



# International Covenant on Civil and Political Rights

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## Human Rights Committee

### Decision adopted by the Committee under the Optional Protocol, concerning communication No. 2859/2016\*\*, \*\*\*

<i>Communication submitted by:</i>	D.V. (represented by counsel, Sladana Čanković and Goran Cvetic)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Croatia
<i>Date of communication:</i>	14 July 2016 (initial submission)
<i>Date of adoption of decision:</i>	6 April 2018
<i>Subject matter:</i>	Arbitrary detention; fair trial; ill-treatment; non-discrimination; lack of effective remedy
<i>Procedural issues:</i>	Exhaustion of domestic remedies; compatibility with the provisions of the Covenant; substantiation of claims
<i>Substantive issues:</i>	Arbitrary detention; fair trial; ill-treatment; non-discrimination
<i>Articles of the Covenant:</i>	2, 7, 9 (1) and (4), 10 (1), 14, 15 and 26
<i>Articles of the Optional Protocol:</i>	3 and 5 (2) (b)

1.1 The author of the communication is D.V., a citizen of Australia and Serbia, born on 12 December 1954. The author claims that Croatia<sup>1</sup> has violated his rights under articles 2, 7, 9 (1) and (4), 10 (1), 14, 15 and 26 of the Covenant. The Optional Protocol to the Covenant entered into force for Croatia on 12 January 1996. The author is represented by counsel, Sladana Čanković and Goran Cvetic.

1.2 The author has been charged in Croatia<sup>2</sup> for war crimes, due to the killing of Croatian prisoners of war and civilians, committed when he was a commander of a Serbian paramilitary group in the territory of Croatia in 1991 and 1993. He was arrested in Australia on the basis of an extradition request by Croatia in January 2006 and placed in detention<sup>3</sup> in

\* Reissued for technical reasons on 27 October 2022.

\*\* Adopted by the Committee at its 122nd session (12 March–6 April 2018).

\*\*\* The following members of the Committee participated in the examination of the communication: Yadh Ben Achour, Ilze Brands Kehris, Ahmed Amin Fathalla, Olivier de Frouville, Christof Heyns, Yuji Iwasawa, Ivana Jelić, Bamariam Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, José Manuel Santos Pais, Yuval Shany and Margo Waterval.

<sup>1</sup> The author has claimed that Croatia has continuously violated his rights under articles 2, 7, 9, 10, 14, 15 and 26 of the Covenant, because he has been subjected to an excessively long extradition process and pretrial investigative detention (over 10 years in total).

<sup>2</sup> The author was sought on the basis of an arrest warrant by INTERPOL.

<sup>3</sup> On the basis of a decision of the High Court of Australia.



anticipation of extradition to Croatia for prosecution. He was extradited to Croatia on 8 July 2015, after losing his thirteenth appeal in Australia, and his trial is ongoing.<sup>4</sup> The author requested that the Committee issue interim or protection measures by requesting his immediate unconditional or conditional release on bail by Croatia.

1.3 On 16 November 2016, the Committee, acting through its Special Rapporteur on new communications and interim measures, registered the case, but did not grant the author's request for interim or protection measures, given that the criminal trial for war crimes remained pending in Croatia<sup>5</sup> and that the author had not *prima facie* substantiated that he would face any reprisals or discrimination while in detention<sup>6</sup> pending the proceedings on the merits of the crimes alleged.<sup>7</sup>

### **Facts as submitted by the author**

2.1 In 1969, the author moved from Serbia, Socialist Federal Republic of Yugoslavia, to Australia, where he acquired Australian citizenship in 1975. The author returned to Yugoslavia in 1990. According to the Croatian authorities, he took part in the armed conflict in the Western Balkan region as a commander of a special purpose unit of Serbian paramilitary troops, which was involved in an armed conflict with the armed forces of Croatia in defence of the Serbian population living in the Krajina region in the territory of Croatia.

2.2 The author submits that, when he moved to Australia in 2004, he did not know of any intended criminal charges for the offences that he had reportedly committed in 1991 and 1993 in Croatia. In January 2006, Croatia<sup>8</sup> requested that Australia extradite the author to face prosecution in Croatia for charges of war crimes<sup>9</sup> that he had allegedly committed as commander of Serbian paramilitary troops in 1991 and 1993.<sup>10</sup> The author was arrested in Sydney, Australia, on 19 January 2006, pursuant to a provisional arrest warrant issued under the Australian Extradition Act of 1988, and remanded in custody in Australia on 20 January 2006. The provisions of the Act apply when no extradition treaty has been concluded between the requesting and extraditing States. The author asserts that he was not formally charged by Croatia for any allegedly committed acts until 8 January 2016, six months after his extradition to Croatia. At the time of his initial communication, the author was in prison in Split to stand trial, which commenced on 20 September 2016.

2.3 The author spent 8 years, 9 months and 10 days in extradition detention in Australian prisons, due to an extremely lengthy extradition procedure before the Australian courts. The author made three unsuccessful applications for bail, on 27 January and 3 March 2006 and 12 December 2007.

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<sup>4</sup> The author's trial began on 20 September 2016 in Split County Court.

<sup>5</sup> On 11 October 2016, the Special Rapporteur registered two cases and prepared draft decisions for the plenary to consider jointly. On 6 April 2018, the Committee decided to consider the claims raised by the author against Australia separately from those claims raised against Croatia.

<sup>6</sup> According to the information on file, the author's extradition and detention have been justified by the charges for offences against articles 120 and 122 of the Basic Penal Code of Croatia.

<sup>7</sup> On 21 September 2016, the Committee was informed that the author had sustained a heart attack on 11 August 2016 in the Split Bilice prison and been treated in hospital, which prompted the prioritization of consideration of the case, due to the author's deteriorating health.

<sup>8</sup> On 28 November 2005, the Sibenik County Public Prosecutor's office submitted a request for investigation of the author for criminal offences, which was accepted by the Sibenik County Court on 12 December 2005.

<sup>9</sup> According to the author, Croatia alleges that, during June and July 1991 in Knin, in a region predominantly populated by Serbs at the time, the author did not prevent members of the paramilitary unit who were his subordinates from mistreating captured members of the Croatian army and police and that he mistreated one such person himself. It also alleges that, in February 1993, he commanded subordinate members of the unit to interrogate, and then execute, two Croatian prisoners of war (alleged contraventions of article 122 of the Basic Penal Code of Croatia). He is further said to have commanded members of a special purpose unit and a tank unit of the Yugoslav People's Army to fire on a church and a school (alleged contraventions of article 120 of the Code).

<sup>10</sup> The extradition request reportedly did not contain the assurance that Croatia would not prosecute the person sought for other offences than those stated in the extradition request.

2.4 On 12 April 2007, the Sydney Local Court ruled that the author was eligible for extradition to Croatia. On 2 September 2009, a full bench of the Federal Court of Australia granted the author's appeal and reversed the extradition decision, on the basis that he had established a substantial or real chance of facing prejudice if he were to be sent to Croatia to stand trial. The author was released on 4 September 2009, after over three years and seven months in prison. The Government of Croatia appealed the decision before the High Court of Australia. On 30 March 2010, the Federal Court again ruled that the author was to be extradited to Croatia. On 12 May 2010, the author was again arrested by the Australian Federal Police. On 16 November 2012, the Government of Australia decided to extradite the author to Croatia. The author lodged complaints about the unlawfulness of his extradition on various grounds before the High Court of Australia, the Federal Court and before the full bench of the Federal Court, which were all rejected.<sup>11</sup> On 2 January 2015, the Minister of Justice of Serbia sent a letter to the Minister of Justice of Australia requesting that Serbia be allowed to prosecute the author, referring to its right to prosecute its own citizens and questioning the Croatian judiciary's ability to ensure a fair trial of the author. That request was also rejected.

2.5 Upon the author's extradition to Croatia on 8 July 2015, he was immediately placed in an investigative detention for more than 12 months awaiting trial, on the basis of the decision by the Sibenik County Court of 12 December 2005. All his appeals were ultimately rejected by the Constitutional Court of Croatia on 5 April 2016.

2.6 The indictment of the author of 8 January 2016 was formally confirmed on 13 June 2016, and the preparatory hearing took place on 14 July 2016. The author claims that all domestic remedies were exhausted on 5 April 2016.

### Complaint

3.1 The author claims that Croatia has violated articles 2, 7, 9 (1) and (4), 10 (1), 14, 15<sup>12</sup> and 26 of the Covenant. The author claims a continuous nature of violations of his rights by the State party.

3.2 Regarding article 9 (1) and (4), the author alleges that his rights have been violated due to the unlawful, excessively long and therefore arbitrary detention in both Australia and Croatia,<sup>13</sup> which was also in breach of his right to presumption of innocence, given that he was denied bail and the right to effectively challenge the legality of his detention, having not been tried until July 2016. He claims that his unlawful and arbitrary detention in Australia and Croatia have the same legal basis, source and purpose, namely, his prosecution in Croatia.

3.3 Regarding the claims of a violation of article 14 (1), (2) and (5), the author asserts that the examination of his detention was ill-founded in both Australia and Croatia, given that he was not notified about the correspondence between the two countries.

3.4 The author claims that Croatia has violated his rights under articles 2 (3), 7, 9 (1) and (4) and 14 (1), because he considers all the decisions of the Croatian courts on the investigative detention to be illegal, arbitrary and developed *in abstracto*. He claims that there has been no risk that he would abscond or disturb the conduct of the criminal proceedings. He further submits that the Constitutional Court did not address the alleged shortcomings, including the absence of explanation as to how he could be "on the run" while in detention in Australia, why his request for bail<sup>14</sup> was not acceptable or why an amount of bail that would be satisfactory was never set, in violation of the Code of Criminal Procedure of Croatia. The Supreme Court of Croatia, however, held that the trial court had given clear and sufficient and valid reasons to justify the need for investigative detention.<sup>15</sup> The author also claims to

<sup>11</sup> The author transmitted copies of the decisions to the Committee with his communication.

<sup>12</sup> The author does not substantiate his claims of violation of article 15.

<sup>13</sup> The author refers to *Griffith v. Australia* (CCPR/C/112/D/1973/2010), para. 7.5. In that case, the author was held for two and a half years in extradition detention by Australia.

<sup>14</sup> The author offered a bail of €700,000, which was not accepted, and the courts did not set any alternative bail amount.

<sup>15</sup> The Supreme Court held that the information on file shows that the defendant has no permanent or temporary residence in Croatia and is not affiliated with the country in any way, whether through

be a victim of discrimination under article 26 of the Covenant, because he is being held in investigative detention, due to being a foreigner who could never meet the conditions referred to by the Supreme Court.<sup>16</sup>

3.5 The author requests that he be immediately released from detention and also requests the payment of compensation by Croatia for the suffering inflicted by his unlawful and arbitrary detention, including the legal costs incurred.

### Issues and proceedings before the Committee

4.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether it is admissible under the Optional Protocol.

4.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol that the same matter is not being examined under another procedure of international investigation or settlement.

4.3 The Committee notes that the author's allegations under articles 2 (3), 7, 9 (1) and (4), 10 (1), 14, 15 and 26 of the Covenant concern mainly the author's pretrial detention owing to the courts' determination that he posed a risk of absconding and to the gravity of the criminal charges faced by the author for war crimes, the absence of the author's release on bail and the alleged discriminatory nature of placing him in detention, on the basis of his being a foreigner. In that context, the Committee takes note of the author's claim that he has never attempted to abscond. The Committee also takes note of the author's allegations that he has exhausted all available domestic remedies with regard to the articles invoked, by way of appeals against the decision of the Sibenik County Court of 12 December 2005, which authorized his investigative detention, and including a complaint lodged with the Constitutional Court of Croatia, which was rejected on 5 April 2016. In the circumstances of the present case, the Committee considers, however, that it is not in a position to review the current grounds for the author's detention in Croatia while his case remains pending a decision on the merits of criminal charges against him, taking into account that he has been detained in compliance with domestic law, as part of the relevant criminal proceedings. The Committee is generally not in a position to review facts and evidence or the application of domestic legislation in a given case made by domestic courts, unless the author of the communication can demonstrate that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice or that the courts otherwise violated their obligation of independence and impartiality.<sup>17</sup> The Committee therefore finds the author's claims inadmissible under article 5 (2) (b) of the Optional Protocol, for failure to exhaust domestic remedies, given that a decision on the merits of the criminal charges against him remains pending, and under article 3 of the Optional Protocol, as incompatible with the provisions of the Covenant, given that the author's appeals against his investigative detention were examined by the State party's courts and nothing on file suggests that the decisions of the courts were arbitrary or amounted to a denial of justice.<sup>18</sup>

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personal, family or business ties or in any other way. Given that the defendant has dual citizenship (Australia and Serbia) and that the crimes of which he is indicted carry a sentence of 20 years' imprisonment, the Court held that the author's investigative detention is lawful and legitimate, as part of the relevant criminal proceedings.

<sup>16</sup> The author argues that, as a non-Croat, he can never achieve the conditions referred above and concludes that an illegal basis for his indefinite detention by the judiciary in Croatia has been applied. He also refers to paragraph 38 of the Committee's general comment No. 35 (2014) on liberty and security of person, in which the Committee stated that the fact that a defendant was a foreigner could not be considered as sufficient to establish that he or she might flee the jurisdiction.

<sup>17</sup> See, for example, the Committee's general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 26. See also *Pillai et al. v. Canada* (CCPR/C/101/D/1763/2008), para. 11.4; and *Simms v. Jamaica* (CCPR/C/53/D/541/1993), para. 6.2.

<sup>18</sup> See, for example, *X and Y v. Canada* (CCPR/C/118/D/2771/2016), para. 4.3.

5. The Committee therefore decides:
- (a) That the communication is inadmissible under articles 3 and 5 (2) (b) of the Optional Protocol;
  - (b) That the decision shall be transmitted to the State party and to the author.
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