



**International covenant
on civil and
political rights**

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HUMAN RIGHTS COMMITTEE
Eighty-second session
18 October - 5 November 2004

DECISION

Communication No. 944/2000

<u>Submitted by:</u>	Chanderballi Mahabir (not represented by counsel)
<u>Alleged victim:</u>	The author
<u>State party:</u>	Austria
<u>Date of communication:</u>	18 May 1999 (initial submission)
<u>Document references:</u>	Special Rapporteur's rule 91 decision, transmitted to the State party on 29 August 2000 (not issued in document form).
<u>Date of decision:</u>	26 October 2004

[ANNEX]

* Made public by decision of the Human Rights Committee.

ANNEX

**DECISION OF THE HUMAN RIGHTS COMMITTEE UNDER
THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT
ON CIVIL AND POLITICAL RIGHTS**

Eighty-second session

concerning

Communication No. 944/2000**

Submitted by: Chanderbali Mahabir (not represented by counsel)

Alleged victim: The author

State party: Austria

Date of communication: 18 May 1999 (initial submission)

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

Meeting on 26 October 2004

Adopts the following:

DECISION ON ADMISSIBILITY

1.1 The author of the communication is Chanderbali Mahabir, a citizen of Trinidad and Tobago, born in 1964. He does not invoke any specific provision of the Covenant. However, the communication appears to raise issues under articles 8, 10, 17 and 26¹ of the International Covenant on Civil and Political Rights (the Covenant). He is not represented by counsel.

** The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

The text of an individual opinion signed by Committee member Mr. Hipólito Solari-Yrigoyen is appended to the present document.

¹ Upon ratification of the Covenant, the State party entered the following reservation in relation to article 26 of the Covenant: "Article 26 is understood to mean that it does not exclude different

1.2 The Covenant and the Optional Protocol entered into force for the State party on 10 December 1978 and 10 March 1988, respectively. Upon ratification of the Optional Protocol, the State party entered the following reservation to article 5, paragraph 2 (a): “On the understanding that, further to the provisions of article 5 (2) of the Protocol, the Committee provided for in Article 28 of the Covenant shall not consider any communication from an individual unless it has been ascertained that the same matter has not been examined by the European Commission on Human Rights established by the European Convention for the Protection of Human Rights and Fundamental Freedoms.”

The facts as submitted by the author

2.1 By judgment of 27 September 1993, the Regional Criminal Court of Graz convicted the author of several drug-related and other offences and sentenced him to nine years and eight months’ imprisonment. The author served this sentence in different correctional facilities in Graz. On 11 May 1994 and 2 September 1995, he tried to escape from prison. He was released on 3 August 2001 and immediately deported to Port of Spain, Trinidad and Tobago.

2.2 While serving his prison term, the author was required to perform work,² receiving an hourly salary of 51.40 Austrian Schillings (ATS). In accordance with Section 32, paragraph 2, of the Enforcement of Sentences Act, 75 percent of the author’s remuneration was deducted to cover his prison expenses. As an example, after a further deduction of 376.80 ATS for unemployment contributions, he received a net salary of 1.892.00 ATS (out of his gross earnings of 8.840.80 ATS) for 172 working hours in October 1998.

2.3 On 3 March 1997, the author requested permission to purchase a personal computer (PC) for study purposes. The prison authorities granted his request on 13 March 1997, since the author had completed a computer course and had shown good conduct and work performance. The authorities withdrew the author’s permission to use a private PC and confiscated his computer, because he did not work in November 1997. His request of 5 November 1997 to have his computer returned was rejected three weeks later, on the ground that good work performance was a requirement for enjoying the privilege of using a private PC.³ After another request had been denied on 16 December 1997 for identical reasons, the author, by letter of 25 February 1998, complained to the Ministry of Justice, claiming that the denial of access to his computer

treatment of Austrian nationals and aliens, as is also permissible under article 1, paragraph 2, of the International Convention on the Elimination of All Forms of Racial Discrimination.”

² See Section 44 of the Federal Act on the Enforcement of Prison Sentences and Preventive Measures in Connection with Imprisonment of 1969 (Enforcement of Sentences Act): “(1) Every prisoner who is physically able to work has the obligation to work. (2) Prisoners obligated to work shall perform the work assigned to them. Prisoners shall not be assigned work that entails life risks or danger of serious damage to their health.”

³ See Section 24 of the Enforcement of Sentences Act: “(1) A prisoner who shows his cooperation in achieving the purposes of his sentence, shall upon his request be granted appropriate privileges. [...] (4) If a prisoner abuses the privileges granted to him or if the conditions on which they were granted subsequently cease to exist, the privileges shall be restricted or withdrawn.”

had exceeded the maximum permissible period of three months (Section 111 of the Enforcement of Sentences Act).

2.4 On 27 July and 10 August 1998, the author requested permission to receive food parcels from his family every three months. Permission was denied in both cases, on the basis that the author served a drug-related sentence and was therefore precluded from receiving food parcels. On 17 September 1998, the author complained to the prison warden and, on 5 October 1998, to the Ministry of Justice, which rejected his complaint on 9 October. On 19 October, the author informed the United Nations and Amnesty International of these decisions, arguing that they amounted to racial discrimination, since other prisoners who were also serving sentences for drug-related offences could receive food parcels from their families and friends.

2.5 On 30 March 1999, the author complained to the Ministry of Justice, claiming violations of his rights as a prisoner, since a parcel with clothing from his aunt had been opened by the duty officer in his absence and without his signature, been re-sealed and returned to the sender. Although a prison social worker promised him that future parcels for him would be accepted, another package was again opened and returned to the sender soon thereafter. By letter of 5 April 1999, the author informed the Ministry of Justice that a social worker had told him that one of the prison guards, Major W., had expressed the intention of barring the author from the receipt of any parcels, should he refuse to withdraw his complaint to the Ministry of Justice.

2.6 On 10 May 1999, the prison authorities rejected the author's request to make his monthly telephone call to a family member, arguing that he had already made a call on 21 April 1999. The prison administration did not react to the author's clarification, on 16 May, that his request was for May rather than April.

2.7 In May 1999, the author bought a printer, but was not given any cartridges for this printer, although the purchase of cartridges had allegedly been authorized. When another request to collect the cartridges was denied on 20 May 1999, on the ground that the author had based his request on false information, he complained to the Ministry of Justice, alleging racial discrimination since two other prisoners, P.B. and H.S., had obtained cartridges. Meanwhile, the prison authorities again confiscated the author's PC.

2.8 On 18 May 1999, the author filed an application with the European Court of Human Rights, in which he complained about the above events. By decision of 19 November 1999, a Committee of three judges dismissed the application, in accordance with article 35, paragraph 4, of the European Convention, finding that the matters complained of "do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols."⁴

The complaint

3.1 The author claims that his unequal treatment in prison amounts to racial discrimination, on the basis that he is black and a foreigner. He also submits that the fact that he was forced to work

⁴ European Court of Human Rights, Decision on admissibility of Application no. 51187/99 (Chanderballi Mahabir against Austria), 19 November 1999.

to pay for his prison expenses, and that such work was a prerequisite for his computer to be returned, constitutes a modern form of slavery.

3.2 The author emphasizes that, while prison regulations allow inmates to receive underwear from home, as well as four food parcels per year, he was denied that right, unlike other prisoners also serving drug-related sentences. He argues that he was denied the possibility to make phone calls during the last three months before writing to the Committee.

3.3 The author criticizes that the deduction of unemployment contributions from the remuneration for his prison work by pointing out that, while Austrian prisoners were able to “reclaim this money” after serving their sentence, no such possibility existed for foreigners who leave the country after the end of their prison term.

3.4 The author claims that he was granted hearings with two prison officers in August 1996, but these meetings did not take place. Similarly, the only reaction from the Ministry of Justice to his complaints was to advise the author to settle his problems with the prison authorities directly.

The State party’s observations on admissibility

4.1 On 23 February 2001, the State party challenged the admissibility of the communication, arguing that the author failed to exhaust domestic remedies, that the same matter has been examined by the European Court of Human Rights, and that it was not clear from the communication which of the author’s Covenant rights were considered to have been violated.

4.2 The State party submits that, pursuant to Sections 120 and 121⁵ of the Enforcement of Sentences Act, the decisions of prison staff were subject to review by the prison superintendent and to further complaint to the superior penal authority or, as the case may be, by the Federal Ministry of Justice. Under Articles 140 and 144 of the Federal Constitution, the author could have challenged the pertinent provisions of the Enforcement of Sentences Act for the receipt of parcels, telephone calls or the compulsory contributions to the unemployment scheme before the Federal Constitutional Court, e.g. by invoking the constitutional prohibition of discrimination or his right to property⁶. As the author failed to avail himself of these remedies, the State party concludes that the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

4.3 The State party argues that the communication is also inadmissible under article 5, paragraph 2 (a), of the Optional Protocol, because the author had already filed an application with the European Court.

⁵ Section 121, paragraph 4, of the Enforcement of Sentences Act reads: “Unless a complaint concerns the prison governor, he or his deputy shall inform the prisoner about the decision taken on the complaint. At the same time, the prisoner shall be informed about the possibility of filing a further complaint. Upon written request, the prisoner shall also be issued a written copy of the decision.”

⁶ Article 1 of Protocol No. 1 to the European Convention read in conjunction with article 14 of the European Convention.

4.4 Lastly, the State party argues that the communication contains insufficient information about the alleged violations of the author's Covenant rights, about possible steps taken by him to exhaust domestic remedies, and about the fact that the same matter was being examined by another procedure of international investigation or settlement.

Author's comments and additional information

5.1 On 22 May 2001, the author commented on the State party's admissibility submission, maintaining his arguments and stating that his "refusal" to exhaust domestic remedies was justified in the light of the material submitted by him.

5.2 On 4 June 2001, the author submitted additional information, documenting the prison authorities' decision of 29 March 2001 to reject his repeated requests for return of his PC, although his application to the European Court was stored on this computer; the dismissal of the author's complaint to the prison governor, as well as of his further complaint of 30 April 2001 to the Ministry of the Interior. In the latter, he claimed that he had been confined to his cell for 23 hours a day since 30 November 2000, allegedly because he was considered "a troublemaker".

The State party's additional observations on admissibility and on the merits

6.1 On 22 October 2003, the State party made additional submissions on the admissibility and, subsidiarily, the merits. It reiterates that the author did not exhaust domestic remedies, given that he himself mentioned his "refusal to exhaust all domestic remedies" in his submission dated 22 May 2001.

6.2 The State party invokes its reservation to article 5, paragraph (a), of the Optional Protocol, arguing that the same matter was already examined by the European Court of Human Rights. Although the reservation explicitly only referred to matters which have already been examined by the European Commission of Human Rights, it was clear from the Committee's jurisprudence that the reservation also applied to cases in which the European Court has previously examined the same matter. The European Court "examined" the matter, when declaring the application inadmissible under article 35, paragraph 4, of the European Convention, on the ground that the author's complaints "do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols." The Court therefore based its decision not solely on procedural grounds, but on a substantive assessment of the author's claims.

6.3 For the State party, the communication is also inadmissible under articles 2 and 3 of the Optional Protocol, as the author did not substantiate his sweeping allegations and because some of his claims are incompatible *ratione materiae* with the provisions of the Covenant. Thus, his obligation to work in prison, which primarily served the rehabilitation of prisoners by preparing them for the labour market rather than the recovery of prison expenses, was not covered by the notion of "forced or compulsory labour", pursuant to article 8, paragraph 3 (c) (i), of the Covenant. Similarly, the use of a personal computer in prison is not covered by article 10 of the Covenant, which aims at the protection of the basic needs of prisoners, such as food, clothing, medical supply, regular exercise etc., all of which were satisfied in the author's case.

6.4 On the merits, the State party submits that the enforcement measures complained of did not constitute discrimination, as they were justified by objective criteria. As for the confiscation of the author's PC, this measure was justified by his failure to report for work. Following the theft of meat from the prison butchery, where the author had worked until 29 October 1997, he was placed under strict house arrest and his privilege to use a computer was withdrawn until after he had started to work again in February 1998. Following further incidents, involving the insult of a prison officer, on 30 November 2000, as well as his refusal, on 23 and 30 January 2001, to move to another cell assigned to him, the author was subjected to strict house arrest for a period of 12 days in December 2000 and for two periods of seven and eight days in early 2001 without specifying the particular dates. He did not perform work during the period from 5 December 2000 to 21 May 2001 and his computer was not returned to him until his release from prison on 3 August 2001.

6.5 The State party submits that the author was treated in compliance with the minimum standard required by article 10 of the Covenant, as his basic needs, including food, clothes, medical supply, sanitary hygiene, light heating and regular exercise were at all times ensured.

6.6 The State party submits that, by falsifying an order code, the author deceived the prison authorities about the purchase of a scanner head for his printer, pretending that he only wanted to buy ink cartridges. The purchase of a scanner head was not authorized because of security concerns.

6.7 The State party considers that the denial of permission to receive parcels was justified, because the author was a security risk, since he twice attempted to escape from prison. The author was allowed to make phone calls at least once a month. Moreover, under article 17, read in conjunction with article 10, of the Covenant, the author was only entitled to communicate with his family and friends by correspondence and by receiving visits.

6.8 Regarding the author's obligation to pay contributions to the unemployment scheme, the State party argues that within a risk community grouping together the members of a certain profession or group, the pension concept prevailed over the insurance concept, in accordance with the jurisprudence of the Constitutional Court. Therefore, compulsory contributions to a social insurance scheme must not necessarily result in the payment of insurance benefits. The major aim of the inclusion of prisoners in the unemployment scheme⁷ was to ensure their re-integration into society. While the author did not receive unemployment benefits because he was deported immediately after his release, a substantial number of former prisoners benefited from the scheme.

⁷ Section 66a of the Austrian Unemployment Insurance Act provides that persons who serve a prison term and comply with their duty to work are liable to pay unemployment benefits, so that the respective period may be counted towards their eligibility for unemployment benefits after their release.

Author's comments

7. On 15 December 2003, the author contended that he had fully substantiated his claims, and that the State party's observations of 22 October 2003 are without merit.

Issues and proceedings before the Committee:

Consideration of admissibility

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

8.2 The Committee notes that the State party has invoked its reservation under article 5, paragraph 2 (a), of the Optional Protocol, which precludes the Committee from considering claims if the same matter has previously been examined by the European Commission on Human Rights. The Committee recalls that, for purposes of ascertaining the existence of parallel or successive proceedings before the Committee and the Strasbourg organs, the European Court of Human Rights has succeeded to the former European Commission by taking over its functions, following the entry into force of Protocol No. 11 to the European Convention.⁸ Consequently, the State party's reservation applies also to situations where the same matter has previously been examined by the European Court.⁹

8.3 As to the question of whether the European Court has "examined" the matter, the Committee recalls its jurisprudence that where the Strasbourg organs have based a decision of inadmissibility not solely on procedural grounds¹⁰, but on reasons that involve even limited consideration of the merits of the case, the same matter has been "examined" within the meaning of the respective reservations to article 5, paragraph 2 (a), of the Optional Protocol.¹¹ It considers that, in the present case, the European Court proceeded beyond an examination of purely procedural admissibility criteria, finding that the author's application "[did] not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols".¹²

8.4 The issue before the Committee is therefore whether the subject matter of the present communication constitutes the "same matter" as the one examined by the European Court. The Committee notes that the author's application under the European Convention of Human Rights was submitted on the same day as his communication under the Optional Protocol and that the State party's explicit contention that the two complaints concerned the same issues has not been

⁸ Communication No. 989/2001, *Kollar v. Austria*, decision on admissibility adopted on 30 July 2003, at para. 8.2.

⁹ *Ibid.*, at para. 8.3.

¹⁰ Communication No. 716/1996, *Dietmar Pauer v. Austria*, at para. 10.2

¹¹ Communication No. 121/1982, *A.M. v. Denmark*, Decision on admissibility adopted on 23 July 1982, at para. 6; Communication No. 744/1997, *Linderholm v. Croatia*, Decision on admissibility adopted on 23 July 1999, at para. 4.2.

¹² Communication No. 744/1997, at paras. 3 and 4.2.

contested by the author. Consequently, and as the State party has invoked its reservation relating to article 5, paragraph 2 (a), of the Optional Protocol, the Committee concludes that the same matter has already been examined by the European Court of Human Rights.

8.5 However, the European Court was able to examine the same matter only insofar as the substantive rights protected under the European Convention converge with those protected under the Covenant, and to the extent that the events complained occurred prior to 18 May 1999, when the author filed his application with the European Court. The Committee observes that articles 8 and 17 of the Covenant largely converge with articles 4 and 8 of the European Convention. However, neither the European Convention nor its Protocols contain provisions equivalent to articles 10 and 26 of the Covenant. Accordingly, the Committee considers that the State party's reservation applies insofar as the case raises issues under articles 8 and 17 of the Covenant and to the extent that it relates to events which took place prior to 18 May 1999. This part of the communication is therefore inadmissible under article 5, paragraph 2 (a), of the Optional Protocol.

8.6 As regards the author's claim that the deduction of unemployment contributions from the remuneration for his prison work amounted to discrimination, in breach of article 26 of the Covenant, since it was clear that he would on his eventual release not receive any unemployment benefits as a foreigner who was to be deported to his country of origin directly following his release from prison, the Committee notes, on the basis of the material at its disposal, that the author had not, at the time of his complaint to the Committee or afterwards, raised this claim before the Austrian authorities and courts. Apart from contending that his "refusal" to exhaust domestic remedies was justified, the author failed to address the State party's argument that he could have challenged any possible discriminatory effect of the compulsory contributions to the unemployment scheme before the Constitutional Court, or to indicate whether and, if so, why the remedy of constitutional complaint would have been ineffective or unavailable to him in the specific circumstances of his case. The Committee therefore considers that the author has failed to exhaust domestic remedies in this regard, and concludes that this part of the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

8.7 As to the remainder of the communication, the Committee observes that the author has not substantiated, for purposes of admissibility, that his obligation to perform work at prison, the degree of the alleged restriction of his telephonic communication with family members, or any other measures taken by the prison authorities, in particular the confiscation of his computer and the denial of permission to buy equipment for his printer or to receive food and other parcels from his family, violated his right under article 10 of the Covenant to be treated, as a prisoner, with humanity and with respect for the inherent dignity of the human person or that he, as a foreigner or on account of his being black, was discriminated against within the meaning of article 26 of the Covenant.

8.8 The Committee also notes the contradiction between the author's complaint to the Ministry of the Interior that he was confined to his prison cell for 23 hours a day from 30 November 2000 to 30 April 2001 and the State party's submission that, during the period in question, the author was placed under strict house arrest on three occasions, for different breaches of the prison rules on 30 November 2001 and on 23 and 30 January 2001, and that the duration of these house

arrests was limited to twelve, seven and eight days, respectively. The Committee notes that the author has not commented on this discrepancy, and therefore concludes that he has failed to substantiate this claim, for purposes of admissibility. It follows that the communication is inadmissible under article 2 of the Optional Protocol, insofar as it raises issues under article 10 of the Covenant.

9. The Human Rights Committee therefore decides:

- (a) That the communication is inadmissible under articles 2 and 5, paragraph 2 (a), and (b), of the Optional Protocol;
- (b) That this decision shall be communicated to the State party and to the author.

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

APPENDIX

Individual opinion by Committee member Mr. Hipolito Solari-Yrigoyen (dissenting)

My partial disagreement is based on the considerations below.

Consideration of admissibility

Regarding the author's assertion that he was punished by being confined to his cell for 23 hours a day, the Committee notes that the State party admits the punishment and the description given of it, but disagrees with how long it lasted. The author says it lasted from 30 November 2000 to 30 April 2001; the State party says it fell into three parts lasting respectively twelve, seven and eight days, making a total of 27 days.

The Committee observes that the State party has given incomplete information, since it does not mention the dates when the author was due to undergo his punishment and fails to explain how it was able to give the author the opportunity to take exercise "at all times", thereby treating him in a manner consistent with the minimum rules laid down in article 10 of the Covenant (as stated in para. 6.5), while admitting that he was shut in his cell 23 hours a day for 27 days. The Committee points out that the State party is required to furnish "explanations or statements clarifying the matter" as stated in article 4, paragraph 2, of the Covenant.

The Committee also observes that the author rejected the State party's comments of 22 October 2003 as without merit, as stated in paragraph 7. The author thus disagrees with the shorter length of punishment claimed by the State party.

It follows from the above that the communication is admissible under article 2 of the Optional Protocol, inasmuch as it raises issues under article 10 of the Covenant.

Consideration on the merits

The Committee must determine, in considering the merits of the case, whether the confinement to which, according to the author's letter of 22 May 2001 providing additional information, he was subjected by the State party constituted a violation of article 10 of the Covenant. It notes that the author and the State party concur that the punishment consisted in confinement of the prisoner to his cell for 23 hours a day.

The Committee points out that the essential aim of any penitentiary system should be the reformation and social rehabilitation of offenders, and that punishments should pursue those objectives provided that they do not encroach upon the humane treatment to which persons deprived of their liberty are entitled (article 10, paragraphs 1 and 3, of the Covenant). The Committee notes that the State party has neither alluded to those objectives nor argued that the punishment inflicted on the author was intended to further them.

The Committee concludes that the extremely harsh punishment inflicted on the author was, given its possible mental and physical consequences and the length of time for which it was inflicted, inconsistent with article 10 of the Covenant which requires all persons deprived of their

liberty to be treated with humanity and with due respect for the inherent dignity of the human person. Pursuant to article 4, paragraph 4, of the Optional Protocol, the Committee finds that the facts alleged reveal a violation of article 10 of the International Covenant on Civil and Political Rights.

[*Signed*] Hipólito Solari-Yrigoyen

Geneva, 27 October 2004

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

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