



**International covenant  
on civil and political  
rights**

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HUMAN RIGHTS COMMITTEE  
Ninetieth session  
9 – 27 July 2007

**VIEWS**

**Communication No. 1454/2006**

<u>Submitted by:</u>	Wolfgang Lederbauer (represented by counsel, Alexander H. E. Morawa)
<u>Alleged victim:</u>	The author
<u>State Party:</u>	Austria
<u>Date of communication:</u>	27 September 2005 (initial submission)
<u>Document references:</u>	Special Rapporteur's rule 97 decision, transmitted to the State party on 16 February 2006 (not issued in document form)
<u>Date of adoption of Views:</u>	13 July 2007

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Made public by decision of the Human Rights Committee.

GE.07-44052

*Subject matter:* Disciplinary dismissal of civil servant for managing private company

*Substantive issues:* Right to a fair and public hearing by an independent and impartial tribunal – Delay in proceedings – Right to equality before the law and equal protection of the law

*Procedural issues:* Admissibility *ratione personae* and *ratione materiae* – Level of substantiation of claim – State party reservation to article 5 (2) (a) of the Optional Protocol – Exhaustion of domestic remedies

*Articles of the Covenant:* 14, paragraph 1; 26

*Articles of the Optional Protocol:* 1, 2, 3 and 5, paragraph 2 (a) and (b)

On 13 July 2007, the Human Rights Committee adopted the annexed text as the Committee's Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1454/2006.

[ANNEX]

**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

Ninetieth session

concerning

**Communication No. 1454/2006\*\***

<u>Submitted by:</u>	Wolfgang Lederbauer (represented by counsel, Alexander H. E. Morawa)
<u>Alleged victim:</u>	The author
<u>State Party:</u>	Austria
<u>Date of communication:</u>	27 September 2005 (initial submission)

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

Meeting on 13 July 2007,

Having concluded its consideration of communication No. 1454/2006, submitted to the  
Human Rights Committee on behalf of Mr. Wolfgang Lederbauer 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:

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

1. The author of the communication is Wolfgang Lederbauer, an Austrian national. He claims  
to be a victim of violations by Austria<sup>1</sup> of his rights under article 14, paragraph 1, read alone as

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\*\* The following members of the Committee participated in the examination of the present  
communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine  
Chanet, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil,  
Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada,  
Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

The text of an individual opinion signed by Committee member Ms. Ruth Wedgwood is  
appended to the present document.

<sup>1</sup> The Covenant and the Optional Protocol entered into force for Austria on 10 December 1978  
and on 10 March 1988, respectively. Austria entered the following reservation upon ratification  
of the Optional Protocol: "On the understanding that, further to the provisions of article 5 (2) of

well as in conjunction with article 2, paragraph 1, and article 26 of the International Covenant on Civil and Political Rights (the Covenant). He is represented by counsel, Alexander H. E. Morawa.

### **Factual background**

2.1 In 1981, the author joined the staff of the Austrian General Audit Office (GAO) (*Rechnungshof*). He was assigned to a department auditing public hospitals. In 1985, he invented a system of ecologically sound wall elements for soundproofing highways and railroad tracks which he named “Ecowall”. He informed the GAO of his invention and designated his wife to act as trustee of the patents.

2.2 In 1989, the author founded, and his wife became the sole shareholder of, a limited liability company named “Econtract”. When he and his wife divorced, the ownership of the company and the patents were transferred to the author, who appointed Mr. E. L. as chief executive officer and informed the GAO of the changed circumstances.

2.3 In 1993, when the GAO inquired into his involvement in the marketing of licenses to install “Ecowall” systems, the author submitted a statement to the President of the GAO, in which he criticized the fact that innovations in the soundproofing of transportation corridors were impeded by the predominance of a few large corporations. Subsequently, “Econtract” made several bids for projects in Austria, including the construction of soundproofing of a track operated by the Federal Railroad Corporation.

2.4 In 1994, the author and E. L. each contacted the chairperson of a Parliamentary Inquiry Commission established to look into alleged irregularities related to the construction of a public motorway, Mr. W., to inform him about “Ecowall” as an alternative to the standard soundproofing systems marketed by other corporations. Unknown to E. L., a journalist of the magazine “Profil” had listened to his conversation with Mr. W. Despite the author’s assurances that he had fully informed the GAO and its President about his ownership of the “Ecowall” patents and of “Econtract”, “Profil” and other newspapers subsequently published articles criticizing the alleged incompatibility with his function as a senior staff member of the GAO.

2.5 On 30 August 1994, the President of the GAO temporarily suspended the author, as there were sufficient grounds to suspect that his private business activities, in particular his involvement in marketing the “Ecowall” project, were incompatible with his function as a civil servant and in breach of Article 126 of the Federal Constitution Act, which provides that members of the GAO must not participate in the management of profit-oriented companies,<sup>2</sup> as well as Section 43 (1) and (2) of the Federal Civil Servants Act.

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the Protocol, the Committee provided for in Article 28 of the Covenant shall not consider any communication from an individual unless it has been ascertained that the same matter has not been examined by the European Commission on Human Rights established by the European Convention for the Protection of Human Rights and Fundamental Freedoms.”

<sup>2</sup> Art. 126 of the Austrian Federal Constitutional Act reads: “No member of the GAO may be a participant in the management and administration of enterprises subject to control by the GAO.

2.6 On 1 September 1994, without hearing the author, the President of the GAO issued a decree (“first decree”) prohibiting the author from participating in the management and administration of “Econtract” and from further engaging in the marketing of “Ecowall”. On 20 September 1994, the author appealed against the decree. The GAO did not take action until 2 June 2000, when the author filed a complaint regarding the inactivity of the GAO with the High Administrative Court, which in turn ordered the GAO to take action within three months. On 18 September 2000, the GAO issued a new decree (“second decree”) merely repeating the previous one. On 18 October 2000, the author appealed to the High Administrative Court, arguing that the GAO had not provided him with an opportunity to be heard, nor investigated to what extent it had known about his involvement with “Econtract”. On 31 October 2000, he supplemented his appeal, asking the Court to hold an oral hearing. By letter of 30 June 2005, the President of the third Senate of the High Administrative Court asked him whether he still was interested in obtaining a decision on his appeal against the decree, which could not alter the final decision taken in the disciplinary proceedings. On 14 July 2005, the author reiterated his interest in a decision by the Court, which then revoked the decree on 27 September 2005.

2.7 On 10 October 1994, the President of the GAO filed a disciplinary complaint against the author, based on Article 126 of the Federal Constitution Act, Sections 43 (1) and (2) *et seq.* of the Federal Civil Servants Act, and the following charges: Participation in the management of “Econtract”; failure to provide medical justification for sick leave and to report for duty during regular office hours on certain days; and non-compliance with instructions received from his superiors. On 11 November 1994, the Disciplinary Commission instituted disciplinary proceedings against him. On 23 December 1994, the author complained to the Constitutional Court alleging violations of his rights to equal treatment before the law and to a lawful judge. On 6 March 1995, the Constitutional Court decided not to deal with the complaint. On 31 May 1995, the President of the GAO amended the disciplinary complaint against the author with additional charges.

2.8 On 13 October 1994, the Disciplinary Commission permanently suspended the author, based on Article 126 of the Federal Constitution Act, and reduced his salary by one-third. On 19 December 1994, the Disciplinary Appeals Commission rejected his appeal. On 6 February 1995, he appealed this decision to the High Administrative Court, requesting an oral hearing and arguing that the GAO had been informed about his involvement with “Econtract” and that it took action only after the media criticized his activities, and without hearing him as a party. On 29 November 2002, the Court rejected the appeal. At the same time, it found that the issue of an oral hearing did not arise, as the matter fell outside the scope of article 6 of the European Convention on Human Rights.

2.9 On 21 December 1995 and 6 March 1996, the author asked for his suspension to be lifted, arguing that it gradually became a *de facto* punishment. The Disciplinary Appeals Commission rejected his requests on 25 January and 10 April 1996, respectively. On 7 June 1996, he complained to the High Administrative Court; this complaint was dismissed on 19 December 2002.

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Just as little may a member of the GAO participate in the management and administration of any other enterprises operating for profit.”

2.10 On 20 May 1997, after the author had requested the President of the National Council (the lower house of Parliament) and the leaders of the four political parties in Parliament to investigate his case, the Disciplinary Commission “hastily” issued a decision scheduling a disciplinary hearing. The Commission was chaired by Mr. P. S., who worked at the GAO as head of the department responsible for auditing the Austrian Federal Railway Administration and the public High-Speed Railway Corporation.

2.11 On 30 May 1997, the author challenged the chairman of the Disciplinary Commission, P. S., for bias, as P. S. was auditing the same agencies which routinely installed those conventional soundproofing materials which the author had criticized and sought to improve with his invention. On 3 July 1997, he filed a complaint against the decision of the Disciplinary Commission scheduling a disciplinary hearing with the Constitutional Court, alleging violations of his rights to equal treatment and to a fair trial before a lawful judge and again challenging P. S. The Constitutional Court refused to deal with the complaint, which was subsequently transferred to the High Administrative Court and dismissed by the Court on 27 June 2001.

2.12 On 6 October 1997, the author requested access to the case file before the Disciplinary Commission based on “a reasonable suspicion” that certain documents had been suppressed or ignored. On 14 October 1997, the Commission rejected his request arguing that its members were “entitled to keep their individual reasoning and voting [...] secret from the parties of the disciplinary proceedings. This is *a fortiori* required since [...] members of the Disciplinary Commission and the parties are members of the staff of the same government agency and therefore presumably in constant contact with one another. Their professional contacts could be adversely affected by the parties’ knowledge about their reasoning and voting [...], which would contravene the legitimate interest of each member of the Disciplinary Commission to avoid disturbances in their work environment. [...] Alleged discrepancies of the disciplinary file or other irregularities may be raised in an appeal.” The decision of the Disciplinary Commission was not subject to appeal.

2.13 Following the media coverage of the author’s activities and the initiation of disciplinary proceedings against him, “Econtract” received no further orders for the “Ecowall” system. A freight company filed criminal charges against the author and E. L. over an unpaid bill. On 18 November 1998, the Regional Criminal Court of Vienna convicted the author of negligently causing the insolvency of a company and sentenced him to a suspended prison term of five months. On 6 July 1999, the Vienna Court of Appeals dismissed his appeal.

2.14 Based on a notification from the Vienna Regional Criminal Court that Criminal proceedings had been initiated against the author, the President of the GAO, on 9 November 1998, brought another disciplinary complaint against the author, charging him with negligently causing the insolvency of a company as well as damage to his creditors.

2.15 In the meantime, it was discovered that a memorandum from a staff member of the GAO dated 18 February 1993, on the compatibility of the author’s private business activities with his official function had been removed from his personnel file, together with accompanying documents. Among these documents were a statement of the author, received by the GAO on 16 July 1993, explaining the extent of his involvement with “Econtract” and, in particular, a draft

order concluding that the author's business activities were incompatible with Article 126 of the Federal Constitutional Act.

2.16 On 27 January 1999, the author requested the Disciplinary Commission to reopen the first set of disciplinary proceedings with a view to discontinuing them, arguing that the newly discovered documents proved that the GAO had been fully informed, as early as 1993, about his involvement with "Econtract", that he had complied with his reporting duties, and that he could reasonably expect that the fact that no order had been issued prohibiting him to continue his activities meant that the GAO did not find these activities objectionable.

2.17 On 23 February 1999, the Disciplinary Commission initiated a second set of disciplinary proceedings against the author. His appeal against this decision was dismissed by the Disciplinary Appeals Commission on 13 June 1999. On 24 August 1999, the Disciplinary Commission informed the author that it would not hold any further oral hearings and that it would render a written decision. On 26 August 1999, the author requested an oral hearing and again challenged the chairman, P. S., who was subsequently replaced by another chairman.

2.18 On 13 December 1999, the Disciplinary Commission found the author guilty of disciplinary offences and dismissed him from civil service. It observed that it "was obliged to adhere to the legally binding findings of fact of a criminal court," and that it had based its decision only on the charges for which the author had been found guilty by the criminal courts. It added that the author's oral testimony would not have led to the discovery of additional facts relevant to the Commission's decision.

2.19 The author appealed this decision on 1 and 14 January 2000, invoking due process rights, and requested an oral hearing before the Disciplinary Appeals Commission, which dismissed his appeal on 13 June 2000 without hearing him, considering that Article 6 of the European Convention on Human Rights was inapplicable in disciplinary proceedings. On 21 July 2000, the author filed a complaint with the Constitutional Court, alleging breaches of his rights to equal treatment and to a fair trial and challenging as unconstitutional that the Disciplinary Commission should be bound by the findings of criminal courts. On 25 September 2001, the Constitutional Court dismissed the complaint, arguing that it had no prospect of success and since it did not raise issues of constitutional law.

2.20 Parallel to the proceedings before the Constitutional Court, the author, on 21 July 2000, appealed to the High Administrative Court, claiming that the decision confirming his dismissal from civil service was made without a fair and public hearing, including an oral hearing, as required by article 6 of the European Convention. He submitted that dismissal from service was such a severe disciplinary sanction that it came within the scope of Article 6 of the European Convention and warranted a right to be heard in person. The author asked the Court to hold an oral hearing, arguing that, in the absence of such hearing, he would be deprived of an opportunity to present his defence.

2.21 On 31 January 2001, the High Administrative Court dismissed the appeal. Based on the assumption that the author's competencies in the GAO included auditing "construction projects in the area of roads and railroads," it concluded that his private business activities were closely related to his official duties as an auditor. By reference to the judgement of the European Court of Human Rights in *Pellegrin v. France*, the Court rejected his request for an oral hearing,

observing that article 6 of the European Convention was inapplicable, given that the author was a civil servant exercising competencies of a public-law character. On 5 June 2001, the author requested the High Administrative Court to review its judgement and challenged the members of the Senate that had decided his case for bias. On 22 January 2002, a differently constituted Court rejected the challenge.

2.22 On 31 December 2002, the author asked the High Administrative Court to reopen the proceedings concerning his suspension and dismissal, claiming procedural irregularities and a violation of his right to an oral hearing. On 27 February 2003, the Court rejected the request to reopen the proceedings concerning his suspension, arguing that the author had sufficient opportunity to submit his arguments in writing and that there was no duty to hear him as a party or to ask him for further written observations. On 27 March 2003, it rejected his request to reopen the proceedings concerning his dismissal, for the same reasons.

2.23 On 1 January 2000,<sup>3</sup> 12 December 2000 and 13 March 2001,<sup>4</sup> and 4 March 2002,<sup>5</sup> the author submitted complaints to the European Court of Human Rights, alleging breaches of his rights under article 6 of the European Convention on Human Rights, in particular his right to a fair trial within a reasonable period of time. The Court joined several of these applications and rejected them as inadmissible *ratione materiae*,<sup>6</sup> by reference to *Pellegrin v. France*.<sup>7</sup>

### **The complaint**

3.1 The author claims that the composition and lack of independence of the Disciplinary Commission, the rejection of his repeated requests for an oral hearing before the Disciplinary Commission, the Disciplinary Appeals Commission and the High Administrative Court, the lack of publicity of the proceedings before the Disciplinary Commission and the Disciplinary Appeals Commission, and the long delays in the proceedings before the High Administrative Court, as well as between the filing of the disciplinary complaint and the initiation of disciplinary proceedings, violated his rights under article 14, paragraph 1, read alone as well as in conjunction with article 2, paragraph 1, and article 26 of the Covenant.

3.2 The author submits that the members of the Disciplinary Commission trying his case were neither independent nor impartial. Pursuant to Section 98 (2) of the Federal Civil Servants Act, members of disciplinary commissions must belong to the same government department as the accused. Although Section 102 (2) of the Act provides that commission members are “independent, while performing their duties,” the author considers this presumption a mere fiction, since: (a) the members of the Disciplinary Commission trying his case continued to serve as civil servants under the authority of the President of the GAO and continued to be bound by

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<sup>3</sup> Application No. 57822/00

<sup>4</sup> Application No. 73230/01

<sup>5</sup> Application No. 13874/02

<sup>6</sup> See European Court of Human Rights, decision on admissibility (Application No. 73230/01), dated 26 February 2002; decision on admissibility (Application No. 13874/02), dated 27 June 2002.

<sup>7</sup> European Court of Human Rights, judgment of 8 December 1999, *Pellegrin v. France* (Application No. 28541/95), 1999-VIII Reports, at para. 67.



his orders, save in matters related to the disciplinary proceedings; (b) they were colleagues on the same career track as the author, competed with him for promotions and regularly interacted with him professionally; (c) they were potentially exposed to the internal politics within the GAO and to pressure from the very persons who had initiated the disciplinary proceedings against him.

3.3 The author submits that the chairperson of the Disciplinary Commission was biased against him, as head of the section in the GAO that audits public railroad companies, given the author's criticism of the practice of purchasing overpriced soundproofing walls, while ignoring alternative solutions such as his invention. One of the projects for which "Econtract" had submitted a bid, concerned the soundproofing of a rail track operated by the public railroad company that P. S. had audited. He criticizes that, although he challenged P. S. "at the very beginning of the hearings" and in his initial complaint to the Disciplinary Commission and the Constitutional Court against the order dated 20 May 1997 of the Disciplinary Commission scheduling a disciplinary hearing, P. S. was not replaced until the very end of the proceedings, after the last formal hearing had taken place.

3.4 The author argues that the appeals bodies' failure to replace P. S. earlier in the proceedings amounts to a violation of his right to an independent and impartial tribunal, protected by article 14, paragraph 1. The fact that, unlike the general workforce, civil servants were excluded from having their case reviewed by the ordinary courts constitutes a violation of article 26.

3.5 In the author's view, the rejection of his repeated requests for an oral hearing by the Disciplinary Commission, the Disciplinary Appeals Commission and the High Administrative Court, on the ground that article 6 of the European Convention on Human Rights is inapplicable in disciplinary proceedings, violated his right to an oral hearing under article 14, paragraph 1.<sup>8</sup> Neither the Disciplinary Appeals Commission nor the High Administrative Court qualified or acted as tribunals within the meaning of article 14 in his case. While the Disciplinary Appeals Commission rejected his appeal without a hearing, the High Administrative Court's review was limited to questions of law.

3.6 The author recalls that article 14, paragraph 1, requires a number of conditions including expeditious procedure<sup>9</sup> and that unreasonable procedural delays violate that provision.<sup>10</sup> He also recalls that it took the High Administrative Court more than seven years to decide on his complaint against the decision suspending him from office, which is unreasonable delay. No action was taken by the Court between 6 February 1995, when he filed the complaint, and 17 July 2002, when the Court held its first session. No remedy was available to challenge the Court's inactivity.

3.7 The author submits that the six and a half years it took the High Administrative Court to decide on his complaint against the Disciplinary Appeals Commission's decision of 10 April 1996 rejecting his request to lift his suspension also is unreasonable delay. No action was taken

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<sup>8</sup> The author refers to Communication No. 1015/2001, *Perterer v. Austria*, at para. 9.3.

<sup>9</sup> The author refers to Communication No. 207/1986, *Yves Morael v. France*, at para. 9.3.

<sup>10</sup> The author refers to Communications No. 203/1986, *Muñoz Hermoza v. Peru*, at paras. 11.3 and 12; No. 238/1987, *Floresmilio Bolaños v. Ecuador*, at para. 8.4.

by the Court between 7 June 1996, when he filed the complaint, and 19 December 2002, when judgement was given.

3.8 For the author, the delay of two years and seven month between the filing of the disciplinary charges against him (10 October 1994) and the decision of the Disciplinary Commission scheduling a first hearing (20 May 1997) was equally unreasonable. As the accused, he was under no obligation to accelerate the proceedings against him. However, it was only after he approached members of Parliament that the Disciplinary Commission scheduled the hearing. No reasons for the delay were given during the domestic proceedings. The delay was therefore entirely attributable to the State party.

3.9 As regards his complaint against the first decree of the President of the GAO, the author recalls that it was only because, on 2 June 2000, he filed a complaint with the High Administrative Court that this decree was renewed. No procedural steps were taken by the Court between 18 October 2000, when he complained against the second decree, and 27 September 2005, when the Court repealed it.

3.10 The author claims that the overall length of disciplinary proceedings (almost 11 years) is unreasonable, given that he did everything possible to accelerate consideration of his appeals.<sup>11</sup>

3.11 Since the proceedings before the Disciplinary Commission and the Appeals Commission were held in camera, in accordance with Section 128 (1) of the Federal Civil Servants Act, and by reference to General Comment No. 13,<sup>12</sup> the author argues that there were no exceptional circumstances which would have justified excluding the public or to limit the hearings to only a particular category of persons, as the accusations against him had been published in newspapers and involved his private conduct, not official duties involving matters of sensitive and confidential nature. The restriction on the publicity of the disciplinary proceedings, combined with the absence of any hearings before the High Administrative and Constitutional Courts, deprived him of a possibility to defend himself by making his position known, thereby violating his right to a public hearing under article 14, paragraph 1.

3.12 On admissibility, the author submits that the same matter is not being, and has not been, examined under another procedure of international investigation or settlement. The European Court of Human Rights declared his applications inadmissible *ratione materiae* by reference to *Pellegrin v. France*, and thus without an examination of the substance of his complaints.<sup>13</sup>

3.13 The author claims to have exhausted all available domestic remedies. There was no remedy to challenge the composition of the Disciplinary Commission; challenging the constitutionality of Section 98 (2) of the Federal Civil Servants Act on the composition of disciplinary

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<sup>11</sup> The author refers, *mutatis mutandis*, to Communication No. 1060/2002, *Franz and Maria Deisl v. Austria*, at para. 11.6 (c).

<sup>12</sup> Human Rights Committee, 21<sup>st</sup> session (1984), General Comment No. 13: *Equality before the courts and the right to a fair and public hearing by an independent court established by law* (Art. 14), at para. 6.

<sup>13</sup> The author refers to Communications No. 158/1983, *O. F. v. Norway*, decision on admissibility adopted on 26 October 1984, at para. 5.2; No. 441/1990, *Casanovas v. France*, Views adopted on 19 July 1994, at para. 5.1.

commissions was futile in the light of the Constitutional Court's jurisprudence on the constitutionality of the establishment and composition of disciplinary authorities at the federal, provincial and municipal levels. With regard to the delays in the proceedings before the High Administrative Court, no remedies are available for challenging the Court's inactivity.

3.14 As regards the applicability of article 14, paragraph 1, to disciplinary proceedings, the author recalls that the concept of a 'suit at law' is based on the nature of the right and obligations in question rather than the status of the parties.<sup>14</sup> Accordingly, the Committee applied article 14, paragraph 1, to proceedings involving civil or public servants, whether the proceedings related to their status or not.<sup>15</sup> He also recalls the Committee's statement, in *Perterer v. Austria*, "that whenever a judicial body is entrusted with the task of deciding on the imposition of disciplinary measures, it must respect the guarantee of equality of all persons before the courts and tribunals as enshrined in article 14, paragraph 1, and the principles of impartiality, fairness and equality of arms implicit in this guarantee."<sup>16</sup>

#### **State party's observations on admissibility and merits**

4.1 On 13 April 2006, the State party challenged the admissibility of the communication, arguing that the author did not exhaust domestic remedies, that his communication is inadmissible *ratione materiae*, and that the same matter has been examined by the European Court of Human Rights. The Austrian reservation concerning article 5, paragraph 2 (a), of the Optional Protocol thus precluded the Committee from considering the author's claims.

4.2 The State party submits that the author failed to exhaust domestic remedies, insofar as he claims unreasonable length of proceedings. Under Section 73 (1) of the Code of General Administrative Procedure, authorities, including the Disciplinary Commission, were obliged to act on his requests and appeals within six months, failing which a request for transfer of jurisdiction to the higher authority can be filed under Section 73 (2). The author never filed such a request, although he was represented by counsel. According to the State party, Article 132 of the Federal Constitutional Act provided for the possibility to file a complaint regarding the inactivity of administrative authorities (hereafter "inactivity complaint") with the High Administrative Court. The author only filed one such complaint challenging the inactivity of the GAO to decide on his appeal against the decree dated 1 September 1994. The State party recalls

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<sup>14</sup> Communication No. 1060/2002, *Deisl v. Austria*, Views adopted on 27 July 2004, at para. 11.1.

<sup>15</sup> Communications No. 203/1986, *Muñoz Hermoza v. Peru*, Views adopted on 4 November 1988, at paras. 11 *et seq.*; No. 824/1998, *Nicolov v. Bulgaria*, Views adopted on 20 March 2000, at para. 8.3; No. 454/1991, *García Pons v. Spain*, Views adopted on 30 October 1995, at paras. 9.3 *et seq.*; No. 468/1991, *Bahamonde v. Equatorial Guinea*, Views adopted on 20 October 1993.

<sup>16</sup> Communication No. 1015/2001, *Perterer v. Austria*, Views adopted on 20 July 2004, at para. 9.2

that the European Court of Human Rights considered the above possibilities to expedite proceedings to be effective remedies.<sup>17</sup>

4.3 By reference to the jurisprudence of the European Court of Human Rights,<sup>18</sup> the State party argues that the disciplinary proceedings against the author fall outside the scope of article 14 of the Covenant, as they concern a dispute between an administrative authority and a member of the civil service whose function requires direct involvement in the exercise of powers and duties assigned to him under public law. Disputes concerning the recruitment, career and termination of service of civil servants only constituted a determination of one's "rights and obligations in a suit at law" within the meaning of article 14, paragraph 1, if they concerned a "purely economic right," such as payment of fees, or an "essentially economic right". This follows from the requirement in the French text of article 14, paragraph 1, that the rights and obligations to be determined must be of a civil character. The author's proceedings were not "civil" merely because they also raised an economic issue,<sup>19</sup> i.e. the financial repercussions of his dismissal. Neither did the disciplinary proceedings constitute a determination of a criminal charge against the author, in the absence of a sufficiently severe sanction which would justify the qualification of the disciplinary measure as a criminal charge. Lastly, the author contradicted himself when denying that the disciplinary authorities and the High Administrative Court are tribunals within the meaning of article 14, and at the same time invoking *Perterer v. Austria*. The State party concludes that his claims under article 14, read alone and in conjunction with articles 2 and 26, of the Covenant are inadmissible *ratione materiae*.

4.4 The State party invokes its reservation to article 5, paragraph 2 (a), on the ground that the same matter has been examined by the European Court of Human Rights. That the Court found the author's applications incompatible with the provisions of the European Convention showed that it rejected his claims on substantive rather than purely formal grounds, after at least a cursory examination of the merits. It had based its decision on article 35 (3) of the European Convention, setting out grounds of merit, rather than on article 35 (1) and (2), which contained formal grounds of inadmissibility. The author's claims are therefore inadmissible under articles 3 and 5 of the Optional Protocol, read in combination with the Austrian reservation.

5.1 On 16 August 2006, the State party commented on the merits and again challenged the admissibility of the communication for non-exhaustion of domestic remedies, lack of victim status, and inapplicability of article 14 of the Covenant. It argues that the author failed to raise his claims before the domestic courts, insofar as they relate to the absence of an oral hearing in the proceedings concerning his suspension, the composition of the Disciplinary Commission as such, and the length and lack of publicity of the proceedings. His argument that challenging the constitutionality of the composition of Disciplinary Commissions would have been futile in the

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<sup>17</sup> The State party refers to the judgments of the European Court of Human Rights on Applications No. 29800/96, *Basic v. Austria*, and No. 30160/96, *Pallanich v. Austria*, both dated 30 April 2001.

<sup>18</sup> European Court of Human Rights, Application No. 28541/95, *Pellegrin v. France*, judgement of 8 December 1999, at paras. 64 *et seq.*; No. 39564/98, *G. K. v. Austria*, judgment of 14 March 2000, *passim*.

<sup>19</sup> The State party refers to European Court of Human Rights, *Pierre-Bloch v. France*, judgment of 21 October 1997, Reports 1997-VI, at para. 51.

light of the Constitutional Court's jurisprudence was incorrect, as the decisions cited by him date back to 1956 and only dealt with formal requirements for establishing disciplinary commissions. Before the domestic organs, the author never challenged the composition of the Disciplinary Commission or of the Appeals Commission as such, but criticized only the participation of the chairman of the Disciplinary Commission, P. S., in the first and second sets of disciplinary proceedings. Rather than contesting the lack of publicity of the disciplinary proceedings, in his complaints of 21 July 2000 to the Constitutional and High Administrative Courts, he explicitly acknowledged that: "Restricting public attendance to three civil servants as persons of confidence (§ 124 (3) of the Federal Civil Servants Act) still satisfies the requirements of publicity and can be logically understood in the light of the possibility of excluding the public pursuant to article 6 (1) of the European Convention on Human Rights [...]. National security is hardly ever at stake in disciplinary proceedings, as a result of which it is not admissible to exclude the public altogether. To a lesser extent, though, the interests of the State are affected, which justify a restriction [...]."

5.2 Under Section 118 (2) of the Federal Civil Servants Act, the first set of disciplinary proceedings against the author was stayed *ex lege* by virtue of his dismissal in the second set of proceedings, the effect of which was similar to an acquittal. The author's claims concerning the first set of proceedings thus became moot. Similarly, the claim about the absence of an oral hearing in the proceedings concerning the decree prohibiting him from engaging in activities related to "Econtract" became moot following the revocation of the second decree by the High Administrative Court on 27 September 2005. The author therefore lacked victim status with regard to the above claims.

5.3 The State party argues that the author has not substantiated the following claims, for purposes of admissibility or, subsidiarily, on the merits:

- (a) He failed to substantiate that the High Administrative Court lacks the attributes of a tribunal within the meaning of article 14 of the Covenant. The Court was an independent body that dealt not only with questions of law but also with questions of fact.
- (b) He did not advance sufficient grounds for assuming that the members of the Disciplinary and Appeals Commissions lacked independence and impartiality. These requirements were ensured under the Federal Civil Servants Act, which has the rank of constitutional law and provides for important safeguards regarding the composition (participation of staff representatives, appointment of members for five years) and working methods (distribution of work one year in advance, confidentiality of deliberations and voting) of disciplinary commissions. That members belong to the same organization enabled them to take an informed decision and placed them in a better position than outsiders to evaluate charges. The confidentiality of deliberations and voting also applied vis-à-vis superiors and colleagues, thereby strengthening members' independence and impartiality.
- (c) P. S. was immediately replaced by another chairperson after he was challenged by the author. The proximity between his responsibility at the GAO and the author's invention should not give rise to doubts about impartiality, as the issue before the Disciplinary

Commission was not the author's invention itself, but the compatibility of his activities with Article 126 of the Federal Constitutional Act.

(d) As reflected in the 1200-page verbatim record, in the first set of disciplinary proceedings, an oral hearing was conducted for 26 days with a new chairman and in the presence of the author, his lawyer and two persons of confidence nominated by him.

(e) There was no need for an oral hearing in the second set of disciplinary proceedings, as the disciplinary authorities were bound by the facts established by final judgment of the Regional Criminal Court of Vienna. It was therefore possible to decide the case merely on the basis of the file, without prejudice to the principles of a fair trial. Conducting another oral hearing would only have led to delays in the proceedings. From the author's perspective that the Disciplinary Appeals Commission and the High Administrative Court were no tribunals within the meaning of article 14, these bodies would not have been required to conduct oral hearings in the first place.

(f) The length of the different and interlocked proceedings was attributable to their complexity, as reflected by the 38-page decision dated 29 November 2002 of the High Administrative Court rejecting the author's appeal against his permanent suspension. The author filed numerous complaints against individual procedural steps of the disciplinary authorities. The proceedings concerning his suspension from office, while lasting from February 1995 to November 2002, ceased to have any effect on the author as of 31 January 2001, when the High Administrative Court upheld his dismissal from service. The total length of the proceedings (11 years) ultimately meant that the author's position improved considerably in terms of pension entitlements.

(g) It was in the interest of official secrecy and in accordance with article 14, paragraph 1, to exclude the public from the disciplinary proceedings. Article 20 (3) of the Federal Constitutional Act requires civil servants to observe secrecy "concerning all facts that have come to their knowledge exclusively on account of their official activities." The exclusion of the public also served to protect the author against undesired publicity concerning any socially inadequate acts performed by him. In accordance with Section 124 (3) of the Federal Civil Servants Act, he was entitled to nominate a maximum of three civil servants to attend the hearings as persons of confidence. The fact that he availed himself of this possibility showed that he did not have any objections against his disciplinary proceedings being conducted exclusively by civil servants.

5.4 The State party concludes that the Committee is not a "fourth instance" and that the author has not substantiated that the alleged defects in the disciplinary proceedings were manifestly arbitrary or amounted to a denial of justice.

#### **Author's comments on the State party's observations on admissibility and merits**

6.1 On 15 December 2006, the author commented, arguing that the State party overlooks that insofar as his claims of unreasonable delay relate to the proceedings before the High Administrative Court, none of the remedies for expediting proceedings were applicable. In the proceedings concerning the first decree of the President of the GAO, he did lodge an inactivity complaint. As regards the 31-month delay between the filing of the disciplinary complaint and

the initiation of the disciplinary proceedings, it would be unreasonable to expect that the author would actively participate in the conduct of disciplinary proceedings against him. He was under no duty to accelerate what amounts to his own 'indictment' after the 'prosecuting' authority had failed to act.

6.2 The author submits that Section 124 (3) of the Federal Civil Servants Act allows for challenging only one member of the senate of the disciplinary commission trying the case. Although he was restricted to only one formal challenge, which he directed against P. S., he also raised objections as to the independence and impartiality of the other members of the Disciplinary Commission, as reflected in several transcripts of closed hearings of the Commission. He thus did everything possible to make his challenge of the entire Disciplinary Commission known.

6.3 The author denies to have consented to the absence of a public hearing in his 21 July 2000 submissions to the Constitutional and High Administrative Courts (see para. 5.2 above). The passage quoted by the State party merely recited the prevailing legal opinion under domestic law – it cannot be interpreted as a waiver of his right to a public hearing.

6.4 On admissibility *ratione materiae*, the author submits that the State party's insistence on a restrictive reading of article 14, paragraph 1, in the light of the practice under the European Convention on Human Rights is contrary to the object and purpose of the Covenant and belies that the European Court of Human Rights clearly understood the temporary and imperfect nature of the Pellegrin criteria, which it considered likely to evolve into a broader concept of protection.

6.5 The author argues that the reservation to article 5, paragraph 2 (a), of the Optional Protocol is inapplicable, because the European Court of Human Rights merely considered the elements necessary to identify him as a "civil servant" under the Pellegrin standard and did not proceed to an examination of the substance of his complaint.

6.6 On the merits, the author submits that constitutional guarantees that civil servants in a dependent and subordinate position are independent during their term as member of a disciplinary commission were purely fictitious, in the absence of an actual "culture of independence." The five-year appointment of Disciplinary Commission members falls short of the judicial guarantees in place for judges, since Commission members remained under the full authority of the agency that prosecutes a disciplinary defendant and to which they return full-time once their term has ended. The participation of staff representatives in the Disciplinary Commission was no guarantee that the Commission as a whole fulfilled the minimum requirements of independence, especially since their status did not afford them any additional safeguards of independence. The fact that members of disciplinary commissions deliberate in private was irrelevant for their independence and impartiality.

6.7 The author complains that the State party extracts artificial omissions, when it considers that his claim of partiality on the part of the chairman, P. S., refers only to the first "set" of disciplinary proceedings, which was ultimately stayed, but not to the second "set" of proceedings. There was only one set of disciplinary proceedings, during which a new charge was introduced, and which was therefore conducted in two stages or parts. He challenged the chairman at both stages of the domestic proceedings and his claim under article 14, paragraph 1,

extends to both stages, as far as the lack of independence and impartiality of the chairman and commission is concerned.

6.8 The author rejects the State party's argument that there was no need for an oral hearing because the disciplinary authorities were bound by the facts established by the criminal court. The legal issue of his criminal conviction, i.e. whether he negligently caused the insolvency of his company, was different from the issue of the disciplinary proceedings, i.e. whether he managed a company in violation of Article 126 of the Federal Constitutional Act. Article 126 did not preclude staff of the GAO from holding management positions in private companies that work in areas unrelated to the auditing competencies of the GAO. The mere finding of the criminal court that the author managed "a" company was therefore insufficient to ascertain whether he managed a company within the meaning of article 126. The fact that only formal hearings were held during the first part of the disciplinary proceedings, while no hearing took place at all during the second part of the proceedings, made it impossible to evaluate the severity of the offence, the necessary level of sanction and the degree of guilt, as required by Section 93 (1) of the Federal Civil Servants Act. Similarly, the absence of an oral hearing deprived him of an opportunity to advance any mitigating circumstances, in accordance with Section 32 (2) of the Penal Code. Even assuming that the Disciplinary Commission was bound by the facts established by the criminal court, the finding of guilt and the imposition of an adequate sanction remained within its own powers, thus requiring a hearing of the author.

6.9 With respect to the length of the proceedings, the author submits that the matter was not particularly complex, nor did it require extensive investigation, as it solely related to the question of whether promoting his invention by owning and allegedly managing a company was incompatible with his function as a civil servant at the GAO. That the proceedings were complex and interlocked was a matter to be resolved by the State party by timely and effectively organizing its judicial and administrative organs. He merely defended himself against the disciplinary charges within the available procedural structure and exercised his right to appeal unfavourable decisions.

6.10 The author rejects the State party's claim that he benefited from the length of proceedings in terms of pension entitlements. Apart from the distress caused by 11 years of uncertainty about his professional status, he lost any entitlement to retirement benefits due to his dismissal from civil service.

6.11 As regards the right to a public hearing, the author argues that the public cannot *ipso facto* be excluded from all disciplinary trials against all civil servants by virtue of a blanket prohibition of publicity in the "interest of official secrecy." Whether the exclusion of the public was in conflict with his interests was irrelevant because publicity was an absolute right that needed not be claimed by a defendant by reference to specific "interests". Rather, publicity must be secured unless it can be demonstrated that the exclusion of the public was justified under article 14, paragraph 1. The State party failed to provide any such justification in his case.



## Issues and proceedings before the Committee

### Consideration of admissibility

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

7.2 With regard to the State party's *ratione materiae* objection, the Committee recalls that the concept of a "suit at law" under article 14, paragraph 1, of the Covenant is based on the nature of the right in question rather than the status of one of the parties.<sup>20</sup> The imposition of disciplinary measures against civil servants does not of itself necessarily constitute a determination of one's rights and obligations in a suit at law, nor does it, except in cases of sanctions that, regardless of their qualification in domestic law, are penal in nature, amount to a determination of a criminal charge within the meaning of the second sentence of article 14, paragraph 1.<sup>21</sup> In *Perterer v. Austria*, which also concerned the dismissal of a civil servant by a disciplinary commission, while observing that the decision on a disciplinary dismissal need not necessarily be determined by a tribunal, the Committee considered that whenever a judicial body is entrusted with the task of deciding on the imposition of disciplinary measures, it must respect the guarantee of equality of all persons before the courts, as enshrined in article 14, paragraph 1, and the principles of impartiality, fairness and equality of arms implicit in this guarantee.<sup>22</sup> In this case, the Committee notes the State party's argument that the author himself submitted that neither the Disciplinary Appeals Commission nor the High Administrative Court "qualified or acted" as tribunals within the meaning of article 14, paragraph 1. However, the Committee does not view the author's statement as a blanket denial of the judicial character of the Disciplinary Appeals Commission, nor of the High Administrative Court, but rather as an allegation that neither one of those bodies complied with the requirements of article 14, paragraph 1, in this case. Furthermore, it notes that the State party itself emphasized that the High Administrative Court was a tribunal within the meaning of article 14, paragraph 1. The Committee therefore declares the communication admissible *ratione materiae* insofar as the author claims to be a victim of violations of his rights under article 14, paragraph 1.

7.3 The State party invokes its reservation to article 5, paragraph 2 (a), of the Optional Protocol. The issue before the Committee is whether the "same matter" has already been "examined" by European Court of Human Rights. The Committee recalls its jurisprudence that the "same matter" within the meaning of article 5, paragraph 2 (a), must be understood as relating to the same author, the same facts and the same substantive rights.<sup>23</sup> As regards the length of proceedings, the author could only raise delays occurring prior to 4 March 2002, the date of submission of his last application (No. 13874/02), to the European Court of Human Rights. Any delays occurring after that date are therefore *ab initio* not covered by the State

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<sup>20</sup> See Communication No. 441/1990, *Robert Casanovas v. France*, Views adopted on 19 July 1994, at para. 5.2.

<sup>21</sup> See Communication No. 1015/2001, *Perterer v. Austria*, Views adopted on 20 July 2004, at para. 9.2.

<sup>22</sup> *Ibid.*

<sup>23</sup> See e.g. Communication 998/2001, *Althammer v. Austria*, , at para. 8.4.

party's reservation. Insofar as his claims under article 14, paragraph 1, relate to events before 4 March 2002, the issue is whether the present communication relates to the same substantive rights as the author's applications to the European Court. In its decisions of 26 February and 14 June 2002, the European Court declared his applications of 13 March 2001 (No. 73230/01) and 4 March 2002 (No. 13874/02) incompatible *ratione materiae* with article 6 of the European Convention. The Committee observes that, despite a considerable degree of convergence between article 6 of the Convention and article 14, paragraph 1, of the Covenant, the scope of application of both articles, as developed in the jurisprudence of the Court<sup>24</sup> and the Committee,<sup>25</sup> differs with respect to proceedings before judicial bodies entrusted with the task of deciding on the imposition of disciplinary measures. It recalls its jurisprudence that, if the rights invoked before the European Court of Human Rights differ in substance from the corresponding Covenant rights, a matter that has been declared inadmissible *ratione materiae* by the European Court has not, in the meaning of the respective reservations to article 5, paragraph 2 (a), been "examined" in such a way that the Committee is precluded from considering it.<sup>26</sup> It follows that the Austrian reservation does not bar the Committee from examining the author's claims under article 14, paragraph 1.

7.4 With regard to the author's claim that the absence of an oral hearing in the proceedings concerning his suspension and dismissal violated his right to a fair hearing under article 14, paragraph 1, the Committee notes his argument that only "formal" hearings were held during the first set of proceedings and that, in the second set of proceedings, the disciplinary authorities were not bound by the facts established by the Vienna Regional Criminal Court due to the different legal issues at stake in the criminal and disciplinary proceedings. In any event, he would have been given an opportunity to present any mitigating factors and his position with regard to his guilt and the sanction to be imposed on him. It notes the State party's reference to the 26-day hearing in the presence of the author and his lawyer during the first set of proceedings and its view on the binding character of the findings of the criminal court. The Committee recalls that it is generally for the courts of States parties to the Covenant to review the facts and evidence, or the application of domestic legislation, in a particular case, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice.<sup>27</sup> The author has not substantiated, for purposes of admissibility, that the decisions of the High Administrative Court of 31 January 2001, 29 November 2002 and 27 February and 27 March 2003 suffer from any such defects. The Committee concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.

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<sup>24</sup> See para. 4.3 above (with reference to European Court of Human Rights, Application No. 28541/95, *Pellegrin v. France*, judgement of 8 December 1999, at paras. 64 *et seq.*).

<sup>25</sup> See para. 6.2 above (with reference to Communication No. 1015/2001, *Perterer v. Austria*, Views adopted on 20 July 2004, at para. 9.2).

<sup>26</sup> See Communication No. 441/1990, *Casanovas v. France*, Views adopted on 19 July 1994, at para. 5.1; Communication No. 1115/2002, *Petersen v. Germany*, decision on admissibility adopted on 1 April 2004, at para. 6.6.

<sup>27</sup> Communication No. 1188/2003, *Riedl-Riedenstein et al. v. Germany*, at para. 7.3; No. 886/1999, *Bondarenko v. Belarus*, at para. 9.3; No. 1138/2002, *Arenz et al. v. Germany*, admissibility decision, at para. 8.6.

7.5 Insofar as the author claims that the absence of an oral hearing in the proceedings concerning the second decree of the President of the GAO also constitutes a violation of his right to a fair hearing under article 14, paragraph 1, the Committee recalls that the High Administrative Court revoked the decree on 27 September 2005. This claim has therefore become moot, and this part of the communication is inadmissible *ratione personae* under article 1 of the Optional Protocol.

7.6 As regards the exclusion of the public from the proceedings before the Disciplinary Commission and the Appeals Commission, the Committee notes that the author, while claiming his right to an oral hearing, did not allege violations of his right to a public hearing in his submissions to the High Administrative Court of 6 February 1995 (further appeal against suspension), 21 July 2000 (further appeal against dismissal), 18 October 2000 (appeal against the second decree of the GAO President), 31 October 2000 (request for oral hearing in the proceedings concerning the second decree) and 31 December 2002 (request to reopen the dismissal and suspension proceedings before the High Administrative Court). Nor did he do so in his complaints to the Constitutional Court. In the appeal of 21 July 2000, the author, while arguing that article 6 of the European Convention requires a public oral hearing, submitted that restricting public attendance at the oral hearing to three civil servants acting as persons of confidence of the accused still satisfies the requirements of article 6, paragraph 1, of the European Convention. While it may be that this statement reflects the predominant legal opinion in Austrian law, without constituting a waiver of the author's right to a public hearing, it is also true that the statement cannot be understood as challenging the absence of a public hearing. It follows that the author has failed to exhaust domestic remedies with regard to the alleged absence of a public hearing. This part of the communication is therefore inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

7.7 With regard to the claim that the chairman of the third Senate of the Disciplinary Commission, P. S., was not replaced until the end of the first set of the disciplinary proceedings, although he was challenged at their beginning, the Committee notes several documents which seem to prove the contrary. Thus, in a memorandum dated 3 June 1997, signed by P. S. and his successor as chairman of the third Senate of the Disciplinary Commission, H. A., it is stated that the author challenged P. S. in a letter of 30 May 1997 within the prescribed time limit; in accordance with the distribution of business of the Disciplinary Commission at the GAO, the President of the first Senate, H. A., was to substitute the President of the third Senate, P. S. In a note dated 3 June 1997, H. A. confirms that he contacted the author and his lawyer to inform them that due to his substituting the former chairman, P. S., an oral hearing scheduled for 12 June 1997 had to be postponed. A meeting of the third Senate of the Disciplinary Commission was held on 12 June 1997 to discuss procedural matters. The minutes of this meeting identify H. A. as chairperson. Similarly, the minutes of the oral hearing held on 20 October 1997 indicate H. A. as chairperson. The Committee also notes that it is uncontested that, in the second set of proceedings, P. S. was replaced after he was challenged by the author on 26 August 1999. It therefore considers that the author has failed to substantiate, for purposes of admissibility, how the alleged bias of P. S. would have affected his right under article 14, paragraph 1, to an independent and impartial tribunal, and concludes that this claim is inadmissible under article 2 of the Optional Protocol.

7.8 With regard to the alleged lack of independence and impartiality of other members of the third Senate of the Disciplinary Commission, the Committee takes note of the author's arguments that Section 124 (3) of the Federal Civil Servants Act allowed him to challenge only one member of the Senate, that he sought to make his challenge of the other members known, and that it would have been futile to challenge the constitutionality of Section 98 (2) of the Federal Civil Servants Act. It also notes that the State party's argument that the Constitutional Court decisions invoked by the author in support of his futility claim are inapplicable, as they date back to 1956 and do not address the question of whether or not civil servants who belong to the same agency as the accused can be considered independent and impartial Commission members. In this regard, the Committee recalls that, in addition to ordinary judicial and administrative appeals, authors must also avail themselves of all other judicial remedies, including constitutional complaints, to meet the requirement of exhaustion of domestic remedies.<sup>28</sup> It considers that the author has not shown that the Constitutional Court's jurisprudence invoked by him would *ab initio* have precluded any prospect of success of a complaint challenging the constitutionality of Section 98 (2) or other relevant provisions of the Federal Civil Servants Act. The author has therefore failed to exhaust domestic remedies to challenge the independence and impartiality of the Disciplinary Commission as such. This part of the communication is thus inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

7.9 Insofar as the author claims that his exclusion from any possibility to have his case reviewed by the ordinary courts, on account of his status as a civil servant, constitutes a violation of article 26 of the Covenant, the Committee notes that civil servants in many civil law jurisdictions may not have their case reviewed by ordinary courts, but by other judicial review mechanisms. This in itself cannot be considered to constitute unjustified differential treatment, and the Committee considers that the author has failed to substantiate this claim, for purposes of admissibility. Consequently, this part of the communication is inadmissible under article 2 of the Optional Protocol.

7.10 As regards the author's claim that the delay between the filing (10 October 1994) of the disciplinary complaint and the Disciplinary Commission's decision (20 May 1997) to schedule the first disciplinary hearing violated article 14, paragraph 1, of the Covenant, the Committee notes the State party's argument that the author should have filed a complaint under Article 132 of the Federal Constitutional Act to challenge the failure of the Disciplinary Commission to schedule such a hearing. It also notes the author's reply that he was not required actively to participate in the initiation of disciplinary proceedings against himself. However, the Committee recalls that the disciplinary proceedings against the author were initiated on 11 November 1994. From this date, he could have filed an inactivity complaint with the High Administrative Court without actively participating in the initiation of disciplinary proceedings against himself. Insofar as the author argues that he could not reasonably be expected to accelerate his own "indictment" by lodging an inactivity complaint, the Committee considers that this circumstance is insufficient to absolve him from the requirement to exhaust all available remedies, given that disciplinary proceedings had already been initiated and that the adoption of the decision scheduling a first

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<sup>28</sup> Communication No. 1003/2001, *P.L. v. Germany*, decision on admissibility adopted on 22 October 2003, at para. 6.5; Communication No. 1188/2003, *Riedl-Riedenstein et al. v. Germany*, decision on admissibility adopted on 2 November 2004, at para. 7.2.

hearing was a formality. If the author now seeks to invoke the delay before the Committee, he should have provided the courts of the State party with an opportunity to remedy the alleged violation. The Committee concludes that the author has failed to exhaust all available domestic remedies. This part of the communication is therefore inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

7.11 Insofar as the author alleges that delays in the proceedings before the High Administrative Court concerning the second decree of the GAO President was unreasonable, in breach of article 14, paragraph 1, the Committee observes that the prohibition ceased to have any effects on him as of 31 January 2001, when the High Administrative Court confirmed his dismissal. By the same token, the final decisions of the High Administrative Court of 31 January 2001 and 29 November 2002 upholding the dismissal and the suspension based on Article 126 of the Federal Constitutional Act, removed any legal uncertainty about the compatibility of his private business activities with his function as a GAO auditor. The Committee considers that the author has failed to substantiate, for purposes of admissibility, that the High Administrative Court's delay in revoking the second decree on 27 September 2005 had any detrimental effects on his legal position that would amount to a violation of article 14, paragraph 1. It follows that this claim is inadmissible under article 2 of the Optional Protocol.

7.12 With regard to the delays in the proceedings before the High Administrative Court concerning the author's suspension and his request to lift the suspension, the Committee has taken note of the State party's argument that these proceedings ceased to have any effect on the author from 31 January 2001, when his dismissal became final. It nevertheless considers that, even if one substracts the duration of the proceedings following this date, the author has advanced sufficient arguments to substantiate, for purposes of admissibility, that the remaining delays were unreasonable. It also recalls that the author has argued that no remedies were available to him for challenging the inactivity of the High Administrative Court. This appears to be correct, as Article 132 of the Federal Constitutional Act invoked by the State party does not apply to the High Administrative Court. The Committee concludes that the communication is admissible, insofar as the author claims that the delays in the proceedings before the High Administrative Court concerning his suspension and his request to lift the suspension, as well as the overall length of the proceedings, raise issues under article 14, paragraph 1.

### **Consideration of the merits**

8.1 The Committee recalls that the right to a fair hearing under article 14, paragraph 1, entails a number of requirements, including the condition that the procedure before the national tribunals must be conducted expeditiously.<sup>29</sup> This guarantee relates to all stages of the proceedings, including the time until the final appeal judgement. Whether a delay is unreasonable must be assessed in the light of the circumstances of each case, taking into account, *inter alia*, the complexity of the case, the conduct of the parties, the manner in which the case

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<sup>29</sup> See Communication No. 1015/2001, *Perterer v. Austria*, Views adopted on 20 July 2004, at para. 10.7.

was dealt with by the administrative and judicial authorities, and any detrimental effects that the delay may have had on the legal position of the complainant.<sup>30</sup>

8.2 In assessing the reasonableness of the delay between 6 February 1995, when the author appealed his suspension to the High Administrative Court, and 29 November 2002, when the High Administrative Court upheld the suspension of the author, the Committee takes into consideration the author's uncontested argument that the High Administrative Court took no procedural action whatsoever during the entire period in question, during which his salary was reduced by one third. Even assuming that the thoroughness of the High Administrative Court's judgment of 29 November 2002 indicates the complexity of the case, the Committee does not consider that this circumstance justifies a delay of more than seven and a half years, during which, up to the date of his dismissal on 31 January 2001, the author was subjected to a salary reduction and to the legal uncertainty about his professional situation. The Committee concludes that the delay in the proceedings before the High Administrative Court concerning the author's suspension was unreasonable and in breach of article 14, paragraph 1, of the Covenant.

8.3 In the light of the foregoing, the Committee need not consider whether the delays in the proceedings before the High Administrative Court concerning the author's request to lift his suspension, as well as the overall length of the proceedings, reveal violations of article 14, paragraph 1.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of article 14, paragraph 1, of the International Covenant on Civil and Political Rights.

10. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including appropriate compensation. The State party is under an obligation to prevent similar violations in the future.

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

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

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<sup>30</sup> See Communication No. 1060/2002, *Deisl v. Austria*, Views adopted on 27 July 2004, at paras. 11.3-11.6.

## APPENDIX

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

1.1 The International Covenant on Civil and Political Rights was the work product of States parties, but also of several prominent individuals. Among them was Mrs. Eleanor Roosevelt, widely admired as a social reformer and as the widow of a wartime president. Alongside her ambition for supporting democracy and civil rights, Mrs. Roosevelt had a practical sense of what can be accomplished at an international level in the enhancement of human rights.

1.2 In its proposed reading of Article 14 of the Covenant, the Human Rights Committee should not ignore Mrs. Roosevelt's words of caution. Indeed, as a matter of law, her words constitute a central part of the treaty negotiating record, and have juridical significance. In an era when administrative agencies were already beginning to assume broad tasks of governance, Mrs. Roosevelt cautioned that the Covenant and its implementing committee could not become a venue for supervising every regulatory agency and administrative decision. The language of Article 14 was shaped by her to that end, and the Committee cannot neglect this negotiating history except at peril to its larger vocation of addressing serious wrongs.

1.3 In this case, an Austrian civil servant named Wolfgang Lederbauer has complained to the United Nations Human Rights Committee about the process by which he was suspended and dismissed from his post with the General Audit Office of his national government. The cause of his suspension was the rather evident conflict between his public work as an auditor in an agency that investigated the national railway administration, and his private economic activities in seeking to sell a particular form of soundproofing for highways and railroads. Despite his public responsibility as an auditor, Mr. Lederbauer went so far as to intervene with a parliamentary leader to promote his product as an alternative for soundproofing highways. He did so despite the flat prohibition of Article 126 of the Austrian Federal Constitutional Act that members of the General Audit Office could not "participate in the management and administration of any ... enterprises operating for profit."

1.4 Mr. Lederbauer was suspended from his job as an auditor on the basis of this violation of Article 126. Subsequently, he was also convicted in an Austrian regional criminal court for "negligently causing the insolvency of a company" and was sentenced to a suspended prison term of five months. After his criminal appeal was denied, the Disciplinary Commission of the Austrian civil service formally dismissed him from his position as auditor, finding that it "was obliged to adhere to the legally binding findings of fact of a criminal court."

1.5 Mr. Lederbauer has since complained to the Human Rights Committee about a host of procedural issues relating to his suspension and discharge. The Committee has elaborated an intricate 22 page opinion that reviews the thrusts and parries of his quarrel with the Austrian civil service, on purely procedural grounds.

1.6 The Committee dismisses all of the author's complaints, except for one. Namely, the Committee finds that there was undue delay in resolving one of the author's five appeals to the High Administrative Court of Austria. The author appealed his order of suspension on 6 February 1995, and the final decision of the High Administrative Court was not rendered until 29

November 2002. The order of suspension was rendered moot, of course, once the author was formally dismissed as a civil servant, and this dismissal was affirmed by the High Administrative Court on 31 January 2001. The Committee concludes that this interval was an “unreasonable” delay and that the author is to be awarded an “appropriate remedy, including appropriate compensation.” See Views of the Committee, paragraphs 8.1, 8.2, and 10.

1.7 Though the High Administrative Court did allow the case to lie upon its docket for a long interval, the finding of actionable delay is rather doubtful against a factual background in which the author was making repeated and conspicuous attempts to impede and revisit every decision reached in his suspension and discharge. At various points in time, the author filed five separate appeals to the High Administrative Court, three appeals to the Constitutional Court, and five appeals to the Disciplinary Appeals Commission. This is over and above the several proceedings before the Austrian Disciplinary Commission. If anything, the time taken and confusion engendered by overlapping proceedings may stand as an indication of the hazards of permitting the interlocutory appeal of each interim decision. In the interval before he addressed himself to the United Nations Human Rights Committee, the author and his counsel also brought four separate complaints to the European Court of Human Rights, which dismissed each complaint as falling outside the scope of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

1.8 In the particular interval said to constitute a violation of the Covenant, in the duration of the appeal before the High Administrative Court from 6 February 1995 to 29 November 2002, or more properly, 31 January 2001, it is also noteworthy that some of the time was consumed by the criminal prosecution pending against Mr. Lederbauer. An appellate court might reasonably wish to await the conclusion of a criminal case before proceeding on a related civil matter.

1.9 In assessing this interval, there is one other point of particular note. Despite an active, indeed swashbuckling, style of litigation, Mr. Lederbauer and his counsel never requested that the High Administrative Court expedite its decision, or even sent a letter of inquiry to the Court. The State party has informed the Committee that Article 132 of the Federal Constitutional Act would have been available as a formal legal remedy to demand a speedy decision from the High Administrative Court. This representation by the State party is discounted by the Committee without reference to any written authority on Austrian administrative law. But regardless of the applicability of Article 132, there is no persuasive ground to find “unreasonable” delay under the Covenant when neither the author nor his counsel ever lifted a pen or pencil to write a letter to the clerk of the High Administrative Court to request delivery of an expedited decision.<sup>31</sup> Especially in the confusion of their many overlapping proceedings, some burden properly rests on the litigants to untangle the web.

2. There is, however, a far more important set of issues that needs to be soberly assessed by the Human Rights Committee, if not in this case, then in the future. This includes the intended scope of the Covenant and its problematic application to administrative agencies and administrative processes, where a matter has not been brought to court. In addition, there is the unavoidable issue of how to allocate the limited material resources of this Committee in the face

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<sup>31</sup> Compare *Casanovas v. France*, no. 441/1990, 19 July 1994, at para. 2.2 (six requests to Administrative Tribunal for expedited proceedings).



of serious situations of human rights abuse around the world. It is doubtful that the framers of the Covenant intended that the Committee should sit in review of the thousands, indeed hundreds of thousands, of routine administrative law decisions taken annually around the globe, especially where the meeting time of the Committee permits the consideration of perhaps 100 communications per year. The Committee has not yet approached how it could adapt its methods of work to accommodate a flood of administrative law cases, in a way that would not divert scarce resources from its most important work. At a minimum, it might require crafting a means to decide communications in a fashion that takes account of the relative importance of the issue at stake. The Committee has not yet seen a plethora of administrative law appeals, but it has embarked down a path in a scattered series of cases that may lead to that result, perhaps without taking full account of the problems inherent in the jurisprudence, and indeed the tension that exists in both the language and negotiating history of the Covenant.

3.1 One should, for initial instruction, revert to the language of the Covenant. The wording of the Covenant varies in its several treaty languages, and each is an authentic text, thus posing a particular challenge. The variations signal not only the problems of translation, but the differences in how legal systems conceptualize civil and private rights. In the English language text of the Covenant, Article 14(1) states in its first sentence that “All persons shall be equal before the courts and tribunals.” Article 14(1) thereafter states in its second sentence that “In the determination of any criminal charge against him, or *of his rights and obligations in a suit at law*, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” (Emphasis added). There is an evident and important difference between the textual provisions applied in Article 14 to criminal charges and to “suits at law”. Only in criminal cases, is there any explicit language that regulates the issue of delay and prompt adjudication. Article 14(3) (c) directly guarantees the right of a criminal defendant “To be tried without undue delay.” In civil cases, to deduce a similar rule requires finding that time limits are implicit in the idea of a ‘fair’ hearing or ‘competent’ tribunal. This difference in language may have consequences, certainly as to the egregiousness of delay required before a matter is actionable.

3.2 In addition, there is the question of what constitutes a “suit at law”. This is a phrase missing from the French text, which speaks instead of “*contestations sur ses droits et obligations de caractère civil*.”<sup>32</sup> The French text, like the Spanish, may seem to turn more directly upon the nature of the right rather than the forum of its adjudication, though one should also recall that the forms of action at English common law were not endless in their variation. It is noteworthy that the phrase “*contestations sur ses droits et obligations de caractère civil*” was also adopted in the European Convention for the Protection of Human Rights and Fundamental Freedoms. In that setting, in the well-known case of *Pellegrin v. France*, the European Court of Human Rights has ruled that the phrase “*caractère civil*” does not include issues of employment law pertaining to public servants who exercise a portion of the state’s sovereign power, as for example, the police. See *Pellegrin v. France*, *Cour européenne des Droits de l’Homme*, 8 décembre 1999, *Rec. 1999-VIII*, no. 28541/95.

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<sup>32</sup> The Spanish text of the International Covenant on Civil and Political Rights speaks similarly of “la determinación de sus derechos u obligaciones de carácter civil.”

3.3 Though the Human Rights Committee has not adverted to the *Pellegrin* case in its recent decisions, it is noteworthy that in the seminal case of *Y.L. v. Canada*, No. 112/1981, 8 April 1986, the Committee sounded a similar note. In *Y.L. v. Canada*, the Committee suggested that the application of Article 14(1) in non-criminal cases would depend either on the nature of the right or on the particular forum. The scope of Article 14(1) in non-criminal matters was arguably limited to civil law issues, rather than public law, and matters heard in a “court” or “tribunal.”<sup>33</sup> The Committee often quotes the test from *Y.L. v. Canada* in a more abbreviated form, noting that it is the nature of the right, rather than the status of the parties, that is important. But it is well to remember that the nature of the right was not seen as a trivial question in the original formulation. Rather, in the formulation of *Y.L. v. Canada*, there may be governmental decisions not amenable to review under Article 14(1) of the Covenant, because of that article’s limited scope.<sup>34</sup>

4.1 In considering that there may be issues of administrative law not amenable to review in this Committee, the negotiating history of Article 14 is especially telling.<sup>35</sup> The original treaty text proposed in the Human Rights Commission in 1947 in a Secretariat draft would have guaranteed individuals in non-criminal cases “access to independent and impartial tribunals for the determination of rights and duties under the law” with a “right to consult with and to be represented by counsel.” See E/CN.4/21 annex A (Secretariat), art. 27.

4.2 The United States representative initially offered a proposal that was similar – to guarantee that “Every person has the right to have any civil claims or liabilities determined without undue

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<sup>33</sup> See *Y.L. v. Canada*, No. 112/1981, 8 April 1986, at para. 5 (“The Working Group of the Human Rights Committee ... considered that the decision [on admissibility] might require a finding as to whether the claim which the author pursued, in the last instance before the Pension Review Board was a ‘suit at law’ within the meaning of article 14 paragraph 1, of the Covenant. The Working Group of the Committee therefore requested the author and the State party to respond to the best of their abilities, to the following questions: (a) How does Canadian domestic law classify the relationship between a member of the Army and the Canadian State? Are the rights and obligations deriving from such a relationship considered to be civil rights and obligations *or* rights and obligations under public law? (b) Are there different categories of civil servants? Does Canada make a distinction between a statutory regime (under public law) and a contractual regime (under civil law)?” (Emphasis added).

<sup>34</sup> See *Y.L. v. Canada*, No. 112/1981, 8 April 1986, at para. 9.2 (“The travaux préparatoires do not resolve the apparent discrepancy in the various language texts. In the view of the Committee, the concept of a ‘suit at law’ or its equivalent in the other language texts is based on the nature of the right in question rather than on the status of one of the parties (government, parastatal or autonomous statutory entities), or else on the particular forum in which individual legal systems may provide that the right in question is to be adjudicated upon, especially in common law systems where there is no inherent difference between public law and private law, and where the courts normally exercise control over the proceedings either at first instance or on appeal specifically provided by statute or else by way of judicial review.”).

<sup>35</sup> For an introduction to the negotiating history of the Covenant, see Marc J. Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights* (Martinus Nijhoff Publishers 1987). It is striking, however, that in a setting of active jurisprudence, there has been no publication of the full *travaux*.

delay by a competent and impartial tribunal, before which he has the opportunity for a fair hearing, and has the right to consult with and to be represented by counsel.” See E/CN.4/21 annex C, art. 10, and E/CN.4/AC.1/8 (referring to Secretariat text Article 27).

4.3 In its second session, the drafting group of the Human Rights Commission considered a third text that spoke of a Covenant right of access to a tribunal, for the resolution of civil law matters. It read: “In the determination of his rights and obligations, everyone is entitled to a fair hearing before an independent and impartial tribunal and to the aid of counsel.” See E/CN.4/37 (USA), Art.10.

4.4 But then, on June 1, 1949, the American representative Mrs. Eleanor Roosevelt warned that the Covenant guarantee of a hearing before an independent and impartial tribunal might be too broad, if it were applied to all “rights or obligations”. Mrs. Roosevelt recast and limited the text to refer only to “civil suits” instead of “rights and obligations.” See E/CN.4/253. Mrs. Roosevelt explained the reason for the change in stark terms:

“The reason for that was that many civil rights and obligations, such as those connected with military service and taxation, were generally determined by administrative officers rather than by courts; the original text, on the other hand, appeared to suggest that all such rights and obligations must necessarily be determined by an independent and impartial tribunal. The United States amendment would obviate such an interpretation.” (E/CN.4/SR 107, pp. 2-3) (emphasis added).

Mrs. Roosevelt’s change was apparently intended to preserve the role of administrative processes in which the decision-maker might be part of an executive branch and not meet strict requirements of independence and impartiality.

4.5 In response, the French representative, the distinguished statesman René Cassin, proposed striking the word “civil” from the phrase “civil rights and obligations” -- on a ground that would have *broadened* the guarantee in its substantive coverage -- for the word “civil” did “not include fiscal, administrative and military questions, in which matters it was possible to appeal, in the final instance, to court.” E/CN.4/SR107, p. 6.

4.6 The Egyptian representative, Mr. Omar Loutfi, agreed that “civil” was “too narrow in that it did not include matters dealing with taxation or military service, for instance.” E/CN.4/SR107, p. 7. Mr. Karim Azkoul of Lebanon also offered the same view. See E/CN.4/SR107, p. 8.

4.7 In subsequent deliberations, on June 2, 1949, the Danish representative Dr. Max Sorensen expressed the concern that the proposal that “everyone should have the right to have a tribunal determine his rights and obligations” was “much too broad in scope; it would tend to submit to judicial decision any action taken by administrative organs exercising discretionary power conferred on them by law. He appreciated that the individual should be ensured protection against any abuse of power by administrative organs but the question was extremely delicate and it was doubtful whether the Commission could settle it there and then.” See E/CN.4/SR109, at p. 3.

4.8 The Guatemalan representative, Mr. Carlos Garcia Bauer, echoed the concern adverted to by France, Egypt, and Lebanon “that civil suits did not cover all the cases contemplated ... for example, commercial and labour questions.” See E/CN.4/SR109, at p. 7.

4.9 Mrs. Roosevelt entered the colloquy again, and did not express any opposition to striking the word “civil.” In seeming response to the concern that all administrative actions would be automatically regulated by the strictures of the Covenant, or that administrative discretion would be lost, she noted that the insertion of the words “in a suit at law” was “to emphasize the fact that appealing to a tribunal was an act of a judicial nature.” See E/CN.4/SR 109, at 8. In other words, it was the appeal to a tribunal, not the underlying matter, which constituted a suit at law. The coverage of the Covenant was limited to cases where a right or obligation was tried or reviewed in a court or tribunal.

4.10 Finally, on June 2, 1949, the French representative René Cassin offered a change that built on Mrs. Roosevelt’s language, stating that:

“The Danish representative’s statement had convinced him that it was very difficult to settle in that article all questions concerning the exercise of justice in the relationships between individuals and governments. He was therefore prepared to let the words “or of his rights and obligations” ... be replaced by the expression “or of his rights and obligations in a suit at law.” (See E/CN.4/SR 109, p. 9.)

4.11 Thus, the word “civil” was dropped in the English language version, and the reach of Article 14(1) in administrative matters was seemingly limited to the ultimate stage of appeal to a judicial tribunal. This was incorporated in the text offered and approved on 2 June 1949 (see E/CN.4/286, and E/CN.4/SR.110, p. 5).

4.12 The Yugoslav representative Mr. Jeremovic later reiterated the view that there should be no implication that all civil matters had to be heard by an independent tribunal. Issues such as “infringement of traffic regulations” were “usually considered within the jurisdiction of the police or similar authorities and were dealt with as matters of administrative procedure.” See E/CN.4/SR.155 Part II, p. 5. A later Philippines proposal for deletion of the phrase “suit at law” was defeated by 11 votes to 1, with one abstention. See E/CN.4/SR.155 Part II, p. 8.

4.13 This preliminary survey of a complicated negotiating history is offered on the premise that the Committee, in its construction of the meaning of Article 14, should have reference not merely to its own view of desirable practice, but also to what the States parties at the time thought they were enacting. This does not deny the possibility of a ‘progressive development’ of the law and it is not a simplistic ‘founder’s syndrome.’ But it does mark the claim that the Committee may wish to pay heed to the negotiating history of a complicated text, as an important starting place in its construction of the Covenant. The expectations of States parties when they ratify a Covenant certainly deserve some weight.

4.14 In the context of the present case, the negotiating history of the Covenant offers little support to the view that there is any strict time limit on an overall administrative process, or that

any stage other than the appeal to a court is covered within the ambit of Article 14(1).<sup>36</sup> In using factually specific grounds as the basis for dismissing a variety of claims advanced by Mr. Lederbauer, one assumes that the Committee does not mean to alter this important distinction.<sup>37</sup> In addition, one also hesitates to permit the inference that every time a State party seeks to assure independence and impartiality in an administrative organ, that this automatically converts the organ into a court or tribunal within the meaning of the Covenant.<sup>38</sup>

5.1 Finally, it may be worthwhile to review several nuances of the Committee's decisions under Article 14 in administrative law settings. This halting and occasional line of cases cautions against any facile belief that the Committee can sit as a fourth instance body in reviewing innumerable matters of administrative process.

5.2 The first major case, *Y.L. v. Canada*, No. 112/1981, submitted on 7 December 1981 and decided on 8 April 1986, *supra*, concerned the challenge mounted by a Canadian soldier dismissed from the army for alleged mental disorders. His appeal was heard and denied in proceedings before the Canadian Pension Commission, Entitlement Board, and Pension Review Board. The complainant argued that the Canadian Pension Review Board was not independent and impartial and lacked fair process. The State party defended on the claim that the proceedings before the Pension Review Board were not a "suit at law" within the meaning of the Covenant and that, in any event, the soldier could have challenged the results before the Federal Court of Appeal.

5.3 As noted above, the working group of the Committee concluded in its discussion of admissibility that it might be important to determine whether the service member's rights and obligations were considered to be "civil rights and obligations" or instead as "rights and obligations under public law". See Views of the Committee, *Y.L. v. Canada*, No. 112/1981, at paragraph 5. This is the distinction that the European Court of Human Rights later found to be central under Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, in the *Pellegrin* case. The majority of the United Nations Human Rights Committee further observed that "it is correct to state" that the guarantees of the second sentence of Article 14(1) "*are limited to criminal proceedings and to any 'suit at law.'*" Views of the Committee, *Y.L. v. Canada*, at paragraph 9.1 (emphasis added).

5.4 Ultimately, the majority of the Committee disposed of the case by observing that the author had had a further review available to him in the Canadian Federal Court of Appeal. In its characterization of the scope of Article 14(1), the Committee adopted a two-part test that draws upon the equal authentic texts of the several languages of the Covenant. We ought not to forget its second part.

5.5 The Committee stated:

"In the view of the Committee, the concept of a 'suit at law' or its equivalent in the other language texts is based on the nature of the right in question rather than on the

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<sup>36</sup> Compare Bernhard Graefrath, *Menschenrechte und internationale Kooperation, 10Jahre Praxis des Internationalen Menschenrechtskomitees*, Berlin 1998, at p. 202.

<sup>37</sup> See Views of the Committee, paragraphs 7.4, 7.5 and 7.6.

<sup>38</sup> See Views of the Committee, paragraphs 5.2, 7.3, and 7.7.

status of one of the parties (governmental, parastatal or autonomous statutory entities), *or else* on the particular forum in which individual legal systems may provide that the right in question is to be adjudicated upon, especially in common law systems where there is no inherent difference between public law and private law, and where the courts normally exercise control over the proceedings either at first instance or on appeal specifically provided by statute or else by way of judicial review.”

See Views of the Committee, *Y.L. v. Canada*, No. 112/1981, at Paragraph, 9.2 (emphasis added).

5.6 The first prong seemingly adverts to a distinction between private rights and public rights. The second prong seems to permit (as well as limit) the Covenant’s further extension to adjudications in judicial forums where a particular state system may allow review of a broader portfolio of rights. The majority ultimately concluded that the author’s failure to take an appeal to the Canadian Federal Court of Appeal precluded any violation.

5.7 Three members of the Human Rights Committee went further and stated in *Y.L. v. Canada* that the Covenant did not apply to the dispute of the soldier, for two reasons. These reasons are the nature of the right, and the forum of the decision. First, in Canada, “the relationship between a soldier, whether in active service or retired, and the Crown has many specific features differing essentially from a labour contract under Canadian law.” Individual Opinion of Bernhard Graefrath, Fausto Pocar, and Christian Tomuschat, concerning the admissibility of communication no. 112/1981, *Y.L. v. Canada*, at paragraph 3. Second, the Pension Review Board, said the concurring members, “is an administrative body functioning within the executive branch of the Government of Canada, lacking the quality of a court.” Thus, said the concurring members, “[n]either of the two criteria which would appear to determine conjunctively the scope of article 14, paragraph 1, of the Covenant is met.”

5.8 In the next major case, *Casanovas v. France*, No. 41/1990, decided 7 July 1993, a complaint was brought by the former head of the fire brigade of the city of Nancy, France, who had been dismissed for alleged incompetence. The *Tribunal Administratif* granted the fire chief’s appeal and reinstated him. However, a second proceeding against the fire chief led again to his dismissal. This time, the *Tribunal Administratif* closed a preliminary inquiry and declined to move the matter up on the calendar, citing other cases that dated from four years prior. The European Commission of Human Rights in the meantime ruled the fire chief’s complaint to be inadmissible under the European Convention for the Protection of Human Rights and Fundamental Freedoms because the Convention “does not cover procedures governing the dismissal of civil servants.” See Views of the Committee, *Casanovas v. France*, at para. 2.5.

5.9 In the proceeding before the United Nations Human Rights Committee, France noted that the European Commission had been faced with identical treaty language under the European Convention, and argued that the Committee should construe the Covenant’s category of “caractère civile” in a parallel way. France also argued that Article 14(1) had no provision imposing time limits in non-criminal matters.

5.10 Curiously, the Committee examined only the first prong of the test from *Y.L. v. Canada*, finding that the appropriate measure was “the nature of the right in question rather than on the

status of one of the parties.” Views of the Committee, *Casanovas v. France*, No. 441/1990, 7 July 1993, para. 5.3. In its review of admissibility, the Committee offered no reason for its conclusion that the employment relationship of a French fire chief to a municipality should be construed in a different fashion than the relationship of a Canadian soldier to his national government. The Committee later concluded, in a separate ruling on the merits, that the French Administrative Tribunal’s delay of two years and nine months in deciding the case was not a violation of Article 14(1), in part because the “Tribunal did consider whether the author’s case should have priority over other cases.” Views of the Committee, *Casanovas v. France*, No. 441/1990, 19 July 1994, at paragraph 7.4.

5.11 Subsequently, the Human Rights Committee again examined the application of Article 14 in *Nicolov v. Bulgaria*, No. 824/1998, filed 14 January 1997, and decided 24 March 2000. The Committee found to be unsubstantiated the claim of a district attorney that he had been forced out of office in violation of the Covenant. The High Judicial Council of Bulgaria ordered the dismissal, and the action was affirmed by the Bulgarian Supreme Court. The UN Human Rights Committee found that the High Judicial Council was a mere “administrative body”, see Views at paragraph 2.1, footnote 1, and the author’s claim that Council members were biased against him was dismissed as “not ... substantiated”, without any explanation as to whether an administrative body as such could be bound by the requirements of Article 14(1). The basis for challenging the dismissal might have rested on a claim that the review procedure of the Supreme Court of Bulgaria was itself amenable to Committee scrutiny, since the court was indisputably a judicial body covered by Article 14.

5.12 One should also note a fourth case of *Franz and Maria Deisl v. Austria*, No. 1060/2002, submitted on 17 September 2001 and decided 27 July 2004. Represented by counsel Alexander H.E. Morawa, the complainants presented an exceedingly complicated set of facts dealing with zoning law in a municipality near Salzburg, including the conversion of a granary into a weekend house, and an appeal against a demolition order concerning a granary that was to be converted into a shed. The authors complained of an administrative process that “took more than 30 years”, and was met at the end by decisions of the Administrative Court and Constitutional Court delayed as long as two years and nine months. See Views of the Committee, *Deisl v. Austria*, at paragraph 3.4. Austria invoked its reservation to Article 14 of the Covenant that sought to maintain “the Austrian organisation of administrative authorities under the judicial control of the Administrative Court and the Constitutional Court.” See Views of the Committee, *id.*, at paragraph 6.4. In regard to the delays before those two courts, Austria noted that the Constitutional Court had also been faced with some 5,000 cases in regard to alien law, stemming from the conflict in the Balkans, and 11,000 complaints about minimum corporate tax.

5.13 The authors claimed that the range of rights covered by Article 14 of the International Covenant was broader than article 6(1) of the European Convention, in particular, because the word “civil” did not appear in the Covenant. Relying upon the “nature of the right” language adduced in the earlier *Y.L. v. Canada* case, but in this rather different context, the Committee opined that “the ... request for an exemption from the zoning regulations, as well as the orders to demolish their buildings, *relate to* the determination of their rights and obligations in a suit at law.” See Views of the Committee, *Deisl v. Austria*, at paragraph 11.1 (emphasis added). This broader phrase might seem to suggest that preliminary administrative decisions are also covered by the Covenant.

5.14 In addressing admissibility and the merits, the Committee noted in the *Deisl* case that article 14(1) “does not require ... that decisions are issued by [independent and impartial] tribunals at all appellate stages.” See Views of the Committee, at paragraph 10.7. But the Committee then seemingly considered tests for unreasonable delay in relation to municipal and provincial administrative authorities that were not themselves “courts” or “tribunals” under Article 14, even though there were reviewing courts in Austria that would, ultimately, review these same proceedings. The Committee also referred to “delays of the proceedings as a whole”, not restricting its gaze to the two particular judicial tribunals. See Views of the Committee, at paragraph 10.11.

5.15 Although I joined in the majority at the time, these tests widely applied would mean that the Human Rights Committee sitting in Geneva could become the arbiter of the calendar delays of all administrative agencies within 160 States parties. It is doubtful that this is what the Committee intended in *Y. L. v. Canada*, or indeed, what the drafters intended in 1949. Though no violation was sustained on the facts of *Deisl v. Austria*, the dicta of the decision potentially could open a Pandora’s Box. Though not fully comprehended at the time, similar scrutiny could bring thousands of decisions each year before the Committee. One may note, as well, that the disposition of this particular petition to the Human Rights Committee entailed a 19-page opinion and substantial deliberative time, in a matter that does not approach the moral or legal seriousness of so many other petitions presented under the Optional Protocol to the Human Rights Committee.<sup>39</sup>

5.16 And then, there is the case of *Perterer v. Austria*, No. 1015/2001, filed on 31 July 2001, and decided on 20 July 2004, in which the complainant was again a municipal official, robustly represented by counsel Alexander H.E. Morawa. As with *Lederbauer*, the complainant in *Perterer* was accused of using public resources for private purposes, and failing to attend scheduled job-related hearings on building projects. He was suspended by the Austrian Disciplinary Commission, and as in the *Lederbauer* case, challenged the qualifications of the chairman of the Disciplinary Commission senate, even seeking to bring criminal charges against him. The complainant engaged in another series of challenges that delayed the proceedings. He argued he was unfit to stand trial for medical reasons. When a new senate chairman was appointed, he newly challenged the two ordinary senate members nominated by the municipality, claiming they also lacked independence. After a remand of the matter affirmed his right to challenge those members, he launched another challenge to disqualify the new senate chairman. The initial chairman returned to conduct the proceeding, was again challenged by Perterer, and the second senate chairman then returned to conduct the proceeding. The Appeals Commission finally dismissed Perterer’s complaint that the second chairman’s brief prior service had prejudiced him. Perterer also had challenged, one might add, the composition of the Disciplinary Appeals Commission, seeking to disqualify its chairman and two members. The Austrian

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<sup>39</sup> There are certainly cases where a substantive Covenant guarantee may have procedural implications. E.g., *Pashtukhov v. Belarus*, No. 814/1998 (arbitrary dismissal of constitutional court judge by presidential decree implicates articles 14 and 25); *Munoz v. Peru*, No. 203/1986 (articles 14 and 25 violated where police officer dismissed without required statutory hearing). Cf. Manfred Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary*, 2d rev.ed., 2005, at p. 67 (relationship between Article 2 and substantive rights under the Covenant).



Administrative Court rejected Perterer's challenge to the composition and decision of the Appeals Commission. His complaint to the European Court of Human Rights was also rejected on the ground that the European Convention did not cover the matter of the discharge of civil service employees, Peterer then complained to the UN Human Rights Committee, arguing with no apparent irony that the Austrian proceedings had lasted too long. The State party argued that Article 14(1) of the International Covenant on Civil and Political Rights did not apply to disputes between administrative authorities and civil servants who exercise public powers. Upon the rationale of *Y.L. v. France*, the state party also noted that Disciplinary Commission decisions could be appealed to the Austrian Civil Service Appeals Commission and Administrative Court, and thus, that the undisputed independence and impartiality of the latter fully met the standards of Article 14.<sup>40</sup>

5.17 The Human Rights Committee concluded, however, that the State party had "conceded that the trial senate of the Disciplinary Commission was a tribunal within the meaning of article 14, paragraph 1 of the Covenant", see Views of the Committee, *Perterer v. Austria*, at paragraph 9.2, though it is open to argument whether the State party merely meant that the Commission was impartial and independent even while not constituting a tribunal. The Committee also concluded that the renewed service of the second chairman of the trial senate "raises doubts about the partial character of the trial senate," even though the Administrative Court dismissed this complaint as unfounded. The Committee acknowledged that the Administrative Court had "examined this question, [but] it only did so summarily." See Views of the Committee, *Perterer v. Austria*, at paragraph 10.4. And finally, the Human Rights Committee found that the 57 months consumed in the administrative proceedings was excessive, because part of the time was taken in the appeal of decisions that were later reversed. See Views of the Committee, *Perterer v. Austria*, at paragraph 10.7. Although these Views occasioned no dissents, one may question in retrospect, with a longer view of the case law, whether this type of detailed reproval of the national administrative law of a particular state system can constitute the kind of violation that the drafters of Article 14 meant to reach. Certainly, the substantial delay of 57 months seems less surprising against a background in which the complainant tried to disqualify every reviewing official involved in his case. It would also be surprising to conclude, as a general matter, that the reversal of a good faith error in a lower body necessarily means that unreasonable time has been taken. In setting standards for acceptable delay, this Committee has a responsibility to take account of the challenges faced by national reviewing bodies in light of their calendars. Standard setters may wish to recall the unavoidable and lengthy delays that even this Committee has occasionally faced in its own work.

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<sup>40</sup> *Accord* I.P. v. Finland, No. 450/1991, decided 26 July 1993, at para. 6.2 (inadmissibility of Article 14 challenge to administrative procedure of tax authorities, noting that "whether matters relating to the imposition of taxes are or are not 'rights or obligations in a suit at law' does not have to be determined, because in any case the author was not denied the right to have his claims concerning the decision by the Tax Office heard before an independent tribunal."). The Human Rights Committee's reversion in this later case to the test of *Y.L. v. France* case may have important lessons for our jurisprudence, suggesting that the availability within national law of an appeal to an impartial tribunal is sufficient, in general, to satisfy the requirements of Article 14 in regard to administrative proceedings.

6.1 Thus, these sorts of cases may properly demand a reflection upon the drafting history and preparatory record of the Covenant – if only to ascertain whether this extrusion of Article 14(1) and the accompanying use of scarce Committee time in order to govern the intricate detail of national administrative processes is in fact consistent with the profoundly important vocation of the Covenant.

6.2 The Human Rights Committee is properly protective of its jurisdiction. But this new example of a genre of routine and fact-specific administrative cases again warrants asking whether we have done justice to the treaty reservation taken by many European states in joining the Optional Protocol. Under Austria's reservation to the Optional Protocol, the Committee is precluded from reexamining a communication that presents the same "matter" previously examined by the European Court of Human Rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>41</sup> The French language text of Article 14(1) of the International Covenant is a close replica of the French language text of Article 6(1) of the European Convention in its reference to "*contestations sur ses droits et obligations de caractère civil*."<sup>42</sup> It is certainly ambitious to say that a "matter" is not covered by the reservation simply because the Committee prefers to take a different view of the merits, in contrast to the European Court. It is also worth recalling that the deliberate usage of the phrase "*droits et obligations de caractère civil*" in the language of the International Covenant was noticeably narrower than the language of the Universal Declaration of Human Rights voted by the General Assembly in 1948, which referred generally to "*droits et obligations*."<sup>43</sup> The

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<sup>41</sup> The English text of the Austrian reservation to the Optional Protocol reads as follows:

"On the understanding that, further to the provisions of article 5(2) of the Protocol, the Committee provided for in Article 28 of the Covenant shall not consider any communication from an individual unless it has been ascertained that the same matter has not been examined by the European Commission on Human Rights established by the European Convention for the Protection of Human Rights and Fundamental Freedoms."

Since the date of the Austrian reservation, the work of the European Commission on Human Rights has been taken up by the European Court of Human Rights. The reservation is appropriately read to apply to this successor body as well.

<sup>42</sup> The first sentence of Article 6(1) of the European Convention reads, in its French text, as follows: "*Toute personne a droit à ce que sa cause soit entendue équitablement, publiquement et dans un délai raisonnable, par un tribunal indépendant et impartial, établi par la loi, qui décidera, soit des contestations sur ses droits et obligations de caractère civil, soit du bien-fondé de toute accusation en matière pénale dirigée contre elle.*" (Emphasis added).

Compare Article 14(1), second sentence, in the French text of the Pacte international relatif aux droits civils et politiques: "*Toute personne a droit à ce que sa cause soit entendue équitablement et publiquement par un tribunal compétent, indépendant et impartial, établi par la loi, qui décidera soit du bien-fondé de toute accusation en matière pénale dirigée contre elle, soit des contestations sur ses droits et obligations de caractère civil.*" (Emphasis added).

<sup>43</sup> See Article 10 of the Declaration universelle des droits de l'homme, adopted by the General Assembly on 10 December 1948, which reads as follows: "*Toute personne a droit, en pleine égalité, à ce que sa cause soit entendue équitablement et publiquement par un tribunal indépendant et impartial, qui décidera, soit de ses droits et obligations, soit du bien-fondé de toute accusation en matière pénale dirigée contre elle.*" (Emphasis added).

accession of States parties to the optional protocol of the International Covenant on Civil and Political Rights is not irreversible, and some caution in the exercise of our jurisdiction may be more faithful to the purpose of the reservation.

6.3 This caution in interpretation is also warranted by the need to preserve the Committee's ability to provide effective and prompt adjudication of serious complaints, within a United Nations human rights system that has competing demands. In a concurring opinion in *Pellegrin v. France*, Judge Ferrari Bravo cautioned that the European Court of Human Rights faced "an avalanche of applications concerning the economic treatment of public servants." Professor Manfred Nowak has noted the "*problematique* of detailed procedural guarantees in international human rights treaties."<sup>44</sup> The backlog of 180,000 cases in the European Court stands as a warning to any international system that hopes to treat the serious human rights crises that arise in countries around the world.

[Signed] Ruth Wedgwood

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

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So, too, the English text differs significantly between the two instruments. Article 10 of the Universal Declaration of Human Rights reads: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." In contrast, Article 14(1), second sentence, of the International Covenant on Civil and Political Rights reads in its English text: "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

<sup>44</sup> See Manfred Nowak, *supra* note 9, at p. 306.