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Fifty-ninth session
24 March - 11 April 1997

DECISIONS

Communication No. 579/1994

Submitted by:	Klaus Werenbeck
Victim:	The author
State party:	Australia
Date of communication:	31 May 1993 (initial submission)
Date of present decision:	27 March 1997

[ANNEX]

*/ Made public by decision of the Human Rights Committee.

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ANNEX */

Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights
- Fifty-ninth session -

concerning

Communication No. 579/1994

Submitted by: Klaus Werenbeck

Victim: The author

State party: Australia

Date of communication: 31 May 1993 (initial submission)

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

Meeting on 27 March 1997,

Adopts the following:

Decision on admissibility

1. The author of the communication is Klaus Werenbeck, a German citizen who, at the time of submission of the complaint, was detained in Australia. He claims to be the victim of a violation by Australia of articles 9, paragraph 3; 10, paragraph 1; 14; 16; and 26 of the Covenant. The Covenant entered into force for Australia on 13 November 1980, and the Optional Protocol on 25 December 1991.

The facts as submitted by the author

2.1 On 5 June 1989, the author was stopped at Brisbane Airport on suspicion of illegally having imported narcotics into Australia. He was formally arrested and charged on 7 June 1989 and brought before the Brisbane Magistrate Court. On 8 March 1990, after a four day trial, he was convicted of the charge

*/ The following members of the Committee participated in the examination of the communication: Messrs. Nisuke Ando, Prafullachandra N. Bhagwati and Thomas Buergenthal, Mrs. Christine Chanet, Lord Colville, Mr. Omran El Shafei, Mrs. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Messrs. Eckart Klein, David Kretzmer and Rajsoomer Lallah, Mrs. Cecilia Medina Quiroga, Mrs. Laure Moghaizel, Messrs. Fausto Pocar, Julio Prado Vallejo, Martin Scheinin and Maxwell Yalden.

and, on 23 March 1990, sentenced to 13 years and four months' imprisonment with a recommendation to serve a minimum of six and a half years. Although the author's lawyers advised him that an appeal would be ineffective, the author filed an appeal with the Court of Criminal Appeal on 23 April 1990. On 12 June 1990, the author was given an extension of time and upon recommendation of the presiding Judge legal aid was granted to him. On 29 October 1990, the author's appeal against his conviction was dismissed and his application for leave to appeal against sentence was refused.

2.2 The case for the prosecution was that the author, on 5 June 1989, had entered Australia by international airline from Thailand. When his luggage was checked by Customs Officers, it was discovered that one of the author's bags had a false bottom, under which heroin was hidden. The heroin was found to weigh 5.3469 kilograms and amounted to 3.635 kg pure heroin. Upon questioning, the author stated that he had been told the bag was valuable and that he was going to be paid $ 32,000 upon delivery of the bag. He denied, however, that he knew that it was heroin he transported. Upon discovery of the heroin, the author assisted the police by keeping the arrangements for the handing over of the bag, as a result of which other suspects could be arrested.

2.3 The author submits that he did not know at all that anything of value was hidden in the bag; he states that he was under the impression that the $ 32,000 he was to be paid was for building- and business-plans, which were in the bag. The author further submits that, after his arrest, he acted upon instructions from the police in his dealings with his Thai contacts, that the police arranged compromising situations for him and that from those events no evidence of his guilt can be deduced.

2.4 The author appealed his conviction inter alia on the grounds that he had not had enough time to consult with his solicitor, that he was sick during the trial, that he had often been unable to follow the translation from English to German during the trial, that because of the faulty translation he made mistakes detrimental to his defence, and that no defence witnesses were called. In the judgment of the Court of Appeal, it is indicated that, although investigations had been made in relation to the issue of the translation, counsel for the author was not able to advance this point any further.

The complaint

3.1 The author claims that his pre-trial detention of nine months was excessive and in violation of articles 9, paragraph 3, and 14, paragraph 3(c).

3.2 The author also claims that he is a victim of a violation of article 10, since he did not receive proper medical treatment during his detention, as a result of which he was not feeling well during the trial.

3.3 The author states that at first he was represented by a private lawyer, but as a result of financial difficulties this lawyer stopped acting for him, only ten days before the committal, which took place on 22 September 1989. On

19 September 1989, he was granted legal aid. During the committal hearings he was represented by a certain lawyer and he wanted this lawyer to defend him at the trial. However, 11 days before the beginning of the trial on 5 March 1990 a new lawyer came to see him in prison in order to prepare the defence and eventually represented him before the Court. The author claims that these events constitute a violation of his right under article 14, paragraph 3(b) and (d), to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing. He likewise claims that the preparation of his defence before the Appeal Court was insufficient, since the legal aid lawyer came to visit him for the first time only seven days before the appeal hearing.

3.4 The author further claims that article 14, paragraph 3(a) and (f), were violated in his case, because he was not informed in detail and in a language he understood of the charges against him. He states that he has only little knowledge of English and therefore depended on translations and interpretation. He claims that, because of the bad quality of the interpretation during the trial, he could only understand half of what was being said, and that as a consequence mistakes to his disadvantage were made. In particular, he mistakenly replied in the negative when asked whether he had any evidence to lead in his defence. Although his counsel was informed of the author's dissatisfaction, he did not take any steps to improve the interpretation. He further claims that the translations of his German statements into English contain mistakes.

3.5 The author also claims that no witnesses were called on his behalf, despite his repeated requests to counsel. He submits that he had wanted to call German witnesses to give evidence about his character and to testify that he went to Australia with the intention to do business, not to smuggle heroin. He claims that the failure to call witnesses on his behalf constitutes a violation of article 14, paragraph 3(e).

3.6 The author further claims that his sentence of 13 years and four months' imprisonment is too harsh and in violation of article 26. In this connection, he explains that, in 1991, a Lebanese citizen, who was arrested at the airport with two kilograms of heroin concealed in a bag, was acquitted by the Court. The author contends that the circumstances in the case were similar, in particular that both the Lebanese and he were unaware of the fact that heroin had been concealed in their bags, and claims that his conviction violates his right to equal protection by the law. In this context he also alleges a violation of article 16 of the Covenant.

3.7 The author submits that under Australian law an appeal to the Court of Appeal can only be argued on points of law. He claims that this is in violation of article 14, paragraph 5, to have his conviction reviewed, since a retrial will only be ordered if the Court of Appeal finds that an error of law has been committed. He further argues that article 14, paragraph 3(d), was violated during the appeal, since he was not present during the hearing, although he had indicated that he desired to be.

3.8 The author submits that his lawyer told him, after the dismissal of the appeal, that the matter could not be taken any further and failed to inform him about the possibility of an appeal to the High Court. Since a case has to be presented to the High Court within 21 days from the date of the decision of the lower court, and the author could not do so himself but needed legal representation to do it, the author claims that he was denied a review by a higher tribunal, in violation of article 14, paragraph 5.

3.9 Finally, the author complains that during a transfer from one prison to another sometime in 1991 tapes with German translations of the English original tapes of the trial, were lost. Since they could not be located, he was compensated $ 995. According to the author this amount is too low and he claims compensation of $ 5,911.

State party's comments on admissibility

4.1 At the end of January 1996, the State party submitted its comments on the admissibility of the communication.

4.2 As regards the author's claim concerning article 9 of the Covenant, the State party notes that the author was kept in pre-trial detention from 5 June 1989 until 4 March 1990, prior to the entry into force of the Optional Protocol on 25 December 1991. The State party argues therefore that the claim is inadmissible ratione temporis. In this connection, the State party refers to the Committee's jurisprudence according to which the test of admissibility ratione temporis is whether the alleged violations of human rights continue after the date of entry into force of the Optional Protocol for the State party concerned or have effects which in themselves constitute a violation of the Covenant after that date. The State party further refers to the Committee's decision in communication No. 520/1992 (E. and A. K. v. Hungary, declared inadmissible on 7 April 1994) where the Committee noted that a continuing violation is to be interpreted as an "affirmation, after entry into force of the Optional Protocol, by act or by clear implication of the previous violations". The State party submits that the author's claim under article 9 of the Covenant is severable from the other alleged violations and that in imposing sentence on the author the trial judge made allowance for the period the author had spent in remand. According to the State party this indicates that there are no continuing violations or effects of the alleged violation, rendering the claim inadmissible ratione temporis.

4.3 As regards the author's claim under article 10 of the Covenant, that he did not receive proper medical treatment during his detention, the State party notes that this allegedly occurred before 8 March 1990, and that the claim is therefore inadmissible ratione temporis.

4.4 Moreover, the State party submits that the author has not sufficiently substantiated his claim, as required by rule 90(b) of the Committee's rules of procedure. The State party notes that the author has not given details concerning his alleged illness, nor has he submitted details concerning the

alleged lack of medical treatment. The State party notes that the author's claim was before the Court of Criminal Appeal, which rejected it. The State party also refers to the author's prison records for the relevant period of time, which indicate that he was medically examined upon entering the prison on 3 July 1989, and on three subsequent occasions, and that no medical conditions were found. The author was provided with an interpreter during these examinations and the records do not show any complaints about the medical treatment. The records do show that the author constantly complained of coldness and that he was given extra blankets. The State party argues therefore that the claim is inadmissible under article 2 of the Optional Protocol.

4.5 As regards the author's claims under article 14 of the Covenant, the State party, noting that the trial against the author was held from 5 to 8 March 1990, and that his appeal was dismissed by the Court of Criminal Appeal on 23 April 1990, argues that his claims are inadmissible ratione temporis. Moreover, the State party argues that the claim is inadmissible ratione materiae.

4.6 As regards the author's legal representation, the State party notes that, under the Covenant, no right exists to legal counsel of one's own choosing when legal assistance is assigned free of charge, nor to continuous representation by the same legal counsel. The State party points out that the author benefitted throughout from public legal counsel provided by the Queensland Legal Aid Commission. The State party further submits that the author has failed to substantiate his claim that he had no time to prepare his defence. The State party notes that public counsel who represented the author at trial, was experienced and competent in the defence of criminal matters and that he, at the commencement of the trial, was satisfied that the matter had been properly prepared. In this context, the State party points out that the question of preparation of the defence of an accused in a criminal trial is one of professional judgment.

4.7 As regards the representation at appeal, the State party points out that the author was assigned legal aid for the conduct of his appeal on 7 June 1990. Counsel was experienced in appeals and had the assistance of an appeal clerk. In this context, the State party argues that because of the nature of an appeal, no detailed, if any, instructions are necessary from a client and that a meeting seven days prior to the appeal is therefore to be considered sufficient. Had counsel felt unprepared, he would have asked for an adjournment. The State party submits therefore that the author's claim is unsubstantiated.

4.8 As regards the author's claim under article 14, paragraph 3(a), the State party submits that the author has failed to substantiate his claim. The State party refers to sworn evidence given by a German and English speaking police constable at trial that the author was informed in detail of the charge against him in the German language in the evening of 7 June 1989.

4.9 The State party argues that the author has failed to substantiate his claim under article 14, paragraph 3(f). The State party submits that the author was provided with free interpreter and translator services by the Government Translating and Interpreting Services. At trial an interpreter, a native German speaker and graduate from Queensland university, with full qualifications, was appointed. The interpreter's performance record, for her working period of 1989 to 1994, was outstanding and there is no record of client dissatisfaction or complaint against her. The State party further refers to the trial transcript which shows that the judge provided clear directions for the interpretation of all that was being said in Court. The State party also notes that the author has not provided information about the extent or nature of the alleged mistakes in translation.

4.10 As regards the author's specific claim that, because of the bad quality of the interpretation, he replied in the negative when asked whether he had any evidence to lead in his defence, the State party refers to the trial transcript and notes that the author was not called as a witness during the trial. When the author was directly addressed, immediately after the verdict of guilty had been pronounced against him, he appeared confused, and the trial was adjourned so as to clarify any possible confusion. The State party therefore submits that this part of the communication is also inadmissible for lack of substantiation. The State party further refers to the judgment of the appeal court in the author's case, where it is stated that counsel for the author, after having made investigations into the issue of translation and after having spoken with the interpreter, was unable to advance the point. The State party submits that the correctness of translations is a question of fact, which has been determined by the Court of Appeal, and that the Committee is not competent to review the determination by the appeal court.

4.11 As regards the author's claim that no witnesses were called on his behalf, the State party submits that the author was given the same powers as the prosecution to compel attendance of witnesses and to examine or cross-examine witnesses. The State party states that it was a matter of professional judgment by the author's legal representative whether to call witnesses for the defence or not. The State party refers to the Committee's jurisprudence that a State party cannot be held accountable for alleged errors made by a defence lawyer, unless it was or should have been manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice (Perera v. Australia, communication No. 536/1993, declared inadmissible on 28 March 1995). The State party concludes that the author has failed to advance a claim under article 2 of the Optional Protocol.

4.12 As regards the author's claim that his right under article 14, paragraph 5, was violated, because the law in Australia allows only an appeal to be argued on points of law, and therefore does not constitute a real review, the State party submits that the appeal procedure in Queensland is compatible with article 14(5), and that the Queensland Court of Criminal Appeal did review the author's conviction and sentence. In this context, the State party explains that according to the Queensland Criminal Code, an appeal

against conviction on a question of law can be made without leave, and an appeal against conviction on a question of fact with leave of the court, and an appeal against sentence also with leave. The Criminal Code expressly provides that the Court of Appeal must allow the appeal if the verdict of the jury is unreasonable or cannot be supported having regard to the evidence, if the judgment was wrong in law, and if a miscarriage of justice occurred.

4.13 As regards the author's claim that he was not present at the appeal hearing, although he had indicated that he desired to be, the State party refers to the Committee's General Comment 13 (adopted at the Committee's 21st session) where it is explained that article 14, paragraph 3(d), means that "the accused or his lawyer must have the right to act diligently and fearlessly in pursuing all the available defences and the right to challenge the conduct of the case if they believe it unfair". The State party argues that article 14, paragraph 3(d), does not contain an absolute requirement to have an accused present at the appeal, when he is being represented by counsel. The State party also submits that the author has failed to show that the interests of justice would have been better served if he had been personally present at the appeal. The State party concludes that the claim is inadmissible under article 2 of the Optional Protocol.

4.14 As regards the author's claim that he was not informed that a possibility to appeal to the High Court existed, effectively preventing him from obtaining a review by a higher tribunal, in violation of article 14, paragraph 5, the State party contends that this provision guarantees no right beyond a single appeal to a higher tribunal. The State party states that the author's representative on appeal was of the judgment that an application for special leave to appeal to the High Court would have had no prospect of success. The State party further submits that conversations between counsel and clients lie outside the scope of responsibility of the State party. Moreover, the State party points out that it has been informed by the Queensland Government that it is standard procedure to advise each client of his appeal rights to the High Court and that the appeal clerk, allocated to the author's defence on appeal at the time, recalls that the author was in fact advised of his right at the time.

4.15 As regards the author's claim under article 26, the State party argues that it is inadmissible ratione temporis. It also contends that the claim is inadmissible for lack of substantiation. In this connection, the State party submits that the acquittal of another person for a criminal offence under the Federal Customs Act cannot be relevant to the conviction of the author, since each case before the courts is judged on its own merits.

4.16 As regards the author's claim under article 16 of the Covenant, the State party argues that the facts of the case do not raise an issue under this article, since the author exercised the same legal rights as any other individual brought before a court in Australia.

4.17 As regards the author's complaint that he lost six tapes (with German translations of English original tapes) when being transferred from one prison to another, and that he has not received sufficient compensation, the State party explains that the compensation paid was based on the cost to the author to have these tapes translated. The State party argues that the claim is inadmissible ratione temporis, because the tapes were lost some time before 26 June 1991, i.e. before the entry into force of the Optional Protocol for Australia, and that no continuing effects exist which in themselves constitute a violation of the Covenant. The State party moreover submits that this complaint made by the author does not raise an issue under the Covenant and that he has failed to exhaust domestic remedies in respect to his allegation.

5.1 By letter of 1 March 1996, the author comments on the State party's submission. He argues that his communication is admissible ratione temporis because the events of which he complains have continuing effects, since he is still in prison.

5.2 As to the length of his pre-trial detention, he maintains that this constituted a violation of his rights under article 9, paragraph 3, and 14, paragraph 3(c), and argues that the shorter sentence imposed by the judge does not remedy the violations.

5.3 As to his claim under article 10 of the Covenant, the author refers to newspaper articles describing the situation in Australia's prisons, and adds that he was never taken seriously by the prison system. He reiterates that he was forced to stand trial while sick.

5.4 As regards his claim that he didn't have enough time and facilities in preparation for his defence, the author states that no lawyer came to visit him after the committal hearing on 22 September 1989 until eleven days before the beginning of the trial in March 1990. He submits that he therefore had only 11 days to prepare for his defence and that this was not adequate. The author further claims that under article 14, paragraph 3(b) and (d), he has a right to choose his own counsel provided to him without payment.

5.5 As to the interpretation during the trial, the author maintains that he did not understand everything that was going on during the trial, despite the judge's directions to the interpreter and despite the interpreter's qualifications. He further submits that if his appeal counsel would have consulted him better he would certainly have been able to advance arguments in support of the ground of appeal.

5.6 As regards to his claims under articles 16 and 26 of the Covenant, the author refers to his original communication and reiterates his arguments. He further refers to publications illustrating the level of corruption in Queensland and argues that deals between the police, judiciary and Lebanese drug syndicates are being made regularly.

5.7 In respect to the lost tapes, the author states that no further domestic remedies exist in practice, since it is beyond anybody's means to seek review in the Supreme Court. He maintains that the compensation received does not cover the costs of the tapes.

State party's further submission and author's comments thereon

6.1 In September 1996, the State party reaffirmed its view that the communication is inadmissible. It reiterated that the author's claim concerning the medical treatment at Brisbane Correctional Centre (BCC) is inadmissible ratione temporis since he was detained there only from June 1989 to September 1989. The State party adds that part of the BCC was closed in November 1989, and the whole in July 1992, following a recommendation to that effect by the Commission of Review into Corrective Services in Queensland.

6.2 As regards the author's lost tapes, the State party maintains that available domestic remedies in the form of judicial review have not been exhausted by the author. It explains the procedure of review and rejects the author's assertion that a review to the Queensland Supreme Court would be too costly, since only a filing fee of $ 154 is required. Moreover, an applicant can request the Court for an order regarding the costs, if he does not have the necessary resources. If the author had availed himself of the remedy, the Court could have remitted the matter for further consideration and higher compensation awarded if that had been lawful and appropriate.

7. In his comments, the author explains that an application for review to the Queensland Supreme Court, concerning the compensation for the lost tapes, is no longer possible because the deadline for filing such an application has expired. He states that he was not informed by the authorities at the time that he could file such application. He adds a decision by the Supreme Court in a review application submitted by another prisoner, which according to the author shows that this avenue is without prospect.

8. Both State party and author inform the Committee that, following the author's release on parole, he has left Australia and now resides in Germany. The author adds that he maintains his communication.

Issues and proceedings before the Committee

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

9.2 As to the duration of the author's pre-trial detention - nine months -, the Committee notes that this lasted from 5 June 1989 to 4 March 1990 and thus occurred prior to the entry into force of the Optional Protocol for Australia. This claim is, accordingly, inadmissible ratione temporis, in so far as it relates to articles 9, paragraph 3, and 14, paragraph 3(c).

9.3 As to the author's claim that he did not receive adequate medical treatment during his pre-trial detention, in violation of article 10, paragraph 1, the Committee also notes that this occurred before March 1990, i.e. once again before the entry into force of the Optional Protocol for Australia. This claim, therefore, is also inadmissible ratione temporis.

9.4 As regards the author's claim that he was denied the right to communicate with counsel of his own choosing, the Committee notes that the author was represented by counsel from the beginning, first by a privately retained lawyer and subsequently by different legal aid lawyers. The Committee recalls that article 14, paragraph 3(d), does not entitle an accused to choose counsel provided free of charge. As regards article 14, paragraph 3(b), the author has not indicated that he was ever denied access to a counsel with whom he wished to communicate. The Committee considers therefore that the author has advanced no claim under article 2 of the Optional Protocol and that this part of the communication is accordingly inadmissible.

9.5 As regards the author's claim that he did not have adequate time and facilities for the preparation of his defence, the Committee notes that nothing in the information submitted by the author indicates that he ever complained before or during the trial to counsel or to the court that he had not had enough time and facilities to prepare his defence, nor did his counsel inform the court that he was not ready to present the defence. The Committee considers that the author has failed to substantiate, for purposes of admissibility, his claim and that this part of the communication is equally inadmissible under article 2 of the Optional Protocol.

9.6 As regards the author's claim under article 14, paragraph 3(a), the Committee notes that, although the author has invoked this provision, he has not adduced any facts in support of his contention that he was not promptly informed and in detail in a language which he understands of the nature and cause of the charge against him. This part of the communication is inadmissible under article 2 of the Optional Protocol.

9.7 As regards the author's allegation that the quality of the interpretation was poor and that this prejudiced him in his defence, the Committee notes that the trial transcript shows that the judge regularly intervened in the hearing of witnesses in order to facilitate the work of the interpreter. The State party further has shown that the interpreter during the author's trial had full professional qualifications. Article 14, paragraph 3(f), obliges States parties to provide the free assistance of a competent interpreter if an accused cannot understand or speak the language used in court. In the instant case, such an interpreter was provided by the State party, and the Committee notes that the record does not show any problems with the interpretation. In the circumstances, this part of the communication is inadmissible under article 2 of the Optional Protocol.

9.8 As regards the author's claim that the failure to call witnesses on his behalf constitutes a violation of article 14, paragraph 3(e), the Committee notes that the defence was free to call any witness, but that the author's

counsel, exercising his professional judgment, chose not to do so. The Committee considers that the State party cannot be held accountable for alleged errors made by a defence lawyer, unless it was or should have been manifest to the judge that the lawyer's behaviour was incompatible with the interest of justice. In the instant case, there is no reason to believe that counsel was not using his best judgment, and this part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

9.9 As regards the author's claims that he is a victim of a violation of article 26 and 16 of the Covenant, the Committee notes that each criminal case is to be examined on its own merits and that the acquittal of one accused and the conviction of another as such do not raise issues of recognition as a person or of equality before the law. This part of the communication is therefore inadmissible under article 3 of the Optional Protocol, as incompatible with the provisions of the Covenant.

9.10 As regards the author's claim under article 14, paragraph 5, the Committee notes that the author's appeal with regard to both conviction and sentence was in fact heard and the evidence reviewed by the Court of Appeal. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

9.11 As regards the appeal to the High Court, the Committee observes that, once a further appeal has been provided by law, the guarantees of article 14 apply and the convicted person thus has a right to make use of this appeal. In the instant case, the Committee notes that the author has not substantiated, for purposes of admissibility, his claim that he was denied his right to appeal to the High Court. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

9.12 Finally, the Committee considers that the issue of the tapes with German translations of English original tapes of the trial, which were lost during a prison transfer, does not raise any issue under the Covenant. This part of the communication is therefore inadmissible under article 3 of the Optional Protocol, as incompatible with the provisions of the Covenant.

10. The Human Rights Committee therefore decides:

(a) that the communication is inadmissible;

(b) that this decision shall be communicated to the State party and to the author.

[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 annual report to the General Assembly.]

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