that guarantees contained in articles 9, 10 and 14 of the Covenant are not complied with. Despite some efforts to build new prisons, the Committee remains concerned about conditions of detention, particularly overcrowding of prisons, which frequently lead to malnutrition, diseases and deaths of detainees. Concern is also expressed about the long period of detention without charge under article 154 of the Code of Criminal Procedure, which appears to be incompatible with article 9 of the Covenant. The Committee is also concerned about the obstacles to the independence and impartiality of the judiciary.

111. The Committee is concerned about the full implementation of the right to freedom of movement, including in particular the restrictions still imposed on members of the Oufkir family.

112. The Committee notes with regret the shortcomings in the observance of article 18 of the Covenant, in particular the restrictions affecting the Baha'i right to profess and practise their belief and limitations on inter-religious marriage. Concern is also expressed at the impediment placed upon the freedom to change one's religion.

113. The Committee expresses concern about the extent of the limitations on the

freedom of expression, assembly and association under the Dahir of 1973 and especially limitations on the right to criticize the Government. Governmental control of the media as well as the imprisonment of some journalists for having expressed criticisms give rise to serious concern.

114. The Committee is concerned that the electoral system, under which two thirds of members of the House of Representatives are elected by direct universal suffrage and one third by an electoral college, may raise issues as to the requirements, under article 25 (b) of the Covenant, that elections be held by "universal and equal suffrage". The wide scope of executive power in the hands of the King has implications for the effective independence of the judiciary and the democratic processes of Parliament.

5. Suggestions and recommendations

115. The Committee recommends that the State party consolidate the process of constitutional revision in order to ensure that all the requirements of the Covenant are reflected in the Constitution, thereby bringing the Constitution into true compliance with the Covenant and ensuring that the limitations imposed on the exercise of rights and freedoms under national legislation do not go beyond those permitted under the Covenant.

116. The Committee hopes that the Government of Morocco will give serious consideration to becoming a party to the First Optional Protocol.

117. The Committee further recommends that Morocco study measures to limit the categories of crimes punishable by the death penalty to the most serious offences, with a view to its eventual abolition.

118. The Committee emphasizes the need for the Government to prevent and eliminate discriminatory attitudes and prejudices towards women and to revise domestic legislation to bring it into conformity with articles 2, 3 and 23 of the Covenant, taking into account the recommendations contained in the Committee's general comments Nos. 4, 18 and 19. It recalls in that regard that, although several reservations were made by Morocco in acceding to the Convention on the Elimination of All Forms of Discrimination against Women, Morocco remains bound to the fullest extent by the provisions of articles 2, 3, 23 and 26 of the Covenant.

119. The Committee recommends that the Moroccan authorities ensure that summary and arbitrary executions, enforced or involuntary disappearances, torture, ill-treatment and illegal or secret detention do not occur and that any such cases be investigated in order to bring before the courts those suspected of having committed or participated in such crimes, to punish them if found guilty, and to provide compensation to victims. The Committee expresses the wish that any measures of clemency be granted on a non-discriminatory basis in conformity with articles 2 and 26 of the Covenant. It also recommends that measures of administrative detention and incommunicado detention be restricted to very limited and exceptional cases, and that the guarantees concerning pre-trial detention provided for in article 9, paragraph 3, of the Covenant be fully implemented. Further measures should also be taken to improve detention conditions and, particularly, to ensure that the United Nations Standard Minimum Rules for the Treatment of Prisoners are complied with and the relevant regulations and directives known and accessible to prisoners. Proposed measures to strengthen the presumption of innocence should be implemented as soon as possible.

120. The Committee emphasizes the need to take further measures to guarantee the freedom of religion and to eliminate discrimination on religious grounds. It suggests in this connection that the State party take into account the recommendations contained in the general comment on article 18 of the Covenant.

121. The Committee recommends that restrictions imposed on the rights to freedom of expression, assembly and association under the Dahir of 1973 be modified and brought into line with those permitted under the Covenant to ensure their application in conformity with the Covenant on a non-arbitrary basis.

122. The Committee recommends that the authorities ensure that the third periodic report of Morocco and the comments of the Committee are disseminated as widely as possible in order to encourage the involvement of all sectors concerned in the improvement of human rights.

D. Libyan Arab Jamahiriya

123. The Committee considered the second periodic report of the Libyan Arab Jamahiriya (CCPR/C/28/Add.16) at its 1275th, 1276th, 1376th and 1377th meetings, on 26 October 1993 and 28 October 1994, and adopted[11] the following comments:

1. Introduction

124. The Committee welcomes the opportunity to renew its dialogue with the State party, as 15 years have elapsed between the consideration of the Government's initial report and the submission of its second periodic report. The Committee, however, regrets this considerable delay. It regrets also that the reporting guidelines have not been met. The report does not give sufficient information about the restrictions or limitations imposed on rights or about factors and difficulties affecting the enjoyment of rights and the implementation of the Covenant in the Libyan Arab Jamahiriya. In addition, the report lacks information about abuses affecting human rights in the country that have been acknowledged even by the head of State; and also about administrative and other measures adopted to give effect to the rights provided for in the Covenant.

125. The Committee welcomes the additional written information provided by the Libyan authorities to reply to the questions raised by the members of the Committee during the first part of the consideration of the report in October 1993, while regretting that the late submission of that information did not make it possible to have the document available in all the working languages of the Committee. The Committee takes note with satisfaction of the efforts made by the Libyan Government to reply to its questions and to clarify certain issues, both in writing and orally through the Government's representatives. Those efforts clearly indicate the willingness of the Government to continue the dialogue with the Committee.

2. Factors and difficulties affecting the implementation of the Covenant

126. Among the factors affecting the implementation of the Covenant, the Committee notes economic difficulties and the existence of extremist movements. The Committee also notes that the embargo on air travel, imposed by the Security Council on the Libyan Arab Jamahiriya since April 1992, is considered by the

Libyan Government as a difficulty affecting the implementation of certain provisions of the Covenant.

3. Positive aspects

127. The Committee notes with satisfaction that the Covenant is part of the domestic law of the Libyan Arab Jamahiriya and that certain aspects of the Covenant have been included in the Great Green Charter of Human Rights of the Jamahiriyan Era (1988), in the Promotion of Freedom Act of 1991 and in the draft Constitution. It welcomes the fact that the Covenant has been published in the Official Bulletin and publicized in the media, while noting that the information provided to the Committee was not sufficient to clarify the precise application of the Covenant provisions or the practical steps open to people to enforce rights or to obtain remedies in case of violation.

128. The Committee also notes with satisfaction the measures taken in the Libyan Arab Jamahiriya to overcome discriminatory attitudes towards women and the initiatives introduced in the country to advance women's rights, to ensure their greater involvement in public life and to improve women's equality in employment and in marriage.

129. The Committee further welcomes the information in the report about the release of certain political and other prisoners, the demolition of certain prisons, the cancellation of the lists of persons banned from travelling and the proposed abolition of the special courts.

4. Principal subjects of concern

130. The Committee is seriously concerned that although the report mentions the objective of eliminating the death penalty, a large number of offences remain punishable by the death penalty in the Libyan Arab Jamahiriya, including economic crimes and other crimes that appear to go beyond the limitations of article 6 (2) of the Covenant. The Committee deplores that there appears to be have been an increase in the number of executions in the last year.

131. The Committee is seriously concerned at information it has received from United Nations and other reliable sources concerning summary or extrajudicial execution and torture perpetrated by the Libyan security forces. It deplores the introduction of cruel punishments such as flogging and amputation. The practice of arbitrary arrest and detention, the detention of persons sentenced after unfair trials and the length of pre-trial detention are also matters of serious concern. The Committee regrets the lack of information about certain identified people who are said to be held in incommunicado detention without trial for lengthy periods and about persons who oppose the Government and are said to have disappeared.

132. The Committee is also concerned at certain restrictions imposed in the Libyan Arab Jamahiriya on the freedom of opinion and expression, the right of assembly and the right to freedom of association, which are not in conformity with articles 19, 21 and 22 of the Covenant. These restrictions also unduly limit the rights to participate in the conduct of public affairs, including the opportunity to criticize and to oppose the Government.

133. Lack of information makes it difficult for the Committee to assess the effectiveness in practice of safeguards protecting the rights of detainees and

of those charged with criminal offences. The lack of independence of the legal profession and doubts about the openness and fairness of trial procedures remain concerns of the Committee.

134. In regard to women the Committee remains concerned about their lack of equality in certain areas of law such as inheritance rights and nationality. It also regrets the lack of specific information concerning the equality of women.

135. Another area of concern is that of freedom of religion. The severe punishments for heresy (which are said not to have been used) and the restrictions on the right to change religion appear to be inconsistent with article 18 of the Covenant. The lack of provision for conscientious objection to military service is another concern.

136. A general concern of the Committee is that in regard to many of the rights under the Covenant the basic law allows for broadly defined exceptions to these rights and no information has been provided as to the way in which those exceptions have been incorporated in specific laws or as to whether their application is in conformity with the Covenant.

5. Suggestions and recommendations

137. The Committee encourages the State party to take the necessary steps to adopt legislative or other measures to give effect to the rights recognized in the Covenant, as provided for by article 2, paragraph 2, of the latter. The Committee emphasizes that these rights represent minimum standards of universal application. This will require a detailed examination of specific laws and practices to ensure that they are fully consistent with the Covenant and do not impose limitations on rights other than those permitted by the Covenant.

138. Noting the statement in the report that the objective of Jamahiri society is to abolish the death penalty, the Committee encourages the State party to move forward with its plans to abolish the death penalty so that it may accede to the Second Optional Protocol to the Covenant.

139. The Committee calls upon the Libyan Arab Jamahiriya to investigate all allegations of summary or extrajudicial execution, disappearances, torture and incommunicado detention, including those referred to by the Committee, and to ensure that those responsible for violations of articles 6, 7 and 9 of the Covenant are prosecuted and that appropriate remedies are provided to the victims. It should implement effective measures to prevent further violations of those provisions of the Covenant and to ensure that the rights of detainees are respected and that the requirements of fair trial are met.

140. The Committee recommends that the State party review its laws that impose limitations on freedom of opinion, expression, association and assembly, to ensure that the restrictions on those freedoms conform to the limits permitted under articles 19, 21 and 22 of the Covenant.

141. The Committee urges the State party to continue with its programme to secure full legal and de facto equality for women in all aspects of society. It should also ensure that its obligations to respect freedom of religion in accordance with article 18 of the Covenant are met. In this connection, the Committee draws attention to its general comment on article 18 of the Covenant.

142. The Committee finally recommends that more detailed information about

specific laws and more concrete and factual information about the enjoyment of rights be provided by the Libyan Arab Jamahiriya in its next periodic report so as to enable the Committee to understand clearly the progress made in the implementation of the Covenant in the State party.

143. The Committee urges the State party to discharge, in future, its reporting obligations under article 40 of the Covenant on a more timely basis.

E. Argentina

144. The Committee considered the second periodic report of Argentina (CCPR/C/75/Add.1) at its 1389th to 1391st meetings, on 21 and 22 March 1995, and adopted[12] the following final comments:

1. Introduction

145. The Committee welcomes the second periodic report submitted by the State party and views with satisfaction the frank and constructive manner in which the dialogue with the Committee has been conducted. It welcomes in particular the comprehensive answers provided by the high-level delegation representing the State party. None the less, the Committee expresses its regret that the report does not adequately deal with the factors and difficulties encountered with regard to the actual implementation of the Covenant. The Committee notes that this shortcoming was compensated in part by the oral update of the report, as well as the oral replies provided to the list of issues and other questions raised by the Committee during the consideration of the State party's report.

2. Factors and difficulties affecting the implementation of the Covenant

146. The Committee notes that the compromises made by the State party with respect to its authoritarian past, especially the Law of Due Obedience and Law of Punto Final and the presidential pardon of top military personnel, are inconsistent with the requirements of the Covenant.

3. Positive aspects

147. The Committee notes with satisfaction Argentina's continuous progress in its efforts to democratize and to match its level of human rights protection with international standards. Although much work remains to be done in this area, legislative developments since 1983 indicate that Argentina is committed to the protection of human rights at the highest levels. In this connection, the Committee welcomes the constitutional reforms of August 1994, which elevate several international human rights instruments, including the Covenant and the First Optional Protocol, above national laws and grants them constitutional status (arts. 31 and 75 (22) of the Constitution). The Committee further welcomes the creation of the post of "Defender of the People", which was established in December 1993 under Act 24,284. This post is responsible for the protection of the rights of the Argentine people against possible infringement by the national authorities.

148. The Committee welcomes the programmes established for the advancement of women's equality and particularly welcomes the recognition on the part of the

State party of violence against women as a matter of concern.

149. The Committee welcomes the enactment of Act 24,043 granting compensation to those who were detained by order of the Executive. It also welcomes Act 24,411, which grants some benefits to relatives of disappeared persons.

150. The Committee welcomes the revisions made to the Code of Criminal Procedure, those which are under way to the Code of Civil Procedure, the reform of the prison system and the establishment of the Office of the Government Procurator for the Prison System. It also welcomes the efforts by the State party to rehabilitate convicted prisoners and construct more facilities to alleviate prison crowding.

151. The Committee notes with satisfaction the elimination in the constitutional reforms of 1994 of the qualification that the President of the Republic must be Catholic.

152. The Committee also notes with satisfaction that the Ministries of the Interior and of Foreign Affairs are conducting human rights training programmes for law enforcement officials, personnel engaged in the administration of justice, and the general public.

4. Principal subjects of concern

153. The Committee reiterates its concern that Act 23,521 (Law of Due Obedience) and Act 23,492 (Law of Punto Final) deny effective remedy to victims of human rights violations, in violation of article 2, paragraphs 2 and 3, and article 9, paragraph 5, of the Covenant. The Committee is concerned that amnesties and pardons have impeded investigations into allegations of crimes committed by the armed forces and agents of national security services and have been applied even in cases where there exists significant evidence of such gross human rights violations as unlawful disappearances and detention of persons, including children. The Committee expresses concern that pardons and general amnesties may promote an atmosphere of impunity for perpetrators of human rights violations belonging to the security forces. Respect for human rights may be weakened by impunity for perpetrators of human rights violations.

154. In the latter connection, the Committee regrets that evidence presented to the Senate against members of the armed forces, proving that they have engaged in extrajudicial executions, forced disappearances, torture, or other violations of human rights, may in some cases prevent the promotion of those accused but does not in itself cause their dismissal.

155. The Committee is concerned about threats to members of the judiciary, which through intimidation seek to compromise the independence of the judiciary as set forth in article 14 of the Covenant. The Committee is further concerned about attacks against journalists and unionists, and the lack of protection afforded to them, which restricts the enjoyment of the rights of expression and association provided for in articles 19 and 22 of the Covenant.

156. While the Committee welcomes Act 24,043 and Act 24,411, it regrets that they do not provide for compensation for victims of torture. The Committee expresses concern about cases of excessive use of force, torture and arbitrary or unlawful detentions committed by members of the police and the armed forces which have been brought to its attention. It is concerned that there is no clear mechanism for investigating complaints of police violence that ensures

there will be no reprisals against complainants, that where provincial administrations are lax in dealing with allegations of police violence the federal authorities do not ensure compliance with the Covenant, and that the perpetrators of acts of police violence generally are not punished and the victims are not compensated. It expresses concern about the delay in resolving the situation of children of disappeared persons and is especially disturbed at the failure of the report to provide any information at all on the real situation as it relates to article 7 of the Covenant.

157. The Committee is concerned that the Penal Code appears to be deficient in certain key areas that apparently conflict with the principle of presumption of innocence (art. 14, para. 2, of the Covenant). It is concerned about the system of pre-trial detention, which it considers to be one of the remaining vestiges of authoritarian rule. The Committee also expresses concern that persons may be detained for a period longer than the maximum penalty allowed by law and regrets, in this connection, that article 317 of the Constitution does not order their release. The Committee further notes that bail is established according to the economic consequences of the crime committed and not by reference to the probability that the defendant will not appear in court or otherwise impede due process of law. Nor is it compatible with the presumption of innocence that the length of pre-trial detention is not a product of the complexity of the case but is set by reference to the possible length of sentence. The Committee is also concerned that accused persons are held in detention in the same facilities as convicted persons, and that the grounds for judicial authorization of telephone tapping may be too broadly drawn.

5. Suggestions and recommendations

158. The Committee recommends that the State party, in accordance with article 2, paragraph 2, of the Covenant, develop mechanisms for compensating all remaining victims of past violations of human rights by amending Act 24,043 or enacting appropriate legislation for the victims of such crimes. The Committee especially recommends that appropriate care be taken in the use of pardons and general amnesties so as not to foster an atmosphere of impunity (see the Committee's general comment No. 7 (16)). The Committee recommends that members of the armed forces or security forces against whom sufficient evidence of involvement in gross human rights violations exists be removed from their posts.

159. The Committee urges the State party to continue to investigate the whereabouts of disappeared persons, to complete urgently investigations into the allegations of illegal adoption of children of disappeared persons and to take appropriate action. It also urges the State party fully to investigate recent allegations of murders committed by the military during the period of military rule and to take action on the findings.

160. The Committee notes that the Office of the Under-Secretary-General of Human and Social Rights falls under the jurisdiction of the Ministry of the Interior, which also regulates the police forces. The Committee recommends that measures to guarantee the independence of the Under-Secretary-General be taken, particularly with respect to investigations of human rights violations.

161. The Committee urges that all necessary steps be taken to prevent cases of excessive use of force, torture, arbitrary detention or extrajudicial execution by members of the armed forces or the police. These steps should include preventive, disciplinary and punitive measures, as well as appropriate training. All violations should be investigated and the victims compensated.

162. The Committee recommends that special protection be provided to journalists and members of trade unions under threat or intimidation so as effectively to protect the rights provided for in articles 19 and 22 of the Covenant.

163. With respect to the Code of Criminal Procedure, the Committee recommends that the system of pre-trial detention be carefully reviewed. Legal safeguards should be established to ensure that, in instances where pre-trial detention exceeds the maximum applicable penalty for a crime, the defendant will be released without qualification. The Committee urges the State party to define clearly the purpose of pre-trial detention and to set the length of detention accordingly, applying the principle of presumption of innocence. It recommends the same consideration in the setting of bail.

164. The Committee recommends that the State party include information in its next report on the procedures established to ensure compliance with the views and recommendations adopted by the Committee under the First Optional Protocol, also bearing in mind its obligations under article 2 of the Covenant.

165. The Committee recommends that Argentina include, in its next periodic report, information on the measures adopted to follow up on the present comments and give effect to its suggestions and recommendations. It further recommends that its comments be widely disseminated and incorporated into the curriculum of the human rights training programmes organized for law enforcement officials and administrators of justice.

F. New Zealand

166. The Committee considered the third periodic report of New Zealand (CCPR/C/64/Add.10 and HRI/CORE/1/Add.33) at its 1393rd to 1395th meetings, on 23 and 24 March 1995, and adopted[12] the following final comments:

1. Introduction

167. The Committee expresses its appreciation to the State party for its excellent report, which contains detailed information on law and practice relating to the implementation of the Covenant and is in full conformity with the Committee's guidelines. The Committee appreciates the fact that the report shows continuous development in the protection of rights and allows the dialogue with the Committee to take place as an unbroken continuation of the examination of the initial and second reports. The Committee is also grateful for the oral responses provided by the competent delegation and considers that the dialogue with the State party has been most fruitful and constructive.

168. The Committee commends the State party for the core document (HRI/CORE/1/Add.33), which has been drawn up in accordance with the consolidated guidelines for the initial part of reports to be submitted by States parties under the various international human rights instruments (HRI/1991/1).

2. Factors and difficulties affecting the implementation of the Covenant

169. The Committee finds that there are no important difficulties which may affect the implementation of the Covenant in New Zealand.

3. Positive aspects

170. The Committee notes with appreciation the level of achievement in respect of human rights in New Zealand. It particularly welcomes the positive developments that have been realized following recommendations of the Committee at the end of the consideration of the second periodic report of New Zealand. Among these developments, the Committee notes the accession to the First Optional Protocol to the Covenant and the ratification of the Second Optional Protocol to the Covenant following the adoption of the Abolition of the Death Penalty Act, 1989.

171. The Committee considers the adoption and entry into force on 25 September 1990 of the Bill of Rights Act, which expressly affirms New Zealand's commitment to the Covenant and which provides a statutory basis for the protection of human rights and fundamental freedoms in New Zealand, as an important step towards the full protection of the rights set forth in the Covenant. The Committee also welcomes the passage into law of the Privacy Act 1993, which promotes and protects individual privacy, and of the Human Rights Act, which entered into force on 1 February 1994. The latter Act further enhances protection of article 2, paragraph 1, of the Covenant by extending the grounds on which discrimination is prohibited. The Act also expands the role of the Human Rights Commission and enables it to inquire into any matter where it appears that human rights have been infringed.

172. The Committee welcomes widely based legislation to provide protection against domestic violence. The Committee is also pleased to note the provision of appeals procedures for refugees and that applicants for refugee status are entitled to work pending a decision on their status. Planned improvements of prison conditions are also welcome.

173. The Committee welcomes the important developments that have occurred in relation to the interests of the Maori. Among these developments, the Committee notes the increasing importance of the work of the Treaty of Waitangi Tribunal in dealing with Maori claims against the Crown. The Committee also appreciates the fact that New Zealand has dedicated the first year of the International Decade of the World's Indigenous People to the Maori language. In this connection, the Committee takes note with satisfaction of the adoption of a language nest programme whereby Maori language, customs and values are taught to pre-school children, as well as other programmes set up to promote Maori language, art and culture.

174. The Committee also welcomes the changes introduced in the electoral law which may provide greater opportunities for the representation of minority groups, Maori and women.

175. With regard to the right of self-determination, the Committee welcomes the development of local institutions of government in Tokelau and the gradual delegation of powers to Tokelauan authorities, which corresponds to the desire of the people of Tokelau to be self-reliant to the greatest extent possible.

4. Principal subjects of concern

176. The Committee regrets that the provisions of the Covenant have not been fully incorporated into domestic law and given an overriding status in the legal system. Article 2, paragraph 2, of the Covenant requires States parties to take such legislative or other measures which may be necessary to give effect to the

rights recognized in the Covenant. In this regard the Committee regrets that certain rights guaranteed under the Covenant are not reflected in the Bill of Rights, and that it does not repeal earlier inconsistent legislation and has no higher status than ordinary legislation. The Committee notes that it is expressly possible, under the terms of the Bill of Rights, to enact legislation contrary to its provisions and regrets that this appears to have been done in a few cases.

177. The Committee expresses concern about the absence of express provision for remedies for all those whose rights under the Covenant or the Bill of Rights have been violated.

178. The Committee regrets that the operation of the new prohibited grounds of discrimination, contained in section 21 of the Human Rights Act 1993, is postponed until the year 2000. It also notes with concern that the prohibited grounds of discrimination do not include all the grounds in the Covenant and, in particular, that language is not mentioned as a prohibited ground of discrimination.

179. The Committee is concerned about provisions in the Criminal Justice Amendment Act which provide for a sentence of indeterminate detention for offenders convicted of serious crimes who are likely to repeat such crimes. The imposition of punishment in respect of possible future offences is inconsistent with articles 9 and 14 of the Covenant.

180. In relation to the right of freedom of expression, the Committee expresses its concern over the vagueness of the term "objectionable publication" and the fact that section 121 of the Films, Videos and Publications Classification Act makes the "possession of any objectionable publication" a criminal offence, even if the person concerned has no knowledge or no reasonable cause to believe that the publication is considered to be objectionable.

181. The Committee is concerned about the fact that, while the Human Rights Act contains a provision corresponding to article 20, paragraph 2, of the Covenant, this provision does not include a prohibition of advocacy of religious hatred.

182. The Committee regrets that despite improvements, Maori still experience disadvantages in access to health care, education and employment. The Committee is also concerned that the proportion of Maori in Parliament and other high public offices, liberal professions and in the senior rank of civil service remains low.

183. The Committee also regrets the delay in the submission of reports under the Covenant by the Tokelau and the Cook Islands Governments and reminds the Government of New Zealand of its obligations under the Covenant in this regard.

5. Suggestions and recommendations

184. The Committee recommends that the State party take appropriate measures to incorporate all the provisions of the Covenant into domestic law and to provide remedies for all persons whose rights under the Covenant have been violated.

185. The Committee recommends that the Bill of Rights be revised in order to bring it into full consistency with the provisions of the Covenant and to give the courts power as soon as possible to strike down or decline to give effect to legislation on the ground of inconsistency with Covenant rights and freedoms as

affirmed in the Bill of Rights.

186. The Committee recommends that the State party revise the provisions relating to "indeterminate sentence of preventive detention" contained in the Criminal Justice Amendment Act in order to bring the Act into full consistency with articles 9 and 14 of the Covenant.

187. The Committee equally recommends amendment of the Films, Videos and Publications Classification Act by a more specific definition of "objectionable publication" or by removing criminal liability for possession without knowledge of or reasonable cause to believe in the objectionability of material.

188. The Committee expresses the hope that any decisions to be taken about future limitations to the entitlement of Maori to advance claims before the Waitangi Tribunal will take full account of Maori interests under the Treaty of Waitangi.

189. The Committee recommends that the State party include information in its next report on the procedures established to ensure compliance with the views and recommendations adopted by the Committee under the First Optional Protocol, also bearing in mind its obligations under article 2 of the Covenant.

190. The Committee recommends that the State party review its reservations relating to articles 10 and 22 of the Covenant with a view to withdrawing them.

191. The Committee would appreciate receiving in the next periodic report information on the experience gained in applying the new Electoral Act and about the Equal Employment Opportunity provisions and their effects on women's entitlement to equal pay and equal employment opportunity. The Committee would also like to be informed on further activities of the National Human Rights Commission and the Treaty of Waitangi Tribunal, and about progress in prison reform.

G. Paraguay

192. The Committee considered the initial report of Paraguay (CCPR/C/84/Add.3 and HRI/CORE/1/Add.24) at its 1392nd and 1396th meetings, on 22 and 24 March 1995, and adopted[13] the following comments:

1. Introduction

193. The Committee welcomes the initial report submitted by the State party and views with satisfaction the cooperative attitude of the delegation in engaging in the dialogue with the Committee. It regrets, however, that the report, while providing detailed information on prevailing legislation in Paraguay, does not adequately deal with the actual state of implementation of the Covenant in practice and the difficulties encountered during implementation. Although the information provided orally by the delegation has addressed some of the concerns of the Committee, the Committee has obtained only a partial picture of the human rights situation in the country.

194. The Committee commends the State party for the core document (HRI/CORE/1/Add.24), which has been drawn up in accordance with the consolidated guidelines for the initial part of reports to be submitted by States parties under the various international human rights instruments (HRI/1991/1).

2. Factors and difficulties affecting the implementation of the Covenant

195. The Committee recognizes that the State party, which is emerging from a change of government in 1989 that ended a long period of dictatorial rule, is undergoing a transition towards democracy in which the infrastructure necessary for the implementation of the Covenant has not been fully developed. The Committee understands that the many encouraging legislative initiatives with respect to human rights are being implemented with difficulty, and that a full assessment of such implementation is not yet possible.

3. Positive aspects

196. The Committee notes with satisfaction Paraguay's continuous progress since 1989 in its efforts to democratize and to match its level of human rights protection with international standards. It particularly welcomes the signing and ratification of a number of international human rights instruments, including the Covenant and the First Optional Protocol, and the legislative and administrative steps taken to advance their implementation. The Committee also commends the State party for ratifying the Covenant without entering any reservations.

197. The Committee particularly welcomes the promulgation of the 1992 Constitution, which incorporates provisions for the protection of civil and political rights and grants constitutional status to a number of international human rights instruments, including the Covenant, thus elevating them above national law.

198. The Committee further welcomes the creation of machinery to receive complaints and manage various aspects of human rights issues, including the Directorate-General for Human Rights under the Ministry of Justice and Labour, the Office of the Ombudsman, and the Human Rights Commissions established in the two Chambers of Congress.

199. The Committee welcomes the amendments made to the Civil Code in 1992 and other relevant legislation that advanced the equal enjoyment of civil and political rights by women. It also welcomes the establishment of the Women's Secretariat.

200. The Committee appreciates the declaration made by the delegation according to which the Government will not enact any amnesty law, and that, on the contrary, concrete steps have already or are being taken to make accountable perpetrators of human rights abuses under the past dictatorial regime. It notes in this regard that such laws, where adopted, are preventing appropriate investigation and punishment of perpetrators of past human rights violations, undermine efforts to establish respect for human rights, further contribute to an atmosphere of impunity among perpetrators of human rights violations, and constitute impediments to efforts undertaken to consolidate democracy and promote respect for human rights.

201. The Committee notes with satisfaction the Government's initiative to make public the military's archives, thus enabling individuals to file complaints based on the information contained in those archives.

202. The Committee notes with satisfaction the incorporation of human rights

issues into the formal secondary education curriculum.

203. The Committee welcomes Paraguay's efforts to modernize the judicial process with international assistance. It also notes that a revision of the Penal Code and the Code of Criminal Procedure is under way.

204. The Committee takes note of the will of the State party to ratify the Second Optional Protocol to the Covenant on the abolition of the death penalty.

4. Principal subjects of concern

205. The Committee regrets that no information was provided about the compensation of victims of human rights violations during the dictatorship.

206. The Committee expresses concern about the continuing occurrence of torture and ill-treatment of detainees, even after the restoration of democracy in 1989. In this connection, the Committee is concerned that there remain officials who are identified and committed to the authoritarian practices of the former regime.

207. The Committee is concerned that, despite constitutional guarantees for the rights of women, women continue to receive unequal treatment in Paraguay, owing in part to outdated laws that clearly contradict the provisions of the Covenant. These would include laws that are more lenient in instances of infanticide committed to protect the honour of a woman than in ordinary cases of homicide and laws that make distinctions in the punishment accorded to persons who rape or abduct women depending on the marital status of the victim. It further notes that labour laws do not adequately protect the rights of women. It notes that domestic work, which is a principal occupation among women, is excluded from minimum wage laws.

208. The Committee expresses its concern about the high level of deaths among expectant mothers referred to in the report. In this regard, it regrets that the State party could not provide information about the effect of the enforcement of abortion laws on this high level of deaths.

209. The Committee is concerned that national laws in conflict with the Constitution remain on the books. In addition, some constitutional provisions, such as the right to compensation for violation of rights (art. 39), still require implementing laws.

210. The Committee notes with concern the practice of not separating accused from convicted persons in prisons, which violates article 10, paragraph 2 (a), of the Covenant. The Committee also notes with concern that there are not sufficient measures to limit pre-trial detention, which makes such detention a common practice rather than an exceptional measure. In the view of the Committee, the conditions in the law do not provide sufficient justification for pre-trial detention in the absence of a reasonable possibility of escape from justice or danger to the community.

211. The Committee expresses concern about the lack of information regarding the independence of the judiciary, principally as to the security of tenure.

212. The Committee is concerned that the predominant role of the Catholic Church in Paraguay appears to lead to certain de facto discrimination against other religions.

213. The Committee is concerned that poverty and lack of education, particularly among indigenous people, adversely affect many people in their ability to enjoy civil and political rights.

214. The Committee notes that the restriction on voting for students of military schools seems to be an unreasonable restriction on article 25 of the Covenant on the right to participate in public life.

5. Suggestions and recommendations

215. Regarding the application of the Covenant, the Committee requests that it be informed in future periodic reports of the State party of any instances that may arise where the Covenant was directly invoked in the courts, as well as the results of any such proceedings.

216. The Committee commends the State party, in accordance with article 2, paragraph 2, of the Covenant, for its efforts to bring to justice perpetrators of past human rights abuses. It urges the State party to continue to investigate allegations of human rights violations, past and present, for which purpose all archives of the past regime should be carefully explored. It further urges the State party to act on the findings of its investigations, to bring to justice the perpetrators and to provide proper compensation to the victims, particularly with respect to continuing occurrences of torture and ill-treatment by the police and security forces. The Committee recommends that an independent and credible mechanism be instituted for dealing with complaints of police violence and that the existence of this mechanism be publicized.

217. The Committee urges the State party to comply with article 10, paragraph 2 (a), of the Covenant by separating in prison accused persons from convicted prisoners. The Committee further recommends that the State party review its laws and practices concerning pre-trial detention to ensure that such detention is not regarded as the general rule and that, where it is imposed, its period is subject to strict limits, in conformity with article 4 of the Covenant.

218. The Committee recommends that all national legislation on women be reviewed with a view to modernizing the outdated legal standards currently in force to bring them into line with the relevant provisions of the Covenant. The Committee recommends in particular that the State party review its laws on criminal offences committed against women and all labour laws that discriminate against women and take the measures necessary to overcome traditional attitudes concerning the role of women in society. It further recommends that the State party encourage the political participation of women in public, particularly in political life, which remains low despite the legal advances that have reduced restrictions in this area.

219. The Committee requests the State party to provide information in its next report about the incidence of illegal abortion, the relationship between illegal abortions and the high incidence of maternal mortality, and its implementation of article 61 of the Constitution.

220. The Committee recommends that the State party undertake a thorough review of its national legislation to ensure conformity with the standards set by both the Constitution and the Covenant. It recommends in this connection that the Covenant and the specific recommendations made in the present comments be taken into account in the revision of the Penal Code currently under way.

221. The Committee recommends that the State party include in its next report comprehensive information on the issues raised during the consideration of the report, particularly on the effectiveness of the laws under review or in existence, the evolving roles of the institutions established for the protection of human rights, and the system of coordination of the various institutions.

222. The Committee recommends that the State party include information in its next report on the procedures established to ensure compliance with the views and recommendations adopted by the Committee under the First Optional Protocol, also bearing in mind its obligations under article 2 of the Covenant.

223. The Committee recommends that the Covenant, the Optional Protocols and the Committee's comments be widely disseminated among the Paraguayan public and that the scope of human rights education be extended to members of the police and security forces, the legal profession and other persons involved in the administration of justice, with a view to making it a part of their regular training.

H. Haiti

224. In the light of past and continuing events in Haiti affecting the human rights guaranteed by the International Covenant on Civil and Political Rights, and in accordance with article 40, paragraph 1 (b), of the Covenant, the Committee requested the Government of Haiti, on 27 October 1994, to submit a special report, not later than 31 January 1995 and if necessary in summary form, describing, in particular, the implementation of articles 6, 7, 9, 10 and 14 of the Covenant during the current period, for consideration by the Committee at its fifty-third session. In response to that request, the Government of Haiti submitted a report on 27 February 1995 (CCPR/C/105), which was considered by the Committee at its 1397th and 1398th meetings, on 27 March 1995. The Committee adopted[13] the following comments:

1. Introduction

225. The Committee welcomes the willingness of the Government of the State party to cooperate and to enter into a constructive dialogue with the Committee on the application of the Covenant in Haiti, as evidenced by the submission of the special report and the sending of a high-level delegation to present the report. The Committee notes that, while providing some information about constitutional and legal measures giving effect to articles 6, 7, 9, 10 and 14, the report lacked information on the practice concerning human rights and on the difficulties affecting the application of the Covenant in the country. The Committee, mindful of the difficulties facing all branches of government in Haiti since the restoration of the legitimate Government, thanks the delegation for endeavouring to reply to the questions raised in the course of the dialogue and thus, to a certain extent, make up for the report's shortcomings.

2. Factors and difficulties affecting the implementation of the Covenant

226. The Committee notes that Haiti is only now emerging from a long and devastating military dictatorial past during which grave human rights violations occurred, including summary executions, torture and other inhuman or degrading treatment and arbitrary arrests and detentions. The country has only recently

initiated a process of recovery and has just embarked on a course of transition to democracy. The Committee also notes that, despite efforts undertaken by the Government, political and social attitudes still prevalent in the country are not conducive to the promotion and protection of human rights. Violence and disorder continue to disrupt society and many weapons remain in the hands of members of former paramilitary groups and the public in general. The lack of a functioning judicial system, and deeply rooted social and economic problems, affect the application of the Covenant.

3. Positive aspects

227. The Committee welcomes the restoration of the legitimate Government of Haiti and the considerable efforts made by the present Government to ensure respect for human rights. In this connection the establishment by presidential decree of a National Commission on Truth and Justice with the task of carrying out investigations into human rights violations and ensuring justice for the victims of such violations is particularly appreciated. The Committee also notes the creation of a civilian police force separated from the armed forces as an important step. The Committee appreciates the fact that programmes for the training of judges and police officers are being initiated.

228. The Committee notes with satisfaction the adoption of a number of laws directly affecting the establishment and development of institutions and policies for the protection of human rights, such as the recent Act declaring all paramilitary groups illegal, the Territorial Communities Act, which eliminates the former autocratic system of section chiefs and provides for local authorities elected by the people, and the Electoral Act. The Committee also welcomes the beginning of the process which will lead to the holding of parliamentary elections in June 1995 and presidential elections in December 1995.

4. Principal subjects of concern

229. Given the general conditions prevailing at the present time in Haiti, the Committee has not detailed all its concerns relating to inconsistencies between provisions of Haitian legislation, including the Constitution and the Covenant.

230. The Committee expresses its concern about the effects of the Amnesty Act, agreed upon during the process which led to the return of the elected Government of Haiti. It is concerned that, despite the limitation of its scope to political crimes committed in connection with the coup d'état or during the past regime, the Amnesty Act might impede investigations into allegations of human rights violations, such as summary and extrajudicial executions, disappearances, torture and arbitrary arrests, rape and sexual assault, committed by the armed forces and agents of national security services. In this connection, the Committee wishes to point out that an amnesty in wide terms may promote an atmosphere of impunity for perpetrators of human rights violations and undermine efforts to re-establish respect for human rights in Haiti and to prevent a recurrence of the massive human rights violations experienced in the past.

231. The Committee emphasizes the importance of investigation of human rights violations, determination of individual responsibility and fair compensation for the victims, and regrets that the Commission on Truth and Justice has not yet initiated its work.

232. The Committee is concerned that failure to screen and exclude human rights violators from service in the military, the police force and the judiciary will seriously weaken the transition to security and democracy. The Committee is also concerned that human rights violations by members of the armed forces, agents of security services, and members of former paramilitary groups still occur. The Committee notes with particular concern the lack of full and effective control by civilian authorities over the military. The Committee is concerned that the composition, command and number of the armed forces is not clearly defined.

233. The Committee expresses its concern at the numerous problems affecting the proper functioning of the justice system, including long periods of pre-trial detention and overcrowding of prisons. It wishes to point out in this regard that, unless a serious effort is undertaken to reform the judiciary and re-establish a proper functioning of the judicial system, efforts to strengthen the rule of law and to promote respect for human rights will be seriously undermined.

234. The Committee is concerned about allegations of forced labour of minors in violation of article 8 of the Covenant.

5. Suggestions and recommendations

235. In view of the fact that the Amnesty Act was adopted before the reinstallation of the legitimate Government, the Committee urges the State party to apply that Act in conformity with the Covenant and to exclude from its scope the perpetrators of past human rights violations.

236. The Committee emphasizes the obligation of the State party under article 2, paragraph 3, of the Covenant to ensure that victims of past human rights violations have an effective remedy. It strongly recommends that the Commission on Truth and Justice initiate its work as soon as possible and that other mechanisms be set up to investigate human rights violations by members of the police, the armed forces and other security services and the judiciary to ensure that persons closely associated with human rights abuses do not serve in those offices.

237. In order to guarantee the safety of the population, the Committee recommends that a clear policy be implemented to disarm members of former paramilitary groups and that effective measures be taken to reduce the number of weapons in the community.

238. The Committee recommends that a major reform of the judiciary be undertaken with a view to establishing an independent and impartial judicial system which will safeguard human rights and enforce the rule of law.

239. The Committee strongly recommends that the State party confirm the ratification of the Optional Protocols to the Covenant by depositing the necessary instruments of ratification or accession with the Secretary-General of the United Nations. Acceptance of the First Optional Protocol would affirm the commitment of the Government with respect to inquiries into allegations of human rights abuses and help to protect the human rights of individuals in the difficult period the country is facing.

240. The Committee urges that respect for human rights be recognized as an essential element of the process of national reconciliation and reconstruction.

To that end, the Committee recommends that all provisions of the Covenant be fully incorporated into the national legal system; that the administration and Parliament, as a confidence-building measure, set up special institutions, open to individuals, to assist in the daily implementation of human rights; that comprehensive human rights training be provided to judges, the police and the military; and that human rights education be provided in schools at all levels.

241. The Committee urges the State party to submit information on measures taken to implement these suggestions and recommendations together with the submission of the initial report, which was due on 6 July 1992, and for whose submission the Committee sets the date of 1 April 1996.

I. Yemen

242. The Committee considered the second periodic report of Yemen (CCPR/C/82/Add.1) at its 1372nd and 1373rd meetings, on 26 October 1994, and at its 1403rd and 1404th meetings, on 30 March 1995, and subsequently adopted[14] the following comments:

1. Introduction

243. The Committee welcomes the second periodic report submitted by the State party and welcomes the delegation's willingness to resume its dialogue with the Committee. The Committee regrets, however, that although the report provides information on general legislative norms in Yemen, it fails to deal with the actual state of implementation of the Covenant in practice and the difficulties encountered in the course of implementation. The Committee appreciated the presence of a competent delegation which provided helpful information to the Committee in addressing some of its questions. Nevertheless, the Committee has obtained only a partial picture of the human rights situation in the country.

244. The Committee welcomes in this connection the intention expressed by the delegation to send additional information as requested by the Committee, particularly information on the difficulties encountered in the implementation of the Covenant, statistics relating to specific articles and the texts of the Civil Code, Code of Criminal Procedure, the amendments to the Constitution and other relevant laws and regulations.

2. Factors and difficulties affecting the implementation of the Covenant

245. The Committee notes that the civil war has left much of the infrastructure destroyed and created severe economic difficulties, which have served to restrict the resources allocated to the protection of human rights. The Committee also notes that national reconstruction and reconciliation remains handicapped by internal disorder.

246. The Committee notes the existence in the State party of customs and traditions, particularly in the area of equality between men and women, which may tend to impede the proper observance of international standards of human rights.

3. Positive aspects

247. The Committee welcomes the succession of Yemen to the Covenant, which was previously acceded to by the Democratic Republic of Yemen in 1986.

248. The Committee welcomes the Government's efforts to raise awareness of human rights issues by disseminating the texts of human rights treaties, including the Covenant, and by holding seminars in this field. It further welcomes the Government's assertion that newspapers are free to publish the reports submitted by the Government and other information released by human rights groups and international organizations.

249. The Committee welcomes the delegation's indication of the Government's willingness to investigate specific cases of human rights violations brought to its attention. In this regard, the Committee notes the assurances of the delegation that the courts are receiving cases of human rights violations which took place during the civil war.

4. Principal subjects of concern

250. The Committee is concerned that some aspects of the legal provisions in the State party do not conform entirely with the Covenant.

251. The Committee calls attention to the contradictions between the Covenant and the Constitution, which affords a lower level of human rights protection than does the Covenant. The Committee expresses concern that victims of human rights violations, despite the direct applicability of the Covenant, may be denied effective remedy if the courts adhere to the standards set forth in the Constitution.

252. The Committee notes with concern the general amnesty granted to civilian and military personnel for human rights violations they may have committed against civilians during the civil war. The Committee notes in this regard that some amnesty laws may prevent appropriate investigation and punishment of perpetrators of past human rights violations, undermine efforts to establish respect of human rights, contribute to an atmosphere of impunity among perpetrators of human rights violations and constitute impediments to efforts undertaken to consolidate democracy and promote respect for human rights.

253. The Committee notes with concern that the role and the competences of the political security forces have not been clarified.

254. The Committee expresses its deep concern at allegations of arbitrary deprivation of life, acts of torture or other cruel, inhuman or degrading treatment, arbitrary arrest and detention, abusive treatment of persons deprived of their liberty and violations of the rights to a fair trial. It is deeply concerned that those violations were not followed by inquiries or investigations, that the perpetrators of such acts were not punished and that the victims were not compensated. Ill-treatment of prisoners and overcrowding of prisons continue to be of concern.

255. The Committee notes with concern reports of female genital mutilation, which appears to be a common practice in some parts of the country. It also notes with concern that the provisions of the Personal Status Act No. 20 of 1992, particularly articles 40 and 41, establish unequal obligations of wives and husbands where wives are relegated to an inferior position. The Committee is concerned that the requirements of this Act, particularly that wives must obey their husbands' orders and may not leave their homes except in limited

situations, contradict articles 3 and 23 of the Covenant. The Committee further regrets that the laws of Yemen contain no specific provisions for dealing with domestic violence.

256. The Committee is concerned about the lack of information concerning the death penalty in Yemen and, bearing in mind that article 6 of the Covenant limits the circumstances under which the death penalty may be imposed, regrets that it is unable to assess whether the State party is in conformity with article 6 owing to the lack of information on the specific crimes that may result in the imposition of the death penalty and on the number of cases in which it was imposed. The Committee deplores that, according to information before it, executions of persons below the age of 18 have taken place that would be a clear violation of article 6, paragraph 5, of the Covenant. The Committee requests that the State party provide information on the cases mentioned during the dialogue. In this regard, the Committee regrets that the right to life has not been incorporated in the new Constitution. The Committee is also deeply concerned about the maintenance of corporal punishments like amputation of limbs and whipping, which is in violation of article 7 of the Covenant.

257. The Committee notes with deep concern the widespread employment of minors, especially in rural areas.

5. Suggestions and recommendations

258. The Committee recommends that a thorough review be undertaken of the legal framework for the protection of human rights in the State party to ensure full conformity with the Covenant. The Committee takes note of the indication by the delegation of the lack of technical expertise in the legal field in the State party and its appeal for assistance in this area. Accordingly, the Committee recommends that the State party avail itself of the technical cooperation services of the Centre for Human Rights and address through the Centre's programmes the question of the status of the Covenant in relation to the Constitution.

259. Regarding the application of the Covenant, the Committee requests that it be informed in future periodic reports of the State party of any instances that may arise where the Covenant was directly invoked in the courts, as well as the results of any such proceedings.

260. The Committee recommends that the State party endeavour to bring to justice perpetrators of human rights abuses, in accordance with article 2 (2) of the Covenant. It urges the State party to continue to investigate allegations of human rights violations, past and present, to act on the findings of its investigations, to bring to justice the perpetrators and to compensate the victims of such acts. To this end, the Committee recommends that an independent mechanism be instituted for receiving complaints of human rights violations and that this mechanism be given investigative authority to pursue such complaints. The Committee suggests that the Government pursue in this manner not only individual complaints but also violations reported by national and international non-governmental organizations.

261. The Committee recommends that the State party review its laws and make appropriate amendments to ensure full legal and de facto equality for women in all aspects of society, particularly in the laws governing the status of women, women's rights and obligations in marriage. The Committee further recommends that the Government conduct a study on the practice of female genital mutilation

within its territory and formulate specific plans to eradicate this practice.

262. The Committee recommends that the Government review its policy on the death penalty with a view to its eventual abolishment. Recalling that article 6 of the Covenant limits the circumstances under which the death penalty may be imposed, it recommends that the Government include in its next report a list of all of the crimes that, when tried, may result in the imposition of the death penalty. If the imposition of the death penalty in respect of some of these crimes is found to be inconsistent with article 6, the Committee recommends that the relevant laws be appropriately amended. The Committee recommends that the Government take the initiative for the total abolishment of corporal punishment.

263. The Committee recommends that the Government conduct a study on the phenomenon of working children, especially children in rural areas, and include its findings in its next periodic report to the Committee.

264. The Committee recommends that more detailed information about specific laws and more concrete and factual information about the enjoyment of rights be provided by Yemen in its next periodic report so as to enable the Committee to clearly understand the progress made in the implementation of the Covenant in the State party.

265. The Committee recommends that appropriate mechanisms be established to revise the relevant legal codes, to provide human rights training for personnel involved in the administration of justice, to draft the State party's reports to various human rights treaty bodies and to collect and analyse data on human rights issues. In this regard, the Committee recommends that the Government draw on the assistance available through the Centre for Human Rights technical cooperation services.

J. United States of America[15]

266. The Committee considered the initial report of the United States of America (CCPR/C/81/Add.4 and HRI/CORE/1/Add.49) at its 1401st, 1402nd, 1405th and 1406th meetings, on 29 and 31 March 1995, and adopted[16] the following comments:

1. Introduction

267. The Committee expresses its appreciation at the high quality of the report submitted by the State party, which was detailed, informative and drafted in accordance with the guidelines. The Committee regrets, however, that, while containing comprehensive information on the laws and regulations giving effect to the rights provided in the Covenant at the federal level, the report contained few references to the implementation of Covenant rights at the state level.

268. The Committee appreciates the participation of a high-level delegation which included a substantial number of experts in various fields relating to the protection of human rights in the country. The detailed information provided by the delegation in its introduction of the report, as well as the comprehensive and well-structured replies provided to questions raised by members, contributed to making the dialogue extremely constructive and fruitful.

269. The Committee notes with appreciation that the Government gave publicity to its report, thus enabling non-governmental organizations to become aware of its

contents and to make known their particular concerns. In addition, a number of representatives of these organizations were present during the Committee's consideration of the report.

2. Factors and difficulties affecting the implementation of the Covenant

270. The Committee notes that, despite the existence of laws outlawing discrimination, there persist within society discriminatory attitudes and prejudices based on race or gender. Furthermore, the effects of past discriminations in society have not yet been fully eradicated. This makes it difficult to ensure the full enjoyment of the rights provided for under the Covenant to everyone within the State party's jurisdiction. The rise in crime and violence also affects the enjoyment of the rights provided for in the Covenant.

271. The Committee also notes that under the federal system prevailing in the United States, the states of the union retain extensive jurisdiction over the application of criminal and family law in particular. This factor, coupled with the absence of formal mechanisms between the federal and state levels to ensure appropriate implementation of the Covenant rights by legislative or other measures, may lead to a somewhat unsatisfactory application of the Covenant throughout the country.

3. Positive aspects

272. The Committee recognizes the existence of effective protection of human rights available to individuals under the Bill of Rights and federal laws. The Committee notes with satisfaction the rich tradition and the constitutional framework for the protection of human rights and freedoms in the United States.

273. The Committee notes with satisfaction that the United States has recently ratified or acceded to some international human rights instruments, including the Covenant, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the Elimination of All Forms of Racial Discrimination. These ratifications reflect a welcome trend towards acceptance of international scrutiny, supervision and control of the application of universal human rights norms at the domestic level.

274. The Committee welcomes the efforts of the Federal Government to take measures at the legislative, judicial and administrative levels to ensure that the states of the union provide human rights and fundamental freedoms. It further appreciates the expression of readiness by the Government to take such necessary further measures to ensure that the states of the union implement the rights guaranteed by the Covenant.

275. The Committee notes with satisfaction that in the first statement of understanding made at the time of ratification the principle of non-discrimination is construed by the Government as not permitting distinctions that would not be legitimate under the Covenant.

276. The Committee takes note of the position expressed by the delegation that, notwithstanding the non-self-executing declaration of the United States, American courts are not prevented from seeking guidance from the Covenant in interpreting American law.

277. The Committee further notes with satisfaction the assurances of the Government that its declaration regarding the federal system is not a reservation and is not intended to affect the international obligations of the United States.

4. Principal subjects of concern

278. The Committee has taken note of the concerns addressed by the delegation in writing to its Chairman about the Committee's general comment No. 24 (52) on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto (CCPR/C/21/Rev.1/Add.6). Attention is drawn to the observations made by the Chairman of the Committee at the 1406th meeting, on 31 March 1995 (CCPR/C/SR.1406).

279. The Committee regrets the extent of the State party's reservations, declarations and understandings to the Covenant. It believes that, taken together, they intended to ensure that the United States has accepted only what is already the law of the United States. The Committee is also particularly concerned at reservations to article 6, paragraph 5, and article 7 of the Covenant, which it believes to be incompatible with the object and purpose of the Covenant.

280. The Committee regrets that members of the judiciary at the federal, state and local levels have not been made fully aware of the obligations undertaken by the State party under the Covenant, and that judicial continuing education programmes do not include knowledge of the Covenant and discussion on its implementation. Whether or not courts of the United States eventually declare the Covenant to be non-self-executing, information about its provisions should be provided to the judiciary.

281. The Committee is concerned about the excessive number of offences punishable by the death penalty in a number of states, the number of death sentences handed down by courts and the long stay on death row, which, in specific instances, may amount to a breach of article 7 of the Covenant. It deplores the recent expansion of the death penalty under federal law and the re-establishment of the death penalty in certain states. It also deplores provisions in the legislation of a number of states that allow the death penalty to be pronounced for crimes committed by persons under 18 and the actual instances where such sentences have been pronounced and executed. It also regrets that, in some cases, there appears to have been lack of protection from the death penalty of those mentally retarded.

282. The Committee is concerned at the reportedly large number of persons killed, wounded or subjected to ill-treatment by members of the police force in the purported discharge of their duties. It also regrets the easy availability of firearms to the public and the fact that federal and state legislation is not stringent enough in that connection to secure the protection and enjoyment of the right to life and security of the individual guaranteed under the Covenant.

283. The Committee is concerned that excludable aliens are dealt with by lower standards of due process than other aliens and, in particular, that those who cannot be deported or extradited may be held in detention indefinitely. The situation of a number of asylum-seekers and refugees is also a matter of concern to the Committee.

284. The Committee does not share the view expressed by the Government that the

Covenant lacks extraterritorial reach under all circumstances. Such a view is contrary to the consistent interpretation of the Committee on this subject, that, in special circumstances, persons may fall under the subject-matter jurisdiction of a State party even when outside that State's territory.

285. The Committee is concerned about conditions of detention of persons deprived of liberty in federal or state prisons, particularly with regard to planned measures that would lead to further overcrowding of detention centres. The Committee is also concerned at the practice that allows male prison officers access in women's detention centres and has led to serious allegations of sexual abuse of women and the invasion of their privacy. The Committee is particularly concerned at the conditions of detention in certain maximum security prisons, which are incompatible with article 10 of the Covenant and run counter to the United Nations Standard Minimum Rules for the Treatment of Prisoners and the Code of Conduct for Law Enforcement Officials.

286. The Committee is concerned that, in some states, non-therapeutic research may be conducted on minors or mentally-ill patients on the basis of surrogate consent in violation of the provisions in article 7 of the Covenant.

287. The Committee is concerned at the serious infringement of private life in some states that classify as a criminal offence sexual relations between adult consenting partners of the same sex carried out in private, and the consequences thereof for their enjoyment of other human rights without discrimination.

288. The Committee is concerned about the impact that the current system of election of judges may, in a few states, have on the implementation of the rights provided under article 14 of the Covenant and welcomes the efforts of a number of states in the adoption of a merit-selection system. It is also concerned about the fact that in many rural areas justice is administered by unqualified and untrained persons. The Committee also notes the lack of effective measures to ensure that indigent defendants in serious criminal proceedings, particularly in state courts, are represented by competent counsel.

289. The Committee welcomes the significant efforts made in ensuring to everyone the right to vote but is concerned at the considerable financial costs that adversely affect the right of persons to be candidates at elections.

290. The Committee is concerned that aboriginal rights of Native Americans may, in law, be extinguished by Congress. It is also concerned by the high incidence of poverty, sickness and alcoholism among Native Americans, notwithstanding some improvements achieved with the Self-Governance Demonstration Project.

291. The Committee notes with concern that information provided in the core document reveals that disproportionate numbers of Native Americans, African Americans, Hispanics and single parent families headed by women live below the poverty line and that one in four children under six live in poverty. It is concerned that poverty and lack of access to education adversely affect persons belonging to these groups in their ability to enjoy rights under the Covenant on the basis of equality.

5. Suggestions and recommendations

292. The Committee recommends that the State party review its reservations, declarations and understandings with a view to withdrawing them, in particular reservations to article 6, paragraph 5, and article 7 of the Covenant.

293. The Committee hopes that the Government of the United States will consider becoming a party to the First Optional Protocol to the Covenant.

294. The Committee recommends that appropriate inter-federal and state institutional mechanisms be established for the review of existing as well as proposed legislation and other measures with a view to achieving full implementation of the Covenant, including its reporting obligations.

295. The Committee emphasizes the need for the Government to increase its efforts to prevent and eliminate persisting discriminatory attitudes and prejudices against persons belonging to minority groups and women including, where appropriate, through the adoption of affirmative action. State legislation which is not yet in full compliance with the non-discrimination articles of the Covenant should be brought systematically into line with them as soon as possible.

296. The Committee urges the State party to revise federal and state legislation with a view to restricting the number of offences carrying the death penalty strictly to the most serious crimes, in conformity with article 6 of the Covenant and with a view eventually to abolishing it. It exhorts the authorities to take appropriate steps to ensure that persons are not sentenced to death for crimes committed before they were 18. The Committee considers that the determination of methods of execution must take into account the prohibition against causing avoidable pain and recommends the State party to take all necessary steps to ensure respect of article 7 of the Covenant.

297. The Committee urges the State party to take all necessary measures to prevent any excessive use of force by the police; that rules and regulations governing the use of weapons by the police and security forces be in full conformity with the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials; that any violations of these rules be systematically investigated in order to bring those found to have committed such acts before the courts; and that those found guilty be punished and the victims be compensated. Regulations limiting the sale of firearms to the public should be extended and strengthened.

298. The Committee recommends that appropriate measures be adopted as soon as possible to ensure to excludable aliens the same guarantees of due process as are available to other aliens and that guidelines be established that would place limits on the length of detention of persons who cannot be deported.

299. The Committee expresses the hope that measures will be adopted to bring conditions of detention of persons deprived of liberty in federal or state prisons in full conformity with article 10 of the Covenant. Legislative, prosecutorial and judicial policy in sentencing must take into account that overcrowding in prisons causes violation of article 10 of the Covenant. Existing legislation that allows male officers access to women’s quarters should be amended so as to provide at least that they will always be accompanied by women officers. Conditions of detention in prisons, in particular in maximum security prisons, should be scrutinized with a view to guaranteeing that persons deprived of their liberty be treated with humanity and with respect for the inherent dignity of the human person, and implementing the United Nations Standard Minimum Rules for the Treatment of Prisoners and the Code of Conduct for Law Enforcement Officials therein. Appropriate measures should be adopted to provide speedy and effective remedies to compensate persons who have been subjected to unlawful or arbitrary arrests as provided in article 9, paragraph 5, of the Covenant.

300. The Committee recommends that further measures be taken to amend any federal or state regulation which allow, in some states, non-therapeutic research to be conducted on minors or mentally-ill patients on the basis of surrogate consent.

301. The Committee recommends that the current system in a few states in the appointment of judges through elections be reconsidered with a view to its replacement by a system of appointment on merit by an independent body.

302. The Committee recommends that steps be taken to ensure that previously recognized aboriginal Native American rights cannot be extinguished. The Committee urges the Government to ensure that there is a full judicial review in respect of determinations of federal recognition of tribes. The Self-Governance Demonstration Project and similar programmes should be strengthened to continue to fight the high incidence of poverty, sickness and alcoholism among Native Americans.

303. The Committee expresses the hope that, when determining whether currently permitted affirmative action programmes for minorities and women should be withdrawn, the obligation to provide Covenant's rights in fact as well as in law will be borne in mind.

304. The Committee recommends that measures be taken to ensure greater public awareness of the provisions of the Covenant and that the legal profession as well as judicial and administrative authorities at federal and state levels be made familiar with these provisions in order to ensure their effective application.

K. Ukraine

305. The Committee considered the fourth periodic report of Ukraine (CCPR/C/95/Add.2) at its 1418th to 1420th meetings, on 11 and 12 July 1995, and adopted[17] the following final comments:

1. Introduction

306. The Committee welcomes the fourth periodic report of Ukraine and views with satisfaction the cooperative attitude of the delegation in engaging in a frank and constructive dialogue with the Committee. The Committee appreciates the fact that the report did not conceal difficulties encountered by the State party in implementing the Covenant. However, those difficulties were described in very broad terms and without describing the steps envisaged by the State party to overcome them. Furthermore, the report did not provide sufficient information on the implementation of the Covenant in practice. The additional information provided in the oral replies given by the delegation to the questions posed and comments raised by the Committee members have enabled the Committee to gain a clearer picture of the overall situation in the country, especially with regard to Ukraine's approach to compliance with the obligations undertaken under the Covenant.

2. Factors and difficulties affecting the application of the Covenant

307. The Committee notes that it is necessary to overcome vestiges of the

totalitarian past and that much remains to be done to strengthen democratic institutions and respect for the rule of law. In this connection, the Committee notes that the Government's efforts in restructuring the legal system and endeavours to implement better the Covenant have been hampered by lacunae in the national legislation as well as by a continuing resort to a large number of outdated - albeit still in force - laws of the former regime, many of them incompatible with corresponding provisions of the Covenant. The Committee also notes that extremist and discriminatory attitudes are emerging in the country that are not conducive to the full promotion and protection of human rights. In addition, this period of transition to a market-oriented economy has been marked by severe economic and social difficulties.

3. Positive aspects

308. The Committee expresses its satisfaction as to the fundamental and positive changes that have recently taken place in Ukraine. These changes will create a better political, constitutional and legal framework for the full implementation of the rights enshrined in the Covenant.

309. The Committee welcomes the fact that, through the adoption of the Act on the Effect of International Agreements on Ukrainian Territory in December 1991 and of the Act on Ukraine's International Treaties in December 1993, international treaties ratified by Ukraine are now automatically part of the domestic legal order. The recognition by Ukraine of the competence of the Committee to receive and consider communications from individuals under the Optional Protocol to the Covenant and its willingness to adopt appropriate procedures to implement the Committee's views without delay is of particular importance for the effective implementation of the Covenant.

310. The Committee welcomes the many other recent legal developments in Ukraine and the present progress in the transition towards democracy and pluralism. In general, the Committee is encouraged by the adoption of the Act on Provisional Detention in June 1993 and of the Decree of the Ukrainian Cabinet on Programmes for Bringing up to World Standards the Conditions of Detention in January 1994, which take into account the United Nations Standard Minimum Rules for the Treatment of Prisoners. The Committee also welcomes the adoption of the Acts on the Ukrainian Public Prosecutor's Office in November 1991, the Legal Profession in December 1992, the Status of Judges in December 1992 and the Self-Governance of the Judiciary in February 1994, aimed at strengthening the independent status of the judicial system and improving judicial guarantees for individuals.

311. The Committee also notes the adoption by the Government of Ukraine of the 1991 Act on Freedom of Conscience and Religious Organizations, of the 1993 Acts on Information and on Printed Media, of the 1993 Act on Television and Radio Broadcasting and of the Act on Public Association of Citizens. The adoption by Ukraine of the Act on Environmental Protection in 1991, along with special provisions in the Penal Code establishing liability for the preparation, processing or selling of radiation-contaminated foodstuffs or other products and their accession to the nuclear non-proliferation treaties are also a welcome development.

312. The Committee further notes the adoption by the Supreme Council of Ukraine of the 1991 Declaration of Rights of the Nationalities of Ukraine, which was given legal force through the Act on National Minorities in 1992.

313. The Committee takes note with appreciation of the confirmation by the

delegation that victims of past human rights violations are entitled to compensation. It further welcomes the efforts initiated by the Government of Ukraine to encourage and facilitate the return of minorities displaced by the Soviet regime and especially the resettlement in Crimea of the Crimean Tartars.

4. Principal subjects of concern

314. The Committee is concerned by the continuing applicability in Ukraine of a Constitution which does not provide guarantees and recourse procedures in full conformity with the Covenant. Furthermore, it has not been made sufficiently clear during the consideration of the report whether, under the law and in the practice of the courts and administrative authorities, provisions of the Covenant are systematically applied in precedence to a conflicting provision to domestic law.

315. The Committee expresses its concern about actual cases of discrimination against women and, in general, the persistence - in a climate of economic and social difficulties - of gender disparities in practice with regard to such issues as equal pay, the equitable participation of women in the conduct of public affairs and in the economic, social and cultural life of the country. The State party has not yet adopted effective measures to overcome attitudes based on traditional roles which hinder equality between men and women. Additionally, the Committee regrets the high level of family violence within the country and recalls that the Covenant requires States parties to implement measures of protection.

316. The Committee expresses its deep concern about the current trend in Ukraine to impose and carry out an increasing number of death sentences, and about the inhumane circumstances in which those sentences are carried out. It recalls that under article 6 of the Covenant a sentence of death may be imposed only for the most serious crimes.

317. The Committee is concerned that the guarantees contained in articles 7, 9, 10 and 14 of the Covenant are not fully complied with. In particular, it is concerned that torture and ill-treatment of persons committed by members of the police and other security forces continue to be reported, particularly to the Public Prosecutor’s Office. In this regard, it is concerned that the right to personal security may be restricted without any involvement of a judicial body. The Procurator’s functions during the investigation process as well as throughout the trial do not ensure the minimum requirements contained in articles 9 and 14 of the Covenant. Furthermore, cases of administrative detention, in particular of vagrants, denial of access of detainees to legal counsel and long periods of pre-trial detention are matters of great concern.

318. The Committee is also concerned at the conditions in places of detention, whether in prisons or curative labour establishments, which do not comply with article 10 of the Covenant or other international standards. Prison overcrowding is a further matter of concern to the Committee.

319. The Committee expresses concern that the independence of the judiciary has not yet been ensured. In this connection, it regrets that the Constitutional Court, which is to be established under the Act on the Constitutional Court of June 1992, has not yet been set up. The Committee is further concerned by the very long delays in the administration of justice, which are not in conformity with the requirements of both articles 9 and 14 of the Covenant, and notes in that regard that the judicial system in Ukraine cannot be efficient until there

is a sufficient number of well-trained and qualified judges and lawyers. The absence of special provisions for juvenile offenders is also a matter of concern.

320. The Committee is further disturbed by continuing obstacles to freedom of movement in Ukraine and in particular by the legal provisions that allow for the rejection of passport applications from holders of State secrets. The requirement of exit visas and the persistence of the internal passport are unacceptable and incompatible with article 12 of the Covenant.

321. The Committee expresses its concern that, although Ukraine adopted a domestic refugee law in December 1993, currently no concrete measures have been taken to implement this law, or to establish a refugee determination procedure for asylum-seekers in Ukraine.

322. The Committee expresses concern arising from the information in the report, corroborated by cases brought to its attention, that there are incidents and situations that may be conducive to acts of discrimination on ethnic, gender, religious, linguistic or property grounds. The Committee regrets that appropriate steps have not yet been taken by the authorities to resolve those difficulties and, in particular, to prevent and suppress the advocacy of national, racial or religious hatred in conformity with the requirements of article 20 of the Covenant. This situation is particularly alarming in that it may undermine harmonious relations with minorities. In that regard, the Committee regrets that the definition of minorities under the Declaration of the Rights of the Nationalities of Ukraine does not conform fully with article 27 of the Covenant, which grants protection to persons belonging to all ethnic, religious or linguistic minorities, and not only to those belonging to "national" minorities. Lastly, the Committee notes with regret that measures have not yet been taken to grant automatically Ukrainian citizenship to Crimean Tartars who have returned to Crimea.

5. Suggestions and recommendations

323. The Committee recommends that the constitutional reform presently under way be accelerated in order to ensure the adoption and implementation of the new Constitution and that the text of the Covenant be taken into account in that regard. In drafting new legislation affecting human rights, attention should systematically be paid to the establishment of effective guarantees for the safeguard of civil and political rights. In that regard, the authorities may avail themselves of the advisory services and technical cooperation programmes developed by the Centre for Human Rights.

324. The Committee urges the Government to set up an independent body, such as a human rights ombudsman, to monitor the implementation of the law in conformity with the obligations under the various human rights instruments to which Ukraine is a party, and to receive complaints by individuals.

325. The Committee recommends that the State party review and include information in its next periodic report on the procedures established to ensure compliance with the views and recommendations adopted by the Committee under the first Optional Protocol to the Covenant, also bearing in mind the obligations under article 2 of the Covenant.

326. With respect to the rights of women, the Committee believes that affirmative measures should be taken to strengthen their participation in the

political, economic, and social life of the country, as well as positive measures to ensure effective protection against domestic violence.

327. The Committee recommends that Ukraine study measures to limit the categories of crimes punishable by death to the most serious offences, in conformity with article 6 of the Covenant, with a view to its prospective abolition, and to make when appropriate more extensive use of the rights of commutation or pardon.

328. The Committee emphasizes the need for greater control over the police. There should be intensive training and educational programmes in the field of human rights aimed at law-enforcement officials. Steps should be taken to strengthen recourse procedures for victims of police abuse and detained persons. Adequate follow-up to reports of such abuse should be ensured by thorough investigations and appropriate penal and administrative sanctions. Prison conditions should be brought into compliance with article 10 of the Covenant and with the United Nations Standard Minimum Rules for the Treatment of Prisoners.

329. The Committee recommends that, in order to ensure the independence and impartiality of the judiciary, as well as the confidence of the individuals in the proper administration of justice, further steps be taken to speed up and complete the reform process. Measures for juveniles should be appropriate to their needs and status. Furthermore, vigorous efforts should also be made to encourage a culture of independence among the judiciary itself and to establish a well-trained and independent legal profession. A first priority should, for instance, be to adopt a law containing all the safeguards set forth in the Covenant.

330. Existing provisions limiting or restricting the exercise of the right to freedom of movement, including the internal passport requirements, as well as the legal provisions relating to holders of State secrets, should be reviewed to bring the legislation fully in conformity with article 12 of the Covenant.

331. The Committee recommends that Ukraine undertake to implement its domestic refugee law of December 1993 and, in this connection, that it seek assistance and advice from relevant international organizations, including UNHCR.

332. The Committee expresses the wish that vigorous measures will be taken to give full implementation to article 20 of the Covenant.

333. The Committee welcomes the publication of the report in Ukraine and the Government's intention to disseminate the record of the dialogue. It emphasizes that the text of the Covenant and the Optional Protocol should be widely publicized in the languages spoken in Ukraine, so that the public can be made fully aware of the rights enshrined in the provisions of these instruments. It also recommends that education in human rights and democracy be included in school and university curricula and that its comments be widely disseminated and incorporated into the curricula of all human rights training programmes organized for law-enforcement officials and administration officers.

L. Latvia

334. The Committee considered the initial report of Latvia (CCPR/C/81/Add.1/Rev.1) at its 1421st, 1422nd and 1425th meetings, on 12 to 14 July 1995, and adopted[18] the following final comments:

1. Introduction

335. The Committee welcomes the initial report (CCPR/C/81/Add.1/Rev.1) of Latvia and expresses its appreciation to the State party for the open and constructive dialogue with the Committee. However, it notes that, while providing detailed information on prevailing legislation in Latvia, the report does not contain enough information on the way in which the Covenant is implemented in practice. To some extent, the information provided by the delegation and the responses to the questions raised by members of the Committee largely covered these deficiencies and provided the Committee with a better insight into the human rights situation in Latvia.

2. Factors and difficulties affecting the application of the Covenant

336. The Committee notes that it is necessary to overcome vestiges of the totalitarian past and that much remains to be done to strengthen democratic institutions and respect for the rule of law. The Government's efforts in restructuring the legal system and endeavouring to implement better the Covenant have been hampered by lacunae in some existing legislation as well as by continuing resort to a number of outdated laws which are incompatible with corresponding provisions of the Covenant.

337. In consequence of large-scale emigration from and immigration to Latvia in the past, there coexisted in the country, at the time of the renewal of independence, a significantly large proportion of persons belonging to various national minorities. The policy of the Government to establish precise criteria with regard to naturalization and citizenship has raised a number of difficulties that are affecting the application of the Covenant.

3. Positive aspects

338. The Committee expresses its satisfaction as to the fundamental and positive changes that have taken place since Latvia re-established itself as a sovereign State in 1990. These changes will create a better political, constitutional and legal framework for the full implementation of the rights enshrined in the Covenant.

339. Latvia's accession, soon after its renewal of independence on 4 May 1990, to various human rights international instruments, such as the Covenant, confirms the genuine commitment of the State party to guarantee the basic human rights of all individuals. The recognition by Latvia of the competence of the Committee to receive and consider communications from individuals under the first Optional Protocol to the Covenant is of particular importance for the effective implementation of the Covenant.

340. The Committee notes with satisfaction that there has been significant progress in securing civil and political rights in Latvia since the proclamation of the renewal of independence. Particular satisfaction is expressed at the adoption in January 1995 of the National Programme for the Protection and Promotion of Human Rights in Latvia and at the establishment of a Human Rights Council in July 1995.

341. The Committee also notes with satisfaction the elimination of capital punishment as a potential penalty for several types of economic crimes as well

as the planned revision of the Criminal Code which should lead to the abolition of the death penalty.

4. Principal subjects of concern

342. The Committee regrets that the Covenant has not been given an overriding status in the Latvian legal order and that the Constitutional Law on the Rights and Obligations of a Citizen and a Person of 10 December 1991 has no constitutional status. Furthermore, the Constitution of 15 February 1922, which was restored in 1993, has not yet been fully amended so as to incorporate all the rights enshrined in the various articles of the Covenant. At the same time, the Committee notes with concern the absence of a body, such as a Constitutional Court, charged with determining, inter alia, the conformity of domestic laws with the provisions of the Covenant and other relevant human rights instruments.

343. The Committee also notes that it was not made sufficiently clear, during the consideration of the report, how the human rights of resident non-citizens are guaranteed, in accordance with article 2, paragraph 1, of the Covenant.

344. The Committee notes with concern that the Latvian legal system has not yet provided for effective mechanisms of investigation in respect of violations of human rights, as required under article 2, paragraph 3, of the Covenant. In the view of the Committee, the need to make effective remedies available to any person whose rights are violated is particularly urgent in respect of the obligations embodied in articles 7, 9 and 10 of the Covenant.

345. The Committee further regrets that the respective functions and mandates of the State Minister on Human Rights and of the newly created Human Rights Council were not clearly described during the discussion and believes that there may be certain overlapping in their activities as well as a lack of effective coordination.

346. While expressing satisfaction at the impending changes in the Criminal Code that are expected to abolish the death penalty in due course, the Committee is concerned that the death penalty can be imposed for crimes that cannot be qualified as the most serious crimes under article 6 of the Covenant.

347. The Committee is concerned that the rights contained in articles 7 and 10 of the Covenant are not fully respected. The Committee is, in particular, concerned at allegations of mistreatment of detainees and at the conditions in places of detention, which do not comply with article 10 of the Covenant or other international standards. The apparent non-separation of accused persons from convicted persons and juveniles from adults is a further matter of concern. The Committee is especially concerned that there do not seem to be clear mechanisms for dealing with complaints of violence by law enforcement authorities and of conditions in detention centres and prisons. The Committee also notes that the judicial system in Latvia will not be able to exercise its functions properly until there is a sufficient number of well-trained and qualified judges and lawyers.

348. With regard to articles 9 and 14 of the Covenant, the Committee is particularly concerned that the new Code of Criminal Procedure has not been enacted. The role of the Prosecutor under the Law on Prosecutor's Supervision, enacted on 19 May 1994, runs counter to the principle of equality of arms in criminal trials and does not protect in a proper way the right to personal security.

349. The Committee is concerned that, as a result of the absence of domestic legislation and procedure governing the treatment of asylum-seekers trying to enter or who have entered Latvia, the Government has resorted to an excessive use of detention and removal of asylum-seekers from the country.

350. While welcoming the attempts at bringing the naturalization and citizenship legislation in conformity with regional human rights instruments, the Committee remains concerned that a significant segment of the population will not enjoy Latvian citizenship owing to the stringent criteria established by the law and the policy deliberately chosen to consider each case on an individual basis and pursuant to a timetable calculated to delay the naturalization process for many years. In the view of the Committee, the legislation still contains criteria of exclusion that give room to discrimination under articles 2 and 26 of the Covenant and raise difficulties under articles 13 and 17 of the Covenant.

5. Suggestions and recommendations

351. The Committee recommends that a review of the existing legal framework for the protection of human rights in the State party be undertaken in order to clarify the status of international human rights treaties, particularly the Covenant, in the domestic legal hierarchy. In this regard, the Committee emphasizes the importance of giving the Covenant an overriding status in the national legal order. Regarding the actual application of the Covenant, the Committee requests the State party to indicate in its second periodic report any possible instances where the Covenant was directly invoked before the courts, as well as about the results of any such proceedings.

352. The Committee recommends that the State party review and include information in its next periodic report on the procedures established to ensure compliance with the views and recommendations adopted by the Committee under the first Optional Protocol to the Covenant, also bearing in mind the obligations under article 2 of the Covenant.

353. The Committee urges the State party to take appropriate measures to provide effective and efficient remedies for all persons whose rights under the Covenant have been violated. In that regard, the Committee requests the State party to ensure due coordination between existing and planned institutions aiming at protecting human rights. The Committee also recommends that measures be taken to ensure greater public awareness of the remedies available to individuals, including the provisions of the first Optional Protocol.

354. The Committee would welcome information on the situation of women, to be provided in the second periodic report, and recommends that the State party take appropriate steps to educate the population of Latvia on the equality of men and women.

355. While strongly endorsing the steps envisaged towards the abolition of the death penalty in Latvia, the Committee recommends that a firm policy be adopted aiming at commuting, during the interim period, all death sentences to life imprisonment.

356. The Committee recommends that the State party take any necessary measures to ensure that the conditions of detention of persons deprived of their liberty comply fully with article 10 of the Covenant, as well as the United Nations Standard Minimum Rules for the Treatment of Prisoners.

357. The Committee emphasizes the need for greater control over the police, particularly in the context of the recent authoritarian past from which Latvian society is emerging. Intensive training and education programmes in the field of human rights for law enforcement officials as well as officials of the correctional service are recommended. Steps should be taken to institute effective recourse procedures for victims of police abuse and detained persons. Adequate publicity should be given to pronounced administrative and penal sanctions.

358. The Committee recommends that, in order to ensure the independence and impartiality of the judiciary, as well as the confidence of the individuals in the proper administration of justice, further steps be taken to speed up and complete the reform process. Further vigorous efforts should also be made to encourage a culture of independence among the judiciary itself.

359. The Committee recommends that the Government of Latvia take steps to adopt domestic legislation governing the treatment of refugees and asylum-seekers in compliance with the Covenant and international refugee law. In this regard, the Committee further recommends that the Government of Latvia seek assistance from relevant international organizations, including UNHCR. The Committee also recommends that the Latvian Government consider acceding to the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.

360. The Committee recommends that the State party take all necessary measures to guarantee that the citizenship and naturalization legislation facilitate the full integration of all permanent residents of Latvia, with a view to ensuring compliance with the rights guaranteed under the Covenant, in particular with articles 2 and 26.

361. The Committee recommends that the Covenant, the Optional Protocol and the Committee's comments be widely disseminated among the Latvian public. Additionally, the Committee recommends that human rights education be provided in school at all levels and comprehensive human rights training be provided to judges, lawyers, law enforcement officers and other persons involved in the administration of justice. In this regard, the Committee suggests that the State party avail itself of the technical cooperation services of the Centre for Human Rights, and seek the cooperation of the relevant non-governmental organizations.

M. Russian Federation

362. The Committee considered the fourth periodic report of the Russian Federation (CCPR/C/84/Add.2) at its 1426th to 1429th meetings, on 17 and 18 July 1995, and adopted[18] the following comments:

1. Introduction

363. The Committee welcomes the fourth periodic report of the Russian Federation and views with satisfaction its dialogue with the delegation, particularly the delegation's willingness to engage in a frank discussion with the Committee and the detail in which its written and additional oral questions were addressed. The Committee regrets that, while the report was mainly drafted on the basis of legal measures enacted or under consideration, insufficient information was provided regarding the actual enjoyment of some of the rights guaranteed in the Covenant. The Committee appreciates that this situation was partly remedied

through the oral responses to the Committee's questions, which allowed it to obtain a clearer view of the overall situation in the State party.

2. Factors and difficulties affecting the application of the Covenant

364. The Committee notes that it is necessary to overcome vestiges of the totalitarian past and that much remains to be done to strengthen democratic institutions and respect for the rule of law. This has created a legal vacuum in certain areas, in which the principles set forth in the Constitution are not implemented by corresponding laws and regulations. The Committee notes that the enactment of new laws is being undertaken by the Government but their consideration by two Chambers of the Federal Assembly prior to promulgation is generally a slow process.

365. The Committee is aware of economic difficulties facing the State party, which inevitably affect the application of the Covenant.

3. Positive aspects

366. The Committee expresses its satisfaction as to the fundamental and positive changes that have recently taken place in the Russian Federation. These changes will create a better political, constitutional and legal framework for the full implementation of the rights enshrined in the Covenant.

367. The Committee welcomes the new Constitution of 1993, which gives legal recognition to the concept of human rights and freedoms of the individual. The Committee considers that chapter 2 of the Constitution, which enumerates the rights and liberties of the individuals, conforms to many of the basic rights provided under the Covenant.

368. The Committee welcomes the provisions of article 15, paragraph 4, of the Constitution, which, together with the limiting provision of article 125, paragraph 6, establishes that international treaties, including the Covenant, are part of the Russian legal system and superior to domestic law. It further welcomes the inclusion of article 17, paragraph 1, which stipulates that the basic rights and liberties, in conformity with the commonly recognized principles and norms of international law, shall be recognized and guaranteed by the State party under the Constitution, the recognition in the Constitution of the right to apply to international bodies when domestic remedies are exhausted and the written and oral affirmations that the provisions of the Covenant are directly invocable in domestic courts of law.

369. In this context, the Committee also welcomes the fact that the Russian Federation is party to the Optional Protocol to the Covenant.

370. The Committee welcomes the progress made towards democracy since the consideration of the third periodic report. It also welcomes the promulgation of a number of legal instruments aimed at guaranteeing human rights for all persons in the territory of the State party, including the new Civil Code and Criminal Code. It further welcomes the draft law aimed at a comprehensive reform of the judicial process and the Code of Criminal Procedures currently in the drafting stage and notes with appreciation that the right of all persons whose rights are violated to have access to judicial recourse has been legally established.

371. The Committee welcomes the establishment of several bodies charged with the protection of human rights, including the Office of the Human Rights Commissioner under the State Duma and the Presidential Human Rights Commission, as well as the newly established Commission for Human Rights of the Commonwealth of Independent States.

372. The Committee welcomes the Government's assurances that a systematic review of persons placed in psychiatric facilities under previous regimes will be carried out and trusts that all those found to be placed in such facilities without due cause will be released.

373. The Committee welcomes the special legislation enacted to provide compensation to victims of the events of October 1993.

4. Principal subjects of concern

374. The Committee is concerned that the profound legislative changes taking place within the State party have not been matched by the actual protection of human rights at the implementation level. Specifically, it regrets that many of the rights established under the Constitution have not been put into effect through the enactment of implementing laws and regulations and that the relationship of the various bodies entrusted with the protection of human rights has not been clearly defined. In this connection, it regrets that the responsibilities of the Human Rights Commissioner, although understood to be broad in nature and to include the power to investigate complaints of human rights violations, to bring cases to the Constitutional Court whenever Constitutional rights are infringed and to take legislative initiatives, are not specified in the Constitution and have not yet been legally defined in subsequent legislation. In addition, the responsibilities of the Procurator's Office with respect to the protection of human rights would appear to coincide in many respects with those of the Human Rights Commissioner. In relation to these bodies, it is not clear why the Presidential Human Rights Commission operating directly under the President, who is personally responsible as guarantor of human rights under the Constitution, is empowered only with recommendatory functions, or what mechanisms are in place to ensure that presidential decrees conform with the Covenant.

375. The Committee is concerned that, despite guarantees of equality in the Constitution and in labour legislation, the de facto situation of women is one of continuing inequality. The failure to ensure equal remuneration for work of comparable worth and the persistence of attitudes and practices which impose child-rearing and other domestic responsibilities entirely on women contribute to this inequality and to discrimination in the workplace. The Committee is especially alarmed at the extent of rape and domestic violence and the inadequate efforts made by the authorities to deal with this problem. It is also alarmed at the high incidence of unemployment among women.

376. Although the Committee notes that the draft Criminal Code before the Federal Assembly would reduce the number of crimes that may result in the imposition of the death penalty, it is still concerned at the wide range of crimes still punishable by such penalty. Moreover, the Committee notes that while the number of persons actually executed has declined dramatically since 1993, sentencing continues, which has resulted in a large and growing number of persons on death row.

377. The Committee expresses deep concern over the practice of pre-trial

detention and over the fact that temporary detention has been extended from 10 to 30 days in certain cases. It is concerned by the extent of the Procurator's competence to decide on matters relating to arrest or detention which cannot be challenged by the person concerned before a court. Under article 9, paragraph 3, of the Covenant, the detention of persons before they are granted a trial should not be the norm and, when it occurs, persons so detained should be granted a trial within a reasonable time or be released. The Committee is concerned that pre-trial detention is practised, not only in cases of serious criminal charges but more so on misdemeanour charges and frequently for unreasonably long periods of time, and that no effective mechanism exists for monitoring such detention.

378. The Committee further expresses grave concern over the lack of a monitoring mechanism for penitentiary facilities to ensure humane treatment of detainees and prisoners. In this regard, it deplores the cruel, inhumane and degrading conditions that persist in many detention centres and penitentiary facilities and condemns the use of food deprivation as punishment.

379. The Committee expresses concern about the lack of independence and efficiency of the judiciary and the long delays in the administration of justice, which do not conform with the requirements of both articles 9 and 14 of the Covenant, and notes in that regard that the judicial system in the Russian Federation cannot be effective to ensure protection of rights until there is a sufficient number of well-trained and qualified judges and lawyers.

380. The Committee is concerned that actions may continue that violate the right to protection from unlawful or arbitrary interference with privacy, family, home or correspondence. It is concerned that the mechanisms to intrude into private telephone communication continue to exist, without a clear legislation setting out the conditions for legitimate interferences with privacy and providing for safeguards against unlawful interferences.

381. Although federal law has provided for the abolition of the propiska (residence permit) system, the Committee is concerned that at regional and local levels, the system is still applied in practice, thus violating not only the Constitution, but also article 12 of the Covenant. It expresses further concern that the most important legal restriction on the right to leave the country is still cast in terms of a State secret. This does not correspond with the requirements of article 12, paragraph 3, of the Covenant and the Committee deplores, in that regard, the resistance to date in bringing the legislation in conformity with the Covenant. The Committee further regrets that all individuals not having yet performed their national service are excluded in principle from enjoying their right to leave the country.

382. The Committee is concerned that conscientious objection to military service, although recognized under article 59 of the Constitution, is not a practical option under Russian law and takes note in this regard of the draft law on alternative service before the Federal Assembly. It expresses its concern at the possibility that such alternative service may be made punitive, either in nature or in length of service. The Committee is also seriously concerned at the allegations of widespread cruelty and ill-treatment of young conscript-soldiers.

383. The Committee is concerned at reports of growing numbers of homeless and abandoned children in need of measures of protection.

384. The Committee expresses its concern that the limited definition of the term

"national minorities", which serves as the basis for much of the legislation in the State party concerning the rights of persons belonging to minorities, does not give protection to all persons referred to in article 27 of the Covenant. It is also concerned at reports of harassment shown towards persons belonging to minority groups from the Caucasus region, in the form of searches, beatings, arrests and deportation.

385. The Committee deeply regrets the lack of familiarity of law enforcement and prison officers with the guarantees provided in the new Constitution and with international human rights standards under the Covenant.

386. The Committee expresses concern over the jurisdiction of the military courts in civil cases. Persons detained by members of the armed forces are said to be able to raise complaints before the Military Procurator's Office in charge of the detention centre where they were held. This would appear to create a situation in which the army is entrusted with the judgement and sentencing of the crimes committed by its own members. The Committee is concerned that such a situation may cause miscarriages of justice, particularly in the light of the Government's acknowledgement that the army, even at the highest levels, is not familiar with international human rights law, including the Covenant.

387. The Committee expresses deep concern at the high number of refugees following the events that occurred in North Ossetia in 1992 and at the difficult conditions faced by these displaced persons in the neighbouring Republic of Ingushetia, as well as at the numerous incidents that occurred during their attempts to return to their homeland.

388. With reference to the specific situation in Chechnya, the Committee expresses concern that article 4 of the Covenant, which specifies the provisions that are non-derogable even in times of public emergency, has not been complied with. It maintains that this article is applicable to the situation in Chechnya, where the use of weapons by combatants has led to the loss of life and deprivation of freedom of large numbers of persons, regardless of the fact that a state of emergency has not been formally declared.

389. The Committee deplores the excessive and disproportionate use of force by Russian forces in Chechnya, indicating grave violation of human rights. It further deplores the fact that no one has been made responsible for the inhumane treatment of prisoners and other detained persons, that investigations on charges of human rights violations by Russian forces, including killing of civilians, have so far been inadequate, that civilian installations such as schools and hospitals were destroyed by government forces, and that a large number of civilians have been killed or displaced as a consequence of the destruction of their homes.

390. The Committee expresses deep concern about the large number of reported cases of torture, ill treatment of the person and arbitrary detention in "reception centres" or "filtration camps", which were originally established to determine the identities of captured combatants but are reported to accommodate large numbers of civilians as well. It deplores the maltreatment of detainees in these centres and is concerned that the International Committee of the Red Cross (ICRC) has not been given access to all such camps.

391. The Committee is concerned that, as a result of the violent excesses of recent developments in Chechnya, the level of confidence of the people in the reconstruction efforts by the local authorities and the attempts to bring relief to human rights violations is extremely low.

5. Suggestions and recommendations

392. The Committee recommends that the relationship between the various bodies charged with the protection of human rights be clearly defined and coordinated and that the existence and functions of these bodies be widely publicized. The Committee further recommends that a mechanism be clearly established to ensure conformity of all presidential decrees and laws with the provisions of the Covenant and other international human rights instruments to which the State is party.

393. The Committee recommends that the State party review and include information in its next periodic report on the procedures established to ensure compliance with the views and recommendations adopted by the Committee under the first Optional Protocol to the Covenant, also bearing in mind the obligations under article 2 of the Covenant.

394. The Committee recommends that greater efforts be made to collect information on the situation of women and the effects on them of the structural political, economic and social changes taking place. On this basis, the Government should initiate or strengthen programmes aimed at providing assistance to women in difficult circumstances, including unemployed women, victims of domestic violence and victims of rape, with a view to ensuring their equality before the law and the equal protection of the law. In particular, it should consider allocating responsibility for that purpose to an appropriate high-level governmental body.

395. The Committee urges the Government to reduce substantially the number of crimes for which the death penalty may be imposed, in accordance with article 6 of the Covenant, with a view to its eventual elimination.

396. The Committee recommends that the treatment of persons deprived of their liberty, whether in detention centres or in penitentiary facilities, be effectively monitored. In this connection, it strongly recommends the adoption of new rules and regulations that comply fully with articles 7, 9, 10 and 14 of the Covenant and the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and that the texts of all prison rules and orders and international norms on prison administration be made public and accessible. The Committee further recommends that priority be given to the establishment of the Visitors' Committee for the correctional institutions of the Federation and that legislation on the judicial review of arrest and detention be urgently passed in compliance with article 9, paragraph 3, of the Covenant, and article 22, paragraph 2, of the Constitution. It urges that the Government should refrain from placing first-time, non-violent and petty offenders in detention centres, and give consideration to various other practical measures designed to reduce the overcrowding of pre-trial detention centres, particularly the greater use of release pending trial. It also calls for an immediate end to the practice of food deprivation as punishment in prisons and encourages the Government's initiatives to institute alternative forms of punishment.

397. The Committee stresses the need for a prompt enactment of the legislation on the judiciary and urges that this legislation fully incorporate the essential guarantees for the independence of the judiciary, including the United Nations Basic Principles on the Independence of the Judiciary. The Committee recommends that efforts be made to make the Covenant and other international human rights norms as widely known as possible, particularly among the authorities invested

with the administration of justice, law enforcement and prison officers but also among the general public. It recommends that the State party avail itself of the technical cooperation services of the Centre for Human Rights.

398. The Committee recommends that the abolition of the propiska system be carried out all over the country without exceptions. Further steps should be taken to bring the law concerning the right to leave the country in full line with the State party's obligations under article 12, paragraphs 2 and 3, of the Covenant and, in particular, to remove restrictions to knowledge of State secrets. The Committee urges that all regional and local authorities be made to comply with the Federal policy of abolishing the propiska system (i.e., the system of "internal passes" or "passports").

399. The Committee urges that legislation be passed on the protection of privacy, as well as that strict and positive action be taken to prevent violations of the right to protection from unlawful or arbitrary interference with privacy, family, home or correspondence.

400. The Committee urges that stringent measures be adopted to ensure an immediate end to mistreatment and abuse of army recruits by their officers and fellow soldiers. It further recommends that every effort be made to ensure that reasonable alternatives to military service be made available that are not punitive in nature or in length of service. It urges that all charges brought against conscientious objectors to military service be dropped.

401. The Committee recommends that national legislation be amended to reflect the broad concept of minorities contained in articles 2, 26 and 27 of the Covenant, which prohibit discrimination on the basis of race, colour, sex, opinion or other status, and further protect the rights not only of "national minorities" but also of ethnic, religious and linguistic minorities.

402. The Committee urges that appropriate and effective measures be adopted to enable all persons displaced as a consequence of the events that occurred in North Ossetia in 1992 to return to their homeland.

403. The Committee firmly urges that the serious violations of human rights that occurred and continue to occur in Chechnya be vigorously and immediately investigated, the perpetrators punished and the victims compensated. It urges the Government to ensure that all persons held in detention are held for legitimate cause, for a reasonable period of time and under humane conditions, in conformity with the State party's obligations under the Covenant.

404. The Committee, noting with appreciation the Government's assurances that ICRC will be granted access to all detention camps, urges that such access be granted immediately in the region of Chechnya and neighbouring republics, to allow ICRC not only to monitor the treatment of detainees but also to provide supplies and services.

405. The Committee recommends that, in order to address the lack of confidence in the local government authorities, the Government consider inviting a greater international presence, including from the Centre for Human Rights, to assist the Special Multilateral Commission established to investigate recent events in Chechnya in improving the effectiveness of human rights investigations and ensuring fairness of trials until such time as the judiciary is functioning properly. Such a measure would make clear that the Government is committed to ending human rights violations both by submitting itself to international scrutiny and by drawing on international expertise toward this end.

406. The Committee urges that adequate measures be adopted to alleviate the conditions of all displaced persons following the fighting in Chechnya, including measures aimed at facilitating their return to their towns and villages.

407. The Committee recommends that education in human rights be included in school and university curricula and that its comments be widely disseminated and incorporated into the curricula of all human rights training programmes organized for law-enforcement officers and administration officials.

N. United Kingdom of Great Britain and Northern Ireland

408. The Committee considered the fourth periodic report of the United Kingdom of Great Britain and Northern Ireland (CCPR/C/95/Add.3) at its 1432nd, 1433rd and 1434th meetings, on 20 and 21 July 1995, and adopted[19] the following final comments:[20]

1. Introduction

409. The Committee expresses its appreciation to the State party for its detailed and exhaustive report, which largely complies with the Committee's guidelines, although regret is expressed concerning the failure to address adequately issues properly arising under article 26 of the Covenant. The high level of competence of the delegation that presented the report is to be acknowledged, as is their willingness to offer thorough and helpful answers to the wide range of questions put by members. The Committee particularly appreciates the frank acknowledgement by the delegation of those legal issues regarding which the Government of the United Kingdom is still in disagreement with views of the Committee and for their willingness to engage in dialogue with regard to those issues. In this context, the delegation indicated that it would present written observations setting out the view of the Government on the Committee's general comment No. 24 (52) on issues relating to reservations made upon ratification or accession to the Covenant or to the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant.[21] It is the view of the Committee that the exchange of views with the State party has been particularly fruitful and constructive.

410. The detailed information submitted by a wide range of non-governmental organizations has not only greatly assisted the Committee but is also a tribute to the democratic nature of United Kingdom society. These organizations play an essential role in furthering the protection of human rights in the country.

2. Factors and difficulties affecting the implementation of the Covenant

411. With regard to all parts of the United Kingdom other than Northern Ireland, the Committee finds that there are no significant factors or other difficulties that should prevent the effective implementation of the Covenant by the Government. With regard to Northern Ireland, the Committee notes that, despite the recent cease-fire and political negotiations, the lack of a final political solution and the continuation of emergency legislation present difficulties affecting full implementation of the Covenant.

3. Positive aspects

412. The Committee warmly welcomes and encourages the initiation of the peace process in Northern Ireland. It acknowledges the historic significance of the recent initiatives and of their importance for the promotion and protection of human rights, including the right of self-determination.

413. While the Committee does not agree with some of the positions of the State party concerning the implementation of the Covenant, it acknowledges the vibrant climate of debate in the United Kingdom, which ensures that issues of human rights are comprehensively discussed and in which it is clear that all points of view are seriously considered.

414. The Committee acknowledges the efforts of the State party to combat racial and ethnic discrimination. The programmes to promote the position of racial and ethnic minorities in society are welcomed, including relevant changes to the entry examination system for the police force, proposed similar changes for the prison service, the activities of the Commission for Racial Equality, and the attention paid to race and ethnic sensitivity training in the training programmes for the judiciary.

415. Improvements in the prison system are welcomed. The Committee welcomes the improvements in prison sanitation conditions and the steps taken in addressing problems of overcrowding within prisons. The Government is to be commended for introducing a system whereby participation by prisoners in programmes of education is remunerated in the same way as engagement in prison labour. The statement by the delegation that accommodation of prisoners in cells at police stations has ceased from June 1995 is also to be welcomed. The appointment of a Prisons Ombudsman by the Government in April 1994 is highly appreciated.

4. Principal subjects of concern

416. The Committee notes that the legal system of the United Kingdom does not fully ensure that an effective remedy is provided for all violations of the rights contained in the Covenant. The Committee is concerned by the extent to which implementation of the Covenant is impeded by the combined effects of the non-incorporation of the Covenant into domestic law, the failure to accede to the first Optional Protocol and the absence of a constitutional bill of rights.

417. The Committee also regrets the decision of the State party not to withdraw any of its reservations under the Covenant.

418. It is the view of the Committee that the powers under the provisions permitting infringements of civil liberties, such as of extended periods of detention without charge or access to legal advisers, entry into private property without judicial warrant, imposition of exclusion orders within the United Kingdom, etc., are excessive. Note is taken of the Government's own admission that conditions at the Castlereagh detention centre in Northern Ireland are unacceptable and concern is therefore expressed at the Government's admission that it has not decided definitively to close the facility. The Committee is also disturbed by reports of the continuation of the practice of strip searching male and female prisoners in the context of the low security risk that now exists and in view of the existence of adequate alternative search techniques.

419. Despite the recent improvements in prison conditions in the United Kingdom,

the Committee is still disturbed by the high number of suicides of prisoners, especially among juveniles.

420. The Committee is concerned that, notwithstanding the establishment in the United Kingdom of mechanisms for the external supervision of investigations of incidents in which the police or military are allegedly involved, especially incidents that result in the death or wounding of persons, as the investigations are still carried out by the police, they lack sufficient credibility.

421. The Committee notes with concern that members of some ethnic minorities, including Africans and Afro-Caribbeans, are often disproportionately subjected to stop and search practices that may raise doubts under the non-discriminatory provisions of the Covenant, particularly its articles 3 and 26.

422. The treatment of illegal immigrants, asylum-seekers and those ordered to be deported gives cause for concern. The Committee observes that the incarceration of persons ordered to be deported and particularly the length of their detention may not be necessary in every case and it is gravely concerned at incidences of the use of excessive force in the execution of deportation orders. The Committee also notes with concern that adequate legal representation is not available for asylum-seekers effectively to challenge administrative decisions.

423. The Committee is concerned that the practice of the State party in contracting out to the private commercial sector core State activities which involve the use of force and the detention of persons weakens the protection of rights under the Covenant. The Committee stresses that the State party remains responsible in all circumstances for adherence to all articles of the Covenant.

424. The Committee notes with concern that the provisions of the Criminal Justice and Public Order Act of 1994, which extended the legislation originally applicable in Northern Ireland, whereby inferences may be drawn from the silence of persons accused of crimes, violates various provisions in article 14 of the Covenant, despite the range of safeguards built into the legislation and the rules enacted thereunder.

425. The Committee is concerned at the levels of support offered for the protection of cultural and ethnic diversity within the United Kingdom. The Committee further notes with concern that many persons belonging to minorities frequently feel that acts of racial harassment are not pursued by the competent authorities with sufficient rigor and efficiency. The Committee also regrets the lack of success in the adequate recruitment of ethnic minorities into the police. It further believes that much remains to be done to effect changes in public attitudes and to combat and overcome racism.

426. The Committee regrets that corporal punishment may still be permitted in certain circumstances in independent schools.

5. Suggestions and recommendations

427. The Committee strongly recommends that the State party take urgent steps to ensure that its legal machinery allows for the full implementation of the Covenant. Accordingly, it is urged to examine the need to incorporate the Covenant into domestic law or to introduce a bill of rights under which legislative or executive encroachment on Covenant rights could be reviewed by the courts. It should also reconsider its current position as to accession to the first Optional Protocol.

428. The State party is recommended to review the reservations which it has made to the Covenant.

429. In the context of the elaboration of a peace settlement for Northern Ireland, the Committee recommends that further concrete steps be taken so as to permit the early withdrawal of the derogation made pursuant to article 4 and to dismantle the apparatus of laws infringing civil liberties which were designed for periods of emergency. It also recommends that specific efforts be made to enhance in Northern Ireland confidence in the administration of justice by resolving outstanding cases and by putting in place transparently fair procedures for the independent investigation of complaints. The Committee further recommends that the Castlereagh detention centre be closed as a matter of urgency.

430. Given the significant decline in terrorist violence in the United Kingdom since the cease-fire came into effect in Northern Ireland and the peace process was initiated, the Committee urges the Government to keep under the closest review whether a situation of "public emergency" within the terms of article 4, paragraph 1, of the Covenant still exists and whether it would be appropriate for the United Kingdom to withdraw the notice of derogation that it issued on 17 May 1976, in accordance with article 4 of the Covenant.

431. The State party should ensure that all those who are involved in the detention of prisoners be made fully aware of the international obligations on the State party concerning the treatment of detainees, including the United Nations Standard Minimum Rules for the Treatment of Prisoners.

432. The Committee recommends that the Criminal Justice and Public Order Act of 1994 and the equivalent legislation in Northern Ireland be reviewed in order to ensure that the provisions that allow inferences to be drawn from the silence of accused persons do not compromise the implementation of various provisions in article 14 of the Covenant.

433. The State party is urged to take further action to tackle the remaining problems of racial and ethnic discrimination and of social exclusion. A concerted campaign is called for to address issues of research, juvenile and adult education, recruitment policies for the public and private sectors, legislative initiative and law enforcement. Similarly forceful action is needed to ensure that women play an equal role in society and that they enjoy the full protection of the law. Law enforcement officers, the judiciary and the legal profession should receive information and education to ensure that laws that protect women from violence are fully enforced and that the interpretation of laws, such as those relating to the doctrine of provocation, does not unfairly discriminate against women. All public officials should be made fully cognizant of the programmes of action and receive guidance to ensure that their actions always serve to support and promote the stated aims.

434. The Committee recommends that corporal punishment administered to privately funded pupils in independent schools be abolished.

435. The Committee recommends that the State party give wide publicity to the Covenant, to its report and the reporting procedure. It recommends that these comments and information about the dialogue with the Committee be distributed to interested non-governmental groups and the public at large.

O. Sri Lanka

436. The Committee considered the third periodic report of Sri Lanka (CCPR/C/70/Add.6 and HRI/Core/1/Add.52) at its 1438th to 1440th meetings, on 24 and 25 July 1995, and adopted[22] the following final comments:

1. Introduction

437. The Committee appreciates the opportunity to resume its dialogue with the State party. It regrets, however, that the State party's report was not satisfactory in that it failed to provide detailed information on the actual implementation in practice of the provisions of the Covenant. Moreover, the Committee, while welcoming the updated additional information prepared by the Government and presented to the Committee, notes that the lateness of its submission did not allow for wide distribution, including its availability in all the working languages of the Committee. Notwithstanding this point, the Committee wishes to express its gratitude to the delegation for the supplementary information it provided orally in answer to both the written and oral questions posed by members of the Committee.

2. Factors and difficulties affecting the implementation of the Covenant

438. The Committee recognizes and appreciates the firm commitment of the Government to a durable and peaceful solution to the conflict in the north and east of the country. In view of the considerable efforts undertaken by the Government to initiate and bring peace to the island, the Committee deeply regrets the breakdown of the negotiations and the resumption of armed conflict. The return of hostilities has given rise to serious violations of human rights on both sides, thus adversely affecting the application of the Covenant.

3. Positive aspects

439. The Committee welcomes the initiatives being undertaken by the Government to further the protection and promotion of human rights. In this respect the Committee notes that a package of constitutional reforms is in the process of preparation. The Committee notes that draft proposals are currently under consideration for establishing a new procedure for direct petitioning to the Supreme Court in the case of the infringement of fundamental rights and for broadening the scope of local standings in such cases so as to permit a non-governmental organization to file a petition before the Supreme Court.

440. The Committee further welcomes the enactment of Parliamentary Commissioner for Administration (Amendment) Act No. 26 of 1994, which provides for more direct public access to the Ombudsman. In addition, the Committee notes that the final report by the Committee appointed to inquire into matters relating to persons detained under the Prevention of Terrorism Act and the Emergency Regulations has recommended the immediate revocation of detention orders relating to 140 persons whom the Attorney General has decided not to prosecute. The appointment of a Commission to inquire into election-related violence is also noted.

441. The Committee expresses its satisfaction at the Government's stated policy

of not implementing death sentences and that corporal punishment as a penalty has been suspended for the last 10 years.

442. The Committee notes with satisfaction the important role being played by non-governmental organizations in Sri Lanka in contributing to the reform of laws protecting human rights, for example with respect to the recent amendment of regulations under section 5 of the Public Security Ordinance, by which members of the armed forces and the police have been directed to issue "arrest receipts" even in the case where such information has not been requested by the interested parties, such as family members.

443. The Committee welcomes the recent adoption of an Act establishing the National Human Rights Commission of Sri Lanka. It also welcomes the establishment of the Human Rights Advisory Group.

444. The Committee expresses its appreciation at the efforts undertaken to include human rights education within the curricula of secondary schools and higher educational establishments, and that human rights training programmes are being organized for the security forces.

4. Principal subjects of concern

445. The Committee considers that the domestic legal system of Sri Lanka contains neither all the rights set forth in the Covenant nor all the necessary safeguards to prevent their restriction beyond the limits established by the Covenant. It notes also that the Government does not appear to be considering the incorporation of all Covenant rights into domestic law or the ratification of the Optional Protocol; individuals are thus unable to invoke all the rights conferred under the Covenant before national courts or before the Human Rights Committee.

446. The Committee is of the opinion that the time-limit of two years proposed in the draft new Constitution for challenging the validity of enacted legislation with the Constitution is a matter of serious concern. Equally, the Committee expresses its concern with respect to the provisions of article 16 (1) of the Constitution, which permits all existing laws to remain valid and operative notwithstanding any inconsistency with the Constitution’s provisions relating to fundamental rights.

447. With regard to the recent establishment of various mechanisms for protecting and promoting human rights, the Committee appreciates the undertaking of these initiatives but remains concerned as to whether sufficient attention is being given to the coordination of the work of the respective committees, commissions and the Human Rights Task Force so as to avoid any duplication of efforts and thus maximize the effectiveness of their work.

448. The Committee is concerned that the derogation of rights under the various emergency laws and regulations may not be in full compliance with the requirement of the provisions of article 4, paragraph 2, of the Covenant. It is further concerned that courts do not have the power to examine the legality of the declaration of emergency and of the different measures taken during the state of emergency. The Committee emphasizes that the obligations assumed by Sri Lanka as a State party to various international instruments must be respected even in times of states of emergency.

449. With reference to article 6 of the Covenant, the Committee is concerned

that under Sri Lankan law, the death penalty may be imposed for crimes such as abetting suicide, drug-related offences, and certain offences against property. Some of these offences do not appear to be the most serious offences under article 6 of the Covenant.

450. The Committee is seriously concerned about the information received of cases of loss of life of civilians, disappearances, torture, and summary executions and arbitrary detention caused by both parties in conflict. The Committee notes with particular concern that an effective system for the prevention and punishment of such violations does not appear to exist. In addition, concern is expressed that violations and abuses allegedly committed by police officers have not been investigated by an independent body, and that frequently the perpetrators of such violations have not been punished. The Committee notes that this may contribute to an atmosphere of impunity among the perpetrators of human rights violations and constitute an impediment to the efforts being undertaken to promote respect for human rights.

451. With respect to the functions of the three Presidential Commissions of Inquiry into Involuntary Removals and Disappearances, the Committee is concerned that the Commissions are not mandated to inquire into such human rights violations allegedly committed between 1984 and 1988 nor into summary executions.

452. The Committee is concerned that the undetermined detention which may be ordered by the Secretary of the Ministry of Defence violates the Covenant, particularly when such detention can be challenged only one year after detention. In view of this, the Committee remains concerned about the effectiveness of the habeas corpus remedy in respect of those arrested under the Prevention of Terrorism Act.

453. The Committee is concerned that the rights under article 10 of the Covenant of persons deprived of their liberty in prisons and other places of detention are not fully respected. It regrets that conditions in places of detention other than prisons are not regulated by law and that prisons and other places of detention are not regularly visited by magistrates or other independent bodies.

454. With respect to the independence of the judiciary, the Committee expresses its concern about the procedure set forth under article 107 of the Constitution read with standing orders made by Parliament.

455. The low age of criminal responsibility and the stipulation within the Penal Code by which a child above 8 years of age and under 12 years of age can be held to be criminally responsible on the determination by the judge of the child's maturity of understanding as to the nature and consequence of his or her conduct are matters of profound concern to the Committee.

456. The provisions of the Special Presidential Commissions of Inquiry Act which permit the acceptance of evidence otherwise inadmissible in a court of law and which stipulate that any decision adopted by a Commission established under the Act is final and conclusive and may not be called into question by any court and tribunal are matters of serious concern to the Committee in view of the fact that the findings of these Commissions can lead to a penalty of civic disability being imposed by Parliament on those subject to an investigation.

457. The Committee is also concerned that article 15 (2) of the Constitution allows the right to freedom of expression to be restricted in relation to parliamentary privilege, particularly in view of the fact that the Parliament

(Power and Privileges) Act as amended in 1978 gives Parliament the power to impose penalties for breaches of this Act. The Committee is also concerned with the proposed amendments in the Constitution which seek to restrict the right to freedom of expression, "in the interest of the authority of Parliament", which would be in violation of article 19 of the Covenant. It is equally concerned that government ownership and control over much of the electronic media might undermine the right of everyone to seek, receive or impart information and ideas of all kinds.

458. The Committee notes that the workers employed in the free trade zones, 80 per cent of whom are women, are unable, in practice, to enjoy fully the rights set forth in articles 21 and 22 of the Covenant.

459. While the Committee welcomes the proposed changes to legislation for offences committed against children, such as incest and the sexual exploitation of children, it is concerned about the situation of the economic and sexual exploitation of children both with respect to the use of children in domestic service and the prostitution of boys.

460. The Committee notes that reforms are in place to raise the marriageable age for girls to 18. However, the current legislation permits the marriage of girls from the age of 12 and contains discriminatory provisions with regard to property between men and women, thus preventing women from fully enjoying the rights protected under articles 3, 23, paragraph 3, and 26 of the Covenant.

5. Suggestions and recommendations

461. The Committee strongly recommends that the State party take urgent steps to ensure that its domestic laws are in full compliance with the Covenant. In this regard, it further recommends that within the context of the present efforts to reform the Constitution due consideration be given to the provisions of the Covenant.

462. The Committee recommends that the State party consider acceding to the Optional Protocol.

463. The Committee notes the efforts being undertaken by the Government to establish various mechanisms to promote and protect human rights, including with respect to the National Human Rights Commission. In this regard, the Committee would like strongly to recommend that the proliferation of bodies with parallel competences should be avoided and that the coordination of such mechanisms should be ensured. It also urges the State party to take into account that investigation and prosecution of criminal offences should be carried out by an independent body and that punishment of criminal offences should be carried out by the judiciary.

464. The Committee recommends that the State party review the provision of article 16 of the Constitution, which permits all existing laws to remain valid and operative notwithstanding any inconsistency with constitutional stipulations relating to fundamental rights. It also recommends that the two-year time-limit for challenging the constitutionality of enacted legislations be abolished.

465. The Committee recommends that the provisions of the Covenant be fully respected in the areas where a state of emergency has been proclaimed. The Committee also urges the State party vigorously to investigate all violations of human rights - both past and present - through an independent agency, to punish

those guilty of such acts and to compensate the victims.

466. The Committee recommends that the State party ensure that the death penalty may only be imposed for the most serious of crimes as required by article 6 of the Covenant. Moreover, in view of the fact that the death penalty has not been carried out since 1977, the Committee wishes further to recommend that the State party consider taking measures for the abolition of the death penalty and the ratification of or accession to the second Optional Protocol.

467. Noting that the definition of torture given in the Convention against Torture Act passed by Parliament on 25 November 1994 is somewhat restrictive, the Committee recommends that the Act be amended to bring it into conformity with article 7 of the Covenant, taking into account the Committee's general comment No. 20 (44). It further recommends that in view of the statement by the Government that corporal punishment has been suspended the provisions of the domestic legislation allowing this form of punishment be revoked.

468. With regard to articles 9 and 10 of the Covenant, the Committee recommends that as a matter of priority all legal provisions or executive orders be reviewed to ensure their compatibility with the provisions of the Covenant and their effective implementation in practice.

469. The Committee recommends that the State party review the existing procedure relating to the removal of Supreme Court judges and judges of the Courts of Appeal with a view to its amendment as a means of ensuring the greater independence of the judiciary.

470. The Committee recommends the amendment of the Special Presidential Commissions of Inquiry Act to bring it into conformity with the provisions of articles 14 and 25 of the Covenant.

471. The Committee recommends that the present provisions by which freedom of the press can be restricted by reason of parliamentary privilege should be removed. The State party should also take the necessary steps to prevent control and manipulation of the electronic media by the Government.

472. With respect to the implementation of article 22, the Committee recommends that the State party ensure that workers within the free trade zones effectively exercise their right to organize.

473. The Committee recommends that measures be taken to ensure the protection of the child and in this regard the particular attention of the State party is drawn to the Personal Status Act, which permits the marriage of a girl at the age of 12, and its incompatibility with the provisions of the Covenant.

474. The Committee urges the State party to develop a comprehensive programme to deal with the issues of child labour, particularly of children in domestic service, and the sexual exploitation of children of both sexes.

475. The Committee strongly recommends that greater efforts be undertaken to ensure that all ethnic groups are provided with the opportunity to participate fully in the conduct of public affairs and are ensured equitable access to public service.

476. The Committee recommends that further measures be taken to develop greater awareness of the Covenant; in particular, law enforcement officials and members of the legal profession should be made fully cognizant of the provisions of the

Covenant.

VII. GENERAL COMMENTS OF THE COMMITTEE

Work on general comments

477. At its fifty-second session, the Committee began discussion of a draft general comment that would address issues relating to reservations made upon ratification of or accession to the Covenant or the Optional Protocols thereto, or relating to statements made under article 41 of the Covenant. It considered that general comment at its 1368th, 1369th, 1380th, 1381st and 1382nd meetings, during its fifty-second session, on the basis of a draft prepared by its working group pursuant to successive drafts revised in the light of the observations and proposals put forward by members during and after the fifty-first session. The Committee adopted the general comment at its 1382nd meeting, on 2 November 1994 (see annex V).

478. Pursuant to the request of the Economic and Social Council, the Committee decided to transmit the general comment addressing issues relating to reservations made upon ratification of or accession to the Covenant or the Optional Protocols thereto, or relating to statements made under article 41 of the Covenant, to the Council at its substantive session in 1995.

479. During the three sessions covered by the present report, the Committee considered a draft general comment on article 25 of the Covenant at its 1384th, 1385th, 1399th, 1414th, 1422nd and 1423rd meetings on the basis of successive drafts revised by its working groups in the light of the observations and proposals of its members.

480. At its fifty-fourth session, the Committee noted that the pre-sessional working group had begun consideration of the general comments already adopted in the past, so as to determine which of them should be updated.

481. The Committee received comments under article 40, paragraph 5, of the Covenant, concerning its general comment No. 24 (52) on issues relating to reservations made upon ratification of or accession to the Covenant or the Optional Protocols thereto, or relating to statements made under article 41 of the Covenant. These comments, which were transmitted by the United States of America and the United Kingdom of Great Britain and Northern Ireland, are contained in annex VI to the present report.

VIII. CONSIDERATION OF COMMUNICATIONS UNDER THE OPTIONAL PROTOCOL

482. Individuals who claim that any of their rights under the International Covenant on Civil and Political Rights have been violated, and who have exhausted all available domestic remedies, may submit written communications to the Human Rights Committee for consideration under the Optional Protocol. Of the 130 States that have ratified or acceded to the Covenant, 84 have accepted the Committee's competence to deal with individual complaints by becoming parties to the Optional Protocol (see annex I, sect. B). Since the Committee's last report to the General Assembly, seven States have ratified or acceded to the Optional Protocol: Bosnia and Herzegovina, Chad, El Salvador, Kyrgyzstan, Namibia, Paraguay and the former Yugoslav Republic of Macedonia. No communication can be examined by the Committee if it concerns a State party to the Covenant that is not also a party to the Optional Protocol.

483. Consideration of communications under the Optional Protocol is confidential and takes place in closed meetings (art. 5, para. 3, of the Optional Protocol). All documents pertaining to the work of the Committee under the Optional Protocol (submissions from the parties and other working documents of the Committee) are confidential. Rules 96 to 99 of the Committee's rules of procedure regulate the confidentiality of documents. The texts of final decisions of the Committee, consisting of Views adopted under article 5, paragraph 4, of the Optional Protocol, are, however, made public. As regards decisions declaring a communication inadmissible (which are also final), the Committee has decided that it will normally make these decisions public.

A. Progress of work

484. The Committee started its work under the Optional Protocol at its second session, in 1977. Since then, 636 communications concerning 46 States parties have been registered for consideration by the Committee, including 49 placed before it during the period covered by the present report.

485. The status of the 636 communications registered for consideration by the Human Rights Committee so far is as follows:

(a) Concluded by Views under article 5, paragraph 4, of the Optional Protocol: 208;

(b) Declared inadmissible: 213;

(c) Discontinued or withdrawn: 108;

(d) Declared admissible, but not yet concluded: 39;

(e) Pending at the pre-admissibility stage: 68.

486. In addition, the secretariat of the Committee has several hundred communications on file, in respect of which the authors have been advised that further information would be needed before their communications could be registered for consideration by the Committee. The authors of a number of additional communications have been informed that their cases will not be submitted to the Committee, as they fall clearly outside the scope of the Covenant or appear to be frivolous.

487. Two volumes containing selected decisions of the Human Rights Committee under the Optional Protocol, from the second to the sixteenth sessions and from the seventeenth to the thirty-second sessions, respectively, have been published (CCPR/C/OP/1 and 2).

488. During the fifty-second to fifty-fourth sessions, the Committee concluded consideration of 15 cases by adopting Views thereon. These are cases Nos. 386/1989 (Koné v. Senegal), 400/1990 (Mónaco de Gallicchio v. Argentina), 447/1991 (Shalto v. Trinidad and Tobago), 453/1991 (Coeriel v. the Netherlands), 464/1991 and 482/1991 (Peart v. Jamaica), 473/1991 (Barroso v. Panama), 493/1992 (Griffin v. Spain), 500/1992 (Debreczeny v. the Netherlands), 511/1992 (Länsman et al. v. Finland), 514/1992 (Fei v. Colombia), 516/1992 (Simunek et al. v. the Czech Republic), 518/1992 (Sohn v. the Republic of Korea), 539/1993 (Cox v. Canada and 606/1994 (Francis v. Jamaica). The texts of the Views in these 15 cases are reproduced in annex X.

489. The Committee also concluded consideration of 13 cases by declaring them inadmissible. These are cases Nos. 437/1990 (Colamarco Patiño v. Panama), 438/1990 (Thompson v. Panama), 460/1991 (Omar Simons v. Panama), 494/1992 (Rogers v. Jamaica), 515/1992 (Holder v. Trinidad and Tobago), 525/1992 (Gire v. France), 536/1993 (Perera v. Australia), 541/1993 (Simms v. Jamaica), 553/1993 (Bullock v. Trinidad and Tobago), 575/1994, 576/1994 (Guerra and Wallen v. Trinidad and Tobago), 578/1994 (De Groot v. the Netherlands) and 583/1994 (van der Houwen v. the Netherlands). The texts of these decisions are reproduced in annex XI.

490. During the period under review, 29 communications were declared admissible for examination on the merits. Decisions declaring communications admissible are not made public. Consideration of 15 cases was discontinued. Procedural decisions were adopted in a number of pending cases (under article 4 of the Optional Protocol or under rules 86 and 91 of the Committee's rules of procedure). The Committee requested Secretariat action in other pending cases.

B. Growth of the Committee's caseload under the Optional Protocol

491. As the Committee has already stated in previous annual reports, the increasing number of States parties to the Optional Protocol and better public awareness of the Committee's work under the Optional Protocol have led to a growth in the number of communications submitted to it. In addition, the Secretariat took action on several hundred cases which, for one reason or another, were not registered under the Optional Protocol and placed before the Committee. Furthermore, follow-up activities are required in the majority of the 154 cases in which the Committee found violations of the Covenant. This workload means that the Committee can no longer examine communications expeditiously and highlights the urgent need to reinforce the Secretariat staff. In this connection the Committee also notes that an increasing number of communications are being submitted in languages that are not among the working languages of the Secretariat, and expresses its concern about the consequent delays in the examination of such communications. The Committee reiterates its request to the Secretary-General to take the necessary steps to ensure a substantial increase in the number of staff, specialized in the various legal systems, assigned to service the Committee, and wishes to record that the work under the Optional Protocol continues to suffer as a result of insufficient Secretariat resources.

C. Approaches to examining communications under the Optional Protocol

1. Special Rapporteur on new communications

492. At its thirty-fifth session, the Committee decided to designate a Special Rapporteur to process new communications as they were received, i.e., between sessions of the Committee. Mrs. Rosalyn Higgins served as Special Rapporteur for a period of two years. She was succeeded as Special Rapporteur by Mr. Rajsoomer Lallah (forty-first to forty-sixth sessions) and by Ms. Christine Chanet (forty-seventh to fifty-second sessions). At the Committee's fifty-third session, Mr. Fausto Pocar was designated to succeed Ms. Chanet as Special Rapporteur. Since the end of the fifty-first session, the Special Rapporteur has transmitted 38 new communications to the States parties concerned under rule 91 of the Committee's rules of procedure, requesting information or observations relevant to the question of admissibility. In some cases, the Special Rapporteurs issued requests for interim measures of protection pursuant to rule 86 of the Committee's rules of procedure. Regarding other communications, the Special Rapporteurs recommended to the Committee that the communications be declared inadmissible without forwarding them to the State party.

2. Competence of the Working Group on Communications

493. At its thirty-sixth session, the Committee decided to authorize the Working Group on Communications to adopt decisions declaring communications admissible when all five members so agreed. Failing such agreement, the Working Group would refer the matter to the Committee. It could also do so whenever it believed that the Committee itself should decide the question of admissibility. While the Working Group could not adopt decisions declaring communications inadmissible, it might make recommendations in that respect to the Committee. Pursuant to those rules, the Working Group that met prior to the fifty-second, fifty-third and fifty-fourth sessions of the Committee declared 23 communications admissible.

3. Joinder of admissibility and merits

494. At its fifty-fourth session, the Committee decided that it would join the consideration of admissibility and merits of communications when both parties consented and the Committee considered it appropriate. Consequently, at its fifty-fourth session, the Committee declared communication No. 606/1994 (Francis v. Jamaica) admissible and adopted its Views thereon.

D. Individual opinions

495. In its work under the Optional Protocol, the Committee strives to arrive at its decisions by consensus. However, pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, members can add their individual concurring or dissenting opinions to the Committee's Views. Pursuant to rule 92, paragraph 3, members can append their individual opinions to the Committee's decisions declaring communications inadmissible.

496. During the sessions covered by the present report, individual opinions were appended to the Committee's Views in cases Nos. 453/1991 (Coeriel v. the

Netherlands) and 539/1993 (Cox v. Canada).

E. Issues considered by the Committee

497. A review of the Committee's work under the Optional Protocol from its second session in 1977 to its fifty-first session in 1994 can be found in the Committee's annual reports for 1984 to 1994, which contain, inter alia, summaries of the procedural and substantive issues considered by the Committee and of the decisions taken. The full texts of the Views adopted by the Committee and of its decisions declaring communications inadmissible under the Optional Protocol have been reproduced regularly in annexes to the Committee's annual reports.

498. The following summary reflects further developments on issues considered during the period covered by the present report.

1. Procedural issues

(a) No claim under article 2 of the Optional Protocol

499. Article 2 of the Optional Protocol provides that "individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration".

500. Although an author does not need to prove the alleged violation at the admissibility stage, he must submit sufficient evidence substantiating his allegation for purposes of admissibility. A "claim" is, therefore, not just an allegation, but an allegation supported by a certain amount of substantiating evidence. Thus, in cases where the Committee finds that the author has failed to substantiate his claim for purposes of admissibility, the Committee has held the communication inadmissible, under rule 90 (b) of its rules of procedure, declaring that the author "has no claim under article 2 of the Optional Protocol".

501. Cases declared inadmissible, inter alia, for lack of substantiation of the claim or failure to advance a claim, are communications Nos. 460/1991 (Simons v. Panama), 536/1993 (Perera v. Australia) and 541/1993 (Simms v. Jamaica).

(b) Competence of the Committee and incompatibility with the provisions of the Covenant (Optional Protocol, art. 3)

502. In its work under the Optional Protocol, the Committee has on several occasions had to point out that it is not an appeal instance intended to review or reverse decisions of domestic courts and that it cannot be used as a forum for pursuing a complaint on the basis of domestic law.

503. In case No. 541/1993 (Simms v. Jamaica), the author, who had been sentenced to death, complained that his trial was unfair and that the judge had misdirected the jury on the issue of identification. The Committee decided that the communication was inadmissible under article 3 of the Optional Protocol. It found that the author's claims did not come within the competence of the Committee, as they related primarily to the judge's instructions to the jury and the evaluation of evidence by the court. The Committee recalled that it was generally for the appellate courts of States parties to the Covenant and not for

the Committee to evaluate the facts and evidence and to review specific instructions to the jury by the judge, unless it can be ascertained that the instructions were clearly arbitrary or amounted to a denial of justice.

504. The Committee reached a similar conclusion with regard to cases Nos. 460/1991 (Simons v. Panama), 536/1993 (Perera v. Australia) and 553/1993 (Bullock v. Trinidad and Tobago).

505. Communication No. 583/1994 (van der Houwen v. the Netherlands) was declared inadmissible as incompatible with the provisions of the Covenant, as was part of communication No. 578/1994 (De Groot v. the Netherlands).

(c) The requirement of exhaustion of domestic remedies (Optional Protocol, art. 5, para. 2 (b))

506. Pursuant to article 5, paragraph 2 (b), of the Optional Protocol, the Committee shall not consider any communication unless it has ascertained that the author has exhausted all available domestic remedies. However, the Committee has already established that the rule of exhaustion applies only to the extent that these remedies are effective and available. The State party is required to give "details of the remedies which it submitted that had been available to the author in the circumstances of his case, together with evidence that there would be a reasonable prospect that such remedies would be effective" (case No. 4/1977 (Torres Ramírez v. Uruguay)). The rule also provides that the Committee is not precluded from examining a communication if it is established that the application of the remedies in question is unreasonably prolonged.

507. Communications Nos. 437/1990 (Colamarco v. Panama), 438/1990 (Thompson v. Panama), 515/1992 (Holder v. Trinidad and Tobago), 525/1993 (Gire v. France) and 575/1994 (Guerra v. Trinidad and Tobago) were declared inadmissible for failure to pursue available and effective domestic remedies.

(d) Inadmissibility ratione temporis

508. As at previous sessions, the Committee was faced with communications based on events that occurred prior to the entry into force of the Optional Protocol for the State concerned. The criterion of admissibility is whether the events have had continued effects which themselves constitute violations of the Covenant after the entry into force of the Optional Protocol.

509. In communication No. 536/1993 (Perera v. Australia), the author, inter alia, complained that the police had used violence against him in 1986. Since the Optional Protocol entered into force for Australia on 25 December 1991, the Committee declared this part of the communication inadmissible ratione temporis.

510. In case No. 516/1992 (Simunek et al. v. the Czech Republic), the Committee observed that:

> "the State party's obligations under the Covenant applied as of the date of its entry into force. A different issue arose as to when the Committee's competence to consider complaints about alleged violations of the Covenant under the Optional Protocol was engaged. In its jurisprudence under the Optional Protocol, the Committee has consistently held that it cannot consider alleged violations of the Covenant which occurred before the entry into force of the Optional Protocol for the State party, unless the violations complained of continue after the entry into force of the

Optional Protocol. A continuing violation is to be interpreted as an affirmation, after the entry into force of the Optional Protocol, by act or by clear implication, of the previous violations of the State party" (annex X, sect. K, para. 4.5).

Since the authors alleged that the continuous application of a law discriminated against them, the Committee declared the communication admissible.

(e) Interim measures under rule 86

511. Under rule 86 of the Committee's rules of procedure, the Committee may, after receipt of a communication and before adopting its views, request a State party to take interim measures in order to avoid irreparable damage to the victim of the alleged violations. The Committee has applied this rule on several occasions, mostly in cases submitted by or on behalf of persons who have been sentenced to death and are awaiting execution, and who claim that they were denied a fair trial. In view of the urgency of the communications, the Committee has requested the States parties concerned not to carry out the death sentences while the cases are under consideration. Stays of execution have specifically been granted in this connection. Rule 86 has also been applied in other circumstances, for instance in cases of imminent extradition.

2. Substantive issues

(a) Right to life (Covenant, art. 6)

512. Article 6, paragraph 2, provides that a "sentence of death may be imposed only for the most serious of crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant". Thus, a nexus is established between the imposition of a sentence of death and observance by State authorities of guarantees under the Covenant. Accordingly, in cases where the Committee found that the State party had violated article 14 of the Covenant, in that the author had been denied a fair trial and appeal, the Committee held that the imposition of the sentence of death also entailed a violation of article 6. In its Views in case Nos. 464/1991 and 482/1991 (Garfield and Andrew Peart v. Jamaica) the Committee observed:

"The Committee is of the opinion that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is possible, a violation of article 6 of the Covenant. As the Committee noted in its general comment 6(16), the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that 'the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review of conviction and sentence by a higher tribunal'" (annex X, sect. E, para. 11.8).

513. Having concluded that the final sentence of death had been imposed after a trial that failed to comply fully with the requirements of article 14, the Committee found that the right protected by article 6 had been violated.

514. In case No. 539/1993 (Keith Cox v. Canada), the Committee had occasion to affirm its earlier decisions with regard to the scope of the requirement under

article 6, paragraph 1, to protect the right to life. In Mr. Cox's case, the Committee had to determine whether the requirement under article 6, paragraph 1, prevented the State party from extraditing the complainant to the United States, where he was to stand trial on two murder charges and, if convicted, could be sentenced to death. The Committee observed that, if Mr. Cox's extradition from Canada had exposed him to a real risk of a violation of article 6, paragraph 2, in the United States, this would have entailed a violation by Canada of its obligations under the said provision. In the circumstances of this particular case, the Committee found that the existence of such risk had not been shown and consequently found no violation of article 6, paragraph 1, by Canada.

515. Five members of the Committee appended dissenting opinions, arguing that Canada had violated article 6 in the instant case. One member appended an individual opinion arguing that Mr. Cox's extradition would entail a violation by Canada of article 7 of the Covenant. Furthermore, two members appended individual opinions, agreeing with the finding of no violation, but arguing that the Committee should have revised its decision on admissibility and not have proceeded to the merits. As to the Committee's decision on admissibility, seven members appended dissenting opinions.

(b) The right not to be subjected to torture or to cruel, inhuman or degrading treatment (Covenant, art. 7)

516. Article 7 of the Covenant provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

517. In its jurisprudence regarding claims that a prolonged stay on death row constitutes cruel, inhuman and degrading treatment, the Committee has consistently held that the facts and circumstances of each case must be examined to see whether an issue under article 7 arises and that prolonged judicial proceedings do not per se constitute that kind of treatment, even if they might be a source of mental strain and tension for detained persons.

518. In case No. 541/1993 (Simms v. Jamaica), the Committee observed:

> "Although some national courts of last resort have held that prolonged detention on death row for a period of five years or more violates their constitutions or laws,[23] the jurisprudence of this Committee remains that detention for any specific period would not be a violation of article 7 of the Covenant in the absence of some further compelling circumstances" (annex XI, sect. H, para. 6.5).

519. In case No. 606/1994 (Francis v. Jamaica), the Committee had to determine whether the author's treatment during his nearly 12 years' detention on death row entailed violations of articles 7 and 10 of the Covenant. After having reaffirmed its established jurisprudence, the Committee found that the delays in this case were attributable to the State party and considered:

> "Whereas the psychological tension created by prolonged detention on death row may affect persons in different degrees, the evidence before the Committee in this case, including the author's confused and incoherent correspondence with the Committee, indicates that his mental health seriously deteriorated during incarceration on death row. Taking into consideration the author's description of the prison conditions, including his allegations about regular beatings inflicted upon him by warders, as well as the ridicule and strain to which he was subjected during the five days he spent in the death cell awaiting execution in February 1988, which

the State party has not effectively contested, the Committee concludes that these circumstances reveal a violation of Jamaica's obligations under articles 7 and 10, paragraph 1, of the Covenant" (annex X, sect. N, para. 9.2).

(c) Liberty and security of person (Covenant, art. 9)

520. Article 9 of the Covenant guarantees to everyone the right to liberty and security of person. Under paragraph 1, no one shall be subjected to arbitrary arrest or detention. Paragraph 2 prescribes that anyone who is arrested shall be informed, at the time of his arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. Paragraph 3 gives anyone arrested or detained on a criminal charge the right to be brought promptly before a judge and states that it shall not be the general rule that persons awaiting trial shall be detained in custody. Paragraph 4 entitles anyone deprived of his liberty to take proceedings before a court, in order to have the court decide on the lawfulness of his detention. Paragraph 5 gives anyone who has been the victim of unlawful arrest or detention a right to compensation.

521. In communication No. 493/1992 (Griffin v. Spain), the author, a Canadian citizen who did not speak Spanish, claimed a violation of article 9, paragraph 2, because there was no interpreter present when he was arrested and he was therefore not informed of the reasons for his arrest. The Committee noted:

> "that the author was arrested and taken into custody at 11.30 p.m. on 17 April 1991, after the police, in the presence of the author, had searched the camper and discovered the drugs. The police reports further reveal that the police refrained from taking his statement in the absence of an interpreter, and that the following morning the drugs were weighed in the presence of the author. He was then brought before the examining magistrate and, with the use of an interpreter, he was informed of the charges against him. The Committee observes that, although no interpreter was present during the arrest, it is wholly unreasonable to argue that the author was unaware of the reasons for his arrest. In any event, he was promptly informed, in his own language, of the charges held against him" (annex X, sect. G, para. 9.2).

The Committee concluded that no violation of article 9, paragraph 2, had occurred.

522. In communication No. 386/1989 (Koné v. Senegal), the author had been arrested on 15 January 1982 and released on 9 May 1986; during this time no trial date was set. The Committee concluded that the author's detention of four years and four months was incompatible with the provisions of article 9, paragraph 3, that anyone arrested on a criminal charge shall be entitled to trial within a reasonable time or to release.

523. In communication No. 447/1991 (Shalto v. Trinidad and Tobago), the author had been found guilty of murdering his wife. However, the Court of Appeal, on 23 March 1983, quashed his conviction and ordered a retrial. The author remained in detention until the retrial, which started on 20 January 1987. The Committee found that the author's detention for a period of almost four years between the judgement of the Court of Appeal and the beginning of the retrial could not be deemed compatible with the provisions of article 9, paragraph 3.

(d) Treatment during imprisonment (Covenant, art. 10)

524. Article 10, paragraph 1, prescribes that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Paragraph 2 of article 10 states that accused persons shall be segregated from convicted persons, save in exceptional circumstances, and that accused juvenile persons shall be separated from adults. The Committee found a violation of article 10, paragraphs 1 and 2, in case No. 493/1992 (Griffin v. Spain).

(e) Guarantees of a fair trial (Covenant, art. 14)

525. Article 14, paragraph 1, provides that all persons shall be equal before the courts and gives everyone the right to a fair and public hearing in the determination of criminal charges against him.

526. In case No. 514/1992 (Fei v. Colombia), the author, who had separated from her husband and had subsequently left Colombia and taken up residence in Italy, was engaged in procedures before the Colombian courts concerning visiting rights and custody of her two children. She claimed that the proceedings had been deliberately delayed by the Colombian judicial authorities. The Committee observed that the concept of "fair trial" includes also other elements than those of impartiality and independence of the judicial authorities:

> "Among these ... are the respect for the principles of equality of arms, of adversary proceedings and of expeditious proceedings. In the present case, the Committee is not satisfied that the requirement of equality of arms and of expeditious procedure have been met. It is noteworthy that every court action instituted by the author took several years to adjudicate - and difficulties in communication with the author, who does not reside in the State party's territory, cannot account for such delays, as she had secured legal representation in Colombia. The State party has failed to explain these delays. On the other hand, actions instituted by the author's ex-husband and by or on behalf of her children were heard and determined considerably more expeditiously. As the Committee has noted in its admissibility decision, the very nature of custody proceedings or proceedings concerning access of a divorced parent to his children requires that the issues complained of be adjudicated expeditiously. In the Committee's opinion, given the delays in the determination of the author's actions, this has not been the case" (annex X, sect. J, para. 8.4).

527. Article 14, paragraph 3 (c), gives every accused person the right to be tried without undue delay. In case No. 447/1991 (Shalto v. Trinidad and Tobago), the Committee found that the delay of almost four years between the judgement of the Court of Appeal ordering a retrial and the beginning of the retrial could not be deemed compatible with this provision. In case No. 473/1991 (Barroso v. Panama), the Committee found a violation of article 14, paragraph 3 (c), because of a delay of over three and a half years between indictment and trial.

528. Pursuant to article 14, paragraph 3 (e), an accused person shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses brought against him. In communication No. 536/1993 (Perera v. Australia), which was declared inadmissible by the Committee, the author complained that his defence lawyer had not called a certain witness for his defence. The Committee considered:

> "that the State party cannot be held accountable for alleged errors made by

a defence lawyer, unless it was or should have been manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice" (annex XI, sect. G, para. 6.3).

529. In cases Nos. 464/1991 and 482/1991 (Garfield and Andrew Peart v. Jamaica), a statement made to the police by the main prosecution witness in the evening after the murder for which the complainants were charged was not made available to the defence. It was shown that the statement materially differed from the statement at the preliminary hearing and at the trial. In the specific circumstances of the case, the Committee considered that the failure to make the statement available to the defence had seriously obstructed the defence in its cross-examination of the witness, thereby precluding a fair trial.

530. Article 14, paragraph 5, gives anyone convicted of a crime the right to have his conviction and sentence reviewed by a higher tribunal according to law. In case No. 536/1993 (Perera v. Australia), the Committee had occasion to observe that article 14, paragraph 5, does not require that a Court of Appeal proceed to a factual retrial, but that a Court conduct an evaluation of the evidence presented at the trial and of the conduct of the trial.

(f) Right to privacy (Covenant, art. 17)

531. Under article 17, paragraph 1, no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. In case No. 453/1991 (Coeriel v. the Netherlands), the Committee had to determine whether article 17 protected the right to choose and change one's own name. The authors of the communication had requested a change of surname in order to enable them to pursue their religious Hindu studies, which had been refused by the State party. The Committee considered:

> "that the notion of privacy refers to the sphere of a person's life in which he or she can freely express his or her identity, be it by entering into relationships with others or alone. The Committee is of the view that a person's surname constitutes an important component of one's identity and that the protection against arbitrary or unlawful interference with one's privacy includes the protection against arbitrary or unlawful interference with the right to choose and change one's own name. For instance, if a State were to compel all foreigners to change their surnames, this would constitute interference in contravention of article 17" (annex X, sect. D, para. 10.2).

In the circumstances of the case, the Committee found that the refusal of the authors' request to have their surnames changed was unreasonable and therefore arbitrary within the meaning of article 17, paragraph 1, of the Covenant. Two members of the Committee appended a dissenting individual opinion to the Committee's finding of a violation.

(g) Freedom of expression (Covenant, art. 19)

532. Under article 19, paragraph 1, everyone has the right to hold opinions without interference; paragraph 2 gives everyone the freedom of expression. The rights provided for in article 19, paragraph 2, may be subject to certain restrictions, but only as are provided by law and are necessary for the protection of the rights or reputations of others or for the protection of national security, public order (ordre public), or public health or morals.

533. In case No. 518/1992 (Sohn v. the Republic of Korea), the author, a labour union leader, had been arrested, charged and convicted for having issued a statement of support for a strike at a shipyard. His conviction was based on article 13 (2) of the Labour Dispute Adjustment Act, which prohibits third-party intervention in labour disputes. The Committee observed:

> "that any restriction of the freedom of expression pursuant to paragraph 3 of article 19 must cumulatively meet the following conditions: it must be provided for by law, it must address one of the aims enumerated in paragraph 3 (a) and (b) of article 19, and must be necessary to achieve the legitimate purpose. While the State party has stated that the restrictions were justified in order to protect national security and public order and that they were provided for by law, under article 13 (2) of the Labour Dispute Adjustment Act, the Committee must still determine whether the measures taken against the author were necessary for the purpose stated. The Committee notes that the State party has invoked national security and public order by reference to the general nature of the labour movement and by alleging that the statement issued by the author in collaboration with others was a disguise for the incitement to a national strike. The Committee considers that the State party has failed to specify the precise nature of the threat which it contends that the author's exercise of freedom of expression posed and finds that none of the arguments advanced by the State party suffice to render the restriction of the author's right to freedom of expression compatible with paragraph 3 of article 19" (annex X, sect. L, para. 10.4).

The Committee concluded that article 19 had been violated in the author's case.

(h) The rights of the family and to marry (Covenant, art. 23)

534. Article 23 of the Covenant protects the family and the right to marry. Paragraph 4 of the article provides that States parties should ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

535. In case No. 514/1992 (Fei v. Colombia), the author, whose marriage was dissolved, had been hindered in having regular contact with her children. The Committee recalled its observations in case No. 201/1985 (Hendriks v. the Netherlands) that article 23, paragraph 4, grants, barring exceptional circumstances, a right to regular contact between children and both of their parents upon dissolution of a marriage. The unilateral opposition of one parent generally does not constitute such an exceptional circumstance. The Committee found that no special circumstances were discernible in the case at hand which could justify that the mother was virtually excluded from having access to her two daughters and it concluded that there had been a violation of article 23, paragraph 4.

(i) The right of a minor to protection on the part of his family, society and the State (Covenant, art. 24)

536. Article 24 of the Covenant provides that every child shall have, without any discrimination, the right to such measures of protection as required by his status as a minor, on the part of his family, society and the State. The facts of case No. 400/1990 (Mónaco de Gallicchio v. Argentina) showed that the author's granddaughter disappeared, together with her parents, in 1977, when she was nine years old. The grandmother managed to locate her granddaughter in

1984; she was then living as the adopted daughter of one S.S., who was subsequently charged with concealing the whereabouts of a minor and forgery of documents. In January 1989, the grandmother was granted provisional guardianship over the child, but denied the right to represent the child in the various proceedings; S.S. was granted visiting rights. On 11 August 1992, the adoption of the child by S.S. was nullified. In 1993, the granddaughter's legal identity was established.

537. Noting the long delay in the completion of the judicial proceedings, the Committee, in the specific circumstances of the case, found:

> "that the protection of children stipulated in article 24 of the Covenant required the State party to take affirmative action to grant Ms. Vicario prompt and effective relief from her predicament. In this context, the Committee recalls its general comment on article 24,[24] in which it stressed that every child has a right to special measures of protection because of his/her status as a minor; those special measures are additional to the measures that States are required to take under article 2 to ensure that everyone enjoys the rights provided for in the Covenant. Bearing in mind the suffering already endured by Ms. Vicario, who lost both of her parents under tragic circumstances imputable to the State party, the Committee finds that the special measures required under article 24, paragraph 1, of the Covenant, were not expeditiously applied by Argentina, and that the failure to recognize the standing of Mrs. Mónaco in the guardianship and visitation proceedings and the delay in legally establishing Ms. Vicario's real name and issuing identity papers also entailed a violation of article 24, paragraph 2, of the Covenant, which is designed to promote recognition of the child's legal personality" (annex X, sect. B, para. 10.5).

(j) The right to vote and to be elected (Covenant, art. 25)

538. Article 25 (b) of the Covenant protects the right and the opportunity, without any of the distinctions mentioned in article 2 of the Covenant and without unreasonable restrictions, to vote and to be elected. In case No. 500/1992 (Debreczeny v. the Netherlands), the author, a local policeman, was elected to the municipal council, but was not allowed to take his seat because under Netherlands law the membership in the municipal council was incompatible with employment as a civil servant in subordination to local authorities. In its Views, the Committee notes that while the right provided for by article 25 is not an absolute right, restrictions of the right must be neither discriminatory nor unreasonable. In the Committee's opinion, the application of the lawful restrictions to the author did not constitute a violation of article 25 of the Covenant.

(k) The right to equality before the law and to equal protection by the law and the prohibition of discrimination

539. Article 26 of the Covenant provides that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination.

540. In case No. 516/1992 (Simunek et al. v. the Czech Republic), the authors had left their country (Czechoslovakia) for political reasons and had had their property confiscated. A law enacted in 1991 provided for restitution or compensation for confiscations carried out by the Communist Government, but

excluded non-residents and non-Czech citizens. The authors argued that the application of the law violated their rights under article 26. The Committee considered that:

> "In examining whether the conditions for restitution or compensation are compatible with the Covenant, the Committee must consider all relevant factors, including the authors' original entitlement to the property in question and the nature of the confiscations. The State party itself acknowledges that the confiscations were discriminatory, and this is the reason why specific legislation was enacted to provide for a form of restitution. The Committee observes that such legislation must not discriminate among the victims of the prior confiscations, since all victims are entitled to redress without arbitrary distinctions. Bearing in mind that the authors' original entitlement to their respective properties was not predicated either on citizenship or residence, the Committee finds that the conditions of citizenship and residence in Act 87/1991 are unreasonable. In this connection the Committee notes that the State party has not advanced any grounds which would justify these restrictions. Moreover, it has been submitted that the authors and many others in their situation left Czechoslovakia because of their political opinions and that their property was confiscated either because of their political opinions or because of their emigration from the country. These victims of political persecution sought residence and citizenship in other countries. Taking into account that the State party itself is responsible for the departure of the authors, it would be incompatible with the Covenant to require them permanently to return to the country as a prerequisite for the restitution of their property or for the payment of appropriate compensation.
>
> "The State party contends that there is no violation of the Covenant because the Czech and Slovak legislators had no discriminatory intent at the time of the adoption of Act 87/1991. The Committee is of the view, however, that the intent of the legislature is not alone dispositive in determining a breach of article 26 of the Covenant. A politically motivated differentiation is unlikely to be compatible with article 26. But an act which is not politically motivated may still contravene article 26 if its effects are discriminatory" (annex X, sect. K, paras. 11.6 and 11.7).

Consequently, the Committee found a violation of article 26 in the authors' case.

(l) The right of persons belonging to minorities to enjoy their own culture, to profess and practise their own religion, or to use their own language (Covenant, art. 27)

541. Article 27 of the Covenant protects the right of persons belonging to minorities to enjoy their own culture, to profess and practise their own religion, or to use their own language. In case No. 511/1992 (Länsman et al. v. Finland), the authors, who belonged to a local Sami community, argued that the quarrying going on in their area interfered with their reindeer husbandry. In its Views, the Committee recalled that economic activities might come within the ambit of article 17 if they were an essential element of the culture of an ethnic community:

> "The right to enjoy one's culture cannot be determined in abstracto but has to be placed in context. In this connection, the Committee

observes that article 27 does not only protect traditional means of livelihood of national minorities, as indicated in the State party's submission. Therefore, the fact that the authors may have adapted their methods of reindeer-herding over the years and may practise it with the help of modern technology does not prevent them from invoking article 27 of the Covenant" (annex X, sect. I, para. 9.3).

In the specific circumstances of the case, the Committee concluded that the quarrying that had taken place did not constitute a denial of the authors' right to enjoy their own culture. The Committee noted, however, that if mining activities were to be approved on a large scale in the future, it might constitute a violation of the authors' rights under article 27. The Committee stated that the State party was under a duty to keep that in mind when either extending existing contracts or granting new ones.

F. Remedies called for under the Committee's Views

542. The Committee's decisions on the merits are referred to as "Views" in article 5, paragraph 4, of the Optional Protocol. After the Committee has made a finding of a violation of a provision of the Covenant, it proceeds to ask the State party to take appropriate steps to remedy the violation. For instance, in the period covered by the present report, the Committee, in a case concerning custody and children's rights, found as follows:

> "In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy. In the Committee's opinion, this entails guaranteeing the author's regular access to her daughters, and that the State party ensure that the terms of the judgments in the author's favour are complied with. The State party is under an obligation to ensure that similar violations do not occur in the future" (annex X, sect. J, para. 10).

The Committee further observed that:

> "Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views" (annex X, sect. J, para. 11).

G. Non-cooperation by States parties

543. The following States have offered no cooperation in the Committee's consideration of communications under the Optional Protocol relating to them: Central African Republic, Dominican Republic, Equatorial Guinea and Zaire.

IX. FOLLOW-UP ACTIVITIES UNDER THE OPTIONAL PROTOCOL

544. From its seventh session, in 1979, to its fifty-fourth session, in July 1994, the Human Rights Committee has adopted 208 Views on communications received and considered under the Optional Protocol. The Committee has found violations in 154 of them. For many years, however, the Committee was informed by States parties in only a limited number of cases of any measures taken by them to give effect to the Views adopted. Because of lack of knowledge about State party compliance with its decisions, the Committee has devised a mechanism that should enable it to evaluate State party compliance with its Views.

545. During its thirty-ninth session (July 1990), following a thorough debate on the Committee's competence to engage in follow-up activities, the Committee established a procedure for monitoring the follow-up to its Views under article 5, paragraph 4, of the Optional Protocol. At the same time, the Committee created the mandate of Special Rapporteur for the follow-up on Views. His mandate is spelt out in annex XI of the Committee's report to the General Assembly at its forty-fifth session.[25] From the thirty-ninth (July 1990) to the forty-seventh (March 1993) session, the late Mr. János Fodor acted as Special Rapporteur for the follow-up on Views. At the forty-seventh session (March 1993), Mr. Andreas Mavrommatis was appointed Special Rapporteur for follow-up on Views. His mandate was extended for another two years at the fifty-third session (March 1995). During its fifty-first session the Committee adopted a new rule of procedure, rule 95, which spells out the mandate of the Special Rapporteur.[26]

546. Pursuant to his mandate, the Special Rapporteur has requested follow-up information from States parties since the autumn of 1990. Follow-up information has systematically been requested in respect of all Views with a finding of a violation of the Covenant. At the beginning of the Committee's fifty-fourth session, follow-up information had been received in respect of 81 Views. No information had been received in respect of 62 Views; in five cases, the deadline for receipt of follow-up information had not yet expired. It may be noted that in many instances, the Secretariat has also received information from authors to the effect that the Committee's Views had not been implemented. Conversely, in some rare instances, the author of a communication has informed the Committee that the State party did give effect to the Committee's recommendations, whereas the State party did not provide this information.

547. There are certain difficulties in attempting to categorize follow-up replies. By the beginning of the fifty-fourth session, it transpired that approximately 30 per cent of the replies received were satisfactory in that they displayed a willingness on the part of the State party to implement the Committee's Views or to offer the applicant an appropriate remedy. Many replies simply indicated that the victim had failed to file a claim for compensation within the statutory deadlines and that, therefore, no compensation could be paid to the victim. Another category of replies cannot be considered fully satisfactory in that they either did not address the Committee's recommendations at all or merely related to one aspect thereof.

548. The remainder of the replies either explicitly challenged the Committee's findings on factual or on legal grounds (nine replies), indicated that the State party would not, for one reason or another, give effect to the Committee's recommendations (nine replies), promised an investigation of the matter considered by the Committee or constituted much belated submissions on the merits of the case.

549. A country-by-country breakdown of follow-up replies received or requested and outstanding as of 28 July 1995 gives the following picture:

Argentina	1 decision finding violations, follow-up deadline not yet expired.
Australia	1 decision finding violations (preliminary), follow-up reply received.
Austria	1 decision finding violations (unsatisfactory), follow-up reply received.
Bolivia	2 Views finding violations, no follow-up reply received.
Cameroon	1 decision finding violations, no follow-up reply received.
Canada	6 Views finding violations, 3 fully satisfactory follow-up replies, 2 (incomplete) follow-up replies, no follow-up reply in 1 case.
Central African Republic	1 decision finding violations, no follow-up reply received.
Colombia	7 Views finding violations, 6 follow-up replies challenging the Committee's findings or amounting to late submissions on the merits; deadline for follow-up submission not expired in 1 case.
Dominican Republic	3 Views finding violations, 1 follow-up reply, no replies in 2 cases.
Ecuador	Three Views finding violations, 1 follow-up reply received, no replies received in 2 cases.
Equatorial Guinea	2 Views finding violations, no follow-up reply received.
Finland	4 Views finding violations, follow-up replies received in all 4 cases.
France	1 decision finding violations, no follow-up reply received.
Hungary	One decision finding violations (preliminary), follow-up reply received.
Jamaica	37 Views finding violations, 9 follow-up replies received, all indicating that the State party will not implement the Committee's recommendations; no follow-up reply in 18 cases.
Libyan Arab Jamahiriya	1 decision finding violations, no follow-up reply received.

Madagascar	4 Views finding violations, no follow-up reply received.
Mauritius	1 decision finding violations, follow-up reply received.
Netherlands	4 Views finding violations, follow-up replies received in all 4 cases.
Nicaragua	1 View finding violations, no follow-up reply received.
Panama	1 decision finding violations, no follow-up reply received.
Peru	4 Views finding violations, follow-up replies indicating that Views were passed on to the Supreme Court for action in 2 cases, no follow-up replies received in 2 cases.
Senegal	1 decision finding violations, follow-up reply received.
Spain	1 decision finding violations, follow-up reply received.
Suriname	8 Views finding violations, no follow-up reply received.
Trinidad and Tobago	3 Views finding violations, 1 follow-up reply received, no follow-up reply in 1 case, follow-up deadline in 1 case not yet expired.
Uruguay	45 Views finding violations, 43 follow-up replies received, no follow-up replies in 2 cases.
Venezuela	1 decision finding violations, follow-up reply received.
Zaire	9 Views finding violations, no follow-up reply received.
Zambia	2 Views finding violations, 1 complete and 1 (preliminary) follow-up reply received.

550. The overall results of the first five years of experience with the follow-up procedure are encouraging, yet they cannot be termed fully satisfactory. Some States parties replying under the follow-up procedure have indeed argued that they are implementing the Committee's Views by, for example, releasing from detention victims of human rights violations, by granting the victim compensation for the violations suffered, by amending legislation found incompatible with the provisions of the Covenant, or by offering the complainant other forms of remedies. Some States parties have acted on the Committee's Views and granted or offered some form of remedy but failed to inform the Committee accordingly.

551. On the other hand, a number of States parties have indicated that compensatory payments to the victim or victims were made ex gratia, notably where the domestic legal system does not provide for compensation in a different manner, or that a remedy was offered ex gratia. This, for example, was the argument of the Government of the Netherlands in its follow-up replies on the Committee's Views in respect of communications No. 305/1988 (Hugo van Alphen v. Netherlands) and No. 453/1991 (Coeriel v. the Netherlands).

552. The Committee is equally aware that the absence of specific enabling legislation is a crucial factor which often stands in the way of monetary compensation to victims of violations of the Covenant. This argument was, for example, adduced by the Government of Austria in its follow-up reply on the Views in case No. 415/1990 (Pauger v. Austria), and by the Government of Senegal in its follow-up reply on the Views in case No. 386/1989 (Koné v. Senegal). The Committee commends those States parties which have compensated victims of violations of the Covenant; it encourages States parties to consider the adoption of specific enabling legislation and, pending this, to make ex gratia payments by way of compensation.

553. In the case of Peru, where enabling legislation does exist, the Committee considered whether it was appropriate to treat the complaint of the author of communication No. 203/1986 (Muñoz Hermosa v. Peru), contending that the Committee's Views had not been implemented by the Peruvian courts, as a new case under the Optional Protocol. The Committee concluded that, on balance, the author's contention that the State party had failed to provide him with a remedy should be examined in the context of the follow-up procedure.

554. Since it began to discuss follow-up matters in 1990, the Committee has carefully examined and analysed all the information gathered through the follow-up procedure. Between the forty-first and fiftieth sessions, it considered follow-up information on a confidential basis. Periodic reports on follow-up activities (so-called "progress reports") were not made public, and the discussions on follow-up issues took place in closed meetings.

555. At the same time, however, the Committee acknowledged that publicity for follow-up activities would be the most appropriate means for making the procedure more effective. Thus, publicity for follow-up activities would not only be in the interest of victims of violations of the Covenant's provisions, but could also serve to enhance the authority of the Committee's Views and provide an incentive for States parties to implement them. The reaction of States parties to the increased publicity and visibility of follow-up activities since the publication of the last annual report, and the interest of academic and non-governmental institutions in the follow-up procedure, has reinforced the Committee's resolve to continue to give publicity to the procedure.

556. During its forty-seventh session in March-April 1993, the Committee agreed in principle that information on follow-up activities should be made public. Discussions on this issue have been held regularly since then. During the fiftieth session in March 1994, the Committee formally adopted a number of decisions concerning the effectiveness and publicity of the follow-up procedure. These decisions were the following:

(a) Every form of publicity will be given to follow-up activities;

(b) Annual reports shall include a separate and highly visible chapter on follow-up activities under the Optional Protocol. This should clearly convey to the public which States have cooperated and which States have failed to

cooperate with the Special Rapporteur for the follow-up on Views. Paragraph 547 above conveys which States parties have and which have not provided follow-up information or cooperated with the Special Rapporteur for the follow-up on Views;

(c) Reminders shall be sent to all States parties that have failed to provide follow-up information. Thus, between December 1994 and June 1995, some 65 follow-up reminders were sent to States that had failed to reply to requests for follow-up information from the Special Rapporteur. As a result of these reminders, some States did formulate follow-up replies and forward them to the Special Rapporteur;

(d) Press communiqués will be issued once a year after the summer session of the Committee, highlighting both positive and negative developments concerning the Committee's and the Special Rapporteur's follow-up activities;

(e) The Committee welcomes information which non-governmental organizations might wish to submit as to what measures States parties have taken, or failed to take, in respect of the implementation of the Committee's Views;

(f) The Special Rapporteur and members of the Committee should, as appropriate, establish contacts with particular Governments and permanent missions to the United Nations to make further inquiries about the implementation of the Committee's Views. Following the fifty-second session, Committee member Julio Prado Vallejo had contacts with government authorities in Colombia and Peru, during which the question of follow-up to some of the Committee's Views was raised. During the fifty-third session of the Committee (March-April 1995), the Special Rapporteur met with the Permanent Representatives of Colombia, Suriname and Zambia to discuss what the Governments concerned might be prepared to do to give effect to the Committee's Views adopted in respect of those States. The Special Rapporteur regrets that, during the same session, he was unable to establish direct contacts with the Permanent Missions of Equatorial Guinea and Zaire;

(g) The Committee should draw the attention of States parties, at their biannual meetings, to the failure of certain States to implement the Committee's Views and to cooperate with the Special Rapporteur in providing information on the implementation of Views.

Follow-up mission by the Special Rapporteur to Jamaica, June 1995

557. In accordance with his mandate under rule 95 of the rules of procedure, the Special Rapporteur conducted his first mission in the context of the follow-up procedure. From 24 to 30 June 1995, he visited Jamaica and held discussions with the Government of Jamaica, judicial authorities, and non-governmental organizations.

558. During his mission, the Special Rapporteur had the opportunity to meet many government officials and representatives of the judiciary and the penitentiary system, as well as the Governor-General of Jamaica. He appreciates the spirit of cooperation and the frankness of the exchanges which characterized the entire mission.

559. The Special Rapporteur thoroughly discussed the status of implementation of the Committee's Views adopted in respect of Jamaica with the authorities. He was informed of the constitutional and legal constraints which have tended to

make it difficult for the State party to implement fully the Committee's Views. Nonetheless, many death sentences had recently been commuted, and the Minister for Foreign Affairs pledged full cooperation with the Committee and the Special Rapporteur under the follow-up procedure.

560. At other levels, the Special Rapporteur was told that the Jamaican Government considers the Committee's Views to be mere recommendations, thereby implying a reluctance to comply with the Views. The Special Rapporteur did indicate, while acknowledging the State party's readiness to "consider" the Committee's Views, that compliance with its Views still left much to be desired.

561. Finally, the Special Rapporteur was able to ascertain the efforts undertaken by the Government of Jamaica to improve certain aspects of the administration of justice. He was informed about efforts to improve prison facilities in general and sanitary conditions in particular; about improvements in the examination of allegations of prisoner abuse by wardens and the payment of compensation to inmates, where appropriate; about improvements relating to the availability of written judgements of the Court of Appeal of Jamaica; about better medical care in the penitentiary system; and about draft legislation currently under consideration which would greatly improve the system of legal aid in capital cases. The Special Rapporteur expresses his hope that these reforms or improvements will be implemented and effected with all due speed.

562. On 25 July 1995, the Special Rapporteur reported to the Committee on his mission to Jamaica. Following its discussion on the mission, the Committee, noting the improved compliance by Jamaica with its Views, requested the Special Rapporteur to continue his contacts with the Government of Jamaica, with a view to ensuring that Jamaica achieved a greater degree of compliance with the Committee's decisions. In that context, the Special Rapporteur recalled that formal follow-up replies remained outstanding in respect of 18 Views, and noted that the State party had promised to forward the outstanding replies with all due speed.

Concern over instances of non-cooperation under the follow-up mandate

563. In spite of the progress in collecting follow-up information since the adoption of the last annual report, the Committee and the Special Rapporteur note with concern that a number of countries have either not provided any follow-up information or have not replied to requests from the Special Rapporteur. Those States which have not replied in respect of at least two follow-up requests, or which have not replied to requests for information in spite of two follow-up reminders, are: Bolivia (no reply in respect of two cases); Dominican Republic (no reply in respect of two cases); Equatorial Guinea (no reply in respect of two cases); France (no follow-up reply in respect of one decision in spite of two reminders); Peru (no reply in respect of two cases); Suriname (no reply in respect of eight cases); Uruguay (no reply in respect of two cases); and Zaire (no reply in respect of nine cases).

564. The Special Rapporteur urges these States parties and all those which have failed to reply to his requests for follow-up information to do so in a timely manner. In future annual reports, the Committee will single out the worst cases of non-compliance with its Views and report on them individually, should there be no reaction to further requests for follow-up information.

565. The Committee reconfirms that it will keep the functioning of the follow-up procedure under constant review. It has requested that at least one follow-up mission per year be budgeted and scheduled by the Centre for Human Rights in the

years to come.

Notes

[1] Official Records of the General Assembly, Forty-ninth Session, Supplement No. 40 (A/49/40), vol. I, para. 14.

[2] Ibid., annex XI.

[3] Ibid., vol. I, paras. 36-56.

[4] A/CONF.157/24 (Part I), chap. III.

[5] Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 40 (A/36/40), annex V.

[6] Ibid., Forty-fifth Session, Supplement No. 40 (A/45/40), vol. I, para. 12.

[7] Ibid., Forty-sixth Session, Supplement No. 40 (A/46/40), paras. 21 and 32 and annex VII.

[8] Ibid., Forty-eighth Session, Supplement No. 40 (A/48/40), vol. I, paras. 166-182.

[9] Ibid., Forty-ninth Session, Supplement No. 40 (A/49/40), para. 61.

[10] At its 1382nd meeting (fifty-second session), on 2 November 1994.

[11] At its 1383rd meeting (fifty-second session), on 3 November 1994.

[12] At its 1411th meeting (fifty-third session), on 5 April 1995.

[13] At the 1412th meeting (fifty-third session), on 5 April 1995.

[14] At its 1414th meeting (fifty-third session), on 6 April 1995.

[15] Consistent with the practice of the Committee, the State party's expert, Mr. Buergenthal, did not take part in the formulation of these comments.

[16] At its 1413th meeting (fifty-third session), on 6 April 1995.

[17] At its 1440th meeting (fifty-fourth session), on 26 July 1995.

[18] At its 1441st meeting (fifty-fourth session), on 26 July 1995.

[19] At its 1442nd meeting (fifty-fourth session), on 27 July 1995.

[20] In accordance with the Committee's practice, the expert from the State party, Mrs. Higgins, did not take part in the preparation of the comments.

[21] The written observations setting out the view of the Government on the Committee's general comment No. 24 (52) were submitted to the Chairman of the Committee on 21 July 1995.

[22] At its 1443rd meeting (fifty-fourth session), on 27 July 1995.

[23] See, inter alia, the judgement of the Judicial Committee of the Privy Council dated 2 November 1993 (Pratt and Morgan v. Jamaica).

[24] General comment No. 17, adopted by the Committee at its thirty-fifth session in 1989.

[25] Official Records of the General Assembly, Forty-fifth Session, Supplement No. 40 (A/45/40).

[26] Ibid., Forty-ninth Session, Supplement No. 40 (A/49/40), vol. I, annex VI.

ANNEX I

States parties to the International Covenant on Civil and Political Rights and to the Optional Protocols and States which have made the declaration under article 41 of the Covenant as at 28 July 1995

State party	Date of receipt of the instrument of ratification or accession (a) or succession (d)	Date of entry into force
A. States parties to the International Covenant on Civil and Political Rights (131)		
Afghanistan	24 January 1983 (a)	24 April 1983
Albania	4 October 1991 (a)	4 January 1992
Algeria	12 September 1989	12 December 1989
Angola	10 January 1992 (a)	10 April 1992
Argentina	8 August 1986	8 November 1986
Armenia	23 June 1993	23 September 1993
Australia	13 August 1980	13 November 1980
Austria	10 September 1978	10 December 1978
Azerbaijan	13 August 1992 (a)	13 November 1992
Barbados	5 January 1973 (a)	23 March 1976
Belarus	12 November 1973	23 March 1976
Belgium	21 April 1983	21 July 1983
Benin	12 March 1992 (a)	12 June 1992
Bolivia	12 August 1982 (a)	12 November 1982
Bosnia and Herzegovina	1 September 1993 (d)	6 March 1992
Brazil	24 January 1992 (a)	24 April 1992
Bulgaria	21 September 1970	23 March 1976
Burundi	9 May 1990 (a)	9 August 1990
Cambodia	26 May 1992 (a)	26 August 1992
Cameroon	27 June 1984 (a)	27 September 1984
Canada	19 May 1976 (a)	19 August 1976
Cape Verde	6 August 1993 (a)	6 November 1993
Central African Republic	8 May 1981 (a)	8 August 1981
Chad	9 June 1995 (a)	9 September 1995
Chile	10 February 1972	23 March 1976
Colombia	29 October 1969	23 March 1976
Congo	5 October 1983 (a)	5 January 1984
Costa Rica	29 November 1968	23 March 1976
Côte d'Ivoire	26 March 1992 (a)	26 June 1992
Croatia	12 October 1992 (d)	8 October 1991

State party	Date of receipt of the instrument of ratification or accession (a) or succession (d)	Date of entry into force
Cyprus	2 April 1969	23 March 1976
Czech Republic	22 February 1993 (d)	1 January 1993
Democratic People's Republic of Korea	14 September 1981 (a)	14 December 1981
Denmark	6 January 1972	23 March 1976
Dominica	17 June 1993 (a)	17 September 1993
Dominican Republic	4 January 1978 (a)	4 April 1978
Ecuador	6 March 1969	23 March 1976
Egypt	14 January 1982	14 April 1982
El Salvador	30 November 1979	29 February 1980
Equatorial Guinea	25 September 1987 (a)	25 December 1987
Estonia	21 October 1991 (a)	21 January 1992
Ethiopia	11 June 1993 (a)	11 September 1993
Finland	19 August 1975	23 March 1976
France	4 November 1980 (a)	4 February 1981
Gabon	21 January 1983 (a)	21 April 1983
Gambia	22 March 1979 (a)	22 June 1979
Georgia	3 May 1994 (a)	3 August 1994
Germany	17 December 1973	23 March 1976
Grenada	6 September 1991 (a)	6 December 1991
Guatemala	6 May 1992 (a)	5 August 1992
Guinea	24 January 1978	24 April 1978
Guyana	15 February 1977	15 May 1977
Haiti	6 February 1991 (a)	6 May 1991
Hungary	17 January 1974	23 March 1976
Iceland	22 August 1979	22 November 1979
India	10 April 1979 (a)	10 July 1979
Iran (Islamic Republic of)	24 June 1975	23 March 1976
Iraq	25 January 1971	23 March 1976
Ireland	8 December 1989	8 March 1990
Israel	3 October 1991 (a)	3 January 1992
Italy	15 September 1978	15 December 1978
Jamaica	3 October 1975	23 March 1976
Japan	21 June 1979	21 September 1979
Jordan	28 May 1975	23 March 1976
Kenya	1 May 1972 (a)	23 March 1976
Kyrgyzstan	7 October 1994 (a)	7 January 1995
Latvia	14 April 1992 (a)	14 July 1992
Lebanon	3 November 1972 (a)	23 March 1976
Lesotho	9 September 1992 (a)	9 December 1992
Libyan Arab Jamahiriya	15 May 1970 (a)	23 March 1976

State party	Date of receipt of the instrument of ratification or accession (a) or succession (d)	Date of entry into force
Lithuania	20 November 1991 (a)	20 February 1992
Luxembourg	18 August 1983	18 November 1983
Madagascar	21 June 1971	23 March 1976
Malawi	22 December 1993 (a)	22 March 1994
Mali	16 July 1974 (a)	23 March 1976
Malta	13 September 1990 (a)	13 December 1990
Mauritius	12 December 1973 (a)	23 March 1976
Mexico	23 March 1981 (a)	23 June 1981
Mongolia	18 November 1974	23 March 1976
Morocco	3 May 1979	3 August 1979
Mozambique	21 July 1993 (a)	21 October 1993
Namibia	28 November 1994 (a)	28 February 1995
Nepal	14 May 1991	14 August 1991
Netherlands	11 December 1978	11 March 1979
New Zealand	28 December 1978	28 March 1979
Nicaragua	12 March 1980 (a)	12 June 1980
Niger	7 March 1986 (a)	7 June 1986
Nigeria	29 July 1993 (a)	29 October 1993
Norway	13 September 1972	23 March 1976
Panama	8 March 1977	8 June 1977
Paraguay	10 June 1992 (a)	10 September 1992
Peru	28 April 1978	28 July 1978
Philippines	23 October 1986	23 January 1987
Poland	18 March 1977	18 June 1977
Portugal	15 June 1978	15 September 1978
Republic of Korea	10 April 1990 (a)	10 July 1990
Republic of Moldova	26 January 1993 (a)	26 April 1993
Romania	9 December 1974	23 March 1976
Russian Federation	16 October 1973	23 March 1976
Rwanda	16 April 1975 (a)	23 March 1976
Saint Vincent and the Grenadines	9 November 1981 (a)	9 February 1982
San Marino	18 October 1985 (a)	18 January 1986
Senegal	13 February 1978	13 May 1978
Seychelles	5 May 1992 (a)	5 August 1992
Slovakia	28 May 1993 (d)	1 January 1993
Slovenia	6 July 1992 (d)	25 June 1991
Somalia	24 January 1990 (a)	24 April 1990
Spain	27 April 1977	27 July 1977
Sri Lanka	11 June 1980 (a)	11 September 1980
Sudan	18 March 1986 (a)	18 June 1986

State party	Date of receipt of the instrument of ratification or accession (a) or succession (d)	Date of entry into force
Suriname	28 December 1976 (a)	28 March 1977
Sweden	6 December 1971	23 March 1976
Switzerland	18 June 1992 (a)	18 September 1992
Syrian Arab Republic	21 April 1969 (a)	23 March 1976
The former Yugoslav Republic of Macedonia	18 January 1994 (d)	17 September 1991
Togo	24 May 1984 (a)	24 August 1984
Trinidad and Tobago	21 December 1978 (a)	21 March 1979
Tunisia	18 March 1969	23 March 1976
Uganda	21 June 1995 (a)	21 September 1995
Ukraine	12 November 1973	23 March 1976
United Kingdom of Great Britain and Northern Ireland	20 May 1976	20 August 1976
United Republic of Tanzania	11 June 1976 (a)	11 September 1976
United States of America	8 June 1992	8 September 1992
Uruguay	1 April 1970	23 March 1976
Venezuela	10 May 1978	10 August 1978
Viet Nam	24 September 1982 (a)	24 December 1982
Yemen	9 February 1987 (a)	9 May 1987
Yugoslavia	2 June 1971	23 March 1976
Zaire	1 November 1976 (a)	1 February 1977
Zambia	10 April 1984 (a)	10 July 1984
Zimbabwe	13 May 1991 (a)	13 August 1991

B. States parties to the Optional Protocol (84)

Algeria	12 September 1989 (a)	12 December 1990
Angola	10 January 1992 (a)	10 April 1992
Argentina	8 August 1986 (a)	8 November 1986
Armenia	23 June 1993	23 September 1993
Australia	25 September 1991 (a)	25 December 1991
Austria	10 December 1987	10 March 1988
Barbados	5 January 1973 (a)	23 March 1976
Belarus	30 September 1992 (a)	30 December 1992
Belgium	17 May 1994 (a)	17 August 1994
Benin	12 March 1992 (a)	12 June 1992

State party	Date of receipt of the instrument of ratification or accession (a) or succession (d)	Date of entry into force
Bolivia	12 August 1982 (a)	12 November 1982
Bosnia and Herzegovina	1 March 1995	1 June 1995
Bulgaria	26 March 1992 (a)	26 June 1992
Cameroon	27 June 1984 (a)	27 September 1984
Canada	19 May 1976 (a)	19 August 1976
Central African Republic	8 May 1981 (a)	8 August 1981
Chad	9 June 1995 (a)	9 September 1995
Chile	28 May 1992 (a)	28 August 1992
Colombia	29 October 1969	23 March 1976
Congo	5 October 1983 (a)	5 January 1984
Costa Rica	29 November 1968	23 March 1976
Cyprus	15 April 1992	15 July 1992
Czech Republic	22 February 1993 (d)	1 January 1993
Denmark	6 January 1972	23 March 1976
Dominican Republic	4 January 1978 (a)	4 April 1978
Ecuador	6 March 1969	23 March 1976
El Salvador	6 June 1995	6 September 1995
Equatorial Guinea	25 September 1987 (a)	25 December 1987
Estonia	21 October 1991 (a)	21 January 1992
Finland	19 August 1975	23 March 1976
France	17 February 1984 (a)	17 May 1984
Gambia	9 June 1988 (a)	9 September 1988
Georgia	3 May 1994 (a)	3 August 1994
Germany	25 August 1993	25 November 1993
Guinea	17 June 1993	17 September 1993
Guyana	10 May 1993 (a)	10 August 1993
Hungary	7 September 1988 (a)	7 December 1988
Iceland	22 August 1979 (a)	22 November 1979
Ireland	8 December 1989	8 March 1990
Italy	15 September 1978	15 December 1978
Jamaica	3 October 1975	23 March 1976
Kyrgyzstan	7 October 1994 (a)	7 January 1995
Latvia	22 June 1994 (a)	22 September 1994
Libyan Arab Jamahiriya	16 May 1989 (a)	16 August 1989
Lithuania	20 November 1991 (a)	20 February 1992
Luxembourg	18 August 1983 (a)	18 November 1983
Madagascar	21 June 1971	23 March 1976
Malta	13 September 1990 (a)	13 December 1990
Mauritius	12 December 1973 (a)	23 March 1976
Mongolia	16 April 1991 (a)	16 July 1991

State party	Date of receipt of the instrument of ratification or accession (a) or succession (d)	Date of entry into force
Namibia	28 November 1994 (a)	28 February 1995
Nepal	14 May 1991 (a)	14 August 1991
Netherlands	11 December 1978	11 March 1979
New Zealand	26 May 1989 (a)	26 August 1989
Nicaragua	12 March 1980 (a)	12 June 1980
Niger	7 March 1986 (a)	7 June 1986
Norway	13 September 1972	23 March 1976
Panama	8 March 1977	8 June 1977
Paraguay	10 January 1995 (a)	10 April 1995
Peru	3 October 1980	3 January 1981
Philippines	22 August 1989 (a)	22 November 1989
Poland	7 November 1991 (a)	7 February 1992
Portugal	3 May 1983	3 August 1983
Republic of Korea	10 April 1990 (a)	10 July 1990
Romania	20 July 1993 (a)	20 October 1993
Russian Federation	1 October 1991 (a)	1 January 1992
Saint Vincent and the Grenadines	9 November 1981 (a)	9 February 1982
San Marino	18 October 1985 (a)	18 January 1986
Senegal	13 February 1978	13 May 1978
Seychelles	5 May 1992 (a)	5 August 1992
Slovakia	28 May 1993	1 January 1993
Slovenia	16 July 1993 (a)	16 October 1993
Somalia	24 January 1990 (a)	24 April 1990
Spain	25 January 1985 (a)	25 April 1985
Suriname	28 December 1976 (a)	28 March 1977
Sweden	6 December 1971	23 March 1976
The former Yugoslav Republic of Macedonia	12 December 1994 (a)	12 March 1995
Togo	30 March 1988 (a)	30 June 1988
Trinidad and Tobago	14 November 1980 (a)	14 February 1981
Ukraine	25 July 1991 (a)	25 October 1991
Uruguay	1 April 1970	23 March 1976
Venezuela	10 May 1978	10 August 1978
Zaire	1 November 1976 (a)	1 February 1977
Zambia	10 April 1984 (a)	10 July 1984

State party	Date of receipt of the instrument of ratification or accession (a) or succession (d)	Date of entry into force
C. Status of the Second Optional Protocol aiming at the abolition of the death penalty (28)		
Australia	2 October 1990 (a)	11 July 1991
Austria	2 March 1993	2 June 1993
Denmark	24 February 1994	24 May 1994
Ecuador	23 February 1993 (a)	23 May 1993
Finland	4 April 1991	11 July 1991
Germany	18 August 1992	18 November 1992
Hungary	24 February 1994 (a)	24 May 1994
Iceland	2 April 1991	11 July 1991
Ireland	18 June 1993 (a)	18 September 1993
Italy	14 February 1995	14 May 1995
Luxembourg	12 February 1992	12 May 1992
Malta	29 December 1994	29 March 1995
Mozambique	21 July 1993 (a)	21 October 1993
Namibia	28 November 1994 (a)	28 February 1995
Netherlands	26 March 1991	11 July 1991
New Zealand	22 February 1990	11 July 1991
Norway	5 September 1991	5 December 1991
Panama	21 January 1993 (a)	21 April 1993
Portugal	17 October 1990	11 July 1991
Romania	27 February 1991	11 July 1991
Seychelles	15 December 1994 (a)	15 March 1995
Slovenia	10 March 1994	10 June 1994
Spain	11 April 1991	11 July 1991
Sweden	11 May 1990	11 July 1991
Switzerland	16 June 1994 (a)	16 September 1994
The former Yugoslav Republic of Macedonia	26 January 1995 (a)	26 April 1995
Uruguay	21 January 1993	21 April 1993
Venezuela	22 February 1993	22 May 1993

State party	Valid from	Valid until
D. States which have made the declaration under article 41 of the Covenant (44)		
Algeria	12 September 1989	Indefinitely
Argentina	8 August 1986	Indefinitely
Australia	28 January 1993	Indefinitely
Austria	10 September 1978	Indefinitely
Belarus	30 September 1992	Indefinitely
Belgium	5 March 1987	Indefinitely
Bosnia and Herzegovina	6 March 1992	Indefinitely
Bulgaria	12 May 1993	Indefinitely
Canada	29 October 1979	Indefinitely
Chile	11 March 1990	Indefinitely
Congo	7 July 1989	Indefinitely
Czech Republic	1 January 1993	Indefinitely
Denmark	23 March 1976	Indefinitely
Ecuador	24 August 1984	Indefinitely
Finland	19 August 1975	Indefinitely
Gambia	9 June 1988	Indefinitely
Germany	28 March 1979	27 March 1996
Guyana	10 May 1993	Indefinitely
Hungary	7 September 1988	Indefinitely
Iceland	22 August 1979	Indefinitely
Ireland	8 December 1989	Indefinitely
Italy	15 September 1978	Indefinitely
Luxembourg	18 August 1983	Indefinitely
Malta	13 September 1990	Indefinitely
Netherlands	11 December 1978	Indefinitely
New Zealand	28 December 1978	Indefinitely
Norway	23 March 1976	Indefinitely
Peru	9 April 1984	Indefinitely
Philippines	23 October 1986	Indefinitely
Poland	25 September 1990	Indefinitely
Republic of Korea	10 April 1990	Indefinitely
Russian Federation	1 October 1991	Indefinitely
Senegal	5 January 1981	Indefinitely
Slovakia	1 January 1993	Indefinitely
Slovenia	6 July 1992	Indefinitely
Spain	25 January 1985	25 January 1993
Sri Lanka	11 June 1980	Indefinitely
Sweden	23 March 1976	Indefinitely
Switzerland	18 September 1992	18 September 1997
Tunisia	24 June 1993	Indefinitely

State party	Valid from	Valid until
Ukraine	28 July 1992	Indefinitely
United Kingdom of Great Britain and Northern Ireland	20 May 1976	Indefinitely
United States of America	8 September 1992	Indefinitely
Zimbabwe	20 August 1991	Indefinitely

ANNEX II

Members and officers of the Human Rights Committee, 1995-1996

A. Membership

Mr. Francisco José AGUILAR URBINA*	Costa Rica
Mr. Nisuke ANDO**	Japan
Mr. Prafullachandra Natwarlal BAGHWATI**	India
Mr. Tamás BÁN*	Hungary
Mr. Marco Tulio BRUNI CELLI*	Venezuela
Mr. Thomas BUERGENTHAL**	United States of America
Mrs. Christine CHANET**	France
Mr. Omran EL SHAFEI**	Egypt
Mrs. Elizabeth EVATT*	Australia
Mr. Laurel FRANCIS*	Jamaica
Mrs. Rosalyn HIGGINS*	United Kingdom of Great Britain and Northern Ireland
Mr. Eckart KLEIN**	Germany
Mr. David KRETZMER**	Israel
Mr. Rajsoomer LALLAH*	Mauritius
Mr. Andreas V. MAVROMMATIS*	Cyprus
Ms. Cecilia MÉDINA QUIROGA**	Chile
Mr. Fausto POCAR*	Italy
Mr. Julio PRADO VALLEJO**	Ecuador

* Term expires on 31 December 1996.
** Term expires on 31 December 1998.

B. Officers

The officers of the Committee, elected for two-year terms at the 1387th and 1399th meetings, held on 20 and 28 March 1995, are as follows:

Chairman: Mr. Francisco José AGUILAR URBINA

Vice-Chairmen: Mr. Prafullachandra Natwarlal BAGHWATI
Mr. Tamás BÁN
Mr. Omran EL SHAFEI

Rapporteur: Mrs. Christine CHANET

ANNEX III

Submission of reports and additional information by States parties under article 40 of the Covenant during the period under review[a]

State party	Type of report	Date due	Date of submission	Date of written reminder(s) sent, during the period under review, to States whose reports have not yet been submitted
Afghanistan	Third	23 April 1994	Not yet received	-
Albania	Initial	3 January 1993	Not yet received	(4) 12 December 1994 (5) 29 June 1995
Angola	Initial[b]	9 April 1993	Not yet received	-
Armenia	Initial	22 September 1994	Not yet received	(1) 12 December 1994 (2) 29 June 1995
Australia	Third	12 November 1991	Not yet received	(6) 12 December 1994 (7) 29 June 1995
Austria	Third	9 April 1993	Not yet received	(3) 12 December 1994 (4) 29 June 1995
Barbados	Third	11 April 1991	Not yet received	(8) 12 December 1994 (9) 29 June 1995
Belarus	Fourth	4 November 1993	11 April 1995	-
Belgium	Third	20 July 1994	Not yet received	(1) 12 December 1994 (2) 29 June 1995
Benin	Initial	11 June 1993	Not yet received	(2) 29 June 1995
Bolivia	Second[c]	13 July 1990	Not yet received	(8) 29 June 1995
	Third	11 November 1994	Not yet received	(1) 29 June 1995
Bosnia and Herzegovina	Initial	5 March 1995	Not yet received	(1) 29 June 1995
Brazil	Initial	23 April 1993	17 November 1994	-
Bulgaria	Third[d]	31 December 1994	Not yet received	(1) 29 June 1995
Cambodia	Initial	25 August 1993	Not yet received	(2) 12 December 1994
Canada	Fourth	4 April 1995	Not yet received	(1) 29 June 1995
Cape Verde	Initial	5 November 1994	Not yet received	(1) 29 June 1995
Central African Republic	Second[e]	9 April 1989	Not yet received	(11) 12 December 1994 (12) 29 June 1995
	Third	7 August 1992	Not yet received	(5) 12 December 1994 (6) 29 June 1995
Chile	Fourth	28 April 1994	Not yet received	(1) 12 December 1994 (2) 29 June 1995
Congo	Second	4 January 1990	Not yet received	(10) 12 December 1994 (11) 29 June 1995
	Third	4 January 1995	Not yet received	(1) 29 June 1995

State party	Type of report	Date due	Date of submission	Date of written reminder(s) sent, during the period under review, to States whose reports have not yet been submitted
Côte d'Ivoire	Initial	25 June 1993	Not yet received	(3) 12 December 1994 (4) 29 June 1995
Croatia	Initial	7 October 1992	Not yet received	(3) 12 December 1994 (4) 29 June 1995
Cyprus	Third	18 August 1989	28 December 1994	-
Czech Republic	Initial	31 December 1993	Not yet received	(1) 29 June 1995
Democratic People's Republic of Korea	Second	13 December 1987	Not yet received	(14) 12 December 1994 (15) 29 June 1995
	Third	13 December 1992	Not yet received	(4) 12 December 1994 (5) 29 June 1995
Denmark	Third	1 November 1990	7 April 1995	-
Dominica	Initial	16 September 1994	Not yet received	(1) 12 December 1994 (2) 29 June 1995
Dominican Republic	Fourth	3 April 1994	Not yet received	(2) 12 December 1994 (3) 29 June 1995
Ecuador	Fourth	4 November 1993	Not yet received	(3) 12 December 1994 (4) 29 June 1995
Egypt	Third[f]	31 December 1994	Not yet received	(1) 29 June 1995
El Salvador	Third[g]	28 February 1991	-	-
Equatorial Guinea	Initial	24 December 1988	Not yet received	(12) 12 December 1994 (13) 29 June 1995
	Second	24 December 1993	Not yet received	(2) 12 December 1994 (3) 29 June 1995
Estonia	Initial	20 January 1993	27 September 1994	-
Ethiopia	Initial	10 September 1994	Not yet received	(1) 12 December 1994 (2) 29 June 1995
Finland	Fourth	18 August 1994	Not yet received	(1) 12 December 1994 (2) 29 June 1995
France	Third	3 February 1992	Not yet received	(6) 12 December 1994
Gabon	Initial	20 April 1984	Not yet received	(21) 12 December 1994 (22) 29 June 1995
	Second	20 April 1989	Not yet received	(11) 12 December 1994 (12) 29 June 1995
	Third	20 April 1994	Not yet received	(2) 12 December 1994 (3) 29 June 1995
Gambia	Second	21 June 1985	Not yet received	(20) 12 December 1994 (21) 29 June 1995
	Third	21 June 1990	Not yet received	(9) 12 December 1994 (10) 29 June 1995

State party	Type of report	Date due	Date of submission	Date of written reminder(s) sent, during the period under review, to States whose reports have not yet been submitted
Germany	Fourth	3 August 1993	Not yet received	(3) 12 December 1994 (4) 29 June 1995
Grenada	Initial	5 December 1992	Not yet received	(4) 12 December 1994 (5) 29 June 1995
Guatemala	Initial	4 August 1993	7 December 1994	-
Guinea	Third	31 December 1994	Not yet received	(1) 29 June 1995
Guyana	Second	10 April 1987	Not yet received	(16) 12 December 1994 (17) 29 June 1995
	Third	10 April 1992	Not yet received	(6) 12 December 1994 (7) 29 June 1995
Haiti	Initial[h]	5 May 1992	-	-
Iceland	Third	31 December 1994	23 March 1995	-
India	Third[i]	31 March 1992	Not yet received	(6) 12 December 1994 (7) 29 June 1995
Iran (Islamic Republic of)	Third[j]	31 December 1994	Not yet received	(1) 29 June 1995
Iraq	Fourth	4 April 1995	Not yet received	-
Israel	Initial	2 January 1993	Not yet received	(4) 12 December 1994 (5) 29 June 1995
Jamaica	Second	1 August 1986	Not yet received	(16) 12 December 1994 (15) 29 June 1995
	Third	1 August 1991	Not yet received	(7) 12 December 1994 (8) 29 June 1995
Kenya	Second	11 April 1986	Not yet received	(18) 12 December 1994 (19) 29 June 1995
	Third	11 April 1991	Not yet received	(8) 12 December 1994 (9) 29 June 1995
Latvia	Initial	13 April 1993	26 September 1994	-
Lebanon	Second	21 March 1986	Not yet received	(19) 12 December 1994 (20) 29 June 1995
	Third	21 March 1988	Not yet received	(14) 12 December 1994 (15) 29 June 1995
	Fourth	21 March 1993	Not yet received	(2) 12 December 1994 (3) 29 June 1995
Lesotho	Initial	8 December 1994	Not yet received	(1) 29 June 1995
Lithuania	Initial	19 February 1993	Not yet received	(4) 12 December 1994 (5) 29 June 1995
Libyan Arab Jamahiriya	Third[k]	4 February 1988	-	-

State party	Type of report	Date due	Date of submission	Date of written reminder(s) sent, during the period under review, to States whose reports have not yet been submitted
Luxembourg	Third	17 November 1994	Not yet received	(1) 29 June 1994
Madagascar	Third[l]	31 July 1992	Not yet received	(5) 12 December 1994 (6) 29 June 1995
	Fourth	3 August 1993	Not yet received	(3) 12 December 1994 (4) 29 June 1995
Malawi	Initial	21 March 1995	Not yet received	(1) 29 June 1995
Mali	Second	11 April 1986	Not yet received	(18) 12 December 1994 (19) 29 June 1995
	Third	11 April 1991	Not yet received	(8) 12 December 1994 (9) 29 June 1995
Mauritius	Third	18 July 1990	2 June 1995	-
	Fourth	4 November 1993	-	-
Mongolia	Fourth	4 April 1995	Not yet received	(1) 29 June 1995
Mozambique	Initial	20 October 1994	Not yet received	(1) 12 December 1994 (2) 29 June 1995
Netherlands	Third	31 October 1991	6 February 1995	-
Nicaragua	Third	11 June 1991	Not yet received	(7) 12 December 1994 (8) 29 June 1995
Niger	Second[m]	31 March 1994	Not yet received	(2) 12 December 1994 (3) 29 June 1995
Nigeria	Initial	28 October 1994	Not yet received	(1) 12 December 1994 (2) 29 June 1995
Panama	Third[n]	31 March 1992	Not yet received	(6) 12 December 1994 (7) 29 June 1995
	Fourth	6 June 1993	Not yet received	(3) 12 December 1994 (4) 29 June 1995
Peru	Third	9 April 1993	24 October 1994	-
Philippines	Second	22 January 1993	Not yet received	(4) 12 December 1994 (5) 29 June 1995
Poland	Fourth	27 October 1994	Not yet received	(1) 12 December 1994 (2) 29 June 1995
Portugal	Third	1 August 1991	Not yet received	(7) 12 December 1994
Republic of Moldova	Initial	25 April 1994	Not yet received	(1) 12 December 1994 (2) 29 June 1995
Romania	Fourth	31 December 1994	Not yet received	(1) 29 June 1995
Russian Federation	Fourth	4 November 1993	27 September 1994	-
Rwanda[b]	Third	10 April 1992	Not yet received	-

State party	Type of report	Date due	Date of submission	Date of written reminder(s) sent, during the period under review, to States whose reports have not yet been submitted
Saint Vincent and the Grenadines	Second[o]	31 October 1991	Not yet received	(7) 12 December 1994 (8) 29 June 1995
	Third	8 February 1993	Not yet received	(4) 12 December 1994 (5) 29 June 1995
San Marino	Second	17 January 1992	Not yet received	(6) 12 December 1994 (7) 29 June 1995
Senegal	Fourth	4 April 1995	Not yet received	(1) 29 June 1995
Seychelles	Initial	4 August 1993	Not yet received	(3) 12 December 1994 (4) 29 June 1995
Slovakia	Initial	31 December 1993	Not yet received	(1) 29 June 1995
Slovenia	Initial	24 June 1992	1 October 1993	-
Somalia	Initial	23 April 1991	Not yet received	(7) 12 December 1994 (8) 29 June 1995
Sudan	Second	17 June 1992	Not yet received	(4) 12 December 1994 (5) 29 June 1995
Suriname	Second	2 August 1985	Not yet received	(19) 12 December 1994 (20) 29 June 1995
	Third	2 August 1990	Not yet received	(9) 12 December 1994 (10) 29 June 1995
Sweden	Fourth	5 December 1994	27 October 1994	-
Switzerland	Initial	17 September 1993	24 February 1995	-
Syrian Arab Republic	Second	18 August 1984	Not yet received	(22) 12 December 1994 (23) 29 June 1995
	Third	18 August 1989	Not yet received	(11) 12 December 1994 (12) 29 June 1995
	Fourth	18 August 1994	Not yet received	(1) 12 December 1994 (2) 29 June 1995
The former Yugoslav Republic of Macedonia	Initial	6 September 1992	Not yet received	(1) 29 June 1995
Trinidad and Tobago	Third	20 March 1990	Not yet received	(10) 12 December 1994 (11) 29 June 1995
	Fourth	20 March 1995	Not yet received	(1) 29 June 1995
United Kingdom of Great Britain and Northern Ireland	Fourth	19 May 1994	14 October 1994	-
United Republic of Tanzania	Third[p]	31 December 1993	Not yet received	(2) 12 December 1994 (3) 29 June 1995
Uruguay	Fourth	31 December 1994	Not yet received	(1) 29 June 1995

State party	Type of report	Date due	Date of submission	Date of written reminder(s) sent, during the period under review, to States whose reports have not yet been submitted
Venezuela	Third[q]	31 December 1993	Not yet received	(2) 12 December 1994 (3) 29 June 1995
Viet Nam	Second[r]	31 July 1991	Not yet received	(7) 12 December 1994 (8) 29 June 1995
	Third	23 December 1993	Not yet received	(2) 12 December 1994 (3) 29 June 1995
Yugoslavia	Fourth	3 August 1993	Not yet received	(3) 12 December 1994 (4) 29 June 1995
Zaire	Third[s]	31 July 1991	Not yet received	(7) 12 December 1994 (8) 29 June 1995
Zambia	Second	9 July 1990	27 January 1995	-
Zimbabwe	Initial	12 August 1992	Not yet received	(5) 12 December 1994 (6) 29 June 1995

Notes

[a] From 1 August 1994 to 29 July 1995 (end of the fifty-fourth session).

[b] Notes verbales were sent to Angola and Rwanda on 12 December 1994 and 23 June 1995, as reminders to send the initial report pursuant to a special decision taken by the Committee.

[c] At its thirty-sixth session (914th meeting), the Committee decided to extend the deadline for the submission of the second periodic report of Bolivia from 11 November 1988 to 13 July 1990.

[d] At its forty-eighth session (1258th meeting), the Committee decided to extend the deadline for the submission of the third periodic report of Bulgaria from 28 April 1989 to 31 December 1994.

[e] At its thirty-second session (794th meeting), the Committee decided to extend the deadline for the submission of the second periodic report of the Central African Republic from 7 August 1987 to 9 April 1989.

[f] At its forty-eighth session (1258th meeting), the Committee decided to extend the deadline for the submission of the third periodic report of Egypt from 13 April 1993 to 31 December 1994.

[g] Pursuant to a decision taken by the Committee at its fiftieth session (1319th meeting), the new date for the submission of the third periodic report of El Salvador is 31 December 1995.

[h] Pursuant to a decision taken by the Committee at its fifty-third session (1415th meeting), the new date for the submission of the initial report of Haiti is 31 December 1996.

[i] At its forty-first session (1062nd meeting), the Committee decided to extend the deadline for the submission of the third periodic report of India

from 9 July 1990 to 31 March 1992.

[j] At its forty-eighth session (1258th meeting), the Committee decided to extend the deadline for the submission of the third periodic report of the Islamic Republic of Iran from 21 March 1988 to 31 December 1994.

[k] Pursuant to a decision taken by the Committee at its fifty-second session (1386th meeting), the new date for the submission of the third periodic report of the Libyan Arab Jamahiriya is 31 December 1995.

[l] At its forty-third session (1112th meeting), the Committee decided to extend the deadline for the submission of the third periodic report of Madagascar from 3 August 1988 to 31 July 1992.

[m] At its forty-seventh session (1215th meeting), the Committee decided to extend the deadline for the submission of the second periodic report of Niger from 6 June 1992 to 31 March 1994.

[n] At its forty-first session (1062nd meeting), the Committee decided to extend the deadline for the submission of the third periodic report of Panama from 6 June 1988 to 31 March 1992.

[o] At its thirty-eighth session (973rd meeting), the Committee decided to extend the deadline for the submission of the second periodic report of Saint Vincent and the Grenadines from 8 February 1988 to 31 October 1991.

[p] At its forty-sixth session (1205th meeting), the Committee decided to extend the deadline for the submission of the third periodic report of the United Republic of Tanzania from 11 April 1991 to 31 December 1993.

[q] At its forty-sixth session (1205th meeting), the Committee decided to extend the deadline for the submission of the third periodic report of Venezuela from 1 November 1991 to 31 December 1993.

[r] At its thirty-ninth session (1003rd meeting), the Committee decided to extend the deadline for the submission of the second periodic report of Viet Nam from 23 December 1988 to 31 July 1991.

[s] At its thirty-ninth session (1003rd meeting), the Committee decided to extend the deadline for the submission of the third periodic report of Zaire from 30 January 1988 to 31 July 1991.

ANNEX IV

Status of reports considered during the period under review and of reports still pending before the Committee

State party	Date due	Date of submission	Meetings at which considered
		A. Initial reports	
Brazil	23 April 1993	17 November 1994	Not yet considered
Estonia	20 January 1993	27 September 1994	Not yet considered
Guatemala	4 August 1993	7 December 1994	Not yet considered
Latvia	13 April 1993	26 September 1994	1421st, 1422nd and 1425th (fifty-fourth session)
Nepal	13 August 1992	30 March 1994	1359th and 1363rd (fifty-second session)
Paraguay	9 September 1993	1 February 1994	1392nd and 1396th (fifty-third session)
Switzerland	17 September 1993	24 February 1995	Not yet considered
United States of America	7 September 1993	29 July 1994	1401st, 1402nd, 1405th and 1406th (fifty-third session)
		B. Second periodic reports	
Afghanistan	23 April 1989	23 March 1992	Not yet considered
Argentina	7 November 1992	7 January 1994	1389th-1391st (fifty-third session)
Libyan Arab Jamahiriya	4 February 1983	4 February 1993	1376th-1377th[a] (fifty-second session)
Yemen	8 May 1993	10 May 1993	1403rd and 1404th (fifty-third session)
Zambia	9 July 1990	27 January 1995	Not yet considered
		C. Third periodic reports	
Cyprus	18 August 1989	28 December 1994	Not yet considered
Denmark	1 November 1990	7 April 1995	Not yet considered
Iceland	30 October 1992	23 March 1995	Not yet considered

State party	Date due	Date of submission	Meetings at which considered
Mauritius	18 July 1990	2 June 1995	Not yet considered
Morocco	31 December 1992	20 July 1993	1364th-1366th (fifty-second session)
Netherlands	31 October 1991	6 February 1995	Not yet considered
New Zealand	27 March 1990	1 April 1994	1393rd-1395th (fifty-third session)
Peru	9 April 1993	24 October 1994	Not yet considered
Sri Lanka	10 September 1991	18 July 1994	1436th-1438th (fifty-fourth session)
D. Fourth periodic reports			
Belarus	4 November 1993	11 April 1995	Not yet considered
Russian Federation	4 November 1994	27 September 1994	1426th-1429th (fifty-fourth session)
Spain	28 April 1994	2 June 1994	Not yet considered
Sweden	5 December 1994	27 October 1994	Not yet considered
Tunisia	4 February 1993	23 March 1993	1360th-1363rd (fifty-second session)
Ukraine	18 August 1994	13 July 1994	1418th-1420th (fifty-fourth session)
United Kingdom of Great Britain and Northern Ireland	19 May 1994	14 October 1994	1432nd-1434th (fifty-fourth session)
E. Reports submitted pursuant to a special decision taken by the Committee			
Burundi[b]	-	12 July 1994	1349th and 1350th (fifty-second session)
Haiti[c]	-	28 February 1995	Not yet considered
F. Additional information submitted subsequent to the examination of initial reports by the Committee[d]			
Gambia	-	5 June 1984	Not yet considered
Kenya	-	4 May 1982	Not yet considered

Notes

[a] The Committee concluded the consideration of the report of the Libyan Arab Jamahiriya, which was initiated at the forty-ninth session of the Committee, at its fifty-second session, held at the United Nations Office at Geneva from 17 October to 4 November 1994.

[b] Special decision adopted by the Committee on 27 October 1994 (fifty-second session).

[c] Special decision adopted by the Committee on 27 October 1994 (fifty-second session).

[d] At its twenty-fifth session (601st meeting), the Committee decided to consider additional information submitted subsequent to the examination of initial reports together with the State party's second periodic report.

ANNEX V

General comments adopted under article 40, paragraph 4, of the International Covenant on Civil and Political Rights[a]

General comment No. 24 (52)[b] and [c]

General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant

1. As of 1 November 1994, 46 of the 127 States parties to the International Covenant on Civil and Political Rights had between them, entered 150 reservations of varying significance to their acceptance of the obligations of the Covenant. Some of these reservations exclude the duty to provide and guarantee particular rights in the Covenant. Others are couched in more general terms, often directed to ensuring the continued paramountcy of certain domestic legal provisions. Still others are directed at the competence of the Committee. The number of reservations, their content and their scope may undermine the effective implementation of the Covenant and tend to weaken respect for the obligations of States parties. It is important for States parties to know exactly what obligations they, and other States parties, have in fact undertaken. And the Committee, in the performance of its duties under either article 40 of the Covenant or under the Optional Protocols, must know whether a State is bound by a particular obligation or to what extent. This will require a determination as to whether a unilateral statement is a reservation or an interpretative declaration and a determination of its acceptability and effects.

2. For these reasons the Committee has deemed it useful to address in a general comment the issues of international law and human rights policy that arise. The general comment identifies the principles of international law that apply to the making of reservations and by reference to which their acceptability is to be tested and their purport to be interpreted. It addresses the role of States parties in relation to the reservations of others. It further addresses the role of the Committee itself in relation to reservations. And it makes certain recommendations to present States parties for a reviewing of reservations and to those States that are not yet parties about legal and human rights policy considerations to be borne in mind should they consider ratifying or acceding with particular reservations.

3. It is not always easy to distinguish a reservation from a declaration as to a State's understanding of the interpretation of a provision, or from a statement of policy. Regard will be had to the intention of the State, rather than the form of the instrument. If a statement irrespective of its name or title, purports to exclude or modify the legal effect of a treaty in its application to the State, it constitutes a reservation.[d] Conversely, if a so-called reservation merely offers a State's understanding of a provision but does not exclude or modify that provision in its application to that State, it is, in reality, not a reservation.

4. The possibility of entering reservations may encourage States which consider that they have difficulties in guaranteeing all the rights in the Covenant nonetheless to accept the generality of obligations in that instrument. Reservations may serve a useful function to enable States to adapt specific elements in their laws to the inherent rights of each person as articulated in

the Covenant. However, it is desirable in principle that States accept the full range of obligations, because the human rights norms are the legal expression of the essential rights that every person is entitled to as a human being.

5. The Covenant neither prohibits reservations nor mentions any type of permitted reservation. The same is true of the first Optional Protocol. The Second Optional Protocol provides, in article 2, paragraph 1, that "No reservation is admissible to the present Protocol, except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime". Paragraphs 2 and 3 provide for certain procedural obligations.

6. The absence of a prohibition on reservations does not mean that any reservation is permitted. The matter of reservations under the Covenant and the first Optional Protocol is governed by international law. Article 19 (3) of the Vienna Convention on the Law of Treaties provides relevant guidance.[e] It stipulates that where a reservation is not prohibited by the treaty or falls within the specified permitted categories, a State may make a reservation provided it is not incompatible with the object and purpose of the treaty. Even though, unlike some other human rights treaties, the Covenant does not incorporate a specific reference to the object and purpose test, that test governs the matter of interpretation and acceptability of reservations.

7. In an instrument which articulates very many civil and political rights, each of the many articles, and indeed their interplay, secures the objectives of the Covenant. The object and purpose of the Covenant is to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify; and to provide an efficacious supervisory machinery for the obligations undertaken.

8. Reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant. Although treaties that are mere exchanges of obligations between States allow them to reserve inter se application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction. Accordingly, provisions in the Covenant that represent customary international law (and a fortiori when they have the character of peremptory norms) may not be the subject of reservations. Accordingly, a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language. And while reservations to particular clauses of article 14 may be acceptable, a general reservation to the right to a fair trial would not be.

9. Applying more generally the object and purpose test to the Covenant, the Committee notes that, for example, reservation to article 1 denying peoples the right to determine their own political status and to pursue their economic, social and cultural development, would be incompatible with the object and purpose of the Covenant. Equally, a reservation to the obligation to respect and ensure the rights recognized in the Covenant, and to do so on a

non-discriminatory basis (art. 2 (1)) would not be acceptable. Nor may a State reserve an entitlement not to take the necessary steps at the domestic level to give effect to the rights of the Covenant (art. 2 (2)).

10. The Committee has further examined whether categories of reservations may offend the "object and purpose" test. In particular, it falls for consideration as to whether reservations to the non-derogable provisions of the Covenant are compatible with its object and purpose. While there is no hierarchy of importance of rights under the Covenant, the operation of certain rights may not be suspended, even in times of national emergency. This underlines the great importance of non-derogable rights. But not all rights of profound importance, such as articles 9 and 27 of the Covenant, have in fact been made non-derogable. One reason for certain rights being made non-derogable is because their suspension is irrelevant to the legitimate control of the state of national emergency (for example, no imprisonment for debt, in art. 11). Another reason is that derogation may indeed be impossible (as, for example, freedom of conscience). At the same time, some provisions are non-derogable exactly because without them there would be no rule of law. A reservation to the provisions of article 4 itself, which precisely stipulates the balance to be struck between the interests of the State and the rights of the individual in times of emergency, would fall in this category. And some non-derogable rights, which in any event cannot be reserved because of their status as peremptory norms, are also of this character - the prohibition of torture and arbitrary deprivation of life are examples.[f] While there is no automatic correlation between reservations to non-derogable provisions and reservations which offend against the object and purpose of the Covenant, a State has a heavy onus to justify such a reservation.

11. The Covenant does not merely establish specific rights; it accompanies them with important supportive guarantees. These guarantees provide the necessary framework for securing the rights in the Covenant and are thus essential to its object and purpose. Some operate at the national level and some at the international level. Reservations designed to remove these guarantees are thus not acceptable. Thus, a State could not make a reservation to article 2, paragraph 3, of the Covenant, indicating that it intends to provide no remedies for human rights violations. Guarantees such as these are an integral part of the structure of the Covenant and underpin its efficacy. The Covenant also envisages, for the better attainment of its stated objectives, a monitoring role for the Committee. Reservations that purport to evade that essential element in the design of the Covenant, which is also directed to securing the enjoyment of the rights, are also incompatible with its object and purpose. A State may not reserve the right not to present a report and have it considered by the Committee. The Committee’s role under the Covenant, whether under article 40 or under the Optional Protocols, necessarily entails interpreting the provisions of the Covenant and the development of a jurisprudence. Accordingly, a reservation that rejects the Committee’s competence to interpret the requirements of any provisions of the Covenant would also be contrary to the object and purpose of that treaty.

12. The intention of the Covenant is that the rights contained therein should be ensured to all those under a State party’s jurisdiction. To this end certain attendant requirements are likely to be necessary. Domestic laws may need to be altered properly to reflect the requirements of the Covenant; and mechanisms at the domestic level will be needed to allow the Covenant rights to be enforceable at the local level. Reservations often reveal a tendency of States not to want to change a particular law. And sometimes that tendency is elevated to a general policy. Of particular concern are widely formulated reservations which

essentially render ineffective all Covenant rights which would require any change in national law. No real international rights or obligations have thus been accepted. And when there is an absence of provisions to ensure that Covenant rights may be sued on in domestic courts, and, further, a failure to allow individual complaints to be brought to the Committee under the first Optional Protocol, all the essential elements of the Covenant guarantees have been removed.

13. The issue arises as to whether reservations are permissible under the first Optional Protocol and, if so, whether any such reservation might be contrary to the object and purpose of the Covenant or of the first Optional Protocol itself. It is clear that the first Optional Protocol is itself an international treaty, distinct from the Covenant but closely related to it. Its object and purpose is to recognize the competence of the Committee to receive and consider communications from individuals who claim to be victims of a violation by a State party of any of the rights in the Covenant. States accept the substantive rights of individuals by reference to the Covenant, and not the first Optional Protocol. The function of the first Optional Protocol is to allow claims in respect of those rights to be tested before the Committee. Accordingly, a reservation to an obligation of a State to respect and ensure a right contained in the Covenant, made under the first Optional Protocol when it has not previously been made in respect of the same rights under the Covenant, does not affect the State's duty to comply with its substantive obligation. A reservation cannot be made to the Covenant through the vehicle of the Optional Protocol but such a reservation would operate to ensure that the State's compliance with that obligation may not be tested by the Committee under the first Optional Protocol. And because the object and purpose of the first Optional Protocol is to allow the rights obligatory for a State under the Covenant to be tested before the Committee, a reservation that seeks to preclude this would be contrary to the object and purpose of the first Optional Protocol, even it not of the Covenant. A reservation to a substantive obligation made for the first time under the first Optional Protocol would seem to reflect an intention by the State concerned to prevent the Committee from expressing its views relating to a particular article of the Covenant in an individual case.

14. The Committee considers that reservations relating to the required procedures under the first Optional Protocol would not be compatible with its object and purpose. The Committee must control its own procedures as specified by the Optional Protocol and its rules of procedure. Reservations have, however, purported to limit the competence of the Committee to acts and events occurring after entry into force for the State concerned of the first Optional Protocol. In the view of the Committee this is not a reservation but, most usually, a statement consistent with its normal competence ratione temporis. At the same time, the Committee has insisted upon its competence, even in the face of such statements or observations, when events or acts occurring before the date of entry into force of the first Optional Protocol have continued to have an effect on the rights of a victim subsequent to that date. Reservations have been entered which effectively add an additional ground of inadmissibility under article 5, paragraph 2, by precluding examination of a communication when the same matter has already been examined by another comparable procedure. Insofar as the most basic obligation has been to secure independent third party review of the human rights of individuals, the Committee has, where the legal right and the subject matter are identical under the Covenant and under another international instrument, viewed such a reservation as not violating the object and purpose of the first Optional Protocol.

15. The primary purpose of the Second Optional Protocol is to extend the scope

of the substantive obligations undertaken under the Covenant, as they relate to the right to life, by prohibiting execution and abolishing the death penalty.[g] It has its own provision concerning reservations, which is determinative of what is permitted. Article 2, paragraph 1, provides that only one category of reservation is permitted, namely one that reserves the right to apply the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime. Two procedural obligations are incumbent upon States parties wishing to avail themselves of such a reservation. Article 2, paragraph 1, obliges such a State to communicate to the Secretary-General, at the time of ratification or accession, the relevant provisions of its national legislation applicable during wartime. This is clearly directed towards the objectives of specificity and transparency and in the view of the Committee a purported reservation unaccompanied by such information is without legal effect. Article 2, paragraph 3, requires a State making such a reservation to notify the Secretary-General of any beginning or ending of a state of war applicable to its territory. In the view of the Committee, no State may seek to avail itself of its reservation (that is, have execution in time of war regarded as lawful) unless it has complied with the procedural requirement of article 2, paragraph 3.

16. The Committee finds it important to address which body has the legal authority to make determinations as to whether specific reservations are compatible with the object and purpose of the Covenant. As for international treaties in general, the International Court of Justice has indicated in the Reservations to the Genocide Convention Case (1951) that a State which objected to a reservation on the grounds of incompatibility with the object and purpose of a treaty could, through objecting, regard the treaty as not in effect as between itself and the reserving State. Article 20, paragraph 4, of the Vienna Convention on the Law of Treaties 1969 contains provisions most relevant to the present case on acceptance of and objection to reservations. This provides for the possibility of a State to object to a reservation made by another State. Article 21 deals with the legal effects of objections by States to reservations made by other States. Essentially, a reservation precludes the operation, as between the reserving and other States, of the provision reserved; and an objection thereto leads to the reservation being in operation as between the reserving and objecting State only to the extent that it has not been objected to.

17. As indicated above, it is the Vienna Convention on the Law of Treaties that provides the definition of reservations and also the application of the object and purpose test in the absence of other specific provisions. But the Committee believes that its provisions on the role of State objections in relation to reservations are inappropriate to address the problem of reservations to human rights treaties. Such treaties, and the Covenant specifically, are not a web of inter-State exchanges of mutual obligations. They concern the endowment of individuals with rights. The principle of inter-State reciprocity has no place, save perhaps in the limited context of reservations to declarations on the Committee's competence under article 41. And because the operation of the classic rules on reservations is so inadequate for the Covenant, States have often not seen any legal interest in or need to object to reservations. The absence of protest by States cannot imply that a reservation is either compatible or incompatible with the object and purpose of the Covenant. Objections have been occasional, made by some States but not others, and on grounds not always specified; when an objection is made, it often does not specify a legal consequence, or sometimes even indicates that the objecting party nonetheless does not regard the Covenant as not in effect as between the parties concerned. In short, the pattern is so unclear that it is not safe to

assume that a non-objecting State thinks that a particular reservation is acceptable. In the view of the Committee, because of the special characteristics of the Covenant as a human rights treaty, it is open to question what effect objections have between States inter se. However, an objection to a reservation made by States may provide some guidance to the Committee in its interpretation as to its compatibility with the object and purpose of the Covenant.

18. It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant. This is in part because, as indicated above, it is an inappropriate task for States parties in relation to human rights treaties, and in part because it is a task that the Committee cannot avoid in the performance of its functions. In order to know the scope of its duty to examine a State's compliance under article 40 or a communication under the first Optional Protocol, the Committee has necessarily to take a view on the compatibility of a reservation with the object and purpose of the Covenant and with general international law. Because of the special character of a human rights treaty, the compatibility of a reservation with the object and purpose of the Covenant must be established objectively, by reference to legal principles, and the Committee is particularly well placed to perform this task. The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation.

19. Reservations must be specific and transparent, so that the Committee, those living in the territory of the reserving State and other States parties may be clear as to what obligations of human rights compliance have or have not been undertaken. Reservations may thus not be general, but must refer to a particular provision of the Covenant and indicate in precise terms its scope in relation thereto. When considering the compatibility of possible reservations with the object and purpose of the Covenant, States should also take into consideration the overall effect of a group of reservations, as well as the effect of each reservation on the integrity of the Covenant, which remains an essential consideration. States should not enter so many reservations that they are in effect accepting a limited number of human rights obligations, and not the Covenant as such. So that reservations do not lead to a perpetual non-attainment of international human rights standards, reservations should not systematically reduce the obligations undertaken only to those presently existing in less demanding standards of domestic law. Nor should interpretative declarations or reservations seek to remove an autonomous meaning to Covenant obligations, by pronouncing them to be identical, or to be accepted only insofar as they are identical, with existing provisions of domestic law. States should not seek through reservations or interpretative declarations to determine that the meaning of a provision of the Covenant is the same as that given by an organ of any other international treaty body.

20. States should institute procedures to ensure that each and every proposed reservation is compatible with the object and purpose of the Covenant. It is desirable for a State entering a reservation to indicate in precise terms the domestic legislation or practices which it believes to be incompatible with the Covenant obligation reserved; and to explain the time period it requires to render its own laws and practices compatible with the Covenant, or why it is unable to render its own laws and practices compatible with the Covenant. States should also ensure that the necessity for maintaining reservations is periodically reviewed, taking into account any observations and recommendations made by the Committee during examination of their reports. Reservations should

be withdrawn at the earliest possible moment. Reports to the Committee should contain information on what action has been taken to review, reconsider or withdraw reservations.

Notes

[a] For the nature and purpose of the general comments, see Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 40 (A/36/40), annex VII, introduction. For a description of the history of the method of work, the elaboration of general comments and their use, see ibid., Thirty-ninth Session, Supplement No. 40 and corrigenda (A/39/40 and Corr.1 and 2), paras. 541-557. For the text of the general comments already adopted by the Committee, see ibid., Thirty-sixth Session, Supplement No. 40 (A/36/40), annex VII; ibid., Thirty-seventh Session, Supplement No. 40 (A/37/40), annex V; ibid., Thirty-eighth Session, Supplement No. 40 (A/38/40), annex VI; ibid., Thirty-ninth Session, Supplement No. 40 (A/39/40 and Corr.1 and 2), annex VI; ibid., Fortieth Session, Supplement No. 40 (A/40/40), annex VI; ibid., Forty-first Session, Supplement No. 40 (A/41/40), annex VI; ibid., Forty-third Session, Supplement No. 40 (A/43/40), annex VI; ibid., Forty-fourth Session, Supplement No. 40 (A/44/40), annex VI; ibid., Forty-fifth Session, Supplement No. 40 (A/45/40), annex VI; ibid., Forty-seventh Session, Supplement No. 40 (A/47/40), annex VI; ibid., Forty-eighth Session, Supplement No. 40 (A/48/40), vol. I, annex VI; and ibid., Fiftieth Session, Supplement No. 40 (A/50/40), vol. I, annex V. Also issued in documents HRI/GEN/1/Rev.1 and CCPR/C/21/Rev.1/Add.5.

[b] Adopted by the Committee at its 1382nd meeting (fifty-second session), on 2 November 1994.

[c] The number in parentheses indicates the session at which the general comment was adopted.

[d] Article 2 (1) (d), Vienna Convention on the Law of Treaties, 1969.

[e] Although the Vienna Convention on the Law of Treaties was concluded in 1969 and entered into force in 1980 - i.e., after the entry into force of the Covenant - its terms reflect the general international law on this matter as had already been affirmed by the International Court of Justice in The Reservations to the Genocide Convention Case of 1951.

[f] Reservations have been entered to both article 6 and article 7, but not in terms which reserve a right to torture or to engage in arbitrary deprivation of life.

[g] The competence of the Committee in respect of this extended obligation is provided for under article 5 - which itself is subject to a form of reservation in that the automatic granting of this competence may be reserved through the mechanism of a statement made to the contrary at the moment of ratification or accession.

ANNEX VI

Observations of States parties under article 40, paragraph 5, of the Covenant*

Observations on General Comment No. 24 (52), on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant

A. United States of America[a]

There can be no serious question about the propriety of the Committee's concern about the possible effect of excessively broad reservations on the general protection and promotion of the rights reflected in the Covenant, nor any reasonable doubt regarding the general desirability of reservations that are specific, transparent and subject to review with an eye to withdrawal where appropriate. General Comment 24, however, appears to go much too far. The United States would therefore like to set forth in summary fashion a number of observations concerning the General Comment as follows.

1. Role of the Committee

The last sentence of paragraph 11 states that "a reservation that rejects the Committee's competence to interpret the requirements of any provisions of the Covenant would also be contrary to the object and purpose of that treaty".

This statement can be read to present the rather surprising assertion that it is contrary to the object and purpose of the Covenant not to accept the Committee's views on the interpretation of the Covenant. This would be a rather significant departure from the Covenant scheme, which does not impose on States Parties an obligation to give effect to the Committee's interpretations or confer on the Committee the power to render definitive or binding interpretations of the Covenant. The drafters of the Covenant could have given the Committee this role but deliberately chose not to do so.

In this respect, it is unnecessary for a State to reserve as to the Committee's power or interpretive competence since the Committee lacks the authority to render binding interpretations or judgements. The quoted sentence can, however, be read more naturally and narrowly in the context of the paragraph as a whole, to assert simply that a reservation may not be taken to the reporting requirement. This narrower view would be consistent with the clear intention of the Convention.

In this regard, the analysis in paragraphs 16-20, regarding which body has the legal authority to make determinations concerning the permissibility of specific reservations, is of considerable concern. Here the Committee appears to reject the established rules of interpretation of treaties as set forth in the Vienna Convention on the Law of Treaties and in customary international law. The General Comment states, for example, that the established provisions of the Vienna Convention are "inappropriate to address the problem of reservations to human rights treaties ... [as to which] [t]he principle of inter-State reciprocity has no place, save perhaps in the limited context of reservations to

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* The present annex is being published as received, without formal editing.

declarations on the Committee's competence under article 41".

Moreover, the Committee appears to dispense with the established procedures for determining the permissibility of reservations and to divest States Parties of any role in determining the meaning of the Covenant, which they drafted and joined, and of the extent of their treaty obligations. In its view, objections from other States Parties may not "specify a legal consequence" and States with genuine objections may not always voice them, so that "it is not safe to assume that a non-objecting State thinks that a particular reservation is acceptable". Consequently, because "the operation of the classic rules on reservations is so inadequate for the Covenant, ... [i]t necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant".

The Committee's position, while interesting, runs contrary to the Covenant scheme and international law.

2. Acceptability of reservations: governing legal principles

The question of the status of the Committee's views is of some significance in light of the apparent lines of analysis concerning the permissibility of reservations in paragraphs 8-9. Those paragraphs reflect the view that reservations offending peremptory norms of international law would not be compatible with the object and purpose of the Covenant, nor may reservations be taken to Covenant provisions which represent customary international law.

It is clear that a State cannot exempt itself from a peremptory norm of international law by making a reservation to the Covenant. It is not at all clear that a State cannot choose to exclude one means of enforcement of particular norms by reserving against inclusion of those norms in its Covenant obligations.

The proposition that any reservation which contravenes a norm of customary international law is per se incompatible with the object and purpose of this or any other convention, however, is a much more significant and sweeping premise. It is, moreover, wholly unsupported by and is in fact contrary to international law. As recognized in the paragraph 10 analysis of non-derogable rights, an "object and purpose" analysis by its nature requires consideration of the particular treaty, right and reservation in question.

With respect to the actual object and purpose of this Covenant, there appears to be a misunderstanding. The object and purpose was to protect human rights, with an understanding that there need not be immediate, universal implementation of all terms of the treaty. Paragraph 7 (which forms the basis for the analysis in para. 8 and subsequently) states that "each of the many articles, and indeed their interplay, secures the objectives of the Covenant". The implied corollary is, of course, that any reservation to any substantive provision necessarily contravenes the Covenant's object and purpose.

Such a position would, of course, wholly mistake the question of the object and purpose of the Covenant insofar as it bears on the permissibility of reservations. In fact, a primary object and purpose of the Covenant was to secure the widest possible adherence, with the clear understanding that a relatively liberal regime on the permissibility of reservations should therefore be required.

3. Specific reservations

The precise specification of what is contrary to customary international law, moreover, is a much more substantial question than indicated by the Comment. Even where a rule is generally established in customary international law, the exact contours and meaning of the customary law principle may need to be considered.

Paragraph 8, however, asserts in a wholly conclusory fashion that a number of propositions are customary international law which, to speak plainly, are not. It cannot be established on the basis of practice or other authority, for example, that the mere expression (albeit deplorable) of national, racial or religious hatred (unaccompanied by any overt action or preparation) is prohibited by customary international law. The Committee seems to be suggesting here that the reservations which a large number of States Parties have submitted to article 20 are per se invalid. Similarly, while many are opposed to the death penalty in general and the juvenile death penalty in particular, the practice of States demonstrates that there is currently no blanket prohibition in customary international law. Such a cavalier approach to international law by itself would raise serious concerns about the methodology of the Committee as well as its authority.

Another point worthy of clarification is whether the Committee really intends that, in the many areas which it mentions in paragraphs 8-11, any reservation whatsoever is impermissible, or only those which wholly vitiate the right in question. At the end of paragraph 8, for example, it is suggested that while reservations to particular clauses of article 14 may be acceptable, a general reservation could not be taken to the article as a whole. Presumably, the same must also be true for many of the other subjects mentioned. For example, even where there is a reservation to article 20, one would not expect such a reservation to apply to advocacy of racial hatred which constitutes incitement to murder or other crime.

4. Domestic implementation

The discussion in paragraph 12, as it stands, is very likely to give rise to misunderstandings in at least two respects. The Committee here states, with regard to implementing the Covenant in domestic law, that such laws "may need to be altered properly to reflect the requirements of the Covenant; and mechanisms at the domestic level will be needed to allow the Covenant rights to be enforceable at the local level". (Emphasis added.)

First, this statement may be cited as an assertion that States Parties must allow suits in domestic courts based directly on the provisions of the Covenant. Some countries do in fact have such a scheme of "self-executing" treaties. In other countries, however, existing domestic law already provides the substantive rights reflected in the Covenant as well as multiple possibilities for suit to enforce those rights. Where these existing rights and mechanisms are in fact adequate to the purposes of the Covenant, it seems most unlikely that the Committee intends to insist that the Covenant be directly actionable in court or that States must adopt legislation to implement the Covenant.

As a general matter, deciding on the most appropriate means of domestic implementation of treaty obligations is, as indicated in article 40, left to the internal law and processes of each State Party.

Rather, the Committee may properly be concerned about the case in which a State has joined the Covenant but lacks any means under its domestic law by which Covenant rights may be enforced. The State could even have similar constitutional guarantees which are simply ignored or non-enforceable. Such an approach would not, of course, be consistent with the fundamental principle of pacta sunt servanda.

Second, paragraph 12 states that "[r]eservations often reveal a tendency of States not to want to change a particular law". Some may view this statement as sweepingly critical of any reservation whatsoever which is made to conform to existing law. Of course, since this is the motive for a large majority of the reservations made by States in all cases, it is difficult to say that this is inappropriate in principle. Indeed, one might say that the more seriously a State Party takes into account the necessity of providing strictly for domestic implementation of its international obligations, the more likely it is that some reservations may be taken along these lines.

It appears that the Comment is not intended to make such a criticism, but rather is aimed at the particular category of "widely formulated reservations" which preserve complete freedom of action and render uncertain a State Party's obligations as a whole, e.g., that the Covenant is generally subordinated to the full unspecified range of national law. This, of course, would be neither appropriate nor lawful. The same is not true, however, when by means of a discrete reservation, a State Party declines for sufficient reasons to accept a particular provision of the Covenant in preference for existing domestic law.

5. Effect of invalidity of reservations

It seems unlikely that one can misunderstand the concluding point of this general comment, in paragraph 18, that reservations which the Committee deems invalid "will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation". Since this conclusion is so completely at odds with established legal practice and principles and even the express and clear terms of adherence by many States, it would be welcome if some helpful clarification could be made.

The reservations contained in the United States instrument of ratification are integral parts of its consent to be bound by the Covenant and are not severable. If it were to be determined that any one or more of them were ineffective, the ratification as a whole could thereby be nullified.

Articles 20 and 21 of the Vienna Convention set forth the consequences of reservations and objections to them. Only two possibilities are provided. Either (i) the remainder of the treaty comes into force between the parties in question or (ii) the treaty does not come into force at all between these parties. In accordance with article 20, paragraph 4 (c), the choice of these results is left to the objecting party. The Convention does not even contemplate the possibility that the full treaty might come into force for the reserving State.

The general view of the academic literature is that reservations are an essential part of a State's consent to be bound. They cannot simply be erased. This reflects the fundamental principle of the law of treaties: obligation is based on consent. A State which does not consent to a treaty is not bound by that treaty. A State which expressly withholds its consent from a provision cannot be presumed, on the basis of some legal fiction, to be bound by it. It

is regrettable that General Comment 24 appears to suggest to the contrary.

B. United Kingdom of Great Britain and Northern Ireland[b]

1. The United Kingdom is of course aware that the general comments adopted by the Committee are not legally binding. They nevertheless command great respect, given the eminence of the Committee and the status of the International Covenant on Civil and Political Rights. The issue dealt with in general comment No. 24 (52) (reservations to the Covenant) is one of great importance, both in respect of the development of the Covenant and the Committee's role under it and in its wider ramifications. The United Kingdom is therefore grateful for the opportunity provided under article 40 (5) of the Covenant to submit to the Committee certain observations on the general comment.

2. These will be divided into four parts: the legal regime regulating reservations to the Covenant; the criteria for assessing compatibility with the object and purpose of the Covenant; the power to determine compatibility with the object and purpose; the legal effect of an incompatible reservation.

The legal regime regulating reservations to the Covenant

3. The United Kingdom shares the Committee's concern that the integrity of the Covenant's treaty regime should not be determined by too extensive a practice of reservations formulated by States on becoming Party to them. The United Kingdom agrees also that individual reservations may on occasion be so widely drawn as to cast doubt on whether their maintenance is compatible with being Party to the Covenant. Regrettable though it may be, such a situation is not materially different from that obtaining in other areas of international relations, and would not provide a justification for a different legal regime to regulate reservations to human rights treaties. To create such a special regime by amendment of the Covenant would be a major task. To do so as part of the development of general international law would, all other considerations aside, be undesirable if the effect was to fragment this aspect of the law of treaties which is currently under study by the International Law Commission.

4. The modern law of reservations to multilateral treaties moreover owes its origin to the Advisory Opinion of the International Court of Justice of 28 May 1951 on Reservations to the Genocide Convention. The Genocide Convention is itself (in the Committee's phrase) a human rights treaty concluded for the benefit of persons within the jurisdiction of the States Parties to it. As the International Court observed, the Genocide Convention is of a type in which "the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely the accomplishment of those high purposes which are the raison d'être of the Convention". It was in the light precisely of those characteristics of the Genocide Convention, and in the light of the desirability of widespread adherence to it, that the Court set out its approach towards reservations. The United Kingdom does not accordingly believe that rules different from those foreshadowed by the International Court and in due course embodied in the Vienna Convention on the Law of Treaties are required to enable the international community to cope with reservations to human rights treaties. The correct approach is rather to apply the general rules relating to reservations laid down in the Vienna Convention in a manner which takes full account of the particular characteristics of the treaty in question.

5. The argument that the existing rules of international law are inadequate to cope with human rights treaties rests in any case, as the United Kingdom sees

it, on a mistaken assumption. The Committee says in paragraph 17 that the Vienna Convention's provisions on the role of State objections in relation to reservations are inappropriate to address the problem of reservations to human rights treaties. This is because such treaties "are not a web of inter-State exchanges of mutual obligations" and because "[t]he principle of reciprocity has no place". The United Kingdom does not find this to be an adequate account, for various reasons. In the first place, it is not the basis on which the International Court of Justice approached the Genocide Convention (para. 3 above). In the second place, it is not the view taken by other authoritative bodies, such as the European Court of Human Rights, which held in 1978[c] that at the European Convention on Human Rights "comprises more than mere reciprocal engagements between Contracting States. It creates over and above a network of mutual bilateral understandings, objective obligations which in the words of the preamble benefit from a 'collective enforcement'" (emphasis added).[d] In the third place, both the faculty under article 41 of the Covenant for bringing inter-State complaints and the widespread practice of States in invoking the Covenant as against other States Parties in respect of the treatment of individuals show that in a very real and practical sense even the substantive provisions of the Covenant are indeed regarded as creating "a network of mutual bilateral undertakings". Finally, it must be assumed that, in respect of reservations which are clearly compatible with the object and purpose of the Covenant, the Committee accepts that States Parties exercise the rights and functions assigned to them by the Vienna Convention. If so, it is not easy to discover a logical ground for ruling out these rights and functions for other reservations, including those where there is at least a reasonable measure of doubt as to whether the reservation is or is not compatible with the object and purpose of the Covenant. Given therefore that the bilateral rights and general interests of other Parties are, as indicated, directly affected, the United Kingdom regards it as a self-evident proposition that the reaction of those Parties to a reservation formulated by one of them is of direct significance both in law and in practice. In short, the legal effect of any particular reservation to a human rights treaty is an amalgam of the terms of the treaty and the terms and import of the reservation, in the light of the reactions to it by the other treaty Parties and in the light of course of any authoritative third-party procedure that may be applicable.

The criteria for assessing compatibility with the object and purpose of the Covenant

6. The United Kingdom shares the Committee's view that an automatic identification between non-derogability and compatibility with the object and purpose is too simplistic. Derogation from a formally contracted obligation and reluctance to undertake the obligation in the first place are not the same thing. The United Kingdom is likewise of one mind with the Committee that multifaceted treaties like the Covenants pose considerable problems over the ascertainment of their object and purpose. The problem is one common to all lengthy treaties containing numerous provisions of coordinate status with one another.

7. The United Kingdom is however less convinced by the argument that, because human rights treaties are for the benefit of individuals, provisions in the Covenant that represent customary international law may not be the subject of reservations. It is doubtful whether such a proposition represents existing customary international law; it is not a view shared by most commentators, and States have not expressly objected to reservations on this ground. In the United Kingdom's view, there is a clear distinction between choosing not to enter into treaty obligations and trying to opt out of customary international

law. Such a distinction is inherent in the Committee's recognition that reservations to articles that guarantee customary international law rights are permitted provided that the right is not deprived of its basic purpose.

8. For broadly similar reasons, the United Kingdom does not wholly share the Committee's concern over reservations which exclude the acceptance of obligations which would require changes in national law to ensure compliance with them. The Committee's comments that "no real international rights or obligations have thus been accepted" and that "all the essential elements of the Covenant guarantees have been removed" miss the fact that States Parties, even while entering such reservations, do at least accept the Committee's supervision, through the reporting system, of those Covenant rights guaranteed by their national law.

The power to determine compatibility with the object and purpose

9. The United Kingdom shares the Committee's view as to the seriousness of the issue of compatibility of reservations with the object and purpose of the treaty in question. It does not however believe that this is the central issue in the law and practice of reservations to multilateral conventions. The vast majority of reservations are in practice dealt with satisfactorily through the operation of the normal rules in the Vienna Convention, it being borne in mind that another Contracting State always has the right formally to object even to a reservation which is undoubtedly admissible (except in the special case of a reservation expressly permitted by the treaty). The question of compatibility with the object and purpose is confined to a small number of extreme cases.

10. It is clear however that a legal regime of reservations that depends to any extent on the general criterion of compatibility with the object and purpose of a treaty as a whole will be uncertain in its operation in the absence of an objective method for determining whether the criterion is satisfied. The availability of binding third-party procedures could be of great importance in this respect, as the International Law Commission itself recognized at the outset. This state of affairs inevitably raises a serious question as to the proper role which the Committee itself may play, to which the Committee has given serious consideration at pages 6 and 7 of the general comment.

11. The United Kingdom shares the analysis that the Committee must necessarily be able to take a view of the status and effect of a reservation where this is required in order to permit the Committee to carry out its substantive functions under the Covenant. Thus, the Committee might find itself unable in particular cases to deliver a report under the special powers conferred upon it by article 41 or the First Optional Protocol, except on the basis of a view as to the impact of a given reservation. Similarly, the Committee might, according to the circumstances, find it appropriate to form or express its view on a reservation for the purpose of questioning a State Party in its reports under article 40 or for the purpose of reporting its own conclusions. Paragraph 20 of the general comment, however, uses the verb "determine" in connection with the Committee's functions towards the status of reservations, and does so moreover in the context if its dictum that the task in question is inappropriate for the States Parties. This would appear to have implications which call for comment.

12. Without wishing to take a final view on the matter, the United Kingdom would make the following points:

(a) Even if it were the case (as the general comment argues but the United Kingdom doubts: see paras. 3-5 above) that the law on reservations is

inappropriate to address the problem of reservations to human rights treaties, this would not of itself give rise to a competence or power in the Committee except to the extent provided for in the Covenant; any new competence could only be created by amendment to the Covenant, and would then be exercisable on such terms as were laid down;

(b) No conclusion as to the status or consequences of a particular reservation could be properly determinative unless it were binding not only on the reserving State Party but on all the Parties to the Covenant, which would in turn automatically presuppose that the Parties had undertaken in proper form a prior legal obligation to accept it;

(c) There is a qualitative distinction between decisions judicially arrived at after full legal argument and determinations made without the benefit of a judicial process.

The legal effect of an incompatible reservation

13. The Committee correctly identifies articles 20 and 21 of the Vienna Convention on the Law of Treaties as containing the rules which, taken together, regulate the legal effect of reservations to multilateral treaties. The United Kingdom wonders however whether the Committee is right to assume their applicability to incompatible reservations. The rules cited clearly do apply to reservations which are fully compatible with the object and purpose but remain open for acceptance or objection (see para. 9 above). It is questionable however whether they were intended also to cover reservations which are inadmissible in limine. For example, it seems highly improbably that a reservation expressly prohibited by the treaty (the case in art. 19 (a) of the Vienna Convention) is open to acceptance by another Contracting State. And if so, there is no clear reason why the same should not apply to the other cases enumerated in article 19, including incompatibility with the object and purpose under 19 (c). The Genocide Convention Advisory Opinion did indeed deal directly with the matter, by stating that acceptance of a reservation as being compatible with the object and purpose entitles a party to consider the reserving State to be party to the treaty. In the converse case (i.e. the case where the reservation is not compatible with the object and purpose) the Court states plainly, "that State cannot be regarded as being a party to the Convention".[e] This is the approach which the United Kingdom has consistently followed in its own treaty practice.

14. The general comment suggests, per contra, that an "unacceptable" reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party as if the reservation had not been entered. The United Kingdom agrees that severability of a kind may well offer a solution in appropriate cases, although its contours are only beginning to be explored in State practice. However the United Kingdom is absolutely clear that severability would entail excising both the reservation and the parts of the treaty to which it applies. Any other solution they would find deeply contrary to principle, notably the fundamental rule reflected in Article 38 (1) of the Statute of the International Court of Justice, that international conventions establish rules "expressly recognized by" the Contracting States. The United Kingdom regards it as hardly feasible to try to hold a State to obligations under the Covenant which it self-evidently has not "expressly recognized" but rather has indicated its express unwillingness to accept. The United Kingdom fears that, questions of principle aside, an approach as outlined in paragraph 20 of the general comment would risk discouraging States from ratifying human rights conventions[f] (since they would not be in a position to

reassure their national Parliaments as to the status of treaty provisions on which it was felt necessary to reserve) or might even lead to denunciations by existing Parties who ratified against a set of assumptions different from those now enunciated in the general comment.

15. The United Kingdom believes that the only sound approach is accordingly that adopted by the International Court of Justice: a State which purports to ratify a human rights treaty subject to a reservation which is fundamentally incompatible with participation in the treaty regime cannot be regarded as having become a party at all - unless it withdraws the reservation. The test of incompatibility is and should be an objective one, in which the views of competent third parties would carry weight. Ultimately however it is a matter for the treaty parties themselves and, while the presence or absence of individual State "objections" should not be decisive in relation to an objective standard, it would be surprising to find a reservation validly stigmatized as incompatible with the object and purpose of the Covenant if none of the Parties had taken exception to it on that ground. For all other reservations the rules laid down in the Vienna Convention do and should apply - except to the extent that the treaty regulates such matters by its own terms.

16. The United Kingdom wishes finally to express its gratitude to the Committee for having focused attention on what is undoubtedly a real and serious problem and for having illuminated the underlying issues. Inasmuch as these issues go wider than the Covenant itself, or than human rights treaties in general, the United Kingdom proposes to reflect further on how international consideration of these matters can best be carried forward.

Notes

[a] Observations transmitted by letter dated 28 March 1995.

[b] Observations transmitted by letter dated 21 July 1995.

[c] Ireland v. United Kingdom.

[d] Series A, No. 25, p. 90, para. 239.

[e] ICJ Report 1951, at p. 29.

[f] A similar point applies for example to the First Optional Protocol, to which the United Kingdom is not, however, a party.

ANNEX VII

Revised guidelines regarding the form and contents of reports from States parties

A. Guidelines regarding the form and contents of reports from States parties under article 40 (1) (a) of the Covenant[a]

1. Under article 40 of the International Covenant on Civil and Political Rights each State party has undertaken to submit, within one year of the entry into force of the Covenant in regard to it and thereafter whenever the Human Rights Committee established under the Covenant so requests, reports on the measures which it has adopted to give effect to rights recognized in the Covenant and on the progress made in the enjoyment of those rights. Article 40 also provides that the reports shall indicate the factors and difficulties, if any, affecting the implementation of the Covenant.

2. In order to assist it in fulfilling the tasks entrusted to it pursuant to article 40 of the Covenant, the Committee has decided that it would be useful to inform States parties of its wishes regarding the form and contents of reports. Compliance with the following guidelines will help to ensure that reports are presented in a uniform manner and enable the Committee and States parties to obtain a complete picture of the situation in each State as regards the implementation of the rights referred to in the Covenant. This will also reduce the need for the Committee to request additional information under its rules of procedure.

3. The general part of the report should be prepared in accordance with the consolidated guidelines for the initial part of the reports of States parties to be submitted under the various international human rights instruments, including the Covenant, as contained in document HRI/1991/1.

4. The part of the report relating specifically to parts I, II and III of the Covenant should describe in relation to the provisions of each article:

(a) The legislative, administrative or other measures in force in regard to each right;

(b) Any restrictions or limitations, even of a temporary nature, imposed by law or practice or any other manner on the enjoyment of the right;

(c) Any other factors or difficulties affecting the enjoyment of the right by persons within the jurisdiction of the State, including any factors affecting the equal enjoyment by women of that right;

(d) Any other information on the progress made in the enjoyment of the right.

5. When a State party to the Covenant is also a party to the Optional Protocol, and if in the period under review the Committee has issued views finding that the State party has violated provisions of the Covenant, the report should include a section explaining what action has been taken relating to the communication concerned. In particular, the State party should indicate what remedy it has afforded the author of the communication whose rights the Committee found to have been violated.

6. The report should be accompanied by copies of the principal legislative and other texts referred to in the report. These will be made available to members of the Committee. It should be noted, however, that, for reasons of expense, they will not normally be reproduced for general distribution with the report except to the extent that the reporting State specifically so requests. It is desirable, therefore, that when a text is not actually quoted in or annexed to the report itself, the report should contain sufficient information to be understood without reference to it.

7. The Committee will welcome at any time information on any significant new development in regard to the rights referred to in the Covenant, but in any event it intends, after the completion of its study of each State's initial report and of any additional information submitted, to call for subsequent reports under article 40 (1) (b) of the Covenant. The aim of such further reports will be to bring the situation up to date in respect of each State.

8. On the basis of reports prepared according to the above guidelines, the Committee is confident that it will be able to develop a constructive dialogue with each State party in regard to the implementation of the Covenant and thereby contribute to mutual understanding and peaceful and friendly relations among nations in accordance with the Charter of the United Nations.

B. General guidelines regarding the form and contents of periodic reports from States parties[b]

1. Under article 40 (1) of the Covenant, every State party has undertaken to submit reports to the Human Rights Committee on the implementation of the Covenant:

(a) Within one year of the entry into force of the Covenant for the State party concerned;

(b) Thereafter whenever the Committee so requests.

2. At its second session, in August 1977, the Committee adopted guidelines for the submission of reports by States parties under article 40.[c] In drawing up these guidelines the Committee had in mind in particular the initial reports to be submitted by States parties under article 40 (1) (a). These guidelines have been followed by the great majority of States parties that have submitted reports subsequent to their issuance and they have proved helpful both to the reporting States and to the Committee.

3. In paragraph 5 of those guidelines, the Committee indicated that it intended, after the completion of its study of each State's initial report and of any subsequent information submitted, to call for subsequent reports under article 40 (1) (b) of the Covenant.

4. At its eleventh session, in October 1980, the Committee adopted by consensus a statement concerning the subsequent stages of its future work under article 40. It confirmed its aim of engaging in a constructive dialogue with each reporting State and determined that the dialogue should be conducted on the basis of periodic reports from States parties to the Covenant (para. (d)). It also decided that, in the light of its experience in the consideration of initial reports, it should develop guidelines for the purpose of subsequent reports. Pursuant to this decision and to the decision taken by the Committee at its thirteenth session to request States parties to submit reports under

article 40 (1) (b) on a periodic basis, the Committee has drawn up the following guidelines regarding the form and contents of such reports, which are designed to complete and to bring up to date the information required by the Committee under the Covenant.

5. General information should be prepared in accordance with the consolidated guidelines for the initial part of reports of States parties to be submitted under the various international human rights instruments, including the Covenant, as contained in document HRI/1991/1.

6. Information relating to each of the articles in parts I, II and III of the Covenant should concentrate especially on:

(a) The completion of the information before the Committee as to the measures adopted to give effect to rights recognized in the Covenant, taking account of questions raised in the Committee on the examination of any previous report and including in particular additional information as to questions not previously answered or not fully answered;

(b) Information taking into account general comments which the Committee may have made under article 40 (4) of the Covenant;

(c) Changes made or proposed to be made in the national laws and practices relevant to the Covenant;

(d) Action taken as a result of experience gained in cooperation with the Committee;

(e) Factors affecting and difficulties experienced in the implementation of the Covenant, including any factors affecting the equal enjoyment by women of rights referred to in the Covenant;

(f) The progress made since the last report in the enjoyment of rights recognized in the Covenant.

7. When a State party to the Covenant is also a party to the Optional Protocol and if, in the period under review, the Committee has issued views finding that the State party has violated provisions of the Covenant, the report should include a section explaining what action has been taken relating to the communication concerned. In particular, the State party should indicate what remedy it has afforded the author of the communication whose rights the Committee found to have been violated.

8. It should be noted that the reporting obligation extends not only to the relevant laws and other norms, but also to the practices of the courts and administrative organs of the State party and other relevant facts likely to show the degree of actual enjoyment of rights recognized by the Covenant.

9. The report should be accompanied by copies of the principal legislative and other texts referred to in it.

10. It is the desire of the Committee to assist States parties in promoting the enjoyment of rights under the Covenant. To this end, the Committee wishes to continue the dialogue which it has begun with reporting States in the most constructive manner possible and reiterates its confidence that it will thereby contribute to mutual understanding and peaceful and friendly relations among nations in accordance with the Charter of the United Nations.

Notes

[a] Adopted by the Committee at its 44th meeting (second session), on 29 August 1977, and embodying amendments adopted by the Committee at its 1002nd meeting (thirty-ninth session), on 24 July 1990, its 1089th meeting (forty-second session), on 25 July 1991, and its 1415th meeting (fifty-third session), on 7 April 1995.

[b] Adopted by the Committee at its 308th meeting (thirteenth session), on 27 July 1981, and embodying amendments adopted by the Committee at its 1002nd meeting (thirty-ninth session), on 24 July 1990, its 1089th meeting (forty-second session), on 25 July 1991, and its 1415th meeting (fifty-third session), on 7 April 1995.

[c] See Official Records of the General Assembly, Thirty-second Session, Supplement No. 44 (A/32/44), annex IV.

ANNEX VIII

Letter dated 13 July 1995 from the Chairman of the Committee to the Permanent Representative of the Federal Republic of Yugoslavia to the United Nations Office at Geneva

We wish to refer to your letter dated 26 January 1995, in which you conveyed your Government's position concerning the submission of the fourth periodic report under article 40 of the International Covenant on Civil and Political Rights.

We would like to inform you that the Human Rights Committee at its fifty-third session, held at United Nations Headquarters from 20 March to 7 April 1995, deeply regretted the decision of the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) not to comply with its reporting obligations. The Committee observed that the submission of reports under the Covenant constitutes a solemn legal obligation assumed by each State party and is indispensable for carrying out the Committee's basic function of establishing a positive dialogue with States parties in the field of human rights. Therefore, non-submission of reports greatly hinders the process of dialogue and seriously undermines the objectives of the Covenant by hampering the Committee's ability to monitor the implementation of the Covenant.

The Committee has taken note of the reasons presented by your Government as forming the basis of its position. In that regard, we would like to recall that, in a decision of 7 October 1992 requesting your Government to submit a report on specific issues in respect of persons and events under its jurisdiction, the Committee emphasized that all the people within the territory of the former Yugoslavia are entitled to the guarantees of the Covenant and that the Federal Republic of Yugoslavia (Serbia and Montenegro) is bound by the obligations under the Covenant. In its comments adopted at the end of the consideration of that report (CCPR/C/79/Add.16), the Committee stated that it regarded the submission of the report by the Government and the presence of a delegation as confirmation that the Federal Republic of Yugoslavia (Serbia and Montenegro) had succeeded, in respect of the territory of Serbia and Montenegro, to the obligations undertaken under the Covenant by the former Socialist Federal Republic of Yugoslavia.

While it is not for the Committee to take a position on last September's action of the Meeting of States parties with regard to the Federal Republic of Yugoslavia (Serbia and Montenegro), the Committee will continue to proceed on the basis of the above-mentioned understanding and expresses the hope that the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) will reconsider its decision and submit its report to the Committee as soon as possible.

(Signed) Francisco José AGUILAR URBINA
Chairman
Human Rights Committee

ANNEX IX

List of States parties' delegations that participated in consideration of their respective reports by the Human Rights Committee at its fifty-second, fifty-third and fifty-fourth sessions

(Listed in the order in which their reports were considered)

Nepal	Representative	Mr. Banmali Prasad Lacoul, Minister Counsellor, Chargé d'affaires a.i., Permanent Mission of the Kingdom of Nepal to the United Nations Office at Geneva
	Adviser	Mr. Ram Badu Dhakal, Third Secretary, Permanent Mission of the Kingdom of Nepal to the United Nations Office at Geneva
Tunisia	Representative	Mr. Mohamed Ennaceur, Ambassador, Permanent Representative of Tunisia to the United Nations Office at Geneva
	Alternate representative	Mr. Abdessalem Hetira, Representative in the Ministry of Foreign Affairs, Director of the Human Rights Unit, Ministry of Foreign Affairs
	Advisers	Mr. Hatem Kotrane, Professor, in charge of the Human Rights Unit, Ministry of Social Affairs
		Mr. Habib Cherif, Representative in the Ministry of Justice
		Mr. Youssef Neji, Chief of the Human Rights Service, Ministry of the Interior
		Mr. Moncef Baati, Counsellor, Permanent Mission of Tunisia to the United Nations Office at Geneva
		Mr. Samir Koubaa, Counsellor, Permanent Mission of Tunisia to the United Nations Office at Geneva
		Mr. Raouf Chatti, Counsellor, Permanent Mission of Tunisia to the United Nations Office at Geneva
		Mrs. Rafla Mrabet, Secretary, Permanent Mission of Tunisia to the United Nations Office at Geneva

Morocco	Representative	Mr. Mohamed Majdi, Chargé d'affaires a.i., Permanent Mission of the Kingdom of Morocco to the United Nations Office at Geneva
	Alternate representative	Mr. Mohamed Lididi, Advisor to the Supreme Court, Director of the Prison and Rehabilitation Service
	Advisers	Miss Saadia Belmir, Advisor to the Supreme Court on secondment to the General Secretariat of the Ministry of Justice
		Mr. Moulay Lahcen Aboutahir, First Secretary, Permanent Mission of the Kingdom of Morocco to the United Nations Office at Geneva
Libyan Arab Jamahiriya	Representative	Mr. Said Hafyana, Chairman of the General People's Committee of Justice and General Security
	Alternate representative	Mr. Mohamed Abdelfattah El Zahrah, Chairman of the Supreme Court, General People's Committee of Justice and General Security
	Advisers	Mr. Bachir Alhadi Al Jnuli, Member of the General People's Committee of Justice and General Security
		Ms. Najat El Hajjaji, Counsellor, Permanent Mission of the Libyan Arab Jamahiriya to the United Nations Office at Geneva
Argentina	Representative	Mr. Rodolpho Carlos Barra, Minister of Justice
	Alternate representative	Ms. Zelmira Regazzoli, Director General of Human Rights, Ministry of Foreign Affairs, International Trade and Worship
	Advisers	Mrs. Maria Eva Gatica, General Coordinator, Social Welfare Services, Secretary General, Office of the President
		Mr. Francisco Javier Fernandez, Private Secretary, Ministry of Justice
New Zealand	Representative	Mr. Colin R. Keating, Ambassador, Permanent Representative of New Zealand to the United Nations in New York

	Alternate representative	Ms. Gabrielle Rush, Policy Officer, Ministry of Foreign Affairs and Trade
	Adviser	Mr. Patrick Rata, Second Secretary, Permanent Mission of New Zealand to the United Nations in New York
Paraguay	Representative	Mr. Juan Rafael Caballero Gonzalez, Deputy Minister of Justice, Ministry of Justice and Labour
	Alternate representative	Mr. José Félix Fernández Estigarribia, Ambassador, Permanent Representative of Paraguay to the United Nations
	Advisers	Mr. Eric Maria Salum Flecha, Director General of Human Rights, Ministry of Justice and Labour
		Mrs. Ana María Baiardi Quesnel, First Secretary, Permanent Mission of Paraguay to the United Nations
Haiti	Representative	Mrs. Nicole Denerville, Secretary of State for Justice
	Adviser	Mr. Napoléon Aubourg, Advisor to the Minister of Justice
United States of America	Representative	Mr. John Shattuck, Assistant Secretary for Democracy, Human Rights and Labor, Department of State
	Alternate representatives	Ms. Ada E. Deer, Assistant Secretary for Indian Affairs, Department of the Interior
		Mr. Conrad K. Harper, Legal Adviser, Department of State
		Ms. Jo Ann Harris, Assistant Attorney-General, Criminal Division, Department of Justice
		Mr. Deval L. Patrick, Assistant Attorney-General, Civil Rights Division, Department of Justice
	Advisers	Mr. T. Alexander Aleinikoff, General Counsel, Immigration and Naturalization Service, Department of Justice
		Ms. Jamison S. Borek, Deputy Legal Adviser, Department of State
		Mr. Kevin Digregory, Deputy Assistant Attorney-General, Criminal Division,

		Department of Justice
		Ms. Juanita C. Hernandez, Counsel to the Assistant Attorney-General, Civil Rights Division, Department of Justice
		Ms. Elizabeth Homer, Director, Office of American Indian Trust, Department of the Interior
		Mr. David P. Stewart, Assistant Legal Adviser, Department of State
		Ms. Beverly Zweiben, Office of Economic and Social Affairs, Bureau of International Organization Affairs, Department of State
		Ms. Sandra J. Ashton, Attorney Adviser, Office of the Solicitor, Department of the Interior
		Mr. Bradford M. Berry, Counsel to the Deputy Attorney-General, Department of Justice
		Mr. Owen B. Cooper, Associate General Counsel, Immigration and Naturalization Service, Department of Justice
		Ms. Catherine Kay, Program Officer, Bureau of Democracy, Human Rights and Labor, Department of State
		Mr. Craig Kuehl, United States Mission to the United Nations
		Mr. Yehudah Mirsky, Office of External Relations, Bureau of Democracy, Human Rights and Labor, Department of State
		Ms. Cynthia Stewart, Office of the Legal Adviser, Department of State
		Ms. Tracy Toulou, Special Assistant to the Assistant Attorney-General, Criminal Division, Department of Justice
		Ms. Nancy Wade, United States Mission to the United Nations
		Ms. Lisa Winston, Special Assistant to the Assistant Attorney-General, Civil Rights Division, Department of Justice
Yemen (52nd session)	Representative	Mr. Yahya Geghman, Ambassador, Permanent Representative of the Republic of Yemen

		to the United Nations Office at Geneva
	Adviser	Mr. Abdul Rahman Al-Musibli, Counsellor, Permanent Mission of the Republic of Yemen to the United Nations Office at Geneva
Yemen (53rd session)	Representative	Mr. Hussein Al-Hubaishi, Adviser to the Government of Yemen
	Advisers	Mr. Abdallah Saleh Al-Ashtal, Permanent Representative of Yemen to the United Nations
		Ms. Noria Abdullah Ali Al-Hamami, First Secretary, Permanent Mission of Yemen to the United Nations
Ukraine	Representative	Mr. Vitali Krukov, Chief Consultant, Administration of the President of Ukraine, Head of the Delegation
	Advisers	Mr. Oleg Shamshur, Counsellor, Permanent Mission of Ukraine
		Mr. Yevhen Semashko, Second Secretary, Permanent Mission of Ukraine
Latvia	Representative	Ms. Inese Birzniece, Head of Delegation, Chairperson of the Parliamentary Commission for Human Rights
	Advisers	Ms. Sandra Kalniete, Permanent Representative of Latvia to the United Nations Office at Geneva
		Mr. Eglils Levits, Ambassador of Latvia to the Swiss Confederation, Former Minister of Justice
		Ms. Dace Dobraja, Chief of the International Law Division, Ministry of Foreign Affairs
		Ms. Vija Jakobsone, Attorney at Law
Russian Federation	Representative	Mr. Valentin Kovalev, Head of Delegation, Minister of Justice, Chairman of the Provisional Supervisory Commission on the Observance of Constitutional Rights and Freedoms of Citizens
	Advisers	Mr. Andrei Kolossovsky, Ambassador, Permanent Representative of the Russian Federation to the United Nations Office at Geneva

Ms. Ludmila Zavadskaya, Chairperson, Subcommittee on Federal Legislation and Human Rights of Russia's State Duma Committee on Legislation, Legal and Judicial Reform

Mr. Valery Chernikov, Chief, Legal Department, Ministry of the Interior

Mr. Roman Chermenteev, Consultant, State and Law Department to the President of Russia

Mr. Victor Makazan, Chief of Executive Board, Provisional Supervisory Commission on the Observance of Constitutional Rights and Freedoms of Citizens

Mrs. Lelia Alehicheva, Chief of Legal Expertise Branch, Central Commission on Elections

Mr. Andrei Maksimov, Assistant to the Minister of Justice

Mr. Mikhail Otdelnov, Assistant to the Minister of Justice

Mr. Mikhail Lebedev, Deputy Head, Department of International Humanitarian Cooperation and Human Rights, Ministry of Foreign Affairs

Mr. Aleksey Rogov, Chief, Human Rights Unit, Ministry of Foreign Affairs

Mr. Oleg Malginov, Senior Counsellor, Permanent Mission of the Russian Federation to the United Nations Office at Geneva

Mr. Andrey Kovalev, Senior Counsellor, Permanent Mission of the Russian Federation to the United Nations Office at Geneva

Mr. Youri Boitchenko, Second Secretary, Permanent Mission of the Russian Federation to the United Nations Office at Geneva

Mr. Nikolay Okinin, Second Secretary, Permanent Mission of the Russian Federation to the United Nations Office at Geneva

Mr. Vladimir Dolgoborodov, Third

		Secretary, Permanent Mission of the Russian Federation to the United Nations Office at Geneva
United Kingdom of Great Britain and Northern Ireland	Representative	Mr. J. F. Halliday, Deputy Secretary, Criminal Department, Home Office
	Alternates	Mrs. S. A. Evans, Principal Assistant, Legal Adviser, Home Office
		Mr. S. Bramley, Assistant Secretary on secondment from the Home Office
	Advisers	Ms. F. Spencer, Principal, Home Office
		Sir Franklin Berman, The Legal Adviser, Foreign and Commonwealth Office
		Mr. I. Barnard, First Secretary, Permanent Mission of the United Kingdom to the United Nations Office at Geneva
		Ms. E. Doherty, Third Secretary, Permanent Mission of the United Kingdom to the United Nations Office at Geneva
Sri Lanka	Representative	Mr. Bernard A. B. Goonetilleke, Permanent Representative to the United Nations (Leader of the delegation)
	Advisers	Mr. Rohan Perera, Legal Advisor, Ministry of Foreign Affairs
		Ms. A. Wijewardena, Deputy Director, Ministry of Foreign Affairs
		Mr. A. L. Abdul Azeez, Third Secretary, Permanent Mission of Sri Lanka to the United Nations Office at Geneva

ANNEX X

Observations of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol relating to the International Covenant on Civil and Political Rights*

* To be issued subsequently in Official Records of the General Assembly, Fiftieth Session, Supplement No. 40 (A/50/40), vol. II.

ANNEX XI

Decisions of the Human Rights Committee declaring communications inadmissible under the Optional Protocol relating to the International Covenant on Civil and Political Rights*

* To be issued subsequently in Official Records of the General Assembly, Fiftieth Session, Supplement No. 40 (A/50/40), vol. II.

ANNEX XII

List of documents issued during the reporting period

Reports of States parties

CCPR/C/28/Add.17	Second periodic report of the Libyan Arab Jamahiriya - additional information
CCPR/C/70/Add.6	Third periodic report of Sri Lanka
CCPR/C/74/Add.2	Initial report of Nepal
CCPR/C/81/Add.1/Rev.1	Initial report of Latvia
CCPR/C/81/Add.4	Initial report of the United States of America
CCPR/C/81/Add.5	Initial report of Estonia
CCPR/C/81/Add.6	Initial report of Brazil
CCPR/C/81/Add.7	Initial report of Guatemala
CCPR/C/84/Add.2	Fourth periodic report of the Russian Federation
CCPR/C/84/Add.3	Initial report of Paraguay
CCPR/C/95/Add.1	Fourth periodic report of Spain
CCPR/C/95/Add.2	Fourth periodic report of Ukraine
CCPR/C/95/Add.3	Fourth periodic report of the United Kingdom
CCPR/C/95/Add.4	Fourth periodic report of Sweden
CCPR/C/105	Initial report of Haiti

Comments of the Human Rights Committee on States parties' reports

CCPR/C/79/Add.42	Comments of the Human Rights Committee on States parties' reports - Nepal
CCPR/C/79/Add.43	Comments of the Human Rights Committee on States parties' reports - Tunisia
CCPR/C/79/Add.44	Comments of the Human Rights Committee on States parties' reports - Morocco
CCPR/C/79/Add.45	Comments of the Human Rights Committee on States parties' reports - Libyan Arab Jamahiriya
CCPR/C/79/Add.46	Comments of the Human Rights Committee on States parties' reports - Argentina
CCPR/C/79/Add.47	Comments of the Human Rights Committee on States parties' reports - New Zealand

CCPR/C/79/Add.48	Comments of the Human Rights Committee on States parties' reports - Paraguay
CCPR/C/79/Add.49	Comments of the Human Rights Committee on States parties' reports - Haiti
CCPR/C/79/Add.50	Comments of the Human Rights Committee on States parties' reports - United States of America
CCPR/C/79/Add.51	Comments of the Human Rights Committee on States parties' reports - Yemen
CCPR/C/79/Add.52	Comments of the Human Rights Committee on States parties' reports - Ukraine
CCPR/C/79/Add.53	Comments of the Human Rights Committee on States parties' reports - Latvia
CCPR/C/79/Add.54	Comments of the Human Rights Committee on States parties' reports - Russian Federation
CCPR/C/79/Add.55	Comments of the Human Rights Committee on States parties' reports - United Kingdom of Great Britain and Northern Ireland
CCPR/C/79/Add.56	Comments of the Human Rights Committee on States parties' reports - Sri Lanka

General comments

CCPR/C/21/Rev.1/Add.6	General comments adopted under article 40, paragraph 4, of the International Covenant on Civil and Political Rights - General comment No. 24 (52) (reservations and declarations)

Guidelines

CCPR/C/5/Rev.2	Revised guidelines regarding the form and contents of initial reports from States parties
CCPR/C/20/Rev.2	Revised guidelines regarding the form and contents of periodic reports from States parties

Provisional agendas and annotations

CCPR/C/99	Provisional agenda and annotations (fifty-second session)
CCPR/C/104	Provisional agenda and annotations (fifty-third session)
CCPR/C/107	Provisional agenda and annotations (fifty-fourth session)

Notes concerning the consideration of reports submitted by States parties

CCPR/C/100	Consideration of initial reports submitted by States parties under article 40 of the Covenant due in 1995: note by the Secretary-General
CCPR/C/101	Consideration of second periodic reports submitted by States parties under article 40 of the Covenant due in 1995: note by the Secretary-General
CCPR/C/102	Consideration of third periodic reports submitted by States parties under article 40 of the Covenant due in 1995: note by the Secretary-General
CCPR/C/103	Consideration of fourth periodic reports submitted by States parties under article 40 of the Covenant due in 1995: note by the Secretary-General

Summary records of Committee discussions

CCPR/C/SR.1358-1386	Summary records of the fifty-second session
CCPR/C/SR.1387-1415	Summary records of the fifty-third session
CCPR/C/SR.1416-1444	Summary records of the fifty-fourth session

United Nations

Report of the Human Rights Committee

Volume II

General Assembly

Official Records · Fiftieth Session
Supplement No.40 (A/50/40)

Report of the Human Rights Committee

Volume II

General Assembly
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United Nations · New York, 1999

NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

The present document contains annexes X and XI to the report of the Human Rights Committee. The main report of the Committee and annexes I to IX and XII are contained in volume I.

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[6 May 1999]

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ANNEX X

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

A. Communication No. 386/1989; Famara Koné v. Senegal[1] (Views adopted on 21 October 1994, fifty-second session)

Submitted by: Famara Koné

Victim: The author

State party: Senegal

Date of communication: 5 December 1989 (initial submission)

Date of decision on admissibility: 5 November 1991

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 21 October 1994,

Having concluded its consideration of Communication No. 386/1989 submitted to the Human Rights Committee by Mr. Famara Koné under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts its Views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Famara Koné, a Senegalese citizen born in 1952 and registered resident of Dakar, currently domiciled in Ouagadougou, Burkina Faso. He claims to be a victim of violations of his human rights by Senegal but does not specifically invoke his rights under the International Covenant on Civil and Political Rights.

Facts as submitted by the author

2.1 The author submits that, in 1978, he joined the "Movement for Justice in Africa" (Mouvement pour la justice en Afrique), whose aim is to assist the oppressed in Africa. On 15 January 1982, he was arrested in Gambia by Senegalese soldiers, allegedly for protesting against the intervention of Senegalese troops in Gambia after an attempted coup on 30 July 1981. He was transferred to Senegal, where he was detained for over four years, pending his trial, until his provisional release on 9 May 1986.

2.2 Mr. Koné claims, without giving details, that he was subjected to torture

[1] Pursuant to rule 85 of the Committee's rules of procedure, Mr. Birame Ndiaye did not participate in the adoption of the Committee's Views.

by investigating officers during one week of interrogation; he indicates that, since his release, he has been in need of medical supervision as a result. He further notes that despite his persistent requests to the regional representative(s) of the United Nations High Commissioner for Refugees, he was denied refugee status both in Gambia and Benin (1988), as well as in the Ivory Coast (1989) and apparently now in Burkina Faso (1992).

2.3 The author states that, after presidential elections in Senegal on 28 February 1988, he was re-arrested and detained for several weeks, without charges. He was released on 18 April 1988 by decision of the regional court of Dakar (Tribunal régional). He contends that, after participating in a political campaign in Guinea-Bissau directed against Senegal, he was once again arrested when he sought to enter Senegal on 6 July 1990. He was detained for six days, during which he claims to have been once again tortured by the security police, which tried to force him to sign a statement admitting attacks on State security and cooperating with the intelligence services of another State.

2.4 According to the author, his family in Dakar is being persecuted by the Senegalese authorities. On 6 June 1990, the regional court of Dakar confirmed an eviction order served by the departmental court (Tribunal départemental) of Dakar on 12 February 1990. As a result, the author and his family had to leave the house in which they had resided for the past forty years. The decision was taken at the request of the new owner, who had bought the property from the heirs of the author's grandfather in 1986. The author and his father challenged the validity of the act of sale and reaffirmed their right to the property. The municipal authorities of Dakar, however, granted a lease contract to the new owner on the basis of the act of sale, thereby confirming - without valid grounds in the author's opinion - the latter's right to the property.

2.5 As to the requirement of exhaustion of domestic remedies, the author affirms, without giving details, that as an opponent of the Government, it is not possible for him to lodge a complaint against the State party's authorities. In this context, he claims that he has been threatened on several occasions by the security police.

Complaint

3. Although the author does not invoke any of the articles of the International Covenant on Civil and Political Rights, it appears from the context of his submissions that he claims violations of articles 7, 9 and 19.

State party's information and observations

4.1 The State party contends that the author is not at all a victim of political persecution and has not been prevented from expressing his opinions, but that he is merely a person rebellious to any type of authority.

4.2 Concerning the author's allegation of torture and ill-treatment, the State party indicates that torture constitutes a punishable offence under the Senegalese Criminal Code, which provides for various penalties for acts of torture and ill-treatment, increasing in severity to correspond with the gravity of the physical consequences of the torture. Other provisions of the Criminal Code provide for an increase of the punishment if the offence is committed by an official or civil servant in the exercise of his functions. Pursuant to article 76 of the Code of Criminal Procedure, the author could have and should have submitted a complaint to the competent judicial authorities against the police officers held responsible for his treatment. The State party further

points out that Mr. Koné had the possibility, 48 hours after his apprehension, to be examined by a doctor, at his own request or that of his family, under article 56, paragraph 2, of the Code of Criminal Procedure.

4.3 Concerning the author's allegation of arbitrary detention in 1982, the State party points out that Mr. Koné was remanded by order of an examining magistrate. As this order was issued by an officer authorized by law to exercise judicial power, his provisional detention cannot be characterized as illegal or arbitrary. Furthermore, articles 334 and 337 of the Penal Code criminalize acts of arbitrary arrest and detention. After his provisional release (élargissement) on 9 May 1986, Mr. Koné could have seized the competent judicial authorities under article 76 of the Code of Criminal Procedure.

4.4 With regard to the allegations pertaining to the eviction order, the State party observes that the judgment which confirmed the order (i.e. the judgment of the Tribunal régional) could have been appealed further to the Supreme Court, pursuant to article 3 of Decree No. 60-17 of 3 September 1960, concerning the rules of procedure of the Supreme Court) and article 324 of the Code of Civil Procedure. Furthermore, as the Senegalese courts have not yet ruled on the substance of the matter, that is, the title to the property, the author could have requested that the civil court rule on the substance.

Committee's decision on admissibility

5.1 During its forty-third session, the Committee considered the admissibility of the communication. It noted that the author's claim concerning the eviction from his family home related primarily to alleged violations of his right to property, which is not protected by the Covenant. Since the Committee is only competent to consider allegations of violations of any of the rights protected under the Covenant, the author's claim in respect of this issue was deemed inadmissible under article 3 of the Optional Protocol.

5.2 Concerning the claim that the author had been tortured and ill-treated by the security police, the Committee noted that the author had failed to take steps to exhaust domestic remedies since he allegedly could not file complaints against Senegalese authorities as a political opponent. It considered, however, that domestic remedies against acts of torture could not be deemed a priori ineffective and, accordingly, that the author was not absolved from making a reasonable effort to exhaust them. This part of the communication was therefore declared inadmissible under article 5, paragraph 2 (b), of the Protocol.

5.3 As to the allegations relating to articles 9 and 19, the Committee noted that the State party had failed to provide information on the charges against Mr. Koné, and on the applicable law governing his detention from 1982 to 1986, from February to April 1988 and in July 1990, nor had it provided sufficient information on effective remedies available to him. It further observed that the State party's explanation that the period of detention from 1982 to 1986 could not be deemed arbitrary simply because the detention order was issued by judicial authority did not answer the question of whether the detention was or was not contrary to article 9. In the circumstances, the Committee could not conclude that there were effective remedies available to the author and considered the requirements of article 5, paragraph 2 (b), of the Optional Protocol to have been met in this respect.

5.4 On 5 November 1991, therefore, the Committee declared the communication admissible in so far as it appeared to raise issues under articles 9 and 19 of the Covenant. The State party was requested, in particular, to explain the

circumstances under which the author was detained from 1982 to 1986, in 1988 and in 1990, indicating the charges against him and the applicable legislation, and to forward to the Committee copies of the detention order(s) issued by the examining magistrates and of the decision of the Tribunal régional of Dakar of 18 April 1988.

State party's information on the merits of the communication

6.1 In its submission on the merits, the State party provides the information requested by the Committee. As to the period of detention from 1982 to 1986, it observes that the author was detained pursuant to a detention order (mandat de dépôt) issued by the Senior Examining Magistrate of Dakar, after having been formally charged with acts threatening national security. This was duly recorded under No. 406/82 in the register of complaints of the prosecutor's office of Dakar as well as under registry number 7/82 at the office of the examining magistrate. The acts attributed to the author are an offence under section 80 (chapter I) of the Senegalese Penal Code.

6.2 The procedure governing provisional custody is governed by article 139 of the Code of Criminal Procedure, which provides for the issuance of a detention order upon request of the Department of Public Prosecutions. Paragraph 2 of this article stipulates that a request for release on bail must be rejected if the public prosecutor's office files a written objection to the request. Notwithstanding, a request for release on bail may, at any moment, be formulated by the accused or his representative. The magistrate is obliged to rule, by reasoned decision (par ordonnance spécialement motivée) within five days of the receipt of the request. If the magistrate does not decide within the deadline, the accused may directly appeal to the competent chamber of the Tribunal Correctionnel (article 129, para. 5); and if the request for release on bail is rejected, the accused may appeal in accordance with the provisions of article 180 of the Code of Criminal Procedure.

6.3 Upon concluding his investigations in the case, the examining magistrate concluded that the charges against Mr. Koné were substantiated and accordingly ordered his case to be tried by the criminal court of Dakar. However, in the light of the author's character and previous documented behaviour, the magistrate considered it appropriate to request a mental status examination and, pending its results, ordered the author's provisional release on 9 May 1986, by judgement No. 1898. The judicial procedure never led a judgment on the merits, as the author fell under the provisions of Amnesty Law No. 88-01 of 4 June 1988.

6.4 In its additional comments on the merits, dated 25 February 1994, the Senegalese Government recounts the circumstances under which the author was held in detention between 1982 and 1986. It states that after his arrest, Mr. Koné was brought before an examining magistrate who, applying the provisions of article 101 of the Code of Criminal Procedure, informed him, by way of an indictment, of the charges entered against him, advised him of his right to choose counsel from among the lawyers listed in the roster, and placed him under a detention order on 28 January 1982. At the conclusion of a legitimate preliminary investigation, he was committed for trial by the examining magistrate, pursuant to a committal order dated 10 September 1983. The State party specifies that the author "never formulated a request for release throughout the investigation of his case", as authorized by articles 129 and 130 of the Code of Criminal Procedure. The State party concludes that "no expression of any intention to obstruct his provisional release can be deduced from these proceedings".

6.5 The State party stresses that, after he was committed to the competent court, the author received a notice to appear before the court on 10 December 1983; the case was not, however, heard on that date; a series of postponements followed. The State party adds that the author "did not file a request for provisional release until mid-May 1986, a request which was granted pursuant to an interlocutory judgment rendered on 9 May 1986".

6.6 With regard to the purpose of Amnesty Law No. 88-01 of 4 June 1988, which was applied to the author, the State party points out that the law does not apply only to the Casamance events, even though it was passed in the context of efforts to contain them. It adds that "the detention period of the person concerned coincided with a period of serious disturbances of national public order caused by the Casamance events, and the State Security Court, the only court of special jurisdiction in Senegal, had to deal with the cases of 286 detainees between December 1982 and 1986", when that Court consisted only of a president, two judges, one government commissioner and an examining magistrate.

6.7 The State party notes furthermore that, although under the terms of article 9, paragraph 3, of the Covenant, pre-trial detention should not be the rule, it may nevertheless constitute an exception, especially during periods of serious unrest, and given that the accused, committed for trial and summoned to appear on a fixed date, had never expressed a wish of any kind to be granted provisional release. It concludes that the preliminary investigation and inquiry were conducted in an entirely legitimate manner, in accordance with the applicable legal provisions and with the provisions of article 9 of the Covenant.

6.8 In further submissions dated 4 and 11 July 1994, the State party justifies the length of the author's pre-trial detention between 1982 and May 1986 on grounds of the complexity of the factual and legal situation. It notes that the author was a member of several revolutionary groups of Marxist and Maoist inspiration, which had conspired to overthrow several Governments in West Africa, including in Guinea-Bissau, Gambia and Senegal. To this effect, the author had frequently travelled to the countries neighbouring Senegal, where he visited other members of this revolutionary network or representatives of foreign Governments. It also observes that it suspected the author of having participated in an unsuccessful coup attempt in Gambia in December 1981, and that he had sought to destabilize the then Government of Sekou Touré in Guinea. In the light of these international ramifications, the State party claims, the judicial investigations in the case were particularly complex and protracted, as they necessitated formal requests for judicial cooperation with other sovereign States.

6.9 In a final submission dated 2 September 1994, the State party reiterates that the detention of Mr. Koné was made necessary because of well-founded suspicions that his activities were endangering the State party's internal security. After his release on bail, the State party observes, no judicial instance in Senegal has ever been seized by Mr. Koné with a request to determine the lawfulness of his detention between January 1982 and May 1986. Given the author's "passivity" in pursuing remedies which were available to him, the State party concludes that the author's claims are inadmissible on the basis of non-exhaustion of domestic remedies.

6.10 Concerning the author's detention in 1988, the State party affirms that Mr. Koné's detention did not last two months but only six days. He was arrested and placed in custody on 12 April 1988, upon orders of the Public Prosecutor of Dakar, and charged with offences against the Law on States of Emergencies

(Law 69-26 of 22 April 1969, Decree No. 69-667 of 10 June 1969 and No. 88-229 of 29 February 1988, Ministerial Decree No. 33364/M.INT of 22 March 1988). He was tried, together with eight other individuals, by a Standing Court (Tribunal des flagrants délits), which, by judgment No. 1891 of 18 April 1988, ordered his release.

6.11 The State party observes that the author has neither been re-arrested nor been the target of judicial investigations or procedures since his release in April 1988. If he had been arrested or detained, there would have been a duty, under articles 55 and 69 of the Code of Criminal Procedure, to immediately notify the Office of the Public Prosecution. No such notification was ever received. Furthermore, had the author been detained arbitrarily in 1990, he could, upon release, have immediately filed a complaint against those held responsible for his detention; no complaint was ever received in this context.

6.12 The State party concludes that there is no evidence of a violation of any provisions of the Covenant by the Senegalese judicial authorities.

7.1 In his comments, the author seeks to refute the accuracy of the State party's information and chronology. Thus, he claims that he was first requested on 2 September 1983 to appear before the Tribunal correctionnel on 1 December 1983. On this occasion, the president of the court requested further information (complément d'information) and postponed the trial to an unspecified subsequent date. On the same occasion and not in the spring of 1986, as indicated by the State party, a mental status examination was ordered by the court. The author forwards a copy of a medical certificate signed by a psychiatrist of a Dakar hospital, which confirms that a mental status examination was carried out on the author on 25 January 1985; it concluded that Mr. Koné suffered from pathological disorder (pathologie psychiatrique) and needed continued medical supervision ("pathologie ... à traiter sérieusement").

7.2 The author reiterates that he was tried on 1 December 1983 by the Tribunal correctionnel, that the court adjourned to consider its findings until 15 December 1983, and that his family was present in the courtroom. According to him, that version can be corroborated by the prison log.

7.3 As for the State party's argument that he never filed a request for provisional release, the author simply notes that he had protested his arbitrary detention to several members of the judiciary visiting the prison where he was held and that not until 1986 did a member of the staff of the Government Procurator's office and the prison's social services suggest that he request provisional release.

7.4 The author affirms that his arrest in January 1982 was the result of manoeuvres orchestrated by the Senegalese ambassador in Gambia, who had been angered by the author's leading role, between 1978 and 1981, in several demonstrations, which had, inter alia, caused damage to the building of the Senegalese Embassy in Banjul[2].

7.5 Concerning the period of detention in 1988, the author recalls that he was arrested around 2 March 1988 together with several other individuals and questioned about the violent incidents that had accompanied the general elections of February 1988. He was released around 20 March 1988, after having addressed a letter to President A. Diouf about his allegedly arbitrary

[2] The author, in a letter dated 10 August 1992, admits to having broken windows in the building of the Senegalese Embassy in Banjul.

detention. On 6 April 1988, he was re-arrested, and after six days spent in a police lock-up, indicted on 12 April 1988. On 18 April 1988, he was released by decision of the Tribunal régional of Dakar.[3]

7.6 The author reaffirms that he was placed once more in custody in 1990; he claims that he was arrested at the border and transferred to Dakar, where he was detained by agents of the Ministry of the Interior. He was booked and made to sign a statement (procès-verbal) on 12 July 1990, which accused him, inter alia, of offences against State security. He ignores why he was released on the same day.

7.7 Finally, the author affirms that he was once more apprehended on 20 July 1992 and detained for several hours. He was allegedly questioned in relation with a manifestation that had taken place in a popular quarter of Dakar. The Government apparently suspects him of sympathizing with the separatist Movement of Casamance's Democratic Forces (Mouvement des forces démocratiques de la Casamance - MFDC) in the South of the country, where separatists have clashed violently with government forces. The author denies any involvement with the Movement and claims that, as a result of constant surveillance by the State party's police and security services, he suffers from nervous disorders.

7.8 The author concludes that the State party's submissions are misleading and tendentious, and affirms that these submissions seek to cover serious and persistent human rights violations in Senegal.

Examination of the merits

8.1 The Human Rights Committee has examined the communication in the light of all the information provided by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

8.2 The Committee notes that the author does not question the legal nature of the charges against him, as described in the State party's submission under article 4, paragraph 2, of the Optional Protocol - he does however reject in general terms the factual accuracy of part of the State party's observations, while some of his statements contain blanket accusations of bad faith on the part of the State party. Conversely, the State party's submission does not address issues under article 19 other than by affirming that the author is adverse to any type of authority, and confines itself to the chronology of administrative and judicial proceedings in the case. Under the circumstances, the Committee has examined whether such information as has been submitted is corroborated by any of the parties' submissions.

8.3 As to the claims of violations of article 9, the Committee notes that, in respect of the author's detention from 1982 to 1986 and in the spring of 1988, the State party has provided detailed information about the charges against the author, their legal qualification, the procedural requirements under the Senegalese Code of Criminal Procedure and the legal remedies available to the author to challenge his detention. The records reveal that these charges were not based, as claimed by the author, on his political activities or upon his expressing opinions hostile to the Senegalese Government. Under the circumstances, it cannot be concluded that the author's arrest and detention were arbitrary or not based "on such grounds and in accordance with such

[3] The decision simply orders the release of the author and eight other co-accused, but is not motivated.

procedure as are established by law". However, there are issues concerning the length of the author's detention, which are considered below (paragraphs 8.6 to 8.8).

8.4 As to the author's alleged detention in 1990, the Committee has taken note of the State party's argument that its records do not reveal that Mr. Koné was again arrested or detained after April 1988. As the author has not corroborated his claim by further information, and given that the copies of the medical reports he refers to in support of his claim of ill-treatment pre-date the alleged date of his arrest (6 July 1990), the Committee concludes that the claim of a violation of article 9 in relation to the events in July 1990 has not been sufficiently corroborated.

8.5 Similarly, the State party has denied that the author was arrested for the expression of his political opinions or because of his political affiliations and the author has failed to adduce material to buttress his claim to this effect. Nothing in the material before the Committee supports the claim that the author was arrested or detained on account of his participation in demonstrations against the regime of President Diouf or because of his presumed support for the Movement of Casamance's Democratic Forces. On the basis of the material before it, the Committee is of the opinion that there has been no violation of article 19.

8.6 The Committee notes that the author was first arrested on 15 January 1982 and released on 9 May 1986; the length of his detention, four years and almost four months, is uncontested. It transpires from the State party's submission that no trial date was set throughout this period, and that the author was released provisionally, pending trial. The Committee recalls that under article 9, paragraph 3, anyone arrested or detained on a criminal charge shall be brought promptly before a judge ... and shall be entitled to trial within a reasonable time or to release. What constitutes "reasonable time" within the meaning of article 9, paragraph 3, must be assessed on a case-by-case basis.

8.7 A delay of four years and four months, during which the author was kept in custody (considerably more taking into account that the author's guilt or innocence had not yet been determined at the time of his provisional release on 9 May 1986), cannot be deemed compatible with article 9, paragraph 3, in the absence of special circumstances justifying such delay, such as that there were, or had been, impediments to the investigations attributable to the accused or to his representative. No such circumstances are discernible in the present case. Accordingly, the author's detention was incompatible with article 9, paragraph 3. This conclusion is supported by the fact that the charges against the author in 1982 and in 1988 were identical, whereas the duration of the judicial process on each occasion differed considerably.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal a violation of article 9, paragraph 3, of the Covenant.

10. The Committee is of the view that Mr. Famara Koné is entitled, under article 2, paragraph 3 (a), of the Covenant, to a remedy, including appropriate compensation. The State party is under an obligation to ensure that similar violations do not occur in the future.

11. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine

whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views.

B. Communication No. 400/1990; Darwinia R. Mónaco v. Argentina (Views adopted on 3 April 1995, fifty-third session)

Submitted by:	Darwinia Rosa Mónaco de Gallicchio, on her behalf and on behalf of her granddaughter Ximena Vicario [represented by counsel]
Victims:	The author and her granddaughter
State party:	Argentina
Date of communication:	2 April 1990 (initial submission)
Date of decision on admissibility:	8 July 1992

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 3 April 1995,

Having concluded its consideration of Communication No. 400/1990 submitted to the Human Rights Committee by Darwinia Rosa Mónaco de Gallicchio, on her behalf and on behalf of her granddaughter Ximena Vicario, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication, their counsel and the State party,

Adopts its Views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Darwinia Rosa Mónaco de Gallicchio, an Argentine citizen born in 1925, currently residing in Buenos Aires. She presents the communication on her own behalf and on behalf of her granddaughter, Ximena Vicario, born in Argentina on 12 May 1976 and 14 years of age at the time of submission of the communication. She claims that they are victims of violations by Argentina of articles 2, 3, 7, 8, 9, 14, 16, 17, 23, 24 and 26 of the International Covenant on Civil and Political Rights. She is represented by counsel. The Covenant and the Optional Protocol entered into force for Argentina on 8 November 1986.

Facts as submitted by the author

2.1 On 5 February 1977, Ximena Vicario's mother was taken with the then nine-month-old child to the headquarters of the Federal Police (Departamento Central de la Policía Federal) in Buenos Aires. Her father was apprehended in the city of Rosario on the following day. The parents subsequently disappeared, and although the National Commission on Disappeared Persons investigated their case after December 1983, their whereabouts were never established. Investigations initiated by the author herself finally led, in 1984, to locating Ximena Vicario, who was then residing in the home of a nurse, S. S., who claimed to have been taking care of the child after her birth. Genetic blood tests (histocompatibilidad) revealed that the child was, with a probability of 99.82 per cent, the author's granddaughter.

2.2 In the light of the above, the prosecutor ordered the preventive detention

of S. S., on grounds that she was suspected of having committed the offences of concealing the whereabouts of a minor (ocultamiento de menor) and the forgery of documents, in violation of articles 5, 12, 293 and 146 of the Argentine Criminal Code.

2.3 On 2 January 1989, the author was granted "provisional" guardianship of the child; S. S., however, immediately applied for visiting rights, which were granted by order of the Supreme Court on 5 September 1989. In this decision, the Supreme Court also held that the author had no standing in the proceedings about the child's guardianship since, under article 19 of law 10.903, only the parents and the legal guardian have standing and may directly participate in the proceedings.

2.4 On 23 September 1989, the author, basing herself on psychiatric reports concerning the effects of the visits of S. S. on Ximena Vicario, requested the court to rule that such visits should be discontinued. Her action was dismissed on account of lack of standing. On appeal, this decision was upheld on 29 December 1989 by the Cámara Nacional de Apelaciones en lo Criminal y Correccional Federal of Buenos Aires. With this, the author submits, available and effective domestic remedies have been exhausted. She adds that it would be possible to file further appeals in civil proceedings, but submits that these would be unjustifiably prolonged, to the extent that Ximena Vicario might well reach the age of legal competence by the time of a final decision. Furthermore, until such time as legal proceedings in the case are completed, her granddaughter must continue to bear the name given to her by S. S.

Complaint

3.1 The author claims that the judicial decisions in the case violate article 14 (bis) of the Argentine Constitution, which guarantees the protection of the family, as well as articles 23 and 24 of the Covenant. It is further submitted that S. S.'s regular visits to the child entail some form of "psycho-affective" involuntary servitude in violation of article 15 of the Argentine Constitution and article 8 of the Covenant. The fact that the author is denied standing in the guardianship proceedings is deemed to constitute a violation of the principle of equality before the law, as guaranteed by article 16 of the Argentine Constitution and articles 14 and 26 of the Covenant.

3.2 The author also claims a violation of the rights of her granddaughter, who she contends is subjected to what may be termed psychological torture, in violation of article 7 of the Covenant, every time she is visited by S. S. Another alleged breach of the Covenant concerns article 16, under which every person has the right to recognition as a person before the law, with the right to an identity, a name and a family: that Ximena Vicario must continue to bear the name given to her by S. S. until legal proceedings are completed is said to constitute a violation of her right to an identity. Moreover, the uncertainty about her legal identity has prevented her from obtaining a passport under her real name.

3.3 The author submits that the forced acceptance of visits from S. S. violates her granddaughter's rights under article 17, which should protect Ximena Vicario from arbitrary interference with her privacy. Moreover, the author contends that her own right to privacy is violated by the visits of S. S., and by her exclusion from the judicial proceedings over the guardianship of Ximena Vicario. Article 23, which protects the integrity of the family and of children, is allegedly violated in that Ximena Vicario is constantly exposed to, and kept in, an ambiguous psychological situation.

State party's observations and author's comments

4.1 The State party, after recapitulating the chronology of events, concedes that with the dismissal of the author's appeal on 29 December 1989, the author has, in principle, complied with the requirements of article 5, paragraph 2 (b), of the Optional Protocol. Nevertheless, it draws attention to the inherent "provisional character" of judicial decisions in adoption and guardianship proceedings; such decisions may be, and frequently are, questioned either through the appearance of new circumstances and facts or the re-evaluation of circumstances by the competent authorities seized of the matter.

4.2 In the author's case, the State party notes, new factual and legal circumstances have come to light which will require further judicial proceedings and decisions; the latter in turn may provide the author with an effective remedy. Thus, a complaint was filed on 13 February 1990 in the Federal Court of First Instance by the Federal Prosecutor charged with the investigation of the cases of the children of disappeared persons; the case was registered under case file A-56/90. On 16 September 1990, the Prosecutor submitted a report from a professor of juvenile clinical psychology of the University of Buenos Aires, which addressed the impact of the visits from S. S. on the mental health of Ximena Vicario; the report recommended that the visiting rights regime should be reviewed.

4.3 The State party further indicates that an action initiated by the author had been pending before the civil court in the province of Buenos Aires (Juzgado en lo Civil No. 10 del Departamento Judicial de Morón), with a view to declaring the adoption of Ximena Vicario by S. S. invalid. On 9 August 1991, the Juzgado en lo Civil No. 10 held that Ximena Vicario's adoption and her birth inscription as R.P.S. were invalid. The decision is on appeal before the Supreme Court of the province of Buenos Aires.

4.4 Finally, the State party notes that criminal proceedings against S. S. remain pending, for the alleged offences of falsification of documents and kidnapping of a minor. A final decision in this matter has not been taken.

4.5 The State party concludes that, in the light of the provisional nature of decisions in guardianship proceedings, it is important to await the outcome of the various civil and criminal actions pending in the author's case and that of Ximena Vicario, as this may modify the author's and Ximena Vicario's situation. Accordingly, the State party requests the Committee to decide that it would be inappropriate to adjudicate the matter under consideration at this time.

4.6 In respect of the alleged violations of the Argentine Constitution, the State party affirms that it is beyond the Committee's competence to evaluate the compatibility of judicial decisions with domestic law and that this part of the communication should be declared inadmissible.

5.1 In her comments, the author contends that no new circumstances have arisen that would justify a modification of her initial claims submitted to the Committee. Thus, her granddaughter continues to receive regular visits from S. S. and the civil and criminal proceedings against the latter have not shown any notable progress. The author points out that, by the spring of 1991, the criminal proceedings in case A-62/84 had been pending for over six years at first instance; as any judgement could be appealed to the Court of Appeal and the Supreme Court, the author surmises that Ximena Vicario would reach legal age (18 years) without a final solution to her, and the author's, plight. Therefore, the judicial process should be deemed to have been "unreasonably

prolonged".

5.2 The author contends that the Supreme Court's decision denying her standing in the judicial proceedings binds all other Argentine tribunals and therefore extends the violations suffered by her to all grandparents and parents of disappeared children in Argentina. In support of her contention, she cites a recent judgement of the Court of Appeal of La Plata, concerning a case similar to hers. These judgements, in her opinion, have nothing "provisional" about them. In fact, the psychological state of Ximena Vicario is said to have deteriorated to such an extent that, on an unspecified date, a judge denied S. S. the month of summer vacation with Ximena Vicario she had requested; however, the judge authorized S. S. to spend a week with Ximena Vicario in April 1991. The author concludes that she should be deemed to have complied with the admissibility criteria of the Optional Protocol.

Committee's decision on admissibility

6.1 During its forty-fifth session the Committee considered the admissibility of the communication. The Committee took note of the State party's observations, according to which several judicial actions which potentially might provide the author with a satisfactory remedy were pending. It noted, however, that the author had availed herself of domestic appeals procedures, including an appeal to the Supreme Court of Argentina, and that her appeals had been unsuccessful. In the circumstances, the author was not required, for purposes of article 5, paragraph 2 (b), of the Optional Protocol, to re-petition the Argentine courts if new circumstances arose in the dispute over the guardianship of Ximena Vicario.

6.2 In respect of the author's claims under articles 2, 3, 7, 8 and 14, the Committee found that the author had failed to substantiate her claims, for purposes of admissibility.

7. On 8 July 1992 the Human Rights Committee decided that the communication was admissible in so far as it might raise issues under articles 16, 17, 23, 24 and 26 of the Covenant.

Author's and State party's further submissions on the merits

8.1 By note verbale of 7 September 1992, the State party forwarded the text of the decision adopted on 11 August 1992 by the Cámara de Apelación en lo Civil y Comercial Sala II del Departamento Judicial de Morón, according to which the nullity of Ximena Vicario's adoption was affirmed.

8.2 By note verbale of 6 July 1994, the State party informed the Committee that S. S. had appealed the nullity of the adoption before the Supreme Court of the province of Buenos Aires and that Ximena Vicario had been heard by the court.

8.3 With regard to the visiting rights initially granted to S. S. in 1989, the State party indicates that these were terminated in 1991, in conformity with the express wishes of Ximena Vicario, then a minor.

8.4 With regard to the guardianship of Ximena Vicario, which had been granted to her grandmother on 29 December 1988, the Buenos Aires Juzgado Nacional de Primera Instancia en lo Criminal y Correccional terminated the regime by decision of 15 June 1994, bearing in mind that Ms. Vicario had reached the age of 18 years.

8.5 In 1993 the Federal Court issued Ximena Vicario identity papers under that name.

8.6 As to the criminal proceedings against S. S., an appeal is currently pending.

8.7 In the light of the above, the State party contends that the facts of the case do not reveal any violation of articles 16, 17, 23, 24 or 26 of the Covenant.

9.1 In her submission of 10 February 1993, the author expressed her concern over the appeal lodged by S. S. against the nullity of the adoption and contends that this uncertainty constitutes a considerable burden to herself and to Ximena Vicario.

9.2 In her submission of 3 February 1995, the author states that the Supreme Court of the province of Buenos Aires has issued a final judgement confirming the nullity of the adoption.

Committee's Views on the merits

10.1 The Human Rights Committee has considered the merits of the communication in the light of all the information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol. It bases its Views on the following considerations.

10.2 With regard to an alleged violation of article 16 of the Covenant, the Committee finds that the facts before it do not sustain a finding that the State party has denied Ximena Vicario recognition as a person before the law. In fact, the courts of the State party have endeavoured to establish her identity and issued her identity papers accordingly.

10.3 As to Darwinia Rosa Mónaco de Gallicchio's claim that her right to recognition as a person before the law was violated, the Committee notes that, although her standing to represent her granddaughter in the proceedings about the child's guardianship was denied in 1989, the courts did recognize her standing to represent her granddaughter in a number of proceedings, including her suit to declare the nullity of the adoption, and that she was granted guardianship over Ximena Vicario. While these circumstances do not raise an issue under article 16 of the Covenant, the initial denial of Mrs. Mónaco's standing effectively left Ximena Vicario without adequate representation, thereby depriving her of the protection to which she was entitled as a minor. Taken together with the circumstances mentioned in paragraph 10.5 below, the denial of Mrs. Mónaco's standing constituted a violation of article 24 of the Covenant.

10.4 As to Ximena Vicario's and her grandmother's right to privacy, it is evident that the abduction of Ximena Vicario, the falsification of her birth certificate and her adoption by S. S. entailed numerous acts of arbitrary and unlawful interference with their privacy and family life, in violation of article 17 of the Covenant. The same acts also constituted violations of article 23, paragraph 1, and article 24, paragraphs 1 and 2, of the Covenant. These acts, however, occurred prior to the entry into force of the Covenant and

of the Optional Protocol for Argentina on 8 November 1986,[4] and the Committee is not in a position ratione temporis to emit a decision in their respect. The Committee could, however, make a finding of a violation of the Covenant if the continuing effects of those violations were found themselves to constitute violations of the Covenant. The Committee notes that the grave violations of the Covenant committed by the military regime of Argentina in this case have been the subject of numerous proceedings before the courts of the State party, which have ultimately vindicated the right to privacy and family life of both Ximena Vicario and her grandmother. As to the visiting rights initially granted to S. S., the Committee observes that the competent courts of Argentina first endeavoured to determine the facts and balance the human interests of the persons involved and that in connection with those investigations a number of measures were adopted to give redress to Ximena Vicario and her grandmother, including the termination of the regime of visiting rights accorded to S. S., following the recommendations of psychologists and Ximena Vicario's own wishes. Nevertheless, these outcomes appear to have been delayed by the initial denial of standing of Mrs. Mónaco to challenge the visitation order.

10.5 While the Committee appreciates the seriousness with which the Argentine courts endeavoured to redress the wrongs done to Ms. Vicario and her grandmother, it observes that the duration of the various judicial proceedings extended for over 10 years, and that some of the proceedings have not yet been completed. The Committee notes that in the meantime Ms. Vicario, who was 7 years of age when found, reached the age of maturity (18 years) in 1994, and that it was not until 1993 that her legal identity as Ximena Vicario was officially recognized. In the specific circumstances of this case, the Committee finds that the protection of children stipulated in article 24 of the Covenant required the State party to take affirmative action to grant Ms. Vicario prompt and effective relief from her predicament. In this context, the Committee recalls its General Comment on article 24,[5] in which it stressed that every child has a right to special measures of protection because of his/her status as a minor; those special measures are additional to the measures that States are required to take under article 2 to ensure that everyone enjoys the rights provided for in the Covenant. Bearing in mind the suffering already endured by Ms. Vicario, who lost both of her parents under tragic circumstances imputable to the State party, the Committee finds that the special measures required under article 24, paragraph 1, of the Covenant were not expeditiously applied by Argentina, and that the failure to recognize the standing of Mrs. Mónaco in the guardianship and visitation proceedings and the delay in legally establishing Ms. Vicario's real name and issuing identity papers also entailed a violation of article 24, paragraph 2, of the Covenant, which is designed to promote recognition of the child's legal personality.

10.6 As to an alleged violation of article 26 of the Covenant, the Committee concludes that the facts before it do not provide sufficient basis for a finding that either Ms. Vicario or her grandmother were victims of prohibited discrimination.

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

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[4] See the Committee's decision on admissibility concerning Communication No. 275/1988, S. E. v. Argentina, declared inadmissible ratione temporis on 26 March 1990, para. 5.3.

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

is of the view that the facts which have been placed before it reveal a violation by Argentina of article 24, paragraphs 1 and 2, of the Covenant.

11.2 In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author and her granddaughter with an effective remedy, including compensation from the State for the undue delay of the proceedings and resulting suffering to which they were subjected. Furthermore, the State party is under an obligation to ensure that similar violations do not occur in the future.

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

12. With reference to the violations of the Covenant which occurred prior to 8 November 1986, the Committee encourages the State party to persevere in its efforts to investigate the disappearance of children, determine their true identity, issue them with identity papers and passports under their real names and grant appropriate redress to them and their families in an expeditious manner.

C. Communication No. 447/1991; Leroy Shalto v. Trinidad and Tobago (Views adopted on 4 April 1995, fifty-third session)

Submitted by: Leroy Shalto [represented by counsel]

Victim: The author

State party: Trinidad and Tobago

Date of communication: 16 July 1989 (initial submission)

Date of decision on admissibility: 17 March 1994

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 4 April 1995,

Having concluded its consideration of Communication No. 447/1991 submitted to the Human Rights Committee by Mr. Leroy Shalto under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts its Views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Leroy Shalto, a citizen of Trinidad and Tobago, at the time of submission of the communication awaiting execution at the State Prison of Port of Spain. He claims to be the victim of a violation of the International Covenant on Civil and Political Rights by Trinidad and Tobago, without specifying which provisions of the Covenant he considers to have been violated.

Facts as submitted by the author

2.1 The author was arrested and charged with the murder of his wife, Rosalia, on 28 September 1978. On 26 November 1980, he was found guilty as charged and sentenced to death. On 23 March 1983, the Court of Appeal quashed the conviction and sentence and ordered a retrial. At the conclusion of the retrial, on 26 January 1987, the author was again convicted of murder and sentenced to death. On 22 April 1988, the Court of Appeal dismissed his appeal; a subsequent petition for special leave to appeal to the Judicial Committee of the Privy Council was dismissed on 9 November 1989. On 2 December 1992, the author's death sentence was commuted to one of life imprisonment.

2.2 The evidence relied on by the prosecution during the trial was that, on 28 September 1978, following a dispute between the author and his wife in the store where she worked, the author took out a gun, aimed at his wife and shot her while she was walking away from him. Several eyewitnesses to the incident gave testimony during the trial.

2.3 In a written statement, given to the police after his arrest and duly signed by the author, the author says that he was in the store, talking to his wife, when he saw a man that he thought was police constable E. behind a refrigerator in the store. He pulled out a gun and his wife started to run in

the man's direction. The author fired a shot, thereby hitting his wife. During the trial, the author claimed that he had signed the written statement under duress, while he was suffering from a leg injury sustained when he was arrested. He claimed that the part of the statement that related to the incident at the store was incorrect and fabricated by the police. After a voir dire, however, the judge admitted the statement as evidence.

2.4 In an unsworn statement during the trial, the author testified that he and his wife had separated about a month prior to the incident and that on the day in question he went to her to inquire about their two children. He added that he also wanted to ask her about a police revolver that he had found in a clothes basket at his home. After a short conversation, his wife told him that the children were not his and that "this policeman" (apparently constable E.) was a better man than he. The author then became angry and took out the revolver which he had found at home. His wife attempted to get hold of the revolver and during the struggle that ensued the weapon was discharged and she was fatally wounded. The author further stated that prior to the incident he had been harassed by police constable E., who had wrongfully arrested him two days before.

Complaint

3.1 The author claims that his retrial in January 1987 was unfair in that the trial judge, when directing the jury in respect of each of the three different versions of what had happened, misdirected the jury by stating that, in law, "words alone cannot amount to provocation", thereby depriving him of the possibility of a verdict of manslaughter based on provocation. In this context, the author submits that, in 1985, by virtue of an amendment of the Offences against the Person Act, the law in Trinidad and Tobago was amended with regard to the issue of provocation, and from then on required that the issue of provocation be left to the jury. It appears from documentation provided by the author, however, that the law applies only to trials in which an indictment was issued after 21 May 1985 and is therefore not applicable to the author's case.

3.2 Although the author does not invoke the specific articles of the Covenant, the delay in the author's retrial appears to raise issues under article 9, paragraph 3, and article 14, paragraph 3 (c).

State party's observations and author's comments thereon

4.1 The State party, by its submission of 30 January 1992, refers to the jurisprudence of the Committee, which holds that it is a matter for the appellate courts of States parties to the Covenant and not for the Committee to evaluate facts and evidence placed before domestic courts and to review the interpretation of domestic laws by those courts. It also refers to the Committee's jurisprudence that it is for the appellate courts and not for the Committee to review specific instructions to the jury by the trial judge, unless it is apparent that the instructions to the jury were clearly arbitrary or tantamount to a denial of justice or that the judge manifestly violated his obligation of impartiality.

4.2 The State party argues that the facts as submitted by the author do not reveal that the judge's instructions to the jury suffered from such defects. It therefore contends that the communication is inadmissible under article 3 of the Optional Protocol.

5. In his comments on the State party's submission, the author requests the

Committee to take into account the fact that he has spent more than 16 years in prison, the last six under sentence of death.

Committee's decision on admissibility

6. At its fiftieth session, the Committee considered the admissibility of the communication. It noted that, despite a specific request, the State party had failed to provide additional information about the delay between the Court of Appeal's decision of 23 March 1983 to order a retrial and the start of the retrial on 20 January 1987. The Committee considered that this delay might raise issues under article 9, paragraph 3, and article 14, paragraph 3 (c), of the Covenant, which should be considered on the merits. Consequently, on 17 March 1994, the Committee declared the communication admissible in this respect.

Issues and proceedings before the Human Rights Committee

7.1 The Committee has considered the communication in the light of all the information provided by the parties. It notes with concern that, following the transmittal of the Committee's decision on admissibility, no further information has been received from the State party clarifying the matter raised by the present communication. The Committee recalls that it is implicit in article 4, paragraph 2, of the Optional Protocol, that a State party examine in good faith all the allegations brought against it, and that it provide the Committee with all the information at its disposal. In the light of the failure of the State party to cooperate with the Committee on the matter before it, due weight must be given to the author's allegations, to the extent that they have been substantiated.

7.2 The Committee notes that the information before it shows that the Court of Appeal, on 23 March 1983, quashed the author's conviction for murder and ordered a retrial, which started on 20 January 1987 and at the conclusion of which he was found guilty of murder. The author remained in detention throughout this period. The Committee recalls that article 14, paragraph 3 (c), of the Covenant prescribes that anyone charged with a criminal offence has the right to be tried without undue delay, and that article 9, paragraph 3, provides further that anyone detained on a criminal charge shall be entitled to trial within a reasonable time or release. The Committee concludes that a delay of almost four years between the judgement of the Court of Appeal and the beginning of the retrial, a period during which the author was kept in detention, cannot be deemed compatible with the provisions of article 9, paragraph 3, and article 14, paragraph 3 (c), of the Covenant, in the absence of any explanations from the State party justifying the delay.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 9, paragraph 3, and article 14, paragraph 3 (c), of the International Covenant on Civil and Political Rights.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy. The Committee has noted that the State party has commuted the author's death sentence and recommends that, in view of the fact that the author has spent over 16 years in prison, the State party consider the author's early release. The State party is under an obligation to ensure that similar violations do not occur in the future.

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

D. Communication No. 453/1991; A. R. and M. A. R. Coeriel v. the Netherlands (Views adopted on 31 October 1994, fifty-second session)[6]

Submitted by:	A. R. Coeriel and M. A. R. Aurik [represented by counsel]
Victims:	The authors
State party:	The Netherlands
Date of communication:	14 January 1991 (initial submission)
Date of decision on admissibility:	8 July 1993

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 October 1994,

Having concluded its consideration of Communication No. 453/1991 submitted to the Human Rights Committee by A. R. Coerieland M. A. R. Aurik under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication, their counsel and the State party,

Adopts its Views under article 5, paragraph 4, of the Optional Protocol.

1. The authors of the communication are A.R. Coeriel and M.A.R. Aurik, two Dutch citizens residing in Roermond, the Netherlands. They claim to be victims of a violation by the Netherlands of articles 17 and 18 of the International Covenant on Civil and Political Rights.

Background

2.1 The authors have adopted the Hindu religion and state that they want to study for Hindu priests ('pandits') in India. They requested the Roermond District Court (arrondissements Rechtbank) to change their first names into Hindu names, in accordance with the requirements of their religion. This request was granted by the Court on 6 November 1986.

2.2 Subsequently, the authors requested the Minister of Justice to have their surnames changed into Hindu names. They claimed that for individuals wishing to study and practice the Hindu religion and to become Hindu priests, it is mandatory to adopt Hindu names. By decisions of 2 August and 14 December 1988 respectively, the Minister of Justice rejected the authors' request, on the ground that their cases did not meet the requirements set out in the 'Guidelines for the change of surname' (Richtlijnen voor geslachtsnaamwijziging 1976). The decision further stipulated that a positive decision would have been justified only by exceptional circumstances, which were not present in the authors' cases. The Minister considered that the authors' current surnames did not constitute an

[6] The text of individual opinions from Mr. N. Ando and Mr. K. Herndl is appended to the Views.

obstacle to undertake studies for the Hindu priesthood, since the authors would be able to adopt the religious names given to them by their Guru upon completion of their studies, if they so wished.

2.3 The authors appealed the Minister's decision to the Council of State (Raad van State), the highest administrative tribunal in the Netherlands and claimed, inter alia, that the refusal to allow them to change their names violated their freedom of religion. On 17 October 1990, the Council dismissed the authors' appeals. It considered that the authors had not shown that their interests were such that it justified the changing of surnames where the law did not provide for it. In the opinion of the Council, it was not shown that the authors' surnames needed to be legally changed to give them the chance to become Hindu priests; in this connection, the Council noted that the authors were free to use their Hindu surnames in public social life.

2.4 On 6 February 1991, the authors submitted a complaint to the European Commission of Human Rights. On 2 July 1992, the European Commission declared the authors' complaint under articles 9 and 14 of the Convention inadmissible as manifestly ill-founded, as they had not established that their religious studies would be impeded by the refusal to modify their surnames.

Complaint

3. The authors claim that the refusal of the Dutch authorities to have their current surnames changed prevents them from furthering their studies for the Hindu priesthood and therefore violates article 18 of the Covenant. They also claim that said refusal constitutes unlawful or arbitrary interference with their privacy.

State party's observations and the authors' comments thereon

4.1 By submission of 7 July 1991, the State party replies to the Committee's request under rule 91 of the rules of procedure to provide observations relevant to the question of the admissibility of the communication in so far as it might raise issues under articles 17 and 18 of the Covenant.

4.2 The State party submits that Dutch law allows the change of surnames for adults in special circumstances, namely when the current surname is indecent or ridiculous, so common that it has lost its distinctive character or, in cases of Dutch citizens who have acquired Dutch nationality by naturalization, not Dutch-sounding. The State party submits that outside these categories, change of surname is only allowed in exceptional cases, where the refusal would threaten the applicant's mental or physical well-being.

4.3 With regard to Dutch citizens belonging to cultural or religious minority groups, principles have been formulated for the change of surname. One of these principles states that a surname may not be changed if the requested new name would carry with it cultural, religious or social connotations.

4.4 The State party submits that the authors in the present case have been Dutch citizens since birth and grew up in a Dutch cultural environment. Since the authors' request to change their surnames had certain aspects comparable to those of religious minorities, the Minister of Justice formally sought an opinion from the Minister of Internal Affairs. This opinion was unfavourable to the authors, as the new names requested by them were perceived as having religious connotations.

4.5 The State party states that the authors are free to carry any name they wish in public social life, as long as they do not carry a name that belongs to someone else without the latter's permission. The State party submits that it respects the authors' religious convictions and that they are free to manifest their religion. The State party further contends that the fact that the authors allegedly are prevented from following further religious studies in India because of their Dutch names, cannot be attributed to the Dutch Government, but is the consequence of requirements imposed by Indian Hindu leaders.

4.6 As regards the authors' claim under article 17 of the Covenant, the State party contends that the authors have not exhausted domestic remedies in this respect, since they did not argue before the Dutch authorities that the refusal to have their surnames changed constituted an unlawful or arbitrary interference with their privacy.

4.7 In conclusion, the State party argues that the communication is inadmissible as being incompatible with the provisions of the Covenant. It further argues that the authors have failed to advance a claim within the meaning of article 2 of the Optional Protocol.

5.1 In their reply to the State party's submission, the authors emphasize that it is mandatory to have a Hindu surname when one wants to study for the Hindu priesthood and that no exceptions to this rule are made. In this connection, they submit that if the surname is not legally changed and appears on official identification documents, they cannot become legally ordained priests. In support of their argument, the authors submit declarations made by two pandits in England and by the Swami in New Delhi.

5.2 One of the authors, Mr. Coeriel, further submits that, although a Dutch citizen by birth, he grew up in Curaçao, the United States of America and India, and is of Hindu origin, which should have been taken into account by the State party when deciding on his request to have his surname changed.

5.3 The authors maintain that their right to freedom of religion has been violated, because as a consequence of the State party's refusal to have their surnames changed, they are now prevented from continuing their study for the Hindu priesthood. In this context, they also claim that the State party's rejection of their request constitutes an arbitrary and unlawful interference with their privacy.

Committee's decision on admissibility

6.1 During its forty-eighth session, the Committee considered the admissibility of the communication. With regard to the authors' claim under article 18 of the Covenant, the Committee considered that the regulation of surnames and the change thereof was eminently a matter of public order and restrictions were therefore permissible under paragraph 3 of article 18. The Committee, moreover, considered that the State party could not be held accountable for restrictions placed upon the exercise of religious offices by religious leaders in another country. This aspect of the communication was therefore declared inadmissible.

6.2 The Committee considered that the question whether article 17 of the Covenant protects the right to choose and change one's own name and, if so, whether the State party's refusal to have the authors' surnames changed was arbitrary should be dealt with on the merits. It considered that the authors had fulfilled the requirement under article 5, paragraph 2 (b), of the Optional Protocol, noting that they had appealed the matter to the highest administrative

tribunal and that no other remedies remained. On 8 July 1993, the Committee therefore declared the communication admissible in so far as it might raise issues under article 17 of the Covenant.

State party's submission on the merits and the authors' comments thereon

7.1 The State party, by submission of 24 February 1994, argues that article 17 of the Covenant does not protect the right to choose and change one's surname. It refers to the travaux préparatoires, in which no indication can be found that article 17 should be given such a broad interpretation, but on the basis of which it appears that States should be given considerable freedom to determine how the principles of article 17 should be applied. The State party also refers to the Committee's General Comment on article 17, in which it is stated that the protection of privacy is necessarily relative. Finally, the State party refers to the Committee's prior jurisprudence[7] and submits that, whenever the intervention of authorities was legitimate according to domestic legislation, the Committee has only found a violation of article 17 when the intervention was also in violation of another provision of the Covenant.

7.2 Subsidiarily, the State party argues that the refusal to grant the authors a formal change of surname was neither unlawful nor arbitrary. The State party refers to its submission on admissibility and submits that the decision was taken in accordance with the relevant Guidelines, which were published in the Government Gazette of 9 May 1990 and based on the provisions of the Civil Code. The decision not to grant the authors a change of surname was thus pursuant to domestic legislation and regulations.

7.3 As to a possible arbitrariness of the decision, the State party observes that the regulations referred to in the previous paragraph were issued precisely to prevent arbitrariness and to maintain the necessary stability in this field. The State party contends that it would create unnecessary uncertainty and confusion, in both a social and administrative sense, if a formal change of name could be effected too easily. In this connection, the State party invokes an obligation to protect the interests of others. The State party submits that in the present case, the authors failed to meet the criteria that would allow a change in their surname and that they wished to adopt names which have a special significance in Indian society. "Granting a request of this kind would therefore be at odds with the policy of the Netherlands Government of refraining from any action that could be construed as interference with the internal affairs of other cultures". The State party concludes that, taking into account all interests involved, it cannot be said that the decision not to grant the change of name was arbitrary.

8. In their comments on the State party's submission, the authors contest the State party's view that article 17 does not protect their right to choose and change their own surnames. They argue that the rejection of their request to have their surnames changed, deeply affects their private life, since it prevents them from practising as Hindu-priests. They claim that the State party should have provided in its legislation for the change of name in situations similar to that of the authors, and that the State party should have taken into account the consequences of the rejection of their request.

9.1 During its fifty-first session, the Committee began its examination of the

[7] See the Committee's Views with regard to Communication No. 35/1978 (Aumeeruddy-Cziffra v. Mauritius, Views adopted on 9 April 1981) and Communication No. 74/1980 (Estrella v. Uruguay, Views adopted on 29 March 1983).

merits of the communication and decided to request clarifications from the State party with respect to the regulations governing the change of names. The State party, by submission of 3 October 1994, explains that the Dutch Civil Code provides that anyone desiring a change of surname can file a request with the Minister of Justice. The Code does not specify in what cases such a request should be granted. The ministerial policy has been that a change of surname can only be allowed in exceptional cases. In principle, a person should keep the name which (s)he acquires at birth, in order to maintain legal and social stability.

9.2 To prevent arbitrariness, the policy with respect to the change of surname has been made public by issuing "Guidelines for the change of surname". The State party recalls that the guidelines indicate that a change of surname will be granted when the current surname is indecent or ridiculous, so common that it has lost its distinctive character or is not Dutch-sounding. In exceptional cases, the change of surname can be authorized outside these categories, for instance in cases where the denial of the change of surname would threaten the applicant's mental or physical well-being. A change of surname could also be allowed if it would be unreasonable to refuse the request, taking into account the interests of both the applicant and the State. The State party emphasizes that a restrictive policy with regard to the change of surname is necessary in order to maintain stability in society.

9.3 The Guidelines also contain rules for the new name which an applicant will carry after a change of surname has been allowed. In principle, a new name should resemble the old name as much as possible. If a completely new name is chosen, it should be a name which is not yet in use, which sounds Dutch and which does not give rise to undesirable associations (for instance, a person would not be allowed to choose a surname which would falsely give the impression that he belongs to the nobility). As regards foreign surnames, the Government's policy is that it does not wish to interfere with the law of names in other countries, nor does it wish to appear to interfere with cultural affairs of another country. This means that the new name must not give the false impression that the person carrying the name belongs to a certain cultural, religious or social group. In this sense, the policy with regard to foreign names is similar to the policy with regard to Dutch names.

9.4 The State party submits that the applicant's request is heard by the Minister of Justice, who then adopts his decision in the matter. If the decision is negative, the applicant can appeal to the independent judiciary. All decisions are being taken in accordance to the policy as laid down in the Guidelines. This policy is departed from in rare cases only, in order to prevent arbitrariness.

9.5 As regards the present case, the State party explains that the authors' request for a change of surname was refused, because it was found that no reasons existed to allow an exceptional change of surname outside the criteria laid down in the Guidelines. In this context, the State party argues that it has not been established that the authors cannot follow the desired religious education without a change of surname. Moreover, the State party argues that, even if a change of surname would be required, this condition is primarily a consequence of rules established by the Hindu-religion, and not a consequence of the application of the Dutch law of names. The State party also indicates that the desired names would identify the authors as members of a specific group in Indian society, and are therefore contrary to the policy that a new name should not give rise to cultural, religious or social associations. According to the State party, the names also conflict with the policy that new names should be

Dutch-sounding.

Issues and proceedings before the Human Rights Committee

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

10.2 The first issue to be determined by the Committee is whether article 17 of the Covenant protects the right to choose and change one's own name. The Committee observes that article 17 provides, inter alia, that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence. The Committee considers that the notion of privacy refers to the sphere of a person's life in which he or she can freely express his or her identity, be it by entering into relationships with others or alone. The Committee is of the view that a person's surname constitutes an important component of one's identity and that the protection against arbitrary or unlawful interference with one's privacy includes the protection against arbitrary or unlawful interference with the right to choose and change one's own name. For instance, if a State were to compel all foreigners to change their surnames, this would constitute interference in contravention of article 17. The question arises whether the refusal of the authorities to recognize a change of surname is also beyond the threshold of permissible interference within the meaning of article 17.

10.3 The Committee now proceeds to examine whether in the circumstances of the present case the State party's dismissal of the authors' request to have their surnames changed amounted to arbitrary or unlawful interference with their privacy. It notes that the State party's decision was based on the law and regulations in force in the Netherlands, and that the interference can therefore not be regarded as unlawful. It remains to be considered whether it is arbitrary.

10.4 The Committee notes that the circumstances under which a change of surname will be recognized are defined narrowly in the Guidelines and that the exercise of discretion in other cases is restricted to exceptional cases. The Committee recalls its General Comment on article 17, in which it observed that the notion of arbitrariness "is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances". Thus, the request to have one's change of name recognized can only be refused on grounds that are reasonable in the specific circumstances of the case.

10.5 In the present case, the authors' request for recognition of the change of their first names to Hindu names in order to pursue their religious studies had been granted in 1986. The State party based its refusal of the request also to change their surnames on the grounds that the authors had not shown that the changes sought were essential to pursue their studies, that the names had religious connotations and that they were not "Dutch sounding". The Committee finds the grounds for so limiting the authors' rights under article 17 not to be reasonable. In the circumstances of the present case, the refusal of the authors' request was therefore arbitrary within the meaning of article 17, paragraph 1, of the Covenant.

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

is of the view that the facts before it disclose a violation of article 17 of the Covenant.

12. Pursuant to article 2 of the Covenant, the State party is under an obligation to provide Mr. Aurik and Mr. Coeriel with an appropriate remedy and to adopt such measures as may be necessary to ensure that similar violations do not occur in the future.

13. The Committee would wish to receive information, within 90 days, on any relevant measures taken by the State party in respect of the Committee’s Views.

Appendix

Individual opinions concerning the Committee's Views

1. Individual opinion by Mr. Nisuke Ando (dissenting)

I do not share the State party's contention that, in examining a request to change one's family name, elements such as the name's "religious connotations" or "non-Dutch sounding" intonation should be taken into consideration. However, I am unable to concur with the Committee's Views on this case for the following three reasons:

(a) Despite the authors' allegation that the requested change of the authors' family name is an essential condition for them to practice as Hindu priest, the State party argues that it has not been established that the authors cannot follow the desired religious education without the change of surname (see paragraph 9.5), and, apparently on the basis of that argument, the authors' claim has been rejected by the European Commission of Human Rights. Since the Committee is not in the possession of any information other than the authors' allegation for the purpose of ascertaining the relevant facts, I cannot conclude that the change of their family names is an essential condition for them to practice as Hindu priests.

(b) Article 18 of the Covenant protects the right to freedom of religion and article 17 guarantees everyone's right to the protection of the law against "arbitrary or unlawful interference with his privacy". However, in my opinion, it may be doubted whether the right to the protection of one's privacy combined with the freedom of religion automatically entails "the right to change one's family name". Surnames carry important social and legal functions to ascertain one's identity for various purposes such as social security, insurance, license, marriage, inheritance, election and voting, passport, tax, police and public records and so on. In fact, the Committee recognizes that "the regulation of surnames and the change thereof was essentially a matter of public order and restrictions were therefore permissible under paragraph 3 of article 18" (see paragraph 6.1). Moreover, it is not impossible to argue that the request to change one's family name is a form of manifestation of one's religion, which is subject to the restrictions enumerated in paragraph 3 of article 18.

(c) I do not consider that a family name belongs to an individual person alone, whose privacy is protected under article 17. In Western society a family name may be regarded only as an element to ascertain one's identity, thus replaceable with other means of identification such as a number or a cipher. However, in other parts of the world, names have a variety of social, historical and cultural implications, and people do attach certain values to their names. This is particularly true with family names. Thus, if a member of a family changes his or her family name, it is likely to affect other members of the family as well as values attached thereto. Therefore, it is difficult for me to conclude that the family name of a person belongs to the exclusive sphere of privacy protected under article 17.

2. Individual opinion by Mr. Kurt Herndl (dissenting)

I regret that I am unable to concur in the Committee's finding that by refusing to grant the authors a change of surname, the Dutch authorities breached article 17 of the Covenant.

(a) The State party's action seen from the general content and scope of article 17

Article 17 is one of the more enigmatic provisions of the Covenant. In particular, the term "privacy" would seem to be open to interpretation. What does privacy really mean?

In his essay on "Global protection of Human Rights - Civil Rights", Lillich calls privacy "a concept to date so amorphous as to preclude its acceptance into customary international law".[8] He adds, however, that in determining the meaning of privacy, stricto sensu, limited help can be obtained from European Convention practice. And there he mentions that, inter alia, "the use of name" was suggested as being part of the concept of privacy. This is, by the way, a quote taken from Jacobs, who, with reference to the similar provision of the European Convention (article 8), asserts that "the organs of the Convention have not developed the concept of privacy".[9]

What is true for the European Convention is equally true for the Covenant. In his commentary on the Covenant, Nowak states that article 17 was the subject of virtually no debate during its drafting and that the case law on individual communications is of no assistance in ascertaining the exact meaning of the word.[10]

It is therefore not without reason that the State party argues that article 17 would not necessarily cover the right to change one's surname (see para. 7.1 of the Views).

Nor has the Committee itself really clarified the notion of privacy in its General Comment on article 17, where it actually refrains from defining that notion. In its General Comment, the Committee attempts to define all the other terms used in article 17 such as "family", "home", "unlawful" and "arbitrary". It further refers to the protection of personal "honour" and "reputation" also mentioned in article 17, but it leaves open the definition of the main right enshrined in that article, i.e. the right to "privacy". While it is true that the Committee, in its General Comment, refers in various instances to "private life" and gives examples of cases in which States must refrain from interfering with specific aspects of private life, the question whether the name of a person is indeed protected by article 17 and, in particular, whether in addition there is a right to change one's name, is not brought up at all in the General Comment.

I raise the above issues to demonstrate that the Committee is not really on safe legal ground in interpreting article 17 as it does in the present decision. I do, however, concur with the view that one's name is an important part of one's identity, the protection of which is central to article 17. Nowak is therefore correct in saying that privacy protects the special, individual qualities of human existence and a person's identity. Identity obviously includes one's name.[11]

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[8] Richard B. Lillich, Civil Rights, in: Human Rights in International Law, Legal and Policy Issues, ed. Th. Meron (1984), p. 148.

[9] Francis G. Jacobs, The European Convention on Human Rights (1975), p. 126.

[10] Nowak, CCPR Commentary (1993), p. 294, section 15.

[11] Nowak, loc. cit., p. 294, section 17.

What is, therefore, protected by article 17, is an individual's name and not necessarily the individual's desire to change his/her name at whim. The Committee recognizes this, albeit indirectly, in its own decision. The example it refers to in order to illustrate a possible case of State interference with individuals' rights under article 17 in contravention of that article is: "... if a State were to compel all foreigners to change their surnames ..." (see para. 10.2 of the Views). This view is correct, but obviously cannot have a bearing on a case where a State - for reasons of generally applied public policy and in order to protect the existing name of individuals - refuses to allow a change of name requested by an individual.

Nevertheless, it can be argued that it would be appropriate to assume that the term "privacy", inasmuch as it covers, for the purpose of appropriate protection, an individual's name as part of his/her identity, also covers the right to change that name. In that regard one must have a closer look at the "Guidelines for the change of surname" published in the Netherlands Government Gazette in 1990 and applied in the Netherlands as common policy. The Dutch policy is, as a matter of principle, based on the premise that a person should keep the name which he/she acquires at birth in order to maintain legal and social stability (see para. 9.1, last sentence, of the Views). As such, this policy can hardly be seen as violating article 17. On the contrary, it is protective of acquired rights, such as the right to a certain name, and would seem to be very much in line with the precepts of article 17.

A change of name, according to the Guidelines, will be granted when the current name is (a) indecent, (b) ridiculous, (c) so common that it has lost its distinctive character and (d) not Dutch sounding. None of these grounds was invoked by the authors when they asked for authorization to change their surnames.

In accordance with the Guidelines a change of name can also be granted "in exceptional cases", for instance "in cases where the denial of the change of surname would threaten the applicant's mental or physical well-being" or "in cases where the denial would be unreasonable, taking into account the interests of both the applicant and the State" (see para. 9.2 of the Views). As the authors apparently could not show such "exceptional circumstances" in the course of the proceedings before the national authorities, their request was denied. Their assertion that they needed the change of names to become Hindu priests was apparently not substantiated (see the reasoning given by the Council of State in its decision of 17 October 1990, para. 2.3, last sentence, of the Views; see also the inadmissibility decision of the European Commission of Human Rights of 2 July 1992, where the European Commission held that the authors had not established that their religious studies would be impeded by the refusal to modify their surnames; para. 2.4, last sentence, of the Views). Nor can requirements imposed by Indian Hindu leaders be attributed to the Dutch authorities, as confirmed by the Committee in the present case in the framework of its decision on admissibility. There it examined the present communication under the angle of article 18 of the Covenant and came to the conclusion that "a State party to the Covenant cannot be held accountable for restrictions placed upon the exercise of religious offices by religious leaders in another country" (see para. 6.1 of the Views).

The request for a change of name was, therefore, legitimately turned down as the authors could not show the Dutch authorities "exceptional circumstances" as required by law. The refusal cannot be seen as a violation of article 17. To hold otherwise would be tantamount to recognizing that an individual has an almost absolute right to have his/her name changed on request and at whim. For

such a view, in my opinion, one can find no basis in the Covenant.

(b) The State party's action seen from the viewpoint of the criteria for permissible (State) interference in rights protected by article 17

On the assumption that there exists a right of the individual to change his/her name, the question of the extent to which "interference" with that right is still permissible has to be examined (and is, indeed, addressed by the Committee in the present Views).

What then are the criteria laid down for (State) interference? They are two and only two. Article 17 prohibits arbitrary or unlawful interference with one's privacy.

It is obvious that the decision of the Dutch authorities not to grant a change of name cannot, per se, be regarded as constituting "arbitrary or unlawful" interference with the authors' rights under article 17. The decision is based on the law applicable in the Netherlands. Hence it is not unlawful. The Committee itself says so (see para. 10.3 of the Views). The conditions under which a change of name will be authorized in the Netherlands are laid down in generally applicable and published "Guidelines for the change of surname" which, in themselves, are not manifestly arbitrary. These Guidelines have been applied in the present case, and there is no indication that they were applied in a discriminatory fashion. Hence it is equally difficult to call the decision arbitrary. The Committee does so, however, "in the circumstances of the present case" (see para. 10.5 of the Views). To arrive at that finding the Committee introduces a new notion - that of "reasonableness". It finds "the grounds for limiting the authors' rights under article 17 not to be reasonable" (see para. 10.5 of the Views).

The Committee thus attempts to expand the scope of article 17 by adding an element which is not part of that article. The only argument the Committee can adduce in this context is a simple reference (renvoi) to its own General Comment on article 17 where it stated that "even interference provided by law ... should be, in any event, reasonable in the particular circumstances". It is difficult for me to go along with this argumentation and to base on such argumentation a finding that a State party violated this specific provision of the Covenant.

E. Communication No. 464/1991 and Communication 482/1991; G. Peart and A. Peart v. Jamaica (Views adopted on 19 July 1995, fifty-fourth session)

Submitted by:	Garfield Peart and Andrew Peart [represented by counsel]
Victims:	The authors
State party:	Jamaica
Date of communications:	17 July 1991 and 12 November 1991 (initial submissions)
Date of decisions on admissibility:	17 March 1994 and 19 March 1993

A. Decision to deal jointly with two communications

The Human Rights Committee,

Considering that Communication No. 464/1991 and Communication No. 482/1991 refer to closely related events affecting the authors,

Considering further that the two communications can appropriately be dealt with together,

1. Decides, pursuant to rule 88, paragraph 2, of its rules of procedure, to deal jointly with these communications;

2. Further decides that this decision shall be communicated to the State party and the authors of the communications.

B. Views of the Human Rights Committee

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 19 July 1995,

Having concluded its consideration of Communication No. 464/1991 and Communication No. 482/1991, submitted to the Human Rights Committee by Messrs. Garfield Peart and Andrew Peart under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communications, their counsel and the State party,

Adopts its Views under article 5, paragraph 4, of the Optional Protocol.

1. The authors of the communications are Garfield and Andrew Peart, Jamaican citizens, at the time of submission of the communications awaiting execution at

St. Catherine District Prison, Jamaica.[12] They claim to be victims of a violation by Jamaica of articles 2, 6, 7, 9, 10 and 14 of the International Covenant on Civil and Political Rights. They are represented by counsel.

Facts as submitted by the authors

2.1 Andrew Peart was arrested on 14 July 1986 and charged with the murder, on 24 June 1986, of one Derrick Griffiths. Garfield Peart was arrested on 5 March 1987, in connection with the same murder. On 26 January 1988, after a trial lasting six days, the two brothers were convicted and sentenced to death in the Home Circuit Court of Kingston. The Court of Appeal dismissed their appeal on 18 October 1988. On 6 June 1991, the Judicial Committee of the Privy Council dismissed their petition for special leave to appeal. In December 1992, the authors' offence was classified as capital murder under section 7 of the Offences Against the Person (Amendment) Act 1992.

2.2 During the trial, the principal witness for the prosecution, Lowell Walsh, who at the time of the trial was 15 years old, testified that he had been watching a bingo game, around 9 p.m. on 24 June 1986. Among those present was the deceased. According to Walsh, Andrew came up to the group and called Griffiths. Griffiths, Walsh and another person, Horace Walker, together with Andrew then went to the latter's house. On arrival there, Walsh testified that he saw Garfield, whom he had known since childhood, sitting outside in the yard. It was night, and there was no lighting. He then witnessed what appeared to be an ambush; an armed man told Griffiths not to move, Andrew wrestled Griffiths to the ground, while Garfield threatened him with a gun. Walsh and Horace ran indoors to hide. Walsh testified that he heard gunshots and a voice saying "make sure he is dead". Walsh was then discovered by Andrew, who tied him up and threatened him. During a further incident between the two brothers and a newcomer, Walsh managed to escape.

2.3 The authors' defence was based on alibi. Upon his arrest, Garfield had immediately denied involvement and said that he had been at the cinema with friends when the incident took place. At the trial, he made an unsworn statement from the dock, repeating what he had told the arresting officer. He added that, while at the cinema, he had received a message from his child's mother that a shooting had taken place at his house. His alibi was supported by the sworn evidence of Claudette Brown, who said that she had been with the author at the cinema, and by Pamela Walker, who confirmed having given the message to the author at the cinema. In an unsworn statement from the dock, Andrew contended that, on the night of the murder, he was in the company of his girlfriend until 11 p.m., and that he had been framed.

Complaint

3.1 The authors claim that the trial against them was unfair. They point out that they were convicted upon the uncorroborated evidence given by Walsh. They submit that the trial transcript contains a suggestion that the other eyewitness, Walker, was not called because his evidence would not have supported that of Walsh. It is submitted that Walsh made a written statement to the police on the night of the incident which contained material discrepancies from the evidence which he gave at the trial. This statement was not released to the defence, even though under Jamaican law the prosecutor is obliged to provide the defence with a copy of any such statement. During the trial, the authors' lawyer applied to see the original statement, but the judge refused the

[12] On 18 April 1995, the authors' death sentences were commuted.

application. A copy of the statement first came into the possession of the authors' counsel in February 1991. In the statement, Walsh does not identify Garfield as one of the attackers, and mentions another person as the one who shot Griffiths. It is submitted that without hearing evidence as to the contents of the statement the jury was not in a position to give a fair and proper verdict.

3.2 The authors further claim that they were not put on an identification parade, although they had asked for one, and that the judge should therefore have disallowed the dock identification made by Walsh. It is stated that Walsh may have been mistaken in his identification of Garfield as being present because he knew that he lived at the premises.

3.3 The authors further claim that the judge was not impartial, but biased in favour of the prosecution. In this context, it is said that the judge allowed the jury to remain in Court during a submission by Garfield's lawyer of "no case to answer", and the judge then dismissed that submission in the presence of the jury. It is submitted that the jury thereby heard weaknesses and inconsistencies in the arguments which should have been heard by the judge alone, thus prejudicing the jury against the authors.

3.4 The authors also claim that the judge's instructions to the jury were inadequate. In particular, it is alleged that the judge did not give proper instructions with regard to the evaluation of the identification evidence. It is stated that the judge failed to draw the jury's attention to the evidence, given during the trial by the investigating policeman, that it was dark that night, that he needed a lamp to see at the premises and that, in order to make out a man holding a gun in his hand, he would have had to have been very close. In this connection, it is stated that the jury could at first not agree upon a verdict in respect of Garfield and asked for a further direction from the judge as to whether, if they believed that Garfield was present at the premises, they were obliged to come back with a guilty verdict. The judge then simply reminded them of the evidence given by Walsh, without pointing out its weaknesses.

3.5 The authors further claim that they did not have adequate time and facilities for the preparation of their defence and that they did not have the opportunity to examine or have examined the witnesses against them. It is further contended that the failure to obtain the attendance of an expert witness from the Meteorological Office to give evidence rendered the trial unfair. It is submitted that evidence as to the state of the moon on the night of the incident would have assisted the court in deciding how clearly Walsh could have seen the incident.

3.6 Andrew Peart complains that prison officers were present during an interview with his lawyer. This is said to be a breach of the right to unimpeded access to a lawyer.

3.7 Garfield Peart claims that he has been arbitrarily deprived of his liberty, in violation of article 9 of the Covenant, because he was not given a fair trial and has been kept in custody without release on bail.

3.8 Andrew Peart alleges violations of article 9 and paragraph 3 (c) of article 14 of the Covenant, on account of the delays in the judicial proceedings in his case. Thus, he was arrested on 14 July 1986, was not brought before an examining magistrate until 5 March 1987, and was not tried until the end of January 1988. It is submitted that a delay of 18 months between arrest and trial is unreasonable. It is submitted that similar delays occurred between the

dismissal of the authors' appeal and the refusal of leave to appeal by the Judicial Committee, which is mainly attributable to the Jamaican judicial authorities; counsel explains that it was difficult to obtain copies of the deposition and the original statement of Walsh.

3.9 The authors also claim that they are victims of a violation of article 6 of the Covenant, since they have been sentenced to death following a trial which was not in accordance with the provisions of the Covenant. In this connection, reference is made to the Safeguards guaranteeing protection of the rights of those facing the death penalty contained in the annex to Economic and Social Council resolution 1984/50 of 25 May 1984.

3.10 Garfield Peart further claims that his prolonged detention on death row, under degrading conditions, is in violation of articles 7 and 10 of the Covenant. Both authors submit that the conditions in St. Catherine District Prison are hard and inhuman and that they are not being offered treatment aimed at reformation and rehabilitation. It appears from a report prepared by a non-governmental organization that Andrew was injured by prison warders during the riots of May 1990. Garfield refers to an incident on 4 May 1993 when he was badly beaten during the course of an extensive search of the prison, allegedly because his brother Andrew was a witness in a murder case involving some senior warders. All his personal belongings were destroyed. Upon indication of a prison warder, a soldier beat him with a metal detector on his testicles. Later he was taken to the sick bay and given pain killers, but no doctor came to see him. He reported the incident to the acting Superintendent, who, however, disclaimed responsibility. His counsel, in September 1993, wrote to the Jamaican Commissioner of Police, also to no avail. The author states that he has exhausted all domestic remedies in this respect and claims that the remedies of filing a complaint with the Superintendent, the Ombudsman or the Prison Visiting Committee are not effective.

State party's observations on admissibility and authors' comments thereon

4.1 The State party argued that the communications were inadmissible on the grounds of failure to exhaust domestic remedies. The State party argued that it was open to the authors to seek redress for the alleged violations of their rights by way of a constitutional motion.

4.2 As regards the authors' claims under article 10 of the Covenant, the State party noted that the authors had not given any explanation for their contention that the available remedies are not effective and it submitted that the authors had not shown that they had attempted to exhaust domestic remedies in this respect. In addition, the State party argued that the authors also could bring a civil action in order to obtain damages for assault and battery and destruction of property. Moreover, the State party indicated that it was in the process of investigating the incident during which Andrew Peart was injured.

5.1 In their comments on the State party's submission, the authors further stated that they had no means to retain counsel and that legal aid is not made available either for constitutional motions or for civil actions, and that for this reason said remedies were not available to them. As regards the constitutional motion, the authors further referred to the Committee's jurisprudence that a constitutional motion is not an effective remedy.[13]

[13] Reference is made to the Committee's decisions in Communication No. 283/1988 (Aston Little v. Jamaica), Views adopted on 1 November 1991, and Communication No. 230/1987 (Raphael Henry v. Jamaica), Views adopted on 1 November 1991.

Moreover, the authors claimed that, even if the constitutional motion were an available remedy, it would entail an unreasonable prolongation of the application of domestic remedies.

5.2 Garfield Peart explained that in May 1993, he filed a further petition for leave to appeal on the grounds that his continued detention on death row, where he had already been for over five years, constituted cruel and inhuman treatment and that therefore the death sentence against him should not be executed.

Committee's decision on admissibility

6.1 During its forty-seventh and fiftieth sessions, the Committee considered the admissibility of the communications.

6.2 As regards the State party's argument that a constitutional remedy was still open to the authors, the Committee recalled its jurisprudence that for purposes of article 5, paragraph 2 (b), of the Optional Protocol, domestic remedies must be both effective and available. The Committee considered that, in the absence of legal aid, a constitutional motion did not, in the circumstances of the instant cases, constitute an available remedy which needed to be exhausted for purposes of the Optional Protocol.

6.3 The Committee considered inadmissible the part of the authors' claims which related to the instructions given by the judge to the jury with regard to the evaluation of the identification evidence. The Committee reiterated that it was, in principle, for the appellate courts of States parties, and not for the Committee, to review specific instructions to the jury by the judge, unless it was clear that the instructions were arbitrary or amounted to a denial of justice, or that the judge manifestly violated his obligations of impartiality. The material before the Committee did not show that the judge's instructions to the jury in the instant case suffered from such defects.

6.4 The Committee further considered that the authors had failed to substantiate, for purposes of admissibility, their claim that the judge was not impartial and their claim that they did not have adequate time and facilities for the preparation of the defence and no opportunity to cross-examine the witnesses against him. In this context, the Committee noted, from the trial transcript, that the authors' counsel who represented them during the trial and at the appeal, had at no time raised objections and had in fact extensively cross-examined the main prosecution witness.

6.5 The Committee considered that Garfield Peart had not exhausted domestic remedies with regard to his claim that his prolonged detention on death row violated articles 7 and 10 of the Covenant. That part of the communication was therefore inadmissible under article 5, paragraph 2 (b), of the Covenant.

6.6 With regard to Garfield Peart's claim that his continued detention was arbitrary and in violation of article 9 of the Covenant, the Committee noted that he was arrested and charged with the offence of murder, and subsequently was brought to trial, convicted and sentenced. It considered that the author could not claim that he was a victim of a violation of article 9 of the Covenant, and this part of the communication was therefore inadmissible under article 2 of the Optional Protocol.

6.7 The Committee considered that the failure to make available to the defence the content of Walsh's original statement, as well as the unavailability of a material defence witness at the trial might raise issues under article 14,

paragraphs 1 and 3 (e), and that the circumstances in detention might raise issues under articles 7 and 10, which should be examined on the merits. The Committee further considered that Andrew Peart's communication might raise issues under article 9, paragraph 3, and that his claim that he did not have unimpeded access to his lawyer should be examined on the merits.

7. Consequently, the Human Rights Committee decided that the communications were admissible in as much as they appeared to raise issues under articles 7 and 10 and paragraphs 1 and 3 (e) of article 14 of the Covenant, in relation to both authors, and under article 9, paragraph 3, in relation to Andrew Peart.

Post-admissibility submissions from the parties

8. By submission of 20 January 1994, counsel for Andrew Peart states that warders had beaten Andrew with a metal detector on 4 May 1993. Afterwards he was passing blood in his urine and suffering from shoulder injuries, but he did not receive medical treatment. He further states that he was locked in his cell without water until Friday 7 May 1993. Counsel also submits that Andrew has been receiving death threats from warders, allegedly because he testified against one of them before the Court after the death of an inmate in 1989. Counsel provides copies of letters sent to the Parliamentary Ombudsman, the Solicitor General, the Director of Correctional Services and the Minister of Justice and National Security. In reply, counsel received information that the complaint was being investigated by the Inspectorate General of the Ministry of National Security and Justice.

9.1 By submission of 11 November 1994 concerning Garfield Peart's communication, the State party reiterates its opinion that the communication is inadmissible for failure to exhaust domestic remedies. In this context, the State party notes that the author complained about his ill-treatment in prison to the Commissioner of Police, who would have little or no jurisdiction in a matter of this kind. It is submitted that the author should have sought the assistance of the Office of the Ombudsman or should have made a formal complaint to the prison authorities. The State party further states that it has asked the Inspectorate General to investigate the allegations.

9.2 With regard to the claim that article 14, paragraph 1, has been violated because counsel was not allowed to see the original statement of Walsh, the State party submits that there is a duty on the part of Crown Counsel under Jamaican law to inform the defence if there is a material discrepancy between the content of a statement given by a witness to the police and the evidence given by a witness to the defence. The duty to show the statement to the defence depends on the circumstances. The State party submits that under article 17 of the Evidence Act, defence counsel may invite a trial judge to exercise his discretion to require the production of the statement.

9.3 In the present case, the trial judge declined to exercise his discretion. In the opinion of the State party this does not involve a breach of article 14 of the Covenant. Furthermore, the State party submits that the appropriate body for reviewing the exercise of the judge's discretion is the Court of Appeal, which, in the present case, did not take the view that the judge's discretion was wrongly exercised, and neither did the Privy Council.

9.4 With regard to the alleged breach of article 14, paragraph 3 (e), the State party argues that, unless the State by act or omission was responsible for the witness not being available, the State cannot be held accountable for the non-availability of a defence witness.

10.1 In his comments, dated 20 February 1995, counsel for Garfield Peart argues that the Office of the Ombudsman is not a competent authority within the terms of article 2, paragraph 3 (b), of the Covenant. Furthermore, counsel points out that in reply to the complaint made by the author about his treatment in prison, the Commissioner of Police acknowledged receipt of the complaints and advised him that the matter was being referred to the Commissioner of Correctional Services for appropriate action. On 27 June 1994, counsel sent a further letter to the Commissioner of Corrections, but no response has been received to date.

10.2 Counsel maintains that there was a material discrepancy between the original statement of Walsh and his evidence in court of which the defence was not advised and that the failure to produce the original statement resulted in a miscarriage of justice.

Issues and proceedings before the Human Rights Committee

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

11.2 The Committee has noted the State party's argument that the claim with regard to the treatment suffered by Garfield Peart in prison is inadmissible because of failure to exhaust domestic remedies. The Committee has also noted that the author had complained to the acting Superintendent, and that his counsel had made a complaint to the Commissioner of Police and was subsequently informed that the complaint was referred to the Commissioner of Correctional Services for appropriate action. Under the circumstances, the Committee considers that the author and his counsel have shown due diligence in the pursuit of domestic remedies and that there is no reason to review the Committee's decision on admissibility.

11.3 With regard to the authors' claim that the unavailability of the expert witness from the Meteorological Office constitutes a violation of article 14 of the Covenant, the Committee notes that it appears from the trial transcript that the defence had contacted the witness but had not secured his presence in court, and that, following a brief adjournment, the judge then ordered the Registrar to issue a subpoena for the witness and adjourned the trial. When the trial was resumed and the witness did not appear, counsel informed the judge that he would go ahead without the witness. In the circumstances, the Committee finds that the State party cannot be held accountable for the failure of the defence expert witness to appear.

11.4 With regard to the evidence given by the main witness for the prosecution, the Committee notes that it appears from the trial transcript that, during cross-examination by the defence, the witness admitted that he had made a written statement to the police on the night of the incident. Counsel then requested a copy of this statement, which the prosecution refused to give; the trial judge subsequently held that defence counsel had failed to put forward any reason why a copy of the statement should be provided. The trial proceeded without a copy of the statement being made available to the defence.

11.5 From the copy of the statement, which came into counsel's possession only after the Court of Appeal had rejected the appeal and after the initial petition for special leave to appeal to the Judicial Committee of the Privy Council had been submitted, it appears that the witness named another man as the one who shot the deceased, that he implicated Andrew Peart as having had a gun in his hand and that he did not mention Garfield Peart's participation or presence

during the killing. The Committee notes that the evidence of the only eye-witness produced at the trial was of primary importance in the absence of any corroborating evidence. The Committee considers that the failure to make the police statement of the witness available to the defence seriously obstructed the defence in its cross-examination of the witness, thereby precluding a fair trial of the defendants. The Committee finds therefore that the facts before it disclose a violation of article 14, paragraph 3 (e), of the Covenant.

11.6 With regard to the authors' allegations about maltreatment on death row, the Committee notes that the State party has indicated that it would investigate the allegations, but that the results of the investigations have not been transmitted to the Committee. Due weight must therefore be given to the authors' allegations, to the extent that they are substantiated. The Committee notes that the authors have mentioned specific incidents, in May 1990 and May 1993, during which they were assaulted by prison warders or soldiers and, moreover, that Andrew Peart has been receiving death threats. In the Committee's view this amounts to cruel treatment within the meaning of article 7 of the Covenant and also entails a violation of article 10, paragraph 1.

11.7 Andrew Peart has further alleged that he did not have unimpeded access to his lawyer because prison officials were present during an interview. The Committee considers that the author has not substantiated in what way the mere presence of the officers hindered him in preparing his defence and notes in this context that no such claim was advanced before the local courts. The Committee concludes therefore that the facts before it do not disclose a violation of article 14 of the Covenant in this respect. The Committee further considers that the facts of the case do not disclose a violation of article 9.

11.8 The Committee is of the opinion that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is possible, a violation of article 6 of the Covenant. As the Committee noted in its General Comment 6(16), the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that "the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review of conviction and sentence by a higher tribunal".[14] In the present case, since the final sentence of death was passed without due respect for the requirement of fair trial, there has consequently also been a violation of article 6 of the Covenant.

12. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 7, paragraph 1 of article 10 and paragraph 3 (e) of article 14, and consequently of article 6, of the International Covenant on Civil and Political Rights.

13. In capital punishment cases, the obligation of States parties to observe rigorously all the guarantees for a fair trial set out in article 14 of the Covenant admits of no exception. The failure to make the prosecution witness' police statement available to the defence obstructed the defence in its cross-examination of the witness, in violation of article 14, paragraph 3 (e), of the Covenant; thus, Garfield and Andrew Peart did not receive a fair trial within the meaning of the Covenant. Consequently, they are entitled, under article 2,

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[14] See CCPR/C/21/Rev.1, p. 7, para. 7.

paragraph 3 (a), of the Covenant, to an effective remedy. The Committee has taken note of the commutation of the authors' death sentence, but it is of the view that in the circumstances of the case, the remedy should be the authors' release. The State party is under an obligation to ensure that similar violations do not occur in the future.

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

F. Communication No. 473/1991; Isidora Barroso v. Panama (Views adopted on 19 July 1995, fifty-fourth session)

Submitted by: Mrs. Isidora Barroso

Victim: Her nephew, Mario Abel del Cid Gómez

State party: Panama

Date of communication: 24 August 1991 (initial submission)

Date of decision on admissibility: 11 October 1993

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 19 July 1995,

Having concluded its consideration of Communication No. 473/1991 submitted to the Human Rights Committee by Mrs. Isidora Barroso on behalf of her nephew, Mario Abel del Cid Gómez, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts its Views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Isidora Barroso, a Panamanian citizen currently domiciled in the United States of America. She submits the communication on behalf of her nephew, Mario Abel del Cid Gómez, a Panamanian citizen, born in January 1949, and, at the time of submission, detained at a prison in Panama City. The author claims that her nephew is the victim of violations by Panama of article 2, paragraphs 3 to 5 of article 9 and paragraphs 2, 3, 6 and 7 of article 14 of the International Covenant on Civil and Political Rights.

Facts as submitted by the author

2.1 Mario del Cid was arrested on 25 December 1989, several days after the intervention of United States troops in Panama. A career military officer, he had held the post of major in the Panamanian armed forces and allegedly turned himself in to United States troops. The author deduces from this that her nephew should have been treated as a prisoner of war, in accordance with the Geneva Conventions, and accorded the appropriate treatment. On 31 January 1990, he was handed over to the new Government of Panama, which immediately placed him under arrest and brought charges against him on 1 February 1990.

2.2 Early in 1990, Mr. del Cid was publicly associated with the assassination, by a paramilitary group, of a doctor, Hugo Spadafora Franco. The author submits that this charge was wholly unfounded and based on the simple fact that her nephew had been present in the town of Concepción on 13 September 1985, when Mr. Spadafora's body was found. Mrs. Barroso, who qualifies Mr. Spadafora as a guerrillero, notes that newspaper reports stated that her nephew had been implicated in the death of Mr. Spadafora by one Colonel Diaz Herrera, who was himself allegedly implicated in the doctor's death and who has since obtained

political asylum in Venezuela. The author observes that the legislature of Panama, by act deemed unconstitutional, nominated a special prosecutor to investigate Mr. Spadafora's death. The special prosecutor, it is submitted, has displayed a similarly biased attitude vis-à-vis Mr. del Cid.

2.3 On 17 January 1990, a request for habeas corpus was filed on behalf of Mr. del Cid, with a view to securing his release. It allegedly took the Government over one month to reply that it had no idea of Mr. del Cid's whereabouts and that no charges were known to exist against him. His mother subsequently tried to visit him at the Fort Clayton detention facility, where the authorities allegedly denied her access to her son. It is claimed that at Fort Clayton, Mr. del Cid was interrogated on a daily basis, in violation of the Geneva Conventions.

2.4 Since mid-1990, a number of unsuccessful requests for Mr. del Cid's release on bail have been filed by his lawyers. One habeas corpus request was granted by the Superior Tribunal (Tribunal Superior del Tercer Distrito Penal); the special prosecutor, however, appealed, and in August 1990, the Supreme Court reversed the release order. Since that date, the Superior Tribunal has not been willing to grant further requests for bail, for fear of coming into conflict with the Supreme Court's decision. In a letter dated 5 December 1992, Mrs. Barroso affirms that her nephew was "to be set free ... several months ago", but that again the prosecutor appealed the decision.

2.5 Besides the repeated denials of bail, the author claims that her nephew's trial has similarly been postponed on several occasions, for unexplained reasons. Late in 1992, she informed the Committee that her nephew's trial was set for February or March 1993; in April 1993, the court hearing had once again been postponed, according to her, to "June or July 1993". By letter dated 25 June 1993, Mrs. Barroso confirmed that the trial was scheduled to begin on 6 July 1993.

2.6 For Mrs. Barroso, her nephew was used by the Government of Panama as a scapegoat for various unfounded charges. She asserts, for example, that he was accused of being responsible for the disappearance of material worth US$ 35,000 donated by the Panama Canal Commission, and that the Government asked him to pay back $50,000 by way of compensation. She further contends that the State party's authorities restricted Mr. del Cid's contacts with members of his family, denying him, for example, the right to visit his dying mother.

2.7 Furthermore, in late 1991, his wife's telephone was allegedly disconnected without valid reason and Mr. del Cid was unable to talk to his children for a prolonged period of time thereafter. According to Mrs. Barroso, all the charges against her nephew are fabricated. The author refers to what she perceives as the desire of the (then) Government to deny their rights to those individuals in detention who are associated in one way or another with the former regime of General Manuel Noriega.

2.8 By a letter of 26 September 1993, Mrs. Barroso indicates that her nephew was acquitted of the charges against him. She contends, however, that new charges against him have been formulated and are pending, as his acquittal caused considerable public protest. In the circumstances, she requests the Committee to continue consideration of the case.

Complaint

3. It is claimed that the facts outlined above constitute violations of article 9, paragraphs 3 to 5, and paragraphs 2, 3, 6 and 7 of article 14 of the Covenant. In particular, the author contends that her nephew was denied bail arbitrarily and contrary to article 9, paragraph 3, and that he has not been tried without undue delay, as required under article 14, paragraph 3 (c). She finally asserts that the judicial authorities and particularly the office of the special prosecutor have done everything to portray her nephew as guilty, in violation of article 14, paragraph 2.

State party's information and observations

4.1 In its submission under rule 91, the State party submits that the author's allegations are unfounded and that Mr. del Cid's procedural guarantees under Panamanian criminal law have been and are being observed.

4.2 The State party contends that there is no basis for the author's allegation of "political interventionism" in the judicial process and adds that the investigations in the case have produced sufficient evidence about Mr. del Cid's involvement in the death of Mr. Spadafora and that, accordingly, Mr. del Cid's arrest and his detention without bail are compatible with article 9 of the Covenant.

4.3 According to the State party, Mr. del Cid's rights under the Criminal Code, the Code of Criminal Procedure, the Constitution of Panama and other applicable laws have been strictly observed. Such delays as may have occurred are merely attributable to the protracted and thorough investigatory process and the volume of documentary evidence, as well as the fact that apart from Mr. del Cid, nine other individuals were indicted in connection with the death of Mr. Spadafora.

4.4 Finally, the State party is adamant that the rights of the defence have been and are being observed and that Mr. del Cid was represented, at all stages of the procedure, by competent lawyers.

Committee's decision on admissibility

5.1 During its forty-ninth session, the Committee considered the admissibility of the communication. It noted that Mr. del Cid was acquitted of the charges against him, upon conclusion of a trial which had started on 6 July 1993. It observed however that he had been detained for well over three and a half years without bail and that the scheduled date for his trial had been postponed on several occasions. While the State party had pointed to the thoroughness of the investigations, it had failed to explain the delays in pre-trial and judicial proceedings. The Committee considered that a delay of over three and a half years between arrest and trial and acquittal justified the conclusion that the pursuit of domestic remedies had been "unreasonably prolonged" within the meaning of article 5, paragraph 2 (b), of the Optional Protocol.

5.2 The Committee considered that the author had sufficiently substantiated her allegations under articles 9 and 14 and, accordingly, on 11 October 1993, declared the case admissible insofar as it appeared to raise issues under articles 9 and 14 of the Covenant.

State party's observations on the merits and author's comments thereon

6.1 In its submission under article 4, paragraph 2, of the Optional Protocol, the State party reiterates that the author's rights under articles 9 and 14 were respected. It notes that in the trial against 14 ex-military officers accused of involvement in the death of Mr. Spadafora, Mr. del Cid was indicted on charges of participation in and having covered up the crime (partícipe y encubridor). In this case, he was acquitted by a decision of which he was notified on 7 September 1993.

6.2 The State party observes that separate proceedings, filed subsequent to those concerning the death of Mr. Spadafora, are currently before the Superior Tribunal (Tribunal Superior del Segundo Distrito Judicial), where Mr. del Cid faces charges of homicide together with seven other individuals, and notes that a summons to present himself in court (auto de llamamiento) was served on him on 28 July 1993. Mr. del Cid filed grounds of appeal and, according to the State party, the Second Chamber of the Supreme Court is now in the process of deciding on the appeal.

6.3 The State party reiterates that in the criminal proceedings against him, Mr. del Cid has benefited from legal assistance and had lawyers assigned to defend him at all stages of the proceedings.

6.4 The State party submits that it has no knowledge of other criminal charges against Mr. del Cid, with the exception of those mentioned in paragraph 6.2 above, which are related to the death of several individuals who, at the time of their death, were serving prison terms at the penitentiary on the island of Coiba, of which Mr. del Cid, at the material time, was the director.

7.1 In her comments, the author contends that the charges still pending against her nephew related to his alleged activities as director of the Coiba Island penitentiary are fabricated and based on false accusations. She submits, without providing further details, that these charges were dismissed at Penomene City, Panama, but that "someone appealed the case" to cause her nephew further harm.

7.2 The author argues that while her nephew was director of the Coiba Island penitentiary, "he was the only one who made it possible for family members of those detained to be able to visit". He allegedly also allowed the detainees to obtain "raw materials", so as to enable them to produce small objects and sell them. The author places confidence in the magistrate of the Second Chamber of the Supreme Court responsible for the case at the level of the Supreme Court (see para. 6.2 above).

Examination of the merits

8.1 The Human Rights Committee has examined the communication in the light of all the submissions made by the parties. It bases its views on the following considerations. In so doing, it recalls that, during its fifty-third session, it had decided to seek certain clarifications from the State party, which were requested in a note dated 28 April 1995. No reply to this request for clarifications has been received from the State party.

8.2 The Committee has noted the author's claim that her nephew was arrested and detained arbitrarily and that he was denied bail primarily out of "political motives". However, the material before the Committee does not reveal that Mr. del Cid was not detained on specific criminal charges; accordingly, his

detention cannot be qualified as "arbitrary" within the meaning of article 9, paragraph 1. There is further no indication that Mr. del Cid was denied bail without a proper weighing, by the judicial authorities, of the possibility of releasing him on bail; accordingly, there is no basis for a finding of a violation of article 9, paragraph 3. Similar considerations apply to the alleged violation of article 9, paragraph 4: the Superior Tribunal did in fact review the lawfulness of Mr. del Cid's detention.

8.3 The author has alleged a violation of article 14, in particular of paragraphs 2, 3, 6 and 7. On the basis of the material before it, the Committee does not find that the presumption of innocence has been violated in the present case as it relates to the death of Mr. Spadafora: no documentation has been provided which would corroborate the author's claim that the office of the special prosecutor was biased against Mr. del Cid and portrayed him as guilty ab initio: on the contrary, in the proceedings related to the death of Mr. Spadafora, Mr. del Cid was acquitted of the charges against him. Nor is there any indication that his rights under article 14, paragraph 3, were not respected: the State party's contention that he had access to legal advice throughout the proceedings has not been refuted by the author.

8.4 The Committee takes note of the State party's argument that the investigations were necessarily protracted and thorough, given the number of individuals indicted in the context of the assassination of Mr. Spadafora. The author has, on the contrary, pointed to the "political nature" of the proceedings and contends that they were unduly delayed, as her nephew was indicted on 1 February 1990 and not tried until the summer of 1993. The Committee further observes that the State party did not reply to its request of 28 April 1995 for further clarifications on the issue of the length of the proceedings against Mr. del Cid.

8.5 The Committee considers that a delay of over three and a half years between indictment and trial in the present case cannot be explained exclusively by a complex factual situation and protracted investigations. In cases involving serious charges such as homicide or murder, and where the accused is denied bail by the court, the accused must be tried in as expeditious a manner as possible. The burden of proof that there are other factors which might have justified the delays in the present case lies with the State party. As the State party has not replied to the Committee's request for further clarifications on this issue, the Committee has no choice but to conclude that no such other factors did in fact exist, and that Mr. del Cid was not tried without "undue delay", contrary to article 14, paragraph 3 (c), of the Covenant.

8.6 The Committee notes that the proceedings before the Superior Tribunal referred to in paragraphs 6.2 and 7.1 above, relating to Mr. del Cid's activities in the Coiba Island penitentiary, remain pending. As these proceedings were not part of the author's initial complaint and are not covered by the terms of the decision on admissibility of 11 October 1993, the Committee makes no finding in their respect.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 14, paragraph 3 (c), of the Covenant.

10. Under article 2, paragraph 3 (a), of the Covenant, Mr. del Cid is entitled to an effective remedy, including compensation. The State party is under an obligation to ensure that similar violations do not occur in the future.

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

G. Communication No. 493/1992; Gerald J. Griffin v. Spain (Views adopted on 4 April 1995, fifty-third session)

Submitted by: Gerald John Griffin

Victim: The author

State party: Spain

Date of communication: 13 January 1992 (initial submission)

Date of decision on admissibility: 11 October 1993

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 4 April 1995,

Having concluded its consideration of Communication No. 493/1992 submitted to the Human Rights Committee by Gerald John Griffin under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts its Views under article 5, paragraph 4, of the Optional Protocol.

Facts as submitted by the author

1. The author of the communication is Gerald John Griffin, a Canadian citizen born in 1948. At the time of submitting his communication, he was detained at a penitentiary at Vitoria, Spain. He claims to be the victim of violations by Spain of article 7; paragraphs 1 and 2 of article 9 and articles 10, 14, 17 and 26 of the International Covenant on Civil and Political Rights.

2.1 In March 1991, the author and an acquaintance, R. L., started a pleasure journey through Europe. Upon arrival in Amsterdam, they rented a camper. R. L. suggested paying the rent with the author's credit card, as his own account was limited, and said that he would later reimburse the author. In Amsterdam, R. L. introduced the author to another Canadian, I. G, with whom he went off to bars on several occasions, leaving the author behind. One day R. L. and I. G. returned with a different camper, claiming that the first one had broken down.

2.2 I. G. suggested meeting again at Ketama, Morocco, where they could stay at a friend's place. The author and R. L. then drove to Morocco, where they spent five days; the camper was parked in a garage.

2.3 On 17 April 1991, on their way back to the Netherlands, the author and R. L. were arrested by the police of Melilla, Spain. It transpired that R. L., I. G. and his Moroccan friend had concealed 68 kilograms of hashish in the camper. R. L. allegedly confessed his guilt and told the police that the author was innocent. It is submitted that, during the interrogation, the police did not seek the assistance of an interpreter, although the author and R. L. did not speak Spanish and the investigating officers did not speak English. The statements were taken down in Spanish.

2.4 On 18 April 1991, the author and R. L. were brought before an examining magistrate. Upon entering the court room, the interpreter allegedly told the author that R. L. had confessed and had said that the author was innocent. The examining magistrate allegedly stated that if the author had no criminal record over the past five years, he would be released within a few days. The author admitted that, in 1971, he had been convicted for possession of 28 grams of hashish and sentenced to six months suspended imprisonment.

2.5 The author was incarcerated at Melilla. Through the mediation of a prisoner who spoke a little English, the author obtained the services of a barrister and a solicitor. He states that the barrister asked for large sums of money, promising on several occasions that she would return with all the documents pertaining to his case and with an interpreter, so as to prepare his defence in consultation with him. The author notes that she tricked him constantly, assuring him and his relatives that he would be released soon. In spite of her promises, she did not prepare his defence. In this context, the author adds that, two days before the start of the trial, she came to the prison, again without an interpreter. With the assistance of a prisoner who spoke broken English, she told the author to reply with "yes" or "no" to all questions posed during the trial.

2.6 On 28 October 1991, the author and R. L. were tried before the Audiencia Provincial (Sector de Malaga) at Melilla. The author states that the court interpreter spoke only a little English and translated into French, but that neither he nor R. L. had any substantial knowledge of French. The barrister, however, did not raise any objections. During the trial, the judge asked the author whether he had always been accompanying R. L. when he drove the camper. Owing to poor translation of the question, the author misunderstood it and answered in the affirmative.

2.7 The author was sentenced to imprisonment for eight years, four months and one day. He requested his barrister to appeal on his behalf; she first refused, then again requested a large sum of money, upon which the author filed a complaint against her with the bar (Colegio de Abogados) of Melilla.

2.8 On 26 November 1991, riots broke out in the prison of Melilla. Prisoners set fire to the patio and climbed on to the roof. The author explains that as he has a lame leg he could not climb up and, because the guards had locked the door to the main building, he was nearly caught in the fire. He states that, only because he helped to carry a man who appeared to suffer from a heart attack, he was allowed by the guards to leave the patio. After the police intervened with tear-gas and rubber bullets, and the prison authorities promised improvements in the conditions of detention, the situation calmed down. On 28 November 1991, the author was transferred to a prison at Seville.

2.9 On 10 January 1992, the author was informed that a legal aid lawyer had been assigned to him and that an appeal was being filed on his behalf. He states that he made numerous unsuccessful attempts to obtain information about the identity of the lawyer and the date of the hearing of the appeal. On 7 March 1992, he started a hunger strike to enforce his right to a fair trial. He was subsequently transferred to the infirmary of a prison at Malaga. At the end of June 1992, he learned from another lawyer that the Supreme Court had dismissed the appeal on 15 June 1992. According to the author, the Supreme Court did not give reasons for its decision.

2.10 The author states that his health is poor and that he suffers from extreme depressions because of his unfair treatment by the Spanish authorities. He lost

21 kilograms because of his hunger strike and developed pneumonia. In September 1992, he resumed eating, as his hunger strike had not had any effect upon the Spanish authorities.

2.11 Finally, the author submits that he has exhausted all available domestic remedies. In this context, he states that he wrote letters to several instances in Spain, including the Constitutional Court, the Ombudsman (Defensor del Pueblo), the judge and public prosecutor and the Prosecutor General (Fiscal General del Estado). The Constitutional Court reportedly replied that it was unable to assist him, but that his case would be passed on to the Prosecutor General. The latter never replied to the author's letters. The Ombudsman reportedly replied that he could not be of any assistance to him because he was awaiting trial. The author questions the effectiveness of this remedy, as the Ombudsman replied to an inmate of the prison that he was unable to assist him because he (the inmate) had already been sentenced. By a letter of 3 March 1992, the prosecutor informed the author that he would look into the claim of absence of a competent interpreter, but he never received any reply.

Complaint

3.1 The author claims that he has been subjected to cruel, inhuman and degrading treatment and punishment during his incarceration at the prison of Melilla. The living conditions in this prison are said to be "worse than those depicted in the film 'Midnight Express'"; a 500-year-old prison, virtually unchanged, infested with rats, lice, cockroaches and diseases; 30 persons per cell, among them old men, women, adolescents and an eight-month-old baby; no windows, but only steel bars open to the cold and the wind; high incidence of suicide, self-mutilation, violent fights and beatings; human faeces all over the floor as the toilet, a hole in the ground, was flowing over; sea water for showers and often for drink as well; urine-soaked blankets and mattresses to sleep on in spite of the fact that the supply rooms were full of new bed linen, clothes, etc. He adds that he has learned that the prison has been "cleaned up" since the riots, but that he can provide the Committee with a list of witnesses and with a more detailed account of conditions and events in the said prison.

3.2 Concerning article 9, paragraphs 1 and 2, of the Covenant, the author claims that he was arbitrarily arrested and detained since there was no evidence against him. He submits that some people he met in prison and who were charged with a similar offence were either released or acquitted, whereas he was detained in spite of R. L.'s confession and the promise of the examining magistrate to release him if he had no criminal record. He further contends that, as there was no interpreter present at the time of their arrest, he was not informed of the reasons for his arrest and of the charges against him.

3.3 The author claims that, while awaiting trial, he was detained in a cell together with persons convicted of murder, rape, drug trafficking, armed robbery, etc. According to him, there is no distinction between convicted and unconvicted prisoners in Spain. Furthermore, he claims that the Spanish penitentiary system does not provide facilities for reformation and social rehabilitation. In this context, he submits that he, together with an inmate at the Melilla prison, tried to teach reading and writing to some prisoners, but that the prison director did not allow them to do so. Moreover, the prison authorities have ignored all his requests for Spanish grammar books and a dictionary. All this is said to constitute a violation of article 10.

3.4 The author claims that his rights under article 14 of the Covenant have been violated. With regard to unfair trial, he submits that the trial lasted

only 10 minutes, that neither he nor R. L. understood what was going on, and that he was not allowed to give evidence or to defend himself. He points out that neither the judge nor the barrister objected to the incompetence of the interpreter, and that his conviction might be based on the discrepancy between his original statement to the examining magistrate (namely, that he was often left behind by R. L. and the other Canadian and that they once returned with a different camper) and his reply at the trial (his affirmation that he was always accompanying R. L. when the latter drove the camper). The author reiterates that there is no evidence against him. In support of his allegations, he encloses two affidavits of R. L., dated 28 January 1992, concerning the author's innocence and the inadequacy of the interpreter. The author further claims that he has been sentenced to a longer term of imprisonment than Spanish nationals normally are in similar cases.

3.5 As to the preparation of his defence, the author affirms that he has never received a single document pertaining to his case. He notes that R. L. had admitted that he owned the camper, that in Canada he had prepared its roof to conceal the drugs, that it was then shipped to the Netherlands where he and I. G. forged the papers and licence plates using those of the camper rented in Amsterdam and that he had invited the author to join him on the trip merely to make it appear less conspicuous. The author contends that the barrister did not make any efforts to obtain evidence about the veracity of R. L.'s confession and that she never interviewed them in the presence of an interpreter.

3.6 With regard to the appeal, the author submits that the lawyer assigned to him never sought to contact him to discuss the case. It was not until September 1992, three months after the dismissal of the appeal, that he learned the name of the representative. Furthermore, the author submits that he was denied the opportunity to defend himself on appeal, as the hearing was held in his absence.

3.7 The author further contends that the Spanish authorities have interfered with his mail, in violation of article 17. He submits that on several occasions letters addressed to him by friends, family and his lawyer in Canada were either returned to the sender or simply disappeared.

3.8 Finally, the author claims that he is discriminated against by the Spanish authorities. In this context, he submits that he has not been treated in the same manner before the courts as Spanish nationals are treated, for example with regard to facilities to prepare the defence or length of term of imprisonment. He further submits that the prison authorities have refused to provide him with work (which makes it possible to have the sentence reduced by one day for every day of work), whereas Spanish prisoners are able to obtain work upon request.

State party's admissibility information and observations and author's comments

4.1 In its submissions dated 28 October 1992 and 22 March 1993, the State party argues that the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol, as the author has failed to apply for amparo before the Constitutional Court of Spain.

4.2 With regard to the claims of ill-treatment in prison, the State party refers to the Ombudsman's 1991 report on ill-treatment in Spanish prisons. It highlights the efforts made by the Director of Penitentiary Affairs, as well as by the prison officials, to eliminate instances of ill-treatment in prison. The Ombudsman points out that his conclusions are based not only on complaints received or periodic visits to the penitentiaries, but also on the results of

investigations into such complaints. He reports that, in 1991, his office received only a few sufficiently substantiated complaints about ill-treatment; two of them were immediately investigated by the penitentiary administration. He concludes that the Director of Penitentiary Affairs has thoroughly cooperated in the investigation of complaints transmitted to his office by the Ombudsman and that the penitentiary administration has always performed its duty rapidly and efficiently, by investigating the events complained of, adopting adequate remedies wherever the allegations could be proved and adopting protective measures for disciplinary proceedings. The State party submits that the Ombudsman received several letters from the author, that each letter was examined by the Ombudsman and that on each occasion the author was informed about the Ombudsman's findings.

4.3 The State party notes that, on 31 March 1992, the author was transferred to a prison at Malaga, where he received the necessary medical attention and where he had numerous interviews with the sociologist and legal adviser, who informed him on the possibilities of his defence. Furthermore, the medical report indicates that the author did not begin a genuine hunger strike but limited himself to selective nutrition, as a result of which he lost 7 kilograms, and that no serious complications arose. Finally, the State party points out that the author did not initiate proceedings with regard to the alleged inhuman conditions of detention.

4.4 With regard to the author's remaining complaints, the State party submits copies of the relevant documents and argues that:

- There was sufficient evidence against the accused for the police to arrest and detain them. In this context, the State party refers to the documents and photographs relating to the quantity of drugs found and their value and to the camper;

- Neither the author nor R. L. made any statements to the police. When arrested, they were informed of the charges against them and of their rights, under article 520 of the Code of Criminal Procedure. Although a lawyer was assigned to them, the author and R. L. indicated that they did not want to make any statements in the absence of an interpreter;

- While represented by a lawyer and assisted by an interpreter, the author made the following deposition during the preliminary hearing: "that he had no knowledge of the drugs which were hidden in the camper, that he was travelling with his friend, that they made a stop at Ketama where they stayed for five days, that the camper was parked in a garage near to the house, the camper from the other Canadian whom they had met in Amsterdam";

- R. L.'s deposition reads as follows: "that he went to Morocco with the intention to pick up the hashish and to transport it to Canada, that a third person had contacted him for this purpose, that he did not know this person's name, ..., that Gerald John Griffin did not know of the hashish, that he only accompanied him for the purpose of tourism, that they spent seven days in Ketama, doing sightseeing during those seven days, that they were lodged at the house of a Moroccan friend, who was a friend of his Canadian friend (I. G.), ...";

- Upon inquiry, the examining magistrate was informed by Interpol in

Canada that the author had a prior criminal record for holding and distributing narcotics, for which he had been sentenced to six months' (suspended) imprisonment;

- Likewise, a letter, dated 9 October 1991, from the Solicitor-General of Canada, addressed to the author's counsel in Canada, belonged to the documents bearing on the case; in that letter, counsel was informed that the author had been granted a pardon under the provisions of the Criminal Records Act;

- According to forensic experts at Melilla, drug traffickers generally claim that one of them is innocent. In evaluating the evidence in drug trafficking offences, the courts do not only consider the statements made by the accused, but also the quantity of drugs involved and the hiding-place;

- The alleged inadequate preparation and conduct of the author's defence at the trial cannot be attributed to the State party, as the barrister was privately retained;

- Besides, the State party submits, the barrister's professional skills are reflected in her letter of 22 November 1991, addressed to the Colegio de Abogados of Melilla. In that letter, the barrister states that, on 30 October 1991, she informed the author of his sentence, and of the possibility of appealing to the Supreme Court by way of request for cassation, either with the assistance of a solicitor and barrister assigned to him by the judicial authorities, or by retaining them privately. The author instructed her to prepare and file a petition for leave to appeal, which she set out to do on 2 November 1991. However, on 8 November 1991, the author informed her of his decision to retain another lawyer for the purpose of the appeal. By registered letter of 11 November 1991, she pointed out to the author that he had to grant power of attorney to any lawyer retained by him. She further informed him that she would forward all documents in his case to his representatives, once he had provided her with their names and addresses, and once he had paid the outstanding fees. On 21 November 1991, she was notified that the Audiencia de Malaga considered that the appeal had been prepared and that it summoned the defence to appear before the Supreme Court in 15 days. She then immediately called the author and again pointed out to him the urgency of empowering the solicitor and barrister who would represent him. Upon contacting the barrister who, according to the author, had agreed to represent him, she was told that he was not in charge of the appeal;

- The State party points out that, subsequently, the author's barrister, concerned about the expiration of the statute of limitations and about the fact that the author had not taken any measures to secure legal representation, requested the Colegio to intervene;

- Upon instructions of the Colegio, the author's solicitor requested the Supreme Court, on 29 November 1991, to assign legal assistance to the author and to stay the proceedings in the intervening period. The State party submits that it was only after this intervention that the author himself requested legal aid;

- Both the accused made statements during the trial, while assisted by

an interpreter and a lawyer. No complaints were ever received about the competence of the court interpreter who is assigned to the tribunals of Melilla;

- It is noted that the judge asked R. L. and not the author whether he was always accompanied by the latter, whereupon R. L. answered "that the author accompanied him during the whole trip". According to the State party, the judges concerned never directed any question to the author;

- On 15 June 1992, the Supreme Court dismissed the author's appeal; the written judgement was issued on 3 July 1992. The State party submits that the author was adequately represented on appeal; in this context, it refers to the grounds of appeal. It further submits that the barrister who was assigned to the author and who filed the grounds of appeal received a telephone call from another lawyer, who requested permission, on behalf of the Canadian Embassy, to conduct the author's defence before the Supreme Court. By a letter of 15 June 1992, the barrister granted permission.

4.5 The State party reiterates that the author has not applied for amparo before the Constitutional Court, although it was adequately explained to him how to proceed.

5. In his comments, the author reiterates that he has exhausted domestic remedies and encloses letters addressed to him by the Ombudsman, and the Registrars of the Supreme Court and the Constitutional Court. The Ombudsman, by letters of 11 December 1991 and 7 April 1992, informed the author of his right to legal representation and that he could not be of any assistance to him while the judicial proceedings were still pending in his case. By a letter of 5 February 1992, the Registrar of the Constitutional Court informed the author about the requirements for the recourse of amparo, among which were:

- Enclosure of a copy of the decision from which leave to appeal is sought;

- Exhaustion of all remedies available concerning the protection of the constitutional rights invoked;

- The request for amparo should be made within 20 days following the notification of the decision which allows no further appeal;

- Representation by a solicitor and barrister; a request for legal aid should be accompanied by a detailed report of the facts on which the recourse of amparo is based.

The author was further informed that his letter would be sent to the Prosecutor-General who would take action in his case, if deemed necessary.

Committee's decision on admissibility

6.1 At its forty-ninth session, the Committee considered the admissibility of the communication. It noted the State party's contention that the communication was inadmissible because the author had failed to apply for amparo before the Constitutional Court, and had not fulfilled the procedural requirements that must be met if he wanted to avail himself of this remedy. It noted the author's allegation, which remained uncontested, that, after two years of imprisonment,

he had not received any of the court documents in his case, which are a requisite for an appeal to the Constitutional Court. The Committee further observed that the Supreme Court had dismissed the author's appeal on 15 June 1992, that he was informally notified of that decision at the end of June 1992, and that the lawyer who had been appointed to him had not contacted him to date. In the circumstances of the case, the Committee did not consider that a petition for amparo before the Constitutional Court was a remedy available to the author. Furthermore, taking into account the fact that the statutory limits for filing a petition for amparo had expired, this remedy was no longer available. It was not apparent that the responsibility for this situation was attributable to the author. Therefore, the Committee did not find itself precluded from considering the communication under article 5, paragraph 2 (b), of the Optional Protocol.

6.2 The Committee considered that the author had failed to substantiate, for purposes of admissibility, his claims under article 9, paragraph 1, and articles 17 and 26 of the Covenant. Accordingly, the Committee found this part of the communication inadmissible under article 2 of the Optional Protocol.

6.3 The Committee noted that the author had invoked article 7 in respect of his allegations concerning the events and conditions of the prison of Melilla. It found, however, that the facts as described by the author fell rather within the scope of article 10.

6.4 On 11 October 1993, the Committee declared the communication admissible insofar as it appeared to raise issues under article 9, paragraph 2, and articles 10 and 14 of the Covenant.

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

7.1 In its submission under article 4, paragraph 2, of the Optional Protocol, dated 31 May 1994, the State party indicates that, on 30 April 1993, the author was deported, under the 1983 Strasbourg Convention on the Deportation of Convicted Persons, to serve the rest of his sentence in Canada; he was released on parole on 8 August 1994. The State party refers to its earlier submissions and adds the following information.

7.2 Regarding the claim under article 9, paragraph 2, the State party points out that the author and R. L. were arrested on 17 April 1991, at 11.30 p.m., after the police had searched their camper and discovered the drugs. The police reports (which were also signed by the lawyer who was assigned to the author and R. L. for purposes of an interrogation) reveal that the police refrained from taking statements from both men, because there was no interpreter present at the police station. The State party further points out that, the following morning, both the accused were brought before an examining magistrate, while represented by a lawyer and assisted by an interpreter, and having been informed of the charges against him and of his rights, the author made the deposition referred to in paragraph 4.4. above. On the same day (18 April 1991), the examining magistrate ordered the author's provisional detention. The State party concludes that the author was arrested in accordance with the law and benefited from all procedural guarantees and that the depositions show the thoroughness with which the arrest was carried out, as well as the promptness with which the author was brought before a judge.

7.3 The State party submits that the author's claims under article 10 are unsubstantiated. In respect of the author's allegation that there is no distinction between convicted and unconvicted prisoners in Spain, the State

party refers to articles 15 and 16 of the General Penitentiary Act, and submits that a distinction is made between accused and convicted persons and, within the category of convicted persons, between first offenders and recidivists. In particular, article 16 of the Act provides that, upon entering a penitentiary, prisoners will be immediately separated, taking into account sex, age, antecedents, physical and mental state and, when it concerns a convicted person, the requirements of the treatment.

7.4 The State party refers to the reports of two doctors who examined the author in the prison of Malaga, and who observed that the author did not begin a genuine hunger strike but limited himself to selective nutrition, as a result of which he lost 7 kilograms, and that no serious complications arose. It further refers to article 134 of the General Penitentiary Act in which the right of prisoners to complain about the treatment or about the prison regime in general is laid down, as well as the procedure and the persons to whom the complaint should be directed. The State party points out that there is no record of any complaint submitted by the author about his treatment in prison or the prison regime; on the contrary, it is submitted, the author has benefited from a reduction of his sentence by doing cleaning work, and he has received all necessary attention. The State party concludes that there is no evidence in support of the author's claims, and that he has failed to exhaust domestic remedies in respect of his claims under article 10 of the Covenant. It appears from the enclosures that, on 3 July 1993, a new penitentiary was opened at Melilla, and that the old prison, dating from 1885, was closed.

7.5 As to the author's claims under article 14, the State party reiterates that the Audiencia Provincial in Melilla has never received a complaint about the competence of Mr. Hassan Mohatar, the court interpreter. Furthermore, the State party points to the deposition which the author made on 18 April 1991 before the examining magistrate, and submits that he did not mention anything about the fact that he was left behind by R. L. and the other Canadian or that they once returned with a different camper. It further reiterates that, during the trial, the author was not asked anything, and if there was any question from the judge, it was directed to R. L., who replied "that Gerald accompanied him all the time during the trip".[15]

7.6 The State party submits that the decision of the Audiencia Provincial is based on applicable law, and that it is for the courts to evaluate the facts and evidence. It points out that the Supreme Court reviewed the author's case and came to the following conclusion: "... the facts are fully established during the trial hearing, which is accepted by the appellant himself, who admits that he was arrested by the Guardia Civil in the port of Melilla, when he was going, in the company of the other accused, in a vehicle which had 68 kilograms of hashish ... hidden in its roof, ... coming from Morocco. From this, and from the accused's statements and the examination of their passports, it can be deduced that they undertook the trip together and that they obtained [the drugs] in Morocco for the subsequent traffic ... Thus, evidence for the charge exists ..., which detracts from the presumption of innocence (invoked by the author). The appellant seeks to give his own evaluation of the evidence, which comes exclusively within the competence of the tribunal ...".

7.7 Furthermore, the Supreme Court rejected the author's complaint that the court of first instance had committed an error in the evaluation of the evidence on the basis of documents that were submitted in the proceedings; in this

[15] In this context, the State party refers to the handwritten annotations on the Acta del Jucio (oral).

context, the author referred to his and his co-accused's depositions, to the letters they had addressed to the examining magistrate and to the record of the trial hearing. In declaring the claim inadmissible, the Supreme Court reiterated its jurisprudence that: "depositions of witnesses or accused are nothing else but personal documentary evidence and therefore cannot serve to challenge in cassation an error of fact flowing from documents that answer for the trial judge's mistake; and the letters referred to, ..., are rather a statement ..., which lacks the guarantees of the presence of a judge, registrar and defence attorney; especially when a statement is given during the preliminary inquiry and subsequently during the [trial] hearing". The State party concludes that the author, advised by counsel, did not apply for amparo against the Supreme Court's decision.

8.1 The author affirms that, on 8 August 1994, he was released on parole in Canada. He states that he is still willing to stand a re-trial in Spain to prove his innocence, provided that a competent lawyer, interpreter and impartial observers are present. For his comments on the State party's submissions, he refers to his previous letters in which he pointed out, inter alia, that pursuant to article 4, paragraph 2, of the Optional Protocol, the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its authorities.

8.2 In this context, he submitted that the State party did not address his specific complaints, but was refuting his allegations in a general manner and that he could not be expected "as a prisoner illegally tried, imprisoned and convicted in the face of overwhelming evidence to my innocence, with no resources, to provide proof, most of which is in the hands of the very people and organisations I am denouncing". He challenged the State party to invite the Committee to visit the prison of Melilla, to provide the Committee with the interpreter's titulo de interprete, and the date of qualification. In this context, he reiterated that the interpreter himself had indicated that he had not been appointed to interpret in English, but in Arabic and French. The author further requested the State party to make available to him all court documents relating to his case.

Examination of the merits

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

9.2 With regard to the author's claim that, as there was no interpreter present at the time of his arrest, he was not informed of the reasons for his arrest and of the charges against him, the Committee notes from the information before it that the author was arrested and taken into custody at 11:30 p.m. on 17 April 1991, after the police, in the presence of the author, had searched the camper and discovered the drugs. The police reports further reveal that the police refrained from taking his statement in the absence of an interpreter, and that the following morning the drugs were weighed in the presence of the author. He was then brought before the examining magistrate and, with the use of an interpreter, he was informed of the charges against him. The Committee observes that, although no interpreter was present during the arrest, it is wholly unreasonable to argue that the author was unaware of the reasons for his arrest. In any event, he was promptly informed, in his own language, of the charges held against him. The Committee therefore finds no violation of article 9, paragraph 2, of the Covenant.

9.3 As to the author's claim of a violation of article 10, on account of his conditions of detention, the Committee notes that they relate primarily to his incarceration at the prison of Melilla, where he was held from 18 April to 28 November 1991. Mr. Griffin has provided a detailed account about those conditions (see para. 3.1 above). The State party has not addressed this part of the author's complaint, confining itself to his treatment in the prison of Malaga, where he was transferred after his detention at Melilla, and to setting out relevant legislation. This apart, it has merely indicated that the old prison of Melilla was replaced by a modern penitentiary in the summer of 1993. In the absence of State party information on the conditions of detention at the prison of Melilla in 1991, and in the light of the author's detailed account of those conditions and their effect on him, the Committee concludes that Mr. Griffin's rights under article 10, paragraph 1, have been violated during his detention from 18 April to 28 November 1991.

9.4 The Committee has also noted the author's claim that, while awaiting trial at Melilla prison, he was detained together with convicted persons. The State party has merely explained that relevant Spanish legislation (articles 15 and 16 of the General Penitentiary Act) provides for the separation of accused and convicted persons (see para. 7.3 above), without making clear whether the author was in fact separated from convicted prisoners while awaiting trial. The Committee notes that the author has sufficiently substantiated this allegation and concludes that there has been a violation of article 10, paragraph 2, in his case.

9.5 The Committee notes that the author claims that he did not receive a fair trial because of the incompetence of the court interpreter and the judge's failure to intervene in this respect, and that he was convicted because of poor translation of a question, as a result of which his statement during the trial differed from his original statement to the examining magistrate. The Committee notes, however, that the author did not complain about the competence of the court interpreter to the judge, although he could have done so. In the circumstances, the Committee finds no violation of article 14, paragraph 3 (f), of the Covenant.

9.6 The author further claims that there was no evidence against him. The Committee recalls that it is generally for the appellate courts of States parties to the Covenant to evaluate the facts and evidence in a particular case. It is not, in principle, for the Committee to review the facts and evidence presented to, and evaluated by, the domestic courts, unless it can be ascertained that the proceedings were manifestly arbitrary, that there were procedural irregularities amounting to a denial of justice, or that the judge manifestly violated his obligation of impartiality.

9.7 The Committee notes that the author was assisted by a lawyer and interpreter when he made the statement to the examining magistrate set out in paragraph 4.4 above. It further notes that the author has signed the statement, which makes no reference to the fact that he was often left behind by R. L. and the other Canadian and that they once returned with a different camper. Furthermore, it transpires from the Acta del Juicio that the author merely stated during the trial hearing that he had no knowledge of the drugs concealed in the camper, and that, as submitted by the State party, R. L. testified that the author accompanied him during the whole trip. In the Committee's opinion, the author's claim that he was not allowed to give evidence or that he had inadequate interpretation during the hearing is not sufficiently substantiated. He was given the opportunity to make a statement and it was R. L. and not the author himself who made the disputed affirmation.

9.8 As to the author's complaint about inadequate preparation and conduct of his defence at trial, the Committee notes that the barrister was privately retained by R. L. and the author, who granted power of attorney to her on 26 April 1991. It further notes from the information submitted by the author, that he was in constant contact with his lawyer in Canada and with the Canadian Embassy in Madrid, and that he had been assigned an attorney for the purpose of the preliminary hearing. If the author was dissatisfied with the performance of the barrister, he could have requested the judicial authorities to assign a lawyer to him or he could have requested his Canadian lawyer to assist him in obtaining the services of another lawyer. Instead, the author continued to retain the services of the said barrister after his trial and conviction, until 8 November 1991. The Committee considers that, in the circumstances, any complaints, whether verified or not, about the author's barrister's conduct prior to or during the trial cannot be attributed to the State party. Accordingly, the Committee finds no violation of article 14 of the Covenant in this respect.

9.9 The Committee has taken note of the information submitted by the State party about the efforts made by the author's barrister, solicitor and the Colegio de Abogados of Melilla in respect of the author's appeal to the Supreme Court and of the author's ambivalent attitude in spite of having been informed about the requirement of legal representation and the statute of limitations. It notes that the author had a legal representative and this legal representative had access to the relevant court documents. This raises doubts about the veracity of his claim that he has never received a single document in his case. The Committee observes that the author was assigned legal representation for the purpose of his appeal, that grounds of appeal were argued on his behalf and that his appeal was heard by the Supreme Court on the basis of a written procedure (sin celebración de vista), in conformity with article 893 bis (a) of the Code of Criminal Procedure. In the circumstances, and taking into account the fact that the case has been reviewed by the Supreme Court, the Committee finds no violation of article 14 in respect of the author's appeal.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, finds that the facts before it disclose a violation of article 10, paragraphs 1 and 2, of the Covenant.

11. The Committee is of the view that Mr. Griffin is entitled, under article 2, paragraph 3 (a), of the Covenant, to a remedy, including appropriate compensation, for the period of his detention in the prison of Melilla.

12. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, and to provide an effective and enforceable remedy in case a violation has been established, and while welcoming the State party's information that the old prison of Melilla was closed and replaced by a new penitentiary in 1993, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its views.

H. Communication No. 500/1992; Joszef Debreczeny v. the Netherlands (Views adopted on 3 April 1995, fifty-third session)

Submitted by: Joszef Debreczeny [represented by counsel]

Victim: The author

State party: The Netherlands

Date of decision on admissibility: 14 October 1993

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 3 April 1995,

Having concluded its consideration of Communication No. 500/1992 submitted to the Human Rights Committee by Joszef Debreczeny under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts its Views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Joszef Debreczeny, a citizen of the Netherlands, residing at Damwoude (municipality of Dantumadeel), the Netherlands. He claims to be the victim of a violation by the Netherlands of articles 25 and 26, juncto article 2, paragraph 1, of the International Covenant on Civil and Political Rights. He is represented by counsel.

Facts as submitted by the author

2.1 The author states that, in general municipal elections, he was elected to the local council of Dantumadeel on 23 March 1990. The council, however, by decision of 10 April 1990, refused to accept his credentials; it considered that the author's employment as a national police sergeant, stationed at Dantumadeel, was incompatible with membership in the municipal council; in this connection, reference was made to article 25, subparagraph (f), of the Gemeentewet (Municipalities Act), which provides that membership in the municipal council is incompatible with, inter alia, employment as a civil servant in subordination to local authorities.

2.2 The author appealed the decision to the Raad van State (Council of State), which, on 26 April 1990, rejected his appeal. It considered that the author, as a national police officer, stationed at Dantumadeel, worked under the direct authority of the mayor of the municipality, for purposes of maintenance of public order and performance of auxiliary tasks; according to the Raad, this subordinate position was incompatible with membership in the local council, which is chaired by the mayor.

2.3 As the Raad van State is the highest administrative court in the Netherlands, the author submits that he has exhausted domestic remedies. He further states that the matter has not been submitted to any other procedure of international investigation or settlement.

Complaint

3.1 The author submits that the refusal to accept his membership in the local council of Dantumadeel violates his rights under article 25, subparagraphs (a) and (b) of the Covenant. He contends that every citizen, when duly elected, should have the right to be a member of the local council of the municipality where he resides, and that the relevant regulations, as applied to him, constitute an unreasonable restriction on this right within the meaning of article 25 of the Covenant.

3.2 According to the author, his subordination to the mayor of Dantumadeel is merely of a formal character; the mayor seldom gives direct orders to police sergeants. In support of his argument he submits that appointments of national policemen are made by the Minister of Justice, and that the mayor has authority over national police officers only with respect to the maintenance of public order; for the exercise of this authority the mayor is not accountable to the municipal council, but to the Minister of Internal Affairs.

3.3 The author further alleges that article 26 of the Covenant has been violated in his case. He contends that membership in the local council is not denied to local firemen and teaching staff, although they also work in a subordinate position to the mayor of the municipality. He also submits that other municipal councils have not challenged the credentials of local police officers, who are duly elected to the council. In this connection, he mentions examples of the municipalities of Sneek and Wapenveld.

State party's observations on admissibility and the author's comments thereon

4.1 By submission of 27 October 1992, the State party provides information about the factual and legal background of the case. It submits that the right to vote and to stand in elections is enshrined in article 4 of the Constitution of the Netherlands, according to which every national of the Netherlands "shall have an equal right to elect the members of the general representative bodies and to stand for election as a member of those bodies, subject to the limitations and exceptions prescribed by Act of Parliament".

4.2 In agreement with the Constitution, section 25 of the Municipalities Act sets forth the positions which may not be held simultaneously with membership in a municipal council. Three groups of positions are held to be incompatible with membership: (a) positions of authority over or supervision of the municipal council; (b) positions which are subject to the supervision of a municipal administrative authority; (c) positions which by their nature cannot be combined with membership in the council. The State party explains that the rationale for these exclusions is to guarantee the integrity of municipal institutions, and hence to safeguard the democratic decision-making process, by preventing a conflict of interests.

4.3 Pursuant to section 25, paragraph 1 (f), of the Act, membership in the municipal council is incompatible with a position as a public servant appointed by or on behalf of the municipal authority or subordinate to it. Exceptions to incompatibility are made for those civil servants working for the public registrar's office, those working as teaching staff at public schools and those who give their services as volunteers.

4.4 Officers in the national police force are appointed by the Minister of Justice, but are, pursuant to section 35 of the Police Act, subject to the authority of the mayor when engaged in maintaining public order. The State party argues that, since a subordinate relationship exists and consequently a conflict of interests may arise, it is reasonable not to permit police officers

to become members of the municipal council in the municipality in which they serve.

4.5 As regards the admissibility of the communication, the State party concedes that domestic remedies have been exhausted. However, it contends that the incompatibility of membership in the municipal council with the author's position in the national police force, as regulated in the Municipalities Act, is a reasonable restriction to the author's right to be elected and based on objective grounds. The State party submits that the author has no claim under article 2 of the Optional Protocol and that his communication should therefore be declared inadmissible.

5.1 In his comments on the State party's submission, the author argues that no conflict of interests exists between his position as a national police officer and membership in the municipal council. He submits that the council, not the mayor, is the highest authority of the municipality and that, with regard to the maintenance of public order, the mayor is accountable to the Minister of Justice, not to the council.

5.2 The author refers to his original communication and claims that inequality of treatment exists between officers in the national police force and other public officers who are subordinate to municipal authorities. In this context, he mentions that teachers in public schools were, until 1982, also barred from membership in municipal councils but are now, following an amendment to the law, eligible for membership. The author therefore argues that no reasonable ground exists to hold his position as a national police officer incompatible with membership in the municipal council.

Committee's decision on admissibility

6. At its forty-ninth session, the Committee considered the admissibility of the communication. It noted the State party's argument that the restrictions placed upon the author's eligibility for membership in the municipal council of Dantumadeel were reasonable within the meaning of article 25. The Committee considered that the question whether the restrictions were reasonable should be considered on the merits in the light of articles 25 and 26 of the Covenant. Consequently, on 14 October 1993, the Committee declared the communication admissible.

State party's observations on the merits and the author's comments thereon

7.1 By submission of 17 August 1994, the State party reiterates that the Constitution of the Netherlands guarantees the right to vote and to stand in elections, and that section 25 of the Municipalities Act, which was in force at the time of Mr. Debreczeny's election, lays down the positions deemed incompatible with membership in a municipal council. Pursuant to this section, officials subordinate to the municipal authority are precluded from membership in the municipal council. The State party recalls that the rationale for the exclusion of certain categories of persons from membership in the municipal council is to guarantee the integrity of municipal institutions and hence to safeguard the democratic decision-making process, by preventing a conflict of interests.

7.2 The State party explains that the term "municipal authority" used in section 25 of the Act encompasses the municipal council, the municipal executive and the mayor. It points out that if holders of positions subordinate to municipal administrative bodies other than the council were to become members of

the council, this would also undermine the integrity of municipal administration, since the council, as the highest administrative authority, can call such bodies to account.

7.3 The State party explains that officers of the national police force, like Mr. Debreczeny, are appointed by the Minister of Justice, but that they were, according to section 35 of the Police Act in force at the time of Mr. Debreczeny's election, subordinate to part of the municipal authority, namely the mayor, with respect to the maintenance of public order and emergency duties. The mayor has the power to issue instructions to police officers for these purposes and to issue all the necessary orders and regulations; he is accountable to the council for all measures taken. Consequently, police officers as members of the municipal council would on the one hand have to obey the mayor and on the other call him to account. According to the State party, this situation would give rise to an unacceptable conflict of interests and the democratic decision-making process would lose its integrity. The State party maintains, therefore, that the restrictions excluding police officers from membership in the council of the municipality where the officers are posted are reasonable and do not constitute a violation of article 25 of the Covenant.

7.4 With regard to the author's statements that these restrictions do not apply to members of the fire brigade and to teachers, the State party points out that section 25 of the Municipalities Act makes two exceptions to the general rule that public servants appointed by or subordinate to the municipal institutions may not be council members. These exceptions apply to those who work for the emergency services on a voluntary basis or by virtue of a statutory obligation and to teaching staff. The State party explains that the fire brigade in the Netherlands is manned by both professionals and volunteers. Under the law, only volunteer members of the fire brigade may serve on the municipal council; professional firemen are similarly excluded from taking seats in the council of the municipality in which they serve. The State party admits that formally volunteer firemen are appointed by and subordinate to the municipal authority. In the opinion of the State party, however, the mere fact of formal subordination to the municipal council does not in itself provide sufficient reason for denying a citizen the right to be elected to the council; in addition, there must exist a real risk of a conflict arising between individuals' interests as civil servants and their interests as council members, threatening to undermine the integrity of the relationship between municipal institutions. In the light of the fact that volunteers are more independent than professionals (who depend on the post for their livelihood) vis-à-vis the services they work for, the State party argues that the risk of a conflict of interests for volunteers is negligible and that it would therefore not be reasonable to restrict their constitutional right to be elected in a general representative body.

7.5 The State party further explains that private schools and public schools coexist on the basis of equality in the Netherlands, and that teachers in a public school are appointed by the municipal authority. Formally, a hierarchical relationship can therefore be said to exist. The State party points out, however, that education policy in the Netherlands is pre-eminently the concern of the State and that quality requirements and funding criteria are laid down by law. Supervision of public schools is carried out at the national level by the central education inspectorate and not by the municipal authority. A conflict of interest between obeying the municipal authority and calling it to account, as exists for police officers, is therefore not likely to arise. The State party considers therefore that a restriction on the eligibility of teachers to a municipal council would be unreasonable.

7.6 The State party further addresses the cases in which, according to the author, local policemen were not prevented from becoming members in their respective municipal councils. The State party begins by emphasizing that the Netherlands is a decentralized unitary State, and that municipal authorities have the power to regulate and administer their own affairs. In the context of elections, municipalities themselves are responsible in the first instance to ensure that councils are lawfully and properly composed. This means that, if a candidate has been elected, the council itself decides whether he may be admitted as a member or whether there are legal obstacles that prevent him from taking his seat. Appeal against the council's decision can be lodged with an administrative court; interested parties may moreover apply to an administrative court if they are of the opinion that a certain council member was wrongfully admitted.

7.7 In the case of Sneek, mentioned by the author, the State party indicates that the police officer who was appointed to the municipal council was employed by the National Police Waterways Branch and based at Leeuwarden. The State party states that as such he was neither subordinate to nor appointed by the municipality of Sneek and that his position is therefore not incompatible with membership in the council.

7.8 In the case of Heerde, mentioned by the author, the State party admits that, between 1982 and 1990, an officer of the National Police Force, employed in the Heerde unit of the force, served as a member of the municipal council. The State party submits that this membership was unlawful; however, since no interested party contested the policeman's election to the municipal council before a court, he was able to maintain his position. The State party argues that "the mere fact that a police officer in Heerde sat unlawfully on the council of the municipality in which he was employed does not mean that Mr. Debreczeny may also sit unlawfully on the council of the municipality in which he is employed". It adds that the principle of equality cannot be invoked to reproduce a mistake made in the application of the law.

7.9 In conclusion, the State party submits that there are no reasons to find that articles 25 or 26 of the Covenant were violated in the author's case. It argues that the provisions, laid down in section 25 of the Municipalities Act, governing the compatibility of positions with membership in a municipal council are completely reasonable and that the protection of democratic decision-making procedures requires that individuals holding certain positions be barred from membership in municipal councils if such membership would entail an unacceptable risk of a conflict of interests. To prevent this general rule from leading to an unreasonable curtailment of the right to stand for election, exceptions have been created for volunteer firemen and teaching staff and the incompatibility of council membership for police officers has been limited to the council of the municipality in which the person in question is employed.

8.1 In his comments on the State party's submission, counsel to the author submits that the State party's interpretation of section 25 of the Municipalities Act, that the incompatibility is limited to those police officers who are elected to the council of the municipality in which they are employed, is too narrow. He submits that the law applies to all municipalities in which the person concerned can be theoretically requested to serve. In this context, counsel points out that the membership of the police officer in the municipal council of Sneek is therefore also against the law, since, although he is posted at Leeuwarden, his working region includes Sneek.

8.2 As regards the exception made for volunteer firemen, counsel points out

that volunteers do receive an emolument for services rendered and that they are appointed by the municipal authority, whereas national police officers are appointed by the Minister of Justice. As regards teaching personnel, which is appointed by the municipal authority, counsel argues that there exists a more than theoretic risk of a conflict of interests, especially in the case of a headmaster functioning as a council member. In reply to the State party's argument that the statute for teaching staff is determined on the national level, counsel points out that this is also the case for national police officers.

8.3 Counsel argues that it is not reasonable to allow teaching staff to become members of the municipal council while maintaining the incompatibility for police officers. In this context, it is argued that 99 per cent of the national police officers do not receive direct orders from the mayor, but from their immediate superior, with whom the mayor communicates.

8.4 Counsel further refers to the parliamentary debate in 1981 which led to the exception of teaching staff from the incompatibility rules, during which the general character of the remaining incompatibilities was deemed to be arbitrary or insufficiently motivated. In this context, counsel states that parliament defended the exception for teaching staff, inter alia, by referring to section 52 of the Municipalities Act, which states that a councillor should refrain from voting on matters in which he is personally involved. It was argued that this clause offered sufficient guarantees for proper decision-making in municipal councils. Moreover, it was argued that it is up to the electorate, the political parties and the persons concerned to ensure that the democratic rules are observed.

8.5 Counsel contends that the same arguments apply to the position of national police officers who wish to take up their seat in the municipal council. He submits that the probability that in a few cases complications may arise does not justify the categorical prohibition which was applied to Mr. Debreczeny. He concludes therefore that the limitation of Mr. Debreczeny's right to be elected was unreasonable. In this connection, he refers to a statement made by the Government during the parliamentary discussion on the restructuring of the police force, in which it was stated that members of a regional functional police unit shall be prohibited from becoming members of the municipal council only when it is plausible that the unit in a municipality can be deployed to a significant extent for public order purposes.

Issues and proceedings before the Committee

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

9.2 The issue before the Committee is whether the application of the restrictions provided for in section 25 of the Municipalities Act, as a consequence of which the author was prevented from taking his seat in the municipal council of Dantumadeel to which he was elected, violated the author's right under article 25 (b) of the Covenant. The Committee notes that the right provided for by article 25 is not an absolute right and that restrictions of this right are allowed as long as they are not discriminatory or unreasonable.

9.3 The Committee notes that the restrictions on the right to be elected to a municipal council are regulated by law and that they are based on objective criteria, namely the electee's professional appointment by or subordination to

the municipal authority. Noting the reasons invoked by the State party for these restrictions, in particular, to guarantee the democratic decision-making process by avoiding conflicts of interest, the Committee considers that the said restrictions are reasonable and compatible with the purpose of the law. In this context, the Committee observes that legal norms dealing with bias, for example section 52 of the Municipalities Act to which the author refers, are not apt to cover the problem of balancing interests on a general basis. The Committee observes that the author was, at the time of his election to the council of Dantumadeel, serving as a police officer in the national police force, based at Dantumadeel and as such for matters of public order subordinated to the mayor of Dantumadeel, who was himself accountable to the council for measures taken in that regard. In these circumstances, the Committee considers that a conflict of interests could indeed arise and that the application of the restrictions to the author does not constitute a violation of article 25 of the Covenant.

9.4 The author has also claimed that the application of the restrictions to him is in violation of article 26 of the Covenant, because (a) the restrictions do not apply to volunteer firemen and to teaching staff and (b) in two cases, police officers were allowed to become members of the council of the municipality in which they served. The Committee notes that the exception for volunteer firemen and teaching staff is provided for by law and based on objective criteria, namely, for volunteer firemen, the absence of income dependency, and, for teaching staff, the lack of direct supervision by the municipal authority. With regard to the two specific cases mentioned by the author, the Committee considers that, even if the police officers concerned were in the same position as the author and were unlawfully allowed to take up their seats in the council, the failure to enforce an applicable legal provision in isolated cases does not lead to the conclusion that its application in other cases is discriminatory.[16] In this connection, the Committee notes that the author has not claimed any specific ground for discrimination and that the State party has explained the reasons for the different treatment stating that, in one case, the facts were materially different and that, in the other, the membership was unlawful but the court never had an opportunity to review it because the case was not brought before it by any of the interested parties. The Committee concludes therefore that the facts of Mr. Debreczeny's case do not reveal a violation of article 26 of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not reveal a breach of any of the provisions of the Covenant.

[16] See also the Committee's decision declaring inadmissible Communication No. 273/1988 (B. d. B. v. the Netherlands) adopted on 30 March 1989, in which the Committee stated that it is "not competent to examine errors allegedly committed in the application of laws concerning persons other than authors of a communication" (para. 6.6).

I. Communication No. 511/1992; Ilmari Länsman et al. v. Finland (Views adopted on 26 October 1994, fifty-second session)

Submitted by:	Ilmari Länsman et al. [represented by counsel]
Victims:	The authors
State party:	Finland
Date of communication:	11 June 1992 (initial submission)
Date of decision on admissibility:	14 October 1993

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 26 October 1994,

Having concluded its consideration of Communication No. 511/1992 submitted to the Human Rights Committee by Ilmari Länsman et al. under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication, their counsel and the State party,

Adopts its Views under article 5, paragraph 4, of the Optional Protocol.

1. The authors of the communication are Ilmari Länsman and 47 other members of the Muotkatunturi Herdsmen's Committee and members of the Angeli local community. They claim to be the victims of a violation by Finland of article 27 of the International Covenant on Civil and Political Rights. They are represented by counsel.

Facts as presented by the authors

2.1 The authors are all reindeer breeders of Sami ethnic origin from the area of Angeli and Inari; they challenge the decision of the Central Forestry Board to pass a contract with a private company, Arktinen Kivi Oy (Arctic Stone Company) in 1989, which would allow the quarrying of stone in an area covering 10 hectares on the flank of the mountain Etela-Riutusvaara. Under the terms of the initial contract, this activity would be authorized until 1993.

2.2 The members of the Muotkatunturi Herdsmen's Committee occupy an area ranging from the Norwegian border in the west, to Kaamanen in the east, comprising both sides on the road between Inari and Angeli, a territory traditionally owned by them. The area is officially administered by the Central Forestry Board. For reindeer herding purposes, special pens and fences, designed for example to direct the reindeers to particular pastures or locations, have been built around the village of Angeli. The authors point out that the question of ownership of lands traditionally used by the Samis is disputed between the Government and the Sami community.

2.3 The authors contend that the contract signed between the Arctic Stone Company and the Central Forestry Board would not only allow the company to extract stone but also to transport it right through the complex system of

reindeer fences to the Angeli-Inari road. They note that in January of 1990, the company was granted a permit by the Inari municipal authorities for the extraction of some 5,000 cubic metres of building stone and that it obtained a grant from the Ministry of Trade and Industry for this very purpose.

2.4 The authors admit that, until now, only some limited test-quarrying has been carried out; by September 1992, some 100,000 kilograms of stone (approximately 30 cubic metres) had been extracted. The authors concede that the economic value of the special type of stone concerned, anorthocite, is considerable, since it may replace marble in, above all, representative public buildings, given that it is more resistant to air-borne pollution.

2.5 The authors affirm that the village of Angeli is the only remaining area in Finland with a homogenous and solid Sami population. The quarrying and transport of anorthocite would disturb their reindeer herding activities and the complex system of reindeer fences determined by the natural environment. They add that the transport of the stone would run next to a modern slaughterhouse already under construction, where all reindeer slaughtering must be carried out as of 1994, so as to meet strict export standards.

2.6 Furthermore, the authors observe that the site of the quarry, Mount Etelä-Riutusvaara, is a sacred place of the old Sami religion, where in old times reindeer were slaughtered, although the Samis now inhabiting the area are not known to have followed these traditional practices for several decades.

2.7 As to the requirement of exhaustion of domestic remedies, the authors point out that 67 members of the Angeli local community appealed, without success, against the quarrying permit to the Lapland Provincial Administrative Board as well as to the Supreme Administrative Court,[17] where they specifically invoked article 27 of the Covenant. On 16 April 1992, the Supreme Administrative Court dismissed the appeal without addressing the alleged violations of the Covenant. According to the authors, no further domestic remedies are available.

2.8 Finally, at the time of submission of the communication in June 1992, the authors, fearing that further quarrying is imminent, requested the adoption of interim measures of protection, under rule 86 of the Committee's rules of procedure, so as to avoid irreparable damage.

Complaint

3.1 The authors affirm that the quarrying of stone on the flank of Mount Etelä-Riutusvaara and its transportation through their reindeer herding territory would violate their rights under article 27 of the Covenant, in particular their right to enjoy their own culture, which has traditionally been and remains essentially based on reindeer husbandry.

3.2 In support of their contention of a violation of article 27, the authors refer to the Views adopted by the Committee in the cases of Ivan Kitok (No. 197/1985) and B. Ominayak and members of the Lubicon Lake Band v. Canada (No. 167/1984), as well as to International Labour Organization Convention No. 169 concerning the rights of indigenous and tribal people in independent countries.

[17] It should be noted that not all of the authors of the communication before the Committee appealed to the Supreme Court.

State party's information and observations and counsel's comments thereon

4.1 The State party confirms that quarrying of stone in the area claimed by the authors was made possible by a permit granted by the Angeli Municipal Board on 8 January 1990. Pursuant to Act No. 555/1981 on extractable land resources, this permit was at the basis of a contract passed between the Central Forestry Board and a private company, which is valid until 31 December 1993.

4.2 The State party opines that those communicants to the Committee who, in the matter under consideration, have applied both to the Lapland Provincial Administrative Board and to the Supreme Administrative Court have exhausted all available domestic remedies. As the number of individuals who appealed to the Supreme Administrative Court is however lower than the number of those who filed a complaint with the Committee, the State party considers the communication inadmissible on the ground of non-exhaustion of domestic remedies in respect of those authors who were not a party to the case before the Supreme Administrative Court.

4.3 The State party concedes that "extraordinary appeals" against the decision of the Supreme Administrative Court would have no prospect of success, and that there are no other impediments, on procedural grounds, to the admissibility of the communication. On the other hand, it submits that the authors' request for the adoption of interim measures of protection was "clearly premature", as only test quarrying on the contested site has been carried out.

5.1 In his comments, counsel rejects the State party's argument that those authors who did not personally sign the appeal to the Supreme Administrative Court failed to exhaust available domestic remedies. He argues that "[a]ll the signatories of domestic appeals and the communication have invoked the same grounds, both on the domestic level and before the Human Rights Committee. The number and identity of signatories was of no relevance for the outcome of the Supreme Court judgment, since the legal matter was the same for all the signatories of the communication ...".

5.2 Counsel contends that in the light of the Committee's jurisprudence in the case of Sandra Lovelace v. Canada, all the authors should be deemed to have complied with the requirements of article 5, paragraph 2 (b), of the Optional Protocol. In this case, he recalls, the Committee decided that the Protocol does not impose on authors the obligation to seize the domestic courts if the highest domestic court has already substantially decided the question at issue. He affirms that in the case of Mr. Länsman and his co-authors, the Supreme Administrative Court has already decided the matter in respect of all the authors.

5.3 In further comments dated 16 August 1993, counsel notes that the lease contract for Arktinen Kivi Oy expires at the end of 1993, and that negotiations for a longer lease are underway. If agreement on a long-term lease is reached, Arktinen intends to undertake considerable investments, inter alia, for road construction. Counsel further notes that even the limited test quarrying carried out so far has left considerable marks on Mount Etelä-Riutusvaara. Similarly, the marks and scars left by the provisional road allegedly will remain in the landscape for hundreds of years, because of extreme climatic conditions. Hence, the consequences for reindeer herding are greater and will last longer than the total amount of stone to be taken from the quarry (5,000 cubic metres) would suggest. Finally, counsel reiterates that the location of the quarry and the road leading to it are of crucial importance for the activities of the Muotkatunturi Herdsmen's Committee, because their new

slaughterhouse and the area used for rounding up reindeers are situated in the immediate vicinity.

Committee's decision on admissibility

6.1 During its forty-ninth session, the Committee considered the admissibility of the communication. It noted that the State party did not object to the admissibility of the complaint in respect of all those authors which had appealed the quarrying permit both to the Lapland Provincial Administrative Board and to the Supreme Administrative Court of Finland, and that only in respect of those authors who had not personally appealed to the Supreme Administrative Court did it contend that domestic remedies had not been exhausted.

6.2 The Committee disagreed with the State party's reasoning and recalled that the facts at the basis of the decision of the Supreme Administrative Court of 16 April 1992 and of the case before the Committee were identical; had those who did not personally sign the appeal to the Supreme Administrative Court done so, their appeal would have been dismissed along with that of the other appellants. It was unreasonable to expect that if they applied to the Supreme Administrative Court now, on the same facts and with the same legal arguments, this court would hand down another decision. The Committee reiterated its earlier jurisprudence that wherever the jurisprudence of the highest domestic tribunal has decided the matter at issue, thereby eliminating any prospect of success of an appeal to the domestic courts, authors are not required to exhaust domestic remedies, for the purposes of the Optional Protocol. The Committee therefore concluded that the requirements of article 5, paragraph 2 (b), of the Optional Protocol had been met.

6.3 The Committee considered that the authors' claims pertaining to article 27 had been substantiated, for purposes of admissibility, and that they should be considered on their merits. As to the authors' request for interim measures of protection, it noted that the application of rule 86 of the rules of procedure would be premature but that the authors retained the right to address another request under rule 86 to the Committee if there were reasonably justified concerns that quarrying might resume.

6.4 On 14 October 1993, therefore, the Committee declared the communication admissible in so far as it appeared to raise issues under article 27 of the Covenant.

State party's submission on the merits and counsel's comments thereon

7.1 In its submission under article 4, paragraph 2, dated 26 July 1994, the State party supplements and corrects the facts of the case. Concerning the issue of ownership of the area in question, it notes that the area is State-owned, as it had been awarded to the State in a general reparceling. It was inscribed as State-owned in the land register and is regarded as such in the jurisprudence of the Supreme Court (judgment of 27 June 1984 dealing with the determination of water limits in the Inari municipality). Powers inherent in the ownership are used by the Finnish Forestry and Park Service (formerly the Central Forestry Board), which is entitled, inter alia, to construct roads.

7.2 The State party further provides information on another case involving planned logging and road construction activities in the Inari District, which had been decided by the Inari District Court and the Rovaniemi Court of Appeal. These courts assessed the matter at issue in the light of article 27 of the

Covenant but concluded that the contested activities did not prevent the complainants from practising reindeer herding.

7.3 As to the merits of the authors' claim under article 27, the State party concedes that the concept "culture" in article 27 also covers reindeer herding as an "essential component of the Sami culture". It examines whether the quarrying permit, its exploitation and the contract between the Central Forestry Board and Arktinen Kivi Oy violates the authors' rights under article 27. In this connection, several provisions of Act No. 555/1981 on extractable land resources are relevant. Thus, section 6 stipulates that an extraction (quarrying) permit may be delivered if certain conditions laid down in the act have been met. Section 11 defines these conditions as "orders which the applicant must follow in order to avoid or restrict damages caused by the project in question". Under section 9, subsection 1, the contractor is liable to compensate the owner of real estate for any extraction of land resources which causes (environmental or other) damage which cannot be qualified as minor. Section 16, litera 3, allows the State authority to amend the conditions of the initial permit or to withdraw it, especially when extraction of land resources has had unpredictable harmful environmental effects.

7.4 As to the permit issued to Arktinen Kivi Oy, the State party notes that it is valid until 31 December 1999, but only if the Finnish Forestry and Park Service upholds the contract until that date. Another condition requires that during and after the quarrying, the area in question must be kept "clear and safe". Condition No. 3 lays down that every year quarrying should be carried out within the period 1 April to 30 September, as requested by the Muotkatunturi Herdsmens' Committee in its letter of 5 November 1989 to the Inari municipality. This is because reindeers do not pasture in the area during this period. The same condition also stipulates that means of communication (transport) to and within the area must be arranged in coordination with the Herdsmens' Committee and that any demands of the Angeli Community Committee should be given due consideration.

7.5 In October 1989, a contract between the Central Forestry Board and the company was concluded, which gave the company the right to use and extract stone in an area covering 10 hectares, to a maximum of 200 cubic metres. This contract was valid until the end of 1993. Under the terms of the contract, means of transportation/communication had to be agreed upon with the district forester. Edges of holes had to be smoothed during quarrying; after quarrying, the slopes had to be remodelled in such a way as not to constitute a danger for animals and men and not to disfigure the landscape. In March 1993, the company requested a new land lease contract; an inspection of the site on 30 July 1993 was attended by a representative of the Forest District, the company, the Angeli Community Committee, the Herdsmens' Committee, and the building inspector of Inari community. The company representatives noted that the construction of a proper road was necessary for the project's profitability; the representative of the Forest District replied that the Herdsmens' Committee and the company had to find a negotiated solution. The State party adds that the Forestry and Park Service has informed the Government that a decision on a possible new contract with the company will be taken only after the adoption of Views by the Committee in the present case.

7.6 As to actual quarrying, the State party notes that the company's activity in the area has been insignificant, both in terms of amount of extracted stone (30 cubic metres) and the extent (10 hectares) of the quarrying area on Mount Riutusvaara. By comparison, the total area used by the Muotkatunturi Herdsmens' Committee covers 2,586 square kilometres, whereas the area fenced in for

quarrying covered only approximately one hectare and is only four kilometres away from the main road. In two expert statements, dated 25 October 1991, submitted to the Supreme Administrative Court, it is noted that "extraction of land resources from Mount Etelä-Riutusvaara has, as regards its size, no significance on the bearing capacity of the pastures of the Muotkatunturi Herdsmens' Committee". Neither can, in the State party's opinion, the extraction have any other negative effects on reindeer husbandry. The Government disagrees with the authors' assertion that already limited test quarrying has caused considerable damage to Mount Etelä-Riutusvaara.

7.7 In the above context, the State party notes that it appears from an opinion of the Environmental Office of the Lapland County Administrative Board (dated 8 May 1991) that only low pressure explosives are used to extract stone from the rock: "Extraction is carried out my means of sawing and wedging techniques ... to keep the rock as whole as possible". As a result, possible harm to the environment remains minor. Furthermore, it transpires from a statement dated 19 August 1990 from the Inari Municipal Executive Board to the County Administrative Board that special attention was paid by the Board and the company to avoid disturbing reindeer husbandry in the area. The State party refers to section 2, subsection 2, of the Reindeer Husbandry Act, which requires that the northernmost State-owned areas shall not be used in ways which can seriously impair reindeer husbandry; it adds that the obligations imposed by article 27 were observed in the permit proceedings.

7.8 With regard to the question of road construction in the quarrying area, the State party notes that transport of the test blocks of stone initially took place on an existing road line, with the help of one of the authors. The company only extended the road line for approximately one kilometre into another direction (not through the authors' reindeer fences), while using the existing road for transport of stone to the main road. The State party observes that the road line has thus been decided upon by the authors themselves. At a meeting on 15 October 1993 of the Inari Advisory Board, the company advised that the construction of a proper road would improve the profitability of the project; and, as conceded by the Inari Municipal Board in a written submission to the Supreme Administrative Court in August 1991, the construction of such a road is technically possible without causing disturbances for reindeer husbandry.

7.9 The State party submits that in the light of the above and given that only 30 cubic metres of rock have actually been extracted, the company's activity has been insignificant in relation to the authors' rights under article 27, especially reindeer herding. Similar conclusions would apply to the possible quarrying of the total allowable extractable amount of stone and its transport over a proper road to the main road. In this context, the State party recalls the Committee's Views in Lovelace v. Canada, which state that "not every interference can be regarded as a denial of rights within the meaning of article 27 ... (but) restrictions must have both a reasonable and objective justification and be consistent with the other provisions of the Covenant ...". This principle, according to the State party, applies to the present case.

7.10 The State party concedes "that the concept of culture in the sense of article 27 provides for a certain protection of the traditional means of livelihood for national minorities and can be deemed to cover livelihood and related conditions insofar as they are essential for the culture and necessary for its survival. This means that not every measure and every effect of it, which in some way alters the previous conditions, can be construed as adverse interference in the rights of minorities to enjoy their own culture under article 27". Relevant references to the issue have been made by the

Parliamentary Committee for Constitutional Law, in relation with Government Bill 244/1989, to the effect that reindeer husbandry exercised by Samis shall not be subject to unnecessary restrictions.

7.11 This principle, the State party notes, was underlined by the authors themselves in their appeal to the Lapland County Administrative Board: thus, before the domestic authorities, the authors themselves took the stand that only unnecessary and essential interferences with their means of livelihood, in particular reindeer husbandry, would raise the spectre of a possible violation of the Covenant.

7.12 The State disagrees with the statement of the authors' counsel before the Supreme Administrative Court (10 June 1991) according to which, by reference to the Committee's Views in the case of B. Ominayak and members of the Lubicon Lake Band v. Canada[18], every measure, even a minor one, which obstructs or impairs reindeer husbandry must be interpreted as prohibited by the Covenant. In this context, the State party quotes from paragraph 9 of the Committee's General Comments on article 27, which lays down that the rights under article 27 are "directed to ensure the survival and continued development of the cultural, religious and social identity of the minorities concerned...". Furthermore, the question of "historical inequities", which arose in the Lubicon Lake Band case, does not arise in the present case. The State party rejects as irrelevant the authors' reliance on certain academic interpretations of article 27 and on certain national court decisions. It claims that the Human Rights Committee's Views in the case of Kitok[19] imply that the Committee endorses the principle that States enjoy a certain degree of discretion in the application of article 27 - which is normal in all regulation of economic activities. According to the State party, this view is supported by the decisions of the highest tribunals of States parties to the Covenant and the European Commission on Human Rights.

7.13 The State party concludes that the requirements of article 27 have "continuously been taken into consideration by the national authorities in their application and implementation of the national legislation and the measures in question". It reiterates that a margin of discretion must be left to national authorities even in the application of article 27: "As confirmed by the European Court of Human Rights in many cases ..., the national judge is in a better position than the international judge to make a decision. In the present case, two administrative authorities and ... the Supreme Administrative Court, have examined the granting of the permit and related measures and considered them as lawful and appropriate". It is submitted that the authors can continue to practise reindeer husbandry and are not forced to abandon their lifestyle. The quarrying and the use of the old forest road line, or the possible construction of a proper road, are insignificant or at most have a very limited impact on this means of livelihood.

8.1 In his comments, dated 31 August 1994, counsel informs the Committee that since the initial submission of the complaint, the Muotkatunturi Herdsmens' Committee has somewhat changed its reindeer herding methods. As of spring 1994, young fawns are not kept fenced in with their mothers, so that the reindeer pasture more freely and for a larger part of the year than previously in areas north of the road between Angeli and Inari, including southern Riutusvaara.

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[18] Views adopted by the Committee at its thirty-eighth session, 26 March 1990.

[19] Communication No. 197/1985, Views adopted during the Committee's thirty-third session on 27 July 1988, paragraph 9.3.

Reindeer now also pasture in the area in April and September. Counsel adds that southern Riutusvaara is definitely not unsuitable for reindeer pasture, as contended by the State party, as the reindeer find edible lichen there.

8.2 As to the supplementary information provided by the State party, the authors note that thus far, the companies quarrying on Mount Etelä-Riutusvaara have not covered any holes or smoothed edges and slopes after the expiry of their contracts. The authors attach particular importance to the State party's observation that the lease contract between the Central Forestry Board and Arktinen Kivi Oy was valid until the end of 1993. This implies that no contractual obligations would be breached if the Human Rights Committee were to find that any further quarrying would be unacceptable in the light of article 27.

8.3 As to the road leading to the quarry, the authors dismiss as misleading the State party's argument that the disputed road has been or would have been constructed in part "by one of the authors". They explain that the road line has been drawn by the two companies wishing to extract stone from the area. Counsel concedes however that the first company used a Sami as "employee or subcontractor in opening the road line. This is probably the reason why the person in question ... did not want to sign the communication to the Human Rights Committee".

8.4 The authors criticize that the State party has set an unacceptably high threshold for the application of article 27 of the Covenant and note that what the Finnish authorities appear to suggest is that only once a State party has explicitly conceded that a certain minority has suffered historical inequities, it might be possible to conclude that new developments which obstruct the cultural life of a minority constitute a violation of article 27. To the authors, this interpretation of the Committee's Views in the Lubicon Lake Band case is erroneous. They contend that what was decisive in Ominayak was that a series of incremental adverse events could together constitute a 'historical inequity' which amounted to a violation of article 27.[20]

8.5 According to counsel, the situation of the Samis in the Angeli area may be compared with "assimilation practices", or at least as a threat to the cohesiveness of their group through quarrying, logging and other forms of exploitation of traditional Sami land for purposes other than reindeer herding.

8.6 While the authors agree that the question of ownership of the land tracts at issue is not per se the subject matter of the case, they observe that: (a) ILO Convention No. 169, although not yet ratified by Finland, has a relevance for domestic authorities which is comparable to the effect of concluded treaties (opinion No. 30 of 1993 by the Parliamentary Constitutional Law Committee); and (b) neither the general reparceling nor the entries into the land register can have constitutive effect for the ownership of traditional Sami territory. In this context, the authors note that the legislator is considering a proposal to create a system of collective land ownership by the Sami villages:

> "As long as the land title controversy remains unsettled ..., Finnish Samis live in a situation that is very sensitive and vulnerable in relation to any measures threatening their traditional economic activities. Therefore, the existing Riutusvaara quarry and the road to it, created with the

[20] In this context, the authors refer to the analysis of the Views in the Lubicon Lake Band case by Professor Benedict Kingsbury (25 Cornell International Law Journal (1992)), and by Professor Manfred Nowak (CCPR Commentary, 1993).

involvement of public authorities, are to be considered a violation of article 27 ... The renewal of a land lease contract between the Central Forestry Board [namely, its legal successor] and the ... company would also violate article 27".

8.7 Finally, the authors point to new developments in Finland which are said to highlight the vulnerability of their own situation. As a consequence of the Agreement on the European Economic Area (EEA), which entered into force on 1 January 1994, foreign and transnational companies registered within the EEA obtain a broader access to the Finnish market than before. The most visible consequence has been the activity of multinational mining companies in Finnish Lapland, including the northernmost parts inhabited by Samis. Two large foreign mining companies have registered large land tracts for research into the possibility of mining operations. These areas are located in the herding areas of some Reindeer Herding Committees. On 11 June 1994, the Sami Parliament expressed concern over this development. The authors consider that the outcome of the present case will have a bearing on the operation of the foreign mining companies in question.

8.8 The information detailed in 8.7 above is supplemented by a further submission from counsel dated 9 September 1994. He notes that the activity of multinational mining companies in Northern Lapland has led to a resurgence of interest among Finnish companies in the area. Even a Government agency, the Centre for Geological Research (Geologian tutkimuskeskus) has applied for land reservations on the basis of the Finnish Mining Act. This agency has entered six land reservations of 9 square kilometres each in the immediate vicinity of the Angeli village and partly on the slopes of Mount Riutusvaara. Two of these land tracts are located within an area which is the subject of a legal controversy about logging activities between the local Samis and the government forestry authorities.

Examination of the merits

9.1 The Committee has examined the present communication in the light of all the information provided by the parties. The issue to be determined by the Committee is whether quarrying on the flank of Mount Etelä-Riutusvaara, in the amount that has taken place until the present time or in the amount that would be permissible under the permit issued to the company which has expressed its intention to extract stone from the mountain (i.e. up to a total of 5,000 cubic metres), would violate the authors' rights under article 27 of the Covenant.

9.2 It is undisputed that the authors are members of a minority within the meaning of article 27 and as such have the right to enjoy their own culture; it is further undisputed that reindeer husbandry is an essential element of their culture. In this context, the Committee recalls that economic activities may come within the ambit of article 27, if they are an essential element of the culture of an ethnic community.[21]

9.3 The right to enjoy one's culture cannot be determined in abstracto but has to be placed in context. In this connection, the Committee observes that article 27 does not only protect traditional means of livelihood of national minorities, as indicated in the State party's submission. Therefore, that the authors may have adapted their methods of reindeer herding over the years and practice it with the help of modern technology does not prevent them from invoking

[21] Views on Communication No. 197/1985 (Kitok v. Sweden), adopted on 27 July 1988, paragraph 9.2.

article 27 of the Covenant. Furthermore, Mount Riutusvaara continues to have a spiritual significance relevant to their culture. The Committee also notes the concern of the authors that the quality of slaughtered reindeer could be adversely affected by a disturbed environment.

9.4 A State may understandably wish to encourage development or allow economic activity by enterprises. The scope of its freedom to do so is not to be assessed by reference to a margin of appreciation, but by reference to the obligations it has undertaken in article 27. Article 27 requires that a member of a minority shall not be denied his right to enjoy his culture. Thus, measures whose impact amount to a denial of the right will not be compatible with the obligations under article 27. However, measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under article 27.

9.5 The question that therefore arises in this case is whether the impact of the quarrying on Mount Riutusvaara is so substantial that it does effectively deny to the authors the right to enjoy their cultural rights in that region. The Committee recalls paragraph 7 of its General Comments on article 27, according to which minorities or indigenous groups have a right to the protection of traditional activities such as hunting, fishing or, as in the instant case, reindeer husbandry, and that measures must be taken "to ensure the effective participation of members of minority communities in decisions which affect them".

9.6 Against this background, the Committee concludes that quarrying on the slopes of Mount Riutusvaara, in the amount that has already taken place, does not constitute a denial of the authors' right, under article 27, to enjoy their own culture. It notes in particular that the interests of the Muotkatunturi Herdsmens' Committee and of the authors were considered during the proceedings leading to the delivery of the quarrying permit, that the authors were consulted during the proceedings, and that reindeer herding in the area does not appear to have been adversely affected by such quarrying as has occurred.

9.7 As far as future activities which may be approved by the authorities are concerned, the Committee further notes that the information available to it indicates that the State party's authorities have endeavoured to permit only quarrying which would minimize the impact on any reindeer herding activity in Southern Riutusvaara and on the environment; the intention to minimize the effects of extraction of stone from the area on reindeer husbandry is reflected in the conditions laid down in the quarrying permit. Moreover, it has been agreed that such activities should be carried out primarily outside the period used for reindeer pasturing in the area. Nothing indicates that the change in herding methods by the Muotkatunturi Herdsmens' Committee (see para. 8.1 above) could not be accommodated by the local forestry authorities and/or the company.

9.8 With regard to the authors' concerns about future activities, the Committee notes that economic activities must, in order to comply with article 27, be carried out in a way that the authors continue to benefit from reindeer husbandry. Furthermore, if mining activities in the Angeli area were to be approved on a large scale and significantly expanded by those companies to which exploitation permits have been issued, then this may constitute a violation of the authors' rights under article 27, in particular of their right to enjoy their own culture. The State party is under a duty to bear this in mind when either extending existing contracts or granting new ones.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the

Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee do not reveal a breach of article 27 or any other provision of the Covenant.

J. Communication No. 514/1992; Sandra Fei v. Colombia (Views adopted on 4 April 1995, fifty-third session)[22]

Submitted by:	Mrs. Sandra Fei [represented by counsel]
Victim:	The author
State party:	Colombia
Date of communication:	22 July 1992 (initial submission)
Date of decision on admissibility:	18 March 1994

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 4 April 1995,

Having concluded its consideration of Communication No. 514/1992 submitted to the Human Rights Committee by Mrs. Sandra Fei under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, her counsel and the State party,

Adopts its Views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Sandra Fei, of Italian and Colombian citizenship, born in 1957 in Santa Fé de Bogotá and currently residing in Milan, Italy. She claims to be a victim of violations by Colombia of articles 2, paragraphs 2 and 3; 14, paragraphs 1 and 3 (c); 17; 23, paragraph 4; and 24 of the International Covenant on Civil and Political Rights. She is represented by counsel.

Facts as submitted by the author

2.1 Mrs. Fei married Jaime Ospina Sardi in 1976; in 1977, rifts between the spouses began to emerge, and in 1981 Mrs. Fei left the home; the two children born from the marriage remained with the husband. The author sought to establish a residence in Bogotá but, as she was unable to obtain more than temporary employment, finally moved to Paris as a correspondent for the daily newspaper 24 Horas.

2.2 A Colombian court order dating from 19 May 1982 established a separation and custody arrangement, but divorce proceedings subsequently were also instituted by the author before a Paris tribunal, with the consent of her ex-husband.

2.3 Under the Colombian court order of May 1982, the custody of the children was granted provisionally to the father, with the proviso that custody would go to the mother if the father remarried or cohabited with another woman. It

[22] Pursuant to rule 85 of the Committee's rules of procedure, Mr. Fausto Pocar did not participate in the adoption of the Committee's Views.

further established joint parental custody and provided for generous visiting rights. Mr. Rodolfo Segovia Salas, a senator of the Republic, brother-in-law of Mr. Ospina Sardi and close family friend, was designated as guarantor of the agreement.

2.4 On 26 September 1985, Mrs. Fei's children, during a visit to her mother, were allegedly kidnapped by the father, with the help of three men said to be employees of the Colombian Embassy in Paris, when the author was leaving her Paris apartment. Between September 1985 and September 1988, the author did not have any contact with her children and knew nothing of their whereabouts, as Mr. Segovia Salas allegedly refused to cooperate. The author obtained the good offices of the French authorities and of the wife of President Mitterrand, but these démarches proved unsuccessful. Mrs. Fei then requested the assistance of the Italian Ministry of Foreign Affairs, which in turn asked for information and judicial assistance from the Colombian authorities. The author alleges that the latter either replied in evasive terms or simply denied that the author's rights had been violated. During the summer of 1988, an official of the Italian Foreign Ministry managed to locate the children in Bogotá. In September 1988, accompanied by the Italian Ambassador to Colombia, the author was finally able to see her two children for five minutes, on the third floor of the American School in Bogotá.

2.5 In the meantime, Mr. Ospina Sardi had himself initiated divorce proceedings in Bogotá, in which he requested the suspension of the author's parental authority as well as an order that would prohibit the children from leaving Colombia. On 13 March 1989, the First Circuit Court of Bogotá (Juzgado Primero Civil del Circuito de Bogotá) handed down its judgement; the author contends that in essence, the judgement confirmed the terms of the separation agreement reached several years earlier. Mrs. Fei further argues that the divorce proceedings in Colombia deliberately ignored the proceedings still pending before the Paris tribunal, as well as the children's dual nationality.

2.6 Mrs. Fei contends that, since September 1985, she has received, and continues to receive, threats. As a result, she claims, she cannot travel to Colombia alone or without protection. In March 1989, therefore, the Italian Foreign Ministry organized a trip to Bogotá for her; after negotiations, she was able to see her children for exactly two hours, "as an exceptional favour". The meeting took place in a small room in Mr. Segovia Salas' home, in the presence of a psychologist who allegedly had sought to obstruct the meeting until the very last moment. Thereafter, the author was only allowed to communicate with her children by telephone or mail; she contends that her letters were frequently tampered with and that it was almost impossible to reach the girls by telephone.

2.7 In May 1989, Mr. Ospina Sardi broke off the negotiations with the author without providing an explanation; only in November 1989 were the Italian authorities informed, upon request, of the "final divorce judgement" of 13 March 1989. Mr. Ospina Sardi refused to comply with the terms of the judgement. On 21 June 1991, Mr. Ospina Sardi filed a request for the revision of the divorce judgement and of the visiting rights granted to the author, on the ground that circumstances had changed and that visiting rights as generous as those agreed upon in 1985 were no longer justifiable in the circumstances; the author contends that she was only informed of those proceedings in early 1992. Mr. Ospina Sardi also requested that the author be refused permission to see the children in Colombia and that the children should not be allowed to visit their mother in Italy.

2.8 The Italian Foreign Ministry was in turn informed that the matter had been

passed on to the office of the Prosecutor-General of Colombia, whose task under article 277 of the Constitution it is, inter alia, to review compliance with judgements handed down by Colombian courts. The Prosecutor-General initially ignored the case and did not investigate it; nor did he initiate criminal proceedings against Mr. Ospina Sardi for contempt of court and non-compliance with an executory judgement. Several months later, he asked for his disqualification in the case, on the grounds that he had "strong bonds of friendship" with Mr. Ospina Sardi; the file was transferred to another magistrate. The Italian authorities have since addressed several complaints to the President of Colombia and to the Colombian Ministries of Foreign Affairs and International Trade, the latter having offered, on an unspecified earlier date, to find a way out of the impasse. No satisfactory reply has been provided by the Colombian authorities.

2.9 The author notes that, during her trips to Colombia in May and June 1992, she could only see her children very briefly and under conditions deemed unacceptable, and never for more than one hour at a time. On the occasion of her last visit to Colombia in March 1993, the conditions under which the visits took place allegedly had become worse, and the authorities attempted to prevent Mrs. Fei from leaving Colombia. Mrs. Fei has now herself instituted criminal proceedings against Mr. Ospina Sardi, for non-compliance with the divorce judgement.

2.10 In 1992 and 1993, the Colombian courts took further action in respect of Mr. Ospina Sardi's request for a revision of parental custody and visiting rights, as well as in respect of complaints filed on behalf of the author in the Supreme Court of Colombia. On 24 November 1992, the Family Law Division (Sala de Familia) of the Superior Court of Bogotá (Tribunal Superior del Distrito Judicial) modified the visiting rights regime in the sense that all contacts between the children and the author outside Colombia were suspended; at the same time, the entire visiting rights regime was pending for review before Family Court No. 19 of Bogotá.

2.11 Mrs. Fei's counsel initiated proceedings in the Supreme Court of Colombia, directed against the Family Court No. 19 of Bogotá, against the office of the Procurator-General and against the judgement of 24 November 1992, for non-observance of the author's constitutional rights. On 9 February 1993, the Civil Chamber of the Supreme Court (Sala de Casación Civil) set aside operative paragraph 1 of the judgement of 24 November 1992 concerning the suspension of contacts between the author and her children outside Colombia, while confirming the rest of said judgement. At the same time, the Supreme Court transmitted its judgement to family court No. 19, with the request that its observations be taken into account in the proceedings filed by Mr. Ospina Sardi, and to the Constitutional Court.

2.12 On 14 April 1993, family court No. 19 of Bogotá handed down its judgement concerning the request for modification of visiting rights. This judgement placed certain conditions on the modalities of the author's visits to her children, especially outside Colombia, inasmuch as the Government of Colombia had to take the measures necessary to guarantee the exit and the re-entry of the children.

2.13 On 28 July 1993, finally, the Constitutional Court partially confirmed and partially modified the judgement of the Supreme Court of 9 February 1993. The judgement is critical of the author's attitude vis-à-vis her children between 1985 and 1989, as it assumes that the author deliberately neglected contact with them between those dates. It denies the author any possibility of a transfer of

custody, and appears to hold that the judgement of family court No. 19 is final ("no vacila ... en oponer como cosa juzgada la sentencia ... dictada el 14 de abril de 1993"). This, according to counsel, means that the author must start all over again if she endeavours to obtain custody of the children. Finally, the judgement admonishes the author to assume her duties with more responsibility in the future ("Previénese a la demandante ... sobre la necesidad de asumir con mayor responsabilidad los deberes que le corresponden como madre de la niñas").

2.14 In December 1993, the author's children, after presumed pressure from their father, filed proceedings pursuant to article 86 of the Colombian Constitution (acción de tutela; see para. 4.5 below) against their mother. The case was placed before the Superior Tribunal in Bogotá (Tribunal Superior del Distrito Judicial de Santa Fé de Bogotá). Mrs. Fei claims that she was never officially notified of this action. It appears that the Court gave her until 10 January 1994 to present her defence, reserving judgement for 14 January. For an unexplained reason, the hearing was then advanced to the morning of 16 December 1993, with the judgement delivered on the afternoon of the same day. The judgement orders Mrs. Fei to stop publishing her book about her and her children's story (Perdute, Perdidas) in Colombia.

2.15 The author submits that her lawyer was prevented from attending the hearing of 16 December 1993 and from presenting his client's defence. Counsel thereupon filed a complaint based on violations of fundamental rights of the defence with the Supreme Court. On 24 February 1994, the Supreme Court (Sala de Casación Penal) declared, on procedural grounds, that it was not competent to hear the complaint.

2.16 Mrs. Fei notes that apart from the divorce and custody proceedings, her ex-husband has filed complaints for defamation and for perjury/deliberately false testimony against her. She observes that she won the defamation complaint in all instances; furthermore, she has won, on first instance, the perjury complaint against her. This action is pending appeal. The author submits that these suits were malicious and designed to provide a pretext enabling the authorities to prevent her from leaving Colombia the next time she visits her children.

Complaint

3.1 The author alleges a violation of article 14, paragraph 1, of the Covenant, in that she was denied equality before the Colombian tribunals. She further contends that the courts have not been impartial in their approach of the case. In this context, it is submitted that just prior to the release of the judgement of the Constitutional Court, press articles carried excerpts of a judgement and statements of a judge on the Court that implied that the Constitutional Court would rule in her favour; inexplicably, the judgement released shortly thereafter went, at least partially, against her.

3.2 The author further alleges that the proceedings have been deliberately delayed by the Colombian authorities and courts, thereby denying her due process. She suspects that the tacitly agreed strategy is simply to prolong proceedings until the date when the children come of age.

3.3 According to the author, the facts as stated above amount to a violation of article 17, on account of the arbitrary and unlawful interferences in her private life or the interference in her correspondence with the children.

3.4 The author complains that Colombia has violated her and her children's rights under article 23, paragraph 4, of the Covenant. In particular, no provision of the protection of the children was made, as required under article 23, paragraph 4, in fine. In this context, the author concedes that her children have suffered through the high exposure that the case has had in the media, both in Colombia and in Italy. As a result, they have become withdrawn. A report and the testimony of a psychologist used during the proceedings before family court No. 19 concluded that the children's relationships deteriorated abruptly because of the "publicity campaign" waged against their father; the author observes that this psychologist was hired by her ex-husband after the children returned to Colombia in 1985, that she received instructions as to which treatment was appropriate for the children and that she literally "brainwashed" them.

3.5 The author alleges a violation of article 24, in relation to the children's presumed right to acquire Italian nationality and their right to equal access to both parents.

3.6 Finally, counsel argues that the Committee should take into account that Colombia also violated articles 9 and 10 of the Convention on the Rights of the Child, which relate to contact between parents and their children. In this context, he notes that the Convention on the Rights of the Child was incorporated into Colombian law by Law No. 12 of 1991, and submits that the courts, in particular Family Court No. 19, failed to apply articles 9 and 10 of the Convention.

3.7 The author submits that whereas some form of domestic remedy may still be available, the pursuit of domestic remedies has already been unduly prolonged within the meaning of article 5, paragraph 2 (b), especially if the very nature of the dispute, custody of and access to minor children, is taken into consideration.

State party's submission on admissibility

4.1 The State party argues that the communication is inadmissible on the ground of non-exhaustion of domestic remedies. It explains the proceedings before family court No. 19, which were, at the time of the submission, still pending.

4.2 The State party further observes that if the author had wanted to complain about the non-execution of the separation agreement of 19 May 1982, she could have initiated proceedings under what was then article 335 of the Code of Civil Procedure. It is noted that between 1986 and 13 March 1989, the author did not avail herself of this procedure.

4.3 With regard to the author's attitude between 13 March 1989 and 21 June 1991, the State party appears to endorse the contention of Mr. Ospina Sardi that, during this period, the author did not visit her children in Colombia and only maintained telephone or postal contacts with them. Furthermore, Mrs. Fei did not avail herself of the possibility of an action under article 336 of the Code of Civil Procedure, namely, to request enforcement of the decision of the First Circuit Court of Bogotá. Accordingly, the State party submits, the non-exhaustion of local remedies has two aspects: (a) judicial proceedings remain pending before a family court; and (b) Mrs. Fei did not avail herself of the available procedures under the Code of Civil Procedure.

4.4 Additionally, the State party affirms that it cannot possibly be argued

that the author was the victim of a denial of justice since:

(a) The judicial authorities acted diligently and impartially, as demonstrated by the separation agreement of 19 May 1982, the divorce judgement of 13 March 1989 and the proceedings before family court No. 19;

(b) The State party's judicial authorities were unaware of the non-compliance with the decisions of May 1982 and March 1989 before 21 June 1991, for the reason that, in civil matters, the courts do not initiate proceedings ex officio, but only upon the request of the party or the parties concerned;

(c) No omission or failure to act in the case can be attributed to the judicial authorities of Colombia, notwithstanding the complaints filed by the author's representative against, for example, the office of the Procurator-General.

4.5 The State party points to the availability of a special procedure (Acción de tutela), which is governed by article 86 of the Colombian Constitution of 1991, under which every individual may request the protection of his or her fundamental rights.[23]

4.6 Finally, the State party reiterates that no impediments exist that prevent Mrs. Fei from entering Colombian territory and from initiating the pertinent judicial proceedings in order to vindicate her rights.

Committee's decision on admissibility

5.1 In March 1994, the Committee considered the admissibility of the communication. It noted the parties' observations relating to the question of exhaustion of domestic remedies, in particular that proceedings in the case had been initiated in 1982 and that two actions which according to the State party remained available to the author had in the meantime been filed and concluded, without providing the relief sought. The Committee also observed that after more than 11 years of proceedings, judicial disputes about custody of and access to the author's children continued, and concluded that these delays were excessive. It remarked that in custodial disputes and in disputes over access to children upon dissolution of a marriage, judicial remedies should operate swiftly.

5.2 In respect of the claim under article 24, the Committee observed that this violation would have had to be claimed on behalf of the author's children, in whose name the communication had not been submitted. The Committee concluded that this allegation had not been substantiated, for purposes of admissibility.

5.3 As to the claim under article 14, paragraph 3 (c), the Committee recalled that the right to be tried without undue delay relates to the determination of

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[23] Article 86 of the Constitution stipulates:

"Toda persona tendrá acción de tutela para reclamar ante los jueces, en todo momento y lugar, mediante un procedimiento preferente y sumario, por sí misma o por quien actue en su nombre, la protección inmediata de sus derechos constitucionales fundamentales ..."

The proceedings leading to the judgement of 28 July 1993 of the Constitutional Court were instituted under article 86 of the Constitution.

criminal charges. As these were not at issue in the author's case, with the exception of those mentioned in paragraph 2.16 above, in respect of which delay had not been claimed, the Committee held this claim to be inadmissible, ratione materiae, as incompatible with the provisions of the Covenant.

5.4 The Committee considered the remaining allegations under article 14, paragraph 1; article 17; and article 23, paragraph 4, to be adequately substantiated, for purposes of admissibility. On 18 March 1994, the Committee declared the communication admissible insofar as it appeared to raise issues under article 14, paragraph 1; article 17; and article 23, paragraph 4, of the Covenant.

State party's observations on the merits and the author's comments thereon

6.1 In its submission under article 4, paragraph 2, of the Optional Protocol, dated 28 September 1994, the State party denies that the author's rights under the Covenant have been violated. As to the claim under article 14, paragraph 1, it submits that articles 113, 116, 228 and 229 of the Colombian Constitution guarantee the independence of the Colombian judiciary. Article 230 guarantees the impartiality of the judges, by stipulating that they are only bound to respect the laws of the country.

6.2 As to the "excessive delays" of the proceedings referred to by the Committee in its admissibility decision, the State party submits that the sole fact that proceedings have lasted for over 12 years does not in itself justify the conclusion that they have been unduly prolonged. It refers to the judgements of the different courts of Bogotá of 1982, 1989, 1992 and 1993 and proceedings initiated by the author's daughters and her ex-husband in December 1993 and June 1994, and contends that in all these proceedings, the principle of equality of arms has been observed, as both parties were equally entitled to file claims and counterclaims and to submit their defence arguments ("... han tenido las mismas oportunidades para iniciar y contestar las acciones ..."). In short, the author is said to have benefited from all available constitutional guarantees and in particular the guarantee of due process, laid down in article 29 of the Constitution.

6.3 The State party observes that if one of the parties does not comply with a judgement or court order in family disputes, the law lays down the procedure to follow to obtain the judgement's or order's enforcement, as well as the penalties for non-compliance with these obligations. In this context, the procedure governed by article 86 of the Constitution becomes relevant, since it enables anyone to seek immediate judicial protection of his/her fundamental rights. The author initiated proceedings under article 86 before the Supreme Court of Colombia, and by judgement of 9 February 1993, the Court reinstated the author's right of access to her daughters.

6.4 To the State party, the above indicates that the Colombian courts treated the author's case on the basis of equality and with the requisite impartiality, that they did so without unnecessary delays and, accordingly, in compliance with their obligations under article 14, paragraph 1, of the Covenant.

6.5 The State party rejects as unfounded the author's claim that Colombian authorities interfered arbitrarily and unlawfully with the author's right to privacy, by making contacts between herself and her children unnecessarily difficult. This claim, according to the State party, has not been sufficiently substantiated. In this context, the State party contends that it always gave the author the guarantees and assurances requested by the intermediary of the

Italian Embassy, so as to facilitate her travel to Colombia. This is said to have included protection, if so requested. The State party recalls that no impediments exist, or have ever existed, that would prevent the author from entering Colombian territory to visit her children, or with a view to initiating such judicial proceedings she considers opportune to defend her rights.

6.6 Concerning the allegation under article 23, paragraph 4, the State party submits that the author has failed to substantiate how this provision was violated in her case. It recalls that the parents jointly agreed, in 1982, that custody of and care for the children should remain with Mr. Ospina Sardi; this agreement has been challenged on numerous subsequent occasions before the domestic courts.

6.7 The State party rejects as unfounded the author's claim that it did nothing or not enough to protect the "interests of the children", within the meaning of article 23, paragraph 4. In this context, it refers to articles 30 and 31 of the Minors' Code (Codigo del Minor), which governs the protection of children. Article 31, in particular, stipulates that the State will guarantee the protection of children, on a subsidiary basis, if the parents or legal guardians do not fulfil their role. As no circumstances that would have warranted the application of articles 30 and 31 were ever brought to the attention of the competent Colombian authorities, the State party deduces that the author's daughters never were in a situation in which they would have required the State's intervention.

6.8 Still in the context of article 23, paragraph 4, the State party notes that Colombian legislation stipulates that the rights of children shall prevail over the rights of others. Article 44 of the Constitution lays down a number of fundamental rights that are enjoyed by children. A special jurisdiction for minors is safeguarding those rights.

6.9 The State party recalls that the author's daughters themselves filed proceedings against their mother under article 86 of the Constitution, with a view to enforcing their rights under articles 15, 16, 21, 42 and 44 of the Constitution, inter alia, on the grounds that their mother's highly publicized attempts to re-establish contacts with them, as well as the publication of a book about her tribulations, interfered with their privacy and had caused them serious moral prejudice. By judgement of 16 December 1993, a court in Bogotá (Sala Penal del Tribunal Superior del Distrito Judicial de Santa Fé de Bogotá) ordered the author to refrain from publishing her book (Perdute, Perdidas) in Colombia, as well as from any other activity encroaching upon her daughters' rights. This judgement was confirmed by the Constitutional Court (Corte Constitucional, Sala Quinta de Revisión) on 27 June 1994.

7.1 In her comments, the author reiterates that she did not benefit from equality of arms before the Colombian tribunals. Thus, the procedures initiated by her took exceedingly long to examine and to resolve, whereas the procedures initiated by her ex-husband, either directly or indirectly, were processed immediately and sometimes resolved before the date of the audience initially communicated to the author.

7.2 As an example, the author refers to the proceedings filed by her daughters late in 1993. She insists that she was only notified at the end of January 1994, whereas the delay for the submission of her defence had been set for 10 January 1994, and the audience scheduled for 14 January 1994. Moreover, these dates were wrong, as the audience in fact took place in the morning of 16 December 1993, and judgement was given on the afternoon of the same day.

7.3 The author also refers to the new custody and visiting rights regime decided by the courts in 1992 and 1993, and detailed in paragraphs 2.10 to 2.13 above. Some of these decisions went against her husband, but the author submits that the judicial authorities did not react to his refusal to execute/accept said decisions. For this reason, the author requested the Colombian authorities to guarantee the enforcement of the decisions of Colombian courts and a magistrate was charged with an investigation into the matter. Months passed before this magistrate asked for his own discharge because of his friendship with Mr. Ospina Sardi and before another judge was entrusted with the inquiry. The author recalls that the issue has been under inquiry since mid-1992, without any sign of a decision having been taken.

7.4 As to the violation of article 17, the author notes that while she was free to travel to Colombia, she had to arrange herself for her personal protection. The Colombian authorities never assisted her in enforcing her visiting rights. Numerous démarches undertaken to this effect by the Italian Embassy in Bogotá either were left without answer or received dilatory replies. The author submits that by so doing, or by remaining inactive, the State party is guilty of passive interference with her right to privacy.

7.5 Still in the context of article 17, the author contends that on two occasions, the State party arbitrarily interfered with her right to privacy. The first occurred in 1992, on the occasion of one of her visits to Colombia. The author submits that she was not personally notified of proceedings instituted by her ex-husband, and that it required the personal intervention of the Italian Ambassador before the magistrate in charge of the case finally accepted to take her deposition, a few hours before her departure for Italy. The second occurred in 1993 when the Colombian police allegedly tried to prevent her from leaving Colombian territory; again, it took the intervention of the Italian Ambassador before the plane carrying the author was allowed to take off.

7.6 Finally, the author contends that the violation of article 23, paragraph 4, in her case is flagrant. She describes the precarious conditions under which the visits of their daughters took place, out of their home, in the presence of a psychologist hired by Mr. Ospina Sardi, and for extremely short periods of time. The testimonies of Ms. Susanna Agnelli, who accompanied the author during these visits, are said to demonstrate clearly the violation of this provision.

7.7 The author further submits that article 23, paragraph 4, was violated because her daughters were forced to testify against her on several occasions in judicial proceedings initiated by Mr. Ospina Sardi, testimonies that allegedly constituted a serious threat to their mental equilibrium. Furthermore, the procedure filed by the children against the author under article 86 of the Constitution is said to have been prompted by pressure from Mr. Ospina Sardi. This, it is submitted, clearly transpires from the text of the initial deposition: according to the author, it could only have been prepared by a lawyer, but not by a child.

7.8 In a letter dated 5 October 1994, the author's former lawyer draws attention to the judgement of the Constitutional Court of 27 June 1994, which prohibits the publication and circulation of the author's book in Colombia. He contends that this judgement is in clear violation of the Colombian Constitution, which prohibits censorship, and argues that the Court had no jurisdiction to examine the contents of a book that had not been either published or circulated in Colombia at the time of the hearing.

Examination of the merits

8.1 The Human Rights Committee has examined the communication in the light of all the information, material and court documents provided by the parties. It bases its findings on the considerations set out below.

8.2 The Committee has taken note of the State party's argument that the Colombian judicial authorities acted independently and impartially in the author's case, free from external pressure, that the principle of equality of arms was respected, and that there were no undue delays in the proceedings concerning custody of the author's daughters and visiting rights. The author has refuted these contentions.

8.3 On the basis of the material before it, the Committee has no reason to conclude that the Colombian judicial authorities failed to observe their obligation of independence and impartiality. There is no indication of executive pressure on the different tribunals seized of the case, and one of the magistrates charged with an inquiry into the author's claims indeed requested to be discharged, on account of his close acquaintance with the author's ex-husband.

8.4 The concept of a "fair trial" within the meaning of article 14, paragraph 1, however, also includes other elements. Among these, as the Committee has had the opportunity to point out,[24] are the respect for the principles of equality of arms, of adversary proceedings and of expeditious proceedings. In the present case, the Committee is not satisfied that the requirement of equality of arms and of expeditious procedure have been met. It is noteworthy that every court action instituted by the author took several years to adjudicate - and difficulties in communication with the author, who does not reside in the State party's territory, cannot account for such delays, as she had secured legal representation in Colombia. The State party has failed to explain these delays. On the other hand, actions instituted by the author's ex-husband and by or on behalf of her children were heard and determined considerably more expeditiously. As the Committee has noted in its admissibility decision, the very nature of custody proceedings or proceedings concerning access of a divorced parent to his children requires that the issues complained of be adjudicated expeditiously. In the Committee's opinion, given the delays in the determination of the author's actions, this has not been the case.

8.5 The Committee has further noted that the State party's authorities have failed to secure the author's ex-husband's compliance with court orders granting the author access to her children, such as the court order of May 1982 or the judgement of the First Circuit Court of Bogotá of 13 March 1989. Complaints from the author about the non-enforcement of such orders apparently continue to be investigated, more than 30 months after they were filed, or remain in abeyance; this is another element indicating that the requirement of equality of arms and of expeditious procedure has not been met.

8.6 Finally, it is noteworthy that, in the proceedings under article 86 of the Colombian Constitution instituted on behalf of the author's daughters in December 1993, the hearing took place, and judgement was given, on 16 December 1993, that is, before the expiration of the deadline for the submission of the author's defence statement. The State party has failed to address this point and the author's version is thus uncontested. In the Committee's opinion, the impossibility for Mrs. Fei to present her arguments

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[24] Views on Communication No. 203/1986 (Muñoz v. Peru), para. 11.3; and Communication No. 207/1986 (Morael v. France), para. 9.3.

before judgement was given was incompatible with the principle of adversary proceedings and thus contrary to article 14, paragraph 1, of the Covenant.

8.7 The Committee has noted and accepts the State party's argument that in proceedings which are initiated by the children of a divorced parent, the interests and the welfare of the children are given priority. The Committee does not wish to assert that it is in a better position than the domestic courts to assess these interests. The Committee recalls, however, that when such matters are before a local court that is assessing these matters, the court must respect all the guarantees of fair trial.

8.8 The author has claimed arbitrary and unlawful interferences with her right to privacy. The Committee notes that the author's claim about harassment and threats on the occasions of her visits to Colombia have remained generalized and the transcript of the court proceedings made available to the Committee do not reveal that this matter was addressed before the courts. Nor has the claim that correspondence with her children was frequently tampered with been further documented. As to the difficulties the author experienced in following the court proceedings before different judicial instances, the Committee notes that even serious inconvenience caused by judicial proceedings to which the author of a communication is a party cannot be qualified as "arbitrary" or "unlawful" interference with that individual's privacy. Finally, there is no indication that the author's honour was unlawfully attacked by virtue of the court proceedings themselves. The Committee concludes that these circumstances do not constitute a violation of article 17.

8.9 As to the alleged violation of article 23, paragraph 4, the Committee recalls that this provision grants, barring exceptional circumstances, a right to regular contact between children and both of their parents upon dissolution of a marriage. The unilateral opposition of one parent generally does not constitute such an exceptional circumstance.[25]

8.10 In the present case, it was the author's ex-husband who sought to prevent the author from maintaining regular contact with her daughters, in spite of court decisions granting the author such access. On the basis of the material made available to the Committee, the father's refusal apparently was justified as being "in the best interest" of the children. The Committee cannot share this assessment. No special circumstances have been adduced that would have justified the restrictions on the author's contacts with her children. Rather, it appears that the author's ex-husband sought to stifle, by all means at his disposal, the author's access to the girls, or to alienate them from her. The severe restrictions imposed by Mrs. Fei's ex-husband on Mrs. Fei's rare meetings with her daughters support this conclusion. Her attempts to initiate criminal proceedings against her ex-husband for non-compliance with the court order granting her visiting rights were frustrated by delay and inaction on the part of the prosecutor's office. In the circumstances, it was not reasonable to expect her to pursue any remedy that may have been available under the Code of Civil Procedure. In the Committee's opinion, in the absence of special circumstances, none of which are discernible in the present case, it cannot be deemed to be in the "best interest" of children virtually to eliminate one parent's access to them. That Mrs. Fei has, since 1992-1993, reduced her attempts to vindicate her right of access cannot, in the Committee's opinion, be held against her. In all the circumstances of the case, the Committee concludes that there has been a violation of article 23, paragraph 4. Furthermore, the

[25] Views on Communication No. 201/1985 (Hendriks v. the Netherlands), adopted on 27 July 1988, para. 10.4.

failure of the prosecutor's office to ensure the right to permanent contact between the author and her daughters also has entailed a violation of article 17, paragraph 1, of the Covenant.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before the Committee reveal violations by Colombia of article 14, paragraph 1, and article 23, paragraph 4, in conjunction with article 17, paragraph 1, of the Covenant.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy. In the Committee's opinion, this entails guaranteeing the author's regular access to her daughters, and that the State party ensure that the terms of the judgements in the author's favour are complied with. The State party is under an obligation to ensure that similar violations do not occur in the future.

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

K. Communication No. 516/1992; Alina Simunek et al. v. the Czech Republic (Views adopted on 19 July 1995, fifty-fourth session)

Submitted by: Mrs. Alina Simunek, Mrs. Dagmar Hastings, Tuzilova and Mr. Josef Prochazka

Alleged victims: The authors and Jaroslav Simunek (Mrs. Alina Simunek's husband)

State party: The Czech Republic

Date of communication: 17 September 1991 (initial submissions)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 19 July 1995,

Having concluded its consideration of Communication No. 516/1992 submitted to the Human Rights Committee by Mrs. Alina Simunek, Mrs. Dagmar Hastings Tuzilova and Mr. Josef Prochazka under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication and the State party,

Adopts its Views under article 5, paragraph 4, of the Optional Protocol.

1. The authors of the communications are Alina Simunek, who acts on her behalf and on behalf of her husband, Jaroslav Simunek, Dagmar Tuzilova Hastings and Josef Prochazka, residents of Canada and Switzerland, respectively. They claim to be victims of violations of their human rights by the Czech Republic. The Covenant was ratified by Czechoslovakia on 23 December 1975. The Optional Protocol entered into force for the Czech Republic on 12 June 1991.[26]

Facts as submitted by the authors

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

2.2 In July 1990, Mr. and Mrs. Simunek returned to Czechoslovakia in order to submit a request for the return of their property, which had been confiscated by the District National Committee, a State organ, in Jablonece. It transpired, however, that between September 1989 and February 1990, all their property and

[26] The Czech and Slovak Federal Republic ratified the Optional Protocol in March 1991 but, on 31 December 1992, the Czech and Slovak Federal Republic ceased to exist. On 22 February 1993, the Czech Republic notified its succession to the Covenant and the Optional Protocol.

personal effects had been evaluated and auctioned off by the District National Committee. Unsaleable items had been destroyed. On 13 February 1990, the authors' real estate was transferred to the Jablonece Sklarny factory, for which Jaroslav Simunek had been working for 20 years.

2.3 Upon lodging a complaint with the District National Committee, an arbitration hearing was convened between the authors, their witnesses and representatives of the factory on 18 July 1990. The latter's representatives denied that the transfer of the authors' property had been illegal. The authors thereupon petitioned the office of the district public prosecutor, requesting an investigation of the matter on the ground that the transfer of their property had been illegal, since it had been transferred in the absence of a court order or court proceedings to which the authors had been parties. On 17 September 1990, the Criminal Investigations Department of the National Police in Jablonece launched an investigation; its report of 29 November 1990 concluded that no violation of (then) applicable regulations could be ascertained, and that the authors' claim should be dismissed, as the Government had not yet amended the former legislation.

2.4 On 2 February 1991, the Czech and Slovak Federal Government adopted Act 87/1991, which entered into force on 1 April 1991. It endorses the rehabilitation of Czech citizens who had left the country under communist pressure and lays down the conditions for restitution or compensation for loss of property. Under section 3, subsection 1, of the act, those who had their property turned into State ownership in the cases specified in section 6 of the act are entitled to restitution, but only if they are citizens of the Czech and Slovak Federal Republic and are permanent residents in its territory.

2.5 Under section 5, subsection 1, of the act, anyone currently in (illegal) possession of the property shall restitute it to the rightful owner, upon a written request from the latter, who must also prove his or her claim to the property and demonstrate how the property was turned over to the State. Under subsection 2, the request for restitution must be submitted to the individual in possession of the property, within six months of the entry into force of the act. If the person in possession of the property does not comply with the request, the rightful owner may submit his or her claim to the competent tribunal, within one year of the date of entry into force of the act (subsection 4).

2.6 With regard to the issue of exhaustion of domestic remedies, it appears that the authors have not submitted their claims for restitution to the local courts, as required under section 5, subsection 4, of the act. It transpires from their submissions that they consider this remedy ineffective, as they do not fulfil the requirements under section 3, subsection 1. Alina Simunek adds that they have lodged complaints with the competent municipal, provincial and federal authorities, to no avail. She also notes that the latest correspondence is a letter from the Czech President's Office, dated 16 June 1992, in which the author is informed that the President's Office cannot intervene in the matter, and that only the tribunals are competent to pronounce on the matter. The author's subsequent letters remained without reply.

2.7 Dagmar Hastings Tuzilova, an American citizen by marriage and currently residing in Switzerland, emigrated from Czechoslovakia in 1968. On 21 May 1974, she was sentenced, in absentia, to a prison term as well as forfeiture of her property on the ground that she had "illegally emigrated" from Czechoslovakia. Her property, 5/18 shares of her family's estate in Pilsen, is currently held by the Administration of Houses in that city.

2.8 By decision of 4 October 1990 of the District Court of Pilsen, Dagmar Hastings Tuzilova was rehabilitated; the District Court's earlier decision, as well as all other decisions in the case, were declared null and void. All her subsequent applications to the competent authorities and a request to the Administration of Houses in Pilsen to negotiate the restitution of her property have, however, not produced any tangible result.

2.9 Apparently, the Administration of Housing agreed, in the spring of 1992, to transfer the 5/18 of the house back to her, on the condition that the State notary in Pilsen agreed to register this transaction. The State notary, however, has so far refused to register the transfer. At the beginning of 1993, the District Court of Pilsen confirmed the notary's action (Case No. 11, Co. 409/92). The author states that she was informed that she could appeal this decision, via the District Court in Pilsen, to the Supreme Court. She apparently filed an appeal with the Supreme Court on 7 May 1993, but no decision had been taken as of 20 January 1994.

2.10 On 16 March 1992, Dagmar Hastings Tuzilova filed a civil action against the Administration of Houses, pursuant to section 5, subsection 4, of the act. On 25 May 1992, the District Court of Pilsen dismissed the claim, on the ground that, as an American citizen residing in Switzerland, she was not entitled to restitution within the meaning of section 3, subsection 1, of Act 87/1991. The author contends that any appeal against this decision would be ineffective.

2.11 Josef Prochazka is a Czech citizen born in 1920, who currently resides in Switzerland. He fled from Czechoslovakia in August 1968, together with his wife and two sons. In the former Czechoslovakia, he owned a house with two three-bedroom apartments and a garden, as well as another plot of land. Towards the beginning of 1969, he donated his property, in the appropriate form and with the consent of the authorities, to his father. By judgments of a district court of July and September 1971, he, his wife and sons were sentenced to prison terms on the grounds of "illegal emigration" from Czechoslovakia. In 1973, Josef Prochazka's father died; in his will, which was recognized as valid by the authorities, the author's sons inherited the house and other real estate.

2.12 In 1974, the court decreed the confiscation of the author's property, because of his and his family's "illegal emigration", in spite of the fact that the authorities had, several years earlier, recognized as lawful the transfer of the property to the author's father. In December 1974, the house and garden were sold, according to the author at a ridiculously low price, to a high party official.

2.13 By decisions of 26 September 1990 and of 31 January 1991, respectively, the District Court of Ustí rehabilitated the author and his sons as far as their criminal conviction was concerned, with retroactive effect. This means that the court decisions of 1971 and 1974 (see paragraphs 2.11 and 2.12 above) were invalidated.

Complaint

3.1 Alina and Jaroslav Simunek contend that the requirements of Act 87/1991 constitute unlawful discrimination, as it only applies to "pure Czechs living in the Czech and Slovak Federal Republic". Those who fled the country or were forced into exile by the ex-communist regime must take a permanent residence in Czechoslovakia to be eligible for restitution or compensation. Alina Simunek, who lived and worked in Czechoslovakia for eight years, would not be eligible at all for restitution, on account of her Polish citizenship. The authors claim

that the act in reality legalizes former Communist practices, as more than 80 per cent of the confiscated property belongs to persons who do not meet these strict requirements.

3.2 Alina Simunek alleges that the conditions for restitution imposed by the act constitute discrimination on the basis of political opinion and religion, without however substantiating her claim.

3.3 Dagmar Hastings Tuzilova claims that the requirements of Act 87/1991 constitute unlawful discrimination, contrary to article 26 of the Covenant.

3.4 Josef Prochazka also claims that he is a victim of the discriminatory provisions of Act 87/1991; he adds that as the court decided, with retroactive effect, that the confiscation of his property was null and void, the law should not be applied to him at all, as he never lost his legal title to his property, and because there can be no question of "restitution" of the property.

Committee's decision on admissibility

4.1 On 26 October 1993, the communications were transmitted to the State party under rule 91 of the rules of procedure of the Human Rights Committee. No submission under rule 91 was received from the State party, despite a reminder addressed to it. The authors were equally requested to provide a number of clarifications; they complied with this request by letters of 25 November 1993 (Alina and Jaroslav Simunek), 3 December 1993 and 11/12 April 1994 (Josef Prochazka) and 19 January 1994 (Dagmar Hastings Tuzilova).

4.2 At its fifty-first session, the Committee considered the admissibility of the communication. It noted with regret the State party's failure to provide information and observations on the question of the admissibility of the communication. Notwithstanding this absence of cooperation on the part of the State party, the Committee proceeded to ascertain whether the conditions of admissibility under the Optional Protocol had been met.

4.3 The Committee noted that the confiscation and sale of the property in question by the authorities of Czechoslovakia occurred in the 1970s and 1980s. Irrespective of the fact that all these events took place prior to the date of entry into force of the Optional Protocol for the Czech Republic, the Committee recalled that the right to property, as such, is not protected by the Covenant.

4.4 The Committee observed, however, that the authors complained about the discriminatory effect of the provisions of Act 87/1991, in the sense that they apply only to persons unlawfully stripped of their property under the former regime who now have a permanent residence in the Czech Republic and are Czech citizens. Thus the question before the Committee was whether the law could be deemed discriminatory within the meaning of article 26 of the Covenant.

4.5 The Committee observed that the State party's obligations under the Covenant applied as of the date of its entry into force. A different issue arose as to when the Committee's competence to consider complaints about alleged violations of the Covenant under the Optional Protocol was engaged. In its jurisprudence under the Optional Protocol, the Committee has consistently held that it cannot consider alleged violations of the Covenant which occurred before the entry into force of the Optional Protocol for the State party, unless the violations complained of continue after the entry into force of the Optional Protocol. A continuing violation is to be interpreted as an affirmation, after the entry into force of the Optional Protocol, by act or by clear implication,

of the previous violations of the State party.

4.6 While the authors in the present case have had their criminal convictions quashed by Czech tribunals, they still contend that Act No. 87/1991 discriminates against them, in that in the case of two of the applicants (Mr. and Mrs. Simunek; Mrs. Hastings Tuzilova), they cannot benefit from the law because they are not Czech citizens or have no residence in the Czech Republic, and that in the case of the third applicant (Mr. Prochazka), the law should not have been deemed applicable to his situation at all.

5. On 22 July 1994 the Human Rights Committee therefore decided that the communication was admissible in as much as it may raise issues under article 14, paragraph 6, and article 26 of the Covenant.

State party's explanations

6.1 In its submission, dated 12 December 1994, the State party argues that the legislation in question is not discriminatory. It draws the Committee's attention to the fact that according to article 11, section 2, of the Charter of Fundamental Rights and Freedoms, which is part of the Constitution of the Czech Republic, "... the law may specify that some things may be owned exclusively by citizens or by legal persons having their seat in the Czech Republic".

6.2 The State party affirms its commitment to the settlement of property claims by restitution of properties to persons injured during the period of 25 February 1948 to 1 January 1990. Although certain criteria had to be stipulated for the restitution of confiscated properties, the purpose of such requirements is not to violate human rights. The Czech Republic cannot and will not dictate to anybody where to live. Restitution of confiscated property is a very complicated and de facto unprecedented measure and therefore it cannot be expected to rectify all damages and to satisfy all the people injured by the Communist regime.

7.1 With respect to the communication submitted by Mrs. Alina Simunek the State party argues that the documents submitted by the author do not define the claims clearly enough. It appears from her submission that Mr. Jaroslav Simunek was probably kept in prison by the State Security Police. Nevertheless, it is not clear whether he was kept in custody or actually sentenced to imprisonment. As concerns the confiscation of the property of Mr. and Mrs. Simunek, the communication does not define the measure on the basis of which they were deprived of their ownership rights. In case Mr. Simunek was sentenced for a criminal offence mentioned in section 2 or section 4 of Law No. 119/1990 on judicial rehabilitation as amended by subsequent provisions, he could claim rehabilitation under the law or in review proceedings and, within three years of the entry into force of the court decision on his rehabilitation, apply to the Compensations Department of the Ministry of Justice of the Czech Republic for compensation pursuant to section 23 of the above-mentioned law. In case Mr. Simunek was unlawfully deprived of his personal liberty and his property was confiscated between 25 February 1948 and 1 January 1990 in connection with a criminal offence mentioned in section 2 and section 4 of the law but the criminal proceedings against him were not initiated, he could apply for compensation on the basis of a court decision issued at the request of the injured party and substantiate his application with the documents which he had at his disposal or which his legal adviser obtained from the archives of the Ministry of the Interior of the Czech Republic.

7.2 As concerns the restitution of the forfeited or confiscated property, the

State party concludes from the submission that Alina and Jaroslav Simunek do not comply with the requirements of section 3 (1) of Law No. 87/1991 on extrajudicial rehabilitations, namely the requirements of citizenship of the Czech and Slovak Federal Republic and permanent residence on its territory. Consequently, they cannot be recognized as persons entitled to restitution. Remedy would be possible only in case at least one of them complied with both requirements and applied for restitution within 6 months from the entry into force of the law on extrajudicial rehabilitations (i.e. by the end of September 1991).

8.1 With respect to the communication of Mrs. Dagmar Hastings-Tuzilova the State party clarifies that Mrs. Dagmar Hastings-Tuzilova claims the restitution of the 5/18 shares of house No. 2214 at Cechova 61, Pilsen, forfeited on the basis of the ruling of the Pilsen District Court of 21 May 1974, by which she was sentenced for the criminal offence of illegal emigration according to section 109 (2) of the Criminal Law. She was rehabilitated pursuant to Law No. 119/1990 on judicial rehabilitations by the ruling of the Pilsen District Court of 4 October 1990. She applied for restitution of her share of the estate in Pilsen pursuant to Law No. 87/1991 on extrajudicial rehabilitations. Mrs. Hastings-Tuzilova concluded an agreement on the restitution with the Administration of Houses in Pilsen, which the State Notary in Pilsen refused to register due to the fact that she did not comply with the conditions stipulated by section 3 (1) of the law on extrajudicial rehabilitations.

8.2 Mrs. Hastings-Tuzilova, although rehabilitated pursuant to the law on judicial rehabilitations, cannot be considered entitled person as defined by section 19 of the law on extrajudicial rehabilitations, because on the date of application she did not comply with the requirements of section 3 (1) of the above-mentioned law, i.e. requirements of citizenship of the Czech and Slovak Federal Republic and permanent residence on its territory. Moreover, she failed to fulfil the requirements within the preclusive period stipulated by section 5 (2) of the law on extrajudicial rehabilitations. Mrs. Hastings-Tuzilova acquired Czech citizenship and registered her permanent residence on 30 September 1992.

8.3 Section 20 (3) of the law on extrajudicial rehabilitations says that the statutory period for the submission of applications for restitution based on the sentence of forfeiture which was declared null and void after the entry into force of the law on extrajudicial rehabilitations starts on the day of the entry into force of the annulment. Nevertheless, this provision cannot be applied in the case of Mrs. Hastings-Tuzilova due to the fact that her judicial rehabilitation entered into force on 9 October 1990, i.e. before the entry into force of Law No. 87/1991 on extrajudicial rehabilitations (1 April 1991).

9.1 With respect to the communication of Mr. Josef Prochazka, the State party argues that section 3 of Law No. 87/1991 on extrajudicial rehabilitations defines the entitled person, i.e. the person who could within the statutory period claim the restitution of property or compensation. Applicants who did not acquire citizenship of the Czech and Slovak Federal Republic and register their permanent residence on its territory before the end of the statutory period determined for the submission of applications (i.e. before 1 October 1991 for applicants for restitution and before 1 April 1992 for applicants for compensation) are not considered entitled persons.

9.2 From Mr. Prochazka's submission the State party concludes that the property devolved to the State on the basis of the ruling of the Usti nad Labem District Court of 1974, which declared the 1969 deed of gift null and void for the reason

that the donor left the territory of the former Czechoslovak Socialist Republic. Such cases are provided for in section 6 (1) (f) of the law on extrajudicial rehabilitations which defined the entitled person as the transferee according to the invalidated deed, i.e. in this case the entitled person is the unnamed father of Mr. Prochazka. Consequently, the persons to whom the sentence of forfeiture invalidated under Law No. 119/1990 on judicial rehabilitations applies, cannot be regarded as entitled persons, as Mr. Prochazka incorrectly assumes.

9.3 With regard to the fact that the above-mentioned father of Mr. Prochazka died before the entry into force of the law on extrajudicial rehabilitations, the entitled persons are the testamentary heirs - Mr. Prochazka's sons Josef Prochazka and Jiri Prochazka, provided that they were citizens of the former Czech and Slovak Federal Republic and had permanent residence on its territory. The fact that they were rehabilitated pursuant to the law on judicial rehabilitations has no significance in this case. From Mr. Prochazka's submission the State party concludes that Josef Prochazka and Jiri Prochazka are Czech citizens but live in Switzerland and did not apply for permanent residence in the Czech Republic.

Authors' comments on the State party's submissions

10.1 By letter of 21 February 1995, Alina and Jaroslav Simunek contend that the State party has not addressed the issues raised by their communication, namely the compatibility of Act No. 87/1991 with the non-discrimination requirement of article 26 of the Covenant. They claim that Czech hard-liners are still in office and that they have no interest in the restitution of confiscated properties, because they themselves benefited from the confiscations. A proper restitution law should be based on democratic principles and not allow restrictions that would exclude former Czech citizens and Czech citizens living abroad.

10.2 By letter of 12 June 1995, Mr. Prochazka informed the Committee that by order of the District Court of 12 April 1995 the plot of land he inherited from his father will be returned to him (para. 2.11).

10.3 Mrs. Hastings Tuzilova had not submitted comments by the time of the consideration of the merits of this communication by the Committee.

Examination of the merits

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

11.2 This communication was declared admissible only insofar as it may raise issues under article 14, paragraph 6, and article 26 of the Covenant. With regard to article 14, paragraph 6, the Committee finds that the authors have not sufficiently substantiated their allegations and that the information before it does not sustain a finding of a violation.

11.3 As the Committee has already explained in its decision on admissibility (para. 4.3 above), the right to property, as such, is not protected under the Covenant. However, a confiscation of private property or the failure by a State party to pay compensation for such confiscation could still entail a breach of the Covenant if the relevant act or omission was based on discriminatory grounds in violation of article 26 of the Covenant.

11.4 The issue before the Committee is whether the application of Act 87/1991 to the authors entailed a violation of their rights to equality before the law and to the equal protection of the law. The authors claim that this act, in effect, reaffirms the earlier discriminatory confiscations. The Committee observes that the confiscations themselves are not here at issue, but rather the denial of a remedy to the authors, whereas other claimants have recovered their properties or received compensation therefor.

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

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

11.7 The State party contends that there is no violation of the Covenant because the Czech and Slovak legislators had no discriminatory intent at the time of the adoption of Act 87/1991. The Committee is of the view, however, that the intent of the legislature is not alone dispositive in determining a breach of article 26 of the Covenant. A politically motivated differentiation is unlikely to be compatible with article 26. But an act which is not politically motivated may still contravene article 26 if its effects are discriminatory.

11.8 In the light of the above considerations, the Committee concludes that Act 87/1991 has had effects upon the authors that violate their rights under article 26 of the Covenant.

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

12.1 The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the denial of restitution or compensation to the authors constitutes a violation of article 26 of the International Covenant on Civil and Political Rights.

12.2 In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, which may be compensation if the properties in question cannot be returned. To the extent that partial restitution of Mr. Prochazka's property appears to have been or may soon be effected (para. 10.2), the Committee welcomes this measure, which it deems to constitute partial compliance with these Views. The Committee further encourages the State party to review its relevant legislation to ensure that neither the law itself nor its application is discriminatory.

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

L. Communication No. 518/1992; Jong-Kyu Sohn v. the Republic of Korea (Views adopted on 19 July 1995, fifty-fourth session)

Submitted by: Jong-Kyu Sohn (represented by counsel)

Victim: The author

State party: Republic of Korea

Date of communication: 7 July 1992 (initial submission)

Date of decision on admissibility: 18 March 1994

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 19 July 1995,

Having concluded its consideration of Communication No. 518/1992 submitted to the Human Rights Committee on behalf of Mr. Jong-Kyu Sohn under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts its Views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Mr. Jong-Kyu Sohn, a citizen of the Republic of Korea, residing at Kwangju, Republic of Korea. He claims to be a victim of a violation by the Republic of Korea of article 19, paragraph 2, of the International Covenant on Civil and Political Rights. He is represented by counsel.

Facts as submitted by the author

2.1 The author has been president of the Kumho Company Trade Union since 27 September 1990 and is a founding member of the Solidarity Forum of Large Company Trade Unions. On 8 February 1991, a strike was called at the Daewoo Shipyard Company at Guhjae Island in the province of Kyungsang-Nam-Do. The Government announced that it would send in police troops to break the strike. Following that announcement, the author had a meeting, on 9 February 1991, with other members of the Solidarity Forum, in Seoul, 400 kilometres from the place where the strike took place. At the end of the meeting they issued a statement supporting the strike and condemning the Government's threat to send in troops. That statement was transmitted to the workers at the Daewoo Shipyard by facsimile. The Daewoo Shipyard strike ended peacefully on 13 February 1991.

2.2 On 10 February 1991, the author, together with some 60 other members of the Solidarity Forum, was arrested by the police when leaving the premises where the meeting had been held. On 12 February 1991, he and six others were charged with contravening article 13(2) of the Labour Dispute Adjustment Act (Law No. 1327 of 13 April 1963, amended by Law No. 3967 of 28 November 1987), which prohibits others than the concerned employer, employees or trade union, or persons having legitimate authority attributed to them by law, to intervene in a labour dispute for the purpose of manipulating or influencing the parties concerned. He was also charged with contravening the Act on Assembly and Demonstration (Law

No. 4095 of 29 March 1989), but notes that his communication relates only to the Labour Dispute Adjustment Act. One of the author's co-accused later died in detention, according to the author under suspicious circumstances.

2.3 On 9 August 1991, a single judge of the Seoul Criminal District Court found the author guilty as charged and sentenced him to one and a half years' imprisonment and three years' probation. The author's appeal against his conviction was dismissed by the Appeal section of the same court on 20 December 1991. The Supreme Court rejected his further appeal on 14 April 1992. The author submits that, since the Constitutional Court had declared, on 15 January 1990, that article 13 (2) of the Labour Dispute Adjustment Act was compatible with the Constitution, he has exhausted domestic remedies.

2.4 The author states that the same matter has not been submitted for examination under any other procedure of international investigation or settlement.

Complaint

3.1 The author argues that article 13 (2) of the Labour Dispute Adjustment Act is used to punish support for the labour movement and to isolate the workers. He argues that the provision has never been used to charge those who take the side of management in a labour dispute. He further claims that the vagueness of the provision, which prohibits any act to influence the parties, violates the principle of legality (nullum crimen, nulla poena sine lege).

3.2 The author further argues that the provision was incorporated into the law to deny the right to freedom of expression to supporters of labourers or trade unions. In this respect, he makes reference to the Labour Union Act, which prohibits third party support for the organization of a trade union. He concludes that any support to labourers or trade unions may thus be punished by the Labour Dispute Adjustment Act at the time of strikes and by the Labour Union Act at other times.

3.3 The author claims that his conviction violates article 19, paragraph 2, of the Covenant. He emphasizes that the way he exercised his freedom of expression did not infringe the rights or reputations of others, nor did it threaten national security, public order, public health or morals.

State party's observations on admissibility and author's comments thereon

4.1 By submission of 9 June 1993, the State party argues that the communication is inadmissible on the grounds of failure to exhaust domestic remedies. The State party submits that available domestic remedies in a criminal case are exhausted only when the Supreme Court has issued a judgement on appeal and when the Constitutional Court has reached a decision on the constitutionality of the law on which the judgement is based.

4.2 As regards the author's argument that he has exhausted domestic remedies because the Constitutional Court has already declared that article 13 (2) of the Labour Dispute Adjustment Act, on which his conviction was based, is constitutional, the State party contends that the prior decision of the Constitutional Court only examined the compatibility of the provision with the right to work, the right to equality and the principle of legality, as protected by the Constitution. It did not address the question of whether the article was in compliance with the right to freedom of expression.

4.3 The State party argues, therefore, that the author should have requested a review of the law in the light of the right to freedom of expression, as protected by the Constitution. Since he failed to do so, the State party argues that he has not exhausted domestic remedies.

4.4 The State party submits, in addition, that the author's sentence was revoked on 6 March 1993, under a general amnesty granted by the President of the Republic of Korea.

5.1 In his comments on the State party's submission, the author maintains that he has exhausted all domestic remedies and that it would be futile to request the Constitutional Court to pronounce itself on the constitutionality of the Labour Dispute Adjustment Act when it has done so in the recent past.

5.2 The author submits that if the question of constitutionality of a legal provision is brought before the Constitutional Court, the Court is legally obliged to take into account all possible grounds that may invalidate the law. As a result, the author argues that it is futile to bring the same question to the Court again.

5.3 In this context, the author notes that, although the majority opinion in the judgement of the Constitutional Court of 15 January 1990 did not refer to the right to freedom of expression, two concurring opinions and one dissenting opinion did. He submits that it is clear therefore that the Court did in fact consider all the grounds for possible unconstitutionality of the Labour Dispute Adjustment Act, including a possible violation of the constitutional right to freedom of expression.

Committee's decision on admissibility

6.1 At its fiftieth session, the Committee considered the admissibility of the communication. After having examined the submissions of both the State party and the author concerning the constitutional remedy, the Committee found that the compatibility of article 13 (2) of the Labour Dispute Adjustment Act with the Constitution, including the constitutional right to freedom of expression, had necessarily been before the Constitutional Court in January 1990, even though the majority judgement chose not to refer to the right to freedom of expression. In the circumstances, the Committee considered that a further request to the Constitutional Court to review article 13 (2) of the Act, by reference to freedom of expression, did not constitute a remedy which the author still needed to exhaust under article 5, paragraph 2, of the Optional Protocol.

6.2 The Committee noted that the author was arrested, charged and convicted not for any physical support for the strike in progress but for participating in a meeting in which verbal expressions of support were given, and considered that the facts as submitted by the author might raise issues under article 19 of the Covenant which should be examined on the merits. Consequently, the Committee declared the communication admissible.

State party's observations on the merits and author's comments thereon

7.1 By submission of 25 November 1994, the State party takes issue with the Committee's consideration when declaring the communication admissible that "the author was arrested, charged and convicted not for any physical support for the strike in progress but for participating in a meeting in which verbal expressions of support were given". The State party emphasizes that the author not only attended the meeting of the Solidarity Forum on 9 February 1991, but

also actively participated in distributing propaganda on 10 or 11 February 1991 and, on 11 November 1990, was involved in a violent demonstration, during which Molotov cocktails were thrown.

7.2 The State party submits that because of these offences, the author was charged with and convicted of violating articles 13 (2) of the Labour Dispute Adjustment Act and 45 (2) of the Act on Assembly and Demonstration.

7.3 The State party explains that the articles of the Labour Dispute Adjustment Act, prohibiting intervention by third parties in a labour dispute, are meant to maintain the independent nature of a labour dispute between employees and employer. It points out that the provision does not prohibit counselling or giving advice to the parties involved.

7.4 The State party invokes article 19, paragraph 3, of the Covenant, which provides that the right to freedom of expression may be subject to certain restrictions, inter alia, for the protection of national security or of public order.

7.5 The State party reiterates that the author's sentence was revoked on 6 March 1993, under a general amnesty.

8.1 In his comments, the author states that, although it is true that he was sentenced for his participation in the demonstration of November 1990 under the Act on Assembly and Demonstration, this does not form part of his complaint. He refers to the judgment of the Seoul Criminal District Court of 9 August 1991, which shows that the author's participation in the November demonstration was a crime punished separately, under the Act on Assembly and Demonstration, from his participation in the activities of the Solidarity Forum and his support for the strike of the Daewoo Shipyard Company in February 1991, which were punished under the Labour Dispute Adjustment Act. The author states that the two incidents are unrelated to each other. He reiterates that his complaint only regards the "prohibition of third party intervention", which he claims is in violation of the Covenant.

8.2 The author argues that the Spate party's interpretation of the freedom of expression as guaranteed in the Covenant is too narrow. He refers to paragraph 2 of article 19, which includes the freedom to impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print. The author argues, therefore, that the distribution of leaflets containing the Solidarity Forum's statements supporting the strike at the Daewoo Shipyard falls squarely within the right to freedom of expression. He adds that he did not distribute the statements himself, but only transmitted them by telefax to the striking workers at the Daewoo Shipyard.

8.3 As regards the State party's argument that his activity threatened national security and public order, the author notes that the State party has not specified what part of the statements of the Solidarity Forum threatened public security and public order and for what reasons. He contends that a general reference to public security and public order does not justify the restriction of his freedom of expression. In this connection, he recalls that the statements of the Solidarity Forum contained arguments for the legitimacy of the strike concerned, strong support for the strike and criticism of the employer and of the Government for threatening to break the strike by force.

8.4 The author denies that the statements by the Solidarity Forum posed a threat to the national security and public order of South Korea. It is stated

that the author and the other members of the Solidarity Forum are fully aware of the sensitive situation in terms of South Korea's confrontation with North Korea. The author cannot see how the expression of support for the strike and criticism of the employer and the government in handling the matter could threaten national security. In this connection, the author notes that none of the participants in the strike was charged with breaching the National Security Law. The author states that in the light of the constitutional right to strike, police intervention by force can be legitimately criticized. Moreover, the author argues that public order was not threatened by the statements given by the Solidarity Forum, but that, on the contrary, the right to express one's opinion freely and peacefully enhances public order in a democratic society.

8.5 The author points out that solidarity among workers is being prohibited and punished in the Republic of Korea, purportedly in order to "maintain the independent nature of a labour dispute", but that intervention in support of the employer to suppress workers' rights is being encouraged and protected. He adds that the Labour Dispute Adjustment Act was enacted by the Legislative Council for National Security, which was instituted in 1980 by the military government to replace the National Assembly. It is argued that the laws enacted and promulgated by this undemocratic body do not constitute laws within the meaning of the Covenant, enacted in a democratic society.

8.6 The author notes that the Committee of Freedom of Association of the International Labour Organization has recommended that the Government repeal the provision prohibiting the intervention by a third party in labour disputes, because of its incompatibility with the ILO constitution, which guarantees workers' freedom of expression as an essential component of the freedom of association.[28]

8.7 Finally, the author points out that the amnesty has not revoked the guilty judgment against him, nor compensated him for the violations of his Covenant rights, but merely lifted residual restrictions imposed upon him as a result of his sentence, such as the restriction on his right to run for public office.

9.1 By further submission of 20 June 1995, the State party explains that the labour movement in the Republic of Korea can be generally described as being politically oriented and ideologically influenced. In this connection, it is stated that labour activists in Korea do not hesitate in leading workers to extreme actions by using force and violence and engaging in illegal strikes in order to fulfil their political aims or carry out their ideological principles. Furthermore, the State party argues that there have been frequent instances where the idea of a proletarian revolution has been implanted in the minds of workers.

9.2 The State party argues that if a third party interferes in a labour dispute to the extent that the third party actually manipulates, instigates or obstructs the decisions of workers, such a dispute is being distorted towards other objectives and goals. The State party explains, therefore, that in view of the general nature of the labour movement it has felt obliged to maintain the law concerning the prohibition of third party intervention.

9.3 Moreover, the State party submits that in the instant case, the written statement distributed in February 1991 to support the Daewoo Shipyard Trade Union was used as a disguise to incite a nation-wide strike of all workers. The

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[28] 294th report of the Committee on Freedom of Association, June 1994, paras. 218 to 274. See also the 297th report, March-April 1995, para. 23.

State party argues that "in the case where a national strike would take place, in any country, regardless of its security situation, there is considerable reason to believe that the national security and public order of the nation would be threatened".

9.4 As regards the enactment of the Labour Dispute Adjustment Act by the Legislative Council for National Security, the State party argues that, through the revision of the constitution, the effectiveness of the laws enacted by the Council was acknowledged by public consent. The State party moreover argues that the provision concerning the prohibition of the third party intervention is being applied fairly to both the labour and the management side of a dispute. In this connection the State party refers to a case currently before the courts against someone who intervened in a labour dispute on the side of the employer.

Issues and proceedings before the Committee

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

10.2 The Committee has taken note of the State party's argument that the author participated in a violent demonstration in November 1990, for which he was convicted under the Act on Assembly and Demonstration. The Committee has also noted that the author's complaint does not concern this particular conviction, but only his conviction for having issued the statement of the Solidarity Forum in February 1991. The Committee considers that the two convictions concern two different events, which are not related. The issue before the Committee is therefore only whether the author's conviction under article 13, paragraph 2, of the Labour Dispute Adjustment Act for having joined in issuing a statement supporting the strike at the Daewoo Shipyard Company and condemning the Government's threat to send in troops to break the strike violates article 19, paragraph 2, of the Covenant.

10.3 Article 19, paragraph 2, of the Covenant guarantees the right to freedom of expression and includes "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media". The Committee considers that the author, by joining others in issuing a statement supporting the strike and criticizing the Government, was exercising his right to impart information and ideas within the meaning of article 19, paragraph 2, of the Covenant.

10.4 The Committee observes that any restriction of the freedom of expression pursuant to paragraph 3 of article 19 must cumulatively meet the following conditions: it must be provided for by law, it must address one of the aims enumerated in subparagraphs 3 (a) and (b) of article 19, and must be necessary to achieve the legitimate purpose. While the State party has stated that the restrictions were justified in order to protect national security and public order and that they were provided for by law, under article 13 (2) of the Labour Dispute Adjustment Act, the Committee must still determine whether the measures taken against the author were necessary for the purpose stated. The Committee notes that the State party has invoked national security and public order by reference to the general nature of the labour movement and by alleging that the statement issued by the author in collaboration with others was a disguise for the incitement to a national strike. The Committee considers that the State party has failed to specify the precise nature of the threat which it contends that the author's exercise of freedom of expression posed and finds that none of the arguments advanced by the State party suffice to render the restriction of

the author's right to freedom of expression compatible with paragraph 3 of article 19.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, finds that the facts before it disclose a violation of article 19, paragraph 2, of the Covenant.

12. The Committee is of the view that Mr. Sohn is entitled, under article 2, paragraph 3 (a), of the Covenant, to an effective remedy, including appropriate compensation, for having been convicted for exercising his right to freedom of expression. The Committee further invites the State party to review article 13 (2) of the Labour Dispute Adjustment Act. The State party is under an obligation to ensure that similar violations do not occur in the future.

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

M. Communication No. 539/1993; Keith Cox v. Canada (Views adopted on 31 October 1994, fifty-second session)[29]

Submitted by:	Keith Cox (represented by counsel)
Victim:	The author
State party:	Canada
Date of communication:	4 January 1993 (initial submission)
Date of decision on admissibility:	3 November 1993

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 October 1994,

Having concluded its consideration of Communication No. 539/1993 submitted to the Human Rights Committee by Keith Cox under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts its Views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Keith Cox, a citizen of the United States of America born in 1952, currently detained at a penitentiary in Montreal, Canada, and facing extradition to the United States. He claims to be a victim of violations by Canada of articles 6, 7, 14 and 26 of the International Covenant on Civil and Political Rights. The author had submitted an earlier communication which was declared inadmissible because of non-exhaustion of domestic remedies on 29 July 1992.[30]

Facts as submitted by the author

2.1 On 27 February 1991, the author was arrested at Laval, Québec, Canada, for theft, a charge to which he pleaded guilty. While in custody, the judicial authorities received from the United States a request for his extradition, pursuant to the 1976 Extradition Treaty between Canada and the United States. The author is wanted in the State of Pennsylvania on two charges of first-degree murder, relating to an incident that took place in Philadelphia in 1988. If convicted, the author could face the death penalty, although the two other accomplices were tried and sentenced to life terms.

2.2 Pursuant to the extradition request of the United States Government and in accordance with the Extradition Treaty, the Superior Court of Québec, on 26 July 1991, ordered the author's extradition to the United States of America.

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[29] The texts of 8 individual opinions, signed by 13 Committee members, are appended to the present document.

[30] CCPR/C/45/D/486/1993.

Article 6 of the Treaty provides:

> "When the offence for which extradition is requested is punishable by death under the laws of the requesting State and the laws of the requested State do not permit such punishment for that offence, extradition may be refused unless the requesting State provides such assurances as the requested State considers sufficient that the death penalty shall not be imposed or, if imposed, shall not be executed".

Canada abolished the death penalty in 1976, except in the case of certain military offences.

2.3 The power to seek assurances that the death penalty will not be imposed is conferred on the Minister of Justice pursuant to section 25 of the 1985 Extradition Act.

2.4 Concerning the course of the proceedings against the author, it is stated that a habeas corpus application was filed on his behalf on 13 September 1991; he was represented by a legal aid representative. The application was dismissed by the Superior Court of Québec. The author's representative appealed to the Court of Appeal of Québec on 17 October 1991. On 25 May 1992, he abandoned his appeal, considering that, in the light of the Court's jurisprudence, it was bound to fail.

2.5 Counsel requests the Committee to adopt interim measures of protection because extradition of the author to the United States would deprive the Committee of its jurisdiction to consider the communication, and the author to properly pursue his communication.

Complaint

3. The author claims that the order to extradite him violates articles 6, 14 and 26 of the Covenant; he alleges that the way death penalties are pronounced in the United States generally discriminates against black people. He further alleges a violation of article 7 of the Covenant, in that he, if extradited and sentenced to death, would be exposed to "the death row phenomenon", i.e. years of detention under harsh conditions, awaiting execution.

Interim measures

4.1 On 12 January 1993 the Special Rapporteur on New Communications requested the State party, pursuant to rule 86 of the Committee's rules of procedure, to defer the author's extradition until the Committee had had an opportunity to consider the admissibility of the issues placed before it.

4.2 At its forty-seventh session the Committee decided to invite both the author and the State party to make further submissions on admissibility.

State party's observations

5.1 The State party, in its submission, dated 26 May 1993, submits that the communication should be declared inadmissible on the grounds that extradition is beyond the scope of the Covenant, or alternatively that, even if in exceptional circumstances the Committee could examine questions relating to extradition, the present communication is not substantiated, for purposes of admissibility.

5.2 With regard to domestic remedies, the State party explains that extradition

is a two step process under Canadian law. The first step involves a hearing at which a judge examines whether a factual and legal basis for extradition exists. The judge considers, inter alia, the proper authentication of materials provided by the requesting State, admissibility and sufficiency of evidence, questions of identity and whether the conduct for which the extradition is sought constitutes a crime in Canada for which extradition can be granted. In the case of fugitives wanted for trial, the judge must be satisfied that the evidence is sufficient to warrant putting the fugitive on trial. The person sought for extradition may submit evidence at the judicial hearing, after which the judge decides whether the fugitive should be committed to await surrender to the requesting State.

5.3 Judicial review of a warrant of committal to await surrender can be sought by means of an application for a writ of habeas corpus in a provincial court. A decision of the judge on the habeas corpus application can be appealed to the provincial court of appeal and then, with leave, to the Supreme Court of Canada.

5.4 The second step of the extradition process begins following the exhaustion of the appeals in the judicial phase. The Minister of Justice is charged with the responsibility of deciding whether to surrender the person sought for extradition. The fugitive may make written submissions to the Minister, and counsel for the fugitive may appear before the Minister to present oral argument. In coming to a decision on surrender, the Minister considers the case record from the judicial phase, together with any written and oral submissions from the fugitive, the relevant treaty terms which pertain to the case to be decided and the law on extradition. While the Minister's decision is discretionary, the discretion is circumscribed by law. The decision is based upon a consideration of many factors, including Canada's obligations under the applicable treaty of extradition, facts particular to the person and the nature of the crime for which extradition is sought. In addition, the Minister must consider the terms of the Canadian Charter of Rights and Freedoms and the various instruments, including the Covenant, which outline Canada's international human rights obligations. A fugitive, subject to an extradition request, cannot be surrendered unless the Minister of Justice orders the fugitive surrendered and, in any case, not until all available avenues for judicial review of the Minister's decision, if pursued, are completed. For extradition requests before 1 December 1992, including the author's request, the Minister's decision is reviewable either by way of an application for a writ of habeas corpus in a provincial court or by way of judicial review in the Federal Court pursuant to section 18 of the Federal Court Act. As with appeals against a warrant of committal, appeals against a review of the warrant of surrender can be pursued, with leave, up to the Supreme Court of Canada.

5.5 The courts can review the Minister's decision on jurisdictional grounds, i.e. whether the Minister acted fairly, in an administrative law sense, and for its consistency with the Canadian constitution, in particular, whether the Minister's decision is consistent with Canada's human rights obligations.

5.6 With regard to the exercise of discretion in seeking assurances before extradition, the State party explains that each extradition request from the United States, in which the possibility exists that the person sought may face the imposition of the death penalty, must be considered by the Minister of Justice and decided on its own particular facts. "Canada does not routinely seek assurances with respect to the non-imposition of the death penalty. The right to seek assurances is held in reserve for use only where exceptional circumstances exist. This policy ... is in application of article 6 of the Extradition Treaty between the United States and Canada. The Treaty was never

intended to make the seeking of assurances a routine occurrence. Rather, it was the intention of the parties to the Treaty that assurances with respect to the death penalty should only be sought in circumstances where the particular facts of the case warrant a special exercise of the discretion. This policy represents a balancing of the rights of the individual sought for extradition with the need for the protection of the people of Canada. This policy reflects ... Canada's understanding of and respect for the criminal justice system of the United States".

5.7 Moreover, the State party refers to a continuing flow of criminal offenders from the United States into Canada and a concern that, unless such illegal flow is discouraged, Canada could become a safe haven for dangerous offenders from the United States, bearing in mind that Canada and the United States share a 4,800 kilometre unguarded border. In the last 12 years there has been an increasing number of extradition requests from the United States. In 1980 there were 29 such requests; by 1992 the number had grown to 88, including requests involving death penalty cases, which were becoming a new and pressing problem. "A policy of routinely seeking assurances under article 6 of the Extradition Treaty would encourage even more criminal offenders, especially those guilty of the most serious crimes, to flee the United States into Canada. Canada does not wish to become a haven for the most wanted and dangerous criminals from the United States. If the Covenant fetters Canada's discretion not to seek assurances, increasing numbers of criminals may come to Canada for the purpose of securing immunity from capital punishment".

6.1 As to the specific facts of the instant communication, the State party indicates that Mr. Cox is a black male, 40 years of age, of sound mind and body, an American citizen with no immigration status in Canada. He is charged in the state of Pennsylvania with two counts of first degree murder, one count of robbery and one count of criminal conspiracy to commit murder and robbery, going back to an incident that occurred in Philadelphia, Pennsylvania, in 1988, where two teenage boys were killed pursuant to a plan to commit robbery in connection with illegal drug trafficking. Three men, one of whom is alleged to be Mr. Cox, participated in the killings. In Pennsylvania, first degree murder is punishable by death or a term of life imprisonment. Lethal injection is the method of execution mandated by law.

6.2 With regard to the exhaustion of domestic remedies, the State party indicates that Mr. Cox was ordered committed to await extradition by a judge of the Quebec Superior Court on 26 July 1991. This order was challenged by the author in an application for habeas corpus before the Quebec Superior Court. The application was dismissed on 13 September 1991. Mr. Cox then appealed to the Quebec Court of Appeal, and, on 18 February 1992, before exhausting domestic remedies in Canada, he submitted a communication to the Committee, which was registered under No. 486/1992. Since the extradition process had not yet progressed to the second stage, the communication was ruled inadmissible by the Committee on 26 July 1992.

6.3 On 25 May 1992, Mr. Cox withdrew his appeal to the Quebec Court of Appeal, thus concluding the judicial phase of the extradition process. The second stage, the ministerial phase, began. He petitioned the Minister of Justice asking that assurances be sought that the death penalty would not be imposed. In addition to written submissions, counsel for the author appeared before the Minister and made oral representations. "It was alleged that the judicial system in the state of Pennsylvania was inadequate and discriminatory. He submitted materials which purported to show that the Pennsylvania system of justice as it related to death penalty cases was characterized by inadequate

legal representation of impoverished accused, a system of assignment of judges which resulted in a 'death penalty court', selection of jury members which resulted in 'death qualified juries' and an overall problem of racial discrimination. The Minister of Justice was of the view that the concerns based on alleged racial discrimination were premised largely on the possible intervention of a specific prosecutor in the state of Pennsylvania who, according to officials in that state, no longer has any connection with his case. It was alleged that, if returned to face possible imposition of the death penalty, Mr. Cox would be exposed to the 'death row phenomenon'. The Minister of Justice was of the view that the submissions indicated that the conditions of incarceration in the state of Pennsylvania met the constitutional standards of the United States and that situations which needed improvement were being addressed ... it was argued that assurances be sought on the basis that there is a growing international movement for the abolition of the death penalty ... The Minister of Justice, in coming to the decision to order surrender without assurances, concluded that Mr. Cox had failed to show that his rights would be violated in the state of Pennsylvania in any way particular to him, which could not be addressed by judicial review in the United States Supreme Court under the Constitution of the United States. That is, the Minister determined that the matters raised by Mr. Cox could be left to the internal working of the United States system of justice, a system which sufficiently corresponds to Canadian concepts of justice and fairness to warrant entering into and maintaining the Extradition Treaty." On 2 January 1993, the Minister, having determined that there existed no exceptional circumstances pertaining to the author which necessitated the seeking of assurances in his case, ordered him surrendered without assurances.

6.4 On 4 January 1993, author's counsel sought to reactivate his earlier communication to the Committee. He has indicated to the Government of Canada that he does not propose to appeal the Minister's decision in the Canadian courts. The State party, however, does not contest the admissibility of the communication on this issue.

7.1 As to the scope of the Covenant, the State party contends that extradition, per se, is beyond its scope and refers to the travaux préparatoires, showing that the drafters of the Covenant specifically considered and rejected a proposal to deal with extradition in the Covenant. "It was argued that the inclusion of a provision on extradition in the Covenant would cause difficulties regarding the relationship of the Covenant to existing treaties and bilateral agreements." (A/2929, chap. VI, para. 72). In the light of the history of negotiations during the drafting of the Covenant, the State party submits "that a decision to extend the Covenant to extradition treaties or to individual decisions pursuant thereto would stretch the principles governing the interpretation of the Covenant, and of human rights instruments in general, in unreasonable and unacceptable ways. It would be unreasonable because the principles of interpretation which recognize that human rights instruments are living documents and that human rights evolve over time cannot be employed in the face of express limits to the application of a given document. The absence of extradition from the articles of the Covenant when read with the intention of the drafters must be taken as an express limitation".

7.2 As to the author's standing as a "victim" under article 1 of the Optional Protocol, the State party concedes that he is subject to Canada's jurisdiction during the time he is in Canada in the extradition process. However, the State party submits "that Cox is not a victim of any violation in Canada of rights set forth in the Covenant ... because the Covenant does not set forth any rights with respect to extradition. In the alternative, it contends that even if [the]

Covenant extends to extradition, it can only apply to the treatment of the fugitive sought for extradition with respect to the operation of the extradition process within the State Party to the Protocol. Possible treatment of the fugitive in the requesting State cannot be the subject of a communication with respect to the State Party to the Protocol (extraditing State), except perhaps for instances where there was evidence before that extraditing State such that a violation of the Covenant in the requesting State was reasonably foreseeable".

7.3 The State party contends that the evidence submitted by author's counsel to the Committee and to the Minister of Justice in Canada does not show that it was reasonably foreseeable that the treatment that the author may face in the United States would violate his rights under the Covenant. The Minister of Justice and the Canadian Courts, to the extent that the author availed himself of the opportunities for judicial review, considered all the evidence and argument submitted by counsel and concluded that Mr. Cox's extradition to the United States to face the death penalty would not violate his rights, either under Canadian law or under international instruments, including the Covenant. Thus, the State party concludes that the communication is inadmissible because the author has failed to substantiate, for purposes of admissibility, that the author is a victim of any violation in Canada of rights set forth in the Covenant.

Counsel's submissions on admissibility

8.1 In his submission of 7 April 1993, author's counsel argues that an attempt to further exhaust domestic remedies in Canada would be futile in the light of the judgment of the Canadian Supreme Court in the cases of Kindler and Ng. "I chose to file the communication and apply for interim measures prior to discontinuing the appeal. This move was taken because I presumed that a discontinuance in the appeal might result in the immediate extradition of Mr. Cox. It was more prudent to seize the Committee first, and then discontinue the appeal, and I think this precaution was a wise one, because Mr. Cox is still in Canada ... Subsequent to discontinuation of the appeal, I filed an application before the Minister of Justice, Ms. Kim Campbell, praying that she exercise her discretionary power under article 6 of the Extradition Act, and refuse to extradite Mr. Cox until an assurance had been provided by the United States Government that if Mr. Cox were to be found guilty, the death penalty would not be applied ... I was granted a hearing before Minister Campbell, on 13 November 1992. In reasons dated 2 January 1993, Minister Campbell refused to exercise her discretion and refused to seek assurances from the United States Government that the death penalty not be employed ... It is possible to apply for judicial review of the decision of Minister Campbell, on the narrow grounds of breach of natural justice or other gross irregularity. However, there is no suggestion of any grounds to justify such recourse, and consequently no such dilatory recourse has been taken ... all useful and effective domestic remedies to contest the extradition of Mr. Cox have been exhausted".

8.2 Counsel contends that the extradition of Mr. Cox would expose him to the real and present danger of:

"(a) Arbitrary execution, in violation of article 6 of the Covenant;

(b) Discriminatory imposition of the death penalty, in violation of articles 6 and 26 of the Covenant;

(c) Imposition of the death penalty in breach of fundamental procedural safeguards, specifically by an impartial jury (the phenomenon of

'death qualified' juries), in violation of articles 6 and 14 of the Covenant;

(d) Prolonged detention on 'death row', in violation of article 7 of the Covenant".

8.3 With respect to the system of criminal justice in the United States, author's counsel refers to the reservations which the United States formulated upon its ratification of the Covenant, in particular to article 6: "The United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age." Author's counsel argues that this is "an enormously broad reservation that no doubt is inconsistent with the nature and purpose of the treaty but that furthermore ... creates a presumption that the United States does not intend to respect article 6 of the Covenant".

9.1 In his comments, dated 10 June 1993, on the State party's submission, counsel addresses the refusal of the Minister to seek assurances on the non-imposition of the death penalty, and refers to the book La Forest's Extradition to and from Canada, in which it is stated that Canada in fact routinely seeks such an undertaking. Moreover, the author contests the State party's interpretation that it was not the intention of the drafters of the Extradition Treaty that assurances be routinely sought. "It is known that the provision in the Extradition Treaty with the United States was added at the request of the United States. Does Canada have any evidence admissible in a court of law to support such a questionable claim? I refuse to accept the suggestion in the absence of any serious evidence".

9.2 As to the State party's argument that extradition is intended to protect Canadian society, author's counsel challenges the State party's belief that a policy of routinely seeking guarantees will encourage criminal law offenders to seek refuge in Canada and contends that there is no evidence to support such a belief. Moreover, with regard to Canada's concern that if the United States does not give assurances, Canada would be unable to extradite and have to keep the criminal without trial, author's counsel argues that "a State Government so devoted to the death penalty as a supreme punishment for an offender would surely prefer to obtain extradition and keep the offender in life imprisonment rather than to see the offender freed in Canada. I know of two cases where the guarantee was sought from the United States, one for extradition from the United Kingdom to the state of Virginia (Soering) and one for extradition from Canada to the state of Florida (O'Bomsawin). In both cases the States willingly gave the guarantee. It is pure demagogy for Canada to raise the spectre of 'a haven for many fugitives from the death penalty' in the absence of evidence".

9.3 As to the murders of which Mr. Cox was accused, author's counsel indicates that "two individuals have pleaded guilty to the crime and are now serving life prison terms in Pennsylvania. Each individual has alleged that the other individual actually committed the murder, and that Keith Cox participated".

9.4 With regard to the scope of the Covenant, counsel refers to the travaux préparatoires of the Covenant and argues that consideration of the issue of extradition must be placed within the context of the debate on the right to asylum, and claims that extradition was in fact a minor point in the debates. Moreover, "nowhere in the summary records is there evidence of a suggestion that the Covenant would not apply to extradition requests when torture or cruel,

inhuman and degrading punishment might be imposed ... Germane to the construction of the Covenant, and to Canada's affirmations about the scope of human rights law, is the more recent Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides, in article 3, that States parties shall not extradite a person to another State where there are serious grounds to believe that the person will be subjected to torture ... It is respectfully submitted that it is appropriate to construe articles 7 and 10 of the Covenant in light of the more detailed provisions in the Convention against Torture. Both instruments were drafted by the same organization and are parts of the same international human rights system. The Convention Against Torture was meant to give more detailed and specialized protection; it is an enrichment of the Covenant".

9.5 As to the concept of victim under the Optional Protocol, author's counsel contends that this is not a matter for admissibility but for the examination of the merits.

Issues and proceedings before the Committee

10.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

10.2 With regard to the requirement of the exhaustion of domestic remedies, the Committee noted that the author did not complete the judicial phase of examination, since he withdrew the appeal to the Court of Appeal after being advised that it would have no prospect of success and, therefore, that legal aid would not be provided for that purpose. With regard to the ministerial phase, the author indicated that he did not intend to appeal the Minister's decision to surrender Mr. Cox without seeking assurances, since, as he asserts, further recourse to domestic remedies would have been futile in the light of the 1991 judgment of the Canadian Supreme Court in Kindler and Ng.[31] The Committee noted that the State party had explicitly stated that it did not wish to express a view as to whether the author had exhausted domestic remedies and did not contest the admissibility of the communication on this ground. In the circumstances, basing itself on the information before it, the Committee concluded that the requirements of article 5, paragraph 2 (b), of the Covenant had been met.

10.3 Extradition as such is outside the scope of application of the Covenant (Communication No. 117/1981 [M. A. v. Italy], paragraph 13.4: "There is no provision of the Covenant making it unlawful for a State party to seek extradition of a person from another country"). Extradition is an important instrument of cooperation in the administration of justice, which requires that safe havens should not be provided for those who seek to evade fair trial for criminal offences, or who escape after such fair trial has occurred. But a State party's obligation in relation to a matter itself outside the scope of the

[31] The Supreme Court found that the decision of the Minister to extradite Mr. Kindler and Mr. Ng without seeking assurances that the death penalty would not be imposed or, if imposed, would not be carried out, did not violate their rights under the Canadian Charter of Rights and Freedoms.

Covenant may still be engaged by reference to other provisions of the Covenant.[32] In the present case the author does not claim that extradition as such violates the Covenant, but rather that the particular circumstances related to the effects of his extradition would raise issues under specific provisions of the Covenant. The Committee finds that the communication is thus not excluded from consideration ratione materiae.

10.4 With regard to the allegations that, if extradited, Mr. Cox would be exposed to a real and present danger of a violation of articles 14 and 26 of the Covenant in the United States, the Committee observed that the evidence submitted did not substantiate, for purposes of admissibility, that such violations would be a foreseeable and necessary consequence of extradition. It does not suffice to assert before the Committee that the criminal justice system in the United States is incompatible with the Covenant. In this connection, the Committee recalled its jurisprudence that, under the Optional Protocol procedure, it cannot examine in abstracto the compatibility with the Covenant of the laws and practice of a State.[33] For purposes of admissibility, the author has to substantiate that in the specific circumstances of his case, the courts in Pennsylvania would be likely to violate his rights under articles 14 and 26, and that he would not have a genuine opportunity to challenge such violations in United States courts. The author has failed to do so. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

10.5 The Committee considered that the remaining claim, that Canada violated the Covenant by deciding to extradite Mr. Cox without seeking assurances that the death penalty would not be imposed, or if imposed, would not be carried out, may raise issues under articles 6 and 7 of the Covenant which should be examined on the merits.

11. On 3 November 1993, the Human Rights Committee decided that the communication was admissible in so far as it may raise issues under articles 6 and 7 of the Covenant. The Committee reiterated its request to the State party, under rule 86 of the Committee's rules of procedure, that the author not be extradited while the Committee is examining the merits of the communication.

State party's request for review of admissibility and submission on the merits

12.1 In its submission under article 4, paragraph 2, of the Optional Protocol, the State party maintains that the communication is inadmissible and requests the Committee to review its decision of 3 November 1993. The State party also submits its response on the merits of the communication.

12.2 With regard to the notion of "victim" within the meaning of article 1 of the Optional Protocol, the State Party indicates that Mr. Keith Cox has not been convicted of any crime in the United States, and that the evidence submitted does not substantiate, for purposes of admissibility, that violations of articles 6 and 7 of the Covenant would be a foreseeable and necessary consequence of his extradition.

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[32] See the Committee's decisions in Communication Nos. 35/1978 (Aumeeruddy-Cziffra et al. v. Mauritius, Views adopted on 9 April 1981) and Communication No. 291/1988 (Torres v. Finland, Views adopted on 2 April 1990).

[33] Views in Communication No. 61/1979, Leo Hertzberg et al. v. Finland, para. 9.3.

12.3 The State party explains the extradition process in Canada, with specific reference to the practice in the context of the Extradition Treaty between Canada and the United States. It elaborates on the judicial phase, which includes a methodical and thorough evaluation of the facts of each case. After the exhaustion of the appeals in the judicial phase, a second phase of review follows, in which the Minister of Justice is charged with the responsibility of deciding whether to surrender the person for extradition, and in capital cases, whether the facts of the particular case justify seeking assurances that the death penalty will not be imposed. Throughout this process the fugitive can present his arguments against extradition, and his counsel may appear before the Minister to present oral argument both on the question of surrender and, where applicable, on the seeking of assurances. The Minister's decision is also subject to judicial review. In numerous cases, the Supreme Court of Canada has had occasion to review the exercise of the ministerial discretion on surrender and has held that the right to life and the right not to be deprived thereof except in accordance with the principles of fundamental justice apply to ministerial decisions on extradition.

12.4 With regard to the facts particular to Mr. Keith Cox, the State party reviews his submissions before the Canadian courts, the Minister of Justice (see paras. 6.2 and 6.3 supra) and before the Committee and concludes that the evidence adduced fails to show how Mr. Cox satisfies the criterion of being a "victim" within the meaning of article 1 of the Optional Protocol. Firstly, it has not been alleged that the author has already suffered any violation of his Covenant rights; secondly, it is not reasonably foreseeable that he would become a victim after extradition to the United States. The State party cites statistics from the Pennsylvania District Attorney's Office and indicates that since 1976, when Pennsylvania's current death penalty law was enacted, no one has been put to death; moreover, the Pennsylvania legal system allows for several appeals. But not only has Mr. Cox not been tried, he has not been convicted, nor sentenced to death. In this connection the State party notes that the two other individuals who were alleged to have committed the crimes together with Mr. Cox were not given death sentences but are serving life sentences. Moreover, the death penalty is not sought in all murder cases. Even if sought, it cannot be imposed in the absence of aggravating factors which must outweigh any mitigating factors. Referring to the Committee's jurisprudence in the Aumeeruddy-Cziffra case that the alleged victim's risk be "more than a theoretical possibility", the State party states that no evidence has been submitted to the Canadian courts or to the Committee which would indicate a real risk of his becoming a victim. The evidence submitted by Mr. Cox is either not relevant to him or does not support the view that his rights would be violated in a way that he could not properly challenge in the courts of Pennsylvania and of the United States. The State party concludes that since Mr. Cox has failed to substantiate, for purposes of admissibility, his allegations, the communication should be declared inadmissible under article 2 of the Optional Protocol.

13.1 As to the merits of the case, the State party refers to the Committee's Views in the Kindler and Ng cases, which settled a number of matters concerning the application of the Covenant to extradition cases.

13.2 As to the application of article 6, the State party relies on the Committee's view that paragraph 1 (right to life) must be read together with paragraph 2 (imposition of the death penalty), and that a State party would violate paragraph 1, if it extradited a person to face possible imposition of the death penalty in a requesting State where there was a real risk of a violation of paragraph 2.

13.3 Whereas Mr. Cox alleges that he would face a real risk of a violation of article 6 of the Covenant because the United States "does not respect the prohibition on the execution of minors", the State party indicates that Mr. Cox is over 40 years of age. As to the other requirements of article 6, paragraph 2, of the Covenant, the State party indicates that Mr. Cox is charged with murder, which is a very serious criminal offence, and that if the death sentence were to be imposed on him, there is no evidence suggesting that it would not be pursuant to a final judgment rendered by a court.

13.4 As to hypothetical violations of Mr. Cox's rights to a fair trial, the State party recalls that the Committee declared the communication inadmissible with respect to articles 14 and 26 of the Covenant, since the author had not substantiated his allegations for purposes of admissibility. Moreover, Mr. Cox has not shown that he would not have a genuine opportunity to challenge such violations in the courts of the United States.

13.5 As to article 7 of the Covenant, the State party first addresses the method of judicial execution in Pennsylvania, which is by lethal injection. This method was recently provided for by the Pennsylvania legislature, because it was considered to inflict the least suffering. The State party further indicates that the Committee, in its decision in the Kindler case, which similarly involved the possible judicial execution by lethal injection in Pennsylvania, found no violation of article 7.

13.6 The State party then addresses the submissions of counsel for Mr. Cox with respect to alleged conditions of detention in Pennsylvania. It indicates that the material submitted is out of date and refers to recent substantial improvements in the Pennsylvania prisons, particularly in the conditions of incarceration of inmates under sentence of death. At present these prisoners are housed in new modern units where cells are larger than cells in other divisions, and inmates are permitted to have radios and televisions in their cells, and to have access to institutional programs and activities such as counselling, religious services, education programmes, and access to the library.

13.7 With regard to the so-called "death row phenomenon", the State party distinguishes the facts of the Cox case from those in the Soering v. United Kingdom judgment of the European Court of Justice. The decision in Soering turned not only on the admittedly bad conditions in some prisons in the state of Virginia, but also on the tenuous state of health of Mr. Soering. Mr. Cox has not been shown to be in a fragile mental or physical state. He is neither a youth, nor elderly. In this connection, the State party refers to the Committee's jurisprudence in the Vuolanne v. Finland case, where it held that "the assessment of what constitutes inhuman or degrading treatment falling within the meaning of article 7 depends on all the circumstances of the case, such as the duration and manner of the treatment, its physical or mental effects as well as the sex, age and state of health of the victim".[34]

13.8 As to the effects of prolonged detention, the State party refers to the Committee's jurisprudence that the "death row phenomenon" does not violate article 7, if it consists only of prolonged periods of delay on death row while appellate remedies are pursued. In the case of Mr. Cox, it is not at all clear that he will reach death row or that he will remain there for a lengthy period of time pursuing appeals.

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[34] Views in Communication No. 265/1987, Vuolanne v. Finland, para. 9.2.

Author's comments

14.1 In his comments on the State party's submission, counsel for Mr. Cox stresses that the state of Pennsylvania has stated in its extradition application that the death penalty is being sought. Accordingly, the prospect of execution is not so very remote.

14.2 With regard to article 7 of the Covenant, author's counsel contends that the use of plea bargaining in a death penalty case meets the definition of torture. "What Canada is admitting ... is that Mr. Cox will be offered a term of life imprisonment instead of the death penalty if he pleads guilty. In other words, if he admits to the crime he will avoid the physical suffering which is inherent in imposition of the death penalty".

14.3 As to the method of execution, author's counsel admits that no submissions had been made on this subject in the original communication. Nevertheless, he contends that execution by lethal injection would violate article 7 of the Covenant. He argues, on the basis of a deposition by Professor Michael Radelet of the University of Florida, that there are many examples of "botched" executions by lethal injection.

14.4 As to the "death row phenomenon", counsel for Mr. Cox specifically requests that the Committee reconsider its case law and conclude that there is a likely violation of article 7 in Mr. Cox's case, since "nobody has been executed in Pennsylvania for more than twenty years, and there are individuals awaiting execution on death row for as much as fifteen years".

14.5 Although the Committee declared the communication inadmissible as to articles 14 and 26 of the Covenant, author's counsel contends that article 6 of the Covenant would be violated if the death penalty were to be imposed "arbitrarily" on Mr. Cox because he is black. He claims that there is systemic racism in the application of the death penalty in the United States.

Examination of the merits

15. The Committee has taken note of the State party's information and arguments on admissibility, submitted after the Committee's decision of 3 November 1993. It observes that no new facts or arguments have been submitted that would justify a reversal of the Committee's decision on admissibility. Therefore, the Committee proceeds to the examination of the merits.

16.1 With regard to a potential violation by Canada of article 6 of the Covenant if it were to extradite Mr. Cox to face the possible imposition of the death penalty in the United States, the Committee refers to the criteria set forth in its Views on Communication No. 470/1991 (Kindler v. Canada) and Communication No. 469/1991 (Chitat Ng v. Canada). That is, for States that have abolished capital punishment and are called to extradite a person to a country where that person may face the imposition of the death penalty, the extraditing State must ensure that the person is not exposed to a real risk of a violation of his rights under article 6 in the receiving State. In other words, if a State party to the Covenant takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that that person's rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant. In this context, the Committee also recalls its General Comment on Article 6,[35] which provides that,

[35] General Comment No. 6/16 of 27 July 1982, para. 6.

while States parties are not obliged to abolish the death penalty, they are obliged to limit its use.

16.2 The Committee notes that article 6, paragraph 1, must be read together with article 6, paragraph 2, which does not prohibit the imposition of the death penalty for the most serious crimes. Canada, while not itself imposing the death penalty on Mr. Cox, is asked to extradite him to the United States, where he may face capital punishment. If Mr. Cox were to be exposed, through extradition from Canada, to a real risk of a violation of article 6, paragraph 2, in the United States, that would entail a violation by Canada of its obligations under article 6, paragraph 1. Among the requirements of article 6, paragraph 2, is that capital punishment be imposed only for the most serious crimes, in circumstances not contrary to the Covenant and other instruments, and that it be carried out pursuant to a final judgment rendered by a competent court. The Committee notes that Mr. Cox is to be tried for complicity in two murders, undoubtedly very serious crimes. He was over 18 years of age when the crimes were committed. The author has not substantiated his claim before the Canadian courts or before the Committee that trial in the Pennsylvania courts with the possibility of appeal would not be in accordance with his right to a fair hearing as required by the Covenant.

16.3 Moreover, the Committee observes that the decision to extradite Mr. Cox to the United States followed proceedings in the Canadian courts at which Mr. Cox's counsel was able to present argument. He was also able to present argument at the ministerial phase of the proceedings, which themselves were subject to appeal. In the circumstances, the Committee finds that the obligations arising under article 6, paragraph 1, did not require Canada to refuse the author's extradition without assurances that the death penalty would not be imposed.

16.4 The Committee notes that Canada itself, save for certain categories of military offences, abolished capital punishment; it is not, however, a party to the Second Optional Protocol to the Covenant. As to whether the fact that Canada has generally abolished capital punishment, taken together with its obligations under the Covenant, required it to refuse extradition or to seek the assurances it was entitled to seek under the extradition treaty, the Committee observes that the domestic abolition of capital punishment does not release Canada of its obligations under extradition treaties. However, it is in principle to be expected that, when exercising a permitted discretion under an extradition treaty (namely, whether or not to seek assurances that capital punishment will not be imposed) a State which has itself abandoned capital punishment would give serious consideration to its own chosen policy in making its decision. The Committee observes, however, that the State party has indicated that the possibility to seek assurances would normally be exercised where exceptional circumstances existed. Careful consideration was given to this possibility. The Committee notes the reasons given by Canada not to seek assurances in Mr. Cox's case, in particular, the absence of exceptional circumstances, the availability of due process in the state of Pennsylvania, and the importance of not providing a safe haven for those accused of or found guilty of murder.

16.5 While States parties must be mindful of the possibilities for the protection of life when exercising their discretion in the application of extradition treaties, the Committee finds that Canada's decision to extradite without assurances was not taken arbitrarily or summarily. The evidence before the Committee reveals that the Minister of Justice reached a decision after hearing argument in favour of seeking assurances.

16.6 The Committee notes that the author claims that the plea bargaining procedures, by which capital punishment could be avoided if he were to plead guilty, further violates his rights under the Covenant. The Committee finds this not to be so in the context of the criminal justice system in Pennsylvania.

16.7 With regard to the allegations of systemic racial discrimination in the United States criminal justice system, the Committee does not find, on the basis of the submissions before it, that Mr. Cox would be subject to a violation of his rights by virtue of his colour.

17.1 The Committee has further considered whether in the specific circumstances of this case, being held on death row would constitute a violation of Mr. Cox's rights under article 7 of the Covenant. While confinement on death row is necessarily stressful, no specific factors relating to Mr. Cox's mental condition have been brought to the attention of the Committee. The Committee notes also that Canada has submitted specific information about the current state of prisons in Pennsylvania, in particular with regard to the facilities housing inmates under sentence of death, which would not appear to violate article 7 of the Covenant.

17.2 As to the period of detention on death row in reference to article 7, the Committee notes that Mr. Cox has not yet been convicted nor sentenced, and that the trial of the two accomplices in the murders of which Mr. Cox is also charged did not end with sentences of death but rather of life imprisonment. Under the jurisprudence of the Committee,[36] on the one hand, every person confined to death row must be afforded the opportunity to pursue all possibilities of appeal, and, on the other hand, the State party must ensure that the possibilities for appeal are made available to the condemned prisoner within a reasonable time. Canada has submitted specific information showing that persons under sentence of death in the state of Pennsylvania are given every opportunity to avail themselves of several appeal instances, as well as opportunities to seek pardon or clemency. The author has not adduced evidence to show that these procedures are not made available within a reasonable time, or that there are unreasonable delays which would be imputable to the State. In these circumstances, the Committee finds that the extradition of Mr. Cox to the United States would not entail a violation of article 7 of the Covenant.

17.3 With regard to the method of execution, the Committee has already had the opportunity of examining the Kindler case, in which the potential judicial execution by lethal injection was not found to be in violation of article 7 of the Covenant.

18. The Committee, acting under article 5, paragraph 4, of the Optional Protocol, finds that the facts before it do not sustain a finding that the extradition of Mr. Cox to face trial for a capital offence in the United States would constitute a violation by Canada of any provision of the International Covenant on Civil and Political Rights.

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[36] Views in Communication No. 210/1986 and Communication No. 225/1987, Earl Pratt and Ivan Morgan v. Jamaica, para. 13.6; Comunication No. 250/1987, Carlton Reid v. Jamaica, para. 11.6; Communication No. 270/1988 and Communication No. 271/1988, Randolph Barrett and Clyde Sutcliffe v. Jamaica, para. 8.4; Communication No. 274/1988, Loxley Griffith v. Jamaica, para. 7.4; Communication No. 317/1988, Howard Martin v. Jamaica, para. 12.1; and Communication No. 470/1991, Kindler v. Canada, para. 15.2.

Appendices

A. Individual Opinions appended to the Committee's decision on admissibility of 3 November 1993

1. Individual opinion by Mrs. Rosalyn Higgins, co-signed by Messrs. Laurel Francis, Kurt Herndl, Andreas Mavrommatis, Birame Ndiaye and Waleed Sadi (dissenting)

[Original: English]

We believe that this case should have been declared inadmissible. Although extradition as such is outside the scope of the Covenant (see M. A. v. Italy, Communication No. 117/1981, decision of 10 April 1984, para. 13.4), the Committee has explained, in its decision on Communication No. 470/1991 (Joseph J. Kindler v. Canada, Views adopted on 30 July 1993), that a State party's obligations in relation to a matter itself outside the scope of the Covenant may still be engaged by reference to other provisions of the Covenant.

But here, as elsewhere, the admissibility requirements under the Optional Protocol must be met. In its decision on Kindler, the Committee addressed the issue of whether it had jurisdiction, ratione loci, by reference to article 2 of the Optional Protocol, in an extradition case that brought into play other provisions of the Covenant. It observed that "if a State party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that the person's rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant" (para. 6.2).

We do not see on what jurisdictional basis the Committee proceeds to its finding that the communication is admissible under articles 6 and 7 of the Covenant. The Committee finds that the communication is inadmissible by reference to article 2 of the Optional Protocol (paragraph 10.4) insofar as claims relating to fair trial (article 14) and discrimination before the law (article 26) are concerned. We agree. But this negative finding cannot form a basis for admissibility in respect of articles 6 and 7. The Committee should have applied the same test ("foreseeable and necessary consequences") to the claims made under articles 6 and 7, before simply declaring them admissible in respect of those articles. It did not do so - and in our opinion could not have found, in the particular circumstances of the case, a proper legal basis for jurisdiction had it done so.

The above test is relevant also to the admissibility requirement, under article 1 of the Optional Protocol, that an author be a "victim" of a violation in respect of which he brings a claim. In other words, it is not always necessary that a violation already have occurred for an action to come within the scope of article 1. But the violation that will affect him personally must be a "necessary and foreseeable consequence" of the action of the defendant State.

It is clear that in the case of Mr. Cox, unlike in the case of Mr. Kindler, this test is not met. Mr. Kindler had, at the time of the Canadian decision to extradite him, been tried in the United States for murder, found guilty as charged and recommended to the death sentence by the jury. Mr. Cox, by contrast, has not yet been tried and a fortiori has not been found guilty or

recommended to the death penalty. Already it is clear that his extradition would not entail the possibility of a "necessary and foreseeable consequence of a violation of his rights" that would require examination on the merits. This failure to meet the test of "prospective victim" within the meaning of article 1 of the Optional Protocol is emphasized by the fact that Mr. Cox's two co-defendants in the case in which he has been charged have already been tried in the State of Pennsylvania and sentenced not to death but to a term of life imprisonment.

The fact that the Committee - and rightly so in our view - found that Kindler raised issues that needed to be considered on their merits, and that the admissibility criteria were there met, does not mean that every extradition case of this nature is necessarily admissible. In every case, the tests relevant to articles 1, 2, 3 and 5, paragraph 2, of the Optional Protocol must be applied to the particular facts of the case.

The Committee has not at all addressed the requirements of article 1 of the Optional Protocol, that is, whether Mr. Cox may be considered a "victim" by reference to his claims under articles 14, 26, 6 or 7 of the Covenant.

We therefore believe that Mr. Cox was not a "victim" within the meaning of article 1 of the Optional Protocol, and that his communication to the Human Rights Committee is inadmissible.

The duty to address carefully the requirements for admissibility under the Optional Protocol is not made the less necessary because capital punishment is somehow involved in a complaint.

For all these reasons, we believe that the Committee should have found the present communication inadmissible.

2. Individual opinion by Mrs. Elizabeth Evatt (dissenting)

[Original: English]

For his claim to be admissible, the author must show that he is a victim. To do this he must submit facts which support the conclusion that his extradition exposed him to a real risk that his rights under articles 6 and 7 of the Covenant would be violated (in the sense that the violation is necessary and foreseeable). The author in the present case has not done so.

As to article 6, the author is, of course, exposed by his extradition to the risk of facing the death penalty for the crime of which he is accused. But he has not submitted facts to show a real risk that the imposition of the death penalty would itself violate article 6, which does not exclude the death penalty in certain limited circumstances. Furthermore, his accomplices in the crime he is charged with were sentenced to life imprisonment, a factor which does not support the contention that the author's extradition would expose him to a "necessary and foreseeable" risk that the death penalty will be imposed.

As to article 7, the claim that the author has been exposed to a real risk of a violation of this provision by his extradition is based on the death row phenomenon (paragraph 8.2); the author has not, however, submitted facts which, in the light of the Committee's jurisprudence, show that there is a real risk of violation of this article if he is extradited to the United States. Furthermore, since, in my opinion, the author's extradition does not expose him

to a real risk of being sentenced to death, his extradition entails a fortiori no necessary and foreseeable consequence of a violation of his rights while on death row.

For these reasons I am of the view that the communication is inadmissible under articles 1 and 2 of the Optional Protocol.

B. Individual opinions appended to the Committee's Views

1. Individual opinion by Messrs. Kurt Herndl and Waleed Sadi (concurring)

[Original: English]

We concur with the Committee's finding that the facts of the instant case do not reveal a violation of either article 6 or 7 of the Covenant.

In our opinion, however, it would have been more consistent with the Committee's jurisprudence to set aside the decision on admissibility of 3 November 1993 and to declare the communication inadmissible under articles 1 and 2 of the Optional Protocol, on grounds that the author does not meet the "victim" test established by the Committee. Bearing in mind that Mr. Cox has not been tried, let alone convicted or sentenced to death, the hypothetical violations alleged appear quite remote for the purpose of considering this communication admissible.

However, since the Committee has proceeded to an examination of the merits, we would like to submit the following considerations on the scope of articles 6 and 7 of the Covenant and their application in the case of Mr. Keith Cox.

Article 6

As a starting point, we would note that article 6 does not expressly prohibit extradition to face capital punishment. Nevertheless, it is appropriate to consider whether a prohibition would follow as a necessary implication of article 6.

In applying article 6, paragraph 1, of the Covenant, the Committee must, pursuant to article 31 of the Vienna Convention on the Law of Treaties, interpret this provision "in good faith" in accordance with the ordinary meaning to be given to the terms in their context. As to the ordinary meaning of the words, a prohibition of extradition is not apparent. As to the context of the provision, we believe that article 6, paragraph 1, must be read in conjunction with article 6, paragraph 2, which does not prohibit the imposition of the death penalty for the most serious crimes; part of the context to be considered is also the fact that a large majority of States - at the time of the drafting of the Covenant and still today - retain the death penalty. One may not like this objective context, it must not be disregarded.

Moreover, the notion "in good faith" entails that the intention of the parties to a treaty should be ascertained and carried out. There is a general principle of international law according to which no State can be bound without its consent. States parties to the Covenant gave consent to certain specific obligations under article 6 of the Covenant. The fact that this provision does not address the link between the protection of the right to life and the established practice of States in the field of extradition is not without

significance.

Had the drafters of article 6 intended to preclude all extradition to face the death penalty, they could have done so. Considering that article 6 consists of six paragraphs, it is unlikely that such an important matter would have been left for future interpretation. Nevertheless, an issue under article 6 could still arise if extradition were granted for the imposition of the death penalty in breach of article 6, paragraphs 2 and 5. While this has been recognized by the Committee in its jurisprudence (see the Committee's Views in Communication No. 469/1991 (Ng v. Canada) and Communication No. 470/1990 (Kindler v. Canada)), the yardstick with which a possible breach of article 6, paragraphs 2 and 5, has to be measured, remains a restrictive one. Thus, the extraditing State may be deemed to be in violation of the Covenant only if the necessary and foreseeable consequence of its decision to extradite is that the Covenant rights of the extradited person will be violated in another jurisdiction.

In this context, reference may be made to the Second Optional Protocol, which similarly does not address the issue of extradition. This fact is significant and lends further support to the proposition that under international law extradition to face the death penalty is not prohibited under all circumstances. Otherwise the drafters of this new instrument would surely have included a provision reflecting this understanding.

An obligation not to extradite, as a matter of principle, without seeking assurances is a substantial obligation that entails considerable consequences, both domestically and internationally. Such consequences cannot be presumed without some indication that the parties intended them. If the Covenant does not expressly impose these obligations, States cannot be deemed to have assumed them. Here reference should be made to the jurisprudence of the International Court of Justice according to which interpretation is not a matter of revising treaties or of reading into them what they do not expressly or by necessary implication contain.[37]

Admittedly, since the primary beneficiaries of human rights treaties are not States or Governments but human beings, the protection of human rights calls for a more liberal approach than that normally applicable in the case of ambiguous provisions of multilateral treaties, where, as a general rule, the "meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties".[38] Nonetheless, when giving a broad interpretation to any human rights treaty, care must be taken not to frustrate or circumvent the ascertainable will of the drafters. Here the rules of interpretation set forth in article 32 of the Vienna Convention on the Law of Treaties help us by allowing the use of the *travaux préparatoires*. Indeed, a study of the drafting history of the Covenant reveals that when the drafters discussed the issue of extradition, they decided not to include any specific provision in the Covenant, so as to avoid conflict or undue delay in the performance of existing extradition treaties (E/CN.4/SR.154, paras. 26-57).

It has been suggested that extraditing a person to face the possible imposition of the death sentence is tantamount, for a State that has abolished

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[37] Oppenheim, International Law, 1992 edition, Vol. 1, p. 1271.

[38] This corresponds to the principle of interpretation known as in dubio mitius. Ibid., p. 1278.

capital punishment, to reintroducing it. While article 6 of the Covenant is silent on the issue of reintroduction of capital punishment, it is worth recalling, by way of comparison, that an express prohibition of reintroduction of the death penalty is provided for in article 4 (3) of the American Convention on Human Rights, and that Protocol 6 to the European Convention does not allow for derogation. A commitment not to reintroduce the death penalty is a laudable one, and surely in the spirit of article 6, paragraph 6, of the Covenant. But certainly this is a matter for States parties to consider before they assume a binding obligation. Such obligation may be read into the Second Optional Protocol, which is not subject to derogation. But, as of November 1994, only 22 countries have become parties - Canada has not signed or ratified it. Regardless, granting a request to extradite a foreign national to face capital punishment in another jurisdiction cannot be equated to the reintroduction of the death penalty.

Moreover, we recall that Canada is not itself imposing the death penalty, but merely observing an obligation under international law pursuant to a valid extradition treaty. Failure to fulfil a treaty obligation engages State responsibility for an internationally wrongful act, giving rise to consequences in international law for the State in breach of its obligation. By extraditing Mr. Cox, with or without assurances, Canada is merely complying with its obligation pursuant to the Extradition Treaty between Canada and the United States of 1976, which is, we would note, compatible with the United Nations Model Extradition Treaty.

Finally, it has been suggested that Canada may have restricted or derogated from article 6 in contravention of article 5 (2) of the Covenant (the "savings clause", see Manfred Nowak's CCPR Commentary, 1993, pp. 100 et seq.). This is not so, because the rights of persons under Canadian jurisdiction facing extradition to the United States were not necessarily broader under any norm of Canadian law than in the Covenant and had not been finally determined until the Supreme Court of Canada issued its 1991 judgments in the Kindler and Ng cases. Moreover, this determination was not predicated on the Covenant, but rather on the Canadian Charter of Rights and Freedoms.

Article 7

The Committee has pronounced itself in numerous cases on the issue of the "death row phenomenon" and has held that "prolonged judicial proceedings do not per se constitute cruel, inhuman and degrading treatment, even if they can be a source of mental strain for the convicted persons".[39] We concur with the Committee's reaffirmation and elaboration of this holding in the instant decision. Furthermore we consider that prolonged imprisonment under sentence of death could raise an issue under article 7 of the Covenant if the prolongation were unreasonable and attributable primarily to the State, as when the State is responsible for delays in the handling of the appeals or fails to issue necessary documents or written judgments. However, in the specific circumstances of the Cox case, we agree that the author has not shown that, if he were sentenced to death, his detention on death row would be unreasonably prolonged for reasons imputable to the State.

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[39] Views on Communication No. 210/1986 and Communication No. 225/1987 (Earl Pratt and Ivan Morgan v. Jamaica) adopted on 6 April 1989, para. 13.6. This holding has been reaffirmed in some ten subsequent cases, including Communication No. 270/1988 and Communication No. 271/1988 (Randolph Barrett and Clyde Sutcliffe v. Jamaica), adopted on 30 March 1992, para. 8.4, and Communication No. 470/1991 (Kindler v. Canada), adopted on 30 July 1993, paragraph 15.2.

We further believe that imposing rigid time limits for the conclusion of all appeals and requests for clemency is dangerous and may actually work against the person on death row by accelerating the execution of the sentence of death. It is generally in the interest of the petitioner to remain alive for as long as possible. Indeed, while avenues of appeal remain open, there is hope, and most petitioners will avail themselves of these possibilities, even if doing so entails continued uncertainty. This is a dilemma inherent in the administration of justice within all those societies that have not yet abolished capital punishment.

2. Individual opinion by Mr. Tamar Ban (partly concurring, partly dissenting)

[Original: English]

I share the Committee's conclusion that the extradition of Mr. Cox by Canada to the United States to face the possible imposition of the death penalty, under the specific circumstances of this case, would not constitute a violation of article 6 of the Covenant, and that judicial execution by lethal injection would not per se constitute a violation of article 7.

I cannot accept the Committee's position, however, that the prospects for Mr. Cox being held for a long period of time on death row, if sentenced to death, would not amount to a violation of his rights under article 7 of the Covenant.

The Committee based its finding of non violation of article 7, regarding the "death row phenomenon" on the following arguments: (a) prison conditions in the state of Pennsylvania have been considerably improved in recent times; (b) Mr. Cox has not yet been convicted nor sentenced, the trial of his two accomplices did not end with sentence of death; (c) no evidence has been adduced to show that all possibilities for appeal would not be available within a reasonable time, or that there would be unreasonable delays which would be imputable to the state (supra, paras. 17.1 and 17.2).

Concerning the prison conditions in Pennsylvania, the State party, Canada, has in fact shown that substantial improvements in the condition of incarceration of inmates under death sentence have taken place in that state (para. 13.6). The measures taken are said to consist mainly of the improvement of the physical conditions of the inmates.

Although I accept the notion that physical conditions play an important role when assessing the overall situation of prison inmates on death row, my conviction is that the decisive factor is rather psychological than physical; a long period spent in awaiting execution or the granting of pardon or clemency necessarily entails a permanent stress, an ever increasing fear which gradually fills the mind of the sentenced individual, and which, by the very nature of this situation, amounts - depending on the length of time spent on death row - to cruel, inhuman and degrading treatment, in spite of every measure taken to improve the physical conditions of the confinement.

Turning now to the second argument, that Mr. Cox has not yet been convicted nor sentenced, and that he therefore has no claim under article 7 (since only de facto sentenced-to-death convicts are in a situation to assert a violation of their rights not to be exposed to torture, cruel, inhuman or degrading treatment), I believe this argument is irrelevant when looking into the merits

of the case. It could have been raised, and indeed, the State party did raise it during the admissibility procedure, but it was not honoured by the Committee. I would like to note that the Committee has taken a clear stand in its earlier jurisprudence on the responsibility of States parties for their otherwise lawful decisions to send an individual within their jurisdiction into another jurisdiction, where that person's rights would be violated as a necessary and foreseeable consequence of the decision (e.g. Committee's Views in the Kindler case, para. 6.2). I will try to show below, discussing the third argument, that in the present case the violation of Mr. Cox's rights following his extradition is necessary and foreseeable.

Concerning the third argument, the Committee held that the author adduced no evidence to show that all possibilities for appeal against the death sentence would not be available in the state of Pennsylvania within a reasonable time, or that there would be unreasonable delays imputable to that state, as a result of which Mr. Cox could be exposed at length to the "death row phenomenon".

I contest this finding of the Committee. In his submission of 18 September 1994, counsel for Mr. Cox contended that "nobody has been executed in Pennsylvania for more than twenty years, and there are individuals awaiting execution on death row for as much as fifteen years".

In its submission of 21 October 1994, the State party - commenting on several statements made by counsel in his above mentioned submission of 18 September - remained silent on this point. In other words, it did not challenge or contest it in any way. In my opinion this lack of response testifies that the author has adduced sufficient evidence to show that appeal procedures in the state of Pennsylvania can last such a long time, which cannot be considered as reasonable.

While fully accepting the Committee's jurisprudence to the effect that every person sentenced to death must be afforded the opportunity to pursue all possibilities of appeal in conformity with article 6, paragraph 4 - a right the exercise of which, in capital cases, necessarily entails a shorter or longer stay on death row - I believe that in such cases States parties must strike a sound balance between two requirements: on the one hand all existing remedies must be made available, but on the other hand - with due regard to article 14, paragraph 3 (c) - effective measures must be taken to the effect that the final decision be made within a reasonable time to avoid the violation of the sentenced person's rights under article 7.

Bearing in mind that in the state of Pennsylvania inmates face the prospect of spending a very long time - sometimes 15 years - on death row, the violation of Mr. Cox's rights can be regarded as a foreseeable and necessary consequence of his extradition. For this reason I am of the opinion that the extradition of Mr. Cox by Canada to the United States without reasonable guarantees would amount to a violation of his rights under article 7 of the Covenant.

I would like to make it clear that my position is strongly motivated by the fact that by Mr. Cox's surrender to the United States, the Committee would lose control over an individual at present within the jurisdiction of a State party to the Optional Protocol.

3. Individual opinion by Messrs. Francisco José Aguilar Urbina and Fausto Pocar (dissenting)

[Original: English]

We cannot agree with the finding of the Committee that in the present case, there has been no violation of article 6 of the Covenant. The question whether the fact that Canada had abolished capital punishment except for certain military offences required its authorities to request assurances from the United States to the effect that the death penalty would not be imposed on Mr. Keith Cox and to refuse extradition unless clear assurances to this effect are given, must in our view receive an affirmative answer.

Regarding the death penalty, it must be recalled that, although article 6 of the Covenant does not prescribe categorically the abolition of capital punishment, it imposes a set of obligations on States parties that have not yet abolished it. As the Committee pointed out in its General Comment 6 (16), "the article also refers generally to abolition in terms which strongly suggest that abolition is desirable". Furthermore, the wording of paragraphs 2 and 6 clearly indicates that article 6 tolerates - within certain limits and in view of future abolition - the existence of capital punishment in States parties that have not yet abolished it, but may by no means be interpreted as implying for any State party an authorization to delay its abolition or, a fortiori, to enlarge its scope or to introduce or reintroduce it. Accordingly, a State party that has abolished the death penalty is in our view under the legal obligation, under article 6, paragraph 1, of the Covenant, not to reintroduce it. This obligation must refer both to a direct reintroduction within the State party's jurisdiction, as well as to an indirect one, as is the case when the State acts - through extradition, expulsion or compulsory return - in such a way that an individual within is territory and subject to its jurisdiction may be exposed to capital punishment in another State. We therefore conclude that in the present case there has been a violation of article 6 of the Covenant.

Regarding the claim under article 7, we cannot agree with the Committee that there has not been a violation of the Covenant. As the Committee observed in its Views on Communication No. 469/1991 (Charles Chitat Ng v. Canada), "by definition, every execution of a sentence of death may be considered to constitute cruel and inhuman treatment within the meaning of article 7 of the Covenant", unless the execution is permitted under article 6, paragraph 2. Consequently, a violation of the provisions of article 6 that may make such treatment, in certain circumstances, permissible, entails necessarily, and irrespective of the way in which the execution may be carried out, a violation of article 7 of the Covenant. It is for these reasons that we conclude in the present case there has been a violation of article 7 of the Covenant.

4. Individual opinion by Ms. Christine Chanet (dissenting)

[Original: French]

As in the Kindler case, when replying to the questions relating to article 6 of the Covenant, the Committee in order to conclude in favour of a non-violation by Canada of its obligations under that article, was forced to undertake a joint analysis of paragraphs 1 and 2 of article 6 of the Covenant.

There is nothing to show that this is a correct interpretation of article 6. It must be possible to interpret every paragraph of an article of the Covenant separately, unless expressly stated otherwise in the text itself or deducible from its wording.

That is not so in the present case.

The fact that the Committee found it necessary to use both paragraphs in support of its argument clearly shows that each paragraph, taken separately, led to the opposite conclusion, namely, that a violation had occurred.

According to article 6, paragraph 1, no one shall be arbitrarily deprived of his life; this principle is absolute and admits of no exception.

Article 6, paragraph 2, begins with the words: "In countries which have not abolished the death penalty ...". This form of words requires a number of comments:

It is negative and refers not to countries in which the death penalty exists but to those in which it has not been abolished. Abolition is the rule, retention of the death penalty the exception.

Article 6, paragraph 2, refers only to countries in which the death penalty has not been abolished and thus rules out the application of the text to countries which have abolished the death penalty.

Lastly, the text imposes a series of obligations on the States in question.

Consequently, by making a "joint" interpretation of the first two paragraphs of article 6 of the Covenant, the Committee has, in my view, committed three errors of law:

One error, in that it is applying to a country which has abolished the death penalty, Canada, a text exclusively reserved by the Covenant - and that in an express and unambiguous way - for non-abolitionist States.

The second error consists in regarding as an authorization to re-establish the death penalty in a country which has abolished it what is merely an implicit recognition of its existence. This is an extensive interpretation which runs counter to the proviso in paragraph 6 of article 6 of that "nothing in this article shall be invoked ... to prevent the abolition of capital punishment". This extensive interpretation, which is restrictive of rights, also runs counter to the provision in article 5, paragraph 2, of the Covenant that "there shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent". Taken together, these texts prohibit a State from engaging in distributive application of the death penalty. There is nothing in the Covenant to force a State to abolish the death penalty but, if it has chosen to do so, the Covenant forbids it to re-establish it in an arbitrary way, even indirectly.

The third error of the Committee in the decision results from the first two. Assuming that Canada is implicitly authorized by article 6, paragraph 2, of the Covenant, to re-establish the death penalty, on the one hand, and to apply it in certain cases on the other, the Committee subjects Canada, in paragraphs 14.3, 14.4 and 14.5, as if it were a non-abolitionist country, to a scrutiny of the obligations imposed on non-abolitionist States: penalty imposed only for the most serious crimes, judgement rendered by a competent court, etc.

This analysis shows that, according to the Committee, Canada, which had abolished the death penalty on its territory, has by extraditing Mr. Cox to the United States re-established it by proxy in respect of a certain category of persons under its jurisdiction.

I agree with this analysis but, unlike the Committee, I do not think that this behaviour is authorized by the Covenant.

Moreover, having thus re-established the death penalty by proxy, Canada is limiting its application to a certain category of persons: those that are extraditable to the United States.

Canada acknowledges its intention of so practising in order that it may not become a haven for criminals from the United States. Its intention is apparent from its decision not to seek assurances that the death penalty would not be applied in the event of extradition to the United States, as it is empowered to do by its bilateral extradition treaty with that country.

Consequently, when extraditing persons in the position of Mr. Cox, Canada is deliberately exposing them to the application of the death penalty in the requesting State.

In so doing, Canada's decision with regard to a person under its jurisdiction according to whether he is extraditable to the United States or not, constitutes an act of discrimination in violation of article 2, paragraph 1, and article 26 of the Covenant.

Such a decision affecting the right to life and placing that right, in the last analysis, in the hands of the Government which, for reasons of penal policy, decides whether or not to seek assurances that the death penalty will not be carried out, constitutes an arbitrary deprivation of the right to life forbidden by article 6, paragraph 1, of the Covenant and, consequently, a misreading by Canada of its obligations under this article of the Covenant.

5. Individual opinion by Mr. Rajsoomer Lallah (dissenting)

[Original: English]

By declining to seek assurances that the death penalty would not be imposed on Mr. Cox or, if imposed, would not be carried out, Canada violates, in my opinion, its obligations under article 6, paragraph 1, of the Covenant, read in conjunction with articles 2, 5 and 26. The reasons which lead me to this conclusion were elaborated in my individual opinion on the Views in the case of Joseph Kindler v. Canada (Communication No. 470/1991).

I would add one further observation. The fact that Mr. Cox has not yet been tried and sentenced to death, as Mr. Kindler had been when the Committee adopted its Views on his case, makes no material difference. It suffices that the offence for which Mr. Cox faces trial in the United States carries in principle capital punishment as a sentence he faces under the law of the United States. He therefore faces a charge under which his life is in jeopardy.

6. Individual opinion by Mr. Bertil Wennergren (dissenting)

[Original: English]

I do not share the Committee's Views about a non-violation of article 6 of the Covenant, as set out in paragraph 16.2 and 16.3 of the Views. On grounds which I developed in detail in my individual opinion concerning the Committee's Views on Communication No. 470/1991 (Joseph John Kindler v. Canada), Canada did, in my opinion, violate article 6, paragraph 1, of the Covenant; it did so when, after the decision to extradite Mr. Cox to the United States had been taken, the Minister of Justice ordered him surrendered without assurances that the death penalty would not be imposed or, if imposed, would not be carried out.

As to whether the extradition of Mr. Cox to the United States would entail a violation of article 7 of the Covenant because of the so-called "death row phenomenon" associated with the imposition of a capital sentence in the case, I wish to add the following observations to the Committee's Views in paragraphs 17.1 and 17.2. The Committee has been informed that no individual has been executed in Pennsylvania for over 20 years. According to information available to the Committee, condemned prisoners are held segregated from other prisoners. While they may enjoy some particular facilities, such as bigger cells, access to radio and television sets of their own, they are nonetheless confined to death row awaiting execution for years. And this is not because they avail themselves of all types of judicial appellate remedies, but because the State party does not consider it appropriate, for the time being, to proceed with the execution. If the State party considers it necessary, for policy reasons, to have resort to the death penalty as such but not necessary and not even opportune to carry out capital sentences, a condemned person's confinement to death row should, in my opinion, last for as short a period as possible, with commutation of the death sentence to life imprisonment taking place as early as possible. A stay for a prolonged and indefinite period of time on death row, in conditions of particular isolation and under the threat of execution, which might by unforeseeable changes in policy become real, is not, in my opinion, compatible with the requirements of article 7, because of the unreasonable mental stress that this implies.

Thus, the extradition of Mr.Cox might also be in violation of article 7. However, there is not enough information in this case about the current practice of the Pennsylvania criminal justice and penitentiary system to allow any conclusion along the lines indicated above. What has been developed above remains hypothetical and in the nature of principles.

N. Communication No. 606/1994; Clement Francis v. Jamaica (Views adopted on 25 July 1995, fifty-fourth session)

Submitted by: Clement Francis (represented by counsel)

Victim: The author

State party: Jamaica

Date of communication: 12 August 1994 (initial submission)

Date of decision on admissibility: 28 July 1992

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 July 1995,

Having concluded its consideration of Communication No. 606/1994 submitted to the Human Rights Committee by Mr. Clement Francis under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts its Views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Clement Francis, a Jamaican citizen currently detained at the General Penitentiary in Kingston, Jamaica. He claims to be the victim of violations by Jamaica of articles 6, 7, 10, paragraph 1, and 14, paragraphs 3 (c), (d) and 5, of the International Covenant on Civil and Political Rights. He is represented by counsel.

2. An earlier communication submitted by the author to the Committee was declared inadmissible because of non-exhaustion of domestic remedies, since it appeared from the information before the Committee that the author had failed to petition the Judicial Committee of the Privy Council for special leave to appeal.[40] The decision provided for the possibility of review of admissibility, pursuant to rule 92, paragraph 2, of the Committee's rules of procedure. On 23 July 1992, the author's petition for special leave to appeal to the Judicial Committee of the Privy Council was dismissed. With this, it is submitted, all domestic remedies have been exhausted.

Facts as submitted

3.1 The author was arrested and charged on 22 February 1980 for the murder of one A. A. On 26 January 1981, he was found guilty as charged and sentenced to death in the Home Circuit Court of Kingston, Jamaica.

3.2 The Jamaican Court of Appeal dismissed the author's appeal on 18 November 1981; on 17 October 1987, a note of the oral judgment was produced, but no written judgment was issued. It appears from the note delivered by a

[40] Communication No. 382/1989, declared inadmissible on 28 July 1992, during the Committee's forty-fifth session.

judge of the Court of Appeal that Mr. Francis' legal representatives stated before the Court that they could find no grounds to argue on his behalf, to which the Court of Appeal agreed.

3.3 A warrant for the author's execution on 23 February 1988 was signed by the Governor-General, but a stay of execution was granted. It is stated that the Governor-General ordered that Mr. Francis' petition for special leave to appeal to the Judicial Committee of the Privy Council should be lodged with the Registrar of the Privy Council not later than 30 April 1988. On 10 March 1988, the London law firm willing to represent the author for the purpose of a petition for special leave to appeal, wrote to the Jamaica Council for Human Rights requesting copies of the trial transcript and Court of Appeal judgment. On 26 April 1988, the London law firm informed the Governor-General of Jamaica, that despite numerous requests by the Jamaica Council for Human Rights to the Registrar of the Court of Appeal, they had not yet obtained the written judgment of the Court of Appeal. Finally, on 1 February 1989, the Registrar of the Court of Appeal forwarded to the Jamaica Council for Human Rights a note, dated 17 October 1987, of the oral judgment in the case. The Jamaica Council for Human Rights forwarded this note to the London law firm on 8 March 1989.

3.4 Although the Judicial Committee of the Privy Council dismissed the author's petition for special leave to appeal, Lord Templeman observed the following in respect of the issue of delay:

> "In this case the petitioner was found guilty of murder and sentenced to death on 26 January 1981. The Court of Appeal of Jamaica dismissed his appeal on 18 November 1981. It is now over 10 years later and there comes before the Board a petition for special leave to appeal. During the whole of that time the petitioner has been under sentence of death. The delay is horrendous and appears solely due to the fact that the machinery for the Court of Appeal's reasons being written down and supplied to the petitioner's representatives is either wholly lacking or wholly broken down.
>
> The Board is well aware [...] that the legal authorities are struggling under great difficulties for lack of resources, [...], lack of machinery, lack of everything, [...]; and that in turn the Government, which must supply these facilities in the interest of justice, is labouring under great economic difficulties.
>
> But nevertheless the Board considers - [...] - that there must be put in place machinery for disposing of appeals, particularly in murder cases, in the sense that the delay should not be brought about by purely mechanical failure to provide facilities for recording and distributing the reasons for the trial judge or the Court of Appeal."

3.5 In December 1992, the offence for which the author was convicted was classified as a non-capital offence under the Offences Against the Person (Amendment) Act 1992; the author was removed from death row to serve a further 10 years' imprisonment at the General Penitentiary before he becomes eligible for parole.

3.6 Counsel affirms that the author has not applied to the Supreme (Constitutional) Court for redress. He submits that a constitutional motion in the Supreme Court would inevitably fail, in light of the precedent set by the

Judicial Committee of the Privy Council's decisions in DAP v. Nasralla[41] and Riley et al. v. Attorney General of Jamaica,[42] where it was held that the Jamaican Constitution was intended to prevent the enactment of unjust laws and not merely the unjust treatment under the law. Since Mr. Francis alleges unfair treatment under the law, and not that post-constitutional laws are unconstitutional, the constitutional motion is not available to him. Counsel further submits that, if it is nonetheless considered that Mr. Francis has a constitutional remedy in theory, it is not available to him in practice because he has no means to retain counsel and no legal aid is made available for the purpose of a constitutional motion.

3.7 It is submitted that Mr. Francis' mental condition has deteriorated as a direct result of his stay on death row. Counsel refers to the letters Mr. Francis addressed to his London solicitors, and points out that these letters demonstrate not only a high level of cognitive impairment, but also general mental disturbance and paranoia. Furthermore, reference is made to a letter, dated 3 June 1992, from the prison chaplain, Father Massie, who states, inter alia, that: "[...] Having worked with the men on Jamaica's death row for over five years, I have a fairly good sense of how they operate, what keeps them sane, what 'breaks' some. [...] It is my opinion that Clement has over the 11 years lost more and more contact with the 'real world'. While we spoke there were moments of lucidity and calmness which would suddenly be interrupted with bursts of paranoia regarding those he could no longer trust. The conversation went back and forth this way. He remembers some things very clearly, and will be conversing naturally, when, unexplainably, his voice will rise, the eyes begin to look suspiciously around, and he will become agitated over those he feels are persecuting him. [...]. As there is no psychiatric care of any kind at the prison it is not possible to get a professional opinion. I have, however, 30 years of experience as a pastoral counsellor [...] and it is my judgment that Clement Francis is in need of psychiatric help [...]".

3.8 Counsel affirms that there has not been a medical diagnosis of insanity and that all attempts to have Mr. Francis examined by a qualified psychiatrist have failed. He claims that this is owing to the difficulty in securing the services of a psychiatrist, because of the shortage of qualified psychiatrists in Jamaica and the lack of psychiatric care within the Jamaica prison system. In respect of the State party's submission to the Human Rights Committee relating to the author's earlier communication that Mr. Francis was examined on 6 February 1990 and was found to be sane, counsel points out that no details were given as to the nature of that examination or the qualifications of the assessor. According to counsel, the information provided by the State party is insufficient to assess the sanity of the author and should be weighed against the comments of Father Massie and the letters of the author. In support of his arguments, counsel refers to documentation on the psychological impact of death row incarceration.

3.9 Counsel concludes that the nature of the alleged violations is such to require Mr. Francis' release from prison as the only means to remedy the violations.

3.10 It is stated that the matter has not been submitted for examination under any other procedure of international investigation or settlement.

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[41] 1967, 2 ALL ER 161.

[42] 1982, 2 ALL ER 469.

Complaint

4.1 It is submitted that the author has been denied the right to have his conviction and sentence reviewed by a higher tribunal, in violation of article 14, paragraph 5, because of the Court of Appeal's failure to issue a written judgment. Counsel points out that the right of appeal to the Judicial Committee of the Privy Council against a decision of the Court of Appeal is guaranteed by section 110 of the Jamaican Constitution. Mr. Francis, however, was prevented from effectively exercising this right, because, in the absence of the written judgment, he was unable to meet the requirements of the Judicial Committee's rules of procedure, i.e. to explain the grounds on which he was seeking special leave to appeal, and to include copies of the Appeal Court's judgment with his petition.[43] With reference to the jurisprudence of the Human Rights Committee,[44] and of English,[45] Australian[46] and United States[47] courts, counsel concludes that the Jamaican Court of Appeal is under a duty to provide written reasons for its decisions and that, by failing to do so in the author's case, his right to have conviction and sentence reviewed has been rendered illusory.

4.2 Counsel points out that it has been over 13 years since the Court of Appeal orally dismissed Mr. Francis' appeal and that no written judgment has been issued to date. It is submitted that the failure of the Court of Appeal to issue a written judgment, despite repeated requests on Mr. Francis' behalf, violates his right, under article 14, paragraph 3 (c), of the Covenant, to be tried without undue delay. Reference is made to the Human Rights Committee's

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[43] Rules 3 and 4 of the Judicial Committee (General Appellate Jurisdiction) Rules Order (1982 Statutory Instrument No. 1676) provide that:

> "3(1) A petition for special leave to appeal shall (a) state succinctly all such facts as it may be necessary to state in order to enable the Judicial Committee to advise Her Majesty whether such leave ought to be granted; (b) deal with the merits of the case only so far as is necessary to explain the grounds upon which special leave to appeal is sought; ....
>
> "4 A petitioner for special leave to appeal shall lodge (a) six copies of the petition and of the judgment from which special leave to appeal is sought".

[44] Communication No. 230/1987 (Raphael Henry v. Jamaica), Views adopted on 1 November 1991, para. 8.4.

[45] See Norton Tools Co. Ltd. v. Tewson [1973] 1 WLR 45, p. 49 d.

[46] See Petit v. Dunkley [1971] 1 NSWLR 376.

[47] See Griffin v. Illinois (100 L Ed 891 [1985]), p. 899.

General Comment 13,[48] to its jurisprudence,[49] and to Lord Templeman's observations when considering Mr. Francis' petition for special leave to appeal to the Judicial Committee of the Privy Council.

4.3 As to a violation of the author's right under article 14, paragraph 3 (d), it is submitted that the legal aid attorneys assigned to Mr. Francis for the purpose of his appeal, did not consult with him, nor informed him that they intended to argue before the Court of Appeal that the appeal had no merit. Counsel explains that, had Mr. Francis known that his attorneys were not going to put forward any ground of appeal, it is likely that he would have requested a change of legal representation. With reference to the Committee's Views in Communication No. 356/1989, it is submitted that the attorneys assigned for Mr. Francis' appeal did not provide effective representation in the interest of justice.[50]

4.4 In respect of violations of articles 7 and 10, paragraph 1, counsel points out that Mr. Francis has been held on death row from his conviction and sentence on 26 January 1981 until the commutation of his death sentence to life imprisonment in December 1992. It is submitted that the mere fact that the author will no longer be executed does not nullify the mental anguish of the 12 years spent on death row, facing the prospect of being hanged. In this context, it is stated that, after a warrant had been issued for the author's execution on 23 February 1988, he was placed, on 18 February 1988, in the death cell adjacent to the gallows where condemned men are held prior to execution. He was subjected to round the clock surveillance and was weighed in order to calculate the length of "drop" required. The author claims that he was taunted by the executioner about the impending execution and about how long it would take for him to die. Furthermore, he could hear the gallows being tested. He adds that the strain of the five days in the death cell was such that he was unable to eat and it left him in a shaken, disturbed state for a long period of time. It is submitted that an increasing number of jurisdictions now recognize that prolonged periods of detention on death row can constitute inhuman and

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[48] CCPR/C/21/Rev.1, p. 14, para. 10, where the Committee held that:

> "[...] all stages must take place 'without undue delay'. To make this right effective, a procedure must be available in order to ensure that the trial will proceed 'without undue delay', both in first instance and on appeal."

[49] See Communication No. 282/1988 (Leaford Smith v. Jamaica), Views adopted on 31 March 1993, during the Committee's forty-seventh session; para. 10.5.

[50] Communication No. 356/1989 (Trevor Collins v. Jamaica), Views adopted on 25 March 1993, during the Committee's forty-seventh session. In para. 8.2 the Committee held that:

> "While article 14, paragraph 3(d), does not entitle the accused to choose counsel provided to him free of charge, measures must be taken to ensure that counsel, once assigned, provides effective representation in the interest of justice. This includes consulting with, and informing, the accused if he intends to withdraw an appeal or to argue, before the appellate instance, that the appeal has no merit".

degrading treatment.[51]

4.5 In addition to the psychological stress, it is submitted that the physical conditions of Mr. Francis' detention on death row exacerbate the violations of his rights under articles 7 and 10, paragraph 1, of the Covenant. In this context, the author states that, during the 12 years on death row, he was held in a cell measuring 10 x 10 feet, which was dirty and infested with rats and cockroaches. He was only allowed out of his cell for a few minutes each day and sometimes remained locked up for 24 hours. He claims that he was regularly beaten by warders and that he still suffers from headaches as a result of a severe wound to his head sustained by the beatings, for which he was denied medical treatment. He further complains about the excessive noise on death row, caused by the cell doors, which would ring loudly when slammed shut or when rattled by inmates trying to attract the attention of the warders.

4.6 Finally, it is submitted that the issuing of a warrant of execution of a mentally disturbed person, such as the author (see paras. 3.7 and 3.8 supra) is in violation of customary international law; the fact that Mr. Francis was kept on death row facing execution until December 1992, while being mentally disturbed, is said to amount to violations of articles 6, 7 and 10, paragraph 1, of the Covenant, juncto Economic and Social Commission resolutions 1984/50 and 1989/64. The lack of psychiatric care in St. Catherine District Prison is said to be in violation of articles 22, paragraph 1, 24 and 25 of the Standard Minimum Rules for the Treatment of Prisoners.[52]

State party's observations and counsel's comments

5.1 By submission of 16 February 1995, the State party does not raise any objections to the admissibility of the communication and offers comments on the merits, in order to expedite the examination of the communication.

5.2 The State party concedes that the author was not provided with a written judgement from the Court of Appeal, but emphasizes that, following instructions by the then President of the Court of Appeal, reasons are now being issued in all cases within three months of the hearing.

5.3 The State party argues that the author did not suffer any miscarriage of justice because of the absence of a written judgment and consequently that there has been no violation of article 14, paragraph 5, of the Covenant. Reference is made to the judgment of the Privy Council in Pratt and Morgan v. Attorney General for Jamaica,[53] where the Privy Council states that the availability of reasons is not a condition precedent for lodging an application for special

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[51] Reference is made, inter alia, to the findings of the European Court of Human Rights in the Soering case (judgment of 7 July 1989, Series A, Volume 161); of the Indian Supreme Court in Rajendra Prasad v. State of Uttar Pradesh (1979 3 SCR 329); of the Zimbabwe Supreme Court in Catholic Commissioners for Peace and Justice in Zimbabwe v. Attorney-General (14 HRLJ 1993); and of the Judicial Committee of the Privy Council in Pratt and Morgan v. Attorney-General of Jamaica (1993, 4 ALL ER 769).

[52] Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

[53] Judgement of 2 November 1993.

leave to appeal. In this connection the State party recalls that the author's case was in fact heard by the Privy Council.

5.4 As regards the author's claim under article 14, paragraph 3 (d), with regard to his appeal, the State party emphasizes that it is its duty to provide competent counsel to assist the author, but that it cannot be held responsible for the manner in which counsel conducts his case, as long as it does not obstruct counsel in the preparation and conduct of the case. To hold otherwise would mean that the State has a greater burden with respect to legal aid counsel than it does for privately retained lawyers.

5.5 The State party denies that the author's detention on death row for over 12 years constitutes a violation of articles 7 and 10. The State party rejects the view that the case of Pratt and Morgan v. the Attorney General is an authority for the proposition that once a person has spent five years on death row there has been automatically a violation of his right not to be subjected to cruel and inhuman treatment. The State party argues that each case must be examined on its own merits. It refers to the Committee's jurisprudence that "in principle, prolonged judicial proceedings do not, per se, constitute cruel, inhuman or degrading treatment even if they can be a source of mental strain for the convicted prisoners".[54]

5.6 As regards the claim that the author is mentally ill and that his continued detention on death row constituted a violation of articles 7 and 10, the State party submits that the author was examined by a psychiatrist on 6 February 1990 and that the psychiatric report states that the author displayed no psychiatric features and no evidence of cognitive impairment. On this basis, the State party rejects the assertions about the author's mental health and notes that an allegation of this kind must be supported by medical evidence.

6.1 In his comments on the State party's submission counsel for the author agrees to the immediate examination by the Committee of the merits of the communication.

6.2 Counsel reiterates that the failure of the Court of Appeal to deliver written reasons for dismissing the appeal constitutes a violation of article 14, paragraph 5, of the Covenant. In support of his view, counsel refers to the Privy Council judgment in Pratt and Morgan v. Jamaica, where it was held that "in practice it is necessary to have the reasons of the Court of Appeal available at the hearing of the application for special leave to appeal, as without them it is not usually possible to identify the point of law or serious miscarriage of justice of which the appellant complains." Counsel concludes that without a written judgement the author could not effectively exercise his right to have his conviction and sentence reviewed by a higher tribunal according to law.

6.3 As regards the claim under article 14, paragraph 3 (d), that the author was not provided with effective representation before the Court of Appeal, counsel refers to the Committee's Views in Communication No. 356/1989,[55] where it was held that effective representation included consulting with, and informing, the accused if counsel intends to withdraw the appeal or intends to argue that the appeal has no merit. Counsel argues that, although a State party cannot be held

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[54] See Committee's Views in Communication No. 219/1986 and Communication No. 225/1987 (Pratt and Morgan v. Jamaica), Views adopted on 6 April 1989.

[55] Trevor Collins v. Jamaica, Views adopted on 25 March 1993, para. 8.2.

responsible for the shortcomings of privately retained counsel, it has the responsibility to guarantee effective representation in legal aid cases.

6.4 Counsel refers, inter alia, to the judgment of the Privy Council in Pratt and Morgan v. Jamaica, and maintains that, as the author was kept on death row for over 12 years, he has been subjected to inhuman and degrading treatment or punishment in violation of articles 7 and 10, paragraph 1, of the Covenant. In this connection, counsel emphasizes the length of the delay in the author's case and the conditions on death row in St. Catherine District Prison.

6.5 As regards the author's mental state, counsel notes that the State party has given no details as to the nature of the psychiatric examination or about the qualifications of the assessor. Counsel argues therefore that the report to which the State party refers has no more evidentiary value than the comments of the prison chaplain and the letters of the author himself. Counsel reiterates that the prison chaplain is convinced that the author is suffering from a mental illness and that the letters of the author demonstrate cognitive impairment, paranoia and general mental confusion. Counsel concludes that one psychiatric evaluation over a 12 year period on death row is insufficient to determine the author's sanity.

6.6 In this connection counsel also recalls the five days spent by the author in the death cell in February 1988, and submits that the State party has not provided medical evidence that the author was sane at the time the warrant for execution was issued. It is argued that articles 7 and 10, paragraph 1, of the Covenant prohibit a State party from executing the insane and that Jamaica's statutory procedure for determining insanity fails to provide adequate protection of this right. In this context, counsel states that an estimated 100 prisoners at St. Catherine District Prison are mentally ill. Counsel concludes that the issuing of a warrant for execution without a prior attempt to establish the author's mental condition constitutes in itself a violation of articles 7 and 10 of the Covenant.

Decision on admissibility and examination of the merits

7.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

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

7.3 The Committee observes that the author had submitted an earlier communication in 1989, which the Committee declared inadmissible in 1992 on account of non-exhaustion of domestic remedies. In its decision the Committee indicated that pursuant to rule 92, paragraph 2, of the rules of procedure the communication could be considered after the author had exhausted domestic remedies.

7.4 Having determined that the author has exhausted domestic remedies for purposes of the Optional Protocol, the Committee finds that it is appropriate in this case to proceed to an examination of the merits. In this context, the Committee notes that the State party does not raise any objections to the admissibility of the communication and has forwarded its comments on the merits in order to expedite the procedure. The Committee recalls that article 4,

paragraph 2, of the Optional Protocol stipulates that the receiving State shall submit its written explanations on the merits of a communication within six months of the transmittal of the communication to it for comments on the merits. The Committee finds that this period may be shortened, in the interests of justice, if the State party so wishes. The Committee further notes that counsel for the author agrees to the examination of the communication at this stage, without the submission of additional comments.

8. Accordingly, the Committee decides that the communication is admissible and proceeds, without further delay, to the examination of the substance of the author's claims, in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

9.1 The Committee must determine whether the author's treatment in prison, particularly during the nearly 12 years that he spent on death row following his conviction on 26 January 1981 until the commutation of his death sentence on 29 December 1992 entailed violations of articles 7 and 10 of the Covenant. With regard to the "death row phenomenon", the Committee reaffirms its well established jurisprudence that prolonged delays in the execution of a sentence of death do not per se constitute cruel, inhuman or degrading treatment. On the other hand, each case must be considered on its own merits, bearing in mind the imputability of delays in the administration of justice on the State party, the specific conditions of imprisonment in the particular penitentiary and their psychological impact on the person concerned.

9.2 In the instant case, the Committee finds that the failure of the Jamaican Court of Appeal to issue a written judgment over a period of more than 13 years, despite repeated requests on Mr. Francis' behalf, must be attributed to the State party. Whereas the psychological tension created by prolonged detention on death row may affect persons in different degrees, the evidence before the Committee in this case, including the author's confused and incoherent correspondence with the Committee, indicates that his mental health seriously deteriorated during incarceration on death row. Taking into consideration the author's description of the prison conditions, including his allegations about regular beatings inflicted upon him by warders, as well as the ridicule and strain to which he was subjected during the five days he spent in the death cell awaiting execution in February 1988, which the State party has not effectively contested, the Committee concludes that these circumstances reveal a violation of Jamaica's obligations under articles 7 and 10, paragraph 1, of the Covenant.

9.3 With regard to the author's allegations of violations of article 14 of the Covenant, the Committee finds that the inordinate delay in issuing a note of oral judgment in his case entailed of violation of article 14, paragraphs 3 (c) and 5, of the Covenant, although it appears that the delay did not ultimately prejudice the author's appeal to the Judicial Committee of the Privy Council. In the light of these considerations the Committee does not deem it necessary to make findings in respect of other provisions of article 14 of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of articles 7, 10, paragraph 1, 14, paragraph 3 (c), and 5, of the Covenant.

11. Pursuant to article 2, paragraph 3 (a), of the Covenant, the author is entitled to an effective remedy, including appropriate medical treatment, compensation and consideration for an early release.

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

ANNEX XI

Decisions of the Human Rights Committee declaring communications inadmissible under the Optional Protocol relating to the International Covenant on Civil and Political Rights

A. Communication No. 437/1990; B. Colamarco Patiño v. Panama (decision of 21 October 1994, fifty-second session)

Submitted by: Renato Pereira

Alleged victim: Benjamin Colamarco Patiño

State party: Panama

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 21 October 1994,

Adopts the following:

Decision on admissibility

1. The author of the communication is Renato Pereira, a Panamanian attorney born in 1936 and a resident of Paris at the time of submission of the communication. He acts on behalf of Mr. Benjamin Colamarco Patiño, a Panamanian citizen born in 1957, detained at the Modelo Prison in Panama City at the time of submission of the communication. It is submitted that Mr. Colamarco is a victim of violations by Panama of articles 9 and 15 of the International Covenant on Civil and Political Rights. Mr. Pereira encloses a power of attorney from Mr. Colamarco Patiño's wife.

Facts as submitted by the author

2.1 Benjamin Colamarco Patiño was a commander of the Panamanian "Batallones de la Dignidad", according to Mr. Pereira an elite unit which resisted the intervention of United States forces in Panama in December 1989 ("Operation Just Cause"). His active resistance was corroborated by United States Colonel D. T., who was in charge of United States Air Force operations during the intervention. On 10 January 1990, Mr. Colamarco Patiño was, according to his representative, taken prisoner by the United States forces and interned in the "Nuevo Emperador" camp.

2.2 When, on 31 January 1990, President George Bush declared the end of hostilities with Panama, most prisoners of war were released. Mr. Colamarco Patiño, however, was transferred to the Modelo Prison in Panama, where he continued to be held. He was indicted on charges of having committed certain offences against the (territorial) integrity and internal order of the Republic of Panama.

2.3 Mr. Pereira submits that Mr. Colamarco acted legitimately vis-à-vis the United States intervention. Article 306 of the Panamanian Constitution indeed obliges all Panamanian citizens to defend the integrity of Panamanian territory and the sovereignty of the State.

2.4 As to the requirement of exhaustion of domestic remedies, Mr. Pereira states, without giving further details, that Mr. Colamarco has exhausted available domestic remedies, including a request for habeas corpus to the Supreme Court of Panama, the country's highest tribunal.

2.5 In further submissions made in the course of 1992 and 1993, Mr. Pereira observed, again without giving any further details, that the Supreme Court of Panama itself had admitted that the acts attributed to Mr. Colamarco and his co-defendants did not constitute criminal offences but that, notwithstanding, his client continued to be detained at Modelo Prison. In early 1993, he indicated that the trial of Mr. Colamarco and his co-defendants was scheduled to start on 19 May 1993 before the Circuit Court Judge No. 4 of Panama City (Juez Cuarto de lo Penal del Primero Circuito Judicial de Panamá), and that the indictment of his client had been changed to include not only offences against the internal order of the State but also crimes against humanity. He objects to the qualification of the offences imputed to Mr. Colamarco Patiño as "political crimes".

Complaint

3. The author contends that the facts as submitted reveal violations by Panama of articles 9 and 15 of the Covenant.

State party's information and observations

4.1 In its submission under rule 91 of the rules of procedure, the State party observes that the trial of Mr. Colamarco and of three co-defendants started as scheduled on 19 May 1993. Mr. Colamarco was represented, both during the preliminary enquiry and during the trial, by a lawyer of his choice. On 4 June 1993, the circuit court judge found Mr. Colamarco and the other co-accused guilty of offences against the internal State order; they were sentenced to 44 months and 10 days of imprisonment and prohibited from running for public office for the same period of time, to run from the day the prison term had been purged. All of the accused were acquitted of the charge of crimes against humanity.

4.2 The Court's decision was notified to Mr. Colamarco. Although his legal representative initially appealed the sentence, he subsequently withdrew the appeal.

4.3 The State party concludes that by February 1994, the case had been filed, because the time spent in preventive detention by Mr. Colamarco had been set off against the prison term imposed on him. He has therefore been released, and no further charges against him remain pending.

Issues and proceedings before the Committee

5.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

5.2 As to the claim under article 9, paragraph 1, the Committee begins by noting that the author links the alleged arbitrariness of Mr. Colamarco's arrest and detention to his presumed innocence. Nothing in the file, however, reveals that Mr. Colamarco was not detained on specific charges (see paragraph 2.2 above), pending the determination of his innocence or guilt by a court of law,

and that he was not properly indicted. But, in any event, the Committee notes that Mr. Colamarco's counsel, while initially appealing the judgment of 4 June 1993 against his client, later withdrew the appeal, where these issues could have been dealt with. For the purpose of article 5, paragraph 2 (b), of the Optional Protocol, an applicant must make use of all judicial or administrative avenues that offer him a reasonable prospect of redress. This Mr. Colamarco's counsel has failed to do, and available domestic remedies have accordingly not been exhausted in the case.

6. The Human Rights Committee therefore decides:

(a) the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol;

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

B. Communication No. 438/1990; Enrique Thompson v. Panama (decision adopted on 21 October 1994, fifty-second session)

Submitted by: Renato Pereira

Alleged victim: Enrique Thompson

State party: Panama

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 21 October 1994,

Adopts the following:

Decision on admissibility

1. The author of the communication is Renato Pereira, a Panamanian attorney residing in Paris at the time of submission of the communication. He acts on behalf of Mr. Enrique Thompson, a Panamanian citizen and architect by profession, who was detained at the Modelo Prison in Panama City at the time of submission of the communication. It is submitted that Mr. Thompson is a victim of violations by Panama of article 9, paragraphs 1 and 2, and article 15, paragraph 1, of the International Covenant on Civil and Political Rights. Mr. Pereira encloses a power of attorney from Mr. Thompson's wife.

Facts as submitted by the author

2.1 Mr. Thompson was a leading member of the Panamanian "Batallones de la Dignidad", according to Mr. Pereira an elite unit which resisted the intervention of United States forces in Panama in December 1989 ("Operation Just Cause"). His active resistance was corroborated by United States Colonel D. T., who was in charge of United States Air Force operations during the intervention. On 10 January 1990, Mr. Thompson was, according to his representative, taken prisoner by the United States forces and interned in the "Nuevo Emperador" camp.

2.2 When, on 31 January 1990, President George Bush declared the end of hostilities with Panama, most prisoners of war were released. Mr. Thompson, however, was transferred to the Modelo Prison in Panama, where he continued to be held. He was indicted on charges of having committed certain offences against the (territorial) integrity and the internal order of the Republic of Panama.

2.3 The author contends that Mr. Thompson acted legitimately vis-à-vis the United States intervention. Article 306 of the Panamanian Constitution indeed obliges all Panamanian citizens to defend the integrity of Panamanian territory and the sovereignty of the State.

2.4 The author states, without giving any further details, that all available domestic remedies have been exhausted in the case of Mr. Thompson.

2.5 In further submissions made in the course of 1992 and 1993, Mr. Pereira observed, again without giving any further details, that the Supreme Court of

Panama itself had admitted that the acts attributed to Mr. Thompson and his co-defendants did not constitute criminal offences but that, notwithstanding this statement, his client continued to be detained at Modelo Prison. In early 1993, he indicated that the trial of Mr. Thompson and his co-defendants was scheduled to start on 19 May 1993 before the Circuit Court Judge No.4 of Panama City (Juez Cuarto de lo Penal del Primero Circuito Judicial de Panamá), and that the indictment of Mr. Thompson had been changed to include not only offences against the internal order of the State, but also crimes against humanity. He objects to the qualification of the offences imputed to Mr. Thompson as "political offences".

Complaint

3.1 The author submits that Mr. Thompson is a victim of violations of articles 9, paragraphs 1 and 2, and 15, paragraph 1, of the Covenant. He contends that Mr. Thompson's detention is arbitrary because he allegedly did not commit any punishable offences, and that he was not informed of the reasons for his detention nor of his indictment. Article 15 is said to have been violated because none of the acts imputed to Mr. Thompson were criminal offences at the time of their commission.

State party's information and observations

4.1 In its submission under rule 91 of the rules of procedure, the State party observes that the trial of Mr. Thompson and three co-defendants began as scheduled on 19 May 1993. Mr. Thompson was represented throughout the trial by a legal representative of his choice. On 4 June 1993, the Circuit Court Judge found Mr. Thompson and his co-defendants guilty of offences against the internal order of the State and sentenced them to 44 months and 10 days of imprisonment; they were further prohibited from running for public office for the same period of time, to run from the day the prison term had been purged. All of the accused were acquitted of the charge of crimes against humanity.

4.2 The court's decision was notified to Mr. Thompson and to his representative. Although his lawyer initially appealed the sentence, he subsequently withdrew the appeal.

4.3 The State party concludes that as of February 1994, the case had been filed, as the time spent in preventive detention by Mr. Thompson had been set off against the prison term imposed upon him. He has therefore been released, and no further charges against him remain pending.

Issues and proceedings before the Committee

5.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

5.2 As to the claims under articles 9, paragraphs 1 and 2, the Committee begins by noting that the author links the alleged arbitrariness of Mr. Thompson's arrest and detention to his presumed innocence. Nothing in the file, however, indicates that Mr. Thompson was not held on specific charges (see para. 2.2 above), pending the determination of his innocence or guilt by a court of law, and that he was not properly indicted. But, in any event, the Committee notes that Mr. Thompson's counsel, while initially appealing the sentence of 4 June 1993 against his client, later withdrew the appeal, where these issues

could have been dealt with. For the purpose of article 5, paragraph 2 (b), of the Optional Protocol, an applicant must make use of all judicial or administrative avenues that offer him a reasonable prospect of success. This Mr. Thompson's counsel has failed to do, and available domestic remedies accordingly have not been exhausted in the case.

6. The Human Rights Committee therefore decides:

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

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

C. Communication No. 460/1991; T. Omar Simons v. Panama (decision of 25 October 1994, fifty-second session)

Submitted by: Terani Omar Simons

Alleged victim: The author

State party: Panama

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 October 1994,

Adopts the following:

Decision on admissibility

1. The author of the communication is Terani Omar Simons, a Panamanian citizen currently residing in El Dorado, Panama. He claims to be a victim of violations by Panama of his human rights without, however, invoking specific provisions of the International Covenant on Civil and Political Rights.

Facts as presented by the author

2.1 Towards the end of 1981, the author was employed by a private insurance company, the Compania Fiduciaria y de Seguros S.A.. In December 1981, he was appointed Managing Director (Gerente General) of this company and at the same time became a major shareholder. The company managed, at the time, a large percentage of the insurance contracts administered by an official social security organism, the Caja de Seguro Social.

2.2 In October 1982, the author was accused of being an accomplice to illegal financial transactions concerning the Compania Fiduciaria and to have pursued personal interests in connection with the administration of a large public housing project (Programa colectivo de viviendas de la Caja de Seguro Social) run by the Caja de Seguro.

2.3 In a financial audit (vista fiscal) of 24 January 1983, the public prosecutor charged the author with abuse of authority. On 19 May 1983, Mr. Simons was also charged with the offence of bribing officials (delito de peculato culposo), to the detriment of the Caja de Seguro Social.

2.4 On 27 September 1983, the author requested a local tribunal (Segundo Tribunal Superior de Justicia) to strike the indictments from the court agenda. On 31 January 1985, the Criminal Chamber of the Second District Court of Panama (Juzgado Segundo del Circuito, Ramo penal) found him guilty as charged on both counts and sentenced him to fifteen months' imprisonment. The author appealed to the Segundo Tribunal Superior de Justicia on 27 March 1985, but the appeal was dismissed. On an unspecified date in 1987, another court (Juzgado IIª - Ramo penal) rejected the author's request for the provisional suspension of execution of the sentence (suspención condicional de ejecución de la pena). In November 1990, the Segundo Tribunal de Justicia dismissed the author's (further) appeal and confirmed the decision of 1987. At the same time, it ordered the author's arrest ("... se dictó orden de arresto").

2.5 The author claims that the criminal proceedings against him were based on false evidence (pruebas falsas). He explains that, in May 1982, two cheques had been paid to the benefit of two former directors of the Caja de Seguro Social. The prosecution contended that these two cheques were paid by the insurance company managed by the author; the author however maintains that he never signed cheques during the time in question and contends that the cheques were signed by shareholders of two construction companies, Alveyco S.A. and Urbana de Expansión S.A., with whom he maintained no contacts. He therefore claims that he is a victim of a judicial error amounting to a denial of justice. The author further contends, without giving details, that as a result of the criminal proceedings, he suffered unlawful attacks on his honour and professional reputation, as well as substantial financial damages.

Complaint

3. It transpires from the facts as described above that the author claims to be a victim of a violation of articles 14 and 17 of the Covenant.

Issues and proceedings before the Committee

4.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 On 28 December 1992, the communication was transmitted to the State party under rule 91 of the rules of procedure, requesting it to provide information and observations on the question of admissibility. No information was received from the State party within the imparted deadline. On 29 July 1994, the State party was advised that any information or observations should reach the Committee well in advance of the Committee's fifty-second session; no submission has been received. The Committee expresses its regret at the State party's failure to cooperate and reaffirms that it is implicit in the Optional Protocol that a State party provide the Committee in good faith with all the information at its disposal. In the circumstances, due weight must be given to the author's allegations, to the extent that they have been substantiated, for purposes of admissibility.

4.3 Concerning the author's contention that he was a victim of a denial of justice, the Committee notes that his complaint relates primarily to the evaluation of the evidence in the case by the Panamanian tribunals. It recalls that it is in principle for the domestic courts of States parties to the Covenant to review the evidence in any particular case and for the appellate courts to review the evaluation of the evidence by the lower courts. It is not for the Committee to evaluate the evidence in a case, unless it can be ascertained that the court's decision was arbitrary or amounted to a denial of justice, or that the judge otherwise violated his obligation of independence and impartiality. After reviewing the material before it, the Committee cannot conclude that the proceedings against Mr. Simons suffered from such defects. Therefore, this claim is inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

4.4 As to the claim under article 17, the Committee considers that the author has failed to substantiate, for purposes of admissibility, that the judicial proceedings against him and his conviction constituted an arbitrary or unlawful attack on his honour and reputation. In this respect, accordingly, the author has no claim within the meaning of article 2 of the Optional Protocol.

5. The Human Rights Committee therefore decides:

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

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

D. Communication No. 494/1992; Lloyd Rogers v. Jamaica (decision of 4 April 1995, fifty-third session)

Submitted by: Lloyd Rogers [represented by counsel]

Alleged victim: The author

State party: Jamaica

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 4 April 1995,

Adopts the following:

Decision on admissibility

1. The author of the communication is Lloyd Rogers, a Jamaican citizen currently awaiting execution at St. Catherine District Prison, Jamaica. He claims to be a victim of violations by Jamaica of article 6, paragraphs 2, 7 and 10, and article 14, paragraphs 1, 3 and 5, of the International Covenant on Civil and Political Rights. He is represented by counsel.

Facts as submitted by the author

2.1 On 21 March 1984, the author was tried and convicted in the Home Circuit Court of Kingston for the murder, on 5 July 1980, of one Marjorie Thomas. In July 1983, he had been tried for the same offence, but the jury did not return a unanimous verdict and a retrial was ordered. After his conviction, the author applied for leave to appeal to the Jamaican Court of Appeal, which confirmed the sentence on 18 December 1985.

2.2 The author had been a corporal in the police force and was a friend of the victim. On 5 July 1980, he had gone with Ms. Thomas and two other acquaintances to a beach in Kingston. While bathing, Ms. Thomas drowned. The author reported the matter to the police station. Ms. Thomas' body was recovered the next day. A post-mortem examination revealed that she had died from asphyxia, caused by strangulation. In the pathologist's opinion, a lesion over the right side of the neck could have been caused by any object with a rough surface, like a rope, belt or stick.

2.3 On 9 July 1980, after having read the post-mortem report, Detective Corporal Thomas interviewed the author, who was cautioned and made a deposition. In it, he stated that on the beach, the deceased had gone for a swim; when she suddenly plunged under water, resurfaced and called for help, the author went out to her and tried to drag her out of the water with his hands. Because he could not swim, he let go and called for help himself. A "rastaman" came to his assistance, but by the time he had reached the spot, the victim had disappeared.

2.4 The prosecution's case rested mainly on the author's statement of 9 July 1980. During the trial, the author made a statement from the dock, in which he stated that the victim had been his girlfriend and that he had tried to save her with a stick with a hook at the end; he had placed the stick around her neck but although she had grasped it with both hands, the current made it

difficult to get her out. Thereafter the "rastaman" went to her rescue, in vain. No witnesses were called in the author's defence.

2.5 Before the Court of Appeal, the author's counsel did not challenge the factual basis of the case nor the directions to the jury given by the trial judge. She applied for the introduction of fresh evidence on the basis that one of the jurors had in fact disagreed with the "guilty" verdict but never openly voiced that disagreement in court. The Court of Appeal considered that, if in fact the juror had shaken her head to indicate dissent, then that apparently was not noticed by the prosecution or the defence during the trial, nor by the judge, the court registrar or the court reporter. The Court of Appeal therefore saw no reason to allow the appeal, and considered the directions of the trial judge to have been fair and thorough.

2.6 After the dismissal of his appeal, the author sought to petition the Judicial Committee of the Privy Council for special leave to appeal. On 24 May 1990, leading counsel advised that, on the basis of the Judicial Committee's jurisprudence, such a petition would fail; he referred in particular to the Judicial Committee's decision on the case of R. v. Lalchan Nanan, in which the Privy Council had refused to entertain a request to overturn a capital verdict which, in spite of the appearance of unanimity, had allegedly been split and not unanimous. Counsel considers that, in the light of this precedent, a petition for special leave to appeal would not constitute an effective remedy within the meaning of the Optional Protocol.

Complaint

3.1 Counsel alleges violations of articles 7 and 10, on account of "inhuman and degrading treatment" of the author in custody on death row.

3.2 Counsel further argues that the author's conviction on the basis of a not unanimous verdict by the jury amounts to a violation of article 14, paragraph 1, of the Covenant.

3.3 Counsel also argues that the author's privately retained counsel did not represent him properly. In this connection, it is stated that counsel was absent from the preliminary hearing, did not call any witnesses for the defence, failed to challenge the evidence put forward by the prosecution and did not argue the appeal properly.

3.4 Counsel also contends that potential defence witnesses were intimidated by the police, without however giving any details of this intimidation.

State party's observations

4. By a submission of 9 September 1992, the State party argues that the communication is inadmissible, because it does not disclose any violation of the Covenant.

5. In reply to the State party's submission, counsel indicates that he has nothing to add to his initial communication.

Issues and proceedings before the Committee

6.1 Before considering any claim in a communication, the Human Rights Committee, in accordance with rule 87 of its rules of procedure, must decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 With regard to the author's claim that his detention on death row amounts to a violation of articles 7 and 10 of the Covenant, the Committee refers to its prior jurisprudence that detention on death row does not, per se, constitute cruel, inhuman or degrading treatment in violation of article 7 of the Covenant.[56] The Committee observes that the author has not shown in what particular ways he was so treated as to raise an issue under articles 7 and 10 of the Covenant. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

6.3 The Committee further considers that counsel has failed to substantiate, for purposes of admissibility, his claim that the author's defence lawyer did not properly represent him and that the jury's verdict was not unanimous, amounting to a violation of article 14, paragraph 1, of the Covenant. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

7. The Human Rights Committee decides:

(a) The communication is inadmissible;

(b) The present decision shall be communicated to the State party and to the author's counsel.

[56] See the Committee's Views on Communication No. 210/1986 and Communication No. 225/1987 (Earl Pratt and Ivan Morgan v. Jamaica), adopted on 6 April 1989, para. 13.6. See also, inter alia, the Committee's views on Communication No. 270/1988 and Communication No. 271/1988 (Randolph Barret and Clyde Sutcliffe v. Jamaica), adopted on 30 March 1992, and Communication No. 470/1991 (Kindler v. Canada), adopted on 30 July 1993.

E. Communication No. 515/1992; Peter Holder v. Trinidad and Tobago (decision adopted on 19 July 1995, fifty-fourth session)

Submitted by: Peter Holder (represented by counsel)

Alleged victim: The author

State party: Trinidad and Tobago

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 19 July 1995,

Adopts the following:

Decision on admissibility

1. The author of the communication is Peter Holder,[2] a Trinidadian citizen, at the time of submission awaiting execution at the State Prison of Port-of-Spain, Trinidad and Tobago. He claims to be a victim of violations of his human rights by Trinidad and Tobago. The author's death sentence has been commuted to life imprisonment.

2.1 The author and two men, Irvin Phillip and Errol Janet, were jointly charged with the murder on 29 March 1985, of one Faith Phillip. On 5 May 1988, after a trial which lasted one month, the jury failed to return a unanimous verdict, and a retrial was ordered. On 18 June 1988, the accused were found guilty as charged and sentenced to death by the second Assizes Court of Port-of-Spain. In March 1990, the Court of Appeal of Trinidad and Tobago dismissed the appeal of Messrs. Holder and Phillip, whereas it acquitted Errol Janet; it issued a written judgment two weeks later. On 27 June 1994, Mr. Holder petitioned the Privy Council for special leave to appeal which has been granted, however the case still has not been heard by the Privy Council.

2.2 The case for the prosecution was based on the evidence given by the sole eyewitness to the crime who testified that, on the morning of 29 March 1985, she was at work in the Zodiac Recreation Club in Port-of-Spain. She was inside the bar and Faith Phillip sat in front of the bar, when the three men came in. They sat down at a table and started talking. Accused No. 1, whom she recognized as Mr. Holder, ordered a drink. After a while, he went downstairs and she heard a sound as if the gate to the entrance was being closed. When he came back, she asked the deceased to have a look. Upon her return to the bar, the deceased was grabbed by accused No. 2, whom she recognized as Mr. Phillip. Accused No. 1 then kicked open the door to the bar and entered the bar with accused No. 3, whom she recognized as Mr. Janet. Both were holding knives. Accused No. 1 forced her to open the cash register, which she did, and accused No. 3 took the money from it. She was forced to show them the club owner's room, which was at the back. There, accused No. 1 tied her up, while No. 3 searched the room for valuables. She was told to face the wall, but before doing so she saw accused No. 2 pulling Ms. Phillip to the back. She then heard fighting in the opposite

[2] The original Communication was submitted by Peter Holder and Irvin Phillip; the communications were separated at counsel's request and have been respectively registered as Communication No. 515/1992 and Communication No. 594/1992.

room, which continued for about five minutes. After it stopped she heard footsteps, as if the accused were leaving. Finally, she was untied by the club's electrician who passed by and they found the deceased lying on the floor.

2.3 One of the co-accused, Mr. Phillip, gave sworn testimony denying any knowledge of the crime and claiming that he had never left his home on 29 March 1985. His statement to the police was also admitted into evidence after a voire dire.

2.4 The second co-accused, Mr. Janet, affirmed upon oath his previous statement to the police. He stated that the robbery had been planned by accused No. 1 and 2, who had received information that the owner of the club kept all his money at the club. He claims to have taken part in the robbery out of fear of the other two men. He further stated that he had prevented accused No. 1 from further hitting the deceased.

2.5 The case for the defence was based on the sworn statement given by Mr. Holder at the trial, in which he admitted his participation in the robbery. He denied, however, having struck the deceased. He stated that while he and accused No. 3 were emptying the drawers in the club owner's room, he saw accused No. 2 going up the corridor with the deceased. When they left the building, they met accused No. 2 outside. The author further denied that he made self-incriminating statements to the police. Said statements were admitted into evidence after counsel had challenged their voluntariness.

2.6 The author states that, in the morning of 3 April 1985, he went to the police station, because he had heard that the police were looking for him.

Complaint

3.1 The author claims that his trial was unfair in breach of article 14 of the Covenant. In this context, he submits that:

(a) During the first trial, an article was published in the local newspaper that was highly prejudicial to his case. He states that the judge, as well as the three counsels for the defence, called upon the reporters to rectify the "misleading" publication. However, the effect was such that it would have been impossible to select an unbiased jury for the re-trial;

(b) The initial date for the re-trial was 1 June 1988. On that day, he was informed that his counsel and counsel for Mr. Phillip had withdrawn from the case. In spite of their requests for a counsel of their own choosing, the judge told them that he would appoint counsel and adjourned the trial to 16 June 1988. On 6 June 1988, the author wrote a letter to the Legal Aid Authorities, requesting counsel of his own choice. He states that one day before the trial started, he was visited by another court-appointed lawyer, who only took thirty minutes to discuss his case. The author alleges that the assignment of a lawyer contrary to his choice amounts to a violation of section 4, subparagraphs (b) and (d), and section 5, subparagraph 2 (c), of the Constitution of Trinidad and Tobago. He also claims that he was denied reasonable time for the preparation of his defence;

(c) The trial judge prevented counsel from properly conducting the defence. The author claims that the judge constantly interrupted and embarrassed counsel by telling him questions to ask and refusing to admit others. Before the trial started the judge allegedly set a deadline, thereby putting a lot of pressure on counsel to complete the defence within a specified

time limit. When counsel asked for a break, the judge allegedly prevented counsel from seeking the author's instructions during the trial. The judge also allegedly forced the author to reply to self-incriminating questions in cross-examination by the prosecution, by threatening him that he would be charged with contempt of court if he did not reply;

(d) Counsel failed to adequately represent the author. The author complains that his counsel was inexperienced and that he failed to cross-examine witnesses on relevant issues. This is said to amount to gross negligence;

(e) The police failed to adequately inform the author of the charges against him. The author claims that he was only charged with robbery, whereas he was later convicted of murder.

3.2 The author further claims that, when he was taken into custody, he was placed in a cell which allegedly was so crowded that he had to remain standing up all day and night. He claims that he was denied the use of a toilet, as well as food and water. Furthermore, he claims that the following morning he was taken to an office where he was "physically assaulted" by police officers, in breach of article 10 of the Covenant.

3.3 It is not stated whether the case has been submitted to another procedure of international investigation or settlement.

State party's information and observations

4. By submission of 12 November 1993, the State party states that the author's case is before the Privy Council. In a further submission of 9 February 1994, the State Party informs the Committee that the author's death sentence has been commuted to life imprisonment.

Issues and proceedings before the Committee

5.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

5.2 The Committee has ascertained, as required under article 5, subparagraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

5.3 As to the requirement in article 5, subparagraph 2(b), of the Optional Protocol that domestic remedies be exhausted, the Committee notes that the State party and the author agree that the author's case is still pending before the Judicial Committee of the Privy Council. Therefore, the Committee concludes that domestic remedies have not been exhausted.

6. The Human Rights Committee therefore decides:

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

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

F. Communication No. 525/1992; Pierre Gire v. France (decision adopted on 28 March 1995, fifty-third session)

Submitted by: Pierre Gire

Alleged victim: The author

State party: France

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 28 March 1995,

Adopts the following:

Decision on admissibility

1. The author of the communication is Pierre Gire, a French citizen, at the time of submission of the communication detained in the Maison d'arrêt at Nantes, France. He claims to be a victim of a violation of his human rights by France, without invoking specific articles of the Covenant.

Facts as submitted by the author

2.1 The author was the director of the Festival Atlantique, a music festival at Nantes. On 9 March 1991, he was arrested and, on 11 March 1991, charged with fraud and forgery. The charges relate to an unaccounted amount of 14 million French francs from the Festival. The author claims that he is innocent and that the money was paid out to artists upon instructions from the board of the Association Festival Atlantique. He further claims that the responsible politicians in Nantes were well aware of the financial problems of the Festival, but continued to encourage its funding.

2.2 The author states that he was kept in pre-trial detention for 22 months and 22 days, from 9 March 1991 to 28 January 1993, and that he filed numerous unsuccessful requests for his release.

Complaint

3.1 The author contends that the preliminary investigations were unduly prolonged and that his right to trial within a reasonable time has been violated. In this connection, he claims that some of the witnesses, all members of the Association, were heard only 16 months after his arrest.

3.2 The author further claims that the investigation has not been impartial and that he is being used as a scapegoat to avoid disclosures about the involvement of politicians in the matter. In this connection, he submits that a press conference was organized by the Prosecutor's Office on 11 March 1991, which depicted him as being solely responsible; he alleges that this press conference prejudiced witnesses against him.

3.3 Finally, the author alleges that he was not able to prepare his defence properly under the circumstances of his detention.

State party's observations

4.1 The State party, by submission of 6 June 1994, explains that the author was arrested after the president of the Conseil Général de Loire-Atlantique and the director general of the departmental administrative authority had brought to the attention of the prosecutor a number of documents with their falsified signatures. The State party submits that in the course of the investigations evidence was found of at least 70 instances of fraud and forgery.

4.2 The State party argues that the communication is inadmissible. It submits that the author submitted a complaint under the European Convention for the Protection of Human Rights and Fundamental Freedoms to the European Commission of Human Rights, which, on 14 October 1993, declared the case inadmissible for failure to exhaust domestic remedies. The State party recalls that it entered a reservation, upon ratifying the Optional Protocol, with regard to article 5, subparagraph 2 (a), to the effect that the Human Rights Committee is not competent to examine a communication if the same matter has already been considered by another procedure of international investigation or settlement.

4.3 Moreover, the State party argues that the communication is inadmissible for failure to exhaust domestic remedies. In this connection, it submits that it was open to the author to appeal the decisions of the Court of Appeal not to order his release, to the Court of Cassation, pursuant to articles 567 and 567-2 of the Code of Penal Procedure, but that he failed to make use of this remedy. The State party argues that the cassation appeal constitutes an effective remedy, since the Court of Cassation, when seized of a matter of pre-trial detention, reviews the question whether the Court of Appeal has correctly applied the requirements to justify the continuation of the pre-trial detention and whether the rules of fair procedure have been respected. The State party submits therefore that the communication does not fulfil the requirements of article 5, subparagraph 2 (b), of the Optional Protocol.

4.4 As regards the author's remaining complaints about the partiality of the investigations against him, the State party emphasizes that the criminal procedures against the author are still pending and that his guilt has not yet been determined by a tribunal. The State party argues that this complaint is therefore inadmissible for failure to exhaust domestic remedies.

5. No comments on the State party's submission were received from the author of the communication, despite a reminder sent on 22 December 1994.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The State party has further argued that the communication is inadmissible for failure to exhaust domestic remedies. The Committee notes that the author has not contested that he could have appealed the decisions of the Court of Appeal, refusing his release from pre-trial detention, to the Court of Cassation and has not explained why he failed to make use of this remedy. Furthermore, as regards the author's complaints that the proceedings against him are biased and that he was not able to prepare his defence properly, the Committee notes that the author's trial is currently in process and that domestic remedies are thus not yet exhausted. The communication, therefore, does not fulfil the requirements of article 5, paragraph 2 (b), of the Optional Protocol.

7. The Human Rights Committee therefore decides that:

(a) The communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol;

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

G. Communication No. 536/1993; Francis P. Perera v. Australia (decision adopted on 28 March 1995, fifty-third session)

Submitted by: Francis Peter Perera

Alleged victim: The author

State party: Australia

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 28 March 1995,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mr. Francis Peter Perera, a merchant seaman and Australian citizen by naturalization, born in Sri Lanka and currently living at Kangaroo Point, Queensland, Australia. He claims to be the victim of a violation by Australia of paragraphs 1, 3 (e) and 5 of article 14 and article 26 of the International Covenant on Civil and Political Rights.

Facts as submitted by the author

2.1 The author was arrested on 11 July 1984, together with one Fred Jensen. He was charged with drug-related offences and later released on bail. On 17 May 1985, he was found guilty on two charges of supplying heroin and one charge of possession of a sum of money obtained by way of commission of a drug offence. He was sentenced to nine years' imprisonment by the Supreme Court of Queensland. On 21 August 1985, the Court of Criminal Appeal quashed the judgement and ordered a retrial. Upon conclusion of the retrial, the author, on 3 March 1986, was found guilty of having possessed and having sold more than 9 grams of heroin to Jensen on 11 July 1984; he was sentenced to eight years' imprisonment. He appealed the judgement on the grounds of misdirection by the judge to the jury, and bias by the judge in the summing-up. The Court of Criminal Appeal dismissed his appeal on 17 June 1986. On 8 May 1987, the High Court of Australia refused the author leave to appeal. On 18 November 1989, the author was released from prison to "home detention" for health reasons; since 17 March 1990 he has been on parole. His parole ended on 18 March 1994.

2.2 At the trial, the prosecution submitted that, early in the morning of 11 July 1984, the author had driven with Jensen in the latter's car; the car had parked next to another car; the author stayed in the car while Jensen went to the other car to sell $11,000 worth of heroin to an undercover police officer. While the sale was proceeding, police arrived and arrested both the author and Jensen. According to the prosecution, the author, when arrested by the police, immediately voluntarily admitted having handed over heroin to Jensen to sell. The author's house was searched by the police and an amount of money was seized; no drugs were found. The prosecution claimed that $3,000 found in the house was marked money used for the buying of heroin from Jensen on 1 July 1984.

2.3 On 15 October 1985, in a separate trial, Jensen was found guilty of four charges of supplying a dangerous drug, two charges of selling a dangerous drug,

and one charge of being in possession of money from the sale of a dangerous drug. On each charge, he was sentenced to six years' imprisonment, to run concurrently.

2.4 The author claims to know nothing of the offence he was charged with and stresses that no drugs were found in his possession. He submits that he did not know about Jensen's involvement with drugs. During the trial, he gave sworn evidence to the effect that Jensen used to work as a handyman around his house, and that, on the morning of 11 July 1984, they were travelling in Jensen's car to a piece of land to build a shack for the author. He further stated that he and his wife, at the end of 1983, had given Jensen $4,000 to fix things in the house. They then left for Sri Lanka in November 1983 and returned in February 1984, only to discover that Jensen had not done the work for which he was commissioned. In July 1984, Jensen then paid them back $3,000.

2.5 The author states that the only non-circumstantial evidence against him, on the basis of which he was sentenced, was the evidence given by two policemen that he made admissions regarding his involvement in the sale of heroin on 11 July 1984, first at the roadside, immediately upon his arrest, and, later the same morning, in the police station. One of the policemen made notes, reflecting the admissions, in his notebook; these notes were not signed by the author.

Complaint

3.1 The author alleges that he did not have a fair trial. He claims that he never made a statement to the police and that the notes which were admitted as evidence during the trial were a fraud. He also claims that the police threatened and hit him and that he was in considerable distress during the interrogations. The author submits that these issues were raised at the trial, but that the judge, after a voir dire, admitted the policemen's evidence regarding the statement given by the author.

3.2 The author further claims that, during the trial, he had repeatedly asked his lawyer to call Jensen as a witness, but that he was advised that there was no need for the defence to call him; nor did the prosecution call Jensen as a witness. The author submits that his lawyer did not raise as a ground of appeal the failure to call Jensen as a witness, although the fact that he was not heard allegedly gave rise to a miscarriage of justice. The author claims that the failure to call Jensen as a witness, despite his numerous requests, constitutes a violation of article 14, subparagraph 3 (e), of the Covenant. In this context, the author also claims that he later discovered that his privately retained lawyer had been in possession of a statement, made by Jensen on 1 March 1986, which exculpated the author. However, this statement was not brought to the attention of the Court. In the statement Jensen admits having difficulty remembering the events of two years previously, as a result of his drug addiction; at that time, he states, however, that during that time he was doing some work for the author around the house and that the author was not aware that he was selling heroin.

3.3 The author further claims that his right to have his conviction and sentence reviewed by a higher tribunal according to law has been violated, since an appeal under Queensland law can be argued only on points of law and allows no rehearing of facts. This is said to constitute a violation of paragraph 5 of article 14.

3.4 The author further claims that he was discriminated against by the police

because of his racial and national origin. He claims that he was called racist names by the police officers who arrested him and that their decision to fabricate evidence against him was motivated by reasons of racial discrimination.

State party's observations and the author's comments thereon

4.1 The State party, by submission of December 1993, argues that the communication is inadmissible.

4.2 As regards the author's general claim that he did not have a fair trial, the State party argues that this claim has not been sufficiently substantiated. In this connection, the State party contends that the claim lacks precision. The State party points out that the independence of the judiciary and the conditions for a fair trial are guaranteed by the constitution of Queensland and satisfy the criteria set out in article 14 of the Covenant. The State party recalls that the author's first conviction was quashed by the Court of Criminal Appeal, because the Court considered that the judge's instructions to the jury had been unbalanced. The State party argues that the author's retrial was fair and that it is not the Human Rights Committee's function to provide a judicial appeal from or review of decisions of national authorities.

4.3 As regards the author's claim that his right under article 14, subparagraph 3 (e), was violated because his lawyer failed to call Jensen as a witness, the State party argues that the author was at no stage hindered by the State party in obtaining the attendance of the witness, but that it was his counsel's decision not to do so. In this context, the State party submits that the police had a signed interview with Mr. Jensen in which he stated that he paid the author in exchange for drugs. Furthermore, the State party submits that the matter was never raised on appeal and that, therefore, domestic remedies have not been exhausted. The State party adds that it is not the Government's responsibility to organize the defence of a person accused of having committed a crime.

4.4 As regards the author's claim that his right to review of conviction and sentence was violated, the State party argues that he has failed to substantiate this claim and that, moreover, his claim is incompatible with the provision of article 14, paragraph 5. The State party explains that the primary ground upon which a conviction may be set aside under the Queensland Criminal Code is "miscarriage of justice". It is stated that arbitrary or unfair instructions to the jury and partiality on the part of the trial judge would give rise to a miscarriage of justice. In this context, reference is made to the author's appeal against his first conviction, which was quashed by the Court. The author's appeal against his second conviction, after the retrial, was dismissed. The State party argues that the appellate courts in the author's case did evaluate the facts and evidence placed before the trial courts and reviewed the interpretation of domestic law by those courts, in compliance with article 14, paragraph 5. Finally, the State party refers to the Committee's jurisprudence that "it is generally for the appellate courts of States parties to the Covenant and not for the Committee to evaluate the facts and evidence placed before the courts and to review the interpretation of domestic law by those courts. Similarly, it is for appellate courts and not for the Committee to review specific instructions to the jury by the trial judge, unless it is apparent from the author's submission that the instructions to the jury were clearly arbitrary or tantamount to a denial of justice, or that the judge manifestly violated his

obligation of impartiality."[3] The State party submits that the Australian appeal processes comply with the interpretation of article 14, paragraph 5, as expressed by the Committee.

4.5 The State party argues that the author's claim that he was subjected to racial discrimination and beatings by members of the Queensland Police Force is inadmissible. In this context, the State party also notes that the incidents complained of occurred in July 1984. The State party submits that there is no evidence that the police actually engaged in racist behaviour. At the trial, the police denied all allegations to that effect. As regards the author's claim that the police fabricated the evidence against him, the State party notes that this allegation was brought before the courts and that it was rejected; there is no suggestion that this rejection was based on racial discrimination. The State party concludes therefore that the claim that the evidence against the author was fabricated for reasons of racial discrimination is unsubstantiated. The author's complaints about police violence and racist abuse were brought to the attention of the Criminal Justice Commission in 1989, which, on 15 March 1991, decided not to conduct any further investigation. The State party argues, however, that another remedy was available to the author under the federal Racial Discrimination Act 1975. Under the Act, complaints can be made to the Human Rights and Equal Opportunity Commission within 12 months of the alleged unlawful conduct. Since the author failed to avail himself of this remedy, the State party argues that his claim under article 26 is inadmissible for failure to exhaust domestic remedies.

5.1 In his comments on the State party's submission, the author reiterates that he had made explicit requests to his solicitors to have Jensen called as a witness, but that they failed to call him, informing him that Jensen's evidence was not relevant to the defence and that it was up to the prosecution to call him. The author states that, being an immigrant and lacking knowledge of the law, he depended on his lawyer's advice, which proved to be detrimental to his defence. In this context, he submits that, under Australian law, he can enforce his right to call witnesses only through his solicitor, not independently. According to the author, his solicitor was accredited to the Supreme Court of Queensland. He argues that the State party should take responsibility for the supervision of solicitors accredited to the courts, to see whether they comply with their obligations under the law. The author further contends that the signed interview with Jensen, referred to by the State party, was obtained under the influence of drugs, and that this would have been revealed if he would have been called as a witness, especially because the evidence that the author was not involved in any drug deal was corroborated by other witnesses.

5.2 The author reiterates that the racist attitude of the police, resulting in violence and in fabrication of the evidence against him, led to his conviction for an offence of which he had no knowledge. He submits that the evidence against him was wholly circumstantial, except for the alleged admissions to the police, which were fabricated. He claims that the failure of the judge to rule the admissions inadmissible as evidence constitutes a denial of justice, in violation of article 14, paragraph 1; in this context, he submits that the judge did not admit evidence on behalf of the defence from a solicitor who had visited the author at the police station and who had seen that the author was upset and crying, allegedly as a result of the treatment he received from the policemen. The author also contends that there were inconsistencies in the evidence against him, that some of the prosecution witnesses were not reliable and that the

[3] Communication No. 331/1988, para. 5.2 (G. J. v. Trinidad and Tobago, declared inadmissible on 5 November 1991).

evidence was insufficient to warrant a conviction. In this context, the author points out that he was acquitted on two other charges, where the evidence was purely circumstantial, and that his conviction on the one charge apparently was based on the evidence that he had admitted his involvement to the policemen upon arrest.

5.3 The author further submits that it is apparent from the trial transcript that he had difficulties understanding the English that was used in court. He claims that, as a result, he misunderstood some of the questions put to him. He claims that his solicitor never informed him that he had the right to have an interpreter and that, moreover, it was the trial judge's duty to ensure that the trial was conducted fairly and, consequently, to call an interpreter as soon as he noticed that the author's English was insufficient.

5.4 The author further notes that one of the appeal judges who heard his appeal after the first trial also participated in the consideration of his appeal after the retrial. He claims that this shows that the Court of Criminal Appeal was not impartial, in violation of article 14, paragraph 1.

5.5 The author maintains that article 14, paragraph 5, was violated in his case, because the Court of Criminal Appeal reviews the conviction and sentence only on the basis of the legal arguments presented by the defendant's counsel and does not undertake a full rehearing of the facts. According to the author, article 14, paragraph 5, requires a full rehearing of the facts. In this context, the author also states that no possibility of direct appeal to the High Court exists, but that one has to request leave to appeal, which was refused by the Court in his case.

5.6 As regards the State party's claim that he has not exhausted domestic remedies with regard to his complaint about police treatment, the author submits that, in fact, he has addressed complaints to the Police Complaints Tribunal, the Human Rights and Equal Opportunity Commission and the Parliamentary Ombudsman, all to no avail.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee observes that the author's allegations relate partly to the evaluation of evidence by the court. It recalls that it is generally for the appellate courts of States parties to the Covenant, and not for the Committee, to evaluate the facts and evidence in a particular case, unless it is clear that a denial of justice has occurred or that the court violated its obligation of impartiality. The author's allegations and submissions do not show that the trial against him suffered from such defects. In this respect, therefore, the author's claims do not come within the competence of the Committee. Accordingly, this part of the communication is inadmissible as incompatible with the provisions of the Covenant, under article 3 of the Optional Protocol.

6.3 As regards the author's complaint that Jensen was not called as a witness during the trial, the Committee notes that the author's defence lawyer, who was privately retained, was free to call him but, in the exercise of his professional judgement, chose not to do so. The Committee considers that the State party cannot be held accountable for alleged errors made by a defence lawyer, unless it was or should have been manifest to the judge that the

lawyer's behaviour was incompatible with the interests of justice. In the instant case, there is no reason to believe that counsel was not using his best judgement, and this part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

6.4 With regard to the author's complaint about the review of his conviction, the Committee notes from the judgement of the Court of Criminal Appeal, dated 4 July 1986, that the Court did evaluate the evidence against the author and the judge's instructions to the jury with regard to the evidence. The Committee observes that article 14, paragraph 5, does not require that a Court of Appeal proceed to a factual retrial, but that a Court conduct an evaluation of the evidence presented at the trial and of the conduct of the trial. This part of the communication is therefore inadmissible as incompatible with the provisions of the Covenant, under article 3 of the Optional Protocol.

6.5 With regard to the author's claim that the appeal against his retrial was unfair, because one of the judges had participated in his prior appeal against the first conviction, the Committee notes that the judge's participation on appeal was not challenged by the defence and that domestic remedies with respect to this matter have thus not been exhausted. This part of the communication is therefore inadmissible.

6.6 As regards the author's claim about the failure to provide him with the services of an interpreter, the Committee notes that this issue was never brought to the attention of the courts, neither during the trial, nor at appeal. This part of the communication is therefore inadmissible for failure to exhaust domestic remedies, under article 5, paragraph 2 (b), of the Optional Protocol.

6.7 In so far as the author complains that the police used violence against him and discriminated against him on the basis of his race, the Committee notes that, to the extent that these allegations do not form part of the author's claim of unfair trial, they cannot be examined because the purported events occurred in July 1986, that is, before the entry into force of the Optional Protocol for Australia on 25 December 1991, and do not have continuing effects which in themselves constitute a violation of the Covenant. This part of the communication is therefore inadmissible ratione temporis.

7. The Human Rights Committee therefore decides:

(a) The communication is inadmissible;

(b) The present decision shall be communicated to the State party and to the author.

H. Communication No. 541/1993; Errol Simms v. Jamaica (decision adopted on 3 April 1995, fifty-third session)

Submitted by: Errol Simms [represented by counsel]

Alleged victim: The author

State party: Jamaica

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 3 April 1995,

Adopts the following:

Decision on admissibility

1. The author of the communication is Errol Simms, a Jamaican citizen, currently awaiting execution at the St. Catherine District Prison, Jamaica. He claims to be the victim of violations by Jamaica of article 6, paragraph 2; article 7; and article 14, paragraphs 1 and 3 (b), of the International Covenant on Civil and Political Rights. He is represented by counsel.

Facts as submitted by the author

2.1 On 17 May 1987, the author was charged with the murder, on 12 April 1987, of one Michael Demercado. He was convicted and sentenced to death in the Kingston Home Circuit Court on 16 November 1988. On 24 September 1990, the Court of Appeal of Jamaica dismissed his appeal. The Judicial Committee of the Privy Council dismissed his petition for special leave to appeal on 6 June 1991. With this, it is submitted, domestic remedies have been exhausted. The murder for which the author stands convicted has been classified as capital murder under the Offences against the Person (Amendment) Act, 1992.

2.2 The case for the prosecution was that, on 12 April 1987, at approximately 3 a.m., the author, together with two other men, followed one Carmen Hanson, who returned from a party, into her house. They demanded money, threatened her and hit her. In the course of the robbery, Carmen Hanson's son, Owen Wiggan, together with Michael Demercado and another man, arrived at the house and called her. The author and his companions left the house and were confronted by the three men; Michael Demercado was then shot dead by the author.

2.3 The prosecution's case rested on the identification evidence of Carmen Hanson's common law husband, Tyrone Wiggan, and their son, Owen. Carmen Hanson testified that the assailants had been masked; she could not identify the author.

2.4 Tyrone Wiggan testified that, during the robbery, he was in his bedroom, opposite to the room where his wife was assaulted; the light in the latter room was turned on. He stated that he could observe the author, who was masked, through a one foot space at the bottom of the bedroom door; although the author had his back turned towards him for most of the time, he recognized the author, whom he had known for two or three years, from the slight hunch in his back and from certain other features. He further testified that, when the author left

the room, he was able to see him from the front for two seconds.

2.5 Owen Wiggan testified that he faced the author, whom he knew since childhood, from a distance of 10 feet, for about three minutes. He stated that he was able to recognize the author as the street light in front of the house illuminated the entrance where the three men were standing, and that he saw the author firing at Michael Demercado. He further stated that he had seen the author earlier that evening at the party, where he had been involved in an argument with the deceased.

2.6 The defence was based on alibi. The author gave sworn evidence in which he denied having been at the party and testified that he had been at home with his girlfriend, going to bed at 8 p.m. and awaking at 6 a.m. the following morning. This evidence was corroborated by his girlfriend.

Complaint

3.1 Counsel submits that there were serious weaknesses in the identification evidence, namely, that identification occurred at night, that Tyrone Wiggan had a limited opportunity to obtain a front view of the assailant and that he partly identified the author because of his nose and mouth despite the fact that the assailant was masked. Counsel further submits that it appears from Owen Wiggan's statement to the police that he did not identify the author, whereas at the trial he stated to the police that the author was the assailant.

3.2 Counsel notes that the author was not placed on an identification parade; he submits that in a case in which the prosecution relies solely on identification evidence, an identification parade must be held.

3.3 As to the trial, counsel submits that the trial judge failed to direct the jury properly about the dangers of convicting the accused on identification evidence alone. Counsel submits that the judge's misdirections on the issue of identification constituted the main ground of appeal and that the Court of Appeal, having found no fault with them, dismissed the appeal. Similarly, the petition for special leave to appeal to the Judicial Committee of the Privy Council was based on the issue of identification. As to the refusal to give leave to appeal, counsel argues that, in view of the fact that the Privy Council limits the hearing of appeals in criminal cases to cases where, in its opinion, some matter of constitutional importance has arisen or where a "substantial injustice" has occurred, its jurisdiction is far more restricted than that of the Human Rights Committee.

3.4 It is submitted that during the preliminary inquiry the author was represented by a privately retained lawyer, who only took a short statement from him. The lawyer resigned, because he was not satisfied with the fees he was paid, while the proceedings in court were still pending. The author was then assigned a legal aid lawyer. The author alleges that he first met with his lawyer just before the trial started, and complains that the lawyer did not adequately represent him, which, according to the author, is due to the fact that legal aid lawyers are paid "little or no money". As to the appeal, it is submitted that the author probably had no choice as to his lawyer, nor the opportunity to communicate with him prior to the hearing. In this context, it is submitted that counsel for the appeal informed counsel in London that he could not recall when he had visited the author and for how long he had spoken to him, and that he was paid the "princely sum of about 3 pounds to argue the appeal".

3.5 It is argued that the facts mentioned above constitute a violation of article 14, paragraphs 1 and 3 (b), of the Covenant. In view of the above, it is also submitted that the imposition of a sentence of death upon the conclusion of a trial in which the provisions of the Covenant have been violated constitutes a violation of article 6, paragraph 2, of the Covenant.

3.6 The author claims that he was beaten by the police upon his arrest, in violation of articles 7 and 10, paragraph 1, of the Covenant.

3.7 Counsel argues that in view of the fact that the author was sentenced to death on 16 November 1988, the execution of the sentence at this point in time would amount to cruel, inhuman and degrading treatment, in violation of article 7 of the Covenant. Counsel asserts that the time spent on death row already constitutes such cruel, inhuman and degrading treatment. To support this claim, counsel refers to a report on the conditions in St. Catherine District Prison prepared by a non-governmental organization in May 1990.

3.8 It is stated that the matter has not been submitted to any other instance of international investigation or settlement.

State party's observations and counsel's comments thereon

4. The State party, by submission of 5 August 1993, argues that the communication is inadmissible for failure to exhaust domestic remedies. In this context, the State party argues that it is open to the author to seek redress for the alleged violations of his rights by way of constitutional motion.

5. In his comments, counsel submits that, although a constitutional remedy exists in theory, it is unavailable to the author in practice, because of his lack of funds and the State party's failure to provide legal aid for constitutional motions.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that part of the author's allegations relate to the evaluation of evidence and to the instructions given by the judge to the jury. The Committee refers to its prior jurisprudence and reiterates that it is generally for the appellate courts of States parties to the Covenant to evaluate facts and evidence in a particular case. Similarly, it is not for the Committee to review specific instructions to the jury by the trial judge, unless it can be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice. The material before the Committee does not show that the trial judge's instructions or the conduct of the trial suffered from such defects. Accordingly, this part of the communication is inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

6.3 The author has further claimed that he had not sufficient time to prepare his defence, in violation of article 14, paragraph 3 (b), of the Covenant. The Committee notes that the lawyer who represented the author at his trial has stated that, in fact, he did have sufficient time to prepare the defence and to call witnesses. With regard to the appeal, the Committee notes that the appeal judgement shows that the author was represented by counsel who argued the

grounds for the appeal and that the author and his present counsel have not specified their complaint. In these circumstances the Committee considers that the allegation has not been substantiated, for purposes of admissibility. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

6.4 As regards the author's claim that he was beaten by the police upon arrest, the Committee notes that this claim was never brought to the attention of the Jamaican authorities, neither in the author's sworn evidence at the trial, nor on appeal, or in any other way. The Committee refers to its standard jurisprudence that an author should show reasonable diligence in the pursuit of available domestic remedies. This part of the communication is therefore inadmissible for failure to exhaust domestic remedies.

6.5 The Committee next turns to the author's claim that his prolonged detention on death row amounts to a violation of article 7 of the Covenant. Although some national courts of last resort have held that prolonged detention on death row for a period of five years or more violates their constitutions or laws,[4] the jurisprudence of this Committee remains that detention for any specific period would not be a violation of article 7 of the Covenant in the absence of some further compelling circumstances.[5] The Committee observes that the author has not substantiated, for purposes of admissibility, any specific circumstances of his case that would raise an issue under article 7 of the Covenant. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible;

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

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[4] See, inter alia, the judgement of the Judicial Committee of the Privy Council, dated 2 November 1993 (Pratt and Morgan v. Jamaica).

[5] See the Committee's Views on Communication No. 210/1986 and Communication No. 225/1987 (Earl Pratt and Ivan Morgan v. Jamaica), adopted on 6 April 1989, para. 12.6. See also, inter alia, the Committee's views on Communication No. 270/1988 and Communication No. 171/1988 (Randolph Barrett and Clyde Sutcliffe v. Jamaica), adopted on 30 March 1992, and Communication No. 470/1991 (Kindler v. Canada), adopted on 30 July 1993.

I. Communication No. 553/1993; Michael Bullock v. Trinidad and Tobago (decision adopted on 19 July 1995, fifty-fourth session)

Submitted by: Michael Bullock

Alleged victim: The author

State party: Trinidad and Tobago

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 19 July 1995,

Adopts the following:

Decision on admissibility

1. The author of the communication is Michael Bullock, a Trinidadian citizen, at the time of submission of the communication awaiting execution at the State Prison in Port-of-Spain, Trinidad and Tobago. He claims to be the victim of violations by Trinidad and Tobago of article 14, paragraphs 1, 2 and 3 (e), of the International Covenant on Civil and Political Rights. He is represented by counsel.

Facts as submitted by the author

2.1 On 25 April 1981, the author, together with one P.S., was charged with the murder of one H.McG. On 27 May 1983, he was found guilty as charged and sentenced to death; his co-accused was acquitted. The Court of Appeal dismissed the author's appeal on 21 April 1988. His petition for special leave to appeal to the Judicial Committee of the Privy Council was dismissed on 9 November 1990. On 19 August 1993, a warrant was issued for the execution of the author on 24 August 1993; on 23 August 1993, the High Court granted a stay of execution, following the filing of a constitutional motion on the author's behalf.

2.2 Following the judgement of the Judicial Committee of the Privy Council in Pratt and Morgan v. Jamaica, the author's death sentence was commuted to one of life imprisonment.

2.3 At the trial, the prosecution's case rested mainly on the testimony of one Movin Brown, who lived at the same address as the author. This witness testified that, in the morning of 25 April 1981, he saw the author pull the victim out of her car and beat her to death. During the trial, the author made an unsworn statement from the dock. He testified that he was present at the time of the incident, but that it was Movin Brown who beat and killed the deceased, and later threatened him. The prosecution also relied on oral statements made by the author testifying to his involvement in the robbery, as well as on circumstantial evidence.

2.4 During the trial, the defence sought to challenge the credibility of Movin Brown on the basis of a statement made by him to the police in 1976, concerning another murder case for which he had been tried, but had been acquitted (reportedly on the ground that the cause of death was not established). The

judge, however, did not allow counsel to cross-examine Movin Brown on the basis of this statement, and refused counsel's request to admit the statement in evidence.

Complaint

3.1 It is submitted that Movin Brown's prior statement was highly relevant to the issue of his credibility, and that the judge, by refusing counsel to cross-examine him on this point, and by refusing to admit the statement in evidence, violated the author's rights under article 14, paragraphs 1 and 3 (e).

3.2 Counsel further points out that the trial judge, when instructing the jury, said: "[...] what Bullock has said in his defence by his statement in the dock is an exercise of his right to speak as an accused person and his right to speak from where he is. But as you have heard from time to time, wherever there are rights, there are responsibilities and I will come to that". The judge later said: "I said earlier, wherever there are rights, there are responsibilities. These responsibilities are not limited to the accused alone. They spread to his legal representative as well. This is the law of this country". And he further said: "As I said, the accused exercised his right, but rights carry responsibilities".

3.3 It is submitted that the judge's instructions were unfair, since he did not give any guidance to the jury as to what he meant by the word "responsibilities" in this connection. Counsel argues that the judge, by using such language, left the jury under the impression that the author had failed to discharge some responsibility which he was obliged to perform, and that, since the exact nature of that responsibility was not made clear, the jury could have interpreted it to mean that the author had a responsibility to give a sworn statement. Counsel further argues that the judge's comments could also have been interpreted by the jury to mean that the author had in some way been irresponsible in levelling, as the judge himself put it, "serious and grave allegations" against Movin Brown. The judge's instructions to the jury are said to amount to a further violation of article 14, paragraph 1, and in addition, to a violation of article 14, paragraph 2, of the Covenant.

State party's observations on admissibility and the author's comments

4.1 By submission of 4 November 1993, the State party argues that the communication is inadmissible.

4.2 The State party points out that on 23 August 1993, after a warrant for the author's execution had been issued, the author filed a constitutional motion before the High Court, seeking a declaration that the execution of the sentence of death against him would be unconstitutional, as well as an order to vacate the sentence of death and to stay the execution. On 23 August 1993, the Court granted a conservatory order, staying the author's execution. The State party concludes that domestic remedies have not been exhausted and that the communication is thus inadmissible.

4.3 As regards the Committee's request, under rule 86 of its rules of procedure, that the State party not carry out the death penalty against the author while his communication is being considered by the Committee, the State party states that, in view of the inadmissibility of the communication, it is not prepared to give such an undertaking. It refers, however, to the stay of execution ordered by the High Court, and states that it will abide by it.

4.4 The State party encloses a copy of the judgement of the Court of Appeal in the author's case. It submits that the Court of Appeal dealt extensively with the refusal of the trial judge to admit the statement made by Movin Brown, as well as with the judge's directions regarding the author's statement from the dock. The Court of Appeal concluded that the trial judge had acted properly in both the conduct of the trial and in his summing up to the jury, and dismissed the appeal.

4.5 The State party claims that the author is seeking to use the Human Rights Committee as a final court of appeal. It argues that this is contrary to the Committee's jurisprudence and incompatible with the provisions of the Covenant.

5.1 In his comments on the State party's submission, the author argues that his constitutional law motion does not render his communication to the Committee inadmissible under article 5, paragraph 2 (b), of the Optional Protocol. He submits that the constitutional motion only concerns the constitutionality of the execution of his death sentence and does not concern his claim of unfair trial.

5.2 The author further argues that, while it is true that it is not in principle for the Committee to evaluate facts and evidence in a particular case or to review the judge's instructions to the jury, the Committee does have competence to do so where it can be ascertained that the proceedings have been arbitrary or manifestly unjust, amounting to a denial of justice. The author argues that the judge's refusal to have him thoroughly cross-examine the prosecution's main witness, as well as the judge's instructions to the jury, improperly shifting the burden of proof onto him, amounted to a denial of justice, and that the Committee therefore is competent to examine his communication.

6. In a further submission, dated 18 July 1994, the State party informs the Committee that the author's death sentence has been commuted to one of life imprisonment for the rest of his natural life, following the decision of the Judicial Committee of the Privy Council in the case of Pratt and Morgan v. the Attorney General of Jamaica, in which it was held that in any case in which execution is to take place more than five years after sentence, there will be strong grounds for believing that the delay is such as to constitute "inhuman or degrading punishment or treatment".

Issues and proceedings before the Committee

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

7.2 The Committee regrets that the State party was not prepared to give the undertaking requested by the Committee under rule 86 of its rules of procedure, not to execute the death sentence against the author while his case was under examination under the Optional Protocol, since the State party considered the communication inadmissible. The Committee observes that it is not for the State party, but for the Committee, to decide whether or not a communication is admissible. The Committee requests the State party to cooperate fully with the Committee's examination of communications in the future.

7.3 The Committee notes that part of the author's allegations relate to the instructions given by the judge to the jury. The Committee refers to its prior jurisprudence and reiterates that it is generally not for the Committee, but for

the appellate Courts of States parties, to review specific instructions to the jury by the trial judge, unless it can be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice. The Committee has taken note of the author's claim that the instructions in the instant case were manifestly unjust. The Committee has also noted the Court of Appeal's consideration of this claim, and concludes that in the instant case the trial judge's instructions did not show such defects as to render them manifestly arbitrary or a denial of justice. Accordingly, this part of the communication is inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

7.4 As regards the author's claim that the judge's refusal to admit the 1976 statement by the main prosecution witness in evidence or to allow cross-examination of this witness on the statement violated his rights under article 14, paragraphs 1 and 3 (e), of the Covenant, the Committee considers that it is generally for the appellate courts of States parties, and not for the Committee, to review the judge's discretion in relation to the admission of evidence unless it can be ascertained that the exercise of the discretion was manifestly arbitrary or amounted to a denial of justice. Since no such defects have been shown in the instant case, this part of the communication is therefore inadmissible under article 3 of the Optional Protocol, as being incompatible with the provisions of the Covenant.

8. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible;

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

J. Communication No. 575/1994 and Communication No. 576/1994; Lincoln Guerra and Brian Wallen v. Trinidad and Tobago; (decision adopted on 4 April 1995, fifty-third session)

Submitted by: Lincoln Guerra and Brian Wallen [deceased] [represented by counsel]

Alleged victims: The authors

State party: Trinidad and Tobago

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 4 April 1995,

Adopts the following:

Decision on admissibility

1. The authors of the communications are Lincoln Guerra and Brian Wallen, two Trinidadian citizens who, at the time of submission of their communications, were awaiting execution at the State Prison at Port-of-Spain, Trinidad and Tobago. Mr. Wallen died of AIDS in the State Prison on 29 July 1994. It is submitted that they are victims of violations by Trinidad and Tobago of articles 6, 7 and 14 of the International Covenant on Civil and Political Rights. They are represented by counsel.

Facts as submitted by the authors

2.1 The authors were arrested in January 1987 and charged with two counts of murder. They were found guilty as charged and sentenced to death in the Port-of-Spain Assizes Court on 18 May 1989. Their appeal against conviction and sentence was dismissed on 2 November 1993. On 21 March 1994, the Judicial Committee of the Privy Council dismissed their petition for special leave to appeal.

2.2 On 24 March 1994, at 2 p.m., warrants were read to the authors for their execution at 7 a.m. the following morning, 25 March. Lawyers in Trinidad, acting pro bono, immediately filed constitutional motions on the authors' behalf, claiming that the carrying out of the executions would violate their constitutional rights. In the context, reference was made to the judgement of the Judicial Committee of the Privy Council in the case of Pratt and Morgan v. Attorney-General,[6] where it was held that execution after a long delay could constitute inhuman punishment and thus would be unlawful under the Constitution of Jamaica, a similar provision being contained in the Constitution of Trinidad and Tobago.

2.3 An application for a stay of execution was filed on the authors' behalf, pending determination of the constitutional motions. On 24 March 1994, at 10 p.m., the application was heard by a single High Court judge, who refused to grant a stay. Notice of appeal to the Court of Appeal was filed immediately. The appeal against dismissal of the request for a stay was heard by a single

[6] Decision of 2 November 1993, Privy Council Appeal No. 10 of 1993.

judge of the Court of Appeal at 1 a.m. on 25 March. At 3.25 a.m., this judge dismissed the appeal but granted leave to appeal to the Judicial Committee of the Privy Council, together with a stay of execution for 48 hours, pending determination of such an appeal. At 5.25 a.m., the Judicial Committee granted a conservatory order, staying execution for four days, pending the filing of a proper appeal to the Judicial Committee. At 6 a.m., the Attorney-General of Trinidad and Tobago applied to the full Court of Appeal to set aside the 48-hour stay granted by the single judge. On reading a faxed copy of the order of the Judicial Committee, the Court of Appeal adjourned the hearing of the Attorney-General's motion until 28 March 1994. On 28 March, the Judicial Committee adjourned the hearing of the petition for leave to appeal from the single judge's decision until 25 April 1994, and extended the order for a stay of execution until after the determination of the petition on 25 April 1994.

2.4 On 31 March 1994, the Court of Appeal heard the application of the Attorney-General. It concluded that the single judge had erred in granting the authors leave to appeal to the Judicial Committee, without recourse to the full Court of Appeal, but decided not to set aside the judge's order, since the Judicial Committee was already seized of the matter.

2.5 On 18 April 1994, the High Court rejected the authors' constitutional motions and refused to grant a stay of execution, pending the exercise by the authors of their right to appeal to the Court of Appeal. On 25 April 1994, the Judicial Committee's stay lapsed, but the Attorney-General gave an undertaking that no execution would take place until the hearing of an application for a stay to the Court of Appeal. On 29 April 1994, the Court of Appeal granted a conservatory order, directing that the death sentences not be carried out until after it had decided on the constitutional motions. The authors unsuccessfully tried to obtain an undertaking from the Attorney-General that no execution would take place pending any further appeal to the Judicial Committee.

2.6 The Court of Appeal reserved judgement on the authors' constitutional motions on 9 June 1994. Following the execution of Glen Ashby on 14 July 1994, the authors again sought an undertaking from the Attorney-General that no executions would be carried out pending the determination of appellate proceedings in respect of their constitutional motions. The Attorney-General, however, refused to give such an undertaking.

2.7 On 25 July 1994, the Judicial Committee heard the authors' petition for leave to appeal against the dismissal of their application for a stay of execution; on 26 July 1994, the Judicial Committee granted a conservatory order, directing that the death sentences not be carried out on the authors until it had decided on their appeal in respect of their constitutional motions. On 27 July 1994, the Court of Appeal of Trinidad and Tobago rejected the constitutional motions and refused to order a stay of execution. An appeal against the latter judgement remains currently (at the end of February 1995) pending before the Judicial Committee.

Complaint

3.1 For the claims under articles 6, 7, and 14, reference is made to the authors' sworn affidavits, and to the grounds argued on their behalf in the constitutional motions and in their petitions for a stay of execution.

3.2 Before the High Court of Trinidad, it was argued that no executions had been carried out in Trinidad and Tobago since 1979, that the authors had been confined to death row under appalling conditions since 1989, and that they had

the legitimate expectation that the death sentences would not be carried out against them, pending the determination of the Advisory Committee on the Power of Pardon. It was noted in this context that the authors had not been given the opportunity to be heard by the Advisory Committee on the Power of Pardon or by the Minister of National Security prior to the making of the decision not to recommend the granting of a pardon. It was also submitted that the authors had been denied such procedural provisions as would ensure the execution of the death sentence against them within a reasonable time. In the circumstances, it is argued that the execution of the death sentence after a long delay would amount to cruel and inhuman treatment and punishment and would violate the authors' right to life, liberty and security of the person, their right not to be deprived thereof, except by due process of law, and their right to equality before the law guaranteed to them under the Constitution of Trinidad and Tobago.

3.3 It is submitted further (as had been argued before the Judicial Committee) that giving a mere 17 hours of notice of the date of the intended execution was improper in that it was wholly contrary to recognized practice and that it denied the authors the right to have recourse to the courts, to make representations to the Human Rights Committee or the Inter-American Commission on Human Rights or to prepare themselves spiritually to meet their death. Counsel notes that under the terms of the "practice" which existed in Trinidad in respect of death penalty cases, a condemned prisoner is informed on a Thursday that a warrant has been issued for his execution not earlier than the following Tuesday.

3.4 The authors contend that, in the light of the Judicial Committee's judgement in Pratt and Morgan, as well as the subsequent commutation of over 50 death sentences, and because of the delay of 4 years and 10 months in the hearing of all the appeals in their criminal case, they were justified in believing that their sentence of death would also be commuted to life imprisonment.

3.5 As to the conditions of detention on death row, both authors submit that they are confined to a small cell measuring approximately 9 feet by 6 feet; there is no window, only a small ventilation hole. The entire cell block is illuminated by means of fluorescent lights which are kept on all night and affect [their] ability to sleep. The authors are kept in the cell 23 hours a day, except on weekends, public holidays and days of staff shortage, when they are locked in for the entire 24-hour period. Apart from the one hour of exercise in the yard, they are permitted to leave the cell only to meet with visitors and to have a bath once a day, during which time they can clean out the slop pail. Exercise is conducted with handcuffs on in a very small yard. The authors note that, since they have been on death row, they have witnessed the reading of death warrants to several inmates and that all scheduled executions were prevented by last minute stays of execution. As a result, they have lived in constant fear every day of their confinement to death row. Their incarceration in these circumstances has had serious adverse impacts on their mental health - they suffer from constant depression, have difficulties in concentrating and are extremely nervous.

State party's information and observations

4.1 In its submission under rule 91 of the rules of procedure, dated 23 June 1994, the State party submits that the communications are inadmissible under article 5, paragraph 2 (a), of the Optional Protocol, as the authors submitted their case to the Inter-American Commission on Human Rights, where it was registered as Communication No. 11279. This complaint alleges that they

were victims of violations of articles 5 and 8, sections 1 and 2H of the Inter-American Convention on Human Rights, namely, the right to freedom from cruel or inhuman treatment or punishment, the right to a fair trial within a reasonable time and the right to appeal in a criminal case. Therefore, this complaint raises substantially the same questions as have been raised before the Human Rights Committee (violations of articles 7 and 14 of the Covenant).

4.2 For the State party, the authors have failed to specify the manner in which their rights under articles 7 and 14 of the Covenant were allegedly violated. It notes that, given the authors' reliance on the judgement of the Judicial Committee in Pratt and Morgan, it appears that they are arguing that the delays in determining their criminal appeals were so inordinate that the execution of the death sentence at this juncture would be in violation of articles 7 and 14. The State party denies that there has been an "inordinate delay" within the meaning of the Judicial Committee's judgement in the authors' case. It adds, "nevertheless, a constitutional motion may be brought for relief on these grounds, as was the case in Pratt and Morgan".

4.3 The State party argues that an effective domestic remedy remains available to the authors: "In Pratt and Morgan, relief was granted to [the] appellants, namely, the commutation of the sentence of death. ... Such relief would be available to the authors if the Court were to hold that there had been a violation of the authors' constitutional rights".

4.4 The State party notes that the authors did file constitutional motions (High Court Actions Nos. 1043 and 1044 of 1994), which were dismissed on 18 April 1994. The authors' appeal to the Court of Appeal was dismissed at the end of July 1994. A right to appeal to the Judicial Committee remains open to them. In the circumstances, the State party contends that the case is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

4.5 As to the request for interim protection under rule 86 issued by the Committee's Special Rapporteur for New Communications on 21 April 1994, the State party notes that it continues to be bound by the conservatory order issued by the Court of Appeal on 29 April 1994. In the circumstances, the State party "is not prepared ... to give the undertaking requested by the Committee".

4.6 In another submission dated 7 September 1994, the State party recalls the terms of the Judicial Committee of the Privy Council's conservatory order of 25 July 1994:

> "(a) ... in the event of the Court of Appeal dismissing the (authors') appeal and not granting immediately thereupon the authors' application dated 25 July 1994 for a conservatory order staying their execution;
>
> "(b) on the (authors') undertaking by Counsel in such an event to appeal to the Judicial Committee of the Privy Council against the order dismissing their appeal and to file all relevant documents in accordance with the time limits set out in the relevant rules:
>
> "A conservatory order be granted directing that the sentence of death be not carried out on the (authors) until after the determination of such appeal by the Judicial Committee of the Privy Council".

In the light of the above, the State party reiterates that the communications are inadmissible on the ground of non-exhaustion of domestic remedies.

4.7 The State party further confirms that Mr. Wallen died in hospital on 29 July 1994, and notes that the post-mortem examination showed that death resulted from meningitis caused by AIDS.

5.1 In her comments, counsel observes that the plea of non-exhaustion of domestic remedies advanced by the State party is inconsistent with the clearly manifested intention of Trinidad and Tobago to execute the authors on merely 17 hours' notice, within three days after the confirmation of their conviction, irrespective of their desire to make representations to the Mercy Committee for commutation of their death sentences, to apply to the courts of Trinidad for relief staying their execution and to apply to the Human Rights Committee.

5.2 Counsel contends that the determination of the State party to execute Mr. Guerra, irrespective of undetermined violations of the author's constitutional rights or rights under the Covenant, is demonstrated by the events surrounding the execution of Glen Ashby in July 1994; Mr. Ashby was executed after his case had been submitted to the Human Rights Committee.

5.3 It is submitted that domestic remedies within the meaning of the Optional Protocol must be effective in the sense of being reasonably available, rather than a theoretical possibility. Measures designed to secure the availability of a remedy are said to include: (a) giving the condemned person the possibility, after confirmation of conviction, to make representations to the Mercy Committee and to bring a constitutional motion to review judicially the refusal of commutation; (b) ensuring that executions are not carried out pending the hearing of such motions; and (c) providing for a reasonable opportunity to submit a communication to the Human Rights Committee.

5.4 Counsel further argues, by reference to an affidavit from a Trinidadian lawyer, that legal aid is not granted with respect to constitutional motions staying the execution of a death sentence.[7] The fact that Mr. Guerra obtained the pro bono services of lawyers both in Trinidad and Tobago and in London does not, in counsel's opinion, make the remedy of a constitutional motion "available" within the meaning of the Optional Protocol.

5.5 Counsel notes that the stay granted by the Judicial Committee of the Privy Council in July 1994 may make it possible to clarify the law and whether in future the State party would be obliged to stay an execution while judicial proceedings are instituted, but submits that in the light of the judgement of the Court of Appeal of 27 July 1994, rejecting both constitutional motion and a stay of execution, it is difficult to argue that the State party's law and practice provides an effective remedy in respect of alleged violations of article 6 of the Covenant.

5.6 By a letter dated 19 October 1994, counsel informs the Committee that with regard to the communication of Mr. Wallen, she has been "unable to obtain any further instructions" and proposes that no further action should be taken in relation to his communication.

5.7 By a further submission dated 10 November 1994, counsel forwards a formal

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[7] The affidavit referred to, sworn by Ms. Alice L. Yorke-Soo Hon on 28 April 1994, states "... with respect to constitutional motions involving staying the execution of the sentence of death for prisoners on death row, so far as I am aware, during the period 1985 to [the] present, legal aid was granted in only two such matters, namely ... [in the cases of] Theophilus Barry and ... Andy Thomas/Kirkland Paul".

note by Mr. Guerra's representative in Trinidad, dated 8 November 1994, addressed to the Inter-American Commission on Human Rights, informing the latter instance that Mr. Guerra does not wish to pursue his case before it since his communication is under consideration by the Human Rights Committee.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 91 of the rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has noted that Mr. Wallen died on 29 July 1994 and that his death is attributable to natural causes. It further notes that counsel has been unable to obtain further instructions in respect of Mr. Wallen's complaint. In the circumstances, the Committee concludes that it would serve little purpose to continue consideration of the case inasmuch as it relates to Mr. Wallen.

6.3 The Committee has noted counsel's statement that the case of Mr. Guerra has been withdrawn from consideration by the Inter-American Commission on Human Rights. While taking note of the State party's information of 23 June 1994 in this respect, it concludes that it is not precluded from considering the case of Mr. Guerra on the basis of article 5, paragraph 2 (a), of the Optional Protocol.

6.4 The Committee has noted the State party's claim that available and effective remedies remain open to Mr. Guerra, as well as counsel's counter-arguments in this respect. While it is true that domestic remedies within the meaning of the Optional Protocol must be both available and effective, that is, have a reasonable prospect of success, the Committee does not consider that the securing of legal assistance for the purpose of constitutional motions on a pro bono basis necessarily implies that the remedy so initiated is not "available and effective" within the meaning of the Optional Protocol. In this context, the Committee notes that counsel herself concedes that the petition for leave to appeal currently pending before the Judicial Committee may make it possible to clarify the law; it further notes that counsel confirmed, by a call of 21 February 1995, that the hearing of the petition could not be expected for another three to four months, and that the arguments on Mr. Guerra's behalf were being prepared. In the circumstances, the Committee considers that the pursuit of a petition for leave to appeal before the Judicial Committee of the Privy Council cannot be considered ineffective and concludes that, in the circumstances, the requirements of article 5, paragraph 2 (b), of the Optional Protocol have not been met.

6.5 The Committee deeply regrets that the State party is not prepared to give the undertaking requested by the Committee on 21 April 1994, apparently because it considers itself bound by the conservatory order issued by the Court of Appeal on 29 April 1994. In the Committee's opinion, this situation should have made it easier for the State party to confirm that there would be no obstacles to acceding to the Committee's request; to do so would, in any event, have been compatible with the State party's international obligations.

7. The Human Rights Committee therefore decides:

(a) The communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol;

(b) The present decision may be reviewed pursuant to rule 92, paragraph 2,

of the Committee's rules of procedure, upon receipt of information from Mr. Guerra or from his representative to the effect that the reasons for declaring the complaint inadmissible no longer apply;

(c) The present decision shall be communicated to the State party, to the author and to his counsel.

K. Communication No. 578/1994; Leonardus J. de Groot v. the Netherlands (decision adopted on 14 July 1995, fifty-fourth session)

Submitted by: Leonardus Johannes Maria de Groot [represented by counsel]

Alleged victim: The author

State party: The Netherlands

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 14 July 1995,

Adopts the following:

Decision on admissibility

1. The author of the communication is Leonardus Johannes Maria de Groot, a Dutch citizen, residing in Heerlen, the Netherlands. The author claims to be a victim of a violation by the Netherlands of articles 4, 6, 7, 14, 15, 17, 18 and 26 of the International Covenant on Civil and Political Rights. He is represented by counsel.

Facts as submitted by the author

2.1 The author is a peace activist and, in November 1988, attended a camp in Vierhouten, the Netherlands, close to a military base, to participate in civil disobedience actions against militarism. He distributed flyers explaining the purpose of the camp and, on one occasion, painted a peace symbol on a military vehicle. He was arrested on 6 November 1988 and charged with public violence and participation in a criminal organization. On 18 November 1988, the Zwolle Magistrate's Court found him guilty of the charge of public violence and sentenced him to a fine of 100 Netherlands guilders. He was acquitted on the charge of participation in a criminal organization.

2.2 On 22 November 1988, the public prosecutor filed an appeal against the judgement. The Arnhem Court of Appeal, on 26 May 1989, declared void the charge of public violence on the ground that it lacked precision, but found the author guilty on the charge of participation in a criminal organization. He was sentenced to one month's imprisonment (suspended for two years) and a fine of 1,000 guilders. The author subsequently appealed the Court of Appeal's judgement in cassation. On 19 January 1991, the Supreme Court (Hoge Raad) of the Netherlands rejected his appeal. With this, it is submitted that all domestic remedies have been exhausted.

2.3 The prosecution argued that the peace camp had as its object and purpose to engage in criminal activities and that the author, by participating, was part of a criminal organization, that is, an organization with the aim and purpose of using violence against persons and/or goods, and/or of illegally destroying or damaging property, and/or of stealing and/or of inciting others to commit the above offences. The prosecution based itself on public announcements made by the campers, before and during the camp, including a public letter to the

population, in which it was clearly stated that the actions undertaken by the campers would involve illegal activities, such as damaging the fence surrounding the military base, blocking the entrance gate and painting symbols and/or slogans on military objects.

2.4 The Appeal Court considered that it was proven that the author, from 1 to 6 November, had participated in the peace camp, an organization with the aim of using violence against property and/or wilfully and illegally destroying or damaging property or rendering it useless and/or inciting others to commit those crimes and/or to be an accessory to those crimes. It concluded that the author had therefore violated article 140 of the Criminal Code by participating in an organization with a criminal intent. Article 140 of the Dutch Criminal Code penalizes participation in an organization which has as its purpose the commission of crimes.

2.5 The author's defence counsel argued that article 140 of the Criminal Code was void because of its vagueness; in this connection, he referred to article 15 of the Covenant. It was further argued that the peace camp was not an organization within the meaning of article 140, since there were no decision-making mechanisms and each person decided for himself or herself whether or not to engage in a certain activity in association with others. According to the defence, the only form of organization was that someone had reserved the camp-site and that transport had been arranged for those who needed it.

2.6 The Court of Appeal rejected the argument of the defence, stating that the fact that article 140 required further interpretation by the judiciary did not make it void. In this context, the Court considered that the organization of different camps under similar names, the announcement of those camps, the provision of addresses for further information, the sharing of the costs of the camps and the fact that the local population had been informed about the purpose of the camps, all indicated that an organization within the meaning of article 140 existed. Although no formal membership existed, the Court considered that participation in the organization was proved by the active participation in the activities organized by the campers.

2.7 In a further submission the author states that, on 16 July 1989, he, together with others, was carrying out some peace activities at the Valkenburg air base with the intention of hindering the ongoing militarization and that he was subsequently charged under article 140 of the Criminal Code for participating in a criminal organization. On 25 January 1991, the District Court in The Hague sentenced him to a fine of 750 guilders and two weeks' suspended imprisonment. On 9 June 1992, the Court of Appeal sentenced the author to two weeks' imprisonment. The author's appeal in cassation was rejected by the Supreme Court on 11 May 1993.

Complaint

3.1 The author claims that his convictions are in violation of articles 14 and 15 of the Covenant. In this context, he states that his convictions were in violation of article 14 of the Covenant, since he was not informed in detail about the nature of the charges against him. He also submits that the charges against him, based on article 140 of the Criminal Code, were so vague as to amount to a violation of his right to be informed in detail of the nature and cause of the charge against him. He further submits that the application of article 140 of the Criminal Code in his case violates the principle of legality, since the text of the article is so vague that it could not have been foreseen that it was applicable to the author's participation in civil disobedience

activities.

3.2 The author also claims that his convictions are unjust because he acted under a higher legal obligation. In this context, the author argues that the possession of nuclear weapons and the preparation for the use of nuclear weapons violate public international law and amount to a crime against peace and a conspiracy to commit genocide. He submits that the Netherlands military strategy violates not only international norms of humanitarian law, but also articles 4, 6 and 7 of the International Covenant on Civil and Political Rights.

3.3 In respect to his second conviction, the author states that he is a victim of a violation of article 26 of the Covenant, because another participant in the so-called "criminal organization" was not prosecuted, according to the author, because he was a spy of the secret service.

3.4 The author does not explain why he considers himself to be a victim of a violation of articles 17 and 18 of the Covenant.

3.5 The author states that he has earlier submitted the same matter to the European Commission of Human Rights, which declared his application inadmissible.

Facts and proceedings before the Committee

4.1 Before considering any claim in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 With regard to the author's allegation that he was the victim of a violation of article 14 of the Covenant, the Committee, after examining the court documents, notes that the question raised by the author was considered by the Netherlands courts, including the Court of Cassation, which found that the charge and the facts on which it was based were sufficiently precise, namely that, in conjunction with other accomplices, he placed anti-militarist slogans on military vehicles and participated in other activities, after illegally having gained access to the military base. The Committee notes that the Human Rights Committee does not constitute a final appeal body and is not in a position to challenge the national courts' assessment of the facts and evidence. Consequently, this part of the communication is inadmissible under article 3 of the Optional Protocol.

4.3 The author has further claimed to be a victim of a violation of article 15 of the Covenant, because he could not have foreseen that article 140 of the Criminal Code, on the basis of which he was convicted, was applicable to his case by virtue of its imprecision. The Committee refers to its established jurisprudence[8] that interpretation of domestic legislation is essentially a matter for the courts and authorities of the State party concerned. Since it does not appear from the information before the Committee that the law in the present case was interpreted and applied arbitrarily or that its application amounted to a denial of justice, the Committee considers that this part of the communication is inadmissible under article 3 of the Optional Protocol.

4.4 As regards the author's claims under articles 4, 6 and 7 of the Covenant, the Committee considers that the author has failed to show, by mere reference to

[8] See, inter alia, the Committee's decision in Communication No. 58/1979 (Anna Maroufidou v. Sweden), para. 10.1 (Views adopted on 9 April 1981).

the State party's military strategy, that he is himself a victim of a violation of these articles by the State party. This part of the communication is therefore inadmissible under article 1 of the Optional Protocol.

4.5 As regards the author's claim under articles 17 and 18 of the Covenant, the Committee considers that the author has failed to substantiate, for purposes of admissibility, that his rights under these articles were violated. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

4.6 With regard to the author's claim under article 26, the Committee recalls that the Covenant does not provide a right to see another person prosecuted,[9] nor does the absence of prosecution against one person render the prosecution of another person involved in the same offence necessarily discriminatory, in the absence of specific circumstances revealing a deliberate policy of unequal treatment before the law. Since no such circumstances have been shown in the instant case, this part of the communication is therefore inadmissible, as incompatible with the provisions of the Covenant, under article 3 of the Optional Protocol.

5. The Committee therefore decides:

(a) That the communication is inadmissible;

(b) That this decision should be communicated to the author of the communication, to his counsel and, for information, to the State party.

[9] See, inter alia, the Committee's inadmissibility decisions with respect to Communication No. 213/1986 (H.C.M.A. v. the Netherlands) and Communication No. 396/1990 (M.S. v. the Netherlands).

L. Communication No. 583/1994; Ronald H. van der Houwen v. the Netherlands (decision adopted on 14 July 1995, fifty-fourth session)

Submitted by: Ronald Herman van der Houwen
[represented by counsel]

Alleged victim: The author

State party: The Netherlands

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 14 July 1995,

Adopts the following:

Decision on admissibility

1. The author of the communication, dated 27 July 1993, is Ronald Herman van der Houwen, citizen of the Netherlands, at the time of submission of the communication detained in a penitentiary in Utrecht. He claims to be a victim of a violation by the Netherlands of article 9, paragraph 3, of the Covenant. He is represented by counsel.

Facts as submitted by the author

2.1 The author was arrested on 12 February 1993, at 11.45 p.m., after police officers had entered his apartment where he was selling cocaine to visitors. On 13 February 1993, at 12.30 p.m., he was charged with the possession and selling of cocaine, and placed in detention. On 16 February 1993, the author was brought before the examining magistrate (rechter commissaris).

2.2 At the hearing, counsel argued that since his client was brought before the magistrate more than three days after he was detained, his detention was unlawful and he should be released. The examining magistrate rejected this argument and ordered the author's further detention for 10 days.

2.3 The author then requested the Utrecht Regional Court (Arrondissementsrechtbank) to quash the detention order. On 24 February 1993, the Court rejected the author's request and ordered his continuing detention for another 30 days. It considered that the detention of three days and one hour was not unlawful, since the Prosecutor had filed the request for further detention within the three-day period prescribed by law. It further considered that grounds existed to order the author's continuing detention. The author appealed the order of the Court to the Court of Appeal in Amsterdam, which dismissed the appeal on 31 March 1993, while setting aside the Regional Court's first consideration. No further appeal against this decision is possible.

2.4 On 25 May 1993, the author was found guilty of the charges against him and sentenced to 25 months' imprisonment, of which 5 months suspended, and confiscation of the money found in his possession at the time of his arrest.

Complaint

3.1 The author claims that 73 hours of detention without being brought before a judge is in violation of the State party's obligation under article 9, paragraph 3, to bring anyone arrested or detained on a criminal charge promptly before a judge.

3.2 The author states that the same matter has not been submitted to any other procedure of international investigation or settlement.

Issues and proceedings before the Committee

4.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 The Committee notes that the author has claimed that his detention was unlawful under domestic law, because he was not brought before the investigating magistrate within three days. The Committee recalls that the interpretation of domestic law is essentially a matter for the courts and authorities of the State party concerned. It is not for the Committee to examine whether the courts applied the domestic law correctly, unless the application by the courts would violate the State party's obligations under the Covenant.

4.3 The Committee observes further that the information before it shows that the author, who claims to be a victim of a violation of article 9, paragraph 3, of the Covenant, was in fact promptly brought before a judge or other officer authorized by law to exercise judicial power. The Committee considers that the facts as presented do not raise any issue under article 9, paragraph 3, of the Covenant and that the communication is therefore inadmissible under article 3 of the Optional Protocol, as incompatible with the provisions of the Covenant.

5. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible;

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