Submission relating to the Fugitive Offenders (Sri Lanka) Order

Janice Brabyn, Department of Law, HKU.

1. As to fugitives convicted of relevant offences in their absence.

A. Conformity with the terms of the Fugitive Offenders Ordinance (Cap 503)

I believe article 2(5) of the Sri Lanka arrangement does conform with the terms of the FOO for the following reasons.

Section 5(1)(b) of the FOO prohibits surrender ' f it appears to an appropriate authority …

(b) that -

(i) the offence in respect of which such surrender is sought was prosecuted in his absence and a conviction obtained; and

(ii) the person-

(A) has not had an opportunity of being tried in his presence for that offence; and

(B) if surrendered, would not have an opportunity of being re-tried in his presence for that offence;"

Since (A) and (B) are cumulative, this provision appears to mean that both (i) a fugitive who did have an opportunity to attend his trial, (which presumably must at least require actual receipt of notification of the proceedings and a realistic opportunity of presence given circumstances of time, place, expense, health, commitments etc) but would not have an opportunity to have his case reheard and (ii) a fugitive who would be able to have the case reheard if he so desired

although he did not have an opportunity to attend his original trial, could lawfully be surrendered, in the former case to face punishment, in the latter case to face punishment or a retrial at the fugitive's option.

Article 2(5) of the Sri Lanka Order provides:

"Where the surrender of a fugitive offender who was convicted in his absence is requested for the purpose of carrying out a sentence:

(a) the requested Party shall not refuse to surrender him on the ground that the conviction was obtained in his absence, unless he had not been given the opportunity to be present at his trial, and

(b) he shall be considered for the purpose of the proceedings in the requested Party to be an accused person."

This seems to mean that the HKSAR may (is required to?) refuse surrender of any person convicted in his absence who did not have an opportunity to attend his trial, even if that fugitive would have an opportunity to be retried in his presence if returned. It follows that although all persons liable to be surrendered under (ii) above remain liable to be surrendered under article 2(5)(b), some persons who could be surrendered under (i) above would not be liable for surrender under article 2(5)(b). Article 2(5)(b) is therefore more restrictive than the statutory provision and should be considered compatible with the FOO by virtue of section 3(1) and (9).

B. As to compatibility with human rights norms

I believe article 2(5) of the Sri Lanka arrangement is compatible with current human rights norms.

Neither the Human Rights Committee nor the European Court of Human Rights has yet declared 'trial in absentia' inherently inconsistent with a defendant's right to a fair trial in general or the right to be tried in one's presence specifically. However, both institutions have found a trial in absentia to be in violation of the general right to a fair trial and of the specific rights of presence or representation by counsel in the absence of proof by the state of sufficient advance notification of the date, place of trial and right to attend and of genuine defence waiver of presence rights. In fact, most of the cases have evolved around failures in the notification process leading to unwilling or unwitting nonattendance by the defendants. One also concerned a trial in absentia which the relevant state ought to have realized the defendant could not possibly have attended since that state had assisted in securing his imprisonment in a third jurisdiction at the time. The Human Rights Committee has suggested that notification failures might be corrected by a new trial in the defendant's presence.

As to the European Court of Human Rights, see in particular Colozza v Italy Series A, No. 89 (1985) 7 EHRR 516, Broziek v Italy Series A, No 167 (1989) 12 EHRR 371, FCB v Italy Series A, No 208-B (1991) 14 EHRR 909, T v Italy Judgment of the European Court of Human Rights, 12 October 1992, all cited by Damilo A. Leonardi in "Italy", Chapter 8, "European Civil Liberties and the European Convention on Human Rights: A Comparative Study (C.A. Gearty ed) (Kluwer Law International The Hague 1997) 339 - 342. As to the Human Rights Committee, see General Comment 13, Wolf v Panama (289/1988), Mbenge v Zaire (16/1977), all cited in Stephen Bailey, 'Rights in the Administration of Justice", Chapter 6 of The International Convention on Civil and Political Rights and United Kingdom Law (Harris and Joseph ed) (Clarendon Press Oxford 1995) p 226 and Maleki v Italy (699/1996) attached.

The most common relevant provision in the FOO arrangements dealing with trials in absentia provides:

"Where the surrender of a fugitive offence is requested for the purpose of carrying out a sentence the requested Party may refuse to surrender him if it appears that the conviction was obtained in his absence, unless he has the opportunity to have his case retried in his presence, in which case he shall be considered an accused person under this agreement." See for example agreements with the Netherlands, India, New Zealand, Singapore and Portugal.

This would appear to permit (in practice require?) non surrender whenever a person convicted in his absence does not have the opportunity of a retrial irrespective of whether that person had an opportunity to attend the original trial.

There are issues as to whether all fair trial guarantees apply in extradition/fugitive offender proceedings. However, irrespective of the position taken on those issues, it is submitted that this provision is consistent with human rights norms as set out in article 14(2)(d) of the ICCPR (article 11(2)(d) of the HKBoR) and Article 6(3)(c) of the European Convention on Human Rights and Fundamental Freedoms) since, if properly applied, it would ensure that any surrendered fugitive would have the opportunity to be tried in his presence if he so chose and would be treated as an accused person in the meantime.

The human rights compatibility of article 2(5)(b) is less certain since that provision does permit the return of persons to face punishment on the basis of a conviction entered at a trial at which they were not present without the possibility of a retrial. However, the emphasis in the human rights cases upon sufficient notification by the state and genuine waiver by the defendant

suggests that even assuming surrender proceedings to be subject to human rights norms, article 2(5)(b) might be human rights compliant. But it must be emphasized that nothing less than truly effective notification has been accepted by the international institutions. Are effective notification procedures (i) in place and (ii) typically followed in Sri Lanka? In this context, the present civil strife in Sri Lanka may be a complicating factor. Are alleged members of/ sympathizers with the Tamil Tigers typically/sometimes being tried in their absence? [On 11th November 1998, BBC News reported a ruling of the Sri Lankan High Court that LTTE head Velupillai Prabhakaran and others would be tried in absentia in connection with a 1996 bomb attack in Colombo] In combination with the unusual provisions relating to the political offences except, this possibility could give rise to some difficult cases. Even more likely to be relevant for HK are reports that some foreign underage sex offenders have been tried in their absence as well. Information as to current Sri Lankan laws and practices might be available from the following sources:

Sri Lankan Bar Association basl.lawnet@stmail.lk

(They have a human rights center)

Law and Society Trust lst@eureka.lk

There is also the question of who in the HKSAR would have responsibility for determining whether the rigorous international standards of effective notice and genuine waiver had been complied with in particular cases? The HKSAR Government? The courts? Both? Would they be willing and able to be rigorous in their inquiries and standards, even at the risk of embarrassing the Sri Lankan/HKSAR government?

Note: The more common clause quoted above appears at first sight to be administratively easier and less controversial in this respect since it might be expected that the availability of a retrial could in theory be determined by a statement of the relevant foreign law from the requesting Party without the need to inquire into actual conduct of the case by Sri Lankan authorities. However, as Maleki v Italy makes clear, the law may be complex and open to dispute, at least as to its application on the particular facts. Application may also largely depend upon questions of effective notice and genuine waiver, so that in the end the practical advantages of the more common clause might not be so great. On the other hand, the Sri Lanka arrangement provision would preclude the necessity to look at the foreign law relating to retrials at least.

The Political Offences exception: exclusion of various offences from Article 6(1)(a)

A. Compatibility with the FOO

I believe that Article 6 (1)(a) is not compatible with the FOO or, alternatively, if technically compatible, should nevertheless not be accepted in the absence of a much clearer legislative mandate.

Section 5(1)(a) prohibits surrender " f it appears to an appropriate authority-

> (a) that the offence of which surrender is sought is an offence of a political character (and irrespective of how that offence is described in the prescribed arrangements concerned)…"

It is generally accepted that the term 'offence of a political character' has no precise definition but there is some common ground. There are some offences such as treason and sedition which are clearly political offences as well as offences of a political kind. Within the family of common

law jurisdictions of which the HKSAR is part, it seems also to have been accepted that ordinary criminal offences may become offences of a political character if committed with the political objective of overthrowing, or perhaps opposing to a lesser extent some aspect of the political control of, the government of the requesting Party. Viscount Radcliffe's speech in Schtraks [1964] AC 556, emphasizing political motive on the part of both the fugitive and the government to which the fugitive was opposed, quoted in the administration's attachment to its response paper, LC Paper No CB(2)380/01-02(01) has been relied on in England, [See cases cited in Jones on Extradition (Sweet and Maxwell London 1995) 150 - 160] Canada [Re State of Wisconsin and Armstrong (1972) 8 CCC (2d) 444 (Ont. Co,Ct)] and Australia [R v Wilson, Ex parte Witness T (1976) 135 CLR 179]. As indicated in the administration's own paper on the subject, murder in the course of and in furtherance of a political disturbance and mutiny involving wounding in order to escape expected prosecution for political offences have been accepted by the English courts as offences of a political character for the purposes of this very common extradition exception in the past. Arson, possessing inflammable substances and threatening or depriving public officials of their property in the course of a student campaign to change policies relating to government schools in Padua, Italy were accepted as offences of a political character in one case in Australia. [Prevato v Governor, Metropolitan Remand Centre (1986) 8 FCR 358 - but this decision might be regarded as exceptionally generous on its facts.]

However, it is true, as also stated in the administration's final paragraph, that many states now see difficulties with the political offences exception as far as 'terrorist activity' is concerned, at least terrorist activity aimed at non totalitarian governments.[See discussion in Anne Warner La Forest, La Forest's Extradition To and From Canada (3rd ed) (Canada Law Book Inc Ontario

1991) 95 - 98] The most wide ranging exceptions are in the European Convention on the Suppression of Terrorism. The international convention relating to genocide provides that relevant offences are not to be regarded as political offences for the purposes of extradition. Express statutory provisions giving effect to these international agreements and sometimes excluding other offences as well are now quite common, [e.g. see Suppression of Terrorism Act 1978, s 1 (UK); Extradition (Foreign States) Act 1966 s. 5 (Aust)] as are specific provisions within fugitive offender arrangements.[See La Forest, ibid., for information re Canadian treaties with Germany, Finland, India, Italy, the Philippins, Spain, Mexico and the USA, EP Aughterson, Australian Extradition Law and Procedure (Law Book Company Limited Sydney 1995) 108 - 111 for Australia.]

Even so, it should not be supposed that the political offences exception is no longer of any practical importance. Jones records a recent English decision in which a request from the then military government of Fiji was rejected by the magistrate on the ground that the offence, though purporting to be an ordinary criminal offence involving deception of the Fijian customs authorities, was really an offence of a political character. Jones on Extradition pp 161-163]

Against this background, article 6(2) of the Sri Lanka agreement is nevertheless problematic. "For the purposes of this Agreement the following shall not be considered to be offences of a political character:

(a) offences specified in Item 1, Item 20 or Item 43 of Article 2(1);

(b) conspiracy to commit, aiding, abetting, counseling or procuring the commission of, inciting the commission of, being an accessory to, or attempting to commit any offence

referred to in paragraph (a).

Item 1 "murder or manslaughter, including causing death by criminal negligence; culpable homicide; assault with intent to commit murder"

Item 20 "any offence against the laws relating to explosives"

Item 43 "any offence within the scope of any convention which in binding on both Parties and which obligates the Parties to prosecute or grant surrender for such offence"

The exclusion of offences in Item 43 from the political offences exception is not unique to the Sri Lanka arrangement (see also arrangements with India, Malaysia, USA, Australia, Philippines. Other HKSAR arrangements exclude attacks on the relevant Heads of State and their immediate families, e.g. Indonesia, India, Malaysia, USA).), nor the HKSAR. (La Forest and Aughterson record similar arrangements in recent Canadian and Australian treaties respectively)

Exclusion of offences within items 1 and 20 from the political offences exception is unusual though and, together with the Item 43 offences, does mean that the political offences exception in the Sri Lanka arrangement is significantly narrower than the only relevant statutory provision, s 5(1) of the FOO. The difference does not come within the terms of section 3(1) since it is not in the nature of a 'limitation, restriction, exception or qualification' for the purposes of that subsection. In the context of s3(1), 'exception' must be taken to refer to an exception that narrows the possible scope of surrender beyond what is legally possible under the FOO. Article 6(2) expands the possible scope of surrender because, if lawful, Article 6(2) would permit the surrender of a person charged with, for example, manslaughter, notwithstanding that the offence

was one of a political character within the meaning of section 5 and hence excluded as a basis for surrender under s 5(1) FOO

.

This is accepted by the administration but said to be acceptable because 'the courts, in ruling upon whether certain offences are offences of a political character within the meaning of provisions similar to Article (1)(a), have laid down criteria which are very similar to the grounds for refusing surrender that are explicitly set out in Article 6(1)(b) and (c). In other words, there is substantial overlap between Article 6(1)(a), on the one hand, and Article 6(1)(b) and (c). Because of the narrow scope of the qualification in Article 6(2) of the "political" exception, it follows that the Sri Lanka Agreement is "substantially in conformity" with section 5 of the Ordinance."

Evidently, the administration is of the view that s3(9) authorizes the CE in Council to enter into agreements that permit/obligate surrender from the HKSAR in circumstances where the terms of the FOO forbid it, provided the agreement is 'substantially in conformity' with the legislation. Of course, the legislature may have intended to grant the CE in Council such authority when it passed the FOO, but it is surely surprising than such an unusual power, a power to exceed statutory limitations on the restriction of a person's liberty and freedom of movement, both recognized fundamental human rights within our legal system, should have been granted so indirectly.

I am strongly of the view that the administration's interpretation of section 3(9) is not correct, in which case, article 6(2) of the Sri Lankan agreement is not compatible with section 5(1) of the

FOO.

But even if the administration is correct in its interpretation of its powers, it is submitted that the distinctive terms of article 6(2) are still disturbing for another reason. The obvious question is, why has such a different form of political offence exception been agreed with Sri Lanka? Is the provision intended to be a 'one- off ', especially negotiated to deal with the Sri Lankan government's concerns about possible application of the political offence exception to Tamil Tiger terrorists? Or is the provision intended to be a model for future arrangements - or even a model for renegotiating existing ones? Either way, it is submitted that, rather than use the 'substantially in conformity' route, the better course would be to provide express statutory authority for such a provision in section 5 of the FOO, preferably before the arrangement is brought into force. The surrender of a fugitive from the HKSAR to another jurisdiction, there to face criminal charges and/or punishment, is a very serious interference with the physical liberty of a person. It is submitted that, as a matter of principle, any such surrender should have a firm basis in legislation, not merely executive action, albeit endorsed by a resolution of the Legislative Council. For this reason, the exclusion of offences within Item 43 and of attacks on the life of the relevant heads of state or their immediate family members in other arrangements mentioned above is also objectionable since those exclusions also lack an express statutory basis in any HKSAR ordinance. But at least those provisions have wide international acceptance. With the exclusion of offences within Items 1 and 20 as well, the Sri Lanka arrangement goes a very significant step further. A provision as wide as that in article 6(2) brings the whole issue of what should be the proper relationship between the political offences exception and violent acts of terrorism into much sharper focus. But, particularly in light of the fact that LegCo has no

power to amend the order but can only accept or reject it as a whole, a committee meeting about whether or not to endorse a particular arrangement is not an appropriate forum for discussing general principles. The proper forum would be during the second reading of a bill to amend section 5 so that article 6(2) would be in full and not merely substantial compliance with that provision. Of course, waiting for legislative authority would mean a delay in implementation, though not necessarily renegotiation since LegCo might well pass such a section 5 amendment in any case. Nevertheless, seeking prior legislative authorization of such an important shift in position would still be the better way. Then, after the basic principle had been decided, LegCo would be able to consider the merits or otherwise of the application of the principle, in whatever form it had been determined, to the particular circumstances of Sri Lanka.

UNITED
NATIONS

CCPR

International Covenant
on Civil and
Political Rights

Distr.

GENERAL

CCPR/C/66/D/699/1996
27 July 1999

Original : ENGLISH

Communication No 699/1996 : Italy. 27/07/99. CCPR/C/66/D/699/1996. (Jurisprudence)

Human Rights Committee

Sixtieth session

14 July - 1 August 1997

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*

Communication No. 699/1996

Submitted by: Ali Maleki (represented by his son, Kambiz Maleki)

Alleged victim: The author

State party: Italy

Date of communication: 28 January 1999

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

Meeting on 15 July 1999,

Having concluded its consideration of communication No. 699/1996 submitted to the Human Rights Committee by Ali Maleki, 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. The author of the communication is Ali Maleki, a sixty-five-year-old Iranian citizen currently serving a 10-year prison sentence in Italy for drug trafficking. The case is submitted on his behalf by his son Kambiz Maleki. He claims that his father is a victim of violations by Italy of the International Covenant on Civil and Political Rights, although he does not specify which provisions of the Covenant he considers to have been violated.

The facts as submitted by the author

2.1 The author, a truck driver for over 40 years who transported consignments between Iran and Italy, was tried and sentenced, in absentia, on 21 November 1988 to 10 years imprisonment for having imported and sold narcotic drugs in Italy. His sentence was confirmed by the Court of Appeal on 16 October 1989.

2.2 In 1991, while in California on a family visit, the author was arrested and detained for about six months, while awaiting his extradition to Italy. On 9 April 1992, the United States District Court, Central District of California, denied the Italian Government's request for his extradition. In May or June of 1995, the author returned to Iran via Italy. He was arrested at Rome airport, and has been detained since.

The complaint

3.1 The author claims that he was wrongly convicted, and that the case was one of mistaken identity based on one single tapped telephone conversation between him and a known drug dealer, who was also a truck driver and who had been under police surveillance for some time.

3.2 Kambiz Maleki alleges that his father was tried in his absence and that the Public Prosecutor's Office appealed the sentence twice in order to effectively bar his father from appealing. (1) This, he claims, means that domestic remedies have been exhausted or are unavailable. In support of his contention, he submits a letter from an Italian lawyer, which states that article 630 of the Criminal Code of Procedure precludes a reopening of the case and concludes that the only possibility remaining is to request the transfer of Mr. Maleki to Iran, to serve the remainder of the sentence there.

3.3 The author's son notes that the only connection in the file submitted by the Italian authorities to the United States in substantiation of the extradition request, contains one single reference to his father.

3.4 Kambiz Maleki adds that his father has been on a hunger strike to obtain a review of his conviction. He claims that his father has a serious heart ailment, having refused heart surgery while in the United States because he wanted to die in his native country. He claims that his father has also been denied the possibility of serving his sentence in his own country (Iran).

State party's information and author's comments thereon

4.1 In its submission of 17 September 1996, the State party explains that Mr. Maleki was tried and convicted in absentia, duly represented by his court-appointed attorney. The decision of the court of first instance was appealed both by Mr. Maleki's counsel and the public prosecutor. The State party assumes that he was informed by his counsel of the proceedings followed against him in Italy. He was charged for drug trafficking. When the authorities were unable to execute the warrant, he was declared a fugitive. The State party notes that when the author was arrested in the United States, he was assisted by an American attorney who argued against the extradition. It further notes that the Office of the Public Prosecutor informed Mr. Maleki of the ways and means still open to him for a revision or reversal of the judgments.

4.2 The State party contends that Mr. Maleki's medical condition is being closely monitored and submits a substantial file in this respect.

4.3 The State party argues that the claims about unfair trial relate to the evaluation of facts and evidence in the case which is better left to the appellate Courts of States parties.

4.4 With respect to the claim that Mr. Maleki should be transferred to his own country (Iran) to serve his sentence, the State party notes that his petition could not be entertained in view of the fact that Iran is not a signatory to the Convention on the Transfer of Sentenced Prisoners (Strasbourg, 21 March 1983) nor is there a bilateral agreement on the matter between Italy and Iran.

5. In his comments Kambiz Maleki reiterates the claims that a trial in absentia constitutes a violation of the Covenant even if his father had a court-appointed lawyer, and that his father suffers from an acute heart condition for which he requires surgery.

Committee's decision on admissibility

6.1 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 it was admissible under the Optional Protocol to the Covenant.

6.2 As regards the author's complaint that he had a heart condition which was not being treated adequately, the Committee noted that the State party had submitted a comprehensive file showing that Mr. Maleki's medical condition was being closely monitored. In the circumstances, the Committee considered that the author had failed to substantiate this claim, for purposes of admissibility.

6.3 With respect to the author's complaint that he had not been transferred to his own country to serve his sentence, the Committee noted that the Covenant does not provide that an alien convicted and sentenced for a crime has a right to serve his sentence in his own country. Accordingly, this part of the communication was inadmissible ratione materiae.

6.4 The author's claim that he was tried in absentia was not contradicted by the State party. On the contrary, the State party conceded that the author was not present at his trial, but argued that he was represented by court-appointed counsel and that he therefore had a fair trial. The Committee was of the opinion that, in these circumstances, the author had substantiated, for the purposes of admissibility, his claims that his right to a fair trial, under article 14, paragraph 1, and his right, under article 14, paragraph 3 (d), to be tried in his presence, were violated, and these should be examined on their merits.

6.5 In deciding on admissibility the Committee was aware that upon ratification of the Covenant the State party made the following declaration: "The provisions of article 14,

paragraph 3 (d), are deemed to be compatible with existing Italian provisions governing trial of the accused in his presence and determining the cases in which the accused may present his own defence and those in which legal assistance is required". The State party did not refer to this declaration in its detailed reply to the author's communication. The declaration's scope, and its effect on the author's claim of a violation of article 14, paragraph 3 (d), therefore remained unclear. The Committee decided that both the State party and the author could include in their replies on the merits arguments relating to the scope of the above declaration, and its effect on the admissibility of the author's claim under article 14. The Committee would examine such arguments together with the arguments on the merits.

6.6 The Human Rights Committee therefore decided that the communication was admissible.

States party's observations on the merits

7. In its submission, dated 18 February 1998, the State party in response to the Committee's decision on admissibility, raises two arguments:

a. That the declaration made by the State party upon ratification of the Covenant constitutes a reservation that precludes the Committee from holding that a trial in absentia, according to the law of the State party, violates the State party's undertakings under the Covenant. The communication should therefore be declared inadmissible;

b. Even if the communication were to be considered admissible, the provisions of Italian law regarding trial in absentia are compatible with article 14, paragraph 3 (d) as, inter alia, in certain circumstances they allow a person who has been tried in absentia to apply for a retrial in his or her presence.

8. The author's son, who represents his father in this communication, informed the Committee that he does not intend to submit further arguments, and the Committee can therefore proceed to examine the arguments raised by the State party.

Issues and proceedings before the Committee

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 for in article 5, paragraph 1, of the Optional Protocol.

9.2 The State party's argument is that its declaration concerning article 14, paragraph 3 (d) is a reservation that precludes the Committee examining the author's argument that his trial in absentia was not fair. However, that declaration deals only with article 14, paragraph 3 (d), and does not relate to the requirements of article 14, paragraph 1. The State party itself has argued that its legal provisions regarding trial in absentia are compatible with article 14, paragraph 1. Under this provision, basic requirements of a fair trial must be maintained, even when a trial in absentia, is not, ipso facto, a violation of a State party's undertakings. These requirements include summoning the accused in a timely manner and informing him of the proceedings against him.

9.3 The Committee has held in the past that a trial in absentia is compatible with article 14, only when the accused was summoned in a timely manner and informed of the proceedings against him. (2) In order for the State party to comply with the requirements of a fair trial when trying a person in absentia it must show that these principles were respected.

9.4 The State party has not denied that Mr. Maleki was tried in absentia. However, it has failed

to show that the author was summoned in a timely manner and that he was informed of the proceedings against him. It merely states that it "assumes" that the author was informed by his counsel of the proceedings against him in Italy. This is clearly insufficient to lift the burden placed on the State party if it is to justify trying an accused in absentia. It was incumbent on the court that tried the case to verify that the author had been informed of the pending case before proceeding to hold the trial in absentia. Failing evidence that the court did so, the Committee is of the opinion that the author's right to be tried in his presence was violated.

9.5 In this regard the Committee wishes to add that the violation of the author's right to be tried in his presence could have been remedied if he had been entitled to a retrial in his presence when he was apprehended in Italy. The State party described its law regarding the right of an accused who has been tried in absentia to apply for a retrial. It failed, however, to respond to the letter from an Italian lawyer, submitted by the author, according to which in the circumstances of the present case the author was not entitled to a retrial. The legal opinion presented in that letter must therefore be given due weight. The existence, in principle, of provisions regarding the right to a retrial, cannot be considered to have provided the author with a potential remedy in the face of unrefuted evidence that these provisions do not apply to the author's case.

10. 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 before it disclose a violation of article 14, paragraph 1, of the Covenant.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Maleki with an effective remedy, which must entail his immediate release or retrial in his presence. The State party is under an obligation to ensure that similar violations do not occur in the future.

12. Bearing in mind that by becoming a State party to the Optional Protocol, Italy 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 or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to translate and publish the Committee's Views.

---

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra N. Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitán de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Hipóito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia. Under rule 85 of the rules of procedure, Mr. Fausto Pocar did not participate in the consideration of the communication.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

1. From a Statement made by the Office of the State Attorney General in Florence, it transpires that under Italian law, Mr. Ali Maleki could, once he surrendered to the Italian authorities, avail himself of the possibility of appealing both sentence and conviction.

2. Committee's Views on communication No. 16/79 (Mbenge v. Zaire).