A v. Australia, Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (30 April 1997).

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HUMAN RIGHTS COMMITTEE

Fifty-ninth session

24 March - 11 April 1997

VIEWS

Communication No. 560/1993

Submitted by: A (name deleted) [represented by counsel]

Victim: The author

State party: Australia

Date of communication: 20 June 1993 (initial submission)

Date of adoption of Views: 3 April 1997

On 3 April 1997, the Human Rights Committee adopted its Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 560/1993. The text of the Views is appended to the present document.

[Annex]

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

- Fifty-ninth session -

concerning

Communication No. 560/1993[*]* **

Submitted by: A (name deleted) [represented by counsel]

Victim: The author

State party: Australia

Date of communication: 20 June 1993 (initial submission)

Date of decision on admissibility: 4 April 1995

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

Meeting on 3 April 1997,

Having concluded its consideration of communication No. 560/1993 submitted to the Human Rights Committee on behalf of A 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, his counsel and the State party,

Adopts the following:

Views under Article, 5 paragraph 4 of the Optional Protocol

1. The author of the communication is A, a Cambodian citizen who, at the time of submission of his communication on 20 June 1993, was detained at the Department of Immigration Port Hedland Detention Centre, Cooke Point, Western Australia. He was released from detention on 27 January 1994. He claims to be the victim of violations by Australia of article 9,

paragraphs 1, 4 and 5, and article 14, paragraphs 1 and 3(b), (c) and (d), juncto article 2, paragraph 1, of the International Covenant on Civil and Political Rights. He is represented by counsel. The optional Protocol entered into force for Australia on 25 December 1991.

The facts as submitted by the author

2.1 A, a Cambodian national born in 1934, arrived in Australia by boat, code-named "Pender Bay", together with 25 other Cambodian nationals, including his family, on 25 November 1989. Shortly after his arrival, he applied for refugee status under the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol thereto. His application was formally rejected in December 1992.

2.2 Counsel provides a detailed chronology of the events in the case. The author's initial application for refugee status was filed on 9 December 1989, with the assistance of a Khmer interpreter and an immigration official. Legal assistance was not offered during the preparation of the application. On 13 December 1989, the author and other occupants of the boat were interviewed separately by the same Immigration official. On 21 December 1989, the author and other Pender Bay occupants were flown to Villawood Detention Centre in Sydney. On 27 April 1990, the author was again interviewed by immigration officials regarding his application for refugee status. The application was rejected by the Federal Government's Determination of Refugee Status Committee on 19 June 1990; the decision was not communicated to the author. Counsel notes that, on that day, none of the Pender Bay detainees had yet seen a lawyer.

2.3 Following intercession by concerned parties, the Minister for Immigration allowed the New South Wales Legal Aid Commission to review the Pender Bay cases. Upon conclusion of its review, the Commission was authorized to provide further statements and material to the Immigration Department. Commission lawyers first visited the author at Villawood in September 1990. The Commission filed formal submissions on his behalf on 24 March and on 13 April 1991 but, because of new Determination of Refugee Status Committee regulations in force since December 1990, all applications had to be reassessed by Immigration Department desk officers. On 26 April 1991, the Commission was given two weeks to reply to the new assessments; replies were filed on 13 May 1991. On 15 May 1991, the Minister's delegate rejected the author's application.

2.4 On 20 May 1991, the author and the other detainees were told that their cases had been rejected, that they had 28 days to appeal, and that they would be transferred to Darwin, several thousands of kilometres away in the Northern Territory. A copy of the rejection letter was given to them but, interpretation was not made available. At this moment, the detainees believed that they were being returned to Cambodia. During the transfer, no one was allowed to talk to the other detainees, and permission to make telephone calls was refused. At no time was the New South Wales Legal Aid Commission informed of the removal of its clients from its jurisdiction.

2.5 The author was then transferred to Curragundi Camp, located 85 km outside Darwin. The site has been described as "totally unacceptable" for a refugee detention centre by the Australian Human Rights and Equal Opportunity Commissioner, as it is flood-prone during the wet season. More importantly, as a result of the move to the Northern Territory, contact between the author and the New South Wales Legal Aid Commission was cut off.

2.6 On 11 June 1991, the Northern Territory Legal Aid Commission filed an application with the Refugee Status Review Committee (which had replaced the Determination of Refugee Status Commission) requesting a review of the refusal to grant refugee status to the author and the other Pender Bay detainees. On 6 August 1991, the author was moved to Berrimah Camp, closer to Darwin, and from there, on 21 October 1991, to Port Hedland Detention Centre, approximately 2,000 km away in Western Australia. As a result of the latter transfer, the author lost contact with his legal representatives in the Northern Territory Legal Aid Commission.

2.7 On 5 December 1991, the Refugee Status Review Committee rejected all of the Pender Bay applications for refugee status, including the author's. The detainees were not informed of the decisions until letters dated 22 January 1992 were transmitted to their former representatives on the Northern Territory Legal Aid Commission. On 29 January, the Commission addressed a letter to the Committee, requesting it to reconsider its decision and to allow reasonable time for the Pender Bay detainees to obtain legal representation to comment on the decision.

2.8 Early in 1992, the Federal Immigration Department contracted the Refugee Council of Australia to act as legal counsel for asylum-seekers held at Port Hedland. On 4 February 1992, Council lawyers started to interview inmates and, on 3 March 1992, the Council transmitted a response to the Refugee Status Review Committee's decision on the author's behalf to the Minister's delegate. On 6 April 1992, the author and several other Pender Bay detainees were informed that the Minister's delegate had refused their refugee status applications. Undertakings were immediately sought from the Immigration Department that none of the detainees would be deported until they had had the possibility of challenging the decision in the Federal Court of Australia; such undertakings were refused. Later on 6 April, however, the author obtained an injunction in the Federal Court, Darwin, which prevented the implementation of the decision. On 13 April 1992, the Minister for Immigration ordered the delegate's decision to be withdrawn, on account of an alleged error in the decision-making process. The effect of that decision was to remove the case from the jurisdiction of the Federal Court.

2.9 On 14 April 1992, Federal Court proceedings were abandoned, and lawyers for the Immigration Department assured the court that a revised report on the situation in Cambodia would be made available to the Refugee Council of Australia by the Department of Foreign Affairs and Trade within two weeks. Meanwhile, the author had instructed his lawyer to continue with an application to the Federal Court, to seek release from detention; a hearing was scheduled for 7 May 1992 in the Federal Court at Melbourne.

2.10 On 5 May 1992, the Australian Parliament passed the Migration Amendment Act (1992), which amended the 1958 Migration Act by insertion of a new division 4B, which defined the author and others in situations similar to his as "designated persons". Section 54R stipulated: "a court is not to order the release from custody of a designated person". On 22 May 1992, the author instituted proceedings in the High Court of Australia, seeking a declaratory judgement that the relevant provisions of the Migration Amendment Act were invalid.

2.11 The revised report of the Department of Foreign Affairs and Trade, promised for the end of April 1992, was not finalized until 8 July 1992; on 27 July 1992, the Refugee Council of Australia forwarded a response to the update to the Immigration Department and, on 25 August 1992, the Refugee Status Review Committee once more recommended dismissal of

the author's application for refugee status. On 5 December 1992, the Minister's delegate rejected the author's claim.

2.12 The author once more sought a review of the decision in the Federal Court of Australia, and since the Immigration Department refused to give assurances that the author would not be deported immediately to Cambodia, an injunction restraining the Department from removing the author was obtained in the Federal Court. In the meantime, by judgement of 8 December 1992, the High Court of Australia upheld the validity of major portions of the Migration Amendment Act, which meant that the author would remain in custody.

The complaint

3.1 Counsel argues that his client was detained "arbitrarily" within the meaning of article 9, paragraph 1. He refers to the Human Rights Committee's General Comment on article 9, which extends the scope of article 9 to cases of immigration control, and to the Views of the Committee on communication No. 305/1988,[1] where arbitrariness was defined as not merely being against the law, but as including elements of "inappropriateness, injustice and lack of predictability". By reference to article 31 of the Convention Relating to the Status of Refugees and to conclusion No. 44 (1986) of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees on detention of refugee and asylum-seekers, it is argued that international treaty law and customary international law require that detention of asylum seekers be avoided as a general rule. Where such detention may become necessary, it should be strictly limited (see conclusion No. 44, para. (b)). Counsel provides a comparative analysis of immigration control and legislation in several European countries as well as Canada and the United States of America. He notes that, under Australian law, not all illegal entrants are subject to detention, nor all asylum-seekers. Those who arrive at Australian borders without a valid visa are referred to as "prohibited entrants" and may be detained under section 88 or 89 of the Migration Act 1958. Section 54B classifies individuals who are intercepted before or on arrival in Australia as "unprocessed persons". Such persons are deemed not to have entered Australia, and are taken to a "processing area".

3.2 The author and others arriving in Australia before 1992 were held by the Federal Government under section 88 as "unprocessed persons", until the entry into force of division 4B of the Migration Amendment Act. Counsel argues that, under these provisions, the State party has established a harsher regime for asylum-seekers who have arrived by boat, without documentation ("boat people") and who are designated under the provision. The practical effect of the amendment is said to be that persons designated under division 4B automatically remain in custody unless or until removed from Australia or granted an entry permit.

3.3 It is contended that the State party's policy of detaining boat people is inappropriate, unjustified and arbitrary, as its principal purpose is to deter other boat people from coming to Australia, and to deter those already in the country from continuing with applications for refugee status. The application of the new legislation is said to amount to "human deterrence", based on the practice of rigidly detaining asylum-seekers under such conditions and for periods so prolonged that prospective asylum-seekers are deterred from even applying for refugee status, and current asylum-seekers lose all hope and return home.

3.4 No valid grounds are said to exist for the detention of the author, as none of the legitimate grounds of detention referred to in conclusion No. 44 (see para. 3.1 above) applies to his case.

Furthermore, the length of detention - 1,299 days or three years and 204 days as at 20 June 1993 - is said to amount to a breach of article 9, paragraph 1.

3.5 Counsel further contends that article 9, paragraph 4, has been violated in the author's case. The effect of division 4B of the Migration Amendment Act is that once a person is qualified as a "designated person", there is no alternative to detention, and the detention may not be reviewed effectively by a court, as the courts have no discretion to order the person's release. This was conceded by the Minister for Immigration in a letter addressed to the

Senate Standing Committee for the Scrutiny of Bills, which had expressed concern that the legislative amendment was to deny designated persons access to the courts and might raise problems in the light of Australia's obligations under the Covenant. The Australian Human Rights Commissioner, too, commented that the absence of court procedures to test either reasonableness or necessity of such detention was in breach of article 9, paragraph 4.

3.6 It is further contended that persons such as the author have no effective access to legal advice, contrary to article 16 of the Convention Relating to the Status of Refugees. That individuals like the author are kept in prolonged custody is said to make access to lawyers all the more important. With respect to the author's case, counsel contends that the State party breached article 9, paragraph 4, and article 14 in the following situations:

(a) Preparation of application for refugee status;

(b) Access to lawyers during the administrative stage of the refugee process;

(c) Access to lawyers during the judicial review stage of the refugee process; in this context, it is noted that the frequent transfers of the author to detention facilities far away from major urban centres vastly compounded the difficulties in providing legal advice to him. Thus, Port Hedland, where A was held for over two years, is expensive to reach by air, and the nearest major town, Perth, is over 2,000 km away. Because of the costs and logistical problems involved, it was difficult to find competent Refugee Council of Australia lawyers to take up the case.

3.7 Counsel contends that the serious delays on the part of the State party in determining the author's application for refugee status constitute a breach of article 14, paragraph 3(c), particularly given the fact that he remained in detention for much of the process.

3.8 It is contended that, as A was detained arbitrarily, he qualifies for compensation under article 9, paragraph 5, of the Covenant. Counsel submits that "compensation" in this provision must be understood to mean "just and adequate" compensation, but adds that the State party has removed any right to compensation for illegal detention by a legislative amendment to the Migration Act. He notes that as a result of the judgement of the High Court of Australia in A's case, further proceedings were filed in the High Court on behalf of the Pender Bay detainees - including the author - seeking damages for unlawful detention. On 24 December 1992, Parliament added Section 54RA(1)-(4) to division 4B of the Migration Act according to counsel in direct response to the High Court's findings in A's case and the imminence of the filing of possible claims for compensation for illegal detention. In paragraph 3, the new provision restricts compensation for unlawful detention to the symbolic sum of one dollar per day. It is submitted that the author is entitled to just and adequate compensation for (a) pecuniary losses, namely, the loss of the boat in which he arrived in Australia; (b) non-

pecuniary losses, including injury to liberty, reputation, and mental suffering; and (c) aggravated and exemplary damages based, in particular, on the length of the detention and its conditions. The symbolic sum the author might be entitled to under Section 54RA(3) of division 4B would not meet the criteria for compensation under article 9, paragraph 5.

3.9 Finally, counsel argues that the automatic detention of boat people of primarily Asian origin, on the sole basis that they meet all the criteria of division 4B of the Migration Act 1958, constitutes discrimination on the basis of "other status" under article 2, Paragraph 1, of the Covenant, "other status" being the status of boat people.

The State party's admissibility observations and comments

4.1 In its submission under rule 91, the State party supplements the facts as presented by the author, and provides a chronology of the litigation in which the author has been, and continues to be, involved. It notes that, after the final decision to reject the author's application for refugee status was taken in December 1992, the author continued to take legal proceedings challenging the validity of that decision. Detention after December 1992 is said to have been exclusively the result of legal challenges by the author. In this context, the State party recalls that, by a letter of 2 November 1993, the Minister for Immigration offered the author the opportunity, in the event of his voluntary return to Cambodia, of applying for (re)entry to Australia after 12 months, on a permanent visa under the Special Assistance Category. The State party further adds that the author's wife's application for refugee status has been approved and that, as a result, the author was released from custody on 21 January 1994 and will be allowed to remain in Australia.

4.2 The State party concedes the admissibility of the communication in so far as it alleges that the author's detention was "arbitrary" within the meaning of article 9, paragraph 1. It adds, however that it strongly contests on the merits that the author's detention was "arbitrary", and that it contained elements of "inappropriateness, injustice and lack of predicability".

4.3 The State party challenges the admissibility of other elements of the complaint relating to article 9, paragraph 1. In this context, it notes that the communication is inadmissible ratione materiae, to the extent that it seeks to rely on customary international law or provisions of other international instruments such as the 1951 Convention Relating to the Status of Refugees. The State party argues that the Committee is competent only to determine whether there have been breaches of any of the rights set forth in the Covenant; it is not permissible to rely on customary international law or other international instruments as the basis of a claim.

4.4 Similarly, the State party claims that counsel's general claim that Australian policy of detaining boat people is contrary to article 9, paragraph 1, is inadmissible, as the Committee is not competent to review in abstracto particular government policies or to rely on the application of such policies to find breaches of the Covenant. Therefore, the communication is considered inadmissible to the extent that it invites the Committee to determine generally whether the policy of detaining boat people is contrary to article 9, paragraph 1.

4 .5 The State party contests the admissibility of the allegation under the article 9, paragraph 4, and argues that existing avenues for review of the lawfulness of detention under the Migration Act are compatible with article 9, paragraph 4. It notes that counsel does not allege that there is no right under Australian law to challenge the lawfulness of detention in court. Habeas corpus, for instance, a remedy available for this purpose, has never been invoked by

the author. It is noted that the author did challenge the constitutional validity of division 4B of part 2 of the Migration Act in the Australian High Court, which upheld the relevant provision under which, from 6 May 1992, the author had been detained. In its judgement, the High Court confirmed that, if a person was unlawfully detained, he could request release by a court. Prior to his release, no proceedings to challenge the lawfulness of his detention were initiated by A, despite the possibility of such proceedings. Other detainees, however, successfully instituted proceedings which led to their release on the ground that they were held longer than allowed under division 4B of the Migration Act.[2] After this action, another 36 detainees were released from custody. The State party submits that, on the basis of the material submitted by counsel, there is "no basis whatsoever on which the Committee could find a breach of article 9, paragraph 4, on the ground that the author was unable to challenge the lawfulness of his detention". A violation has not been sufficiently substantiated, as required under rule 90(b) of the rules of procedure. The State party adds that the allegations relating to article 9, paragraph 4, could be deemed an abuse of the right of submission and that, in any event, the author failed to exhaust domestic remedies in this respect, as he did not test the lawfulness of his detention.

4.6 To the extent that the communication seeks to establish a violation of article 9, paragraph 4, on the ground that the reasonableness or appropriateness of detention cannot be challenged in court, the State party considers that the absence of discretion for a court to order a person's release falls in no way within the scope of application of article 9, paragraph 4, which only concerns review of lawfulness of detention.

4.7 To the extent that the communication claims a breach of article 9, paragraph 4, because of absence of effective access to legal representation, the State party notes that this issue is not covered by the provision: access to legal representation cannot, in the State party's opinion, be read into the provision as in any way related to or a necessary right which flows from the guarantee that an individual is entitled to take proceedings before a court. It confirms that the author had access to legal advisers. Thus, the funding for legal assistance was provided through all the stages of the administrative procedure; subsequently, he had access to legal advice to pursue judicial remedies. For these reasons, the State party argues that there is insufficient substantiation of facts which might establish a violation of article 9, paragraph 4, by virtue of absence of access to legal advisers. To the extent that the claim concerning access to legal advisers seeks to rely on article 16 of the 1951 Convention Relating to the Status of Refugees, the State party refers to its arguments in paragraph 4.3 above.

4.8 The State party disputes that the circumstances of the author's detention give rise to any claim for compensation under article 9, paragraph 5, of the Covenant. It notes that the Government itself conceded in legal proceedings brought by the author and others that the applicants in this case had been detained without the statutory authority under which boat people had been held prior to the enactment of division 4B of part 2 of the Migration Act: this was merely the result of a bona fide but mistaken interpretation of the legislation under which the author had been held. On account of the inadvertent basis for the unlawful detention of individuals in the author's situation, the Australian Parliament enacted special compensation legislation. The State party considers this legislation compatible with article 9, paragraph 5.

4.9 The State party points out that a number of boat people have instituted proceedings challenging the constitutional validity of the relevant legislation. As the author is associated with those proceedings, he cannot be deemed to have exhausted domestic remedies in respect of his claim under article 9, paragraph 5.

4.10 The State party refutes the author's claim that article 14 applies to immigration detention and considers the communication inadmissible to the extent that it relies on article 14. It recalls that article 14 only applies to criminal charges; detention for immigration purposes is not detention under criminal law, but administrative detention, to which article 14, paragraph 3, is clearly inapplicable. This part of the communication is therefore considered inadmissible ratione materiae.

4.11 Finally, the State party rejects the author's allegation of discrimination based on articles 9 and 14 juncto article 2, paragraph 1, on the ground that there is no evidence to sustain a claim of discrimination on the ground of race. It further submits that the quality of "boat person" cannot be approximated to "other status" within the meaning of article 2. Accordingly, this aspect of the case is deemed inadmissible ratione materiae as incompatible with the provisions of the Covenant.

4.12 In relation to the allegation of discrimination on the basis of race, the State party affirms that there is no substance to this claim, as the law governing detention of illegal boat arrivals applies to individuals of all nationalities, regardless of their ethnic origin or race. The State party proceeds to an analysis of the meaning of the term "other status" in articles 2 and 26 of the Covenant and, by reference to the Committee's jurisprudence on this issue, recalls that the Committee itself has held that there must be limits to the term "other status". In order to be subsumed under this term, the State party argues, a communication must point to some status based on the personal characteristics of the individual concerned. Under Australian law, the only basis may be seen to be the fact of illegal arrival of a person by boat: "Given that a State is entitled under international law to determine whom it admits to its territory, it cannot amount to a breach of articles 9 and 14 in conjunction of article 2, paragraph 1, for a State to provide for illegal arrivals to be treated in a certain manner based on their method of arrival". For the State party, there is no basis in the Committee's jurisprudence relating to discrimination under article 26 under which "boat person" could be regarded as "other status" within the meaning of article 2.

5.1 In his comments, counsel takes issue with some of the State party's arguments. He disputes that the three-year period necessary for the final decision of the author's application for refugee status was largely attributable to delays in making submissions and applications by lawyers, with a view to challenging the decision-making process. In this context, he notes that of the 849 days which the administrative process lasted, the author's application was with the Australian authorities for 571 days - two thirds of the time. He further recalls that during this period the author was moved four times and had to rely on three unrelated groups of legal representatives, all of whom were funded with limited public resources and needed time to acquaint themselves with the file.

5.2 Counsel concedes that the author was given a domestic Protection (Temporary) Entry Permit on 21 January 1994 and released from custody, after his wife was granted refugee status because of her Vietnamese ethnic origin. It is submitted that the author could not have brought his detention to an end by leaving Australia voluntarily and returning to Cambodia, first because he genuinely feared persecution if he returned to Cambodia and, secondly, because it would have been unreasonable to expect him to return to Cambodia without his wife.

5.3 The author's lawyer reaffirms that his reliance on article 31 of the 1951 Convention Relating to the Status of Refugees or other instruments to support his allegation of a breach of

article 9, paragraph 1, is simply for the purpose of interpreting and elaborating on the State party's obligations under the Covenant. He contends that other international instruments may be relevant in the interpretation of the Covenant, and in this context draws the Committee's attention to a statement made by the Attorney-General's Department before the Joint Committee on Migration, in which it was conceded that treaty bodies such as the Human Rights Committee may rely on other international instruments for the purpose of interpreting the scope of the treaty of which they monitor the implementation.

5.4 Counsel reiterates that he does not challenge the State party's policy vis-a-vis boat people in abstracto, but submits that the purpose of Australian policy, namely, deterrence, is relevant inasmuch as it provides a test against which "arbitrariness" within the meaning of article 9, paragraph 1, can be measured: "It is not possible to determine whether detention of a person is appropriate, just or predictable without considering what was in fact the purpose of the detention". The purpose of detention in the author's case was enunciated in the Minister for Immigration's introduction to the Migration Legislation Amendment Bill 1992; this legislation, it is submitted, was passed in direct response to an application by the author and other Cambodian nationals for release by the Federal Court, which was due to hear the case two days later.

5.5 Concerning the claim under article 9, paragraph 4, counsel submits that, where discretion under division 4B of the Migration Act 1958 to release a designated person does not exist, the option to take proceedings for release in court is meaningless.

5.6 Counsel concedes that, after the decision of the High Court in December 1992, no further challenge was indeed made to the lawfulness of the author's detention. This was because A clearly came within the scope of division 4B and not within the scope of the 273-day provisions in Section 54Q, so that any further challenge to his continued detention would have been futile. It is submitted that the author is not required to pursue futile remedies to establish a breach of article 9, paragraph 4, or to establish that domestic remedies have been exhausted under article 5, paragraph 2(b) , of the Optional Protocol.

5.7 Counsel insists that an entitlement to take proceedings before a court under article 9, paragraph 4, necessarily requires that an individual have access to legal advice. Wherever a person is under detention, access to the courts can generally only be achieved through assistance of counsel. In this context, counsel disputes that his client had adequate access to legal advice: no legal representation was afforded to him from 30 November 1989 to 13 September 1990, when the New South Wales Legal Aid Commission began to represent him. It is submitted that the author, who was unaware of his right to legal assistance and who spoke no English, should have been advised of his right to legal advice, and that there was a positive duty upon the State party to inquire of the author whether he sought legal advice. This positive duty is said to be consistent with principle 17(1) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and rule 35(1) of the Standard Minimum Rules for the Treatment of Prisoners.

5.8 Author's counsel adds that on two occasions his client was forcibly removed from a State jurisdiction and therefore from access to his lawyers. On neither occasion was adequate notice of his removal given to his lawyers. It is submitted that these events constitute a denial of the author's access to his legal advisers.

5.9 Concerning the State party's observations on the claim under article 9, paragraph 5, counsel observes that the author is not a party to proceedings currently under way which challenge the validity of the legislation restricting damages for unlawful detention to one dollar per day. Rather, the author is plaintiff in a separate action which has not proceeded beyond initial procedural stages and will not be heard for at least a year. Counsel contends that his client is not required to complete these proceedings in order to comply with the requirements of article 5, paragraph 2(b), of the Optional Protocol. In this context, he notes that, in June 1994, the Australian Parliament introduced new legislation to amend retrospectively the Migration Act 1958, thereby foreclosing any rights which the plaintiffs in the case of Chu Kheng Lim (concerning unlawful detention of boat people) may have to damages for unlawful detention. On 21 September 1994, the Government introduced Migration Legislation Amendment Act (No. 3) 1994 ("Amendment No. 3"), which intended to repeal the original "dollar a day" legislation. As a direct result of this legislation, the High Court proceedings in the case of Ly Sok Pheng v. Minister for Immigration, Local Government and Ethnic Affairs were adjourned from October 1994 until at least April 1995. If Amendment No. 3 is enacted into law, which remains the intention of the Federal Government, any action introduced by the author seeking damages for unlawful detention would be made meaningless.

5.10 Counsel disputes the State party's argument that article 14, paragraph 3, is not applicable to individuals in administrative detention and refers in this context to rule 94 of the Standard Minimum Rules for the Treatment of Prisoners, which equates the rights of persons detained for criminal offences with those of "civil prisoners".

5.11 Finally, counsel reaffirms that "boat people" constitute a cohesive group which may be subsumed under the term "other status" within the meaning of article 2, paragraph 1, of the Covenant: "all share the common characteristic of having arrived in Australia within a set time period, not having presented a visa, and having been given a designation by the Department of Immigration". Those matching this definition must be detained. To counsel, it is "this immutable characteristic which determines that this group will be treated differently to other asylum seekers in Australia".

The Committee's admissibility decision

6.1 During its 53rd session, the Committee considered the admissibility of the communication. It noted that several of the events complained of by the author had occurred prior to the entry into force of the Optional Protocol for Australia; however, as the State party had not wished to contest the admissibility of the communication on this ground, and as the author had remained in custody after the entry into force of the Optional Protocol for Australia, the Committee was satisfied that the complaint was admissible ratione temporis. It further acknowledged that the State party had conceded the admissibility of the author's claim under article 9, paragraph 1.

6.2 The Committee noted the author's claim there was no way to obtain an effective review of the lawfulness of his detention, contrary to article 9, paragraph 4, and the State party's challenge of the author's argument. The Committee considered that the question of whether article 9, paragraph 4, had been violated in the author's case and whether this provision encompasses a right of access to legal advice was a question to be examined on the merits.

6.3 The Committee specifically distinguished this finding from its earlier decision in the case of V.M.R.B. v. Canada[3] since, in the present case, the author's entitlement to refugee status remained to be determined at the time of submission of the communication, whereas in the former case an exclusion order was already in force.

6.4 On the claim under article 9, paragraph 5, the Committee noted that proceedings challenging the constitutional validity of Section 54RA of the Migration Act were under way. The author had argued that it would be too onerous to challenge the constitutionality of this provision and that it would be meaningless to pursue this remedy, owing to long delays in Court and because of the Government's intention to repeal said remedy. The Committee noted that mere doubts about the effectiveness of local remedies or the prospect of financial costs involved did not absolve an author from pursuing such remedies. As to counsel's reference to draft legislation which would eliminate the remedy sought, the Committee noted that this had not yet been enacted into law, and that counsel therefore relied on hypothetical developments in Australia's legislature. This part of the communication was accordingly deemed inadmissible under article 5, paragraph 2(b), of the Optional Protocol.

6.5 As to the claim under article 14, the Committee recalled the State party's claim that detention of boat people qualified as "administrative detention" which cannot be subsumed under article 14, paragraph 1, let alone paragraph 3. The Committee observed that the author's detention, as a matter of Australian law, neither related to criminal charges against him nor to the determination of his rights and obligations in a suit at law. It considered, however, that the issue of whether the proceedings relating to the determination of the author's status under the Migration Amendment Act nevertheless fell within the scope of article 14, paragraph 1, was a question to be considered on the merits.

6.6 Finally, with respect to the claim under article 2, paragraph 1, juncto articles 9 and 14, the Committee observed that it had not been substantiated, for purposes of admissibility, that A was discriminated against on account of his race and/or ethnic origin. It was further clear that domestic remedies in this respect had not been exhausted, as the matter of alleged race- or ethnic origin-based discrimination had never been raised before the courts. In the circumstances, the Committee held this claim to be inadmissible under article 5, paragraph 2(b), of the Optional Protocol.

6.5 On 4 April 1995, therefore, the Committee declared the communication admissible in so far as it appeared to raise issues under articles 9, paragraphs 1 and 4, and 14, paragraph 1.

State party's merits submission and counsel's comments thereon

7.1 In its submission under article 4, paragraph 2, of the Optional Protocol, dated May 1996, the State party supplements the facts of the case and addresses the claims under articles 9, paragraphs 1 and 4, and 14, paragraph 1. It recalls that Australia's policy of detention of unauthorised arrivals is part of its immigration policy. Its rationale is to ensure that unauthorized entrants do not enter the Australian community until their alleged entitlement to do so has been properly assessed and found to justify entry. Detention seeks to ensure that whoever enters Australian territory without authorization can have any claim to remain in the country examined and if the claim is rejected, will be available for removal. The State party notes that from late 1989, there was a sudden and unprecedented increase of applications for refugee status from individuals who had landed on the country's shores. This led to severe

delays in the length of detention of applicants, as well as to reforms in the law and procedures for determination of on-shore applications for protection visas.

7.2 As to the necessity of detention, the State party recalls that unauthorized arrivals who landed on Australian shores in 1990 and early 1991 were held in unfenced migrant accommodation hostels with a reporting requirement. However, security arrangements had to be upgraded, as a result of the number of detainees who absconded and the difficulty in obtaining cooperation from local ethnic communities to recover individuals who had not met their reporting obligations; 59 persons who had arrived by boat escaped from detention between 1991 and October 1993. Of the individuals who were allowed to reside in the community while their refugee status applications were being determined, it is noted that out of a group of 8,000 individuals who had been refused refugee status, some 27% remained unlawfully on Australian territory, without any authority to remain.

7.3 The State party points out that its policy of mandatory detention for certain border claimants should be considered in the light of its full and detailed consideration of refugee claims, and its extensive opportunities to challenge adverse decisions on claims to refugee status. Given the complexity of the case, the time it took to collect information on the continuously changing situation in Cambodia and for A's legal advisers to make submissions, the duration of the author's detention was not abusively long. Furthermore, the conditions of detention of A were not harsh, prison-like or otherwise unduly restrictive.

7.4 The State party reiterates that the author was informed, during his first interview after landing in Australia, that he was entitled to seek legal advice and legal aid. He had continued contact with community support groups which could have informed him of his entitlement. According to the State party, legal expertise is unnecessary to make an application for refugee status, as entitlement is primarily a matter of fact. The State party underlines that throughout his detention, reasonable facilities for obtaining legal advice or initiating proceedings would have been available to the author, had he sought them. After 13 September 1990, the author was a party to several court actions; according to the State party there is no evidence that at any time A failed to obtain legal advice or representation when he sought it. On balance, the conditions under which the author was detained did not obstruct his access to legal advice (see below, paragraphs 7.8 to 7.11). The State party maintains that contrary to counsel's assertion, long delays did not result from any change in legal advisors after A's consecutive moves between detention centres.

7.5 As to the claim under article 9, paragraph 1, the State party argues that the author's detention was lawful and not arbitrary on any ground. A entered Australia without authorization, and subsequently applied for the right to remain on refugee status basis. Initially, he was held pending examination of his application. His subsequent detention was related to his appeals against the decisions refusing his application, which made him liable to deportation. Detention was considered necessary primarily to prevent him from absconding into the Australian community.

7.6 The State party notes that the travaux preparatoires to article 9, paragraph 1, show that the drafters of the Covenant considered that the notion of "arbitrariness" included "incompatibility with the principles of justice or with the dignity of the human person". Furthermore, it refers to the Committee's jurisprudence according to which the notion of arbitrariness must not be equated with "against the law", but must be interpreted more broadly as encompassing elements of inappropriateness, injustice and lack of predictability.[4]

Against this background, the State party contends, detention in a case such as the author's was not disproportionate nor unjust; it was also predictable, in that the applicable Australian law had been widely publicized. To the State party, counsel's argument that it is inappropriate per se to detain individuals entering Australia in an unauthorized manner is not borne out by any of the provisions of the Covenant.

7.7 The State party asserts that the argument that there is a rule of public international law, be it derived from custom or conventional law, against the detention of asylum seekers, is not only erroneous and unsupported by prevailing State practice, but also irrelevant to the considerations of the Human Rights Committee. The instruments and practice invoked by counsel - inter alia the 1951 Refugee Convention, Conclusion 44 of the Executive Committee of the UNHCR, the Convention on the Rights of the Child, the practice of 12 Western states - are said to fall far short from proving the existence of a rule of customary international law. In particular, the State party disagrees with the suggestion that rules or standards which are said to exist under customary international law or under other international agreements may be imported into the Covenant. The State party concludes that detention for purposes of exclusion from the country, for the investigation of protection claims, and for handling refugee or entry permit applications and protecting public security, is entirely compatible with article 9, paragraph 1.

7.8 As to the claim under Article 9, paragraph 4, the State party reaffirms that it was always open to the author to file an action challenging the lawfulness of his detention, e.g. by seeking a ruling from the courts as to whether his detention was compatible with Australian law. The courts had the power to release A if they determined that he was being unlawfully detained. In that respect, the State party takes issue with the Committee's admissibility considerations relating to article 9, paragraph 4. For the State party, this provision does not require that State party courts must always be free to substitute their discretion for the discretion of Parliament, in as much as detention is concerned: "[T]he Covenant does not require that a court must be able to order the release of a detainee, even if the detention was according to law".

7.9 Furthermore, the State party specifically rejects the notion that article 9, paragraph 4, implicitly includes the same (procedural) guarantees for provision of legal assistance as are set-out in article 14, paragraph 3: in its opinions, a distinction must be drawn between the provision of free legal assistance in terms of article 14, paragraph 3, and allowing access to legal assistance. In any event, it continues, there is no substance to the author's allegation that his rights under article 9, paragraph 4, were impeded by an alleged absence of effective access to legal advice. The author "had ample access to legal advice and representation for the purpose of challenging the lawfulness of his detention", and was legally represented when he brought such a challenge.

7.10 In support of its argument, the State party provides a detailed chronology of attempts to inform A of his right to legal advice:

(a) The form used for applications for refugee status advises applicants of their right to have a legal advisor present during interview and to ask for legal aid assistance. The application form was read to the author on 9 December 1989 at Willie's Creek in the Kampuchean language by an interpreter, completed and signed by the author. The author did not request legal advice or access to a lawyer at this time;

(b) During his first six months of detention, the author had contact with members of the Australian community, as well as with the Cambodian, Khmer and Indo-Chinese communities in Sydney, which provided some support to the Pender Bay detainees. These groups would have been able to provide access to legal advisers;

(c) In June/July 1990, the Jesuit Refugee Service approached the Legal Aid Commission of New South Wales (LACNSW) to represent the Pender Bay detainees. On 11 September 1990, A authorised LACNSW to represent him. Prior to LACNSW's involvement, the Department of Immigration and Ethnic Affairs (DIEA) had planned to move the Pender Bay detainees from Sydney in early October 1990. To ensure continued access to their legal representatives, the group was not moved to Darwin until 20 May 1991;

(d) At the time of the move to Darwin, LACNSW advised the Northern Territory Legal Aid Commission (NTLAC) that the group was being relocated. NTLAC lawyers were at the Curragundi camp (near Darwin) approximately one week after the Pender Bay group's arrival. When A was moved to Port Hedland on 21 October 1991, NTLAC continued to act on his behalf until 29 January 1992, when it advised DIEA that it could no longer represent the Pender Bay detainees. On 3 February 1992, the Refugee Council of Australia (RCoA) took over the function of representatives of all Pender Bay detainees;

(e) The NTLAC was retained by members of the Pender Bay group for Federal Court proceedings in April 1992. RCoA continued to provide advice in relation to the refugee status applications.

7.11 The State party points out that prior to 1991/92, funds for legal assistance were not specifically earmarked for asylum seekers in detention, but individual applicants had access to legal aid through the normal channels, with NGOs also providing support. Since 1992, legal assistance is provided to applicants through contractual agreements between DIEA and RCoA and Australian Lawyers for Refugees (ALR). The State party notes that in the proceedings seeking to overturn the decision which refused him refugee status, A was legally represented. His advisers included not only the NSWLAC and the NTLAC, but also Refugee Advice Casework and two large law firms.

7.12 The State party contests that delays in the hearing of A's case were attributable to his losing contact with legal advisors after each move between detention centres. When the author was removed from Sydney to Curragundi on 21 May 1991, the NSWLAC immediately advised the NTLAC, and on 11 June, NTLAC forwarded to the Refugee Status Review Committee (RSRC) an application for review of refusal to grant refugee status to members of the group. When the author was removed to Port Hedland on 21 October 1991, the application for review was under consideration by the RSRC, and there was no need for immediate action by the author's legal advisors. When RSRC's recommendation to refuse the application was notified to NTLAC on 22 January 1992, NTLAC requested a reasonable time for the author to get legal assistance. The RCoA arrived in Port Hedland on 3 February 1992 to represent the author, and lodged a response to RSRC'S recommendation on 3 March 1992. The State party contends that nothing suggests that requests for review in these two cases would have been lodged much earlier had there been no change in legal representation.

7.13 Finally, the State party denies that there is any evidence that the remote location of the Port Hedland Detention Centre was such as to obstruct access to legal assistance. There are forty-two flights to and from Perth each week, with a flight time of 130 to 140 minutes; early

morning flights would enable lawyers to be in Port Hedland before 9 a.m. The State party notes that a team of six lawyers and six interpreters, contracted by RCoA with funding from DIEA, lived in Port Hedland for most of 1992 to provide legal advice to the detainees.

7.14 As to article 14, paragraph 1, the State party contends that no argument can be made that there was a breach of the author's right to equality before the courts: in particular, he was not subject to any form of discrimination on the grounds that he was an alien. It notes that if the Committee were to consider that equality before the courts encompasses a right to (obligatory) legal advice and representation, it must be recalled that the author's access to such advice was never, at any stage during his detention, impeded (see paragraphs 7.9 and 7.10 above).

7.15 The State party affirms that the second and third sentences of article 14, paragraph 1, do not apply to refugee status determination proceedings. Such proceedings cannot be described as a "determination ... of his rights and obligations in a suit at law". Reference is made in this context to decisions of the European Commission of Human Rights, which are said to support this conclusion[5]. The State party fully accepts that aliens subject to its jurisdiction may enjoy the protection of Covenant rights: "However, in determining which provisions of the Covenant apply in such circumstances, it is necessary to examine their terms. This interpretation is supported by the terms of the second and third sentences of article 14, paragraph 1, which are limited to certain types of proceedings determining certain types of rights, which are not those involved in [the] case". If the Covenant lays down procedural guarantees for the determination of entitlement to refugee status, those in article 13 appear more appropriate to the State party than those in article 14, paragraph 1.

7.16 If the Committee were to consider that the second and third sentences of article 14, paragraph 1, are applicable to the author's case, then the State party notes that

* hearings in all cases to which A was a party were conducted by competent, independent and impartial tribunals;

* judicial hearings on review were conducted in public, and such decisions as were rendered were made public;

* the administrative proceedings to determine whether the Minister for Immigration, Local Government and Ethnic Affairs should grant refugee status were held in camera, but the State party argues that privacy of these administrative proceedings was justified by considerations of ordre public, because it would be harmful to refugee status applicants for their cases to be made public;

* such decisions of administrative tribunals as were handed down in the author's case were not made public. To the Australian Government, the limited exceptions to the rule of publicity of judgments enunciated in article 14, paragraph 1, indicate that the notion of "suit at law" was not intended to apply to the administrative determination of applications for refugee status;

* A had at all times access to legal representation and advice;

* finally, given the complexity of the case and of the legal proceedings involving the author, the State party reiterates that the delays encountered in the case were not such as to amount to a breach of the right to a fair hearing.

8.1 In his comments, dated 22 August 1996, counsel takes issue with the State party's explanation of the rationale for immigration detention. At the time of the author's detention, the only category of unauthorized border arrivals in Australia who were mandatorily detained were so-called "boat people". He submits that the Australian authorities had an unjustified fear of a flood of unauthorized boat arrivals, and that the policy of mandatory detention was used as a form of deterrence. As to the argument that there was an "unprecedented influx" of boat people into Australia from the end of 1989, counsel notes that the 33, 414 refugee applications from 1989 to 1993 must be put into perspective - the figure pales in comparison to the number of refugee applications filed in many Western European countries over the same period. Australia remains the only Western asylum country with a policy of mandatory, non-reviewable detention.

8.2 In any way, counsel adds, lack of preparedness and adequate resources cannot justify a continued breach of the right to be free from arbitrary detention; he refers to the Committee's jurisprudence that lack of budgetary appropriations for the administration of criminal justice does not justify a four-year period of pre-trial detention. It is submitted that the 77-week period it took for the primary processing of the author's asylum application, while he was detained, was due to inadequate resources.

8.3 Counsel rejects the State party's attempts to attribute some of the delays in the handling of the case to the author and his advisers. He reiterates that Australia mishandled A's application, and maintains that there was no excuse for the authorities to take seven months for a primary decision on his application, which was not even notified to him, another eight months for a new primary decision, six months for a review decision, and approximately five months for a final rejection, which could not be defended in court. Counsel suggests that it is less important to determine why delays occurred, but to ask why the author was detained throughout the period when his application was being considered: when the original decision was referred back to immigration authorities after Australia could not defend it in court, the State party took the unprecedented step of passing special legislation (Migration Amendment Act 1992), with the sole purpose of keeping the author and other asylum seekers in detention.

8.4 As to the question of the author's access to legal advice, counsel affirms that contrary to the State party's assertion, legal expertise is necessary when applying for refugee status, as well as for any appeal processes - had the author had no access to lawyers, he would have been deported from Australia in early 1992. Counsel considers it relevant that the current practice is for Australian authorities to assign legal assistance to asylum seekers immediately when they indicate that they wish to seek asylum. It is submitted that A should have been provided with a lawyer when he requested asylum in December 1989.

8.5 Counsel reiterates that the author had no contact with a representative for nearly 10 months after his arrival, i.e. until September 1990, although a final decision had been made on his claim in June 1990. When, in 1992, he did seek legal aid to obtain judicial review of the decision rejecting his application for refugee status, his request was refused. Resort to pro bono representation was only obtained when legal assistance was refused, and in counsel's opinion, it is erroneous to argue that state-sponsored legal assistance was unnecessary because

pro bono assistance was available; in fact, pro bono assistance had to be found because legal aid had already been refused.

8.6 Counsel acknowledges that many flights are indeed available to and from Port Hedland, but points out that these connections are expensive. He maintains that the isolation of Port Hedland did in fact restrict access to legal advice; this factor was raised repeatedly before the Joint Standing Committee on Migration which, while conceding that there were some difficulties, rejected any recommendation that the detention facility be moved.

8.7 On the issue of the "arbitrariness" of the author's detention, counsel notes that the State party incorrectly seeks to blame the author for the prolongation of his detention. In this context, he argues that A should not have been penalized by prolonged detention for the exercise of his legal rights. He further denies that the detention was justified because of a perceived likelihood that the author might abscond from the detention centre; he points out that the State party has been unable to make more than generalized assertions on this issue. Indeed, he submits, the consequences of long-term custody are so severe that the burden of proof for the justification of detention lies with the State authority in the particular circumstances of each case; the burden of proof is not met on the basis of generalized claims that the individual may abscond if released.

8.8 Counsel reaffirms that there is a rule of customary international law to the effect that asylum seekers should not be detained for prolonged periods and that the pronouncements of authoritative international bodies, such as UNHCR, and the practice of other states, all point to-the existence of such a rule.

8.9 Concerning the State party's claim that the author always had the opportunity to challenge the lawfulness of his detention, and that such a challenge was not necessarily bound to fail, counsel observes the following:

* While the High Court held Section 54R, to exceed the State party's legislative power and therefore unconstitutional, the unenforceability of the provision does not mean that, once a person is a "designated person" within the meaning of the Migration Act, he can realistically challenge the detention. It simply means that Parliament does not have the power, by virtue of Section 54R, to direct the Judiciary not to release a designated person. In practice, however, if someone fits the definition of a "designated person", there still is no possibility of obtaining release by the courts.

* By reference to Section 54Q of the Act (now Section 182), under which detention provisions cease to apply to a designated person who has been in immigration detention for more than 273 days, it is submitted that a period of 273 days during which there is no possibility of release by the courts is per se arbitrary within the meaning of article 9, paragraph 1. According to counsel, it is virtually impossible for a designated person to be released even after the 273 calendar days since, under Section 54Q, the countdown towards the 273 day cut-off date ceases where the Department of Immigration is awaiting information from individuals outside its control.

8.10 Counsel rejects the argument that since the guarantees of article 14, paragraph 3(d), are not spelled out in article 9, paragraph 4, A had no right to access to state-funded legal aid. He argues that immigration detention is a quasi-criminal form of detention which in his opinion requires the procedural protection spelled out in article 14, paragraph 3. In this context, he

notes that other international instruments, such as the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Principle 17) recognize that all persons subjected to any form of detention are entitled to have access to legal advice, and be assigned legal advisers without payment where the interests of justice so require.

8.11 Finally, counsel reaffirms that tht proceedings concerning A's status under the Migration Amendment Act can be subsumed under article 14, paragraph 1: (even) during its administrative stage, the author's application for refugee status came within the scope of article 14. The exercise of his rights to judicial review in relation to his application for refugee status, as well as his challenge to detention in the local courts gave rise to a "suit at law". In this connection, counsel contends that by initiating proceedings against the Department of Immigration, with a view to reviewing the decisions to refuse his application for refugee status, the proceedings went beyond any review on the merits of his application and became a civil dispute about the Department's failure to guarantee him procedural fairness. And by filing proceedings seeking his release, the author disputed the constitutionality of the Migration Act's new provisions under which he was held - again, this is said to have been a civil dispute.

Examination of the merits

9.1 The Human Rights Committee has examined the present communication in the light of all the information placed before it by the parties, as it is required to do under article 5, paragraph 1, of the Optional Protocol to the Covenant. Three questions are to be determined on their merits:

(a) whether the prolonged detention of the author, pending determination of his entitlement to refugee status, was "arbitrary" within the meaning of article 9, paragraph 1;

(b) whether the alleged impossibility to challenge the lawfulness of the author's detention and his alleged lack of access to legal advice was in violation of article 9, paragraph 4; and

(c) whether the proceedings concerning his application for refugee status fall within the scope of application of article 14, paragraph 1 and whether, in the affirmative, there has been a violation of article 14, paragraph 1.

9.2 On the first question, the Committee recalls that the notion of "arbitrariness" must not be equated with "against the law" but be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context. The State party however, seeks to justify the author's detention by the fact that he entered Australia unlawfully and by the perceived incentive for the applicant to abscond if left in liberty. The question for the Committee is whether these grounds are sufficient to justify indefinite and prolonged detention.

9.3 The Committee agrees that there is no basis for the author's claim that it is per se arbitrary to detain individuals requesting asylum. Nor can it find any support for the contention that there is a rule of customary international law which would render all such detention arbitrary.

9.4 The Committee observes however, that every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed. In any event, detention should not continue beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individuals, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal. In the instant case, the State party has not advanced any grounds particular to the author's case, which would justify his continued detention for a period of four years, during which he was shifted around between different detention centres. The Committee therefore concludes that the author's detention for a period of over four years was arbitrary within the meaning of article 9, paragraph 1.

9.5 The Committee observes that the author could, in principle, have applied to the court for review of the grounds of his detention before the enactment of the Migration Amendment Act of 5 May 1992; after that date, the domestic courts retained that power with a view to ordering the release of a person if they found the detention to be unlawful under Australian law. In effect, however, the courts' control and power to order the release of an individual was limited to an assessment of whether this individual was a "designated person" within the meaning of the Migration Amendment Act. If the criteria for such determination were met, the courts had no power to review the continued detention of an individual and to order his/her release. In the Committee's opinion, court review of the lawfulness of detention under article 9, paragraph 4, which must include the possibility of ordering release, is not limited to mere compliance of the detention with domestic law. While domestic legal systems may institute differing methods for ensuring court review of administrative detention, what is decisive for the purposes of article 9, paragraph 4, is that such review is, in its effects, real and not merely formal. By stipulating that the court must have the power to order release "if the detention is not lawful', article 9, paragraph 4, requires that the court be empowered to order release, if the detention is incompatible with the requirements in article 9, paragraph 1, or in other provisions of the Covenant. This conclusion is supported by article 9, paragraph 5, which obviously governs the granting of compensation for detention that is "unlawful" either under the terms of domestic law or within the meaning of the Covenant. As the State party's submissions in the instant case show that court review available to A was, in fact, limited to a formal assessment of the self-evident fact that he was indeed a "designated person" within the meaning of the Migration Amendment Act, the Committee concludes that the author's right, under article 9, paragraph 4, to have his detention reviewed by a court, was violated.

9.6 As regards the author's claim that article 9, paragraph 4, encompasses a right to legal assistance in order to have access to the courts, the Committee notes from the material before it that the author was entitled to legal assistance from the day he requested asylum and would have had access to it, had he requested it. Indeed, the author was informed on 9 December 1989, in the attachment to the form he signed on that day, of his right to legal assistance. This form was read in its entirety to him in Kampuchean, his own language, by a certified interpreter. That the author did not avail himself of this possibility at that point in time cannot be held against the State party. Subsequently (as of 13 September 1990), the author sought legal advice and received legal assistance whenever requesting it. That A was moved repeatedly between detention centres and was obliged to change his legal representatives cannot detract from the fact that he retained access to legal advisers; that this access was inconvenient, notably because of the remote location of Port Hedland, does not, in the Committee's opinion, raise an issue under article 9, paragraph 4.

9.7 In the circumstances of the case and given the above findings, the Committee need not consider whether an issue under article 14, paragraph 1, of the Covenant arises.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the Covenant, concludes that the facts as found by the Committee reveal a breach by Australia of article 9, paragraphs 1 and 4, and article 2, paragraph 3, of the Covenant.

11. Under article 2, paragraph 3, of the Covenant, the author is entitled to an effective remedy. In the Committee's opinion, this should include adequate compensation for the length of the detention to which A was subjected.

12. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party 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 and 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 90 days, information about the measures taken to give effect to its Views.

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

Individual opinion by Prafullachandra N. Bhagwati (*concurring*)

I am in agreement with the opinion rendered by the Committee save and except that in regard to paragraph 9.5, I would prefer the following formulation:

"9.5 The Committee observes that the author could, in principle, have applied to the court for review of the grounds of his detention before the enactment of the Migration Amendment Act on 5 May 1992; after that date, the domestic courts retained the power of judicial review of detention with a view to ordering the release of a person if they found the detention to be unlawful. But with regard to a particular category of persons falling within the meaning of the expression 'designated person', in the Migration Amendment Act, the power of the courts to review the lawfulness of detention and order release of the detention was found unlawful, was taken away by Section 54R of the Migration Amendment Act. If the detained person was a 'designated person' the courts had no power to review the continued detention of such person and order his/her release. The only judicial review available in such a case was limited to a determination of the fact whether the detained person was a 'designated person' and if he was, the court could not proceed further to review the lawfulness of his detention and order his/her release. The author in the present case, being admittedly a 'designated person', was barred by Section 54R of the Migration Amendment Act from challenging the lawfulness of his continued detention and seeking his release by the courts."

But it was argued on behalf of the State that all that article 9, paragraph 4, of the Covenant requires is that the person detained must have the right and opportunity to take proceedings before a court for review of lawfulness of his/her detention and lawfulness must be limited merely to compliance of the detention with domestic law. The only inquiry which the detained person should be entitled to ask the court to make under article 9, paragraph 4, is whether the detention is in accordance with domestic law, whatever the domestic law may be. But this

would be placing too narrow an interpretation on the language of article 9, paragraph 4, which embodies a human right. It would not be right to adopt an interpretation which will attenuate a human right. It must be interpreted broadly and expansively. The interpretation contended for by the State will make it possible for the State to pass a domestic law virtually negating the right under article 9, paragraph 4, and making non-sense of it. The State could, in that event, pass a domestic law validating a particular category of detentions and a detained person falling within that category would be effectively deprived of his/her right under article 9, paragraph 4. I would therefore place a broad interpretation on the word "lawful" which would carry out the object and purpose of the Covenant and in my view, article 9, paragraph 4, requires that the court be empowered to order release "if the detention is not lawful", that is, the detention is arbitrary or incompatible with the requirement of article 9, paragraph 1, or with other provisions of the Covenant. It is no doubt true that the drafters of the Covenant have used the word "arbitrary" along with "unlawful" in article 17 while the word "arbitrary" is absent in article 9, paragraph 4. But it is elementary that detention which is arbitrary is unlawful or in other words, unjustified by law. Moreover the word "lawfulness" which calls for interpretation in article 9, paragraph 4, occurs in the Covenant and must therefore be interpreted in the context of the provisions of the Covenant and having regard to the object and purpose of the Covenant. This conclusion is furthermore supported by article 9, paragraph 5, which governs the granting of compensation for detention "unlawful" either under the terms of the domestic law or within the meaning of the Covenant or as being arbitrary. Since the author in the present case was totally barred by Section 54R of the Migration Amendment Act from challenging the "lawfulness" of his detention and seeking his release, his right under article 9, paragraph 4, was violated.

Prafullachandra N. Bhagwati [signed]

[Original: English]

[*] */ Made public by decision of the Human Rights Committee.

[**] **/ An individual opinion (concurring) by Committee member

Prafullachandra N. Bhagwati is appended to the present document.

[1] Van Alphen v. the Netherlands: Views adopted on 23 July 1990, paragraph 5.8.

[2] Tang Jia Xin v. Minister for Immigration and Ethnic Affairs No. 1 (1993), 116 ALR 329;

Tang Jia Xin v. Minister for Immigration and Ethnic Affairs No. 2 (1993), 116 ALR 349.

[3] Communication No. 236/1987 (V.M.R.B. v. Canada), inadmissibility decision of 18 July 1988, paragraph 6.3.

[4] See Views on communication No. 305/1988 (Hugo van Alphen v. The Netherlands), adopted on 23 July 1990, paragraph 5.8.

[5] See X, Y, Z and W v. United Kingdom (Application No. 3325/67); and Agee v. United Kingdom (Application No. 7729/76).