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Seventy-eighth session
14 July - 8 August 2003

VIEWS

Communication No. 1020/2001

Submitted by:	Mr. Carlos Cabal and Mr. Marco Pasini Bertran (represented by counsel Mr. John P. Pace and Mr. John Podgorelec)
Alleged victim:	The author
State party:	Australia
Date of communication:	6 July 2001 (initial submission)
Document references:	Special Rapporteur's rule 91 decision, transmitted to the State party on 22 October 2001 (not issued in document form)
Date of adoption of Views:	7 August 2003

On 7 August 2003, the Human Rights Committee adopted its Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1020/2001. The text of the Views is appended to the present document.

[ANNEX]

* Made public by decision of the Human Rights Committee.

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

Seventy-eighth session

concerning

Communication No. 1020/2001[**]

Submitted by:	Mr. Carlos Cabal and Mr. Marco Pasini Bertran (represented by counsel Mr. John P. Pace and Mr. John Podgorelec)
Alleged victim:	The author
State party:	Australia
Date of communication:	6 July 2001 (initial submission)

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

Meeting on 7 August 2003,

Having concluded its consideration of communication No. 1020/2001, submitted to the Human Rights Committee on behalf of Mr. Carlos Cabal and Mr. Marco Pasini Bertran 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:

[**] The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen and Mr. Roman Wieruszewski.

Pursuant to Rule 85 of the Committee's rules of procedure, Sir Nigel Rodley did not participate in the adoption of the views.

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

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

1. The authors of the communication, dated 6 July 2001, are Carlos Cabal, currently residing in Mexico, and Marco Pasini Bertran ("Pasini"), currently under detention in Port Philip maximum security prison awaiting extradition to Mexico. Both are Mexican citizens. They claim to be victims of violations of articles 7, 10, paragraphs 1 and 2 (a), and 14, paragraph 2, of the International Covenant on Civil and Political Rights, by Australia. They are represented by counsel.

The facts as submitted by the authors

Extradition Proceedings

2.1 On 11 November 1998[1], the authors were arrested in Australia, pursuant to *provisional* arrest warrants issued under the Extradition Act 1988 ("Extradition Act"). They were taken before a magistrate and remanded in custody at the Melbourne Assessment Centre, Victoria, where they were segregated from convicted prisoners. On 4 January 1999, they were moved to Port Philip Prison, Victoria. They were held in a transit unit for three weeks, then placed in a unit with common prisoners, and in August 1999 were moved to the Sirius East high protection unit of Port Philip Prison. From the time the authors were detained at Port Philip Prison, they were neither *segregated* nor *treated separately* from convicted prisoners.

2.2 On 31 December 1998 and 11 February 1999, Mexico filed formal requests for the extradition of Cabal in respect of a number of alleged offences relating to the operation of a bank and other offences relating to fraud, tax evasion and money-laundering. On 20 January 1999, Mexico made a formal request for the extradition of Pasini in respect of two alleged offences relating to the operation of a bank and one of concealment. On 17 December 1999, a Magistrate of Australia found the authors eligible for surrender, and warrants were signed ordering their committal to Port Philip Prison. On 29 August 2000, the Federal Court of Australia dismissed the authors' application for judicial review of the extradition proceedings. The authors applied to the full court of the Federal Court to appeal this decision. On 18 April 2001, the full court dismissed their appeal. On 7 September 2001, the High Court dismissed an application by Pasini for special leave to appeal the decision of the full court of the Federal Court.

2.3 As of 20 December 2000, Pasini was granted bail several times until his return into custody on 19 July 2001 where he remains to date. On 4 July 2001, Cabal was granted bail by the High Court but this order was set aside on appeal on 2 August 2001. On the same day, Cabal notified the authorities that he no longer wished to avail himself of the remaining recourses open to him and that he accepted extradition and return to Mexico. On 6 September 2001, he was removed to Mexico.

2.4 On 22 May 2002, Pasini requested the Minister for Justice not to issue a surrender decision under section 22 of the Extradition Act until the outcome of his *amparo* proceedings in

[1] According to the State party, warrants were issued for Cabal on 11 November 1998, and for Pasini on 27 November 1998.

Mexico were known. The Minister acceded to this request. In a fax dated 9 February 2003, Pasini informed the Committee that, having exhausted all appeals in Australia in respect of Mexico's extradition request, he consented to extradition, and is currently awaiting surrender to Mexico. He remains in the Sirius East Unit of Port Philip Prison.

The Prison Conditions and Treatment of the Authors

2.5 Prior to his surrender, Cabal was held with convicted prisoners in the Sirius East high protection unit of Port Phillip maximum security prison. Pasini continues to be held with convicted prisoners in the same Unit. Port Philip is a privately operated prison, run by Group 4 Correction Services Pty Ltd. ("Group 4") and regulated by the law of the State of Victoria. The prison system in Victoria - unlike in the other States and Territories of Australia - does not provide for the separate custody of persons held on remand without bail pending extradition proceedings.

2.6 According to the authors, the Sirius East Unit of the prison is populated with "convicted multiple murderers and rapists", and violence in the Unit is common. The inmates almost always have a history of violence and drug abuse. They have been described by one forensic psychologist as "perpetrators rather than victims". There is one prisoner in the unit with AIDS, and up to 12 with Hepatitis C. Many of the prisoners suffer from communicable diseases and according to the authors in one affidavit by an inmate it is stated that as of 4 January 2000, the authors were detained with a prisoner who was "spitting blood".

2.7 There is a constant apprehension of violence and the authors refer to an affidavit of another inmate who describes various incidents in which he was sexually assaulted by other prisoners. The authors describe two incidents during which specific threats of violence were made against them. On 30 May 2000, Pasini, in the company of Cabal, was threatened with a 20 centimetre metal knife by a fellow inmate who was known for his history of drug abuse and violence. On 26 October 2000, in the exercise yard, two prisoners signalled that they wished to speak to Cabal and approached him. They were intercepted by prison officers who searched them, only to discover that one of them was carrying a pair of scissors.

2.8 The treatment afforded to the authors was, and with respect to Pasini is, not different or separate from that afforded to convicted prisoners. The following description of the treatment afforded to Pasini also applied to Cabal prior to his extradition. Pasini has a "Criminal Record Number" (CRN), which he is obliged to call out every time he is asked to identify himself. He is subjected to the same daily routine as convicted prisoners, including the same restrictions on everything, from physical contact with his family to the food he eats. During industrial relations disputes which result in strike action, the prison is run on skeleton staff. Consequently, all of the detainees in the prison are locked in their cells for 23 hours of the day, during which they have very little access to telephones. For this disturbance, convicted prisoners have their sentences reduced by approximately 1-2 days per day of strike action. In comparison, Pasini receives no compensation whatsoever.

2.9 Every time Pasini travels from the prison he is shackled and manacled with 12/17-link shackles. He is also strip searched after each visit, and before and after he is transported to court. This means that he may be subjected to a cavity inspection more than 3 times a day. Pasini is regularly subjected to pushing and shoving and general violence by prison officers.

2.10 On 17 December 1999, the authors were placed simultaneously in what is described as a "cage" for one hour. This was about the size of a telephone booth, triangular in shape with two solid walls and the third made of metal with small round holes. There is a small built-in chair but with two persons in it there is no room to sit.[2]

2.11 The authors state that the Courts have from time to time expressed serious concern about their situation but did not consider that their incarceration constituted circumstances that are sufficiently special, to warrant a bail decision in their favour.[3] They held that the risk of flight out-weighed the negative effects that this incarceration was having on the authors.

Attempts made by the authors to challenge their detention

2.12 On 8 November 1999, Cabal applied to the Federal Court for an interlocutory injunction restraining the Minister for Justice and Customs and the Director of Port Philip Prison from further keeping him in custody, pending consideration by the Federal Court of an appeal relating to extradition proceedings before the Federal Court.[4] This application was dismissed on 3 December 1999.

2.13 On 19 May 2000, the authors filed an application in the Supreme Court of Victoria for the issue of a writ of habeas corpus. On 30 May 2000, their application was dismissed. On 19 June 2000, they applied to the Federal Court of Australia for identical relief, claiming that their detention was in contravention of the Extradition Act. On 14 July 2000, the Court dismissed their application. On 28 July 2000, the authors appealed this decision to the full court of the Federal Court, which in turn dismissed the appeal. On 13 September 2000, the authors filed an application in the High Court of Australia for special leave to appeal from the judgement of the full court of the Federal Court. On 28 November 2000, this application was dismissed.

2.14 The authors attempted, through a motion dated 27 July 2000 to the Federal Court of Australia, to seek, inter alia, orders that they be released from prison and committed into the custody of the Australian Federal Police, the Victoria Police and/or the Secretary of the Department of Justice. On 11 August 2000, the court adjourned the Notice of Motion for a change of custody to a date to be determined. No further information is provided on the outcome of this motion.

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[2] The authors do not state why they were held in this "cage". In its findings of fact, the Human Rights and Equal Opportunity Commission stated that "they were placed in a small triangular cell at the Melbourne Custody Centre on 17 December 1999".

[3] The authors refer to remarks made by judges in the cases of Cabal v. United Mexican States, an unsuccessful bail application, and Cabal & Pasini v. Secretary, Department of Justice (Victoria) & Lisa Hannon, an habeas corpus application.

[4] Peniche v Vanstone [1999] FCA 1688

2.15 On 8 March 2000, the authors lodged a complaint with the Human Rights and Equal Opportunity Commission ("HREOC"), complaining that their detention violated provisions of the International Covenant on Civil and Political Rights. On 9 November 2000, this Commission delivered its *Preliminary Findings* in which it found that the authors' detention violated their rights under articles 7, and 10, paragraphs 1, 2 (a), of the Covenant. On 23 October 2001, HREOC, after receiving additional submissions, released its final decision, finding that "the acts and practices complained of are not inconsistent with or contrary to a human right".

2.16 Since the start of the authors' detention, many letters have been written to the prison authorities on their behalf, requesting that their conditions of detention be improved.

The complaint

3.1 The authors claim that the State party has violated article 10, paragraph 2 (a), of the Covenant, by failing *to segregate* them from convicted persons, and failing to treat them *separately* in a manner appropriate to their status as unconvicted persons[5]. In this regard, they refer to the Standard Minimum Rules for the Treatment of Prisoners ("SMR") and Principle 8 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment ("Body of Principles"), which affirm the principle of segregation.

3.2 On the issue of *segregation*, the authors argue that the qualification of "save in exceptional circumstances" in article 10, paragraph 2 (a), was added for the benefit of impoverished countries who could not afford to build separate places of detention.[6] They refer to the Committee's General Comment 21, in which it is stated that "…..in order to emphasise their status as unconvicted persons who at the same time enjoy the right to be presumed innocent as stated in article 14, paragraph 2. The reports of States parties should indicate how the separation of accused persons from convicted persons is effected and explain how the treatment of accused persons differs from that of convicted persons".[7]

3.3 On the issue of *separate treatment*, the authors note that this element of article 10, paragraph 2 (a), is unqualified and unequivocally requires "separate treatment appropriate to their status as unconvicted persons".[8] They claim that "the conditions of detention of a person in preventative detention should be separate and distinct". They argue that such treatment should be consistent with the SMR (rules 85 – 93), which describes how to implement these rules, including providing access to doctors, dentists, and legal advisers.

[5] Although the authors' were neither segregated nor treated separately from convicted prisoners from the time they were detained in Port Philip Prison, their complaint relates to the period of detention in the Sirius East Unit of Port Philip Prison from August 1999 to 6 September 2001 with respect to Cabal and August 1999 to date with respect to Pasini.

[6] The authors refer to the Commentary on the Covenant by M. Nowak and the "Guide to the Travaux Préparatoires" by M. Bossuyt.

[7] General Comment 21, Replaces general comment 9 concerning humane treatment of persons deprived of liberty, Article 10, Forty-fourth session, 1992.

[8] The authors refer to the Committee's jurisprudence in *Berry v. Jamaica, Case No. 330/1988, Views adopted on 7 April 1994* and *Griffin v. Spain, Case No.493/1992, Views adopted on 4 April 1995*

3.4 The authors recall that Australia entered the following reservation to article 10:

> "In relation to paragraph 2(a) the principle of segregation is accepted as an objective to be achieved progressively".

They observe that this reservation only relates to the element of *segregation* and that upon ratification of the Covenant, the State party accepted the obligation of ensuring *separate treatment* of convicted and unconvicted persons. They claim that as this reservation was entered twenty years ago, it is reasonable to expect that Australia would have achieved this objective to be in full compliance with its obligations, and argue that article 26 of the Vienna Convention on the Law of Treaties stipulates the principle of performance in good faith in carrying out obligations entered into by States. The authors claim that, on the contrary, the State party has taken a regressive approach at least in its application of the principle of segregation in its prison system in the State of Victoria. They argue that the Melbourne Remand Centre which, from 6 April 1989, facilitated the segregation of convicted and unconvicted persons, reversed this policy in 1994. They also argue that there has been no policy of segregation at Port Phillip Prison, and that despite the State party's contention in its fourth report under article 40 of the Covenant[9], examined in July 2000, that the Port Phillip Prison would "allow for further improvement in the separation of convicted and unconvicted male prisoners", these intentions were not followed up.

3.5 The authors claim that the conditions under which Cabal was detained and Pasini continues to be detained violates their right to be treated with humanity and with respect for the inherent dignity of the human person, contrary to articles 7 and 10, paragraph 1.

3.6 It is claimed that, because Cabal was and Pasini continues to be treated in all respects as persons found guilty and serving a sentence, they have not been afforded the right to be presumed innocent until proved guilty according to law, contrary to article 14, paragraph 2 of the Covenant.

3.7 The authors claim that "their right to health is being put or exposed to serious jeopardy", by being detained with prisoners who suffer from communicable diseases. They make specific reference to the prisoner who was alleged to have been "spitting blood", a classic symptom of tuberculosis. The authors also refer to an article published in an international journal on the subject, where reference is made to the Baku Declaration on Tuberculosis, which issues a warning to Governments and health authorities to take action to tackle the problem of tuberculosis in prisons. The authors claim that failing to address the problem would be in violation of article 12 of the Covenant on Economic, Social and Cultural Rights.

<u>The State party's submissions on the admissibility and merits of the communication</u>

4.1 By note verbale of 1 October 2002, the State party commented on the admissibility and merits of the communication. It provides general information on Port Philip Prison including the fact that it is the primary remand prison in the State of Victoria, that approximately 40-50% of detainees are unconvicted remand prisoners, and that it performs a transit function in the Victorian corrections system. It submits that the Sirius East Unit houses prisoners who require

[9] CCPR/C/AUS798/4: Australia 4/8/99.

protection from other prisoners within the prison. The unit contains convicted and unconvicted persons. It explains that both Cabal and Pasini were moved to Sirius East to ensure their safety, as they were believed to have been targeted for extortion in other parts of the prison and to have engaged in behaviour that put themselves at risk of becoming the victims of violent recrimination.[10]

4.2 The State party refers to the findings of the Working Group on Arbitrary Detention of the Commission on Human Rights, Opinion No. 15/29001 (Australia), of 18 May 2001, which concluded that the authors were not being arbitrarily detained and that the conditions of detention, alleged by the authors to pose a danger to their lives, was not a matter which fell within the mandate of the Working Group. It also referred to the urgent appeal sent to the State party by the Special Rapporteur against Torture of the Commission on Human Rights on 12 June 2001.

4.3 The State party submits that the communication is inadmissible. It argues that the authors have not submitted to the Committee any material they did not already present to HREOC, which concluded in its final report of 23 October 2001 that the State party had not breached any of their rights under the Covenant. The alleged violations of the Covenant, save for the currently alleged violation of article 14, paragraph 2, are identical both in the case before HREOC and the case now before the Committee. It argues that the Committee's findings in the case of *F, on behalf of her son, C v. Australia*[11], indicate that where HREOC has concluded that an author's allegations and evidence do not reveal a violation of the Covenant, and where the author has failed to provide the Committee with information supplementary to that provided to HREOC, the communication to the Committee should be held inadmissible for lack of substantiation.

4.4 The State party submits that, on account of its pertinent reservation, the allegation of a violation of article 10, paragraph 2 (a), for failure of the State party to *segregate* the authors from convicted prisoners is inadmissible *ratione materiae*. It argues that at the 13th session of the Third Committee of the General Assembly, the practical implications of article 10, paragraph 2 (a), were considered to be of concern to a number of States. In fact, "Doubt was expressed by some representatives about the practical possibility in many countries of always segregating accused persons from convicted persons as required in paragraph 2 of the article".[12] There have been no objections to Australia's reservation, and it is in accordance with the Committee's guidelines on reservations as set out in General Comment No 24.[13] The State party argues that

[10] The State party refers to the explanation provided by the Head of Operations in a letter dated 6 August 1999 to the Assistant Manager Sentence Management "……Prisoners in Pencihe's unit, Scarborough South, claim that he [Cabal] cannot continue to do what he is doing to fellow prisoners [promising to provide them with money and then not doing so], and that the time is quickly arriving when he will be severely assaulted, or worse. Prisoners have stated that whilst he has been accommodated in Scarborough South, he has been looked after, and has not readily associated with other prisoners. But the prisoners stressed that they believe he will be assaulted in the near future…… I firmly believe that prisoners have reached the point of enough talking, and physical response is the only method in which they wish to deal with this matter….."

[11] *Communication No. 832/1998, Decision adopted on 25 July 2001.*

[12] The State party refers to, M. Bossuyt, Guide to the "Travaux Preparatoires" of the International Covenant on Civil and Political Rights (1987), page 226.

[13] HRI/GEN/1/Rev.4

Article 19(3) of the Vienna Convention on the Law of Treaties provides that where a reservation is not prohibited by the treaty or falls within the specified permitted categories, a State may make a reservation, provided it is not incompatible with the object and purpose of the treaty. The Covenant neither prohibits reservations generally nor mentions any type of permitted reservation.

4.5 The State party provides the following information on the factual circumstances surrounding the progressive implementation of segregation in prisons in the State of Victoria. A new 600 bed metropolitan Melbourne Remand Prison and a 300 bed metropolitan medium security prison will be completed in late 2004. The final location of these new correctional facilities has yet to be finalised. It refers to the explanation by the then Correctional Services Commissioner of Victoria to HREOC: "Victoria is not currently in a position to separate convicted from unconvicted prisoners. In 1989, the Melbourne Remand Centre was constructed to house all remand prisoners but within six weeks of opening, it was at full capacity, and additional remand prisoners had to be accommodated at the reception prison at Coburg…. There is significant pressure on prison accommodation in Victoria. This situation is not confined to this State. While ideally sentenced and remand prisoners would be separated, in practical terms the needs of all detainees must be considered … to separate remand and sentenced prisoners in all cases would essentially require a duplicated prison system with all tiers of security and special needs facilities available for remand prisoners…. [I]t balances this objective [segregation] with other factors that directly and immediately impact on the safe custody and welfare of individual prisoners and the prison population generally…. Placement decisions are reviewed periodically. These considerations must be made within the context of a prison system operating at maximum capacity….".

4.6 For the State party, the fact that segregation has not been achieved does not amount to a violation of article 10, paragraph 2 (a). Progressive realisation does not mean "purely linear progress". Circumstances may arise where progress is halted and indeed reversed where, for example, budgetary constraints may make it necessary to use what was formerly a remand centre for unconvicted persons as a centre to house convicted and unconvicted persons. Temporary regression does not mean that segregation is not being achieved progressively. The State party refers to the submission of the Correctional Services Commissioner of Victoria to HREOC who argued that "merely to say (as the complainants do) that the reservation was made 20 years ago and should therefore have been achieved is to discount the challenges (such as the expanding prison population and the change in characteristics of those detained) that have faced correctional management in the last 20 years." The State party recalls the Committee's jurisprudence on the requirement of segregation under article 10, paragraph 2 (a), of the Covenant but concludes that such jurisprudence is not applicable given its reservation to article 10.

4.7 On the claim that Cabal's right to be presumed innocent was violated and Pasini's identical right is being violated, the State party submits that article 14, paragraph 2, only applies to persons facing criminal proceedings.[14] Although the authors had been charged with criminal

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[14] The State party refers *to Morael v France, Case No. 207/1986, Views adopted on 28 July 1989; WJH v The Netherlands, Case No. 408/1990, Decision adopted on 22 July 1992; WBE v The Netherlands, CaseNo. 432/1990, Decision adopted on23 October 1992.*

offences by Mexico, they were at no time facing criminal proceedings under Australian law. Under Australian law, extradition proceedings are not criminal proceedings, and Australian courts have at no time ruled on the guilt or innocence of the authors. Rather, they have only come to a determination on whether or not they could be extradited in accordance with the Extradition Act. The State party, therefore, submits that there is no issue arising under the Covenant in relation to any presumptions afforded to the authors under Australian law. Accordingly, this part of the communication is inadmissible *ratione materiae*.

4.8 The State party does not concede that the authors' detention may have made them appear to be guilty and submits they provided no evidence that their right to be presumed innocent was neglected by any Australian court or official. It submits, therefore, that the authors have failed to substantiate this claim.

4.9 On the authors' claim that their right to health is put in jeopardy, the State party notes that the authors do not relate this allegation to any right protected under the Covenant. It submits that there is no Covenant article which protects the right to health and that therefore an alleged violation of this right is inadmissible *ratione materiae*. Should the Committee decide to interpret a Covenant provision as protecting the right to health, the State party reserves the right to make submissions prior to the Committee's final determination of the matter. In addition, the State party submits that the authors have not demonstrated how they are victims of an alleged violation of their right to health, and provides detailed information on disease control in Port Philip Prison. In particular, it submits that the authors have not shown that they are at a real risk of contracting any diseases that other prisoners may have.

4.10 With respect to the authors' claim that the State party has contravened the Vienna Convention on the Law of Treaties, the State party submits that this claim is inadmissible as the Committee is only mandated to consider alleged violations of the Covenant and not any other international instrument.

4.11 On the merits, and with respect to the issue of *separate treatment* and the authors' reference to the SMR and Body of Principles, the State party argues that these principles are not legally binding, and therefore a failure to implement all of the recommendations therein does not in and of itself indicate a violation of article 10, paragraph 2 (a). It refers to the 1958 report of the Third Committee of the General Assembly which made it clear that the SMR, although an interpretative tool, does not bear any formal relationship to the Covenant.[15] It also refers to the SMR themselves which are prefaced with qualifications that imply that they are neither binding nor conclusive of prisoner rights. Also, the UN Special Rapporteur on Torture has explained that "The SMR is not per se a legal instrument, since ECOSOC has no power to legislate. Even when the General Assembly urges the implementation of the SMR, it does not do so in such a way as to suggest that its pertinent resolutions are anything more than political or moral recommendations."[16]

[15] The State party refers to M Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (1993) page 185.
[16] N Rodley, *The Treatment of Prisoners under International Law* (1999) (2nd ed), pages 280 – 281.

4.12 The State party submits that the authors were afforded *separate treatment* sufficient to meet Australia's obligations under article 10, paragraph 2 (a). It argues that the authors were afforded the majority of the elements of *separate treatment* of unconvicted persons suggested in the SMR and Body of Principles including, access to legal advisers, visits from family, right to wear their own clothes, housing in individual cells with their own bathroom facilities, access to their own doctors, right to purchase newspapers and books, and the opportunity, if they so chose, to work. It supports its argument by referring to the final report of HREOC, which stated, *inter alia*, that "Mr. Cabal has made in excess of 2600 telephone calls and Mr. Pasini has made in excess of 1600 telephone calls."[17]

4.13 On the allegation that Cabal's right to be presumed innocent was violated and Pasini's identical right is being violated, the State party submits that separate treatment was and is granted, in part, in recognition of the authors' status as unconvicted persons not facing criminal charges under Australian law. Therefore their detention would not have given the impression that they were guilty. The State party reiterates its arguments on admissibility, and submits that even if the authors were held in conditions that implied their guilt, there would have been no effect on the outcome of the actual criminal charges facing them in Mexico.

4.14 The State party denies that the authors were subjected to treatment in violation of articles 7 or 10, paragraph 1, of the Covenant. It submits that, in so far as the authors allege that acts of other prisoners violate articles 7 or 10, paragraph 1, these acts, not being committed by State agents, cannot be attributed to Australia. It then refers to the final report of HREOC, dated 23 October 2001, which found that there had been no breach of either of these articles. On the authors' allegations to HREOC concerning their general conditions of detention, including the lack of adequate access to library and recreational activities, inadequate visiting rights, the nature of the work available, the difficulties in making overseas calls to lawyers and family and in having access to their own food, the State party notes the findings of HREOC that article 10, paragraph 1, would involve harsher conditions than those complained of and would not extend to cover the hardships or constraints that result from the deprivation of liberty.

4.15 On the issue of shackling, the State party submits that the SMR and Body of Principles may be used as a guide to the interpretation of article 10, paragraph 2:

Rule 33 provides that:

> "…..instruments of restraint shall not be used except in the following circumstances: (a) As a precaution against escape during a transfer, provided that they shall be removed before a judicial or administrative authority."

Rule 34 further provides that:

[17] The State party also refers to the submission from Group 4 which provides similar information and which the State party includes as part of its submission. Apart from that already mentioned by the State party, the Group 4 submission states that on numerous occasions the authors were accommodated with special requests over and above the services and facilities ordinarily provided to prisoners, including being allowed social visits in addition to the maximum number of visits permitted to other prisoners and a range of food which reflected their Mexican origin.

> "The patterns and manner of use of instruments of restraint shall be decided by the central prison administration. Such instruments must not be applied for any longer time than is strictly necessary."

4.16 The State party submits that the authors were shackled during transport to and from court hearings, as a result of being placed on the high security escort list because of a presumed flight risk. It refers to the submission of the then Commissioner for Correctional Services to HREOC, who explained that the assessment of the authors flight risk was made because they had: in the past evaded arrest through the use of false travel and identity documents; had access to considerable financial resources; had made payments to other prisoners; and prison intelligence had reported incidents of other prisoners offering to assist any escape in return for financial payment. The State party also refers to the comments made by a judge quoted in the HREOC report who had argued that there was a substantial risk of the authors absconding if released on bail.

4.17 The State party quotes from the final report of HREOC on the nature of the restraints used, "It is acknowledged that a 12 link shackle was used on the complainants during transport. However, since 7 January 2000, only 17 link shackles have been used. 17 link shackles provide for more leg movement for entry into the van and in general. Escort officers assist prisoners taking steps into the transport van by supporting the belt that is placed on the prisoners…." The State party also quotes the conclusion drawn on this issue by HREOC: "…the decision to shackle the prisoners during transport was taken by the Governor in charge of SESG in response to an assessment made that the complainants were a flight risk. The decision was confirmed by the Correctional Services Commissioner on review. The shackling is only used in connection with transportation. It is unfortunate that the Governor has assessed that such restrictive restraints should be applied to the complainants. However, in the circumstances I am of the view there is no breach of articles 10(1) or 7 in relation to the issue of shackling."

4.18 On the issue of the detention of the authors' in a "cage", HREOC received evidence that the authors had been detained for an hour in the holding cell for in question as it was the only one available in the custody center at that time that could accommodate both prisoners (maximum security prisoners normally being held individually). They had refused the option of being placed in separate single cells, wanting to be placed together. They could stand or sit in the cell, at worst in the alternative, and chose to stand. While there may have been discomfort, it was for a limited period and any physical or mental suffering (of which there was no evidence) was only of a temporal and minimal nature. In its findings on these submissions, HREOC considered that, even accepting that the cell was small and uncomfortable, placement therein for such a short and temporary period could not, having regard to jurisprudence, be said to amount to a breach of articles 7 or 10 of the Covenant.

4.19 On the issue of strip and cavity searching, the State party explains the procedure governing the searching of detainees as set out in the Operations Manual for each prison. The search procedure, conducted by two staff members of the prisoner's sex, is first explained to the prisoner. The search takes place in a dry, warm location, out of the sight of other persons, with a floor covering provided to stand on if the floor is not carpeted. The prisoner, fully clothed, may be asked to open his mouth, raise his tongue and remove any dentures, for a purely visual

inspection. The prisoner's clothing is checked; in underclothes, the prisoner is asked to raise his arms so that the top half of his body can be examined purely visually. Upon removing underclothes, the lower areas of the body are also examined purely visually. Finally, the prisoner is asked to lift his feet for an inspection of the soles. The overall time taken is kept as short as possible.

4.20 The State party quotes from the final report of HREOC which states that "…it would seem that these type of searches [strip and cavity searches] are an inevitable incident of the complainants being incarcerated in a prison. The purpose of these searches is to deter and detect the movement of unlawful drugs into the prison. Entry of drugs through the visitor reception area is of particular concern, hence the requirement that a search is conducted at the conclusion of each visit. I note that the cavity searches are visual inspections and that there is no physical intrusion." It concluded that "Having accepted that the searches are necessary for the proper and secure running of the prison and thus would seem an inevitable consequence of imprisonment I am of the view that the requirement for the complainants to undergo the searches does not breach articles 10(1) or 7 of the ICCPR….." The State party submits that the authors were not singled out for searches, the searches were carried out in a manner designed to minimise the embarrassment to them, and were carried out only to ensure the safety and security of the prison.

4.21 The State party contests the view that there was or is a risk to the authors' physical and mental health resulting from detention. It submits that the allegation that Pasini was threatened with a 20 centimetre metal knife by a fellow inmate was investigated and found not to be substantiated. However, in the interests of the author's safety, the Director of Sentence Management moved the alleged attacker to another prison. It also submits that the affidavit, to which the authors refer, as attesting to the sexual assault of an inmate of Sirius East is unsubstantiated and that the person who made the affidavit has been unwilling to co-operate with a police inquiry.

4.22 Although the State party does not consider that any Covenant provision relates to the right to health, it does provide the following information on the merits of this claim at this point. The State party denies that the prisoner spitting blood suffered from tuberculosis. It submits that prisoners with tuberculosis in Port Philip are segregated in the in-patient facility, St Johns unit. A response from Group 4, which the State party directs the Committee to consider as part of its submission, confirms the State party's explanation. It submits that the best practice within correctional institutions is for prisoners with AIDS to be integrated in the general prison population. All prisoners, regardless of their impairment, are to be treated equally and it would be contrary to the Victorian Equal Opportunity Act to act otherwise. Given that it is not a requirement for prisoners to declare their HIV status on reception into Port Phillip Prison and given that there is no requirement that prisoners be tested for HIV on arrival, Group 4 submits that it would not be possible to maintain a segregation policy with respect to HIV/AIDS sufferers in any event.

Comments by the authors

5.1 By letter of 28 January 2003, the authors responded to the State party's submission. They contest the view that the communication is inadmissible and argue that the Committee's findings in the case of *F, on behalf of her son, C v. Australia*,[18] are not applicable to the facts of the communication.

5.2 The authors consider that the intervention of the Special Rapporteur on Torture is important as the information was compelling enough to warrant the despatch of an urgent appeal to the State party. They reiterate their claim made before the Working Group on Arbitrary Detention, that it was the procedure itself by which they were transferred from the common prisoners unit to the high protection unit of Sirius East, that they alleged was arbitrary, as they had no opportunity to contest the reasons behind the decision. According to the authors, the Courts cannot review this procedure as they may only consider whether such detentions accord with the Extradition Act.

5.3 The authors recall that the State party's fourth report to the Committee specifically stated that "[T]he Prison at Laverton will house the majority of male remand prisoners and will allow for further improvement in the separation of convicted and unconvicted male prisoners."[19] This prison is Port Philip Prison which, according to the authors, could be used and was supposed to be used for the purpose of segregating convicted and unconvicted persons, including the authors, but fails to do so for policy reasons. Thus, the State party had the means and facility to accommodate the authors in a manner consistent with the provisions of article 10, paragraph 2 (a).

5.4 The authors contest the State party's argument that there were no objections to the reservation to article 10, paragraph 2 (a), and submit that the Netherlands expressed its "misgivings" about this reservation. They argue that in considering the extent and scope of the reservation, it is necessary to look at the State party's intention when making it and to take into account the Committee's views in General Comment 24, that reservations are the exception, that acceptance of the full range of obligations in the Covenant is the rule, and that they should be withdrawn at the earliest possible moment. The authors argue that since segregation is accepted as an objective to be achieved progressively it is inconsistent with the reservation to place inmates according to "management needs rather than sentencing status", as stated by the Corrections Commissioner[20], when the facilities actually exist to house them separately. According to the authors, the current practice of non-segregation in the State of Victoria results from a policy introduced since the reservation was made, a policy deemed inconsistent with the intention expressed in the reservation itself and the principles set out in the General Comment.

5.5 The authors refer to the decision of HREOC which it submits is not binding on either the State party or the Committee. They do emphasise that although HREOC did not find any

[18] Supra.
[19] Supra.
[20] The authors refer to a letter of 28 June 2000 from the then Correctional Services Commissioner, addressed to the Human Rights Commissioner.

violations of the Covenant, it did not dispute the facts submitted by the authors, including the fact that they were subjected to threats of violence, the use of shackles and manacles, and strip and cavity searches, and that they were neither segregated from nor treated separately to convicted prisoners. The authors analyse the decision of HREOC inasmuch as it refers to the evaluation of facts and evidence of the case, to support of their argument that the Commissioner erred in his decision.

Supplementary submissions by the parties

6.1 By Note verbale of 24 April 2003, the State party made supplementarysubmissions concerning the status and effect of its reservation to article 10, paragraph 2, of the Covenant, and reiterated its earlier arguments on this issue.

6.2 A further Note Verbale was submitted by the State party on 22 July 2003. In light of the draft Views before it, prepared by its pre-sessional Working Group, the Committee decided that the State party's late submission had no bearing on the declarations of the Committee.

Issues and Proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 87 of its rules of procedure, whether the claim is admissible under the Optional Protocol to the Covenant. The Committee has ascertained that the same matter is not being examined under another international procedure of international investigation or settlement.

7.2 Prior to considering the admissibility of the individual claims raised, the Committee must consider whether the State party's obligations under the Covenant apply to privately-run detention facilities, as is the case in this communication, as well as State-run facilities. While this is not an argument put forward by the State party, the Committee must consider *ex officio* whether the communication concerns a State party to the Covenant in the meaning of article 1 of the Optional Protocol. It recalls its jurisprudence in which it indicated that a State party "is not relieved of its obligations under the Covenant when some of its functions are delegated to other autonomous organs."[21] The Committee considers that the contracting out to the private commercial sector of core State activities which involve the use of force and the detention of persons does not absolve a State party of its obligations under the Covenant, notably under articles 7 and 10 which are invoked in the instant communication. Consequently, the Committee finds that the State party is accountable under the Covenant and the Optional Protocol of the treatment of inmates in the Port Philip Prison facility run by Group 4.

7.3 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

[21] *B.d.B.v.The Netherlands, Case No. 273/88, Decision of 30 March 1989,* [and *Lindgren et al v. Sweden, Case No. 298-299/88, Views adopted on 9 November 1990.*

segregation is an objective to be achieved progressively". Also, the Committee notes the authors' argument that despite the reservation this part of the communication is admissible as the reservation was made twenty years ago and it would be reasonable to expect that the State party would have fulfilled its objective to comply fully with its obligations under this article at this stage. Further, the Committee notes that both parties have made reference to the Committee's General Comment No. 24 on reservations.

7.4 The Committee observes that the State party's reservation in question is specific and transparent, and that its scope is clear. It refers to the *segregation* of convicted and unconvicted persons and does not extend, as argued by the authors and not contested by the State party, to cover the *separate treatment* element of article 10, paragraph 2 (a) as it refers to these two categories of persons. The Committee recognises that while 20 years have passed since the State party entered the reservation and that it intended to achieve its objective "progressively", and although it would be desirable for all States parties to withdraw reservations expeditiously, there is no rule under the Covenant on the timeframe for the withdrawal of reservations. In addition, the Committee notes the State party's efforts to date to achieve this objective with the construction of the Melbourne Remand Centre in 1989, specifically for the purpose of housing remand prisoners, and its plan to construct two new prisons in Melbourne, including a remand prison, by end 2004. Consequently, although it may be considered unfortunate that the State party has not achieved its objective to *segregate* convicted and unconvicted persons in full compliance with article 10, paragraph 2 (a), the Committee cannot find that the reservation is incompatible with the object and purpose of the Covenant. This part of the authors' claim is, therefore, inadmissible under article 3 of the Optional Protocol.

7.5 As to the remaining part of the authors' claim under article 10, paragraph 2 (a) of the Covenant that the State party failed to treat the authors *separately* in a manner appropriate to their status as unconvicted persons, the Committee notes that in many respects the authors were provided with separate treatment in relation to such privileges as the right to wear their own clothes, making telephone calls and being permitted to eat their own food. The Committee takes the view that the authors have not substantiated, for purposes of admissibility, that the matters in which they were treated similarly to convicted prisoners would either not be compatible with their status as persons detained pending extradition procedures, or raise any issues separate from the lack of *segregation*, a matter covered by the reservation by the State party. Consequently, the Committee finds this part of the authors' claim inadmissible under article 2 of the Optional Protocol.

7.6 With respect to the claim that the authors' right to be presumed innocent was violated by not segregating or treating them separately from convicted prisoners, the Committee recalls article 14, paragraph 2, only relates to individuals charged with a criminal offence. As the authors were not charged by the State party with a criminal offence, this claim does not raise an issue under the Covenant and the Committee, therefore declares it inadmissible *ratione materiae* under article 3 of the Optional Protocol.

7.7 With respect to the authors' claim of a violation of their right to health, the Committee shares the State party's view that there is no such right protected *specifically* by provisions of the

Covenant. The Committee considers that a failure to separate detainees with communicable diseases from other detainees could raise issues primarily under articles 6, paragraph 1, and 10, paragraph 1[22]. However, in the instant case the Committee considers that the authors have failed to substantiate their claim, which is therefore inadmissible, under article 2 of the Optional Protocol.

7.8 With respect to the authors' new claim (see paragraph 5.2) that the decision to transfer them from the unit with common prisoners to the high protection unit of Sirius East was arbitrary, as the authors could neither contest nor have reviewed the reasoning for such a transfer by a court, the Committee notes that the authors, who were detained under the Extradition Act, filed several habeas corpus applications while detained at Sirius East. The Committee notes that the authors have failed to substantiate, for purposes of admissibility, what separate issue under the Covenant would arise due to the alleged arbitrariness. Consequently, this claim is inadmissible under article 2 of the Optional Protocol.

7.9 The Committee finds no obstacles to the admissibility of the claims of a violation of articles 7 and 10, paragraph 1. These claims should be considered forthwith on the merits.

Consideration of the merits

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

8.2 With respect to the claim that the State party violated articles 7 and 10, paragraph 1, because of prison conditions and the treatment to which the authors were subjected, the Committee notes that the allegations of shackling the authors with 12 link shackles, subsequently replaced by 17 link ones during transport to and from prison, and of having stripped and subjected them to cavity searches after each visit, are factually uncontested by the State party. However, the State party has provided justification for the treatment in question, explaining that the assessment of the authors flight risk was made because they had in the past evaded arrest through the use of false travel and identity documents, that they had access to considerable financial resources; had made payments to other prisoners, and that prison intelligence had reported incidents of other prisoners offering to assist any escape in return for financial payment. Also, the State party has explained that the authors were not singled out for searches but that the searches were carried out in a manner designed to minimise the embarrassment to them, and were carried out only to ensure the safety and security of the prison. In the assessment of the Committee, there has been no violation of article 7 or article 10, paragraph 1, in these respects.

8.3 As to the issues raised by the authors' detention for an hour in a triangular "cage", the Committee notes the State party's justification that this holding cell was the only one capable of holding two persons at the time, and that the authors requested to be placed together. In the Committee's view, a failure to have a cell sufficient adequately to hold two persons is insufficient

[22] *Lantsova v. The Russian Federation, Case No. 736/1997, Views adopted on 26 March 2002.*

explanation for requiring two prisoners to alternately stand and sit, even if only for an hour, within such an enclosure. In the circumstances, the Committee considers this incident to disclose a violation of article 10, paragraph 1, of the Covenant.

9. 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 as found by the Committee reveal a violation by Australia of article 10, paragraph 1, of the International Covenant on Civil and Political Rights.

10. Pursuant to article 2, paragraph 3 (a) of the Covenant, the Committee concludes that the authors are entitled to an effective remedy of compensation for both authors. The State party is under an obligation to ensure that similar violations of the Covenant do not occur in the future.

11. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognised 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 and subject to its jurisdiction the rights recognised 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 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

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

APPENDIX

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

I disagree with the present communication on the grounds set forth below:

8.2 With regard to the claim that the State party violated articles 7 and 10, paragraph 1, because of the prison conditions and treatment to which the authors were subjected and because, every time Pasini leaves the prison, he is shackled with 12 to 17 link shackles and, after each visit, he is stripped and searched, as he is before and after every time he is taken to court; and that this means he may be subjected to cavity searches more than three times a day and has to put up with the pushing and shoving and general violence of the prison guards, the Committee takes note of the fact that the State party has not contested any of these facts. It has, however, tried to justify them on the grounds that Pasini might be a flight risk. The Committee understands that the State party has ways and means of preventing a flight risk without using humiliating and unnecessary methods that are incompatible with respect for the inherent dignity of the human person and the treatment to which anyone deprived of his liberty is entitled. The Committee therefore considers that there has been a violation of articles 7 and 10, paragraph 1, of the Covenant.

[Signed] Hipólito Solari-Yrigoyen
8 August 2003

[Adopted in English, French and Spanish, the Spanish 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.]
