



**International Covenant on  
Civil and Political Rights**

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**Human Rights Committee**

**Communication No. 1821/2008**

**Views adopted by the Committee at its 106th session (15 October-  
2 November 2012)**

<i>Submitted by:</i>	Sholam Weiss (represented by Jonathan Cooper)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Austria
<i>Date of communication:</i>	12 May 2008 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 28 November 2008 (not issued in document form)
<i>Date of adoption of Views:</i>	24 October 2012
<i>Subject matter:</i>	Extradition to a country where the person faces life imprisonment
<i>Substantive issue:</i>	Right to appeal and inhumane and degrading treatment linked to the duration and disproportionality of a sentence.
<i>Procedural issues:</i>	Victim status, admissibility <i>ratione loci</i> and exhaustion of domestic remedies
<i>Articles of the Covenant:</i>	7 and 14, paragraph 5
<i>Article of the Optional Protocol:</i>	1 and 5, paragraph 2 (b)



## 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 (106th session)**

concerning

#### **Communication No. 1821/2008\***

*Submitted by:* Sholam Weiss (represented by Jonathan Cooper)

*Alleged victim:* The author

*State party:* Austria

*Date of communication:* 12 May 2008 (initial submission)

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

*Meeting on 24 October 2012*

*Having concluded* its consideration of communication No. 1821/2008, submitted to the Human Rights Committee by Mr. Sholam Weiss 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 author of the communication, and the State party,

*Adopts the following:*

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

1.1 The author of the communication, dated 12 May 2008, is Sholam Weiss, a citizen of the United States of America and Israel, born on 1 April 1954. He claims that by extraditing him to the United States, where he would not be entitled to appeal his life sentence, Austria has violated article 7 and article 14, paragraph 5, of the International Covenant on Civil and Political Rights. The author is represented by Jonathan Cooper.<sup>1</sup>

1.2 On 3 April 2003, the Committee adopted its Views in relation to communication No. 1086/2002, submitted by the author, in which he claimed, inter alia, that his extradition to the United States violated the above provisions of the Covenant, as his conviction there was pronounced and his sentence imposed *in absentia* and he had no effective opportunity to appeal against them. On the basis of the information before it, the Committee considered

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\* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Ms. Christine Chanet, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Iulia Motoc, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval. Pursuant to rule 91 of the Committee's rules of procedure, Committee member Mr. Gerald L. Neuman did not participate in the adoption of the present Views.

<sup>1</sup> The Covenant and the Optional Protocol entered into force for Austria on 10 December 1978 and on 10 March 1988 respectively.

that since conviction and sentence in the United States had not yet become final, it was premature for the Committee to decide, on the basis of hypothetical facts, whether such a situation gave rise to the State party's responsibility under the Covenant. The Committee did find a violation, however, of article 14, paragraph 1, taken together with article 2, paragraph 3, since the extradition had been carried out in breach of a stay issued by the Austrian administrative court and the author had been deprived of his right to appeal an adverse decision of the Austrian Upper Regional Court. The Committee concluded that the State party was under an obligation to make such representations to the United States authorities as might be required to ensure that the author did not suffer any consequential breaches of his rights under the Covenant which would flow from the State party's extradition of the author in violation of its obligations under the Covenant.<sup>2</sup>

1.3 In the present communication, the author reiterates his claims, not addressed by the Committee in its Views on communication 1086/2002, that his extradition involved violations of articles 7 and 14, paragraph 5, of the Covenant, and alleges that, in view of the proceedings in the United States, these claims are no longer based on hypothetical facts.

### **Factual background**

2.1 In a trial beginning on 1 November 1998 in the District Court of Florida, the author was tried on numerous charges of fraud, racketeering and money laundering.<sup>3</sup> He was represented throughout the trial by counsel of his choice. On 29 October 1999, as jury deliberations were about to begin, the author fled the courtroom and escaped. On 1 November 1999, the author was found guilty on all charges. Following submissions from the prosecution, and the author's counsel in opposition, as to whether sentencing should proceed in his absence, the Court ultimately sentenced him *in absentia* on 18 February 2000 to 845 years' imprisonment (with the possibility of a reduction to 711 years and pecuniary penalties in excess of US\$ 248 million).

2.2 The author's counsel lodged a notice of appeal within the 10-day time limit stipulated by law. On 10 April 2000, the United States Court of Appeals for the Eleventh Circuit rejected the motion of the author's counsel to defer dismissal of the appeal, and dismissed it on the basis of the "fugitive disentitlement" doctrine. Under this doctrine, a court of appeal may reject an appeal lodged by a fugitive on the sole grounds that the appellant is a fugitive. With that decision, the criminal proceedings against the author were concluded in the United States.

2.3 On 24 October 2000, the author was arrested in Vienna, Austria, pursuant to an international arrest warrant, and on 27 October 2000 transferred to extradition detention. On 18 December 2000, the United States submitted a request to the State party for the author's extradition. The author claims that, in response, the State party requested assurances from the United States, under articles 9 and 11 of the Extradition Treaty between the two countries, that following extradition, the author would be given the right to a full appeal of his sentence and conviction. He indicates that, by letters dated 8 February and 14 May 2002, the United States provided the State party with assurances that if the author was extradited with Austria denying one or more criminal counts on which the applicant was convicted, the presiding United States judge would be required, on the

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<sup>2</sup> Communication No. 1086/2002, *Weiss v. Austria*, Views adopted on 3 April 2003, para. 11.1.

<sup>3</sup> In its Memorandum Opinion of the United States District Court, Middle District of Florida, Ocala Division of 15 December 2008, provided by the State party in its observation of 30 January 2009, the judge mentions that the author was charged with violating numerous counts of the Racketeer Influence and Corrupt Organization (RICO) Act, money laundering and other offences arising out of the failure of National Heritage Life Insurance Co.

condition of the Rule of Specialty, to re-sentence him, and that a re-sentencing would permit him to appeal both his sentence and conviction. The assurances, contained in the letter dated 14 May 2002, were drafted as follows:

(1) Assurance on U.S. Law: “If Weiss is extradited subject to the condition that he not be punished for offenses involving false statements to government officials or in judicial proceedings, the presiding United States judge would be required to re-sentence Weiss in order to give effect to the condition.”

(2) Assurance by Expert Opinion, based on assurance # 3 regarding US law: “In our opinion, this would result in Weiss being permitted to file a full appeal on all issues, including the guilty verdict, errors committed during the trial, constitutional issues, and his sentence.”

(3) Assurance on U.S. Law: “Under United States law, a defendant does not separately appeal his verdict and a sentence. Any appeal is from the final judgment, which contains both the finding of guilt and the imposition of punishment.”

(4) Assurance on future U.S. actions in court: “Furthermore, in any proceedings before any United States court, the United States would take the position that the re-sentencing permits Weiss to appeal both the sentence and the guilty verdict.”

2.4 On 8 May 2002, the Austrian Upper Regional Court, upon reconsideration, found that the author’s extradition was admissible on all counts except that of “perjury while a defendant” (so-called Count 93 in the agreement, for which the author had been sentenced to 10 years’ imprisonment), on the basis that no corresponding crime exists in Austria.

2.5 In its ruling, the Austrian Upper Regional Court further considered that according to the case-law of the European Court of Human Rights, extradition to a country where a person faces a life sentence without parole could raise issues under article 3 of the European Convention on Human Rights. The Court continues by stating that at the time of the ruling, however, the European Court of Human Rights had never come to the conclusion that a life sentence without parole was in itself a violation of article 3 of the Convention. The Court stated that on the basis of the note of the United States Department of Justice dated 26 June 2001, the author would have the possibility to appeal the United States judgment and to ask for a new trial on the grounds that he had not been present when he was sentenced. According to the same note, if successful, the author would be retried. The Court decided that it was not certain that the author would be serving a life sentence without parole and therefore, the factual implementation of his life sentence was not confirmed. The Court concluded that article 3 of the Convention would not be violated were the author to be extradited. The Court then assessed whether article 3 of the Convention could also be relevant if a person would be extradited to a country where his conditions of detention were to be incompatible with article 3 of the Convention. The Court considered that neither the general information available nor facts of the case indicated that the author would undergo treatment in the United States incompatible with article 3 of the Convention<sup>4</sup>.

2.6 On 10 May 2002, the Minister of Justice allowed the author’s extradition to the United States, which took place on 9 June 2002.

2.7 The author states that the Austrian Ministry of Justice, in a legal brief to the Austrian Administrative Court submitted on 6 June 2002, declared that the United States letters were

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<sup>4</sup> See Judgment of the Austrian Upper Regional Court of 8 May 2002, p. 27.

“binding international declarations”. The brief specified, inter alia, that “since execution of the part of the verdict concerning Count 93 is not possible in the United States (...) a resentencing must take place there upon petition of the Government, which re-sentencing would have to refer to all counts because of the interconnectedness of the facts”. It also indicated that if the author was extradited he would “be entitled to an unlimited appeal, since separate appeals against verdict and guilt are not admissible with regard to a final judgment”.

2.8 Following the author’s extradition, the United States Government filed a motion with the Middle District Court of Florida (Orlando Division) to re-sentence the author in accordance with the order under which he was extradited from Austria (Rule of Specialty). Specifically, the United States Government requested that the Court re-sentence the author on all counts of conviction except Count 93, which alleged obstruction of justice. On 15 August 2002, the Court denied the United States Government’s motion, ruling that the case was different from the vast majority of cases applying the rule of specialty to an extradition as, in all but rare cases, extradition occurs before trial, and the rule of specialty controls the charges for which the requesting State may prosecute a defendant. The Court ruled that a sentence was not alterable at the will of the Government, in accordance with the principle of separation of powers, and that the latter had not cited any authority which would provide the Court the power to modify the author’s sentence. It added that the rule of specialty was being asserted by the Government, not to limit the offences for which the author can be prosecuted but rather to modify a valid judgement of the Court. The circumstances under which a district court may modify or vacate a sentence were strictly limited by statute and the Federal Rules of Criminal Procedure which did not encompass the circumstances of the present case. The Court also referred to earlier United States jurisprudence related to extradition confirming that re-sentencing was prohibited under the constitutional doctrine of separation of powers.

2.9 On 29 August 2002, the United States Government filed a Notice of Appeal to the United States Circuit Court of Appeals for the Eleventh Circuit. On 10 October 2002, the United States Government filed a motion to stay appeal proceedings in the Eleventh Circuit pending authorization from the United States Department of Justice Solicitor General to appeal the judge’s decision of 15 August 2002. On 23 December 2002, the United States Government filed a “motion to dismiss with prejudice” in the Eleventh Circuit, indicating that the Solicitor General did not give authorization to appeal the judge’s decision. On 8 January 2003, the Eleventh Circuit Court of Appeals granted the Government’s motion, dismissing the appeal “with prejudice” and making the judge’s decision final.

2.10 Having been barred from the appeal process that was assured by the United States authorities to the State party authorities, the author initiated what is known as a 2241 habeas corpus petition in the District Court for the Central District of Florida, claiming that the United States had violated its treaty obligations to Austria since it had failed to provide him with an appeal of his conviction and sentence upon his return to the United States. He claimed that the United States had deliberately misled the Austrian authorities to believe that, in addition to vacating the sentence on Count 93, the author would be re-sentenced and permitted a full appeal of his criminal conviction and new sentence. Accordingly, the United States had violated the Rule of Specialty. These proceedings are an entirely new cause of action within the United States and were pending at the time of submission of the present communication.

### **The complaint**

3.1 In communication No. 1086/2002, the author claimed, inter alia, that his extradition to the United States violated article 14, paragraph 5 in so far as he would not be able to appeal either his conviction or his sentence passed *in absentia*. The author had also argued

that his extradition violated his rights under article 7 as he would be facing 845 years in prison as a consequence of his sentence, which would amount to inhuman and degrading treatment. The author noted in this regard that the Minister of Justice eventually allowed the author's extradition to the United States, without reference to any issues as to the author's human rights.<sup>5</sup>

3.2 The author remarks that in its Views, the Committee opted not to examine these two aspects of the author's claim on the grounds that to do so would be hypothetical exercises. The Committee made this decision on the basis of the United States assurances received by the State Party.

3.3 Following the author's extradition, the State Party failed to ascertain properly the validity of the assurances provided by the United States. Whilst his sentence, for technical reasons has, or will be, reduced to 711 years, the author has been unable to appeal against it, or his conviction. In failing to ensure the validity of the assurances received, the State party has denied the author his appeal rights. Moreover, the author considers that to return him to life imprisonment without the prospect of parole for a property crime amounts to inhuman and degrading treatment and punishment, in violation of article 7 of the Covenant.

3.4 As a remedy, the author demands that the Committee request the State party to call for the authorities in the United States to provide him with an effective appeal of both conviction and sentence; and that in the alternative, the State party calls for the return of the author to its jurisdiction and for the extradition process to be recommenced in line with the State party's obligations under the Covenant.

#### **State party's observations on admissibility and merits**

4.1 On 30 January 2009, the State party provided its observations on admissibility and merits. It states that, according to the information at its disposal, the author has so far not expressed in the proceedings in the United States his unconditional agreement to the effect that the prison term imposed upon him is reduced by the portion that relates to Count 93 ("perjury while a defendant"). However, it was only in connection with this count that the Austrian court and the Austrian Federal Ministry of Justice declared the extradition to be inadmissible. Rather, the author is said to have challenged directly the lawfulness of his extradition in its entirety in the United States and to have maintained that the United States obtained his extradition by devious means.<sup>6</sup> The State party considers that Austria is neither a party nor a party concerned in the proceedings conducted in connection with the author in the United States.

4.2 The author maintains that the letters of the United States Department of Justice dated 8 February 2002 and 14 May 2002 would have guaranteed him, without any further requirements, a full appeal and new proceedings. The State party interprets these letters differently. The United States Department of Justice only stated, against the background of the Rule of Specialty, that in the event that extradition for the enforcement of the sentence is not granted for certain parts, the sentence will be lowered. The author can still take legal

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<sup>5</sup> The author provides the terms of the Treaty, which states: "Convictions in absentia. If the person sought has been found guilty in absentia, the executive authority of the Requested State may refuse extradition unless the Requesting State provides it with such information or assurances as the Requested State considers sufficient to demonstrate that the person was afforded an adequate opportunity to present a defence or that there are adequate remedies or additional proceedings available to the person after surrender."

<sup>6</sup> The author sought a writ of habeas corpus commanding that he be released from custody on the basis of the violation by the United States of the extradition treaty signed with Austria.

remedies<sup>7</sup> under the American legal system against such lowering of the sentence, which might subsequently also give him the right to obtain a full appeal and new proceedings in the criminal matter altogether. The State party refers in this respect to paragraph 9.3 of the Committee's Views in relation to communication No. 1086/2002.

4.3 The State party underlines that it has repeatedly asked its United States counterpart to comply with the obligations under international law concerning the applicability of the Rule of Specialty by concluding the still pending American proceedings. According to the Memorandum Opinion of the United States District Court, Middle District of Florida, Ocala Division, of 15 December 2008, in relation to the habeas corpus proceedings initiated by the author against the United States,<sup>8</sup> the court could amend the imposed sentence with a view to Count 93, which was declared inadmissible. However, this indicates that the proceedings to lower the sentence were still pending in the United States at the time of submission.

4.4 The State party submits that according to article 1 of the Optional Protocol, the Committee can receive and examine communications only with regard to persons who are subject to the jurisdiction of a State party to the Covenant and the Protocol and who maintain that they have been the victim of a violation of the rights, as recognized by the Covenant, by that State party. Since the proceedings to lower the sentence in the United States are still pending, the author is not a victim of a violation of the rights under the Covenant. Moreover, the present communication relates to the conduct of the United States, allegedly for not paying sufficient attention to the Rule of Specialty in connection with the author's extradition. The communication should therefore be declared inadmissible under article 1 of the Optional Protocol, in view of the fact that it is directed against the conduct of the United States.

4.5 The present communication calls for a re-examination of the case that was previously examined by the Committee in communication No. 1086/2002, and claims a violation of articles 7 and 14, paragraph 5. The Committee adopted its Views on 3 April 2002 and since that date, no change in the essential facts of the case has occurred. The communication is therefore inadmissible, as this is an adjudicated matter and there are no provisions in the Optional Protocol for new proceedings or for re-opening of cases already examined by the Committee.

4.6 With regard to the author's allegation that he is not in a position to challenge the continued violations of the Covenant before Austrian courts, the State party replies that it has fully complied with paragraph 11.1 of the Views in communication No. 1086/2002 in that it obtained the relevant statements by the competent United States authorities and courts and continues to obtain information on the proceedings pending in the United States on an ongoing basis. Furthermore, the author is entitled to file actions for official liability in connection with his extradition, as the Austrian Administrative Court granted his complaint suspensive effect. However, he has not filed such actions. He therefore did not take all steps in order to exhaust domestic remedies pursuant to article 5, paragraph 2 (b), of the Optional Protocol.

4.7 The State party concludes that the communication should be declared inadmissible and that it reveals no violation of the Covenant.

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<sup>7</sup> The State party does not mention the legal remedies he is referring to.

<sup>8</sup> Case No. 5: 02-Ov-204-Oc-10 rj.

**Author's comments on the State party's observations**

5.1 On 28 May 2009, the author submitted his comments to the State party's observations, which, in the author's opinion, do not address the substance of the communication.

5.2 With regard to admissibility, the author replies that the current communication is intimately linked to communication No. 1086/2002 and premised on the same facts, which satisfied the admissibility criteria in the original communication and therefore continue to do so now. What is new in the present communication is the clear evidence that, as a result of the State party's actions, the Committee was misled.

5.3 The failure of the State party to probe adequately the assurances presented by the United States Government resulted in its misleading the Committee on a crucial aspect. The Committee's Views in communication No. 1086/2002 would have been different had the Committee not relied upon those inaccurate assurances. Throughout his extradition proceedings and in his original communication the author challenged the veracity of the assurances.

5.4 The State party's observations raise the possibility of a domestic challenge. This argument was raised also in connection with communication No. 1086/2002 and the Committee found it unpersuasive. The author considers that there is no reason for the Committee to depart from its previous position as the putative remedy for official liability is not an effective one.

5.5 The author further alleges that he remains a victim under the Covenant of the State party's actions. The fact that he was extradited to the United States, where the alleged violations of the Covenant are actually occurring, cannot exonerate the State party from its responsibility and obligations not to expose him to violations of his rights in the first place. This principle, originally derived from non-refoulement, is an established and non-controversial feature of international human rights law. The assertions of the State party that the author's communication is against the United States fails to acknowledge the State party's direct complicity in exposing the author to violations of the Covenant.

5.6 The author remains convinced that the Committee's previous Views were adopted on the basis of the assurances received from Austria, which the Committee considered reliable. The author accepts that on occasion, the Committee will be required to rely upon assurances given to it by the State party. However, for the Committee to do so, it has to be certain as to their accuracy, particularly where these assurances engage a real and personal risk of a violation of the prohibition of inhuman and degrading treatment and the fundamental qualities of a fair trial. By failing to adequately probe the United States assurances, the State party continues to violate the author's rights under the Covenant. Therefore, the author will remain a victim until one or more of the proposed remedies outlined in the present communication are afforded to him. Simply transferring the author to another country does not absolve the sending country from its obligations. If it did, the effectiveness of the Covenant would be undermined and States parties could seek to avoid their obligations by creating what would be in effect "sham" removal proceedings.

5.7 On the merits, the author does not consider it necessary to address any of the issues relating to the Rule of Specialty with reference to Count 93 ("perjury while a defendant"). Where the Rule of Specialty is relevant is that according to this Rule, in these extradition proceedings, full appeal rights of the whole criminal proceedings against the author should have been considered a binding condition, including re-sentencing, for the author's extradition to the United States. According to the assurances received, the United States authorities would provide a re-sentencing on all counts of the author's sentence and not simply a reduction of his sentence by vacating Count 93. In reality, the author was later informed of existing United States jurisprudence according to which an extradition treaty



did not establish jurisdiction of the court to amend existing judgments, but the executive branch would be bound by the principle of specialty and the sentence could thus be reduced in order to comply with such principle. In support of the conclusion that the author has no possibility to appeal in the United States, the author provides a copy of an affidavit presented by Professor Daniel J. Capra<sup>9</sup> in which he states that although the United States Government, on 22 June 2001, asked the Court of Appeals to reinstate the author's appeal, the jurisdictional time limit for an appeal had long passed and the Court of Appeals denied the Government's request. Professor Capra continued by stating that at this point, the author cannot appeal his conviction and sentence, and the United States has no mechanism to obtain an appeal for the author. Although the author knew about the lack of effective appeal process available in the United States, he went through the process confirming his inability to appeal and continues to carry out this exercise.

5.8 As for the habeas corpus proceedings before the federal courts in the United States, the author contends that they did not form part of the assurances provided by the United States authorities, nor were they part of the author's original communication before the Committee and as such they do not form part of the present communication. In any event, the habeas corpus, even if successful, would lead to the release of the author after the legal portion of his sentence has been served. Considering that the author's sentence is of 845 years, this would mean that he could petition the court for relief after 835 years (minus time off for good behaviour). The author adds that these proceedings will take time to be exhausted, which reveals a general problem of length of judicial proceedings in the United States which the State party should also have considered before accepting assurances.

5.9 The author provides a copy of a letter dated 22 October 2008, sent by the Austrian Chancellor to the President of the United States, in which the Chancellor notes that the author's extradition was granted in 2002 trusting in assurances that he would receive both a re-sentencing and a full appeal of his conviction and sentence; that after six years, he had received neither a re-sentencing nor a full appeal; that one possibility to resolve the issue rapidly would be a Presidential commutation of the sentence handed down to the author to 10 years, which would correspond to the maximum sentence had he been tried in Austria for the same crimes; and that an additional consideration for the commutation was that the author had undergone surgery for colon cancer and was in poor health. The author is grateful for the State party's intervention but considers it insufficient to protect his rights under the Covenant. The author points out that the State party has not referred to this letter in its observations.

#### **Additional observations from the State party**

6.1 In its note dated 22 July 2009, the State party provided additional observations. It reiterates that in its notes of 8 February and 14 May 2002, the U.S. Department of Justice stated that the author was entitled, in its opinion, to make use of all remedies available under the American legal system<sup>10</sup> to challenge the decision for a reduction and re-fixing of the sentence, which would subsequently enable him to appeal the entire judgment. The author seems to be unaware of these possibilities when he does not refer in his response to the fact that the extradition by Austria had not been granted in respect of all counts of the judgement. On the other hand, the author does not deny that as a result of the habeas corpus proceedings, there will be a reduction of the penalty in the United States because his extradition for executing the sentence was denied on Count 93. In the State party's view, the Rule of Specialty will be complied with by the reduction of the penalty on Count 93. In

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<sup>9</sup> Professor of Law at Fordham University School of Law.

<sup>10</sup> As mentioned previously, the State party does not indicate the legal remedies he is referring to.

addition to this reduction, it will be possible for the author to challenge the entire decision within the framework of the habeas corpus proceedings, if this is actually intended by him. According to the information available to the State party, the author did not previously request a reduction of the sentence, but a declaration that his extradition is invalid because it was fraudulently obtained and, accordingly, he should be immediately released. This request is however neither covered by the specialty principle nor does it follow from the above-mentioned explanations of the United States Department of Justice.

6.2 The State party contends that the duration of the proceedings so far referred to by the author is also due to the fact that he primarily requests his immediate release from detention.

6.3 Furthermore, the author presents an affidavit by Professor Capra of 24 August 2007. This affidavit is outdated following the memorandum opinion of the competent United States District Court,<sup>11</sup> which grants the author habeas corpus proceedings as an admissible means to invoke the specialty principle. In its memorandum opinion, the District Court opened up the possibility for the author to obtain re-entry of the judgement of February 2000 in identical form in every respect except that any reference to Count 93 of the Indictment, and any reference to or accumulation of any criminal sanction relating to Count 93, should be omitted. The Court added that such a result would comply with the rule of specialty created by the refusal of Austria to extradite the author as to Count 93, and it would afford the author his former right of appeal against the conviction and sentence as a whole, thereby rectifying the breach of the Treaty alleged in his petition of habeas corpus. The State party adds that even though the specialty principle is an obligation between sovereign States, it cannot remain unnoticed that the extradited person has taken procedural steps to which he was entitled, and which could reasonably be expected of him, to implement the specialty principle.

6.4 If the State party repeatedly requested the American authorities to conclude the still pending proceedings in the United States, this can by no means be regarded as an admission that the State party has violated its obligations under the Covenant. On the contrary, the State party thereby complies with paragraph 11.1 of the Committee's Views in relation to communication No. 1086/2002 by continuing to procure information on the proceedings pending in the United States. The suggestion made by the former Austrian Chancellor on 22 October 2008 to the President of the United States, quite obviously based on humanitarian considerations,<sup>12</sup> can do nothing to change this situation. The State party therefore requests the Committee to declare the communication inadmissible under article 5 of the Optional Protocol.

#### **Additional observations from the author**

7.1 On 9 January 2012, the author informed the Committee about the judgements passed on first instance and on appeal regarding the habeas corpus proceedings. The Court of Appeals for the Eleventh Circuit, in particular in its judgement of 20 April 2010, confirmed that the rule of specialty required vacating Count 93 and that the resulting re-entry of judgement would permit the author to appeal his new sentence and original conviction. Having come to this conclusion, the Court determined that the proceedings for re-sentencing on a full appeal of his conviction and sentence could proceed. In the author's view, such proceedings do not solve the issue as the assurances received by the State party

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<sup>11</sup> See above, para. 4.4.

<sup>12</sup> In his letter, the Chancellor mentions that an additional consideration for the commutation is that the author had had surgery for colon cancer and is in poor health and is willing to accept a commutation of 10 years.

were that the author would receive a full re-sentencing on all counts of his conviction and not just relating to Count 93.

7.2 On 12 January 2012, the author added that his appeal to the Supreme Court against the Court of Appeals' judgement was denied on 18 April 2011. In accordance with the judgement of the Court of Appeals, the author's case for a re-sentencing without Count 93 is to be heard on 30 November 2012. The author is currently incarcerated at United States Penitentiary-Canaan, a high security prison.

### **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 93 of its Rules of Procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

8.2 The Committee has ascertained, as required under article 5, paragraph 2(a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

8.3 The State party argues that domestic remedies were not exhausted as the author has not filed actions for official liability in connection with his extradition, which was allegedly made possible by the Austrian Administrative Court. The Committee notes the author's reply that the putative remedy for official liability is not an effective one. Recalling its Views regarding communication No. 1086/2002, the Committee considers that the State party has not demonstrated that the suggested remedies are effective, in view of the fact that the author was extradited and is now detained in the United States of America. The Committee therefore finds that it is not prevented from examining the communication under article 5, paragraph 2 (b), of the Optional Protocol.

8.4 With regard to the State party's argument that the author is not a victim under article 1 of the Optional Protocol, the Committee notes that the claim was brought against Austria as State party to the Optional Protocol and refers to the State party's failure to ensure that the author does not suffer any consequential breaches of his rights under the Covenant following his extradition from Austria to the United States of America. The present communication concerns the author's claims under article 14, paragraph 5, and article 7 of the Covenant, which the Committee considered it premature to address at the time of adoption of its Views on communication No. 1086/2002. The author holds the State Party responsible for breaches of his rights under the Covenant as a result of his extradition to the United States of America. Accordingly, the Committee considers that the author has victim status, under article 1 of the Optional Protocol and that the matter of this communication differs from the matter examined in communication No. 1086/2002.

8.5 With regard to the author's allegations under article 14, paragraph 5, which the State party considers inadmissible, the Committee notes that in the framework of the habeas corpus proceedings that the author initiated, the United States Court of Appeals passed a judgement on 20 April 2010 confirming the memorandum opinion of the United States district court dated 15 December 2008, according to which re-entry of the judgement passed in February 2000 was indeed possible and would call for the elimination of Count 93, the recalculation of the sentence without that count, and the resulting opportunity for a full appeal of his conviction and sentence. The Court concluded that having resolved the district court's authority to provide re-sentencing and a full appeal of his conviction and sentence without Count 93, the case as initially presented before the District Court following the author's extradition could now proceed. The Committee notes that in

accordance with the judgement of the Court of Appeals, the author's case for a re-sentencing without Count 93 is to be heard on 30 November 2012.

8.6 In the light of the above, the Committee concludes that the author's claim under article 14, paragraph 5, has not been sufficiently substantiated for the purpose of admissibility under article 2 of the Optional Protocol.

8.7 As for the author's claim under article 7, the Committee considers it sufficiently substantiated for the purpose of admissibility and proceeds to its examination on the merits.

#### *Consideration of the merits*

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

9.2 The Committee has to determine whether, at the time of extradition, the State party had ascertained, in the light of the information available to it at that time, that the author would face a real risk of a violation of article 7 of the Covenant.

9.3 The Committee notes the author's argument that his extradition to the United States of America where he faced a real risk of life imprisonment without the prospect of parole, for a property crime, constituted inhuman and degrading treatment and punishment under article 7 of the Covenant. The Committee notes that the Austrian Regional Upper Court considered in its judgement of 8 May 2002 that while the jurisprudence of the European Court of Human Rights<sup>13</sup> admitted that extradition to a country where a person faces a life sentence could raise issues under article 3 of the European Convention on Human Rights, it had never come to the conclusion that a life sentence without parole was in itself a violation of article 3 of the Convention; article 3 of the Convention is similar to article 7 of the Covenant. The Committee further notes that in the author's case, the Austrian Court based its ruling, that his extradition to the United States of America would not constitute cruel, inhuman or degrading treatment or punishment, on the interpretation of the assurances received from the United States Department of Justice that the author had various possibilities to appeal his sentence.

9.4 While acknowledging that deporting a person to a country where the person will serve what is, for all practical purposes, a life sentence without parole such as that imposed on the author may raise issues under article 7 of the Covenant, in the light of the objectives of punishment as enshrined in article 10, paragraph 3, of the Covenant, the Committee considers that the decision of the State party to extradite the author to the United States of America must be assessed in the light of the legal developments at the time when the alleged violation took place. In this regard, the information provided to the Committee by both parties during the procedure appears to indicate that the State party based its decision to extradite the author to the United States of America on the careful examination of the claim of the author by the Austrian Upper Regional Court in the light of the facts of the case and the applicable law at the time. Accordingly, the Committee considers that by extraditing the author, the State party did not violate his rights under article 7 of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it do not disclose a violation of article 7 of the Covenant.

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<sup>13</sup> See more recently, European Court of Human Rights Judgement in *Babar Ahmad and others v. The United Kingdom*; 24 September 2012, Appl. Nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09.

[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.]

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