

OPINION No. 34/2000 (UNITED STATES OF AMERICA*)

Communication addressed to the Government on 19 November 1999

Concerning Jan Borek

The State is a party to the International Covenant on Civil and Political Rights

1. The Working Group on Arbitrary Detention was established by the Commission on Human Rights resolution 1991/42. The mandate of the Working Group was clarified and extended by resolution 1997/50, and reconfirmed by resolution 2000/36. Acting in accordance with its methods of work, the Working Group forwarded the above-mentioned communication to the Government.
2. The Working Group conveys its appreciation to the Government for having provided the requisite information in good time.
3. The Working Group regards deprivation of liberty as arbitrary in the following cases:
 - (i) When it manifestly cannot be justified on any legal basis (such as continued detention after the sentence has been served or despite an applicable amnesty act) (category I);
 - (ii) When the deprivation of liberty is the result of a judgement or sentence for the exercise of the rights and freedoms proclaimed in articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and also, in respect of States parties, in articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);
 - (iii) When the complete or partial non-observance of the relevant international standards set forth in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned relating to the right to a fair trial is of such gravity as to confer on the deprivation of liberty, of whatever kind, an arbitrary character (category III).
4. In the light of the allegations made, the Working Group welcomes the cooperation of the Government. The Working Group transmitted the reply provided by the Government to the source and received its comments. The Working Group believes that it is in a position to render an opinion on the facts and circumstances of the case, in the context of the allegations made and the response of the Government thereto, as well as the observations by the source.

* Mr. Petr Uhl did not participate in the deliberations on or the adoption of this Opinion.

5. According to the source, Jan Borek, a Czech citizen, was arrested on 10 October 1991, reportedly indicted for first degree murder in October 1991 and incarcerated in the Michigan Department of Corrections. Finally, he pled guilty to the substituted charge of second degree murder and was sentenced, on 3 December 1992, to 5 to 25' years imprisonment, with 466 days credited for the time already served. According to his own calculations, he was therefore eligible for release in 2 years and 10 months from the time of his conviction.
6. Mr. Borek has reportedly been through the parole review process three times. Each time, he has apparently received a 24-month continuation. No reasons were apparently given.
7. The first parole review reportedly took place in July 1995. Apparently, at the review, the interviewing member recognized Mr. Borek's outstanding institutional record and said that she would grant him parole. However, he reportedly received a 24-month continuation a few weeks later.
8. The second parole interview was scheduled to take place in July 1997. Reportedly, Mr. Borek received a phone call at 3 p.m. on 24 July 1997 from a detective responsible for his case who told him that he had an excellent chance of being granted parole, but that Mr. Borek first had to speak with him. The detective apparently threatened that if he did not talk with him, he would make sure that Mr. Borek was not paroled. Mr. Borek reportedly told him that he had no further information to give in addition to what he had told the judge in open court. In October 1997, his second parole hearing was reportedly held. On 17 December 1997, Mr. Borek reportedly received a second 24-month continuation. He appealed this decision and his appeal was turned down. He has appealed to the Michigan Court of Appeals, but his case has not yet been heard.
9. A third parole hearing has reportedly taken place. A few weeks after the third parole hearing, Mr. Borek received a third 24-month continuation despite the apparently favourable vote of the interviewing parole board member.
10. It is alleged that the detention of Jan Borek is arbitrary, since he has been granted three 24-month continuations despite being told by interviewing parole board members at three separate parole hearings that he would be granted parole.
11. In the light of the allegations submitted by the source and the Government's response to the transmittal of the allegations to it, the murder which led to the arrest of Jan Borek was reportedly committed in the following circumstances. The son of a first marriage, Jan Borek followed his mother to the United States, where she married Gustav Prilepok. Relations between the spouses apparently degenerated rapidly, in particular because of the violent behaviour of the husband towards his wife and his stepson. The situation became so serious that the mother, Jana Prilepok, decided to flee with her son and return to Czechoslovakia. On 7 February 1991, during a violent argument on that subject, Gustav Prilepok apparently tried to stab Jan Borek, who managed to seize the weapon and allegedly fatally wounded his aggressor. In his initial statements, Borek claimed that he then panicked and transported the body in the back of his truck to some woods, where he buried it.

12. A few months later, overcome with remorse, he turned himself in to the police and was placed in custody on 10 October 1991. His mother was also placed in custody as an accessory after the fact.

13. The searches conducted during the investigation to locate the weapon and the body were fruitless. It has not been denied that Jan Borek cooperated with the investigation. Jan Borek has always maintained that since he had not been in the United States for long and was not familiar with the region, he was unable to locate the body or the place where the weapon had been abandoned.

14. Therefore, and in view of the fact that he had turned himself in, when Mr. Borek appeared before the Oakland County Circuit Court on 13 October 1992, the prosecutor proposed the following plea bargain, in agreement with Mr. Borek's lawyer and the judge. The initial charge of first degree murder (the sentence for which is between 50 years' and life imprisonment) would be reduced to second degree murder (the sentence for which is between 5 and 25 years). The Michigan Parole Board could grant Mr. Borek parole for good conduct after he had served five years of the sentence. As has been indicated, the judge credited the time already served, making Mr. Borek eligible for parole after 2 years and 10 months.

15. Mr. Borek was brought before the Michigan Parole Board first in July 1995, then in July 1997 and again in July 1999. At each session, as is confirmed by the Government in its response, the Parole Board decided to continue detention for a further 24 months on the following grounds:

The offence had been planned and carried out in a secretive manner;

The body of the victim had been and remains hidden;

Mr. Borek has continuously minimized his criminal behaviour;

Mr. Borek has shown no remorse;

Mr. Borek remains a risk to public safety.

The Government adds that the decision to grant a prisoner parole is taken solely on the discretionary authority of the Parole Board.

16. The Government further indicates, and the source does not deny, that on 5 December 1997 a second decision denying parole was appealed, in compliance with the provisions of Michigan legislation, to the Oakland County Circuit Court, which confirmed the decision. A further appeal to the Michigan Court of Appeals was still pending on the date of the Government's reply (19 January 2000), i.e. almost two years and one month after the Parole Board's decision to deny parole.

17. Furthermore, with a view to favouring a decision to grant parole, the Government of the Czech Republic has on several occasions informed the Michigan authorities that, should Mr. Borek be granted parole, it would approve his transfer to the country of his birth, as in the eyes of the Czech authorities Mr. Borek was neither a risk to public safety nor a menace to Czech society.

18. In the light of the above, the Working Group observes that the explanation given by the Michigan Parole Board contrasts with the appraisals of the penal authorities, as certified in numerous documents whose trustworthiness is beyond doubt (official, signed and notarized attestations), namely:

Attestations and declarations established by the prison management (some of them for the Parole Board) concerning Mr. Borek's excellent conduct in prison since 1993 and emphasizing that he had never been the object of disciplinary citations and that he performed the teaching duties assigned to him within the prison most ably;

Certificates proving that Mr. Borek has obtained several degrees by correspondence (Bachelor in Science and Business Administration from the Indiana Institute of Technology, and Associate in Science and Associate in Arts from Pennsylvania University);

A letter from the Consul of the Czech Republic to the Chairman of the Working Group dated 20 March 2000, confirming Mr. Borek's good conduct in the following terms:

"According to the head of the staff of Ionia Prison he is considered to be among the best prisoners in the whole history of the Ionia Maximum Facility. Beside his exceptional behaviour, reaching 12 points on a scale of 12, he studied, served as a deputy on the prisoners' council and is teaching more than two hundred inmates how to read and count. Despite his outstanding record, the Parole Board has already three times rejected his request for parole, noting in vague terms that, he remains a threat to society."

An affidavit dated 3 September 1999 in which the Consul of the Czech Republic in the United States, Mr. Petr Hrubec, states that he was permitted to attend Mr. Borek's third Parole Board hearing on 2 August 1999 and that he observed that:

"At the end of the parole hearing the interviewer stated that she was alerted to the fact that there was some kind of note in Mr. Borek's file. The first Parole Board member, who had screened Mr. Borek's file prior to the interview, deferred his vote due to the contents of the note. The interviewing Parole Board member stated that as a result of this interview she intended to vote for parole, but she wanted to first see the note. Consequently, the interviewing member also deferred her final vote until the time when she had the opportunity to read the note and review the case with another Parole Board member. At the time of the interview, Mr. Borek was neither aware about the existence of the note in his Lansing file, nor was he given the opportunity to dispute its contents prior to or during the parole interview."

Another letter to the Chairman of the Working Group, in which the new Consul of the Czech Republic, Mr. Richard Krpac, recalls that, according to the provisions of the Vienna Convention on Consular Relations and the bilateral consular agreement between the United States of America and the Czech Republic, the Consul should have been informed of Mr. Borek's detention from the outset. Instead, Mr. Borek was deprived of consular assistance between 1991 and 1996. As a result, according to the Consul,

“Mr. Borek, being a foreigner with a poor knowledge of the country and language, was denied access to consular help during the crucial stages of investigations and court trials which later determined his sentence.”

19. In view of the above, the Working Group is of the opinion that the following should be taken into account in considering whether or not Mr. Borek's detention since the end of his fifth year of imprisonment is arbitrary.

20. The reduced sentence for second degree murder, the result of a plea bargain, varying between a minimum of 5 years and a maximum of 25 years, gives the Parole Board, an administrative body, vast discretionary powers to determine the extent of the actual sentence required to be served by Jan Borek. Such a procedure allows too much room for uncertainty. Absence of legal representation of the convict before the Parole Board, the subjective nature of its proceedings, reliance by the Board on material and, in the present case, the existence of a note, the contents of which are not required to be disclosed, and the finality of the decisions of the Parole Board, are all characteristics which render the discretionary procedure of the Parole Board suspect and subject to the charge of unreasonableness for its lack of transparency.

21. Principle 4 of the Body of Principles for the Protection of Persons under Any Form of Detention or Imprisonment states, “Any form of detention and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority”. The local law applicable in the case of Borek only entitles the appellate court to direct the Parole Board to re-examine the case. The court cannot order that the prisoner be granted parole or change the scope of the decision appealed. What is required is an effective alternative remedy which would entitle the appellate authority to consider on their merits the decisions of the Parole Board, especially when the said Board is vested with vast discretionary powers, as already referred to.

22. In addition, principle 16, paragraph 2, of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that if a detained or imprisoned person is a foreigner, he shall also be promptly informed of his right to communicate by appropriate means with a consular post or the diplomatic mission of the State of which he is a national. This guarantee was disregarded for five years.

23. The Working Group notes that, despite by the interviewing Parole Board members stating three different parole hearings, that Mr. Borek was likely to be granted parole in the light of his excellent conduct in prison since 1993 and positive aspects of his accomplishments while in prison, the Parole Board directed that there should be three 24-month continuations of his sentence. On being sentenced after a plea bargain, Mr. Borek was entitled to be considered for

parole after having served his minimum five-year sentence. The relevant criteria must necessarily relate to Borek's conduct while serving his sentence. The Working Group notes that, in fact, the Board, in rejecting parole, based itself primarily on factors unrelated to Mr. Borek's conduct, such as the fact that the victim's body had never been recovered, a matter already considered during the trial. These considerations, coupled with other elements relating to the rejection of parole, as set above, would cumulatively confer on the deprivation of liberty an arbitrary character, falling within category III of the Working Group's methods of work.

24. In the light of the foregoing, the Working Group renders the following opinion:

The deprivation of the liberty of Jan Borek beyond the date on which he had served five years of his sentence is arbitrary, as being in contravention of articles 9, 10 and 19 of the Universal Declaration of Human Rights, articles 2, 9 and 14 of the International Covenant on Civil and Political Rights and Principle 16, paragraph 2, of the Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, and falls within category III of the categories applicable to the consideration of cases submitted to the Working Group.

25. Consequently, the Working Group requests the Government to take measures necessary to remedy the situation, including an examination of the possibility of the State of Michigan modifying its legislation governing parole, so as to bring it into conformity with the standards and principles set forth in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

Adopted on 27 November 2000