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

DECISION

Communication No. 954/2000

Submitted by:	Craig Minogue (not represented by counsel)
Alleged victim:	The author
State party:	Australia
Date of communication:	23 September 1999 (initial submission)
Document references:	Special Rapporteur's rule 91 decision, transmitted to the Sate party on 14 November 2000 (not issued in document form).
Date of decision:	2 November 2004

[ANNEX]

* Made public by decision of the Human Rights Committee.

ANNEX

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

Eighty-second session

concerning

Communication No. 954/2000[**]

Submitted by:	Craig Minogue (not represented by counsel)
Alleged victim:	The author
State party:	Australia
Date of communication:	23 September 1999 (initial submission)

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

Meeting on 2 November 2004

Adopts the following:

DECISION ON ADMISSIBILITY

1. The author is Craig Minogue, an Australian citizen, currently serving life imprisonment at Barwon Prison, Victoria, Australia. He claims to be a victim of violations by Australia of article 2, paragraphs 1, 2, 3 (a) and (b), article 9, paragraph 4, article 10, paragraphs 1, and 2 (a), article 14, paragraphs 1, 3 (b) and 5, and articles 26 and 50, of the International Covenant on Civil and Political Rights and article 1 of the Optional Protocol. He is not represented by counsel. The Optional Protocol came into force for the State party on 25 December 1991.

The facts as presented by the author

2.1 In March 1986, the author was arrested with four other men, in relation to the murder of a police officer in Australia. In 1988, despite his claim of innocence, he was found guilty

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[**] The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.

Under Rule 90 of the Committee's Rules of Procedure, Mr. Ivan Shearer did not participate in the Committee's consideration of the case.

of murder, convicted and sentenced to life imprisonment, with a minimum imprisonment of 30 years. He then used all the appeal procedures available to him, to no avail.

2.2 When in the mid-nineties, the author became aware of serious criticisms against two witnesses at his trial, he considered a review of his case. Between July 1996 to August 1998, while imprisoned at Barwon Prison, he attempted to prepare a petition for mercy and a new appeal based on new evidence. He alleges that in the process, he was restricted by the prison authorities from accessing legal resource materials, computers, and his lawyers. He was further restricted in his preparation of his petitions by the obligation to move cell every month, allegedly for security purposes. He claims that he was placed on cell rotation as a form of punishment for making a complaint to the Human Rights and Equal Opportunities Commission (HREOC) and that this is highlighted by the fact that he was the only prisoner subjected to such rotation. In addition, he claims that prison officers were able to gain access to documents relating to his petitions.

2.3 By letter of 14 November 1996, the author complained to the HREOC that the prison authorities of Victoria were impeding his efforts to prepare a petition of mercy. On 6 May 1997, his complaint was rejected as the HREOC lacked jurisdiction in the matter. The author sought to have the HREOC decision reviewed by the Administrative Appeals Tribunal, but was advised that the matter was outside their jurisdiction. The author's attempt to have the HREOC decision reviewed by the Commonwealth Ombudsman was rejected on the same basis.

2.4 On 24 December 1997, the author filed a complaint against the HREOC in the Federal Court of Australia. A member of the International Commission of Jurists with *an amicus curia status* was assigned to the author as legal assistance. On 12 October 1998, the court dismissed the complaint. This decision was appealed to the Full Federal Court of Australia. Additional to his claim before the Full Federal Court, the author claimed not to have been provided with necessary legal assistance before the first instance court. On 19 February 1999, the Federal Court dismissed the appeal. The author did not appeal to the High Court of Australia, as this remedy would take a further two years, and thus in his view be "unreasonably prolonged".

The complaint

3. The author claims violations of article 2, paragraphs 1, 2, 3 (a) and (b), article 9 paragraph 4, article 10, paragraph 1, article 14, paragraphs 1, 3 (b) and 5, and articles 26 and 50 of the Covenant, and article 1 of the Optional Protocol to the Covenant. These claims are said to arise from the regular change of cells and the restrictions referred to in paragraph 2.2, which are said to have thwarted his attempts to have his case reviewed.

Pre-admissibility submissions from the State party and the author's comments thereon

4.1 In June 2001, the State party submitted a "request for advice on whether the complaint was ongoing". It advised the Committee that the author was transferred to Port Phillip Prison in September 1999. The transfer was negotiated between the Sentence Management Unit of the Office of the Correctional Services Commissioner in Victoria (which has responsibility for managing the transfer of prisoners between prisons), the Governor of Barwon Prison and the General Manager of Port Phillip Prison. The author was transferred "in response to a

variety of management issues," and, subject to the security, safety and overall needs of the prison system, would continue to be accommodated there for several months while he was pursuing issues with respect to his appeals. Given the author's transfer, the State party submits that it is unaware of any facts that could give the Committee any grounds for concern in relation to Covenant issues. It explains to the Committee the facilities that are currently available to the author.[1]

4.2 On 11 July 2001, the author responded, acknowledging that the matters raised in the initial communication were no longer relevant to his current situation, that they occurred between July 1996 and August 1998 and that the matters complained of no longer applied. However, he states that he wishes to maintain the communication as his rights were violated while detained at Barwon prison and the issue of there being no domestic remedies for violations of Covenant rights is not addressed by the State party. He also raises a new claim of a violation of article 10, paragraph 2(a), as convicted and unconvicted prisoners are not segregated in Port Philip prison. According to the author, the only reason he was moved to Port Philip was because he had filed a motion against Barwon Prison in the High Court claiming violations of his rights under the Covenant.

4.3 On 28 November 2001, after receiving the author's response, the State party requested further advice as to whether the complaint was still under active consideration. It disputes the author's argument that the present circumstances of his incarceration are irrelevant to his complaint, which arises from his individual experience on particular days, with particular individuals, and not from an express legislative provision of general application. It is an

[1] He has been accommodated in a single cell according to his wishes; has large volumes of legal texts in his cell, including hard backed books, and a large number of legal documents; has a personal computer with a CD drive, printer, diskettes and paper (for printing) in his cell; and is enrolled in full-time education which enables him access to the prison library in excess of what is normally timetabled for his unit. The library has 5 computers, three of which are common use computers for prisoners and one has a dedicated intranet link to the local Hobsons Bay Library database. All the computers in the library are linked to the main prison server which allows access to a complete collection of the Butterworths Legal CD-Rom collection (an up-to-date loose leaf legal service). Prisoners are allowed phone access to their lawyers. If a lawyer consents to receive calls, the prisoner may put the lawyer's name on his phone list. Prisoners can have up to ten phone numbers on their nominated phone list at any one time and these can be changed by submitting the appropriate alteration request form. We are advised that access to a phone should not be problem where the author is accommodated nor should it be a problem at any other prison. If he wishes to lodge a fresh evidence appeal, the appropriate appeal forms are available at Port Phillip Prison and other prisons. If he wishes to lodge a petition of mercy, he has access to facilities to prepare the petition. No forms are required for the petition of mercy, only a letter to the Victorian Government to instigate a review of the application is required. The State party has been advised that the author has not yet lodged either a fresh evidence appeal or a petition of mercy. The author has access to lawyers. The Victorian Legal Aid Prison Advice Service (VLA) may visit the Prison as often as it wishes, as can lawyers representing the author within the professional visits timeframe. Professional visits are seven days a week, generally between 9am and 6pm.

essentially personal complaint alleging frustrated access to computer equipment and legal resources, resulting in the alleged denial of access to court.

4.4 While not conceding the substance of the author's complaint, the State party submits that his circumstances have changed: his concerns have been met and there is no longer any complaint to answer. On the author's own admission, his transfer to Port Philip Prison has resolved his complaints about access to computer equipment and legal resources, and he is allowed to stay at Port Philip Prison for the duration of his legal actions, subject to overall safety and security concerns. The State Party therefore requests the Committee to discontinue the communication. [2]

4.5 The State party contends that the communication is inadmissible as the author is no longer a victim as required by article 1 of the Optional Protocol. In circumstances where the author has in fact obtained the benefit of his claim, the Committee has in the past found that the author can not continue his or her claim because there is no victim as required by article 1 of the Optional Protocol.[3] Thus the provision of a remedy by a State party negates the basis for the international claim. Like the condition that applicants to international procedures must previously exhaust domestic remedies, the requirement that there be a victim recognises the primary role of the domestic legal system, and the subsidiary role of the international mechanisms, in providing remedies. The Committee's view is consistent with the European human rights jurisprudence.[4] The State party submits it was not intended that the Committee would spend its limited time considering issues in the abstract, removed from concrete circumstances.

4.6 As to the author's comment that remand prisoners and convicted prisoners are held together at Port Philip Prison, and that this may infringe article 10, paragraph 2, of the Covenant, the State party submits that the benefit of the Covenant provision is clearly for accused prisoners to claim, not for sentenced ones in the author's position. In addition, the State party refers to its reservation to article 10, paragraph 2, in which it states that the principle of segregation is an objective to be achieved *progressively*.

4.7 Should the Committee consider the complaint ongoing, the State party reserves the right to provide full comments on admissibility and merits. On 21 December 2001, on behalf

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[2] The State party refers to the Committee's decisions in *Waksman v Uruguay, Case no 31/1978, Discontinued; Ramsey v Australia, Case no 655/1995, Discontinued*. See also Novak CCPR Commentary. Engel 1993, p 673

[3] *Van Duzen v Canada, Case no. 50/1979, Views adopted on 25 July 1980*. In this case, the Committee did not consider the substantive issues, finding that the author had in fact obtained the benefit claimed.

[4] The European Commission and Court have acknowledged that "an applicant may no longer claim to be a victim if his claims have been satisfied in full by the authorities of the State party at the domestic level, since the applicant is then placed in the same position as if the events which gave rise to his claim had not occurred." Preikhzas case application no. 6504/74, report of 13 December 1978, DR 16, pp 16, 17. It also refers to the case of *EW et al v Netherlands, Case no. 429/1990, Views adopted on 8 April 1993.*

of the Committee, the Special Rapporteur on New Communications requested the State party to respond in full on the admissibility and the merits of the case.

State party's response on admissibility and the merits and the author's comments thereon

5.1 On admissibility, the State party reiterates the arguments made in its request to ascertain whether the complaint was still under active consideration. It also argues that the complaint is inadmissible in so far as the author's allegations relate to access to documents, lawyers and computers, because the author has failed to exhaust domestic remedies. This argument does not apply to the allegations that articles 26 and 50 of the Covenant, and article 1 of the Optional Protocol, were violated, as the author exhausted domestic remedies in relation to the HREOC's decision not to hear this complaint.

5.2 According to the State party, the author had three opportunities to exhaust domestic remedies. Firstly, as a prisoner in Barwon Prison, he could lodge a complaint with the State Ombudsman of Victoria. Under the Ombudsman Act 1983 (Vic), the Ombudsman should make independent inquiries into administrative action taken by relevant public bodies. During reception, prisoners are advised about their right to make complaints and requests to various persons and bodies. Where the Ombudsman investigates a complaint and is satisfied that action is required, he or she must send a report and recommendations to the principal officer of the appropriate authority and send a copy to the responsible Minister. Where action recommended by him is not taken within a given time, the Ombudsman may directly report and make recommendations to the Governor in Council. Where a report or recommendations have been sent to the Governor in Council, the Ombudsman may submit a report before both Houses of the State Parliament. In this way, pressure and public scrutiny will often result in the Ombudsman's recommendations being implemented.

5.3 Secondly, the author could have complained to the Minister and the Secretary to the Department of Justice, under section 47(1)(j) of the Corrections Act 1986 (Vic). Thirdly, he could have brought a case to court. The author did bring two cases to the Federal Court, relating to the decision of the HREOC not to examine his case, to constitutional issues relating to the HREOC Act 1986 (Cth), and relating to the direct, verbatim incorporation of the right in the Covenant into Australian domestic law. However, no domestic court has so far decided whether the author has a right under Australia's existing domestic law, to access his documents, lawyers and computers. The author does have a right to claim, before the courts, that he was denied access to them and that this was confirmed by the Federal Court, which informed the author that he could bring an action relating to his access to documents, lawyers and computers.

5.4 The State party dismisses the allegations relating to access to lawyers as inadmissible for lack of substantiation. The author has not provided any proof relating to the alleged denial, by the Victorian authorities, to allow him access to lawyers. All the material he submitted relates to access to legal documents and computers. As to the allegation of a violation of article 2, paragraphs 3 (a) and (b), the State party submits that the author has not demonstrated how it has refused to grant him access to an effective remedy.

5.5 The State party submits that some of the authors allegations are inadmissible *ratione materiae*: rights protected under article 2 of the Covenant are accessory in nature and not free standing; article 10 does not relate to a claim of restrictions to lawyers and legal documents; and as no determination of a criminal charge is being made against the author, and neither the petition of mercy or the fresh evidence appeal is a "defence" within the meaning of the Covenant, article 14, paragraph 3(b), does not apply to the author's case. The author's allegation concerning the review of his conviction and sentence, and the preparation of a new evidence appeal and his petition of mercy, properly relate to article 14, paragraph 5, and not to article 9, paragraph 4. However, in so far as the author alleges that interference with the preparation of a petition of mercy violates article 14, paragraph 5, it is submitted that such a petition is not an appeal to a higher tribunal, so that any alleged interference in its preparation would not breach this provision.

5.6 On the merits, the State party submits that the mere fact that the author could not pursue a remedy through the HREOC, a body with limited jurisdiction, does not mean that he could not pursue a remedy through another body (see paras. 5.2 and 5.3 above). None of the restrictions placed on the author's access to legal documents and lawyers is said to reach the threshold required for treatment in violation of article 10, paragraph 1.

5.7 As to the allegations under articles 26 and 14, paragraph 3 (b), the State party submits that restricted access to documents, lawyers and computer facilities was reasonable and objective in the author's circumstances. The very nature of imprisonment necessarily places restrictions on a prisoner's access to legal documents. In particular, safety and security concerns must be balanced with a prisoner's desire to keep all of his legal documents in his cell. The governor of Barwon Prison continually reviewed the number of boxes of documents in the author's cell, to assess its safety and security, as the cell had been identified as a fire risk by the Fire Risk Assessment Officer of the prison. After each assessment, the governor increased the number of boxes the author could keep in his cell. He could access the boxes of documents by trading boxes in his cell for others in storage. By 6 February 1997, he had been permitted to retain 24 boxes of legal documents in his cell. As to the claim that he had to regularly move cells because he had made complaints regarding his access to legal documents and that being required to move cells every week disrupted the preparation of a fresh appeal and a petition of mercy, the State party argues that he was subjected to rotation as he was considered a high security risk.

5.8 The author was permitted to have access to lawyers in accordance with the rules and regulations applying to Barwon Prison between July 1996 and August 1998. He received four visits from lawyers during this period. In addition, as evidenced by copies of correspondence annexed to his initial complaint, he could contact numerous lawyers and other members of the legal profession. As to access to his personal computer, the State party concedes that he did not have such access from June 1996 to 24 November 1997, as during this period no new computers were allowed into the prison so that an audit could be undertaken. Unfortunately, the author's computer malfunctioned during the period in question and could not be replaced. Once the audit was over, the author was permitted to buy a new personal computer. On article 14, paragraph 5, the State party submits that the author's current efforts to submit a new appeal with fresh evidence and a petition of mercy are not being hampered by the authorities.

5.9 The State party understands that the author's allegation under article 26 relates to the fact that the HREOC does not have jurisdiction to hear his complaint, it points out that there are other Victorian state agencies competent to hear his substantive complaint (see paras. 5.2 and 5.3 above). If his argument is that he is not receiving equal protection of the law, because he, unlike persons complaining against Commonwealth agencies, cannot bring a complaint under the HREOC Act 1986 (Cth), it submits that what is at issue is not whether he can file a complaint under a particular law or before a particular body but rather whether he can bring a complaint before a decision making body competent to decide on the substance of his complaint.

5.10 On 20 December 2002, the author reiterated his previous claims and concedes that after challenging his placement on the security list, he was not required to move cells after September 1997. As to the claim of fire risk he submits that both this risk and the alleged security risk were "invented" by the prison authorities to deny prisoners access to legal documents. As to the State party's arguments on the "victim" requirement, he claims that failure to consider the case on the merits on this reason alone would legitimise the violation of his rights, and encourage the authorities temporarily to change an individual's circumstances.

5.11 As to the argument of failure to exhaust domestic remedies, the author contends that complaints to the Ombudsman and through the court system would be ineffective. In relation to the Ombudsman, he argues that although his/her function is to conduct investigations of administrative action, the function is rarely used. Informal inquiries are preferred, but although this method may be more expedient, it is the author's view that prison and police officers do not confess guilt when asked to respond to such an informal inquiry. He refers to various annual Ombudsman reports, including the 2001/2002 report, in which 699 complaints were made and only one was investigated and sustained. In relation to the courts, he claims that they are ineffective, as they consistently refuse to rule in favour of prisoners and are reluctant to interfere in the operation of prisons. As to the possibility of filing a complaint with the prison manager or the Minister, he submits that it is unrealistic to expect a prisoner to complain to those who hold him in custody.

5.12 On 7 July 2004, a further letter from an organization claiming to assist the author stated that he had been transferred back to Barwon Prison, and that restrictions have been placed on his ability to access his legal materials, including his files relating to his case before this Committee. It provides a copy of a letter, dated 1 June 2004, in which the author requested access to his legal materials. This request was refused.

Issues and proceedings before the Committee

Consideration of 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 is admissible under the Optional Protocol to the Covenant.

6.2 The State party argues that the author's claims relating to his imprisonment in Barwon Prison are inadmissible as the author is not a "victim" within the meaning of article 1 of the

Optional Protocol. It argues that by having moved the author to Port Philip Prison, where he had access to all necessary information for the purposes of preparing his petitions, his grievances were remedied. The Committee notes that the author does not dispute this but that he still wishes the Committee to consider his claims. The Committee recalls its jurisprudence that where a violation of the Covenant is remedied at the domestic level prior to the submission of the communication, it may consider a communication inadmissible on grounds of lack of "victim" status or absence of a "claim".[5] In the present case, it notes that the author submitted his communication on 23 September 1999, relating to events occurring between July 1996 and August 1998. Although the author's claims were apparently remedied by the State party prior to submission of the complaint, the author has in his latest submission informed the Committee that he has been transferred back to Barwon Prison where at least some of his original complaints are again valid. In these circumstances, the Committee finds that the author may be considered a "victim" within the meaning of article 1 of the Optional Protocol, and his claims are not inadmissible merely because the State party provided him with relief at one point.

6.3 As to the requirement of exhausting domestic remedies, the Committee considers that the author has, by making use of several judicial and quasi-judicial procedures in order to seize various domestic authorities of his grievances, complied with the requirement set out in article 5, paragraph 2 (b) of the Optional Protocol.

6.4 As to the claim under article 9, paragraph 4, the Committee finds that, as the author is currently serving the minimum duration of a prison sentence as decided by a court of law, his claim does not fall within the purview of this provision. As to the claims under article 14 paragraphs 3 and 5, the Committee finds that as the author is not under a criminal charge and had his conviction and sentence reviewed by a higher tribunal, the provisions of these articles are not applicable. As to article 14, paragraph 1, the Committee finds that his claims relate neither to the conduct of judicial authorities nor to access to court in a matter that would constitute a suit at law in the meaning of this provision. For these reasons, the Committee finds that these claims are incompatible with the provisions of the Covenant and are, accordingly, inadmissible *ratione materiae*, pursuant to article 3 of the Optional Protocol.

6.5 As to the author's claim that convicted and unconvicted prisoners are not segregated in Port Philip Prison, the Committee notes that the State party has invoked its reservation to article 10, paragraph 2 (a), of the Covenant which states that, "In relation to paragraph 2 (a) the principle of segregation is an objective to be achieved progressively". It recalls its previous jurisprudence that while it may be considered unfortunate that the State party has not so far achieved its objective to segregate convicted and unconvicted persons in full compliance with article 10, paragraph 2 (a), it cannot be said that the reservation is incompatible with the object and purpose of the Covenant.[6] This part of the author's claim is, therefore, incompatible with the provisions of the Covenant and is, accordingly, inadmissible *ratione materiae*, pursuant to article 3 of the Optional Protocol.

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[5] *Dergachev v Belarus, Case no. 921/2000, Views adopted on 2 April 2002, and Wilson v. The Philippines, Case no.868/1999 , Views adopted on 868/1999.*

[6] *Cabal and Pasini v. Australia, Case no. 1020/2001, Views adopted on 7 August 2003.*

6.6 As to the claim of a violation of article 1 of the Optional Protocol, the Committee takes the view that, although it has on its own initiative established a breach of the right of the individual complaint procedure enshrined in the Optional Protocol, in cases where a State party has executed or deported a person while an individual communication has been under the Committee's consideration, it takes the view that the author has not made out a case of a breach of the right in question. Consequently, this part of the communication is inadmissible *ratione materiae,* under article 3 of the Optional Protocol.

6.7 As to the claim under article 26 of the Covenant, the Committee finds that the author has failed to present any arguments substantiating this claim. Consequently, the Committee finds this part of the communication inadmissible, pursuant to article 2 of the Optional Protocol.

6.8 As to the remaining claims made under article 10, paragraph 1, read in conjunction with article 2 of the Covenant, the Committee has reviewed the author's claims against the provisions of the United Nations Standard Minimum Rules for the Treatment of Prisoners. Taking note of the State party's submissions relating to the author's conditions of detention, including his access to legal documents and lawyers and the availability of various remedial mechanisms on the domestic level, the Committee considers that the author has not substantiated, for purposes of admissibility, a claim that these provisions have been violated. Consequently, the Committee finds this claim inadmissible, pursuant to article 2 of the Optional Protocol.

6.9 Concerning the claim under article 50 of the Covenant, the Committee refers to its constant jurisprudence that it is only with respect to articles in Part III of the Covenant, interpreted as appropriate in the light of the articles in Parts I and II of the Covenant that an individual communication may be presented to it. Accordingly, article 50 cannot give rise to a free-standing claim that is independent of a substantive violation of the Covenant. Thus, the Committee finds this claim inadmissible *ratione materiae*, pursuant to article 3 of the Optional Protocol.

7. Accordingly, the Committee decides:

(a) that the communication is inadmissible, under articles 2, and 3 of the Optional Protocol;

(b) that this decision be transmitted to the State party and to the author.

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