Adimayo M. Aduayom, Sofianou T. Diasso and Yawo S. Dobou v. Togo,
Communications Nos. 422/1990, 423/1990 and 424/1990,
U.N. Doc. CCPR/C/51/D/422/1990, 423/1990 and 424/1990(1996).

ANNEX */

Views of the Human Rights Committee under article 5, paragraph 4,

of the Optional Protocol to the International Covenant

on Civil and Political Rights

- Fifty-seventh session -

concerning

Communications Nos. 422/1990, 423/1990 and 424/1990 *

Submitted by: Adimayo M. Aduayom, Sofianou T. Diasso and Yawo S. Dobou

Victims: The authors

State party: Togo

Dates of communications: 31 July 1990, 31 July 1990 and 1 August 1990, respectively (initial submissions)

Date of decision on admissibility: 30 June 1994

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

Meeting on 12 July 1996,

Having concluded its consideration of communications Nos. 422/1990, 423/1990 and 424/1990 submitted to the Human Rights Committee by Messrs. Adimayo M. Aduayom, Sofianou T. Diasso and Yawo S. Dobou under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communications and the State party,

Adopts the following:

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

1. The authors of the communications are Adimayo M. Aduayom, Sofianou T. Diasso and Yawo S. Dobou, three Togolese citizens currently residing in Lomé, Togo. The authors claim to be the victims of violations by Togo of articles 9 and 19 of the International Covenant on Civil and Political Rights by Togo. The Optional Protocol entered into force for Togo on 30 June 1988.

Facts as submitted by the authors

2.1 The author of communication No. 422/1990, Mr. Aduayom, is a teacher at the University of Benin (Togo) in Lomé. He states that he was arrested on 18 September 1985 by the police in Lomé and transferred to a Lomé penitentiary on 25 September 1985. He was charged with the offence of lèse-majesté (outrage au Chef de l'Etat dans l'exercice de sa fonction), and criminal proceedings were instituted against him. However, on 23 April 1986, the charges against him were dropped, and the author was released. Thereafter, he unsuccessfully requested his reinstatement in the post of maître assistant at the University, which he had held prior to his arrest.

2.2 The author of communication No. 423/1990, Mr. Diasso, also was a teacher at the University of Benin. He was arrested on 17 December 1985 by agents of the Togolese Gendarmerie Nationale, allegedly on the ground that he was in possession of pamphlets criticizing the living conditions of foreign students in Togo and suggesting that money "wasted" on political propaganda would be better spent on improving the living conditions in, and the equipment of, Togolese universities. He was taken to a Lomé prison on 29 January 1986. He was also charged with the offence of lèse-majesté, but the Ministry, after conceding that the charges against him were unfounded, released him on 2 July 1986. Thereafter, he has unsuccessfully sought reinstatement in his former post of adjunct professor of economics at the University.

2.3 The author of case No. 424/1990, Mr. Dobou, was an inspector in the Ministry of Post and Telecommunications. He was arrested on 30 September 1985 and transferred to a Lomé prison on 4 October 1985, allegedly because he had been found reading a document outlining in draft form the statutes of a new political party. He was charged with the offence of lèse-majesté. On 23 April 1986, however, the charges were dropped and the author was released. Subsequently, he unsuccessfully requested reinstatement in his former post.

2.4 The authors' wages were suspended under administrative procedures after their arrest, on the ground that they had unjustifiably deserted their posts.

2.5 With respect to the requirement of exhaustion of domestic remedies, the authors state that they submitted their respective cases to the National Commission on Human Rights, an organ they claim was established for the purpose of investigating claims of human rights violations. The Commission, however, did not examine their complaints

and simply forwarded their files to the Administrative Chamber of the Court of Appeal. This instance, apparently, has not seen fit to examine their cases. The author of case No. 424/1990 additionally complains about the delays in the procedure before the Court of Appeal; thus, he was sent documents submitted by the Ministry of Post and Telecommunications some seven months after their receipt by the Court.

The complaint

3.1 The authors claim that both their arrest and their detention was contrary to article 9, paragraph 1, of the Covenant. This was implicitly conceded by the State party when it dropped all the charges against them. They further contend that the State party has violated article 19 in respect to them, because they were persecuted for having carried, read or disseminated documents that contained no more than an assessment of Togolese politics, either at the domestic or foreign policy level.

3.2 The authors request reinstatement in the posts they had held prior to their arrest, and request compensation under article 9, paragraph 5, of the Covenant.

State party's admissibility observations and authors' comments and clarifications

4.1 The State party objects to the admissibility of the communications on the ground that the authors have failed to exhaust available domestic remedies. It observes that the procedure is regularly engaged before the Court of Appeal. In the cases concerning Messrs Aduayom and Diasso (communications Nos. 422/1990 and 423/1990), the employer (the University of Benin) did not file its own submission, so that the Administrative Chamber of the Court of Appeal cannot pass sentence. With respect to the case of Mr. Dobou (No. 424/1990), the author allegedly did not comment on the statement of the Ministry of Post and Telecommunications. The State party concludes that domestic remedies have not been exhausted, since the Administrative Chamber has not handed down a decision.

4.2 The State party also notes that the Amnesty Law of 11 April 1991 decreed by the President of the Republic constitutes another remedy for the authors. The law covers all political cases as defined by the Criminal Code ("infractions à caractère ou d'inspiration politique, prévues par la législation pénale") which occurred before 11 April 1991. Article 2 of the Law expressly allows for the reinstatement in public or private office. The amnesty is granted by the Public Prosecutor ("Procureur de la République ou juge chargé du Ministère Public") within three days after the request (article 4). According to article 3, the petition under these provisions does not prevent the victim from pursuing his claims before the ordinary tribunals.

5.1 After a request for further clarifications formulated by the Committee during the forty-ninth session, the authors, by letters dated 23 December, 15 November and 16 December 1993 respectively, informed the Committee that they were reinstated in their posts pursuant to the Law of 11 April 1991. Mr. Diasso notes that he was reinstated with effect from 27 May 1991, the others with effect from 1 July 1991.

5.2 The authors note that there has been no progress in the proceedings before the Administrative Chamber of the Court of Appeal, and that their cases appear to have been shelved, after their reinstatement under the Amnesty Law. They argue, however, that the law was improperly applied to their cases, since they had never been tried and convicted for committing an offence, but had been unlawfully arrested, detained and subsequently released after the charges against them were dropped. They add that they have not been given arrears on their salaries for the period between arrest and reinstatement, during which they were denied their income.

5.3 As regards the statute of the University of Benin, the authors submit that, although the University is, at least in theory, administratively and financially autonomous, it is in practice under the control of the State, as 95 per cent of its budget is State-controlled.

5.4 The authors refute the State party's argument that they have failed to exhaust domestic remedies. In this context, they argue that the proceedings before the Administrative Chamber of the Court of Appeal are wholly ineffective, since their cases were obviously filed after their reinstatement under the Amnesty Law, and nothing has happened since. They do not, however, indicate whether they have filed complaints with a view to recovering their salary arrears.

The Committee's admissibility decision

6.1 During its fifty-first session, the Committee considered the admissibility of the communication. It noted with concern that no reply had been received from the State party in respect of a request for clarification on the issue of exhaustion of domestic remedies, which had been addressed to it on 26 October 1993.

6.2 The Committee noted the authors' claims under article 9 and observed that their arrest and detention occurred prior to the entry into force of the Optional Protocol for Togo (30 June 1988). It further noted that the alleged violations had continuing effects after the entry into force of the Optional Protocol for Togo, in that the authors were denied reinstatement in their posts until 27 May and 1 July 1991 respectively, and that no payment of salary arrears or other forms of compensation had been effected. The Committee considered that these continuing effects could be seen as an affirmation of the previous violations allegedly committed by the State party. It therefore concluded that it was not precluded ratione temporis from examining the communications and considered that they might raise issues under articles 9, paragraph 5; 19; and 25(c), of the Covenant.

6.3 The Committee took note of the State party's argument that domestic remedies had not been exhausted, as well as of the authors' contention that the procedure before the Administrative Chamber of the Court of Appeal was ineffective, because no progress in the adjudication of their cases was made after their reinstatement under the Amnesty Law, and that indeed said cases appeared to have been filed. On the basis of the information before it, the Committee did not consider that an application to the

Administrative Chamber of the Court of Appeal constituted an available and effective remedy within the meaning of article 5, paragraph 2(b), of the Optional Protocol.

6.4 On 30 June 1994, therefore, the Committee declared the communication admissible in as much as it appeared to raise issues under articles 9, paragraph 5; 19; and 25(c), of the Covenant. It further decided, pursuant to rule 88, paragraph 2, of its rules of procedure, to deal jointly with the authors' communications.

Examination of the merits

7.1 The deadline for the submission of the State party's observations under article 4, paragraph 2, of the Optional Protocol expired on 10 February 1995. No submission has been received from the State party, in spite of a reminder addressed to it on 26 October 1995. The Committee regrets the absence of cooperation on the part of the State party, as far as the merits of the authors' claims are concerned. It is implicit in article 4, paragraph 2, of the Optional Protocol that a State party must furnish the Committee, in good faith and within the imparted deadlines, with all the information at its disposal. This the State party has failed to do; in the circumstances, due weight must be given to the authors' allegations, to the extent that they have been adequately substantiated.

7.2 Accordingly, the Committee has considered the present communications in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

7.3 The authors contend that they have not been compensated for the time they were arbitrarily arrested, contrary to article 9, paragraph 5. The procedures they initiated before the Administrative Chamber of the Court of Appeal have not, on the basis of the information available to the Committee, resulted in any judgment or decision, be it favourable or unfavourable to the authors. In the circumstances, the Committee sees no reason to go back on its admissibility decision, in which it had held that recourse to the Administrative Chamber of the Court of Appeal did not constitute an available and effective remedy. As to whether it is precluded ratione temporis from considering the authors' claim under article 9, paragraph 1, the Committee wishes to note that its jurisprudence has been not to entertain claims under the Optional Protocol based on events which occurred after entry into force of the Covenant but before entry into force of the Optional Protocol for the State party. Some of the members feel that the jurisprudence of the Committee on this issue may be questionable and may have to be reconsidered in an appropriate (future) case. In the instant case, however, the Committee does not find any elements which would allow it to make a finding under the Optional Protocol on the lawfulness of the authors' arrest, since the arrests of the authors took place in September and December 1985, respectively, and they were released in April and July 1986, respectively, prior to the entry into force of the Optional Protocol for Togo on 30 June 1988. Accordingly, the Committee is precluded ratione temporis from examining the claim under article 9, paragraph 5.

7.4 In respect of the claim under article 19, the Committee observes that it has remained uncontested that the authors were first prosecuted and later not reinstated in their posts, between 1986 and 1991, inter alia, for having read and, respectively, disseminated information and material critical of the Togolese Government in power and of the system of governance prevailing in Togo. The Committee observes that the freedoms of information and of expression are cornerstones in any free and democratic society. It is in the essence of such societies that its citizens must be allowed to inform themselves about alternatives to the political system/parties in power, and that they may criticize or openly and publicly evaluate their Governments without fear of interference or punishment, within the limits set by article 19, paragraph 3. On the basis of the information before the Committee, it appears that the authors were not reinstated in the posts they had occupied prior to their arrest, because of such activities. The State party implicitly supports this conclusion by qualifying the authors' activities as "political offences", which came within the scope of application of the Amnesty Law of 11 April 1991; there is no indication that the authors' activities represented a threat to the rights and the reputation of others, or to national security or public order (article 19, paragraph 3). In the circumstances, the Committee concludes that there has been a violation of article 19 of the Covenant.

7.5 The Committee recalls that the authors were all suspended from their posts for a period of well over five years for activities considered contrary to the interests of the Government; in this context, it notes that Mr. Dobou was a civil servant, whereas Messrs Aduayom and Diasso, were employees of the University of Benin, which is in practice state-controlled. As far as the case of Mr. Dobou is concerned, the Committee observes that access to public service on general terms of equality encompasses a duty, for the State, to ensure that there is no discrimination on the ground of political opinion or expression. This applies a fortiori to those who hold positions in the public service. The rights enshrined in article 25 should also be read to encompass the freedom to engage in political activity individually or through political parties, freedom to debate public affairs, to criticize the Government and to publish material with political content.

7.6 The Committee notes that the authors were suspended from their posts for alleged "desertion" of the same, after having been arrested for activities deemed to be contrary to the interests of the State party's Government. Mr. Dobou was a civil servant, whereas Messrs. Aduayom and Diasso were employees of the University of Benin, which is in practice state-controlled. In the circumstances of the authors' respective cases, an issue under article 25(c) arises in so far as the authors' inability to recover their posts between 30 June 1988 and 27 May and 1 July 1991, respectively, is concerned. In this context, the Committee notes that the non-payment of salary arrears to the authors is a consequence of their non-reinstatement in the posts they had previously occupied. The Committee concludes that there has been a violation of article 25(c) in the authors' case for the period from 30 June 1988 to 27 May and to 1 July 1991, respectively.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that

the facts as found by the Committee reveal violations by Togo of articles 19 and 25(c) of the Covenant.

9. Pursuant to article 2, paragraph 3(a), of the Covenant, the authors are entitled to an appropriate remedy, which should include compensation determined on the basis of a sum equivalent to the salary which they would have received during the period of non-reinstatement starting from 30 June 1988. The State party is under an obligation to ensure that similar violations do not occur in the future.

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

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

Individual opinion by Committee member Fausto Pocar

While I concur with the Committee's findings on the issues raised by the authors' claims under articles 19 and 25(c), I cannot subscribe to the Committee's conclusions on issues raised under article 9, paragraph 5, of the Covenant. On this issue, the Committee argues that since it is precluded ratione temporis from establishing the lawfulness of the authors' arrest and detention under article 9, paragraph 1, of the Covenant, it is also precluded ratione temporis from examining their claim to compensation under article 9, paragraph 5. I cannot share these conclusions, for the following reasons.

Firstly, it is my personal view that the claim under article 9, paragraph 1, could have been considered by the Committee even if the alleged facts occurred prior to the entry into force of the Optional Protocol for Togo. As I had the opportunity to indicate with regard to other communications, and in more general terms when the Committee discussed its General Comment on reservations (see CCPR/C/SR.1369, page 6, paragraph 31), the Optional Protocol provides for a procedure which enables the Committee to monitor the implementation of the obligations assumed by States parties to the Covenant, but it has no substantive impact on the obligations as such, which must be observed as from the entry into force of the Covenant. In other words, it enables the Committee to consider violations of such obligations not only within the reporting procedure established under article 40 of the Covenant, but also in the context of the consideration of individual communications. From the merely procedural nature of the Optional Protocol it follows that, unless a reservation is entered by a State party upon accession to the Protocol, the Committee's competence

also extends to events that occurred before the entry into force of the Optional Protocol for that State, provided such events occurred or continued to have effects after the entry into force of the Covenant.

But even assuming, as the majority view does, that the Committee was precluded ratione temporis from considering the authors' claim under article 9, paragraph 1, of the Covenant, it would still be incorrect to conclude that it is equally precluded, ratione temporis, from examining their claim under article 9, paragraph 5. Although the right to compensation, to which any person unlawfully arrested or detained is entitled, may also be construed as a specification of the remedy within the meaning of article 2, paragraph 3, i.e. the remedy for the violation of the right set forth in article 9, paragraph 1, the Covenant does not establish a causal link between the two provisions contained in article 9. Rather, the wording of article 9, paragraph 5, suggests that its applicability does not depend on a finding of violation of article 9, paragraph 1; indeed, the unlawfulness of an arrest or detention may derive not only from a violation of the provisions of the Covenant, but also from a violation of a provision of domestic law. In this latter case, the right to compensation may exist independently of whether the arrest or detention can be regarded as the basis for a claim under article 9, paragraph 1, provided that it is unlawful under domestic law. In other words, for the purpose of the application of article 9, paragraph 5, the Committee is not precluded from considering the unlawfulness of an arrest or detention, even if it might be precluded from examining it under other provisions of the Covenant. This also applies when the impossibility to invoke other provisions is due to the fact that arrest or detention occurred prior to the entry into force of the Covenant or, following the majority view, prior to the entry into force of the Optional Protocol. Since in the present case the unlawfulness of the authors' arrest and detention under domestic law is undisputed, I conclude that their right to compensation under article 9, paragraph 5, of the Covenant has been violated, and that the Committee should have made a finding to this effect.

F. Pocar

[signed]

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

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footnotes

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

*/ The text of an individual opinion by one Committee member is appended to the present document.