Организация Объединенных Наций CCPR/C/115/D/2005/2010

Международный пакт о гражданских и политических правах

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Комитет по правам человека

Сообщение № 2005/2010*

Соображения, принятые Комитетом на его 115-й сессии (19 октября – 6 ноября 2015 года)

Представлено:	Дэвидом Хиксом (представлен адвокатами Тамарой Симс и Беном Саулом)
Предполагаемая жертва:	автор сообщения
Государство-участник:	Австралия
Дата сообщения:	20 сентября 2010 года (первоначальное представление)
Справочная документация:	решение Специального докладчика в соответствии с правилами 92 и 97, препровожденное государству-участнику 18 ноября 2010 года (в виде документа не издавалось)
Дата принятия Соображений:	5 ноября 2015 года
Тема сообщения:	ответственность государства-участника за исполнение приговора, вынесенного в иностранном государстве
Вопросы существа:	ретроактивное наказание, пытки, произвольное содержание под стражей, условия содержания под стражей, несправедливое судебное разбирательство, недискриминация, право на неприкосновенность частной жизни
Процедурные вопросы:	юрисдикция государства-участника, отсутствие обоснования
Статьи Пакта:	2, 7, 9, 10, 12, 14, 15, 17, 19 и 22
Статьи Факультативного Протокола	1 и 2

* Приложение II распространяется только на языке представления.

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Приложение I

Соображения Комитета по правам человека в соответствии с пунктом 4 статьи 5 Факультативного протокола к Международному пакту о гражданских и политических правах (115-я сессия)

относительно

Сообщения № 2005/2010**

Представлено:	Дэвидом Хиксом (представлен адвокатами Тамарой Симс и Беном Саулом)
Предполагаемая жертва:	автор сообщения
Государство-участник:	Австралия
Дата сообщения:	20 сентября 2010 года (первоначальное представление)

Комитет по правам человека, учрежденный в соответствии со статьей 28 Международного пакта о гражданских и политических правах,

на своем заседании 5 ноября 2015 года,

завершив рассмотрение сообщения № 2005/2010, представленного ему Дэвидом Хиксом в соответствии с Факультативным протоколом к Международному пакту о гражданских и политических правах,

приняв во внимание всю письменную информацию, представленную ему автором сообщения и государством-участником,

принимает следующее:

Соображения в соответствии с пунктом 4 статьи 5 Факультативного протокола

1.1 Автором сообщения является Дэвид Хикс, гражданин Австралии, родившийся 7 августа 1975 года. Он утверждает, что является жертвой дискриминации со стороны Австралии в соответствии со статьями 2, 7, 9, 12, 14, 15, 17, 19,

** В рассмотрении настоящего сообщения принимали участие следующие члены Комитета: Ядх Бен Ашур, Лазхари Бузид, Ахмед Амин Фаталла, Оливье де Фрувиль, Юдзи Ивасава, Ивана Елич, Дункан Лаки Мухумуза, Фотини Пазарцис, Мауро Полити, сэр Найджел Родли, Виктор Мануэль Родригес-Ресия, Фабиан Омар Сальвиоли, Дируджлалл Ситулсингх, Аня Зайберт-Фор, Юваль Шани, Константин Вардзелашвили и Марго Ватервал.
В соответствии с правилом 91 правил процедуры Комитета член Комитета г-жа Сара Кливленд не принимала участия в рассмотрении настоящего сообщения.
Два особых мнения, подписанные двумя членами Комитета, содержатся в добавлениях к настоящим Соображениям.

22 и 26 Пакта. Факультативный протокол вступил в силу для государства-участника 25 декабря 1991 года.

1.2 Автор был задержан в Афганистане в ноябре 2001 года. Примерно 15 декабря 2001 года он был передан в распоряжение Соединенных Штатов Америки, содержался на различных объектах, а затем переведен на военно-морскую базу Соединенных Штатов в заливе Гуантанамо, Куба, где он находился под стражей с января 2002 года по март 2007 года. 31 марта 2007 года он был приговорен Военной комиссией к семи годам лишения свободы. После заключения двустороннего соглашения о передаче заключенных между Соединенными Штатами и Австралией автор был 20 мая 2007 года возвращен в Австралию, где он отбыл семь месяцев из своего приговора. Автор был освобожден 29 декабря 2007 года. Перед его освобождением Федеральный магистратский суд Австралии вынес в его отношении приказ об ограничении свободы. Автор, в частности, утверждает, что в силу указанного соглашения Австралия принимала непосредственное участие в ретроспективном наказании и тюремном заключении, которым он подвергался в то время, когда он находился под юрисдикцией Соединенных Штатов, что является нарушением его прав, предусмотренных в Пакте.

1.3 Полный отчет о фактах, изложенных автором, его утверждениях в соответствии с Пактом, замечаниях государства-участника относительно приемлемости и существа сообщения, а также комментариях автора к замечаниям государства-участника, содержится в приложении II к настоящему документу.

Вопросы и процедура их рассмотрения в Комитете

Рассмотрение вопроса о приемлемости

2.1 Прежде чем рассматривать любые утверждения, содержащиеся в сообщении, Комитет должен решить, в соответствии с правилом 93 своих правил процедуры, является ли данное сообщение приемлемым согласно Факультативному протоколу.

2.2 Как того требует пункт 2 a) статьи 5 Факультативного протокола, Комитет отмечает, что этот же вопрос не рассматривается в соответствии с какой-либо другой процедурой международного разбирательства или урегулирования. Комитет далее принимает к сведению утверждение автора о том, что он исчерпал все внутренние средства правовой защиты, инициировав несколько юридических процедур и процедур, не связанных со спором между сторонами. При отсутствии комментариев со стороны государства-участника в этой связи Комитет считает, что ничто не препятствует ему рассмотреть данное сообщение в соответствии с пунктом 2 b) статьи 5 Факультативного протокола.

2.3 Автор утверждает, что с того момента, когда он был взят под стражу под контролем Соединенных Штатов в Афганистане в декабре 2001 года и до его передачи в Австралию 20 мая 2007 года, он стал жертвой нарушений его прав, предусмотренных в Пакте, большинство из которых произошли в то время, когда он находился под стражей на военно-морской базе Соединенных Штатов в заливе Гуантанамо. В этой связи нет сомнений в том, что в течение всех этих лет автор сообщения находился под юрисдикцией Соединенных Штатов и что его приговор был вынесен в результате судебного разбирательства, проведенного властями Соединенных Штатов. Кроме того, нет никаких сомнений в том, что большинство нарушений, о которых утверждает автор, приписываются Соединенным Штатам. Однако заявления автора Комитету в основном касаются той части ответственности, которую несет Австралия в своих отношениях с Со-

единенными Штатами Америки, в результате чего автор отбывал наказание в Австралии.

2.4 Автор утверждает, что Австралия несет ответственность за нарушение его прав в соответствии с Пактом по следующим причинам: a) в результате заключения соглашения о передаче Австралия принимала непосредственное участие в его ретроспективном наказании и тюремном заключении, нарушая тем самым пункт 1 статьи 15 Пакта; b) его тюремное заключение в Австралии является прямым следствием несправедливого, незаконного и дискриминационного суда в Соединенных Штатах в нарушение статей 2, 14 и 26 Пакта: несправедливость судебного разбирательства по его делу автоматически делает его содержание под стражей в Австралии произвольным и незаконным, поскольку Австралия взяла на себя ответственность за выполнение приговора и наказания; c) правительство Австралии вело непосредственно с Соединенными Штатами переговоры в отношении стандартов судопроизводства, которые будут применяться к автору; d) высокопоставленные должностные лица Соединенных Штатов и Австралии неоднократно публично утверждали о его виновности, что крайне негативно сказалось на возможности справедливого судебного разбирательства; e) Австралия не направляла решительных протестов или представлений правительству Соединенных Штатов, чтобы оспорить либо обратную силу обвинения, либо несправедливость процедуры; f) Австралия не провела расследования в связи с утверждениями автора о применении пыток во время содержания под стражей в Соединенных Штатах, что является нарушением статей 7 и 10 Пакта; g) австралийские должностные лица неоднократно проводили беседы с автором, когда он находился под стражей под контролем Соединенных Штатов, в условиях, когда такие должностные лица знали или с разумной степенью вероятности должны были знать о серьезных нарушениях его прав; h) проводя с автором беседы, когда он находился в заключении под контролем Соединенных Штатов, для сбора информации, Австралия признала незаконное обращение с автором со стороны Соединенных Штатов и тем самым поощряла и поддерживала такое обращение; впоследствии Австралия использовала информацию, собранную в ходе этих бесед, в процессе вынесения приказа об ограничении свободы автора в австралийских судах; i) исполнение приговора о лишении свободы представляло собой признание и принятие Австралией соглашения о признании вины; j) в своих отношениях с автором в Австралии австралийские власти ссылались на это соглашение в угрожающей манере; k) приказ об ограничении свободы автора после его освобождения из Ятальской тюрьмы, в которой заключенные работают, был несправедливым, а наложенные на него ограничения не были необходимыми, что составляет нарушение статей 12, 14, 17, 19 и 22 Пакта.

2.5 Поскольку многие из претензий автора в адрес Австралии касаются предполагаемых нарушений прав автора до его возвращения в Австралию, Комитет должен определить, осуществляла ли Австралия какую-либо юрисдикцию в отношении автора, когда он находился под стражей под контролем Соединенных Штатов. Комитет напоминает, что в соответствии со статьей 2 Пакта государство-участник обязуется уважать и обеспечивать всем находящимся в пределах его территории и под его юрисдикцией лицам права, признаваемые в настоящем Пакте, и что статья 1 Факультативного протокола позволяет Комитету получать и рассматривать сообщения от лиц, находящихся под такой юрисдикцией. В своем замечании общего порядка № 31 (2004) о характере общего юридического обязательства, налагаемого на государства – участники Пакта, Комитет определил, что государство-участник обязано уважать и обеспечивать любому лицу, находящемуся в пределах компетенции или эффективного

контроля этого государства-участника, права, признаваемые в Пакте, даже если лицо не находится на территории государства-участника (пункт 10). Комитет отмечает, что автор находился под стражей под контролем Соединенных Штатов с декабря 2001 года по 20 мая 2007 года и что в этот период он был подвергнут уголовному преследованию по закону Соединенных Штатов. Однако Комитет также отмечает, что, по утверждению государства-участника, в период нахождения автора под стражей под контролем Соединенных Штатов его 21 раз посещали австралийские должностные лица и сотрудники полиции (см. ниже приложение II, пункт 116). Автор сообщил, что Австралия сделала ряд представлений правительству Соединенных Штатов, стремясь улучшить процедуры и усилить защиту, доступные автору, причем этот факт не оспаривается государством-участником. В этих обстоятельствах Комитет считает, что вопрос о юрисдикции тесно связан с существом дела и его следует рассмотреть на этой стадии[1].

2.6 Комитет отмечает, что государство-участник возражает против рассмотрения ответственности, которую несет Австралия в отношении лишения автора свободы и решения судебного органа Соединенных Штатов на основе принципа, изложенного Международным Судом в деле о монетарном золоте, вывезенном из Рима в 1943 году[2]. Комитет отмечает, что в том деле Суд постановил, что он не может рассматривать первую претензию Италии, поскольку интересы Албании, которая не давала согласия на юрисдикцию Суда, будут не только затронуты решением, которое примет Суд, но и станут «самим предметом решения»[3]. Комитет считает, что в настоящем деле ясно, что автор жалуется на поведение Австралии и что интересы Соединенных Штатов не являются «предметом» Соображений, которые автор призывает Комитет принять[4]. В этой связи Комитет отмечает судебное решение от 18 февраля 2015 года, в котором Надзорный суд Военной комиссии Соединенных Штатов в деле *Дэвид М. Хикс против Соединенных Штатов Америки* постановил отложить и отменил обвинительный приговор в отношении автора и освободил от его отбывания приговора, определив, что осуждение автора было незаконно ретроспективным. По мнению Комитета, такое судебное решение заставляет сомневаться даже в том, что решение, которое Комитет вынесет в отношении ответственности, которую несет Австралия, хоть каким-либо образом отразится на интересах Соединенных Штатов. Поэтому Комитет считает, что тот факт, что Соединенные Штаты не ратифицировали Факультативный протокол, не препятствует рассмотрению им жалобы автора в отношении ответственности, которую несет Австралия в связи с периодом, когда автор находился под стражей под контролем Соединенных Штатов.

2.7 Учитывая вышеизложенное, Комитет считает приемлемыми заявления автора по статьям 9 (факты, касающиеся незаконного и произвольного задержания в контексте нахождения под стражей под контролем Соединенных Штатов),

[1] См. сообщение № 1539/2006, *Мунаф против Румынии*, Соображения, принятые 30 июля 2009 года, пункт 7.5.

[2] *Case of the monetary gold removed from Rome in 1943 (Preliminary Question) (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, *Reports of Judgments, Advisory Opinions and Orders,* judgment of 15 June 1954, *I.C.J. Reports 1954*, p. 19.

[3] Ibid., p. 32.

[4] См. *Case concerning certain phosphate lands in Nauru (Nauru v. Australia)(Preliminary Objections),Reports of Judgments, Advisory Opinions and Orders*, judgment of 26 June 1992, *I.C.J. Reports 1992*, p. 240, para. 55; *Case of armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda)*, judgment of 19 December 2005, *I.C.J. Reports 2005*, p. 168, paras. 203–204.

7 и 10 (обращение во время нахождения под стражей под контролем Соединенных Штатов), 14 (несправедливое судебное разбирательство согласно правилам Военной комиссии Соединенных Штатов), 15 (ретроспективное преступление) и 2 и 26 (незаконная дискриминация по признаку национального происхождения согласно Закону о военных комиссиях) в той части, в которой они касаются периода нахождения автора под стражей под контролем Соединенных Штатов.

2.8 Комитет напоминает о том, что, согласно пункту 3 статьи 2, государства-участники обязаны обеспечить любому лицу, чьи права и свободы, признанные в Пакте, нарушены, эффективное средство правовой защиты. Соответственно, государства-участники обязаны оперативно и беспристрастно расследовать обоснованные утверждения о применении пыток и других грубых нарушениях прав человека и, если расследования свидетельствуют о нарушении статьи 7, обеспечить привлечение виновных к ответственности.

2.9 Автор утверждает, что Австралия не приняла мер по расследованию его заявлений о применении пыток во время содержания под стражей под контролем Соединенных Штатов в нарушение статей 2 и 7 Пакта. Государство-участник заявляет, что это утверждение следует признать неприемлемым ratione materiae, поскольку в Пакте не предусмотрена обязанность расследовать утверждения о пытках, связанные с действиями, осуществляемыми за пределами юрисдикции государства-участника. Однако Комитет принимает к сведению факт, который не оспаривается государством-участником, что австралийские должностные лица несколько раз беседовали с автором, когда он находился под стражей под контролем Соединенных Штатов. Он также отмечает, что, по мнению Австралии, австралийские агенты приняли ряд мер по расследованию утверждений о пытках или бесчеловечном обращении с их гражданами, находившимися под стражей в Соединенных Штатах, включая автора. Комитет считает, что сформулированный государством-участником аргумент дает повод для вопросов, которые тесно связаны с существом дела и должны быть рассмотрены на этой стадии. Поскольку нет никаких других вопросов, касающихся приемлемости настоящего сообщения, Комитет считает его приемлемым.

2.10 Автор утверждает, что он является жертвой нарушений государством-участником его прав согласно Пакту в связи с его тюремным заключением в Австралии с 20 мая по 29 декабря 2007 года, а также в связи с последующим приказом об ограничении свободы, вынесенным Федеральным магистратским судом Австралии, срок действия которого истек 21 декабря 2008 года. Его тюремное заключение в Австралии было результатом приговора к семи годам лишения свободы (из которых шесть лет и три месяца были заменены на условный срок), вынесенного Военной комиссией Соединенных Штатов 31 марта 2007 года, а также двустороннего соглашения о передаче заключенных между Соединенными Штатами и Австралией, согласно которому автор был возвращен в Австралию, чтобы отбыть оставшуюся часть своего наказания. Автор заявляет, что его тюремное заключение представляет собой незаконное и произвольное задержание, поскольку оно является непосредственным результатом несправедливого судебного разбирательства. Поскольку эта передача стала результатом соглашения между Австралией и Соединенными Штатами, Комитет считает, что это утверждение дает повод для вопросов, предусмотренных статьей 9 Пакта, и что оно было достаточно обосновано для целей приемлемости. Поэтому он объявляет его приемлемым.

2.11 Что касается приказа об ограничении свободы, изданного Федеральным магистратским судом согласно статье 104 Уголовного кодекса Австралии, автор утверждает, что эта процедура была несправедливой, составляя нарушение ста-

тьи 14 Пакта. Комитет принимает к сведению утверждение автора о том, что ему не была обеспечена реальная возможность представить доказательства, поскольку это могло бы рассматриваться как нарушение соглашения о признании вины. Тем не менее, согласно информации, содержащейся в деле, Комитет отмечает, в частности, что Федеральный магистратский суд предложил автору предъявить доказательства от своего имени и дал ему дополнительное время, чтобы их предъявить, но автор отказался сделать это; что Суд тщательно исследовал доказательства, предъявленные Австралийской федеральной полицией, выразил определенную озабоченность, ослабил требование о сообщении информации властям, а затем выдвинул аргументированное объяснение своего решения, основанного на доказательствах, находящихся в его распоряжении; и что автор не обжаловал судебное решение, подтверждающее приказ об ограничении свободы.

2.12 Комитет придерживается того мнения, что утверждения автора по существу относятся к оценке фактов и доказательств, проведенной австралийскими судами. Комитет не является органом последней инстанции, правомочным производить переоценку выводов о фактической стороне дела или применении внутреннего законодательства, если только он не может установить, что процессуальные действия во внутренних судах были произвольными или были равносильны отказу в правосудии. В настоящем деле Комитет считает, что автор не смог обосновать для целей приемлемости свое утверждение о том, что действия национальных судов являлись произвольными или были равносильны отказу в правосудии. Таким образом, эти утверждения являются неприемлемыми согласно статье 2 Факультативного протокола.

2.13 Комитет принимает к сведению утверждения автора по статьям 12, 17, 19 и 22 о том, что приказ об ограничении свободы наложил ограничения на осуществление его свобод. Тем не менее Комитет считает, что автор недостаточно обосновал свои утверждения для целей приемлемости. Поэтому эти утверждения являются неприемлемыми по смыслу статьи 2 Факультативного протокола.

3. В свете вышеизложенного Комитет объявляет сообщение приемлемым в отношении утверждений, указанных в пунктах 2.7, 2.9 и 2.10 выше, и переходит к рассмотрению дела по существу.

Рассмотрение сообщения по существу

4.1 Комитет по правам человека рассмотрел сообщение в свете всей информации, представленной ему сторонами, как это предусмотрено пунктом 1 статьи 5 Факультативного протокола.

a) Предполагаемая ответственность государства-участника в связи с периодом, когда автор находился под стражей под контролем Соединенных Штатов

4.2 На стадии рассмотрения вопроса о приемлемости Комитет принял решение о том, что вопрос о юрисдикции государства-участника тесно связан с существом дела и должен быть рассмотрен на этой стадии. Поэтому Комитет должен выяснить, осуществляло ли государство-участник в какой-либо момент власть или эффективный контроль над автором, и, таким образом, находился ли автор под его юрисдикцией.

4.3 Комитет принимает к сведению утверждения автора о том, что: a) государство-участник вело прямые переговоры с Соединенными Штатами относительно стандартов судопроизводства, которые будут применяться к автору (см. ниже приложение II, пункт 15); b) государство-участник сделало различные

представления правительству Соединенных Штатов, стремясь улучшить защиту автора и добиться освобождения другого австралийца, содержавшегося под стражей в заливе Гуантанамо (см. ниже приложение II, пункт 17); c) автора 21 раз посещали австралийские должностные лица и сотрудники полиции (см. ниже приложение II, пункт 116), когда он находился под стражей под контролем Соединенных Штатов, и австралийские агенты беседовали с ним для сбора информации, которая позже использовалась против него в ходе вынесения приказа об ограничении свободы в австралийских судах (см. ниже приложение II, пункт 39); d) Австралия знала условия соглашения о признании вины, заключенного со стороной обвинения, которое требовало от автора сотрудничества с австралийскими властями и содержало другие положения в пользу Австралии; e) автор сообщил об обращении с ним австралийским должностным лицами, которые беседовали с ним, а Австралия просила власти Соединенных Штатов провести расследование его утверждений (см. ниже приложение II, пункт 177).

4.4 На основе этих фактов, которые государство-участник не оспорило, можно предположить, что государство-участник имело некоторое влияние на то, как Соединенные Штаты обращались с автором, и было в состоянии принять позитивные меры для обеспечения того, чтобы с автором обращались в соответствии с Пактом, в том числе меры, направленные на исправление нарушений прав автора.

4.5 Тем не менее влияние, которым располагало государство-участник, не может рассматриваться как осуществление власти или эффективный контроль над автором, который содержался под стражей на территории, контролируемой Соединенными Штатами, не находящейся под суверенитетом или юрисдикцией государства-участника.

4.6 Таким образом, Комитет заключает, что в течение всего времени, которое автор провел под стражей под контролем Соединенных Штатов, автор не может рассматриваться как находившийся под «юрисдикцией» государства-участника по смыслу статьи 1 Факультативного протокола и пункта 1 статьи 2 Пакта. В результате Комитет имеет основания ratione loci не выносить своего мнения в связи с утверждениями автора по статьям 2 и 7 Пакта, которые касаются обращения с ним тогда, когда он находился под стражей в распоряжении Соединенных Штатов.

b) Предполагаемая ответственность Австралии в отношении обеспечения исполнения приговора к тюремному заключению в рамках соглашения о передаче

4.7 Комитет отмечает, что в результате соглашения о передаче автор был переведен в Австралию 20 мая 2007 года, чтобы отбыть оставшуюся часть приговора, вынесенного ему Военной комиссией Соединенных Штатов 31 марта 2007 года. На рассмотрении Комитета находится вопрос о том, нарушило ли государство-участник, оставляя автора в тюрьме до 29 декабря 2007 года в результате этого соглашения, права автора по пункту 1 статьи 9 Пакта.

4.8 Комитет отмечает, что к моменту передачи автора общественно доступным был большой объем информации, вызывавшей серьезную озабоченность в отношении справедливости процедур Военной комиссии Соединенных Штатов, и это должно было быть достаточно, чтобы у австралийских властей появились сомнения относительно законности и легитимности приговора, вынесенного автору. Многие из этих озабоченностей были выражены Комитетом в его заключительных замечаниях по второму и третьему периодическим докладам Со-

единенных Штатов, принятых 27 июля 2006 года (CCPR/C/USA/C/3/Rev.1), и Комитетом против пыток в его заключительных замечаниях по второму периодическому докладу Соединенных Штатов Америки, принятых в мае 2006 года (CAT/C/USA/CO/2). Хотя это и произошло после предполагаемых фактов, решение Надзорного суда Военной комиссии Соединенных Штатов от 18 февраля 2015 года, вынесенное в пользу автора, не оставляет сомнений относительно несправедливости судебного разбирательства в его отношении, а также относительно того, что преступления, за которые он был осужден, были ретроспективными. Кроме того, ввиду посещений автора в заливе Гуантанамо австралийскими должностными лицами и сотрудниками правоохранительных органов государство-участник имело все возможности знать условия судебного разбирательства в отношении автора.

4.9 Соглашения о передаче играют важную роль в гуманитарных и других законных целях, позволяя лицам, которые были осуждены за границей и соглашаются на передачу, вернуться в свою страну для отбывания наказания и получить преимущества, например от более тесных контактов со своей семьей. Однако, согласно Пакту, государства-участники не обязаны исполнять приговор, когда имеется достаточно доказательств того, что он был вынесен в результате судебного разбирательства, в котором явно нарушались права обвиняемого. По мнению Комитета, исполнение в соответствии с соглашением о передаче приговоров, вынесенных в результате вопиющего отказа в правосудии, представляет собой несоразмерное ограничение права на свободу в нарушение пункта 1 статьи 9 Пакта. Тот факт, что соответствующее лицо в качестве предпосылки для своего возвращения приняло условия соглашения, не имеет решающего значения, учитывая, что в данном случае может быть продемонстрировано, что условия содержания под стражей и жестокое обращение, которому оно было подвергнуто, оставляло ему весьма ограниченные возможности для выбора. В таких обстоятельствах государству-участнику следовало обеспечить, чтобы условия соглашения о передаче не приводили к нарушению Пакта с его стороны.

4.10 Комитет отмечает утверждения автора о том, что государство-участник не только не пыталось договориться об условиях соглашения о передаче таким образом, чтобы оно было совместимым с его обязательствами по Пакту, но также в значительной степени повлияло на формулировку соглашения о признании вины, которое было условием немедленного возвращения автора в Австралию (см. ниже приложение II, пункты 108 и 109). Комитет также отмечает утверждение государства-участника о том, что автор согласился признать себя виновным, потому что он считал условия содержания в тюрьмах в Австралии более благоприятными (см. ниже приложение II, пункт 109). Однако Комитет считает, что, для того чтобы избежать нарушений, которым подвергался автор, он не имел другого выбора, чем принять условия соглашения о признании вины, которое было ему предложено. Именно поэтому государство-участник обязано доказать, что оно сделало все возможное, для того чтобы условия соглашения о передаче, которое оно заключило с Соединенными Штатами, не приводили к нарушению Пакта, особенно учитывая, что автор является одним из его граждан. При отсутствии таких доказательств Комитет считает, что, согласившись исполнить оставшуюся часть приговора в соответствии с соглашением о признании вины и лишить автора свободы на семь месяцев, государство-участник нарушило права автора согласно пункту 1 статьи 9 Пакта.

5. Комитет по правам человека, действуя на основании пункта 4 статьи 5 Факультативного протокола, считает, что находящиеся в его распоряжении факты свидетельствуют о нарушении пункта 1 статьи 9 Пакта.

6. В соответствии с пунктом 3 a) статьи 2 Пакта государство-участник обязано обеспечить автору эффективное средство правовой защиты. Для этого необходимо предоставить полное возмещение лицам, права которых, признаваемые в Пакте, были нарушены. В конкретных обстоятельствах данного дела, в котором действия государства-участника были направлены в пользу автора и фактически уменьшили вред, который был бы ему нанесен, если бы он продолжал содержаться под стражей под контролем Соединенных Штатов, Комитет считает, что выявление нарушения является надлежащим возмещением в форме удовлетворения. Государство-участник обязано также принять меры к недопущению подобных нарушений в будущем.

7. Государству-участнику предлагается опубликовать текст настоящих Соображений и широко распространить их в государстве-участнике.

Добавление I

Особое (несогласное) мнение члена Комитета сэра Найджела Родли

1. Я с сожалением выражаю свое несогласное мнение по данному делу, особенно поскольку я считаю, что автор сообщения, гражданин Австралии, доказал, что в течение длительного периода содержания под стражей (явно произвольного) его правительство защищало его в недостаточной степени. Однако, поскольку Комитет в своем выводе подразумевает, что автор в течение большей части срока его содержания под стражей находился вне юрисдикции государства-участника, Пакт не изменил право дипломатической защиты таким образом, чтобы сделать этот традиционно дискреционный вопрос вопросом международно-правовых обязательств.

2. Таким образом, единственным вопросом для Комитета было соглашение о передаче автора, заключенное государством-участником, а также соблюдение им этого соглашения. Комитет считает государство-участник виновным, поскольку оно не смогло доказать, что «оно сделало все возможное для того, чтобы условия соглашения о передаче, которое оно заключило с Соединенными Штатами, не приводили к нарушению Пакта» (см. пункт 4.10 выше). Комитет утверждает это без указания на то, что еще государство-участник могло бы на самом деле сделать, чтобы облегчить участь своего гражданина. Комитет благоразумно избегает заявления о том, что государство-участник не имело возможности согласовать условия соглашения, заключенного с целью добиться (запоздалого) спасения автора, и он не заявляет, что после согласования условий соглашения государству-участнику не следовало его выполнять. Он даже не заявляет, что оно могло бы заключить соглашение, более благоприятное с точки зрения прав человека; он просто констатирует факт, не доказывая, что государство-участник могло бы стремиться достичь лучшего соглашения. Именно это отсутствие аргументации заставляет меня не согласиться с Комитетом в его выводах.

3. Комитет, как мне представляется, также не уделил надлежащего внимания молчаливому согласию автора в связи с соглашением о передаче. Если бы автор с ним не согласился, Комитет безусловно был бы в состоянии использовать отсутствие согласия в качестве возможного основания утверждать о нарушении со стороны государства-участника. Тем не менее, по мнению Комитета, автор имел «весьма ограниченные возможности для выбора» (см. пункт 4.9 выше), чтобы не принять соглашение. При этом Комитет приближается к выводу о том, что автор имел все права принять соглашение в надежде на то, что государство-участник затем нарушит его, не выполнив его условия, когда автор будет возвращен в государство-участник. Такая перспектива мало способствует укреплению института соглашений о передаче заключенных: польза таких соглашений для заключенных в будущем будет зависеть от тщательного соблюдения принимающим государством условий передачи.

Добавление II

Особое (несогласное) мнение члена Комитета Дируджлалла Ситулсингха

1. Все утверждения автора были отвергнуты большинством, за исключением предполагаемого нарушения пункта 1 статьи 9 Пакта государством-участником, выразившегося в содержании автора под стражей в Австралии в течение приблизительно семи месяцев в соответствии с соглашением о передаче, заключенным с Соединенными Штатами.

2. На мой взгляд, государство-участник не совершило какого-либо нарушения в этом отношении, поскольку автор не подвергался произвольному задержанию в смысле положений Пакта. Утверждение о наличии нарушения равносильно требованию к государству-участнику подать апелляцию в отношении судебного разбирательства, которое имело место в Соединенных Штатах, за пределами юрисдикции государства-участника.

3. Вопрос, который стоит перед нами, очень четко разъяснен в ответе государства-участника на утверждение автора, изложенном в пунктах 84–89, 95–96 и 99 приложения II ниже. Вопрос о передаче заключенных регулируется: a) Конвенцией о передаче осужденных лиц, участниками которой являются и Австралия, и Соединенные Штаты; b) соглашением между этими двумя странами; и c) Законом Австралии о международной передаче заключенных 1997 года. Статья 10 этого Закона весьма четко предусматривает, что Австралия и передающая страна должны согласиться на передачу заключенного согласно положениям Закона и что заключенный должен в письменном виде дать свое согласие на передачу на этих условиях. Автор дал согласие на передачу и не может отказываться от него впоследствии и упрекать государство-участник за его согласие на передачу и за отказ от проведения переговоров о более благоприятных условиях. Если бы государство-участник поставило под сомнение обстоятельства задержания автора в 2007 году на основе определенных событий, которые произошли в 2006 году, упомянутых в пункте 4.8 Соображений большинства, наиболее вероятно, что переговоры о передаче автора закончились бы неудачей. Кроме того, любая ссылка на постановление Соединенных Штатов 2015 года не имеет отношения к вопросу, поскольку оно имело место ex post facto.

4. Выводы большинства основаны на гипотетической ситуации, в которой государство-участник предположительно могло бы договориться о более благоприятных условиях, без указания на то, какими именно могли бы быть эти условия. Эти выводы могут подразумевать, что государство-участник могло бы попросить освободить автора в Соединенных Штатах до его передачи Австралии или что автора следовало передать Австралии и затем освободить. Трудно себе представить такое соглашение или такие переговоры. Также трудно заключить, что государству-участнику следовало согласиться на передачу, а затем не соблюдать условия соглашения, освободив автора сразу же после его приезда в Австралию. Такой ход действий стал бы полным издевательством над соглашениями о передаче и нарушением всех международных правовых обязательств и норм дипломатических отношений. Это не было бы гарантией прав человека и не может быть целью нашего Пакта.

5. В пунктах 86 и 87 приложения II ниже содержатся ссылки на обязательные положения соглашения между двумя государствами: как соглашение следует соблюдать, например в том, что касается юридического характера и продолжительности срока наказания; а также на исключительное право Соединенных Штатов принимать решения по любому ходатайству о пересмотре приговора или помиловании.

6. Пункты 89 и 94 приложения II ниже указывают на утверждение автора, направленное на оспаривание самой цели договоренностей о международной передаче заключенных:

> Если считать, что принимающие государства берут на себя ответственность за судебное разбирательство и осуждение их граждан в других государствах в рамках процесса передачи, принимающее государство может не соглашаться на возвращение своих граждан без всеобъемлющего обзора процессов, которые привели к их осуждению, а это ставит под угрозу гуманитарные и реабилитационные цели договоренностей о передаче заключенных (пункт 89).
>
> Австралия добавляет, что двусторонние соглашения о передаче заключенных с иностранным государством не должны рассматриваться как одобрение системы уголовного правосудия этой страны или судебного процесса или приговора в каждом конкретном случае. Процесс передачи не предполагает оценку иностранного осуждения или приговора, а скорее направлен на обеспечение долгосрочного благополучия и реабилитации заключенного. Если считать, что Австралия могла принять меры по индивидуальной просьбе о передаче или обеспечить фактическую передачу лица только в том случае, когда существует полное доверие в отношении системы уголовного правосудия в соответствующей зарубежной стране (или в отношении судебного процесса и осуждения в конкретном случае), это будет несовместимым с гуманитарными, реабилитационными и социальными целями и задачами договоренностей о международной передаче. Стороной, больше всех теряющей от отсутствия сотрудничества в процессах передачи заключенных, является сам заключенный, а не передающее государство. Международная передача заключенных не является транснациональным сотрудничеством в сфере уголовного правосудия; скорее она является гуманитарным и реабилитационным механизмом (пункт 94).

7. Я полностью поддерживаю четко сформулированную позицию, занятую государством-участником, и считаю ее полностью совместимой с целями, которые преследует Пакт.

8. Международная передача заключенных создает для заключенных возможность находиться под стражей ближе к своему дому, обеспечивает посещения заключенных родственниками и содержание под стражей вместе с соотечественниками, а также участие в программах реабилитации, направленных на их реинтеграцию в местное общество. Они соответствуют по форме и на практике Минимальным стандартным правилам обращения с заключенными, в настоящее время пересматриваемым Генеральной Ассамблеей Минимальным стандартным правилам Организации Объединенных Наций в отношении обращения с заключенными (Правила Манделы), а именно правилу 59, которое гласит:

> Заключенные должны помещаться, по мере возможности, в тюремные учреждения, расположенные вблизи от их дома или места их социальной реабилитации.

9. Толкование, поддержанное большинством, наносит ущерб концепции международных соглашений о передаче, если принимающие государства-участники будут обвиняться в оправдании нарушений прав человека в передающих государствах, когда они вступают в такие соглашения. В конечном счете, это может также удерживать государства от соблюдения Факультативного протокола, тем самым лишая лиц возможности добиваться защиты своих прав.

Приложение II

[Только на английском языке]

Facts as presented by the author, the complaint, the State party's observations and the author's comments thereon

Facts as presented by the author

1. In November 2001, the author was apprehended by the Northern Alliance (a non-State armed group) in Afghanistan. At the time of his apprehension, he had fled an area of hostilities and was attempting to make his way to Pakistan. The United States and Australia allege that he was involved with the Al-Qaida organization. However, the author maintains that he was under the command authority of the Taliban, then the effective Government of Afghanistan and responsible for its State armed forces. During his detention by the Northern Alliance, he was interrogated by United States personnel and, on around 15 December 2001, he was transferred into the custody of the United States in Afghanistan, held at various facilities and on board naval vessels (*USS Peleliu* and *USS Bataan*) and later transferred to the United States Naval Base at Guantanamo Bay, Cuba, where he was detained from January 2002 to March 2007.

2. Initially, the author was detained under the United States Congress Authorization for Use of Military Force of 18 September 2001. On 3 July 2003, he was placed under the Military Order of the President of the United States of 13 November 2001 on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, in which was authorized the detention and prosecution by military commission of persons designated by the President as members of Al-Qaida or otherwise involved in international terrorism.

3. On 10 June 2004, the author was charged with a number of offences before a United States Military Commission. The proceedings were stayed pending a number of decisions regarding the validity of the military commission system. After the United States Congress reconstituted the commissions under the Military Commissions Act 2006, the author was charged under this Act solely with providing material support for terrorism. On 26 March 2007, he pleaded guilty under a plea agreement accepted and endorsed by the Convening Authority of the Military Commission and, on 31 March 2007, he was sentenced by the Military Commission to seven years of imprisonment, with six years and three months suspended.

4. Following a bilateral prisoner transfer arrangement between the United States and Australia, the author was returned to Australia on 20 May 2007, where he served seven months of his sentence at Yatala Labour Prison in Adelaide. He was released on 29 December 2007. Prior to his release, on 21 December 2007, an interim control order was imposed upon him by the Federal Magistrates Court of Australia, which placed the following restrictions on him: he was required to remain at specified premises between specified times; he was required to report at regular intervals to the police; he was required to have his fingerprints taken by the police; he was prohibited from leaving Australia except with the prior permission of the Australian Federal Police; he was prohibited from any dealings with explosives and documents regarding explosives, weapons, combat skills or military tactics and from communicating with any person about terrorist methods or tactics or the names or contact details of terrorists; he was prohibited from communicating or associating with any individual that the author knew to be a member of a terrorist organization; he was prohibited from accessing or using various forms of telecommunications or other technology that were not approved by the Australian Federal

Police, including the telephone, the Internet and e-mail;[1] he was prohibited from possessing or using firearms, ammunition or explosive devices. After the control order expired, on 21 December 2008, the Federal Police did not seek to renew it.

5. The present communication is not directed at the conduct of the United States but focuses on the conduct of Australia towards the author. Domestic remedies have been exhausted. In March 2007, the author initiated two sets of proceedings in the Federal Court of Australia: (a) an order of habeas corpus for release from Guantanamo Bay on the basis that Australia was constructively detaining him there as a result of its ability to direct the treatment inflicted upon him by the United States; and (b) a judicial review of the administrative decision not to request the United States to release him. The proceedings were discontinued as a result of the author's transfer to Australia. As his detention in Australia was lawful under Australian law and he was later released, the remedies sought in the present communication are not able to be vindicated through habeas corpus proceedings or judicial review. Furthermore, judicial review remedies are directed towards correcting government decisions and do not provide relief equivalent to that available under human rights law, such as acknowledgment, apology and compensation.

6. The author also exhausted discretionary avenues of redress. In 2008 and 2009, he wrote repeatedly to the office of the Commonwealth Attorney-General seeking redress and informing it of his intention to bring the matter before the Committee. However, in its letter dated 3 August 2009, the Commonwealth Attorney-General declined the author's offer to negotiate any avenue of redress. Australia does not have a federal constitutional or statutory bill of rights that would enable the author to directly vindicate the violations alleged in the present communication.

The complaint

Claims under article 15 regarding retrospective punishment

7. The author was convicted of "providing material support for terrorism", an offence created by a United States statute, § 950v (25) of the Military Commissions Act, which became law on 17 October 2006. Hence, such offence did not exist in United States law at the time at which the author allegedly committed the relevant conduct, i.e. from December 2000 to December 2001. While some of the numerous offences under the Military Commissions Act may constitute war crimes under international humanitarian law, the offences of terrorism and providing material support for terrorism were not known to international humanitarian law, general international law or United States domestic law at the time of the author's conduct. By holding the author criminally liable for conduct which was not criminal under international law or United States law at the time of its commission, the United States inflicted retrospective criminal punishment on the author, contrary to the obligation of the United States under article 15 (1) of the Covenant. The author could not have reasonably foreseen at the time that his conduct in Afghanistan would be criminal under international or United States law.

8. The scope of the offence under the Military Commissions Act of providing material support for terrorism is too vague and uncertain to satisfy the principle of legality. In particular, the requirement that the accused's conduct intends to "influence or affect the conduct of government or civilian population by intimidation or coercion" is indeterminate and overbroad and captures conduct that may not be unlawful under international law. Furthermore, in the application of the offence under the Military Commissions Act to the author, the allegations do not identify which instances of the provision of "material support

[1] One landline and one mobile phone were allowed.

or resources" are said to have been committed by him. Such failure made it difficult for the author to answer the charge against him.

9. In application of the International Transfer of Prisoners Act 1997 and subsequent amendment of 23 March 2004, Australia entered into a prisoner transfer arrangement with the United States, which recognized the author's conviction and by which Australia agreed to imprison him in Australia to serve out the remainder of his sentence. Upon the transfer of a prisoner, the United States agrees to suspend its enforcement of the sentence and Australia agrees to respect and maintain the legal nature and duration of the sentence as determined by the United States. Australia assumes full responsibility for the enforcement of the sentence.[2]

10. By virtue of that arrangement, Australia participated directly in the retrospective punishment and imprisonment of the author, thus breaching article 15 (1) of the Covenant, according to which no one shall be held guilty of a retrospective criminal offence. The ordinary meaning of "held guilty" encompasses not only the moment of judgement and conviction before a criminal court, but also the enforcement of any sentence of punishment that follows from the conviction. Such interpretation is supported by the safeguards elsewhere in paragraph 1 concerning the application of penalties and in paragraph 2 concerning trial and punishment, which indicate that the scope of the protection extends to whatever punishment follows from a conviction. Furthermore, the protection of article 15 must extend to wherever enforcement of a sentence takes place, including where a sentence is enforced by another State in its own territory. Otherwise, one State would be free to enforce retroactive penalties imposed by another State's courts without itself violating article 15. This would create an incentive to "contract out" the enforcement of sentences to other States whose imprisonment of an offender could not be challenged in the second State for retroactivity.

Claims under article 9 regarding unlawful and arbitrary detention

11. The author's detention at Guantanamo Bay was arbitrary because the United States failed to establish a justification for it under international law. It did not properly determine his status in accordance with international humanitarian law and did not charge him with a valid criminal offence. Furthermore, the absence of a lawful, non-retrospective conviction renders the detention arbitrary and unlawful. Its lawfulness is assessed not only according to domestic law but also according to international law. As for arbitrariness, detention flowing from a retrospective offence is a paradigmatic example of it, since it is premised on capricious, post facto government action.

12. The author's trial was consequent to his designation as an alien unlawful enemy combatant under the Military Commissions Act by a Combatant Status Review Tribunal. If, as explained below, the process of the Combatant Status Review Tribunal was seriously flawed, there can be no certainty that he was eligible for trial under the Military Commissions Act. Moreover, if the Combatant Status Review Tribunal does not meet the requirement (in article 5 of the Geneva Convention relative to the Treatment of Prisoners of War (Third Geneva Convention)) of a "competent tribunal" for determining entitlement to prisoner of war status where a person's status is in doubt (as it was in the author's case) upon capture in an international armed conflict, then the author remained entitled to presumptive prisoner of war status until his status was properly determined by a competent tribunal. However, the Combatant Status Review Tribunal was only empowered to

[2] Under schedule 1, para. 9 (2), of the International Transfer of Prisoners Act, "the enforcement of the sentence in Australia is to be governed by the law of Australia and Australia alone is to be competent to take all appropriate decisions".

determine whether the author was an "enemy combatant" and not to determine what was his actual status under the Geneva Conventions of 1949.

13. The unfairness of the process of the Combatant Status Review Tribunal was compounded by the author's inability to invoke the Geneva Conventions of 1949 as a source of rights in Military Commission proceedings. Furthermore, the removal of habeas corpus rights under section 7 of the Military Commissions Act rendered it difficult for the author to seek review of the accuracy of his determination by the Combatant Status Review Tribunal. The non-judicial nature of the Combatant Status Review Tribunal and the removal of habeas corpus rights by the Military Commissions Act are contrary to article 9 (4) of the Covenant.

14. The unfairness of the author's trial automatically renders his detention in Australia arbitrary and unlawful, as Australia assumed responsibility for carrying out the sentence and punishment.

15. The author's trial in United States was unfair for the following reasons:

(a) The Military Commission was not a competent, independent and impartial tribunal. First, while military commissions were formally enabled by an Act of Congress, under the Act, authority is delegated to the President to establish them and to the Secretary of Defense to convene them. The President is commander-in-chief of the armed forces and the Secretary of Defense is responsible for the armed forces. The author was therefore subject to a tribunal that was in essence an organ of the United States military against which he was allegedly engaged in hostilities in an armed conflict. Second, the jurisdiction of the Military Commission to prosecute the author flowed from a "dispositive" determination of a Combatant Status Review Tribunal that he was an "unlawful enemy combatant" and not from an independent inquiry into his status. Third, the Secretary of Defense decided on the composition of the Military Commission and the Court of Military Commission Review. The judges were commissioned officers of the armed forces under the command of the President and/or the Secretary of Defense. Fourth, members of the Military Commission were military officers on active duty, not appointed with the degree of independence typifying a regular court or court martial. Fifth, the Secretary of Defence prescribed the regulations for the appointment of prosecution and defence counsel. The prosecution and defence counsel in the author's case were military employees of the Department of Defense. Sixth, the Secretary of Defense determined or could influence a number of vital procedural matters, including the availability of evidence to the defence, the protection of classified information, access of the defence to the trial records and the elements and modes of proof as "practicable or consistent with military or intelligence activities". Seventh, under the Act, exclusive authority was vested in the President to interpret the Geneva Conventions of 1949 and those interpretations were binding and authoritative in domestic law. Eighth, the Secretary of Defense prescribed the maximum penalties and enjoyed discretion to mitigate the findings and sentence of a commission in a particular case;

(b) The Government of Australia negotiated directly with the United States concerning the trial standards that would apply to the author. Such guarantees, which were still not sufficient to make his trial fair, did not apply to any other detainees at Guantanamo Bay. In fact, trial standards depended entirely upon the nationality of a particular offender and the willingness and capacity of their government to negotiate with the United States;

(c) The author was not tried before a regularly constituted court but by a post facto tribunal that only prosecuted "alien enemy unlawful combatants";

(d) The author did not enjoy the right to be presumed innocent until proved guilty. Public statements asserting his guilt were repeatedly made by senior United States and Australian officials, who had the capacity to influence judges and jurors of the Military Commission. His status as an "enemy" engaged in "unlawful" combat was highly prejudi-

cial and pejorative and must have tainted the Military Commission's perception of him. Moreover, his long period of pretrial detention, the high level of publicity surrounding alleged "terrorists" at Guantanamo Bay and the remote, highly militarized conditions in which he was held conveyed the impression that he was a notorious and dangerous criminal;

(e) The author was not informed promptly of the nature and cause of the charges against him. The first charges were issued only in June 2004, i.e. almost two and a half years after his detention. They were subsequently withdrawn and new ones were brought only in late 2006. No adequate justification was given for the delay;

(f) Despite his requests, the author was not provided with legal representation until 28 November 2003, when Major M.D.M. was appointed as his military defence counsel. His United States civilian defence counsel and one foreign attorney consultant were appointed after that. His military lawyer conceded lacking experience in the relevant law and procedure. By contrast, the prosecution legal team had both experience and greater resources at their disposal. The author also requested a lawyer when being interviewed in United States custody by Australian officials in May 2002, but was told that he was not entitled thereto.

Additional claims under articles 9 and 15

16. Australia could have followed a course of action similar to that of the Government of the United Kingdom of Great Britain and Northern Ireland regarding British nationals held at Guantanamo Bay. The Government of the United Kingdom insisted to the United States that British nationals should not be tried before United States military commissions because of the manifest unfairness of that process. The United Kingdom thereby secured the release of all its nationals without subjection to an unfair trial. With this precedent and Australia enjoying a comparably close relationship as a United States ally, there is no reason to believe that the United States would not have acceded to a similar request from Australia for the release of the author.

17. During the period of the author's detention, officials of the Government of Australia repeatedly stressed the closeness of therelationship of Australia with the United States and the former's capacity to secure outcomes. The Government of Australia reportedly made various representations to the Government of the United States that sought to improve the procedures and protections available to the author. Australia secured the release of another Australian from Guantanamo Bay. However, Australia did not make strong protests or representations to the Government of the United States to object to the retroactivity of the charge against the author or the unfairness of his procedure. On the contrary, numerous public statements by senior Australian officials expressed support for the author's prosecution and trial. The Government of Australia defended its difference in approach from the United Kingdom by arguing that the author had already been charged, whereas the repatriated British nationals had not. However, the latter had not been charged precisely due to British objections that the trial procedures were not fair.

Claims under article 14 (3) (b) regarding the preparation of a defence

18. The author was interrogated on numerous occasions without the presence of his lawyer and the information gathered was later used as evidence against him in the Military Commission proceedings.

19. The author was only able to communicate with his lawyers when they were present at Guantanamo Bay. He was rarely provided with the means or opportunity to communicate with them at other times and in other places (including in Australia and the United States). Furthermore, the United States authorities searched, copied and/or seized confidential legal

documents from him on numerous occasions and all materials brought into Guantanamo Bay by lawyers were monitored and filtered. Video cameras were present in the rooms where the author met with his lawyers.

20. The author's military counsel was subjected to pressure by the prosecution for having publicly criticized the military commissions. As for his Australian foreign civilian lawyers, they were required to sign undertakings in relation to the trial. For instance, they were required not to publicly comment to the media or any person about the trial without the permission of the military commissions.

Claims under article 14 (3) (c) regarding the right to be tried without undue delay

21. Delays in the author's trial were mainly linked to delays in providing a competent tribunal to determine the status of detainees held at Guantanamo Bay; the fact that the Military Commissions Act system had to be reviewed in 2006 after the Supreme Court of the United States, in *Hamdan v. Rumsfeld et al.*, determined that the 2001 system did not satisfy the minimum requirements of a procedurally fair trial; and the limitations on the author's access to full and expeditious legal advice and representation.

Claims under article 14 (3) (d) regarding the right of author to be tried in his presence or to defend himself through counsel of his own choosing

22. The author did not enjoy his rights under this provision. An accused could be excluded from any hearing to determine whether to protect against the disclosure of classified information under § 949d (f). This procedure impaired the author's ability to know and test the evidence against him. He would not have been able to attend, participate in or even be aware of the existence of such proceedings had he proceeded to trial. An accused could be excluded from any portion of the proceedings if the judge determined that the exclusion was necessary to ensure the physical safety of individuals or to prevent the accused from disrupting the proceedings.

Claims under article 14 (3) (e) regarding the right of author to examine or have examined witnesses

23. Under rule 703 (a) of the Rules for Military Commissions, the defence was only entitled to a "reasonable opportunity" to obtain witnesses and other evidence. The prosecution was entitled to rely on statements from witnesses who were released from Guantanamo Bay, in circumstances where the author could not have secured their repatriation to Guantanamo Bay to cross-examine them. Other witnesses may have been unavailable because of the long delay in bringing the author to trial. A defendant was in general not entitled to the presence of a witness who was deemed "unavailable" at the discretion of the military judge.

24. The Military Commissions Act, § 949a (b), expressly permits the admission of hearsay evidence, as long as the other party is notified in advance and provided with particulars. A reverse onus is then placed on the accused to demonstrate that the admission of the evidence would be unreliable or lacking in probative value. There is thus no onus on the party adducing the evidence to demonstrate why reliance on hearsay evidence is necessary or not unduly prejudicial.

25. An accused may not become aware of the fact that evidence has been obtained by torture or coercion since the interrogation techniques used to obtain evidence subsequently presented at trial may themselves be classified and thereby outside the knowledge of the accused. The failure to exclude hearsay or coerced evidence and the inability of the accused to challenge such evidence is compounded by the very low threshold for the admissibility of evidence generally – that the evidence "would have probative value to a reasonable

person".[3] This departs from the higher, more protective threshold for regular United States courts martial. The author's plea agreement was based entirely on the stipulation of facts of the prosecution. The evidentiary bases of the allegations in the stipulation were not disclosed to the author, making impossible for him to properly know the provenance of the evidence or to challenge its reliability or the methods of its collection.

26. Measures for the protection of classified information[4] did not enable the author to know the allegations against him with sufficient particularity and he was thus unable to adequately answer the charges against him. His military lawyer was prohibited from sharing classified evidence with him.

Claims under article 14 (3) (g) regarding the right not to be compelled to testify against oneself or to confess guilty

27. Under the Military Commissions Act, § 948r (c) and (d), evidence obtained from the author by coercion during interrogation was admissible at the judge's discretion where "the degree of coercion is disputed". The United States denied that evidence was obtained from the author by coercion.

Claims under article 14 (5) regarding the right to have one's conviction and sentence reviewed by a higher tribunal

28. Under the Military Commissions Act, § 950g (c), the right to appeal was limited to a matter of law. His plea agreement required him to surrender any right of appeal, including an appeal on matters of law.

Claims under articles 2 and 26 regarding non-discrimination

29. The author's trial involved unlawful discrimination on the basis of national origin, as the Military Commissions Act applies only to the prosecution of "alien" unlawful combatants.[5] By contrast, United States citizens were entitled to a higher standard of justice in either regular military courts martial or in civilian courts.

Claims under article 7 regarding treatment while in United States custody

30. There is a high likelihood that evidence obtained against the author was tainted by the torture, inhuman or degrading treatment of witnesses under interrogation by the United States authorities and when obtaining admissions from the author himself.

31. The definition of torture in the Rules for Military Commissions[6] for the purpose of the evidentiary exclusion is too narrow to exclude the range of evidence that should properly be excluded as obtained by torture under international human rights law.

32. Under the Military Commissions Act, § 948r, evidence obtained by coercion prior to 30 December 2005 may be admitted at the judge's discretion where "the degree of coercion is disputed" and the following conditions are met: "(1) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and (2) the interests of justice would best be served by admission of the statement into evidence". Evidence obtained on or after 30 December 2005 may be admitted in the same circumstances as long as "the interrogation methods used to obtain the statement do not amount to cruel, inhuman or degrading treatment prohibited by section 1003 of the Detainee Treatment Act of 2005".

[3] Military Commissions Act, § 949a (b) (2) (A).
[4] Ibid., § 949d (f) (1) (A).
[5] Ibid., § 948d (a).
[6] Rule 304.

33. For evidence obtained prior to 30 December 2005, which includes the period in which the author and other detainees were extensively interrogated, the Military Commissions Act does not automatically exclude evidence obtained by cruel, inhuman or degrading treatment. This is contrary to article 7 of the Covenant, which does not permit a discretionary judicial balancing of interests in assessing coerced evidence.

34. The author was subjected to various forms of ill-treatment while in the custody of the United States. Such forms included: beatings, punching and kicking; sexual abuse and humiliation; repeatedly being threatened with weapons; being forced into painful stress positions; prolonged hooding and blindfolding; frequent tight handcuffing and shackling; being forced to take medication or drugs; sleep deprivation; prolonged exposure to bright lighting and excessive continual noise; deprivation of the ordinary necessities of living, including adequate food, exercise and hygiene basics; threats of rendition to torture in Egypt; prolonged solitary confinement; witnessing abuse to other detainees; etc. The author reported his abuse to the International Committee of the Red Cross, family members and Australian officials who interviewed him in May 2002, including Australian Federal Police, Australian Security Intelligence Organisation and consular officials. Former detainees at Guantanamo Bay substantiated the author's claims.[7]

35. While at Guantanamo Bay, the author was detained in solitary confinement for extended periods as follows: (a) at Camp X-Ray and Camp Delta he was in single-cell occupancy and was forbidden to talk to other detainees or to physically move for the first two weeks; (b) at Camp Echo, he was kept in complete isolation continuously for 16 months (around 2003) and denied sunlight for eight of those; furthermore, there were no windows in the prefabricated huts where he was being held; (c) at Camp 5, he was kept in isolation for over six months; (d) at Camp 6, he was held in isolation; (e) during legal visits to Camp Echo, the author was isolated for four or five days at a time; when he was being transported there in a van he was blindfolded and shackled; and (f) at Camp Echo, before return to Australia, he was held in isolation for two months.

36. The author suffered significant physical injuries due to his ill-treatment, many of which require ongoing medical treatment. They include a fractured hand, back and jaw injuries, stress-fractured feet, eye injuries and affected vision, kidney stones, painful lumps on his chest, tooth decay and a double inguinal hernia. No explanation has been offered by the United States for those injuries.

37. While a State is primarily required to investigate torture committed within its territory or jurisdiction, there is also a duty on a State to investigate torture where: (a) a person presently within the State's territory or jurisdiction makes a credible allegation that he/she was tortured in the territory or jurisdiction of a foreign State; (b) the foreign State is alleged to have committed the act of torture; and (c) the foreign State has failed to adequately discharge its own duty to investigate the act of torture committed in its territory or jurisdiction. No remedy can be secured unless credible allegations of torture are properly investigated. Under the Covenant, the duty to investigate extends to cases where victims resident in a State raise credible allegations of torture by another State, where the other State has failed to investigate.

38. Australia has not taken adequate steps to investigate the author's allegations of torture in the custody of the United States. Instead, Australia relied upon a United States Navy investigation into the allegations, which found that there was insufficient evidence to substantiate them. This is not sufficient to discharge the obligation of Australia. United States Navy investigators were part of the same military apparatus that detained,

[7] Details are contained on file.

interrogated, prosecuted and convicted the author. Their investigation failed to account for the injuries that the author sustained, which did not exist prior to his detention.

Claims under articles 7, 9 and 10 regarding the participation of Australia in the detention, interrogation and treatment of the author at Guantanamo Bay

39. Australian officials interviewed the author while he was in United States custody, in circumstances where those officials knew of or should reasonably have been aware of serious violations of his rights.[8] He complained directly to Australian officials of his ill-treatment and his father and lawyers frequently spoke publicly about his situation at Guantanamo Bay. By interviewing the author in the custody of the United States to gather intelligence, Australia recognized the author's unlawful treatment by the United States and thereby encouraged and supported it. Subsequently, Australia made use of the intelligence gathered in those interviews in the control order proceedings against him in the Australian courts.

Claims under articles 2, 7, 14, 17 and 19 in connection with the plea agreement

40. The author signed a pretrial plea agreement, which was approved by the Military Commission on 26 March 2007. Thereby, the author purportedly agreed not to challenge his conviction, which constitutes a violation of article 14 and of the right to an effective remedy, under article 2 of the Covenant.[9] It also required the author to: (a) fully cooperate with Australian law enforcement and intelligence authorities and any further judicial proceedings; (b) assign to the Government of Australia any proceeds of his alleged crime, which constitutes a violation of the author's right to freedom of expression, under article 19 of the Covenant; (c) not speak publicly about his conduct, capture or detention for a period of one year, thus in violation of the author's right to freedom of expression under article 19 of the Covenant; (d) agree that he was not tortured or illegally treated and to surrender any such claims, which constitutes a denial of the author's right to a remedy for acts of torture or ill-treatment, contrary to articles 2 and 7 of the Covenant; (e) agree that he was an "alien unlawful enemy combatant" who was lawfully dealt with under the law of war – this is contrary to the author's right under article 5 of the Third Geneva Convention to have his prisoner of war status assessed by a competent tribunal; and (f) face possible consequences under Australian law for non-compliance, by stipulating that any failure to fully cooperate with Australian or United States authorities may delay his release from confinement or custody under applicable provisions of Australian law. That constitutes a violation of the author's right to privacy under article 17 of the Covenant.

41. The agreement deems lawful the author's entire period of detention by the United States and thus constitutes a denial of his right to seek effective remedies under article 2 of the Covenant. It also stipulates that if the agreement becomes null and void for any reason the United States may prosecute the author again for the same conduct, in violation of his right to be protected against double jeopardy under article 14 (7) of the Covenant.

[8] A list of the interviews is contained on file.

[9] Paragraph 4 of the agreement reads as follows: "I voluntarily and expressly waive all rights to appeal or collaterally attack my conviction, sentence, or any other matter relating to this prosecution whether such a right to appeal or collateral attack arises under the Military Commissions Act of 2006, or any other provision of United States or Australian law. In addition, I voluntarily and expressly agree not to make, participate in, or support any claim, and not to undertake, participate in, or support any litigation, in any forum against the United States or any of its officials, whether uniformed or civilian, in their personal or official capacities with regard to my capture, treatment, detention or prosecution."

42. The right not to be compelled to testify against oneself or to confess guilt in article 14 (3) (g) of the Covenant necessarily prohibits guilty pleas, such as this, that are tainted by compulsion. The guilty plea was unlawful for the following reasons: (a) the underlying offence on which it was based was retroactive; (b) a plea agreement cannot be "voluntary" where, but for the plea, the person faces a manifestly unfair criminal trial; and (c) the plea agreement was based on unlawful psychological coercion, pressure and duress. The only real alternative was to plead guilty. Otherwise, his options were either to proceed to an unfair trial or to remain in detention pending further United States litigation challenging the military commissions, which would likely have involved more years without trial at Guantanamo Bay. Accepting the agreement provided him with the only real prospect of release within a reasonable time.

43. Australia was not a direct party to the plea agreement, which is an instrument of United States criminal law. Nonetheless, Australia can be held responsible for the breaches of the author's right arising from it for the following reasons.

44. In article 11 of the draft articles on State responsibility adopted by the International Law Commission in 2001, it is stipulated that conduct which is not attributable to a State shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own. Australia clearly and unequivocally acknowledged and adopted as its own the original conduct of the United States in accepting and upholding the agreement for the following reasons:

(a) The author's conviction was based wholly on the United States Military Commission's acceptance of the agreement, which operated to waive a full criminal trial. In accepting the plea, the Military Commission conducted no independent inquiry into its truthfulness or reliability, into whether the sources of evidence upon which it was based were properly obtained or into whether the prosecution's case would support a conviction;

(b) The agreement was the indispensable element of the conviction and sentence. Hence, any enforcement of the sentence of imprisonment necessarily constituted an acknowledgment and adoption of the agreement by Australia as the State enforcing the sentence;

(c) The United States suspended its enforcement of the author's sentence in favour of the assumption by Australia of full responsibility for the enforcement. Accordingly, the conduct of Australia goes beyond mere support or approval of the military commission process and instead constitutes an acknowledgement and adoption of the United States conviction and agreement;

(d) Australia was aware of the circumstances of the agreement, not only from its consular attention to the matter, but also under the terms of the transfer arrangement, which required the United States to provide Australia with detailed documentation on the case, including a certified copy of all judgements, sentences and determinations;

(e) The Australian authorities did not independently assess the evidence upon which the United States authorities relied in framing the stipulation of facts in the plea agreement;

(f) Australian authorities invoked the agreement in their dealings with the author in Australia. For instance, the Australian Federal Police threatened him that his suspended sentence would be revived if he refused to cooperate with Australian law enforcement authorities as required under the agreement.

45. In consequence, the violations of the author's rights manifest in the plea agreement are attributable to Australia under the law of State responsibility. Furthermore, under article 16 of the draft articles on State responsibility, a State can be responsible for aiding or assisting another State in the commission of an internationally wrongful act. In that respect,

there are indications that Australia is internationally responsible for its own role in aiding or assisting the United States in establishing the agreement, for reasons such as:

(a) It can be inferred from the inclusion of provisions beneficial to the Australian authorities that Australia exercised a significant degree of influence over the content and formulation of the agreement, or was apprised of and acquiesced in it;

(b) The agreement was premised on the assumption that the author would be imminently returned to Australia. In fact, three days after its adoption Australia gave domestic effect to it and the transfer took place;

(c) The United States would not have accepted the agreement but for Australian assurances that its relevant provisions would be implemented and upheld in Australia;

(d) The cooperation between United States and Australia in the author's case generally implies that Australia must have been involved in the formulation and adoption of the terms of the agreement.

46. The responsibility of Australia for aiding or assisting the United States in negotiating and accepting the agreement is separate from and additional to its subsequent conduct in post facto adopting the agreement, which gives rise to the responsibility of Australia under article 11 of the draft articles on State responsibility.

Claims under articles 12, 14, 17, 19 and 22 in connection with the control order

47. The control order imposed on the author upon release from Yatala Labour Prison violated his rights under articles 12, 14, 17, 19 and 22 of the Covenant because the proceedings were unfair and because there was no necessity for the limitations imposed.

48. The author was not able to fully test the evidence brought by the authorities and upon which the order was issued. In issuing the order, Australia was not required to disclose any information to him if that disclosure was "likely to prejudice national security", within the meaning of National Security Information (Criminal and Civil Proceedings) Act 2004. The availability of the non-disclosure measures under the Act and the risks of further criminal prosecution entailed in them substantially deterred the author from seeking to adduce or contest evidence at the control order hearings. The evidence adduced by the Australian Federal Police appeared to be based solely upon interviews they conducted while the author was at Guantanamo Bay. Given the coercive environment there, there are serious doubts about the lawfulness of the manner of obtaining that evidence, the propriety of its admission in court and its reliability.

49. Furthermore, the legislation did not require the court to determine whether other less invasive methods were available to the authorities for achieving the same purpose of preventive terrorism, such as surveillance.

50. The order was designed to prevent "terrorism" as defined under a broad and vague definition of terrorism in Australian law that does not satisfy the principle of legality and is compounded by the low standard of proof used to assess the threat.

51. None of the facts before the court disclosed evidence of any current or future intention by the author to deliberately harm civilians. No contemporaneous evidence was presented by the Australian Federal Police. The only evidence presented was that relating to his conduct prior to his prolonged detention and subsequent conviction. Faced with the same evidence, the author was effectively required to prove that he was no longer a threat, rather than the police being required to prove that he was still a threat. Furthermore, there was evidence available on the public record that indicated that the author had renounced violence. The author concludes that the imposition of a control order on the basis of the

same conduct that sustained his conviction and imprisonment is contrary to the *ne bis in idem* principle.

Remedies sought

52. The State party should be urged to: (a) publicly acknowledge its participation in the author's retrospective punishment, apologize to him for his retroactive punishment and provide him with full and prompt compensation; (b) eliminate any further consequences under Australian law that may follow from the author's retroactive punishment; (c) request the United States authorities to formally overturn the author's conviction under United States law and to nullify the plea agreement; (d) acknowledge that the author's detention in Australia was unlawful, apologize for it and provide him with compensation; (e) acknowledge that Australia violated the author's rights by adopting the plea agreement by which his conviction was secured and/or aiding and abetting the United States in the offer of that agreement; (f) apologize to the author for violating his rights in connection with the plea agreement; (g) provide an undertaking to the author that it does not recognize the validity of his plea agreement and will not seek to enforce it in Australia; (h) request the Government of the United States to overturn the author's conviction before a United States Military Commission; (i) acknowledge that Australia violated the author's rights by participating in his unlawful detention, interrogation and treatment at Guantanamo Bay, apologize to him and provide him with compensation; (j) initiate and conduct an independent investigation into the author's allegations of torture and ill-treatment; (k) acknowledge that Australia violated the author's rights by imposing a control order, apologize to him and provide him with compensation; and (l) amend its legislative scheme under the Criminal Court Act 1995 regarding control orders to ensure compliance with its obligations under the Covenant.

State party's observations on admissibility and author's comments thereon

53. The State party submitted observations on admissibility on 14 October 2011 and the author replied to them on 17 February 2012. Additional submissions from both parties were made subsequent to those dates. The main arguments put forward by the parties are summarized as follows. Both indicate that arguments raised by the other party not expressly addressed in their respective submissions should not be taken to be accepted.

(a) The communication expressly or impliedly alleges breaches of the Covenant by the United States

State party's observations

54. The State party recalled the principle recognized by the International Court of Justice in its judgment on the *Case of the monetary gold removed from Rome in 1943*[10] that a court cannot decide upon an issue where it is required first to make a determination as to the lawfulness of actions of a State that has not consented to the exercise of jurisdiction by the court. The Court has subsequently found that, consistent with that principle, a claim will be inadmissible if it requires the Court to first rule on the actions of or make a determination on the international responsibility of a State that has not consented to jurisdiction. Concerning the present case, although it is a party to the Covenant, the United States is not a party to the Optional Protocol and therefore has not consented to the Committee considering allegations that it has breached the Covenant. Furthermore, the United States has expressly rejected the Committee's views concerning extraterritorial

[10] *Case of the monetary gold removed from Rome in 1943 (preliminary question) (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America), Reports of Judgments, Advisory Opinions and Orders,* judgment of 15 June 1954, *I.C.J. Reports 1954*, p. 19.

application of its obligations under the Covenant, including to its conduct at Guantanamo Bay.

55. Notwithstanding that the communication is made against Australia and that the United States is not a party to the Optional Protocol, a number of the claims expressly or impliedly allege breaches of the Covenant by the United States. Those breaches constitute the very subject matter of the claims against Australia and constitute a prerequisite for a view to be formed on whether Australia breached the Covenant. Accordingly, a number of claims are inadmissible under article 1 of the Optional Protocol.

Author's comments

56. In its response to the State party's observations, the author submits that the rule of the International Court of Justice cited by the State party is a jurisdictional rule specific to the Court in contentious cases and between two or more States in dispute. The distinctive jurisdictional considerations that apply to that sui generis context do not automatically carry over to the Committee, which is not a court and focuses on guaranteeing individual human dignity through a right of individual petition. The Committee's position is more analogous to the Court's advisory opinion jurisdiction, in which there is no rule precluding Court jurisdiction where legally affected States do not consent to it. The Court does not consider that to give an advisory opinion would have the effect of circumventing the principle of consent to judicial settlement. Furthermore, the Committee has issued numerous Views finding violations of the Covenant by a State party after examining the related conduct of a State not party to the Optional Protocol; for instance, cases concerning violations of article 7 on non-refoulement. Those latter States typically do not participate in the proceedings and their consent is neither sought nor required by the Committee. In many such cases, the Committee has satisfied itself that there is sufficient evidence to reach confident conclusions about the situation in the State not party to the Optional Protocol and is even prepared to make predictions about what States not party to the Optional Protocol are likely to do in the future. There is, therefore, even more reason for the Committee to confidently make determinations about the provable past conduct of a State not party to the Optional Protocol in cases where it is connected with the actions of the State party against whom the communication is brought.

57. The implication of the State party's argument is that no claim may be brought against a State party to the Optional Protocol where the conduct of a State not party thereto is implicated in the violations of an individual's rights under the Covenant. In a world of very active transboundary counter-terrorism cooperation among States (with different levels of human rights protection), accepting that view would create a legal "black hole" of accountability in relation to those operations.

58. Article 1 of the Optional Protocol does not preclude the Committee from considering the conduct of States not party thereto when determining whether a State party has violated its obligations under the Covenant.

Further submission by the State party

59. In a subsequent submission, the State party affirmed that the author's characterization of the Committee's Views as similar to the advisory opinions of the International Court of Justice is incorrect. The Optional Protocol provides a mechanism under which States can consent to the Committee's examination of individual communications. Unlike the advisory jurisdiction of the Court, which arises at the request of authorized bodies by virtue of the Statute of the Court, there is no alternative source of jurisdiction for the Committee to consider matters concerning States that are not party to the Optional Protocol.

60. The examination of the claims in the present communication that effectively involve a complaint against the United States is not analogous to an examination of the conduct of a State party to the Optional Protocol in the context of an alleged violation of the non-refoulement obligation by a State party. The Committee may be required to evaluate evidence that concerns the conduct of a State not party to the Optional Protocol in its examination of non-refoulement claims. However, it does not require the Committee to make a finding on whether a State not party to the Optional Protocol has breached its obligations under international law. Non-refoulement claims should therefore be distinguished from the claims in the present communication, most of which require the finding of a breach against the United States before it can consider whether Australia has breached its obligations. In that respect, the State party makes submissions on the merits of allegations relating to its conduct to the extent that it does not require it to make submissions on whether the United States breached its obligations under the Covenant.

61. The asserted legal "black hole" of accountability described by the author refers to the limitation of all treaties that States must consent to be bound by them. It is not incompatible with the object and purpose of the Covenant or the Optional Protocol to rule that a communication, to the extent that it concerns the conduct of a State which is not party to the Optional Protocol, is inadmissible.

(b) Claims under article 15 regarding retrospective punishment

State party's observations

62. The author alleges that Australia participated directly in the retrospective punishment and imprisonment of the author by operation of the arrangement for the transfer of persons sentenced by military commissions. This claim is inadmissible because to proceed with it would require the Committee to find first that the application of the offence of "providing material support for terrorism" in the case of the author amounted to a breach of the Covenant by the United States.

Author's comments

63. In an additional submission to the Committee, dated 12 November 2012, the author provides a copy of the decision of 16 October 2012 of the United States Court of Appeals for the District of Columbia Circuit in *Hamdan v. United States*. The Court held that Mr. Hamdan's conviction for material support for terrorism could not stand, as, when Hamdan committed the conduct (from 1996 to 2001), the military commissions could try violations of the international law of war. However, the international law of war did not proscribe material support for terrorism as a war crime. Furthermore, on 9 January 2015, the convening authority for United States military commissions at Guantanamo Bay dismissed the charges in the case of *United States v. Noor Uthman Muhammed*, in view of the fact that the charge of providing material support for terrorism had been invalidated by a superior United States civilian appeals court. Finally, on 18 February 2015, the United States Court of Military Commission Review, in the case of *David M. Hicks v. United States of America*, set aside and dismissed the guilty verdict against the author and vacated his sentence, finding that the author's conviction was unlawfully retrospective. According to the author, that new fact destroys the inadmissibility argument of Australia that, in order to accept the article 15 claim, the Committee should first determine the legal responsibility of the United States. The United States has now determined its own legal liability for retrospective punishment.

(c) Claims under article 9 regarding unlawful and arbitrary detention

State party's observations

64. The author's claims that Australia breached article 9 is comprised of two grounds, both of which rest on allegations against the United States being made out. The first ground is that the author's imprisonment in Australia was based on the imposition of a retroactive offence upon him by the United States. This ground is inadmissible on the same basis as the claim under article 15 (1). As to the ground that the author's imprisonment in Australia flowed directly from his unfair, unlawful United States trial, it is inadmissible because it would require the Committee to find first that the trial and related allegations of ill-treatment amounted to breaches of the Covenant by the United States.

65. On several occasions in his submission, the author relies on international humanitarian law; for instance, when he claims that at the very least he was entitled to the minimum guarantees of common article 3 of the Geneva Conventions of 1949. The State party recalls the Committee's jurisprudence that communications asserting a violation of rights other than those set forth in the Covenant are incompatible *ratione materiae* with the provisions of the Covenant and should be declared inadmissible under article 3 of the Optional Protocol.

Author's comments

66. In his response to the State party's observations, the author emphasizes that he does not request the Committee to find autonomous breaches of international humanitarian law, absent any connection to rights under the Covenant. Rather, he invokes international humanitarian law as *lex specialis* solely for the purpose of interpreting the scope of relevant rights under the Covenant in the special context of armed conflict. He recalls general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, in which the Committee states that, "the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of the Covenant rights, both spheres of law are complementary, not mutually exclusive." In the present matter, whether the author's detention is "arbitrary" under article 9 of the Covenant can only be determined by reference to the lawfulness of detention under international humanitarian law, which qualifies the standard of arbitrariness. The author is therefore only requesting the Committee to correctly interpret the rights under the Covenant.

(d) Claims under articles 2, 7, 14, 17 and 19 in connection with the plea agreement

State party's observations

67. The author contends that Australia is responsible for breaches of the Covenant arising from the agreement on two grounds: (a) acknowledging and adopting as its own the conduct of the United States; and (b) aiding or assisting the United States in relation to the agreement. In connection with the first ground, the State party submits that the claim is inadmissible under article 1 of the Optional Protocol, because the conduct at issue would remain the conduct of the United States. The author invites the Committee to use Australia as a proxy for the United States to make findings on United States conduct under the guise that it was conduct adopted by Australia. As for the second ground, it is also inadmissible under article 1 of the Optional Protocol because to proceed would require the Committee to find first, as a matter of primary liability, that the conclusion of the agreement constituted a breach of the author's rights by the United States. Under article 16 of the draft articles on State responsibility of the International Law Commission, primary liability for an

internationally wrongful act by the aided or assisted State must be established as a prerequisite to a finding of liability of the aiding or assisting State for that act.

(e) Claims under articles 7, 9 and 10 in connection with the author's detention, interrogation and treatment at Guantanamo Bay

State party's observations

68. The author claims that Australia aided or assisted the alleged unlawful detention, interrogation and treatment of the author by the United States at Guantanamo Bay. Again, the author's reliance on article 16 of the draft articles on State responsibility of the International Law Commission would require the Committee to find first that the United States, as the aided or assisted State, had breached the author's rights under articles 7, 9 and 10. Accordingly, this claim is also inadmissible under article 1 of the Optional Protocol.

(f) Claims under article 14 regarding unfair trial

State party's observations

69. The same argument regarding the two previous claims, with reference to article 16 of the draft articles on State responsibility of the International Law Commission, applies with respect to the author's claims that Australia unlawfully aided and assisted in his alleged unfair trial. These claims are also inadmissible under article 1 of the Optional Protocol.

70. As to the author's contention that, at the very least, he was entitled to the finding of a breach of common article 3 of the Geneva Conventions of 1949, the State party recalls the Committee's jurisprudence that communications asserting a violation of rights other than those set forth in the Covenant are incompatible *ratione materiae* with the provisions of the Covenant and should be declared inadmissible under article 3 of the Optional Protocol.

(g) Claim under articles 2 and 7 regarding torture and ill-treatment

State party's observations

71. The author's claims that Australia failed to investigate his allegations of torture or cruel, inhuman or degrading treatment are inadmissible under article 1 of the Optional Protocol. The Committee cannot reach a view regarding the responsibility of Australia without determining that the United States breached the Covenant.

72. Furthermore, the claim is inadmissible *ratione materiae*, as there is no duty set forth in the Covenant to investigate allegations of torture relating to conduct outside the jurisdiction of a State party. In its general comment No. 20 (1992) on the prohibition of torture or cruel, inhuman or degrading treatment or punishment, the Committee explicitly links the prevention and punishment of torture to acts that occur within any territory under the jurisdiction of a State party and makes no mention of an obligation on a State party to prevent, punish or investigate alleged acts of torture that occur within territory under the jurisdiction of another State party. If a State party is not responsible for the breach of the Covenant in relation to a citizen that takes place in another country at the instigation of that country's government, it cannot be argued that a State party has a duty under the Covenant to investigate an allegation that such a breach has occurred.

Author's comments

73. The author insists that a proper interpretation of the Covenant sustains his contention that Australia bears an obligation to investigate his alleged torture by the United States. The

responsibility of a foreign State (the United States in this case) for committing torture exists independently of any duty on a second State to investigate acts of foreign torture where a victim is present in its territory. The meaning of article 7 of the Covenant is interpreted more extensively than its literal terms by the Committee. For instance, the article encompasses a duty of non-refoulement even though there are no words to that effect. The provisions of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which share the common purpose of eliminating torture, can inform the interpretation of article 7. The preamble of the Convention specifically references article 7, demonstrating the linkage between the two treaties as part of an integrated human rights treaty system.

(h) Claims under articles 12, 14, 17, 19 and 22 regarding the imposition of a control order

State party's observations

74. Regarding the author's claims on the imposition of a control order, the author alleges that he could not test adequately the evidence brought by the Australian Federal Police and upon which the order was issued because, under the Criminal Code Act, no disclosure of information is required if it is likely to prejudice national security. However, the author does not explain how the relevant provisions of the Code were applied in his case and how that application violated his right to a fair trial. The Australian Federal Police did not rely on such provisions to exclude information from documents it was required to otherwise provide the author or to prepare for other purposes in relation to the control order process. There is no reference to the Code in the judgements regarding the control order. The author states that the evidence adduced by the Australian Federal Police appeared to be based solely upon interviews conducted while he was at Guantanamo Bay. However, the Australian Federal Police adduced other evidence, which included letters written by him to his family from Pakistan and Afghanistan and other material seized under a lawfully executed search warrant in Australia. That evidence was also made available to the author. Furthermore, in his judgement confirming the control order, the Federal Magistrate identified the material to which he had regard in considering the matter and based his decision on evidence that had been made public. The author was invited to present evidence, but he declined, as noted by the Magistrate in his judgement.

75. That element of the fair hearing ground invites the Committee to conduct a review of legislation in the abstract (*actio popularis*) of the provisions of the National Security Information (Criminal and Civil Proceedings) Act and related provisions of the Criminal Code. This is inadmissible under article 1 of the Optional Protocol, because the legislation in question did not affect the author's rights under the Covenant.

76. The author's allegation that the Magistrate erred in his evaluation of the evidence presented by the Australian Federal Police is inadmissible under article 2 of the Optional Protocol. The author does not show that the court's evaluation was clearly arbitrary or amounted to a manifest error or denial of justice or that the court otherwise violated its obligation of independence and impartiality. He does not contend that the Federal Magistrate's evaluation of the evidence demonstrated a lack of independence or impartiality. Furthermore, he did not ask the Magistrate to rule on the admissibility of the evidence of the Australian Federal Police and its reliability.

77. As for the necessity for the restrictions placed on him, the author contends that the definition of "terrorist act" in the Criminal Code is broad and vague and does not satisfy the principle of legality. However, the author does not link that principle to any article in the Covenant. Furthermore, the elements of the principle of legality embodied in article 15 are only applicable in cases involving criminal offences, while the control order proceedings were civil. Accordingly, that element should be found inadmissible *ratione materiae*.

Additionally, the necessity ground of the author's control order claim, insofar as it rests on the definition of "terrorist act" in the Criminal Code, is inadmissible as *action popularis* under article 1 of the Optional Protocol, because it invites the Committee to conduct an abstract or theoretical review of the definition. The author does not explain how the definition of "terrorist act" impacted upon him in the control order proceedings.

Author's comments

78. The author rejects the State party's contention regarding *action popularis.* He accepts that the National Security Information (Criminal and Civil Proceedings) Act and related Criminal Code provisions were not applied to him. However, the very existence of the legislation and the obvious potential for its use (necessarily to his detriment) substantially deterred him from seeking to adduce or contest evidence at the control order hearings.

79. He did not enjoy a genuine opportunity to present evidence without serious risk of adverse repercussions. If he had produced evidence as to his innocence, that would have directly called into question the soundness of his conviction and could have been considered as a collateral attack upon it of the kind prohibited by the plea agreement.

80. The author maintains that the Magistrate did not adequately scrutinize the limited evidence presented by the Australian authorities, so as to establish the necessity of imposing the control order. The evidence was old; related to the author's past activities (none of which involved actual or attempted "terrorism" against protected targets); and did not evidence anything as to his conduct or state of mind in the six previous years or his state of mind at the time of the hearing.

81. The author maintains that the vagueness of the definition of terrorism of Australia remains problematic as regards article 15 of the Covenant and the principle of legality. Control order proceedings should be treated as attracting the protection of criminal law proceedings, including protection against retrospective punishment.

82. The author disagrees with the State party's contention that his claim regarding the necessity ground involves a theoretical review of the legislation. The overly broad Australian definition of terrorism enabled the Australian court to identify the author as a "terrorist" threat in respect of conduct which is not indisputably terrorist.

Further submission from the State party

83. In a subsequent submission, the State party contests some of the above arguments put forward by the author. It clarifies that the National Security Information (Criminal and Civil Proceedings) Act and the offences stated therein did not apply to the author. Therefore, there was no risk that the author could have been subject to any criminal prosecution under it. His claim that the existence of the provisions of the National Security Information (Criminal and Civil Proceedings) Act deterred him from participating in the proceedings and mounting an effective defence should therefore be dismissed. The author's decision not to submit evidence was entirely his own, as the legislation did not apply to him and could not have had any deterrent effect upon his ability or willingness to adduce or contest evidence in the circumstances.

State party's observations on the merits and author's comments thereon

(a) Claims under article 15 regarding retrospective punishment

State party's observations

84. Australia disagrees with the author's argument that the protection of article 15 must extend to wherever enforcement of a sentence takes place, including where a sentence is enforced by another State in its own territory; that otherwise one State would be free to enforce retroactive penalties imposed by another State's courts without itself violating article 15; and that this would create an incentive to "contract out" the enforcement of sentences to other States whose imprisonment of an offender could not be challenged in the second State for retroactivity. That hypothetical scenario fails to deal with the reality of the international framework for the transfer of sentenced persons. Bilateral and multilateral transfer agreements do not provide for the enforcement of sentences to be "contracted out" at the convenience of the sentencing State.

85. Australia disagrees with the author's contention that Australia accepted "full responsibility" for the enforcement of the author's sentence by operation of the transfer arrangement. The arrangement draws on elements of the Convention on the Transfer of Sentenced Persons of the Council of Europe, to which both countries are party. Paragraph 8 of the arrangement, which is based on article 8 (1) of the Convention, provides that the taking into custody of a prisoner by Australia has the effect of suspending the enforcement of the sentence by the United States of America. Hence, the transfer only suspends and does not terminate the enforcement of that prisoner's sentence by the United States. Furthermore, in paragraph 9.1 of the arrangement, it is stipulated that "the competent authorities of Australia are to continue the enforcement of the sentence immediately upon the prisoner being taken into Australian custody". The use of the word "continue" makes clear that Australia is not engaged in a separate process of enforcement for which it bears "full responsibility".

86. In paragraph 10.1 of the arrangement, it is stipulated that "consistent with its law, the Government of Australia is to respect and maintain the legal nature and duration of the sentence as determined by the United States". In continuing to enforce the sentence, Australia is thus not permitted to change its legal nature or duration, except insofar as the sentence would need to be adapted to avoid incompatibility with Australian law.

87. In paragraph 9.2 of the arrangement, it is stipulated that "the enforcement of the sentence in Australia is to be governed by the law of Australia and Australia alone is to be competent to take all appropriate decisions". The use of the term "appropriate" suggests that Australia alone does not take all decisions; for instance, it cannot change the legal nature or duration of the sentence. Furthermore, in paragraph 12, which draws on articles 12 and 13 of the Convention on the Transfer of Sentenced Persons, it is stipulated that the United States alone is to have the right to decide on any application for review of the judgement or to pardon the offence. In doing so, it is thus made clear that the United States retains responsibility for convictions by military commissions and that this has not passed to Australia.

88. Finally, in paragraph 13 of the arrangement, which is based on article 14 of the Convention on the Transfer of Sentenced Persons, it is provided that Australia is to terminate the enforcement of a sentence if it is informed by the United States of "any decision or measure as a result of which the sentence ceases to be enforceable". This shows that the United States continues to exercise responsibility for sentences and the legal review of the proceedings that led to those sentences.

89. The interpretation of the provisions in the transfer arrangement proposed by the author, if accepted, may undermine the intention of schemes facilitating the international transfer of prisoners. If receiving States are to be regarded as assuming responsibility for the trial and conviction of their nationals in other States as part of the transfer process, a receiving State may well be reluctant to agree to the return of its nationals without a comprehensive review of the processes that led to their convictions, an outcome that would risk negating the humanitarian and rehabilitative objectives of prisoner transfer schemes.

Author's comments

90. The author states that no serious interpretation of article 15 can hold that it covers only convictions but not penalties.

91. By "full responsibility" for enforcement, the author means that Australia bears full responsibility for such enforcement functions as are assigned to it by the transfer arrangement. Australia was responsible for continuing the "enforcement" of the sentence in accordance with Australian law and was competent to make all appropriate decisions. In the performance of those functions, Australia was required to comply with its obligation under article 15 to ensure that no one within its territory and jurisdiction was subjected to retrospective punishment, including imprisonment. Nothing in article 15 creates an exception for transfer arrangements. Moreover, the tasks allocated to Australia were of such nature that the State's conduct can be assessed for compliance with article 15 without reference to whatever enforcement acts the United States may have performed after the author's return to Australia.

92. The author expresses doubts as to whether his transfer complies with the Convention on the Transfer of Sentenced Persons. First, the Convention applies only to sentences imposed by a court of law. Given the characteristics of the United States Military Commission, it is doubtful whether it can be qualified as a court. Second, the Convention imposes the double criminality rule. In that respect, Australia has repeatedly maintained that the author could not be prosecuted in Australia for lack of a corresponding offence under the legislation in force at the time. Third, under the Convention, either the administering State or the sentencing State may grant pardon, amnesty or commutation of the sentence. In contrast, the author's transfer arrangement permitted only the United States to make such decisions. Thus, the arrangement is clearly incompatible with the Convention.

93. The author claims that States must not cooperate in transfers following convictions that result from a flagrant denial of justice. Receiving States are not required to conduct a "comprehensive" review of the actual conditions in which the trial took place, but simply to review the foreign proceeding for the purpose of determining whether a flagrant denial of justice occurred. Precluding cooperation in cases where justice is flagrantly denied would send a signal to violator States that there are principled limits to transnational criminal cooperation. The humanitarian objective of transferring a prisoner does not excuse violations of the Covenant.

State party's further submission

94. Australia adds that bilateral agreements on prisoner transfer with a foreign country are not to be regarded as a means of endorsing that country's criminal justice system or the trial process or sentence in a particular case. The transfer process does not involve an evaluation of the foreign conviction or sentence, but rather considers the prisoner's long-term welfare and rehabilitation. The enforcement of the author's sentence was consistent with the transfer arrangement and the continued enforcement method as set out in the International Transfer of Prisoners Act 1997. Taking a position that Australia could progress with an individual transfer application or effect the actual transfer of a person only where there exists full confidence in the relevant foreign country's criminal justice system

(or the trial process and conviction in a particular case) would be incompatible with the humanitarian, rehabilitative and social objects and purposes of international transfer schemes. The party that stands to lose the most from non-cooperation in prisoner transfers is the prisoner, not the sending State. International prisoner transfer is not about transnational criminal cooperation; rather, it is a humanitarian and rehabilitative mechanism.

(b) Claims under article 9 regarding unlawful and arbitrary detention in Australia

State party's observations

95. Australia refers to the author's claims that, if his imprisonment in Australia constituted retroactive punishment under article 15 (1) of the Covenant, then his detention was unlawful and arbitrary and that the unlawfulness and arbitrariness flowed also from his procedurally unfair trial. Both grounds are without merit for the same reasons as those applicable to article 15 (1), i.e. that Australia did not assume full responsibility for the enforcement of the sentence.

96. Regarding the author's argument that Australia could have followed the course of action taken by the United Kingdom in seeking the return of its nationals detained at Guantanamo Bay, the State party submits that there was no binding legal obligation on it, under the Covenant or otherwise, to adopt the approach taken by the United Kingdom.

Author's comments

97. The author rejects the arguments of Australia. He does not argue that his imprisonment was arbitrary or unlawful under Australian domestic law, but rather that it was arbitrary or unlawful under international law.

98. The author has never contended that Australia was legally required under the Covenant to request his return to Australia without trial. Nonetheless, it could have secured its humanitarian objective to return the author to Australia while simultaneously avoiding any cooperation in a prisoner transfer premised on retrospective punishment and an unfair trial.

Further submissions from the parties

99. Australia rejects the author's claim that the legality of detention under article 9 must not be assessed by reference to domestic law. Where the term "lawful" is used in various provisions of the Covenant, such as articles 9 (1), 17 (2), 18 (3) and 22 (2), it clearly refers to domestic law. Therefore, Australia maintains that the author's detention in Australia was lawful under article 9 (1).

100. In his subsequent submission, in which the author informs the Committee about the decision of the United States Court of Military Commission Review in the case of *David M. Hicks v. United States of America*, the author submits that the decision necessarily renders his imprisonment for nine months in Australia unlawful and contrary to article 9. There was no lawful basis for the imprisonment in the absence of a valid conviction and sentence, upon which the transfer arrangement was based.

(c) Claims under articles 2, 7, 14, 17 and 19 in connection with the plea agreement

State party's observations

101. The author founds these claims on two grounds. First, that Australia is responsible for breaches of the Covenant by acknowledging and adopting as its own the conduct of the United States in accepting the agreement. Second, that Australia is internationally

responsible for its own role in aiding or assisting the United States in relation to the agreement.

102. In connection with the first ground, Australia reiterates the arguments submitted under articles 15 and 9, where it refuses the author's contention that, by operation of the transfer arrangement, Australia assumed full responsibility for the enforcement of the author's sentence. The International Law Commission, in its commentary on article 11 of the draft articles on State responsibility, states that the act of acknowledgement and adoption, whether it takes the form of words or conduct, must be clear and unequivocal. The author has not established that Australia, by words or conduct, made the plea agreement "its own". The transfer arrangement does not pass responsibility for the plea agreement to Australia. The agreement is an instrument of United States criminal law, remains the responsibility of the United States authorities and is not enforceable in Australian courts. Furthermore, the International Law Commission, in its commentary on draft article 11, states that "the term 'acknowledges and adopts' in article 11 makes it clear that what is required is something more than a general acknowledgment of a factual situation, but rather that the State identifies the conduct in question and makes it its own". The fact that Australia was aware of the circumstances of the agreement does not mean that it made the agreement its own. The author does not explain, either, why the fact that the Australian authorities did not independently assess the evidence relied upon by the United States authorities in relation to the agreement represented conduct that showed that Australia, clearly and unequivocally, made the agreement its own.

103. The author claims that the officers of the Australian Federal Police sought to rely on the agreement in their dealings with him in Australia and threatened to revive his suspended sentence if he refused to cooperate with Australian law enforcement authorities as required under the agreement. In its correspondence with the author's lawyer, the Australian Federal Police referred to the part of the agreement relating to the author's cooperation with Australian and United States law enforcement and intelligence agencies. However, that correspondence did not threaten to have the author's suspended sentence revived if he refused to cooperate. The Government of Australia made no approach to the United States in that regard and the Australian Federal Police accepted advice from the author's representatives that he was unable for medical reasons to participate in an interview. Ultimately, his lawyer advised the Australian Federal Police in May 2009 that the author was of the view that it would be fruitless to engage him in any future interviews, as he had already provided all the information that he could to the Australian Federal Police.

104. In connection with the second ground, the author has failed to substantiate, for the purposes of article 16 of the draft articles of the International Law Commission, that Australia aided or assisted the United States in the conclusion of the plea agreement. The term "aid or assist" in article 16 must comprehend conduct on the part of a State that, as explained in the commentary of the International Law Commission, makes a significant contribution to the performance of an internationally wrongful act by another State. The author has failed to show that the alleged conduct of Australia made a significant contribution to the negotiation and acceptance of the agreement. The alleged acquiescence by Australia cannot be understood as representing a significant contribution to the negotiation and acceptance of the agreement.

105. There were exchanges between Australian officials and the United States authorities in which a potential plea agreement was raised. Australian officials raised the issue of cooperation between the author and Australian law enforcement authorities in one such exchange. However, the inclusion of a provision on cooperation in the agreement does not support the inference that Australia exercised a significant degree of influence over the content and formulation of the agreement. To achieve such influence would have required Australia to be a party to the negotiation of the agreement, which it was not. Contrary to the

inference that the author tries to draw, his transfer to Australia did not arise as an issue for the first time when the agreement was concluded. The question of the transfer had been a matter in the public domain well before the agreement was concluded.

Author's comments

106. The author reiterates his claims and indicates that any "aid or assistance" attracts responsibility. If the aid or assistance is of only minor significance, then the State's relatively low level of contribution to the wrong will be proportionately reflected in the remedial consequences. Thus, reparations will be adjusted accordingly: the quantum of compensation will be small or other measures of satisfaction may suffice.

107. Australia has not provided any evidence of the precise content of its discussions with the United States authorities in connection with the agreement, such as a transcript or meeting records. Since the plea agreement did ultimately include provisions for the author's cooperation with Australian law enforcement officials, the influence of Australia must have been decisive. Furthermore, it is possible for one State to aid or assist another in formulating the content of a plea agreement even though the first State is not a party to the negotiation. In fact, Australia conceded that it was involved in such negotiations behind the scenes.

108. Moreover, the offer of immediate return to Australia after the author had been detained for almost six years at Guantanamo Bay plainly operated as an improper inducement to the author to plead guilty, so as to escape his illegal detention for the "lesser evil". The aid or assistance of Australia in the formulation of the agreement was therefore significant or, at the very least, unlawful.

State party's further submission

109. Australia rejects the author's argument that any aid or assistance to another State attracts State responsibility, as it has no basis in legal authority and is incompatible with the commentary of the International Law Commission on the draft articles on State responsibility. Australia also rejects the author's comment that the offer of immediate return to Australia operated as improper inducement to the author to plead guilty. The fact that the author entered into a plea agreement because he perceived prison conditions in Australia to be more favourable cannot be held to be the fault of the Government of Australia, let alone an improper inducement to the author to plead guilty.

(d) Claims under articles 7, 9 and 10 regarding the participation of Australia in the detention, interrogation and treatment of the author at Guantanamo Bay

State party's observations

110. Australia rejects the author's claim that, by interviewing him while he was detained by the United States, Australia "aided or assisted" the treatment by the United States. The term "aid or assist" in article 16 must comprehend conduct of a State that makes a significant contribution to the performance of an internationally wrongful act by another State. The author has failed to demonstrate that such conduct took place and Australia does not accept that the interviewing of the author by Australian authorities encouraged and supported his alleged unlawful treatment. The interviews were conducted for appropriate Australian law enforcement and intelligence purposes, and the author made no allegation of mistreatment during those interviews. Even if the Committee were to take the view that the interviews encouraged and supported the alleged unlawful treatment of the author by the United States, such purported encouragement and support would not rise to the level of aiding or assisting, as required in article 16.

Author's comments

111. The author disagrees with the State party's legal characterization of its conduct. He had no objection to, for instance, consular visits for the purpose of his welfare. However, Australia took advantage of the basis and conditions of his confinement to pursue its own law enforcement ends, in the process legitimizing the unlawful acts committed by the United States. Such assistance was thus "significant". Interviewing the author in such circumstances cannot be described as for "appropriate" law enforcement and intelligence purposes.

(e) Claims under article 14 regarding unfair trial

State party's observations

112. Australia refers to the author's reliance on article 16 of the draft articles on State responsibility of the International Law Commission in claiming that it unlawfully aided and assisted his alleged unfair trial. In advancing that claim, the author states that senior Australian government officials repeatedly expressed the approval of Australia of the military commission system to which he was subjected. However, the author fails to demonstrate how the alleged condoning and encouraging of the trial system by Australia rose to the level of aiding or assisting the United States, as required in article 16. In its commentary on the draft articles, the International Law Commission states that "the incitement of wrongful conduct is generally not regarded as sufficient to give rise to responsibility on the part of the inciting State, if it is not accompanied by concrete support or does not involve direction and control on the part of the inciting State".

Author's comments

113. The author rejects the arguments of Australia and its interpretation of the commentary of the International Law Commission. There is no reason why incitement could not rise to the level of aid or assistance in an appropriate case. In its commentary, the International Law Commission suggests only that "generally" incitement is not regarded as attracting responsibility. There is no absolute exclusionary rule. Australian officials repeatedly expressed approval of the military commission system and condoned and encouraged it. As a result, Australia provided vital legal and diplomatic support to the United States in defending that system from international criticism.

114. Australia did in fact provide "concrete support" alongside its incitement. Law enforcement officers searched premises and seized evidence from the author's family home in Adelaide, interrogated the author at Guantanamo Bay and cooperated with United States officials in the sharing of law enforcement and intelligence information. Such concrete support was given in the context of Australia publicly endorsing the author's military commission trial. The endorsement of Australia of the military commissions may be seen as rendering aid or assistance in the context of breaching article 41 of the draft articles on State responsibility of the International Law Commission.[11] In its commentary thereon, the International Law Commission mentions the prohibition of torture in that context. In that regard, the statements by Australia supporting the author's unfair trial, which arguably amounts to a war crime, may violate the prohibition on recognizing as lawful a violation of a peremptory norm.

[11] "No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40 [obligations arising under a peremptory norm of general international law], nor render aid or assistance in maintaining that situation".

State party's further submission

115. Australia reiterates that incitement is not sufficient to give rise to State responsibility if it is not accompanied by concrete support or does not involve direction and control, and rejects the claim that statements by Australian officials amount to aid or assistance. Even if it were the case, the author has not demonstrated how any of the actions that he refers to constitute "concrete support". The actions described by the author, such as gathering evidence, conducting interviews and cooperating with foreign officials, are preliminary to a trial and have no bearing on the way in which a trial is conducted in a foreign State. The author alleged that his trial did not meet the minimum guarantees of a fair trial as a result of a range of procedural and institutional defects. However, Australia had no control over those.

(f) Claims under articles 2 and 7 regarding torture and ill-treatment

State party's observations

116. Regarding the author's claim that Australia failed to investigate his allegations of torture while in the custody of the United States, Australia refers to its arguments regarding inadmissibility and adds that the claim does not concern an obligation set forth in the Covenant. It recalls the 21 visits that Australian officials paid to the author during the time he spent at Guantanamo Bay and on board the *USS Peleliu*.

117. Australian officials did not at any stage witness or participate in any mistreatment of the author, who made no allegation of mistreatment during interviews conducted by Australian officials. From December 2001 to May 2003, Australian officials visited the author on five occasions, but it was not until the fifth visit in May 2003 that he alleged having been mistreated. In particular, he said that he had been beaten while in custody in Afghanistan, but did not provide details. On 20 May 2004, in response to media reports about his mistreatment, Australia formally requested the United States Department of Defense to conduct an investigation into the treatment of the author, including during the period prior to his detention at Guantanamo Bay. The investigation revealed no information that substantiated the author's allegations of mistreatment.

118. The author was not mentioned in the reports of the International Committee of the Red Cross on Guantanamo Bay, as the Australian Senate was informed on 3 June 2004. In July 2005, a second investigation of the author's complaints of mistreatment was carried out by the United States Naval Criminal Investigative Service, which found them unsubstantiated.

119. Complaints made by the author during visits of Australian officials regarding food, a lack of exercise, medical conditions and other matters, such as access to reading material, were raised with the camp authorities at Guantanamo Bay or, where appropriate, with the United States Department of Defense.

Author's comments

120. The author disagrees with the interpretation given by Australia of articles 2 and 7 of the Covenant and reiterates his initial claims. He says, inter alia, that he was never provided with a copy of either of the reports on the two United States investigations. As a result, it is impossible for him or the Committee to be satisfied that those investigations were comprehensive, impartial and credible.

(g) Claims under articles 12, 14, 17, 19 and 22 regarding the imposition of a control order

State party's observations

121. Regarding the author's claims that the control order proceedings were unfair, Australia refers to the author's contention that the reliance on the civil standard of proof (balance of probabilities) in imposing the control order was inappropriate given the seriousness of the restrictions imposed and, as such, was in breach of article 14 (1) of the Covenant. The control order regime is directed at protecting national security and public order by reducing the risk of terrorist acts. The regime recognizes the principle of proportionality by requiring the court to be satisfied that restrictions are reasonably necessary, appropriate and adapted, for the purpose of protecting the public.

122. The author contends that he was unable to test fully the evidence brought by the authorities and upon which the order was issued because of restrictions on his access to it. However, that argument lacks merit. The author cites provisions of the Criminal Code, according to which information does not have to be included in certain documents, such as documents to be served on the person in relation to whom the control order is sought, if disclosure of the information would be likely to prejudice national security within the meaning of the National Security Information (Criminal and Civil Proceedings) Act. However, the author does not explain how those provisions were applied in his case. Furthermore, the Australian Federal Police did not rely on those provisions to exclude information from documents that it was otherwise required to provide to the author.

123. The author makes other assertions concerning the operation of elements of the National Security Information Act, but does not specify how those elements were applied in his case. The judgements of the Federal Magistrate make no reference to the Act having been invoked in the matter. The evidence submitted by the Australian Federal Police was available to the author, whose counsel cross-examined the applicant for the control order, a senior member of the Australian Federal Police. The author was invited to present evidence on his own behalf, but did not do so. The judgements contain no reference to the author claiming that his ability to submit evidence had been compromised by the Act. Those points, taken together, demonstrate that the author failed to substantiate the merits of his claim. Thus, Australia submits that the Act and related provisions of the Criminal Code did not violate the rights guaranteed under article 14 (1).

124. The author does not substantiate his contention that the Federal Magistrate's evaluation of the evidence presented by the Australian Federal Police was capricious or unreasonable. The Magistrate subjected that evidence to scrutiny and provided a reasoned explanation of why the evidence taken as a whole provided a sufficient basis for the court to be satisfied that the issuance of the control order would assist in preventing a terrorist act. Moreover, the Magistrate reduced the reporting requirement for the author from the three times per week sought by the Australian Federal Police to twice per week. The Magistrate further underlined that the author had not submitted evidence of, inter alia, "his current views and beliefs" or "an explanation of the documents relied upon by the Applicant". Furthermore, it is indicated in the judgement that the author was given additional time to present evidence, but that the offer was not taken up. Finally, the author could have sought to appeal the judgement confirming the control order, but did not do so. Australia concludes that the fair hearing ground of the claim under articles 12, 14, 17, 19 and 22 has not been substantiated on the merits.

125. Regarding the necessity ground, Australia submits the following arguments. First, the necessity ground, to the extent that it rests on the contention that the author's right to a fair hearing was violated, has not been substantiated on the merits.

126. Second, regarding the possibility of imposing less invasive methods, Australia submits that the control order regime in the Criminal Code represents a necessary and proportionate response to the risk of terrorist acts. Consequently, the author's positing of a hypothetical alternative regime is without merit. Further, the imposition of the order followed a properly conducted judicial process and the restrictions on the author conformed to the principle of proportionality and were appropriate to achieve their protective function. The author was required to report to the police twice a week on Wednesdays and Saturdays between 5.15 a.m. and midnight. The requirement did not preclude the author from seeking employment or studying. He was prevented from contacting any individual whom he knew to be a member of a terrorist organization, which was necessary and proportionate in addressing the risk of a terrorist act. He was not prohibited from using basic telecommunication services. In reducing the reporting requirement, the Magistrate took into account the impact on the author's circumstances, including financial and personal ones. Furthermore, the Australian Federal Police facilitated changes to the order to allow the author to travel within Australia and change his residence from Adelaide to Sydney.

127. Third, the contention that the definition of "terrorist act" in the Criminal Code does not satisfy the principle of legality lacks merit. Only article 15 of the Covenant embodies elements of the principle of legality and does so in relation to criminal proceedings. The control order proceedings were civil, not criminal. As article 15 does not apply to civil proceedings, the author has failed to show that his contention regarding the definition of "terrorist act" can be assessed against the Covenant. The author has also failed to establish how the alleged problem with the definition of "terrorist act" affected him in the control order proceedings.

128. Fourth, the contention that prior training is not sufficient, in and of itself, to justify a control order without evidence of any continuing intention on the part of the affected person to engage in terrorism, lacks merit. Under article 104.4 (1) of the Criminal Code, a court has discretion as to whether to impose a control order where the person has provided training to, or trained with, a listed terrorist organization. The court is required to be satisfied that each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary and appropriate.

129. Fifth, the author had the opportunity to give evidence that he did not pose a danger to the community, but did not use it. Furthermore, it is only the Federal Magistrate's evaluation of the facts and evidence that can properly be subjected to scrutiny by the Committee and, then, only if it can be shown that such evaluation was clearly arbitrary or amounted to a manifest error or denial of justice. As to the contention that the imposition of the control order breached the *ne bis in idem* principle, the imposition of the control order did not constitute a criminal penalty and the order did not subject the author to detention.

130. Sixth, the contention that the organizations with which the author trained were not proscribed in Australian law at the time is irrelevant, since the purpose of the control order proceedings was not to determine whether the author should be subject to a penalty for his involvement with them. The fact that the author trained with them prior to their listing did not reduce the harm that the author was considered to present at the time the court considered the control order application.

131. Seventh, the contention that the activities undertaken by the author were not unlawful at the time has not been substantiated on the merits, as the control order proceedings were not criminal proceedings.

132. Lastly, the question of the interpretation of the author's letters to his family is bound up with the evaluation of evidence by the Magistrate. The author does not establish that the Magistrate's evaluation was clearly arbitrary or amounted to a manifest error or denial of justice, or that the Magistrate otherwise violated his obligation of independence and

impartiality. The author had the opportunity to give evidence challenging that interpretation, but did not use it.

Author's comments

133. In connection with the standard of proof, the author submits that the standard requiring only "reasonable satisfaction" still permits a very wide margin for error and falls well short of the criminal standard of beyond reasonable doubt. A standard closer to the criminal standard is more acceptable in control order proceedings than relying on a civil standard. He also reiterates his claim that the court should not have exercised its discretion to impose a control order as it was not necessary in the circumstances. It cannot be necessary to impose rights restrictions solely in respect of past conduct that was not unlawful, to prevent potential future conduct that is also not harmful to civilians and cannot genuinely be classified as "terrorist".

134. Regarding the letters to his family, the author reiterates that the court did not closely examine the range of possible meanings that they conveyed and assumed the worst of the author, without demonstrating how they revealed an intention to unlawfully harm civilians.

135. As to his ability to challenge the evidence, the author submits that the court should have asked harder questions in scrutinizing the evidence and satisfied itself as to the facts that the evidence was actually capable of supporting. There was no credible evidentiary basis for the court to find that the author intended to harm civilians currently or in future. That was true even in the absence of the author's own evidence to rebut the Australian authorities' case.

136. The legislation does not formally require the authorities or courts to consider other, less invasive means before applying for or issuing a control order. In his case, the court considered the availability of surveillance in determining adjustments to the restrictive measures. The court did not, however, carefully scrutinize the means of surveillance, illustrating the point that the court did not adequately examine whether other means were able to secure the same security end with less invasive effects. Control orders were abolished in the United Kingdom because of concerns about their effectiveness, necessity and adverse impacts on human rights.

137. Regarding the definition of terrorism, the author reiterates that it is too vague and had an adverse effect in his case by leading directly to the imposition of the control order.

138. The author also contends that the *ne bis in idem* principle is not limited to cases where two criminal proceedings are involved, but may encompass, for instance, a criminal proceeding followed by a civil process that imposes punishment or penalties in respect of the same underlying conduct.