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HUMAN RIGHTS COMMITTEE
Seventy-seventh session
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VIEWS

Communication No. 1086/2002

Submitted by:	Sholam Weiss (represented by counsel Mr. Edward Fitzgerald)
Alleged victim:	The author
State party:	Austria
Date of communication:	24 May 2002 (initial submission)
Document references:	Special Rapporteur's rule 86/91 decision, transmitted to the State party on 24 May 2002 (not issued in document form)
Date of adoption of Views:	3 April 2003

On 3 April 2003, the Human Rights Committee adopted its Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1086/2002. The text of the Views is appended to the present document.

[ANNEX]

* Made public by decision of the Committee.

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Annex*

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

Seventy-seventh session

concerning

Communication No. 1086/2002

Submitted by:	Sholam Weiss (represented by counsel Mr. Edward Fitzgerald)
Alleged victim:	The author
State party:	Austria
Date of communication:	24 May 2002 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 3 April 2003,

Having concluded its consideration of communication No. 1086/2002, submitted to the Human Rights Committee on behalf of Mr. Sholam Weiss 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 the following:

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Mr. Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication, initially dated 24 May 2002, is Sholam Weiss, a citizen of the United States of America and Israel, born on 1 April 1954. At the time of submission, he was detained in Austria pending extradition to the United States of America ("the United States"). He claims to be a victim of violations by Austria of article 2, paragraph 3, article 7, article 10, paragraph 1, and article 14, paragraph 5, of the International Covenant on Civil and Political Rights. He also claims to be a victim of a violation of his right to be free from unlawful detention and of his right to "equality before the law", possibly raising issues under articles 9, and 14, paragraph 1, respectively. Subsequently, as a result of his extradition, he claims to be a victim of a violation of article 9, paragraph 1, of the Covenant, as well as of articles 1 and 5 of the Optional Protocol. The author is represented by counsel.

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

1.3 Upon ratification of the Optional Protocol, the State party entered a reservation in the following terms: "The Republic of Austria ratifies the Optional Protocol ... on the understanding that, further to the provisions of article 5 (2) of the Protocol, the Committee ... shall not consider any communication from an individual unless it has ascertained that the same matter has not been examined by the European Commission of Human Rights established by the European Convention for the Protection of Human Rights and Fundamental Freedoms."

The facts as submitted

2.1 In a trial beginning on 1 November 1998 in the District Court of Florida, the author was tried on numerous charges of fraud, racketeering and money laundering. He was represented throughout the trial by counsel of his choice. On 29 October 1999, as jury deliberations were about to begin, the author fled the courtroom and escaped. On 1 November 1999, the author was found guilty on all charges. Following submissions from the prosecution, and the author's counsel in opposition, as to whether sentencing should proceed in his absence, the Court ultimately sentenced him in absentia on 18 February 2000 to 845 years' imprisonment (with possibility to reduce it, in the event of good behaviour, to 711 years (sic)) and pecuniary penalties in excess of US$ 248 million.

2.2 The author's counsel lodged a notice of appeal within the 10-day time limit stipulated by law. On 10 April 2000, the United States Court of Appeals for the Eleventh Circuit rejected the motion of the author's counsel to defer dismissal of the appeal, and dismissed it on the basis of the "fugitive disentitlement" doctrine. Under this doctrine, a court of appeal may reject an appeal lodged by a fugitive on the sole grounds that the appellant is a fugitive. With that decision, the criminal proceedings against the author were concluded in the United States.[1]

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

2.4 On 25 May 2001, the Vienna Upper Regional Court sought the advice of the United States authorities as to whether it remained open to the author to challenge his conviction and sentence. Thereupon, on 21 June 2001 the United States Attorney lodged an emergency motion to reinstate the author's appeal with the United States Court of Appeals for the Eleventh Circuit. The author's counsel explicitly took no position on the motion, but questioned the State's standing to file such an application on the author's behalf. On 29 June 2001 that court denied the motion. On 5 July 2001, the United States prosecutor filed another emergency motion with the United States District Court for the Middle District of Florida, which sought to vacate that court's judgement concerning the author. On 6 July 2001 the Court refused the motion and confirmed that its judgement was unimpeachable.

2.5 On 13 August 2001, the author applied to the European Court of Human Rights ("the European Court"), alleging that his extradition would violate the following provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention"): article 3, in that he would have to serve a mandatory life sentence; article 6, and article 2 of Protocol No. 7, on the basis that his conviction and sentence were pronounced in absentia and no appeal was available to him; article 5 in that his detention with a view to extradition was unlawful; and article 13.

2.6 On 11 September 2001, the Vienna Upper Regional Court refused the United States request for the author's extradition. The sole ground for refusal was that the author's extradition without an assurance that he would be entitled to a full appeal would be contrary to article 2 of Protocol No. 7 to the European Convention.[2]

2.7 The State Prosecutor (who alone has standing to lodge such an appeal) appealed the Upper Regional Court's decision to the Supreme Court ("Oberster Gerichtshof"). On 9 April 2002, the Supreme Court held that the Upper Regional Court's decision was a nullity because it had no jurisdiction to consider the right to an appeal under article 2 of Protocol No. 7 to the European Convention. The Upper Regional Court could only consider the specific aspects listed in the extradition statute (whether the author had enjoyed a fair trial and whether his punishment would amount to cruel, inhuman or degrading treatment or punishment); by contrast, the Minister of Justice was the sole authority with the competence to consider any further issues (including the right to an appeal) when s/he subsequently decided whether or not to extradite a person whose extradition had judicially been found to be admissible. The Upper Regional Court's judgement was accordingly set aside, and the case was remitted.

2.8 On 8 May 2002, the Upper Regional Court, upon reconsideration, found that the author's extradition was admissible on all counts except that of "perjury while a defendant" (for which the author had been sentenced to 10 years' imprisonment). In conformity with the Supreme Court's decision, the Court concluded that the author had enjoyed a fair trial and that his

sentence would not be cruel, inhuman or degrading. It did not address the issue of the author's right to an appeal. On 10 May 2002, the Minister of Justice allowed the author's extradition to the United States, without reference to any issues as to the author's human rights.[3]

2.9 On 10 May 2002, the European Court of Human Rights indicated interim measures, staying the author's extradition. On 16 May 2002, following representations of the State party, the Court decided not to prolong the application of the interim measures. On the author's application, the Constitutional Court ("Verfassungsgerichtshof") issued an injunction on 17 May 2002 staying (until 23 May 2002) execution of the author's extradition.

2.10 On 23 May 2002, the Constitutional Court refused to accept the author's complaint for decision, on the basis that it had insufficient prospects of success and was not excluded from the competence of the Administrative Court ("Verwaltungsgerichtshof"). The Court accordingly terminated the injunction. On the same day, the author again applied to the European Court of Human Rights for the indication of interim measures, an application that was denied.

2.11 On 24 May, the author informed the European Court that he wished to withdraw his application "with immediate effect". On the same day, he petitioned the Administrative Court, challenging the Minister's decision to extradite him and seeking an injunction to stay the author's extradition, pending decision on the substantive challenge. The stay was granted and referred to the Ministry of Justice and the Vienna Regional Criminal Court.

2.12 On 26 May, an attempt was made to surrender the author. After a telephone call by the ranking officer of the airport police to the president of the Administrative Court, the author was returned to a detention facility in light of the stay issued by the Administrative Court and the author's poor health. On 6 June 2002, the investigating judge of the Vienna Regional Criminal Court considered the Administrative Court to be "incompetent" to entertain any proceedings or to bar implementation of the extradition, and directed that the author be surrendered. On 9 June 2002, the author was transferred by officials of the author's prison and of the Ministries of Justice and the Interior, to the jurisdiction of United States military authorities at Vienna airport, and returned to the United States.

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

2.14 On 13 June 2002, the Administrative Court decided, given that the author had been removed in violation of the Court's stay on execution, that the proceedings had been deprived of any object and suspended them. The Court observed that the purpose of its order to stay extradition was to preserve the rights of the author pending the main proceedings, and that as a result no action could be taken to the author's detriment on the basis of the Minister's challenged decision. As a consequence, the author's surrender had no sufficient legal basis.

2.15 On the same day, the European Court of Human Rights noted that the author wished to withdraw his application. After setting out the facts and the complaint, the Court considered that respect for human rights as defined in the Convention and its Protocols did not require continuation of its examination of the case irrespective of the applicant's wish to withdraw it, and struck out the application.[4]

2.16 On 12 December 2002, the Constitutional Court decided in the author's favour, holding that the Upper Regional Court should examine all admissibility issues concerning the author's human rights, including issues of a right to an appeal. Thereafter, the Minister's formal decision to extradite should consider any other issues of human dignity that might arise. The Court also found that the author's inability, under the State party's extradition law, further to challenge a decision of the Upper Regional Court finding his extradition admissible was contrary to rule of law principles and unconstitutional.

The complaint

3.1 In his original communication (preceding extradition), the author claims that extradition to the United States would deprive him of the ability to be present in the State party for the vindication of his claims in that jurisdiction. In particular, he would be unable to enjoy the benefits of the remedies flowing from the Constitutional Court's determination of the "negative competence" challenge as to which court or administrative authority should consider his argument of a denial of a right to a fair trial/appeal, as well as the consideration thereafter by the competent authority of this issue, as required by articles 14, paragraph 5, and 2, paragraph 3, read together. Extradition would prevent him enjoying remedies such as barring of extradition altogether, extradition for a sentence equivalent to that which would be imposed in the State party, or extradition subject to full rights of appeal. He argues that neither the State party's courts nor administrative authorities have ever substantively addressed the issue of his alleged denial, in the United States, of a right to a fair trial/appeal.

3.2 The author also claims that the State party, if it extradited him, would abet and adopt the violation of his right under article, 14, paragraph 5, already allegedly suffered in the United States. In light of the finality of the criminal proceedings in the United States, his extradition to the United States would be unlawful, firstly as his conviction was pronounced and his sentence imposed in absentia and, secondly, as he had and has no effective opportunity to appeal against conviction or sentence under the fugitive disentitlement doctrine. Specifically, he cannot appeal in respect of the fact that his conviction was pronounced and his sentence was imposed in absentia. The author argues that the right to a fair trial/appeal in the Covenant is mandatory, and, if not complied with, this would render an extradition unlawful.

3.3 The author claims a violation of his right to "equality before the law". Only the State Prosecutor has the ability to lodge an appeal to the Supreme Court against a decision of the Upper Regional Court, subject to the proviso under the State party's domestic law, that such an appeal cannot operate to the detriment of the person whose case is appealed, as that person is unable to avail themselves of such an appeal. In the present case, the Supreme Court reversed the Upper Regional Court's decision that the author could not be extradited, and returned the case for a reconsideration that did not take into account the author's rights to a fair trial/appeal.

3.4 The author claims that his sentence for a period of 845 years without opportunity for release until at least 711 years have been served is an "exceptional and grotesque punishment" that is "inhuman" and amounts to the most serious form of incarceration short of actual torture. He argues that there is a "clear and irreversible" breach of article 10, paragraph 1, of the Covenant, because of the excessive length of the sentence and the absence of any possibility of release within a lifetime, or of any appeal. The State party is responsible for the failure of its courts and/or administrative authorities to consider this issue.

3.5 Finally, the author complains that he is unlawfully detained. He argues that as his extradition is unlawful because he was denied a fair trial/appeal, any detention with a view to extradition must also be unlawful.

3.6 As to the admissibility of his complaint, the author argues that with the Constitutional Court's judgement against him, all effective remedies were exhausted. He submits that the complaints raised in the communication are not "being examined", in terms of article 5, paragraph 2, of the Optional Protocol, under the European (or any other) procedure of international investigation or settlement. Nor does the State party's reservation to article 5, paragraph 2, of the Optional Protocol preclude the Committee from considering the communication.

3.7 The author argues, firstly, that there was never any formal decision of the European Court on the admissibility or merits of the application to the European Court, but merely procedural decisions. In view of the interpretation given by the Committee to the word "examined" in the Austrian reservation in the case of Pauger v. Austria,[5] it is submitted that these procedural steps did not constitute an "examination" of the case. Secondly, while it remained pending, the application was not communicated to the State party for its observations on either the admissibility and/or merits. Thirdly, in any event, the communication relates in part to rights (such as articles 2, paragraph 3, and 10, paragraph 1, of the Covenant) which are not protected under the European Convention.

3.8 By submission of 19 June 2002 (post-extradition), the author argued that his removal neither prevents the Committee from examining the communication, nor affected the interim measures requested by the Committee. The author refers to the Committee's public discussion of a State party's obligations in a previous case in which a request for interim measures had not been complied with.[6] He invokes the jurisprudence of the PCIJ to the effect that participation in a system of international adjudication implies that the State party accepts an obligation to abstain from "any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given, and, in general, not to allow any step of any kind to be taken which might aggravate or extend the dispute".[7] Similarly, the International Court of Justice has decided that its provisional measures are binding upon the parties to a dispute before it.[8]

3.9 In the specific case, the author argues that the jurisprudence of the Committee suggests that the author would suffer a risk of irreparable harm. In Stewart v. Canada,[9] interim measures were requested in circumstances where it was unlikely that the author would be able to return to his adopted homeland, Canada, while, in the present case, there is no possibility of release from prison.

3.10 The author recalls that his case is not one where the gap between the request for interim measures (24 May 2002) and the action sought to be prevented (9 June 2002) was short. Accordingly, he requests that the Committee direct the State party to explain the factual basis of his removal, whether and how the request for interim measures was taken into account by the State party in removing him, and how the State party proposed to fulfil its continuing obligations.

The State party's submissions on the admissibility and merits of the communication

4.1 By submissions of 24 July 2002, the State party contested both the admissibility and the merits of the communication. It argues that the author has not exhausted domestic remedies. While accepting that the Committee has not usually required domestic proceedings to have been concluded at the time of submission of the communication, it argues that they have to have been concluded by the time the Committee considers the communication.[10] In view of the proceedings that were, at the time of the State party's submission, still pending before the Constitutional Court, the State party argues that this requirement has not been satisfied.

4.2 The State party invokes its reservation to article 5, paragraph 2, of the Optional Protocol and argues that a complaint already submitted to the European organs may not be submitted to the Committee. It contends that the complaint was "examined" by the European Court on the merits - after seeking observations from the State party, the Court clearly made a merits assessment of the case. In requesting withdrawal of the case from the Court's list before presenting it to the Committee, the author makes clear that he raises essentially the same concerns before both organs.

4.3 On the merits, the State party points out that extradition as such is outside the scope of the Covenant, so that the issue is whether the State party would subject the author to treatment contrary to the Covenant in a State not party to the Optional Protocol by virtue of extradition.[11] In terms of domestic proceedings, the State party argues that the ordinary as well as the highest courts, as well as the administrative authorities, carefully examined the author's submissions, and he was legally represented throughout. The State party recalls that extradition proceedings, according to the jurisprudence of the European Court, do not necessarily enjoy the same procedural guarantees as criminal proceedings on which the extradition is based.[12]

4.4 As to the alleged violation of article 14, paragraph 5, on the ground that the author was found guilty and sentenced in absentia, the State party recalls the Committee's jurisprudence that a trial in absentia is compatible with the Covenant only if the accused is summoned in a timely manner and informed of the proceedings against him.[13] In the present case, the author does not contend that these requirements were not fulfilled - he fled after all evidentiary proceedings had concluded and the jury had retired to deliberate, and did not return thereafter to participate in further proceedings. He was therefore not convicted in absentia, and that sentencing occurred subsequently does not change this conclusion.

4.5 As to the second alleged violation of article 14, paragraph 5, in conjunction with article 2, paragraph 3, arising from the denial of a fair appellate hearing in the United States due to his absence, the State party points out that article 14, paragraph 5, guarantees a right to appeal "according to law". The State party in question is thus free to define in greater detail the substantive and procedural content of the right, including, in this case, the formal requirement

that an appellant must not be a fugitive when an appeal is filed. The author was legally represented and aware of the legal situation in the United States, and thus it can be reasonably assumed from his overall conduct, including his flight from the United States, that he renounced his right to appeal. The State party notes that the author did not support the motion of the United States Attorney to reinstate his appeal, in order to prevent his extradition to the United States. He never submitted an appeal, and his notice of appeal remains without content. As to his future treatment in this respect, the State party observes that its Minister of Justice sought assurances of the competent United States authorities, which were provided, that new proceedings for determining a sentence would be open to the author on all counts.

4.6 As to the allegation that the author's life-long imprisonment violates article 10, paragraph 1, the State party argues that this provision refers solely to the conditions of detention, rather than its duration. It refers to the Committee's jurisprudence that the mere fact of deprivation of liberty does not imply a violation of human dignity.[14] The State party argues that the 845-year sentence is not disproportionate or inhuman taking into account the numerous property offences and the losses suffered by pension holders. It also notes that the sentencing court did not exclude conditional release, provided the author pays restitution of US$ 125 million and a fine of US$ 123 million. The State party also points out that, while the European Court has suggested that lifetime imprisonment may raise issues under article 3 of the European Convention, it has not yet made such a finding.[15]

4.7 For the State party, nothing in the Covenant prevents extradition to a State where an offence carries a more severe sentence (short of corporal punishment). Any contrary position would deprive the instrument of extradition of its utility in terms of international cooperation in the administration of justice and denial of impunity, a purpose the Committee has itself stressed.[16]

Further issues arising in relation to the Committee's request for interim measures

5.1 By letter of 2 August 2002 to the State party's representative to the United Nations in Geneva, the Committee, through its Chairperson, expressed great regret at the author's extradition, in contravention of its request for interim protection. The Committee sought a written explanation about the reasons which led to disregard of the Committee's request for interim measures and an explanation of how it intended to secure compliance with such requests in the future. By Note of the same date, the Committee's Special Rapporteur on New Communications requested the State party to monitor closely the situation and treatment of the author subsequent to his extradition, and to make such representations to the Government of the United States that were deemed pertinent to prevent irreparable harm to the author's Covenant rights.

5.2 By submissions dated 15 October 2002, the State party, in response to the Committee's request for explanation, explains that following receipt of the Committee's request for interim measures, the Federal Minister of Justice on 25 May 2002 ordered the Vienna Public Prosecutor's Office ("Staatsanwaltschaft") to file a request with the investigating judge of the Vienna Regional Criminal Court seeking suspension of the extradition. The same day, the Court refused to comply with this request, on the basis that Rule 86 of the Committee's Rules of Procedure may neither invalidate judicial orders or restrict the jurisdiction of an independent domestic court. On 6 June 2002, the investigating judge ordered the author's surrender.

5.3 As to the legal issues arising, the State party argues that Rule 86 of the Committee's Rules of Procedure does not oblige States parties to amend their constitutions so as to provide for direct domestic effect of requests for interim measures. A request under Rule 86 "does not as such have any binding effect under international law". A request made under Rule 86 cannot override a contrary obligation of international law, that is, an obligation under the extradition treaty between the State party and the United States to surrender a person in circumstances where the necessary prerequisites set out in the treaty were followed. The State party points to the extensive consideration of the author's case by its courts and the European Court.

5.4 As to the current situation, the State party observes that the United States Attorney has applied to the United States District Court for the author to be re-sentenced (such that he would not serve sentence for the offence of "perjury while a defendant in respect of which extradition was denied). According to information supplied to the State party, re-sentencing would provide the author with a full right of appeal against the (new) sentence, and against the original conviction itself. The State party will continue to seek information from the United States authorities in an appropriate manner about the progress of proceedings in the United States courts.

The author's comments

6.1 By letter of 8 December 2002, the author claimed a breach of article 9, paragraph 1, of the Covenant since he was surrendered to the United States in breach of the Committee's request for interim measures. He invokes the Committee's Views in Piandiong v. The Philippines.[17]

6.2 By letter of 21 January 2003, the author rejected the State party's contention that the Committee's request under rule 86 gave way to the international obligation to extradite found in its extradition treaty with the United States. The author notes that the treaty itself, as well as the State party's domestic law, provide for refusal of extradition on human rights grounds. In any event, mandatory obligations under human rights treaties owed erga omnes, including under the Covenant, take precedence over any inter-State treaty obligations.

6.3 The author submits there is an express obligation under international law, the Covenant and the Optional Protocol for the State party to respect a request under rule 86. This obligation can be derived both from article 2, paragraph 3, of the Covenant, and from the recognition, upon adherence to the Optional Protocol, of the Committee's competence to determine violations of the Covenant, which must also imply, subsidiarily, respect for the Committee's properly promulgated Rules of Procedure.

6.4 The author relies on the Committee's jurisprudence for the proposition that the exposure of a person, to an irreversible measure prior to examination of a case defeats the purpose of Optional Protocol and deprives that person of the effective remedy the Covenant obliges a State party to provide.[18] Thus the findings of the Vienna Regional Criminal Court (see paragraph 5.2 above) ignored direct obligations under articles 1 and 5 of the Optional Protocol. The Committee is invited to direct the State party to indicate what steps it proposes to take to remedy this breach, including by means of diplomatic representation to the United States, to restore the status quo ante.

6.5 As to the State party's admissibility arguments, the author argues that the proceedings pending in the courts were neither timely, real nor effective, as he was removed before they were completed. In any event, with the Constitutional Court's decision of 12 December 2002, domestic remedies are now exhausted. He rejects the contention that the European Court had "examined" his case within the meaning of the State party's reservation to article 5, paragraph 2, of the Optional Protocol, for the decision to strike the case from its lists "clearly did not involve any determination of the merits".

6.6 On the merits, the author maintains he suffered a violation of article 14, paragraph 5, in that he was deprived, through the "fugitive disentitlement" doctrine, of appellate review of conviction or sentence in the United States. This doctrine also served to deny the United States motion to reinstate his appeal. The author challenges the notion that he "renounced" his appeal, as the appellate court rejected his (counsel's) motion to defer dismissal of the appeal. In Austria, this violation was adopted, as no court with effective jurisdiction considered this aspect of his case before he was removed. The Constitutional Court's recognition that the lower courts should have done so came too late to provide an effective remedy.

6.7 As to the claim of a violation of articles 7 and 10, the author submits that an 845-year sentence for offences of fraud is grossly disproportionate, an element that amounts to inhuman punishment.[19] The author rejects the State party's reliance on Vuolanne v. Finland,[20] observing that that case concerned a deprivation of liberty of 10 days, scarcely comparable to his own sentence. He further submits that a life sentence (without parole) for a non-violent offence is per se an inhuman sentence. He invokes a decision of the German Constitutional Court finding a life sentence for murder unconstitutional without provision for parole rehabilitation and conditional release.[21] *A fortiori*, a life sentence for an offence of no irreparable physical or psychological harm and with a possibility of restitution would be inhuman. The sentence is an affront to human dignity and, since it is devoid of rehabilitative possibility, violates article 10, paragraph 1.

6.8 The author rejects the State party's argument that extradition to a country where a possibly more serious penalty looms than is applicable in the extraditing State is unobjectionable as being inherent in the nature of extradition, for at some point the more serious penalty becomes so inhuman that it is inhuman to so extradite someone. The author relies on the Committee's Views in Ng v. Canada[22] for this proposition**,** and also refers to the jurisprudence of the European Court suggesting that a wholly disproportionate custodial penalty such as an irreducible life sentence (as distinct from physical or psychological torture) could also rise to such a level of inhumanity.[23]

The State party's failure to respect the Committee's request for interim measures of protection

7.1 The Committee finds, in the circumstances of the case, that the State party breached its obligations under the Protocol, by extraditing the author before the Committee could address the author's allegation of irreparable harm to his Covenant rights. In particular, the Committee is concerned by the sequence of events in this case in that, rather than requesting interim measures of protection directly upon an assumption that irreversible harm could follow the author's

extradition, it first sought, under Rule 86 of its Rules of Procedure, the State party's views on the irreparability of harm. In so doing, the State party could have demonstrated to the Committee that extradition would not result in irreparable harm.

7.2 Interim measures pursuant to rule 86 of the Committee's rules adopted in conformity with article 39 of the Covenant, are essential to the Committee's role under the Protocol. Flouting of the Rule, especially by irreversible measures such as the execution of the alleged victim or his/her deportation from the country, undermines the protection of Covenant rights through the Optional Protocol.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

8.2 As to the State party's argument that domestic remedies have not been exhausted, the Committee observes that the remedy of petitioning the Constitutional Court has been exhausted since the State party's submission. Furthermore, the Committee observes that in a case where it has requested interim measures of protection, it does so because of the possibility of irreparable harm to the victim. In such cases, a remedy which is said to subsist after the event which the interim measures sought to prevent occurred is by definition ineffective, as the irreparable harm cannot be reversed by a subsequent finding in the author's favour by the domestic remedies considering the case. In such cases, there remain no effective remedies to be exhausted after the event sought to be prevented by the request for interim measures takes place; specifically, no appropriate remedy is available to the author now detained in the United States should the State party's domestic courts decide in his favour in the proceedings still pending after his extradition. The Committee thus is not precluded by article 5, paragraph 2 (b), from considering the communication**.**

8.3 Concerning the State party's argument that its reservation to article 5, paragraph 2 (a), of the Optional Protocol precludes the Committee's consideration of the communication, the Committee notes that the State party's reservation refers to claims submitted to the European Commission on Human Rights**.** Assuming *arguendo* that the reservation does operate in respect of complaints received, in place of the former European Commission, by the European Court of Human Rights, the Committee refers to its jurisprudence that where the European Court has gone beyond making a procedural or technical decision on admissibility, and has made an assessment of the merits of the case, then the complaint has been "examined" within the terms of the Optional Protocol, or, in this case, the State party's reservation.[24] In the present case, the Committee notes that the Court considered that respect for human rights did not require continued consideration of the case, and struck it out. The Committee considers that a decision that a case is not of sufficient importance to continue its examination after an applicant's action to withdraw the complaint, does not amount to a real assessment of its substance. Accordingly, the complaint cannot be said to have been "examined" by the European Court and the Committee is not precluded by the State party's reservation from considering the claims that were presented

under the European Convention but later withdrawn by the author. In the absence of any further obstacles to admissibility, the Committee concludes that the issues raised in the communication are admissible**.**

Consideration of the merits

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

9.2 As to the author's claim that the pronouncement *in absentia* of his conviction and sentence resulted in a violation of article 14 of the Covenant, the Committee notes that in the present case, the author and his legal representatives were present throughout the trial, as arguments and evidence were advanced, and that thus the author self-evidently had notice that judgment, and in the event of a conviction, sentence would be passed. In such circumstances, the Committee, referring to its jurisprudence,[25] considers that no question of a violation of the Covenant by the State party can arise on the basis of the pronouncement of the author's conviction and sentence in another State.

9.3 As to the author's claim that by operation of the "fugitive disentitlement" doctrine he was denied a full appeal, the Committee notes that, on the information before it, it appears that the author - by virtue of being extradited on fewer than all the charges for which he was initially sentenced - will, according to the rule of specialty, be re-sentenced. According to information supplied to the State party, such a re-sentencing would entitle the author fully to appeal his conviction and sentence. The Committee thus need not consider whether the "fugitive disentitlement" doctrine is compatible with article 14, paragraph 5, or whether extradition to a jurisdiction where an appeal had been so denied gives rise to an issue under the Covenant in respect of the State party.

9.4 As to whether the State party's extradition of the author to serve a sentence of life imprisonment without possibility of early release violates articles 7 and 10 of the Covenant, the Committee observes, as set out in its preceding paragraph, that the author's conviction and sentence are not yet final, pending the outcome of the re-sentencing process which would open the possibility to appeal against the initial conviction itself. Since conviction and sentence have not yet become final, it is premature for the Committee to decide, on the basis of hypothetical facts, whether such a situation gave rise to the State party's responsibility under the Covenant.

9.5 In the light of these findings, it is unnecessary to examine the author's additional claims which are based on either of the above elements having been found to be in violation of the Covenant.

9.6 Concerning the author's claim that, in the proceedings before the State party's courts, he was denied the right to equality before the law, the Committee observes that the author obtained, after submission of the case to the Committee, a stay from the Administrative Court to prevent his extradition until the Court had resolved the author's challenge to the Minister's decision directing his extradition. The Committee observes that although the order to stay was duly communicated to the relevant officials, the author was transferred to United States jurisdiction after several attempts, in violation of the Court's stay. The Court itself, after the event, observed

that the author had been removed from the country in violation of the Court's stay on execution and that there was no legal foundation for the extradition; accordingly, the proceedings had become moot and deprived of object in the light of the author's extradition, and would not be further pursued. The Committee further notes that the Constitutional Court found that the author's inability to appeal an adverse judgement of the Upper Regional Court, in circumstances where the Prosecutor could, and did, appeal an earlier judgement of the Upper Regional Court finding the author's extradition inadmissible, was unconstitutional. The Committee considers that the author's extradition in breach of a stay issued by the Administrative Court and his inability to appeal an adverse decision of the Upper Regional Court, while the Prosecutor was so able, amount to a violation of the author's right under article 14, paragraph 1, to equality before the courts, taken together with the right to an effective and enforceable remedy under article 2, paragraph 3, of the Covenant.

10.1 The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal violations by Austria of article 14, paragraph 1 (first sentence), taken together with article 2, paragraph 3, of the Covenant. The Committee reiterates its conclusion that the State party breached its obligations under the Optional Protocol by extraditing the author before allowing the Committee to address whether he would thereby suffer irreparable harm, as alleged.

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

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

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] The author relies for this proposition on a decision of another United States District Court in United States v. Bakhtiar 964 F Supp 112. That case held that, when a person was extradited on fewer charges than s/he had been convicted of, the original conviction and sentence remained intact, but an application for habeas corpus would lie against the executive once sentence had been served in respect of the extraditable offences. (See further paragraphs 4.5 (final sentence) and 5.4.)

[2] "Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law."

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

[4] Article 37 of the European Convention provides, so far as is material, "1. The Court may decide at any stage of the proceedings to strike an application out of its list of cases where the circumstances lead to the conclusion that:

(a) the applicant does not intend to pursue his application; …

However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires."

[5] Case No. 716/1996, Views adopted on 30 April 1999.

[6] CCPR/C/SR.1352 (discussing at a preliminary stage the case of Ashby v. Trinidad & Tobago Case No. 580/1994, Views adopted on 21 March 2002).

[7] Electricity Company of Sofia and Bulgaria PCIJ Series A/B No. 79, at p. 199.

[8] Germany v. United States (La Grand), judgment of 27 June 2001.

[9] Case No. 538/1993, Views adopted on 16 December 1996.

[10] Asensio López v. Spain Case No. 905/2000, Decision adopted on 23 July 2001; Wan Kuok Koi v. Portugal Case 925/2000, Decision adopted on 22 October 2001.

[11] Ng v. Canada Case No. 469/1991, Views adopted on 5 November 1993; Cox v. Canada Case No. 539/1993, Views adopted on 31 October 1994.

[12] Raf v. Spain Appl. No. 53652/00, judgement of 21 November 2001, and Eid v. Italy Appl. No. 53490/99, judgement of 22 January 2002.

[13] Maleki v. Italy Case No. 699/1996, Views adopted on 15 July 1999.

[14] Vuolanne v. Finland Case No. 265/1987, Views adopted on 7 April 1989.

[15] In Einhorn v. France, Appl. No. 71555/01, judgement of 16 October 2001, the Court stated: "… it is not to be excluded that the extradition of an individual to a State in which he runs the risk of being sentenced to life imprisonment without any possibility of early release may raise an issue under Article 3 of the Convention".

[16] Cox v. Canada, op. cit., at para. 10.3.

[17] Case No. 869/1999, Views adopted on 19 October 2000.

[18] Ashby v. Trinidad & Tobago op. cit.; Mansaraj et al. v. Sierra Leone, Case No. 839/1998, Views adopted on 16 July 2001; Piandiong et al v. The Philippines op. cit.

[19] The author refers to the jurisprudence of the European Court for the proposition that disproportionate sentences can be inhuman: Weeks v. United Kingdom (1988) 10 EHRR 293; Hussain v. United Kingdom (1996) 22 EHRR 1.

[20] Op. cit.

[21] Detlef 45 BVerfGE 187 (1977). To similar effect, the Namibian Supreme Court determined in State v. Tcoeib (1996) 7 BCLR 996 that life sentence without parole was unconstitutional.

[22] Op. cit. (death by gas asphyxiation) and further Soering v. United Kingdom 11 EHRR 439 (overall death row phenomenon).

[23] Altun v. Germany App. No. 10308/83 DR 209; Nivette v. France judgement of 3 July 2001; Einhorn v. France op. cit.

[24] See, for example, Linderholm v. Croatia Case No. 744/1997, Decision adopted on 23 July 1999.

[25] See, for example, Maleki v. Italy op. cit.

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