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HUMAN RIGHTS COMMITTEE

Sixty-fifth session

SUMMARY RECORD OF THE SECOND PART (CLOSED)** OF THE 1749th MEETING

Held at Headquarters, New York,
on Wednesday, 7 April 1999, at 10.55 a.m.

Chairperson: Ms. MEDINA QUIROGA

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* All persons handling this document are requested to respect and observe its confidential nature.

** The summary record of the first part (public) of the meeting appears as document CCPR/C/SR.1749.

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The closed part of the meeting was called to order at 10.55 a.m.

CONSIDERATION OF COMMUNICATIONS UNDER THE OPTIONAL PROTOCOL TO THE COVENANT (continued)

Communication No. 751/1997: Pasla v. Australia (CCPR/C/WG/65/DR/751/1997)

1. Mr. KRETZMER, speaking as Rapporteur for Communication No. 751/1997, said that the author claimed to be a victim of violations by Australia of articles 2, 3, 14, paragraph 1, 16 and 26 of the Covenant. He had been granted worker's compensation for injuries sustained in an accident while working for the Australian Postal Commission in 1985, but the compensation had later been terminated on the ground that his condition had not been the result of the accident. Subsequently, he had challenged the termination in the federal Administrative Appeals Tribunal (AAT), but the lawyers appointed by the Legal Aid Commission of Victoria to represent him had withdrawn from the case during the appeal hearing after a dispute with the author, and the appeal itself had eventually been rejected. His subsequent application for legal aid to appeal that rejection had been declined and he had failed to lodge an appeal of that decision with the appropriate court within the required time-frame. Meanwhile, his application for an invalid pension had also been rejected by the federal Retirement Benefits Office because the Office had not been satisfied that the extent of his injuries warranted the award of such a pension. The author had not appealed that decision to the AAT.

2. He had later lodged another application for financial and legal assistance to challenge both the AAT and the Retirement Benefits Office's decisions, and to file claims against his former legal advisers for negligence and against his former employer for wrongful dismissal. The application had been rejected twice on the ground that the author's claims lacked merit, but he had again failed to lodge an appeal.

3. The State party submitted that the whole of the communication should be ruled inadmissible ratione materiae under article 1 of the Optional Protocol on the ground that none of the author's claims were referable to any right set forth in the Covenant. It also submitted that the author's claims relating to his worker's compensation should be ruled inadmissible ratione temporis on the ground that his right to lodge an appeal had lapsed before the Optional Protocol had entered into force for Australia. Similarly, the State party submitted that the author's claim against the federal Retirement Benefits Office should be declared inadmissible ratione materiae under article 3 of the Optional Protocol, as the interpretation of the relevant domestic legislation did not fall within the Committee's jurisdiction. Finally, the State party submitted that the whole of the communication should be ruled inadmissible under article 5, paragraph 2 (b), of the Optional Protocol because the author had failed to exhaust domestic remedies. In his reply, the author had failed to adequately address the arguments of the State party and had simply reiterated his claim that the denial of legal aid had rendered the remedies ineffective.

4. With regard to the author's claim that de facto he had been denied access to court through the rejection of his applications for legal aid, the Working

Group recommended in paragraph 6.2 of its draft Views that the Committee should note that the author had not adduced any allegations that he had been prevented from representing himself before the tribunals and courts that he had wanted to petition. In the absence of such impediments, the Covenant in general did not provide for the right to legal aid in civil cases. Moreover, the Committee should note that the author had not sought review of the denials of his applications for legal aid at various levels, and therefore it should find that part of the communication inadmissible under articles 3 and 5, paragraph 2 (b), of the Optional Protocol.

5. Finally, the Committee should find that the author's claim that the procedure before and decisions made respectively by the AAT, the Retirement Benefits Office and the Legal Aid Commission of Victoria amounted to denial of justice in violation of the Covenant was inadmissible under article 5, paragraph 2 (b), as the author had failed to exhaust all available domestic remedies. In sum, the Working Group recommended that the Committee should decide that the communication was inadmissible.

6. Mr. POCAR said that he agreed that the communication should be found inadmissible, although he did not agree with all the grounds proposed for doing so. In particular, he noted that article 14, paragraph 1, of the Optional Protocol could be interpreted as providing the right to legal aid in civil cases under some circumstances. He asked for clarification of the reference in paragraph 6.2 to the author's failure to demonstrate that he had been "prevented" from representing himself, and stressed that the problem lay not so much with the denial of legal aid, of which the author had shown ample evidence, as with the author's failure on several occasions to lodge the appropriate appeals. He therefore recommended that the first two sentences of paragraph 6.2 should be deleted and that the Committee should limit the grounds for its declaration of inadmissibility to the author's failure to exhaust domestic remedies under article 5, paragraph 2 (b), of the Optional Protocol.

7. Mr. LALLAH said that he agreed that the grounds for dismissing the communication should be limited to those provided under article 5, paragraph 2 (b), of the Optional Protocol.

8. Mr. KRETZMER suggested a possible alternative wording to the effect that the Covenant did not per se provide a right to legal aid in civil cases, but accepted Mr. Pocar's recommendation to delete the text of paragraph 6.2 following the phrase "applications for legal aid," up to and including the word "Moreover,". The subsequent reference to article 3 of the Optional Protocol should also be deleted.

9. The CHAIRPERSON said that she took it that the Committee wished to adopt the decision on admissibility recommended by the Working Group as orally amended, and the Views on the merits recommended by the Working Group.

10. It was so decided.

Communication No. 633/1995: Gauthier v. Canada (CCPR/C/WG/65/DR/633/1995)

11. Ms. EVATT, speaking as Rapporteur for Communication No. 633/1995, said that the author was a Canadian national who claimed to be a victim of a violation by Canada of article 19 of the Covenant. The author, a newspaper publisher, had been denied full membership in the Parliamentary Press Gallery, a private, but publicly funded, association administering accreditation for access to Parliament by the press. He had filed numerous requests with the Press Gallery and the Speaker of the House and had taken his case to the Federal Court, the Provincial Court and the Bureau of Competition Policy, all to no avail. The author claimed that the denial of equal access to press facilities in Parliament constituted a violation of his rights under article 19 of the Covenant.

12. The State party had maintained that there was no formal or legal relationship between the Speaker and the Press Gallery and that the author had been uncooperative in providing information to the latter. Moreover, it had pointed out that live television coverage of all House of Commons proceedings was available throughout the country. In response, the author submitted that, although no authority had been legally transferred, the Press Gallery had assumed powers to permit or deny access to facilities provided to the media by Parliament and that access was granted or withheld at whim. Furthermore, he had been denied his right to seek redress in the courts, because the courts had no jurisdiction over Parliament, so that he had no way to bring a claim in Canada.

13. On 10 July 1997, the Committee had decided that the communication was admissible under article 19 of the Covenant and that it might raise issues under articles 22 and 26. The Committee had considered that the author's exclusion from the Press Gallery constituted a restriction of his right to freedom of expression under article 19, paragraph 2, of the Covenant, in view of the importance of access to information about democratic processes.

14. Mr. LALLAH, referring to paragraph 13.4 of the draft decision, said that the issue had general application as it dealt with State responsibility. In the current case, that responsibility had effectively been granted to a monopoly and a similar delegation of authority could occur in other sectors. For example, courts of law had restricted premises and, if those who were in charge of ensuring the security and transparency of the legal process effectively delegated their functions to a private institution, it would constitute a breach of responsibility. The Speaker had delegated his functions to the Press Gallery and paragraph 13.6 of the draft decision should make it very clear that the Committee's views were not based on the criteria for membership of the Press Gallery, but rather on the fact that the delegation was wrong in itself, since the Speaker should have retained control over how access to the Press Gallery was regulated.

15. Mr. POCAR said that the words "reasonableness of the exclusion" in the fourth line of paragraph 13.6 were unsuitable and proposed that they should be replaced by the phrase "legality of his exclusion and its necessity for the purposes set out in article 19".

16. Mr. SCHEININ said that he had read paragraph 3.1 of the draft decision, setting out the original complaint on the basis of article 19, together with

paragraph 9.4, where the Committee expanded the case to include articles 22 and 26, and the proposed findings where article 2, paragraph 3, was also mentioned. He had concluded that the only issue involved was freedom of expression and proposed that the Committee's finding should be limited to a violation of article 19, using all the other issues as arguments. In his opinion, delegation was not a serious issue in the case, since it involved self-regulation of the profession of journalism as a means of ensuring freedom of expression. The Committee should be careful not to appear to state that such a practice, of itself, amounted to a violation of the Covenant. The issue was whether the author's ability to exercise his profession was impaired by his exclusion from the Press Gallery and whether that amounted to a violation of his right to freedom of expression. In that regard, the relatively minor prohibition on taking notes when in the Public Gallery could weigh the scales in favour of limiting the finding to a violation of freedom of expression. Lastly, he proposed that paragraph 13.5 of the draft decision should conclude with a finding of a violation.

17. Mr. SOLARI YRIGOYEN said that he agreed with Mr. Lallah and Mr. Pocar. Furthermore, in paragraph 13.4, the State party claimed that, owing to modern technology, House of Commons proceedings were available to all journalists. That could be a very dangerous line of defence, as it could invalidate recourse under article 19, paragraph 2, of the Covenant, since, if it was generalized, the State could prohibit journalists from entering places because they could observe events directly on television.

18. Mr. KRETZMER said that he did not agree that privatization of the right to allow access would, in itself, be a violation of Covenant rights. He suggested that perhaps the Committee should welcome the fact that authorities did not claim to be sole guardians of the right of access, but had allowed the press to regulate itself. However, as pointed out in the draft decision, the question arose as to whether the system which had been instituted resulted in a restriction of the right to freedom of expression. He therefore supported the suggestion made by Mr. Scheinin that the Committee should stress the restriction of freedom of expression under article 19. The grounds for that decision were clear from paragraph 13.4, which stated that the author was unable to take notes on Parliamentary proceedings. He would oppose any finding that a State party could not allow the press to regulate itself and regulate access to press facilities, provided that the procedures used by the regulatory body were fair.

19. Mr. BHAGWATI said that he agreed with Mr. Kretzmer that such press regulation could be left to a private organization as long as the criteria used were fair and objective. However, he believed that article 26 was relevant to paragraphs 13.6, 13.7 and 13.8, sine the distinction between a journalist like the author and those who were members of the Press Gallery was totally arbitrary, thereby violating article 26, which prohibited arbitrary treatment.

20. Mr. KLEIN said that he agreed with Mr. Scheinin that the draft decision concerned a violation of article 19, which was clearly set out in paragraphs 13.4 and 13.5. He had been on the Working Group that dealt with the admissibility of the case, and it had been difficult to find a violation of the rights established in articles 22 and 26 of the Covenant. He considered that article 22 (freedom of association) had not been violated for two reasons.

First, the author had always asked to be a member of the Press Gallery and, second, if he had been admitted, he would immediately have become a full member. Since he wished to become a member, a violation of article 22 was not at issue. The draft decision should state that there was no violation of article 22, and article 26 could be dealt with on a separate basis since it was mentioned in paragraph 13.7.

21. Ms. CHANET said that she could accept a finding of violations of article 2, paragraph 3, and article 19. The operation of the accreditation system, which enabled a private organization to control freedom of expression, amounted to a violation of article 19 of the Covenant. The absence of a recourse was a violation of article 2, paragraph 3. In paragraph 13.6 of the draft decision, the words "the criteria for membership in the Press Gallery are ill-defined and determination of membership is entirely in the hands of the organization itself" should be deleted. As long as the criteria for membership remained within the law, an organization should be free to choose its members. The issue was that there was no possibility of recourse.

22. Mr. POCAR said that he would prefer the first version of paragraph 13.8 and that the word "appropriate" in the third sentence should be deleted. He did not agree that the Committee should make a separate finding of a violation of article 2, paragraph 3. The reference to that article in paragraph 13.6 could be retained, but the finding of a violation of that article in paragraphs 13.7 and 14 should be deleted.

23. Mr. LALLAH said that he believed that there had been a violation of article 22 because freedom of association meant the freedom to join or not to join an association. Specifically, the author could not enjoy his rights under article 19 unless he joined a private organization. There might also be a violation of article 26. The State was delegating its responsibility to treat people equally to a private association. However, the ability to observe the proceedings of Parliament, which consisted of representatives of the people, must be open to everyone and should not be the monopoly of a private organization.

24. Ms. EVATT said that the Committee could incorporate Mr. Solari Yrigoyen's point on paragraph 13.4 by stating that, in view of the importance of access to information about the democratic process, the Committee did not accept the State party's argument about technological advances. It could cover Mr. Bhagwati's suggestion on paragraph 13.5 by deleting the reference to the State party's refusal to intervene. Mr. Scheinin's proposal for a direct reference to a violation of article 9.2 could be added at the end of paragraph 13.5 or 13.6. With regard to paragraph 13.6, she could accept the amendments proposed by Ms. Chanet and Mr. Pocar. Those amendments would meet the concerns expressed by Mr. Lallah and others that there should be a more specific reference to the issue of the State party delegating responsibility to a monopoly. With regard to paragraph 13.8, she noted that, although the author had said that he wanted to join the Press Gallery, that was because there was no other way of gaining access to parliamentary press facilities. It was the monopoly enjoyed by the private organization that was the threat to freedom of association.

25. Mr. BHAGWATI said that he had difficulty with the last sentence of paragraph 13.7; he was not sure that the absence of a procedure of review would render the process arbitrary. The basis of the distinction between the author and journalists who were given access to the parliamentary media facilities was membership in a private association, which amounted to a violation of article 26. He agreed with Mr. Lallah's point about article 22.

26. Mr. KLEIN said that he felt that there had been no violation of article 22. The author had never claimed a violation of that article and had, in fact, wanted to be a member of the private association in question. If the Committee decided to find a violation of article 22, he would write a dissenting opinion.

27. Mr. ZAKHIA said that, on the question of monopolies, in all countries there were professional associations which had criteria for membership. Such criteria could not be regarded as a violation of the Covenant.

28. The CHAIRPERSON said that the membership criteria of professional associations were not at issue. In response to Mr. Klein, she pointed out that paragraph 12.3 stated that the author rejected membership in the association in question as a prerequisite to enjoying his fundamental right to freedom of expression.

29. Mr. ANDO said that he supported Mr. Pocar's position with regard to article 2, paragraph 3. The Committee would need to find a violation in conjunction with other substantive rights enshrined in the Covenant. With regard to article 22, the issue was not that a monopoly existed, but that that monopoly prevented the effective exercise of freedom of expression. He agreed that there had been no violation of article 22. With regard to article 26, he was not sure that the State could or should be entitled to intervene in the private sphere. By allowing the Press Gallery the right to monopolize facilities, the State party could be helping it maintain a monopoly, but that point could be dealt with within the context of article 19, paragraph 3.

30. Mr. WIERUSZEWSKI said that he would prefer to limit the finding to a violation of article 19, paragraph 3. He was not in favour of a finding under article 22, for the reasons given by Mr. Klein, and could accept the second version of paragraph 13.8.

31. Mr. ANDO said that the Committee had referred to article 22 in its admissibility decision; however, in its examination of the merits of the case, it could reconsider that decision and declare that a violation of article 22 was inadmissible.

32. Ms. CHANET said that she agreed with Mr. Klein with regard to article 22. Although the admissibility decision had referred to article 22, the author's original complaint had been of a violation under article 19. The Committee should not have included article 22 in its admissibility decision. She could not accept either version of paragraph 13.8. She also had doubts about finding a violation of article 26 and would prefer to limit the finding to a violation of article 19.

33. Mr. SCHEININ said that he supported Mr. Klein concerning article 22. With regard to article 26, the fact that the author's position as a journalist was different from that of members of the Press Gallery was a violation of article 19. A finding of a violation of article 26 would merely be based on the same question of the different treatment given to two categories of journalists. He would therefore support a finding of inadmissibility under articles 22 and 26.

34. Ms. EVATT said that the Committee had found the communication admissible in relation to articles 22 and 26, and as a result, the author had sent submissions on those two articles. She would therefore be reluctant to ignore those articles. Instead, the Committee could say that since the essence of the author's claim of arbitrariness and exclusion from an organization which enjoyed certain rights was fully dealt with in article 3, there was no need to deal separately with articles 22 and 26.

35. Mr. POCAR said that he would prefer to reverse the admissibility decision, rather than state that articles 22 and 26 were no longer relevant.

36. Mr. KRETZMER said that he disagreed with Mr. Pocar. When the Committee had made its admissibility decision, it had not known which articles it would find to have been violated. He would have difficulty in finding a violation of article 26, but felt that the author had made a credible claim of a violation under article 22. He, therefore, supported Ms. Evatt's proposal.

37. Mr. LALLAH said that, for the sake of consensus, he could agree to Ms. Evatt's suggestion, bearing in mind that the Working Group had linked its finding of a violation of article 26 to the arbitrary nature of the decision to deny the author access to the Parliamentary press facilities.

38. Mr. BHAGWATI said that the author had been discriminated against in violation of both article 19, paragraph 3, and article 26 of the Covenant. However, he could agree to Ms. Evatt's suggestion that the Committee should state that, having found a violation of article 19 (and, in his opinion, article 26), it saw no need to address the question of article 22.

39. The CHAIRPERSON said that she had no objection to Ms. Evatt's suggestion since the Committee had followed that course of action in the past. However, if the communication was declared inadmissible with respect to article 22 of the Covenant, she would be forced to issue a dissenting opinion since she considered that the author had substantiated his claim and that there had been a clear violation of that article.

40. Mr. POCAR said that while he realized that the suggestion by Ms. Evatt had also been made in other cases, he could not recall any instance where the Committee had proceeded along those lines and considered that it would have been wrong to do so since the Committee was obliged to address all claims made by the authors of communications under all relevant articles of the Covenant. He might be prepared to support a reversal of the admissibility decision in the case of the articles in question, but if Ms. Evatt's proposal was adopted he would append a dissenting opinion, at least with regard to the methodology followed in the case.

41. Mr. AMOR and Mr. ZAKHIA said that, in their opinion, the Committee should reverse its admissibility decision with respect to articles 22 and 26 of the Covenant.

42. The CHAIRPERSON said that there did not appear to be a clear majority on Ms. Evatt's proposal or on a decision to find a violation of articles 22 and 26.

43. Mr. POCAR proposed that the Committee should vote on whether the communication should be declared inadmissible with respect to articles 22 and 26.

44. It was so decided.

45. Communication No. 633/1995 was declared inadmissible in respect of article 22 of the Covenant by 9 votes to 7.

46. Communication No. 633/1995 was declare inadmissible in respect of article 26 of the Covenant by 9 votes to 7.

47. The CHAIRPERSON, Mr. BHAGWATI, Lord COLVILLE, Ms. EVATT, Mr. KRETZMER, Mr. LALLAH and Mr. SOLARI YRIGOYEN said that they planned to express dissenting opinions, together or separately.

48. Ms. EVATT said that paragraph 14 would be amended accordingly. She suggested that the Committee might also wish to delete the words contained in square brackets in paragraph 15.

49. Mr. KLEIN said that since the Committee had found a violation of article 19 of the Covenant, it might wish to state that under the circumstances, the author should be given access to the press facilities in Parliament.

50. Mr. KRETZMER said that he disagreed since there might be valid grounds for denying the author access to those facilities. He therefore thought that the words in square brackets should be retained.

51. Mr. POCAR said that he agreed with the view expressed by Mr. Kretzmer.

52. Mr. SCHEININ said that the words contained in square brackets should be deleted since there were other ways for the State party to provide the author with an effective remedy; for example, he could be given access to Parliament without membership in the Press Gallery.

53. Lord COLVILLE said that the essence of the Committee's finding was that rejected applications for membership in the Press Gallery should be subject to an independent review. Thus, the bracketed material should be retained.

54. Mr. BHAGWATI said that he, too, thought that the proposed wording should be retained.

55. Mr. WIERUSZEWSKI said that he agreed since the Committee was not calling for the author's admission to the Press Gallery, but merely to the press facilities.

56. Mr. ANDO said that he agreed with Mr. Scheinin but would not oppose a consensus on retaining the bracketed text.

57. The CHAIRPERSON said that she took it that the Committee wished to retain the words contained in square brackets.

58. It was so decided.

59. The CHAIRPERSON said that the Committee had yet to decide on what basis it wished to declare the communication inadmissible with respect to article 26 of the Covenant. Furthermore, since Ms. Evatt planned to express a dissenting opinion, the Committee would need to select another member to write the majority opinion.

60. Mr. POCAR volunteered to write the majority opinion and proposed that the Committee should state that it had revised its decision on the admissibility of the communication with respect to articles 22 and 26 of the Covenant on the grounds that the author had not adequately substantiated his claim for purposes of admissibility under article 2 of the Optional Protocol.

61. The CHAIRPERSON said that she took it that the Committee wished to proceed along those lines and to adopt the Views on the merits recommended by the Working Group, as orally amended.

62. It was so decided.

Communication No. 737/1997: Lamagna v. Australia (CCPR/C/WG/65/DR/737/1997)

63. Mr. ANDO, speaking as Rapporteur for Communication No. 737/1997, said that the author and her husband, as Lamagna Enterprises Pty., had purchased a nursing home in New South Wales, Australia in June 1991. Australia operated a subsidy scheme by which proprietors of approved nursing homes were paid a benefit in respect of each approved patient for each day of care received. In 1991/1992, the Commonwealth Department of Human Services and Health had conducted an audit and found that the previous owner of the nursing home had received an overpayment of subsidies in 1986/1987; that error had led to additional overpayments in 1987/1988 and 1990/1991.

64. The Department had informed the author that it planned to recover those overpayments from future subsidy payments made to her. The Commonwealth had subsequently amended its legislation to provide for compulsory notice to the Government of the sale of a nursing home and a 90-day waiting period so that the Department could detect and declare any loadings, thus protecting the interests of purchasers. A further amendment entitled prospective purchasers to have access to the future fee scale of a nursing home.

65. The author's complaint was that the Department had not disclosed the so-called "negative loadings" on the nursing home even though she had submitted a letter from the vendor authorizing the Department to disclose to her all relevant matters. She had explored a range of avenues of review, including a protest to the Minister of the Department and an unsuccessful legal action, and

had stated that she could not afford further action since she was nearly bankrupt and no legal aid was available to her.

66. She had also lodged a complaint with the Office of the Ombudsman, which had recommended that the Department should make financial restitution for her loss and the interest on her overdraft. However, the Department had taken no action on that recommendation. The author thus contended that she had been subjected to unfair, unreasonable and unjust treatment constituting discrimination and, consequently, a violation of the Covenant, without invoking any specific articles thereof.

67. The State party argued that the communication was inadmissible ratione personae, on the grounds that all of her claims had been presented in the name of her company whereas only individuals could submit communications under the First Optional Protocol to the Covenant, and ratione materiae, on the grounds that the nature of her claim was not referrable to any of the rights set forth in the Covenant and thus did not engage the Committee's jurisdiction.

68. The Working Group recommended that notwithstanding what appeared to be certain irregularities in the proceedings, the communication should be declared inadmissible ratione personae under article 1 of the First Optional Protocol and ratione materiae under article 2 thereof.

69. Mr. KLEIN said that while he agreed that the communication was inadmissible, he found it unnecessary to adduce more than one reason for that decision and would prefer a finding of inadmissibility ratione personae.

70. Mr. SCHEININ said that he agreed with Mr. Klein and suggested that paragraph 6.3 should be deleted. However, paragraph 6.2 should be amended to include a reference to article 2 of the Optional Protocol since, in principle, an individual's rights under the Covenant could be affected even in cases where all claims had been made in the name of a company. He, therefore, proposed that the phrase "and the author had not substantiated that her rights under the Covenant would have been affected" should be inserted after the word "author" in the fourth sentence of paragraph 6.2.

71. Mr. ANDO said that he agreed with Mr. Scheinin.

72. The CHAIRPERSON said that she took it that the Committee wished to adopt the draft decision as amended and declare the communication inadmissible.

73. It was so decided.

The meeting rose at 1 p.m.