



## International Covenant on Civil and Political Rights

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### Human Rights Committee

#### Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 2229/2012\*, \*\*, \*\*\*

<i>Communication submitted by:</i>	Nasir (represented by the Human Rights Clinic at the Kingsford Legal Centre, University of New South Wales)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Australia
<i>Date of communication:</i>	24 October 2012 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 11 December 2012 (not issued in document form)
<i>Date of adoption of Views:</i>	29 March 2016
<i>Subject matter:</i>	Detention and conviction for people smuggling
<i>Procedural issues:</i>	Non-exhaustion of domestic remedies; non-substantiation of claims; victim status
<i>Substantive issues:</i>	Arbitrary detention, fair trial, arbitrary or unlawful interference with family and protection of the family

\* Adopted by the Committee at its 116th session (7-31 March 2016).

\*\* The following members of the Committee participated in the examination of the communication: Yadh Ben Achour, Lazhari Bouzid, Sarah Cleveland, Olivier de Frouville, Yuji Iwasawa, Ivana Jelić, Photini Pazartzis, Mauro Politi, Sir Nigel Rodley, Víctor Manuel Rodríguez-Rescia, Fabián Omar Salvioli, Dheerujlall Sektulsingh, Anja Seibert-Fohr, Yuval Shany, Konstantine Vardzelashvili and Margo Waterval. Three opinions signed by five Committee members are appended to the present Views.

\*\*\* The annexes to the present document are being circulated as received, in the language of submission only.



*Articles of the Covenant:* 9 (1), (3) and (4), 10 (1), 14 (1), (3) (c) and (5), 17 (1) and 23 (1)

*Articles of the Optional Protocol:* 1, 2, 5 (2) (b)

1. The author of the communication is Nasir, a national of Indonesia. He claims to be a victim of a violation by Australia of his rights under article 9 (1), (3) and (4), article 10 (1), article 14 (1), (3) (c) and (5), article 17 (1) and article 23 (1) of the Covenant. The author is represented. The Optional Protocol entered into force for the State party on 25 December 1991.

### **The facts as submitted by the author**

2.1 The author was born in the Riau province of Sumatra, Indonesia, in 1970 and was educated to primary school level. He worked as a fisherman in Indonesia earning less than US\$2 per day to support his wife and two daughters. That income did not always meet the family's basic survival needs. In early 2010, the author was approached by a man on the street who offered him a sum of money equivalent to \$731 to work as a cook on a boat, which he accepted. On 28 February 2010, the author left Indonesia on board a boat carrying 49 persons, including 46 Afghan asylum seekers and three Indonesian crew members. The author's job was cooking and he also steered the boat at night on one occasion.

2.2 On 10 March 2010, the Australian authorities detected the boat in Australian waters and took the author to the Christmas Island immigration and processing centre, where he was detained for one week and then transferred to the northern immigration detention centre in Darwin, Northern Territory.

2.3 On 6 May 2010, the Attorney-General issued a "criminal justice stay certificate" against the author.<sup>1</sup> There is no limit on the length of time an individual may be kept in Australia pursuant to a stay certificate — and detained in immigration detention — for the purpose of investigation and prosecution of criminal offences. There is no court or administrative body with jurisdiction to review the process or justifiability of detention pursuant to a stay certificate at any stage and it does not appear that stay certificates are the subject of any systematic internal administrative review process.<sup>2</sup>

2.4 The author was detained for a total of 146 days without charge. During that time, he was not informed of the grounds or duration of his detention or the possibility of contacting the Indonesian consulate. He had very limited contact with his wife because of the high cost of telephone calls. He first received legal assistance from Legal Aid Queensland on 29 June 2010, after he had been in detention for 110 days. Under the Australian Migration Act 1958 (Commonwealth), non-citizens may be indefinitely detained without charge in immigration detention centres for the purpose of investigation and prosecution of criminal offences, with no possibility of judicial review or administrative oversight of those detentions.<sup>3</sup>

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<sup>1</sup> Under section 147 of the Australian Migration Act 1958, "If an unlawful non-citizen is to be (...) removed or deported and the Attorney-General considers that the non-citizen should remain in Australia temporarily for the purposes of (...) the administration of criminal justice in relation to an offence against a law of the Commonwealth (...) the Attorney-General may give a certificate that the stay of the non-citizen's removal or deportation is required for the administration of criminal justice".

<sup>2</sup> See section 250 of the Migration Act.

<sup>3</sup> Section 189 of the Australian Migration Act requires the detention of any person suspected of entering Australia unlawfully and section 250 allows for the person to remain detained until he or she is granted a visa or removed from Australia.

2.5 On 3 August 2010, the author was charged with an aggravated offence of people smuggling under section 232A of the Migration Act<sup>4</sup> and was transferred the following day to a correctional facility. On 5 August 2010, he appeared before the Brisbane Magistrate's Arrest Court and was remanded into custody. On 2 December 2011, the Supreme Court of Queensland found the author guilty and sentenced him to the mandatory minimum of five years' imprisonment with a three-year non-parole period, as required under section 233C of the Migration Act.<sup>5</sup> He challenged his conviction at the Queensland Court of Appeal, which refused him leave to appeal on 13 September 2012.

2.6 The author submits that he has exhausted all effective remedies available to him. A direct appeal is not allowed in his case, because once a person has been convicted under the Migration Act, no court can reduce the length of the sentence below the mandatory minimum. A constitutional challenge to the mandatory sentencing provisions would be highly unlikely to succeed, as the High Court of Australia has already upheld the power of the legislature to establish mandatory sentences. In *Palling v. Corfield*, the High Court held that a mandatory sentence for a Commonwealth offence was not contrary to judicial power and did not infringe upon the separation of powers.<sup>6</sup> Furthermore, there are no effective avenues for challenging the legality of detention without charge under the Migration Act, as the High Court has held that courts are not competent to review or overturn a government decision under the Migration Act to hold a person in immigration detention. The legislative scheme for mandatory detention under the Migration Act has been unsuccessfully challenged a number of times in the High Court. Additionally, section 474 of the Migration Act provides that administrative decisions under the Act are final and not subject to appeal. Although the High Court has held that section 474 does not apply to cases where a decision maker has committed a "jurisdictional error", that was not relevant in this case.

2.7 Throughout his detention, the author suffered from significant emotional distress caused by concern about his family in Indonesia, for which he was prescribed sleeping pills, but did not receive counselling. As a result of his prolonged detention, his wife remarried because he could no longer support her financially and his daughters were staying with their grandmother, with no telephone, and therefore he had no possibility of contacting them directly. The small amount of money that he sent them from what he earned in prison was insufficient to cover their basic living expenses.

### The complaint

3.1 The author submits that his detention for 146 days without charge under a legislative scheme enabling indefinite detention violates article 9 (1) of the Covenant, as the length of

<sup>4</sup> At the time, section 232A of the Act established that "A person who organises or facilitates the bringing or coming to Australia, or the entry or proposed entry into Australia, of a group of 5 or more people ... and does so reckless as to whether the people had, or have, a lawful right to come to Australia ... is guilty of an offence punishable, on conviction, by imprisonment for 20 years or 2,000 penalty units, or both."

<sup>5</sup> In passing sentence, the judge noted that "were it not for the requirement of a statutory minimum sentence, the sentence I am obliged to pass upon you would not be in accordance with the requirements of section 16A of the Crimes Act, which establishes the mitigating facts that the court must take into account when passing a sentence to ensure that the severity of the sentence is proportionate to the offence." The sentencing judge commented that the mitigating factors that she would have taken into account in the author's case would include his condition of extreme poverty in Indonesia, the fact that he had not previously committed any offences, the fact that he showed contrition for the offence, his good rehabilitation prospects, the probable appalling effect of the sentence on his family, the deterrent effect that had already been accomplished by the 632 days spent in detention, and his cooperation with pretrial matters.

<sup>6</sup> See *Palling v. Corfield*, High Court of Australia, 123 CLR 52 (1970).

the detention was unnecessary for the investigation and prosecution of the offence and the impact on him and his family was unreasonable. His detention was also arbitrary owing to the absence of guarantees to be brought promptly before a judge, to legal assistance, to trial without delay and to be able to challenge his detention. He notes that the Committee has previously considered that mandatory detention of asylum seekers by Australia under the Migration Act raises issues under article 9.<sup>7</sup>

3.2 The author contends that his detention for 146 days without charge and without access to judicial review also violates article 9 (3) and (4) of the Covenant. The denial of access to legal representation for the first three and a half months of his detention also constitutes a violation of article 9 (4). Prior to being charged with an offence on 3 August 2010, the author was neither informed of the basis on which he was being detained nor the duration of the detention and did not have access to the Indonesian consulate.

3.3 His right to be tried within a reasonable time under articles 9 (3) and 14 (3) of the Covenant was also violated because he was held for 21 months before being convicted, even though the facts of his case were relatively simple and prototypical. Such a delay was therefore not justified.

3.4 His rights under article 9 (1) were also violated as a result of the imposition of a mandatory minimum sentence, which was disproportionate, inappropriate and unjust in light of his personal circumstances. The mandatory minimum sentencing policy under the Migration Act punishes all boat crew members equally, regardless of their culpability. The author was merely a crew assistant (a cook). He knew very little about the venture and he had no part in organizing the trip or in inducing others to make the journey. The Australian Migration Act does not differentiate between voyage organizers and crew and does not allow for any mitigating factors, or other proportionality considerations, to be taken into account in sentencing.

3.5 The author contends that his right to a fair trial under article 14 (1) of the Covenant was violated because the sentencing judge was unable to exercise independent judgment in determining his sentence and, as a result, imposed a disproportionate sentence. The mandatory sentence imposed is fundamentally inconsistent with the right to a fair hearing before an independent and impartial tribunal, because the sentence is prescribed by the legislature and all discretion is removed from the sentencing judge. No mitigating factors were taken into account and the excessive and disproportionate prison sentence would not have been imposed were it not for the statutory requirement.

3.6 The mandatory sentence removes sentencing discretion and prevents an appeal court from changing the penalty if the mandatory minimum was imposed, thereby rendering any judicial review of the sentence meaningless, in violation of article 14 (5) of the Covenant.

3.7 The author contends that the very limited contact he had with his family as a result of his detention and his lack of means to pay for costly phone calls, together with the deprivation of income and emotional support for his family, violated his right to be treated with humanity and respect for human dignity under article 10 (1) of the Covenant.

3.8 Finally, the author claims a violation of articles 17 (1) and 23 (1) of the Covenant because, throughout his detention, his family was deprived of financial and emotional support. His wife remarried and he had very limited contact with his daughters, who lacked any means of support. Although the author was the family's main source of income, during his two and a half years of detention at the time of submitting his complaint, he was only able to send a total of approximately \$A150 to them.

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<sup>7</sup> See CCPR/C/AUS/CO/5, para. 23.

3.9 The author asks that the Committee request the State party to: (a) release him from detention and return him to Indonesia; (b) compensate him for the harm he endured as a result of the violations of his rights under the Covenant, including loss of liberty, emotional suffering during his prolonged and arbitrary detention, loss of his marriage and harm to his dependents, and lost income; (c) adopt measures to promote his physical and psychological recovery, rehabilitation and reintegration upon his return to Indonesia; and (d) provide him with a public apology. The State party should also be required to amend its migration laws, in particular, by repealing the mandatory sentencing provisions under the Migration Act and amending the relevant provisions in the Act to include a time limit on detention without charge of non-citizens suspected of involvement in criminal offences, and that it establish appropriate mechanisms for review of detention, for access to courts to challenge the lawfulness of detention and for access to legal aid at all stages of detention. It should also implement policies to ensure that similar violations do not occur in the future, including by ensuring that non-citizens detained in connection with people-smuggling offences are immediately provided with legal representation, interpretation and assistance in contacting their consulate and family.

#### **State party's observations on admissibility and the merits**

4.1 On 28 January 2014, the State party submitted its observations on the admissibility and merits of the communication. The State party also informed the Committee that on 8 March 2013, the author was released from prison after the expiration of the three-year non-parole period of his sentence and on the same date, he was removed from Australia by the Department of Immigration and Border Protection and returned to Indonesia.

#### *Admissibility*

4.2 The State party contended that a domestic remedy existed in relation to the author's claims under articles 9 (1) and 14 (1) and (5) of the Covenant concerning his detention and mandatory minimum sentence, since the author could have challenged the constitutionality of the relevant legislative provisions. A recent matter before the High Court (*Magaming v. the Queen*)<sup>8</sup> demonstrated that this option was available to the author. The case involved a person convicted of the offence of organizing or facilitating the bringing to Australia of a group of unlawful non-citizens and sentenced to the mandatory minimum penalty. That person claimed that his mandatory minimum penalty violated the Constitution because it impermissibly conferred judicial power on the executive branch of government by removing part of the judicial sentencing function; furthermore, the constitutional separation of powers involved a guarantee of liberty which was violated by the inability of the courts to avoid sentences that are arbitrary and capricious. That closely reflects the author's allegations regarding violations of the above-mentioned provisions of the Covenant. While the constitutional challenge in the *Magaming* case did not succeed, the fact that the High Court granted special leave to hear the case demonstrated that there was a question to be adjudicated and that an available remedy existed.

4.3 Regarding the author's claim under article 9 (4), he could have brought a writ of habeas corpus in the Federal Court of Australia or the High Court to determine the legality of his pre-charge detention and those courts could have ordered his release if they had found that he had been detained unlawfully. The State party challenges the author's claim that a court cannot order the release of a person detained under a criminal justice stay certificate if they apply for a writ of habeas corpus. The State party maintains that a court may order the release of a person detained under a stay certificate where the detention is

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<sup>8</sup> Case S114/2013.

unlawful. As to the author's contention that judicial review of the stay certificate issued in respect of him was not worth pursuing, as courts are limited to conducting reviews only on grounds of jurisdictional error, the State party indicates that jurisdictional error is a commonly used and often successful ground of review. For the purpose of satisfying the requirement of exhaustion of remedies, the author was required to pursue judicial review, regardless of the doubts expressed in his submissions.

4.4 Regarding the claims submitted by the author on behalf of his family under articles 10, 17 (1) and 23 of the Covenant, relating to the detriment experienced by his family in Indonesia as a result of his detention, the State party asserts that they are inadmissible *ratione loci* under article 1 of the Optional Protocol, because his family is not and has not been subject to Australian jurisdiction. Accordingly, the matter goes beyond the scope of the obligations of the State party under the Covenant. Furthermore, there is no authorization from the author's wife or daughters to submit the communication on their behalf and the author has made no submissions as to why they would not be able to provide such authorization.

4.5 Regarding the claims under article 10 (1) of the Covenant in relation to the author, they are inadmissible for non-substantiation. The author has provided no evidence indicating that his treatment in detention rose to a level of humiliation or debasement beyond the fact of detention itself in his own particular circumstances.

#### *Merits*

4.6 The author's pretrial detention was initially necessary for immigration purposes pursuant to the Migration Act and subsequently for criminal justice purposes. From his arrival on Christmas Island on 13 March 2010 until he was removed from Australia on 8 March 2013, the author was in immigration detention pursuant to the Migration Act. From the date he was charged with a criminal offence and remanded in custody until he left Australia, he was concurrently in criminal detention and held in a criminal correctional facility.

4.7 In order to find a violation of article 9 (1) of the Covenant, the author must show that his deprivation of liberty was unlawful, which must be understood as contrary to domestic laws, or that it was otherwise arbitrary, which is determined based on the circumstances of detention not being reasonable and necessary or not proportional to the end that is sought.

4.8 The State party submits that the author's claims under article 9 (1) with regard to his immigration detention from 13 March to 4 August 2010 was not unlawful, as it was conducted in accordance with the requirements of the Migration Act. As to arbitrariness, the Committee has confirmed that the mandatory detention of unauthorized arrivals is not arbitrary per se. Additionally, there is no indication in the Committee's jurisprudence that detention for a particular length of time could be considered arbitrary per se. The determining factor is not the length of the detention but whether the grounds are justifiable. The author's immigration detention was necessary throughout this period because he did not have a valid visa to enter or remain in Australia. Once the criminal justice stay certificate was issued on 6 May 2010, the author's continued immigration detention was necessary under the Migration Act as he was an unlawful non-citizen and while the stay certificate was in effect he could not be removed from Australia, as he was required to be in the country for the administration of criminal justice. As noted above, review mechanisms were available in relation to the author's immigration detention.

4.9 The author's detention within the criminal justice system from 4 August 2010 until the commencement of his trial on 21 November 2011 was likewise lawful and not arbitrary. He was remanded in custody by a court on 5 August 2010, two days after he was charged

with a criminal offence. The detention was necessary to allow the criminal justice system to proceed with the charges and was subject to the supervision and review of the court at all times.

4.10 Regarding the author's detention subsequent to his custodial sentence, the State party submits that the mandatory minimum penalties for the offence of organizing or facilitating the bringing of more than five non-citizens to Australia is justified under article 9 (1) and the detention of the author for the mandatory minimum period imposed is justified and necessary in the circumstances, to achieve the legitimate objectives of punishing the author, deterring the future commission of such offences, which involve serious risks to the lives of asylum seekers, and to ensure that the courts consistently apply penalties commensurate with the seriousness of the crime. The author's conviction was the result of a proper legal process in which he was legally represented and his individual circumstances were considered. The author's pre-conviction detention was taken into account in sentencing, which shows how his individual circumstances were taken into account.

4.11 With regard to the author's claims under article 9 (3) of the Covenant, concerning his right to be brought promptly before a judge, the State party does not consider that the author was arrested or detained on a criminal charge when he was detained for immigration purposes. The criminal justice stay certificate did not form the basis of his detention and the interview on 29 June 2010 with the Australian Federal Police did not transform the nature of the author's detention. His detention continued because he did not have a valid visa. To the extent that the author's immigration detention was prolonged by the need to conduct a criminal investigation, the time taken by the police to conduct the investigation was reasonable. If he had been in Australia lawfully, he would not have been detained during the investigation.

4.12 On 4 August 2010, the author was brought to the Brisbane watch house and charged and the next day he appeared before a magistrate and was remanded in custody. He was therefore brought promptly before a judge after being charged with a criminal offence.

4.13 There were 15 months and 19 days between the author's charge and his trial on 23 November 2011, a period of time during which the case was actively managed and which is justified in the circumstances.<sup>9</sup> Hence, the author's allegations relating to the length of his pretrial detention are without merit.

4.14 With respect to the author's claims under article 9 (4) that his right to challenge the lawfulness of his detention was violated during his immigration detention, the State party asserts that this claim is without merit. The State party interprets the term "lawfulness" under article 9 (4) as meaning lawful under domestic law, and contends that there is nothing apparent in the terms of the Covenant that "lawful" was intended to mean "lawful at international law" or "not arbitrary". Furthermore, as set out in the State party's observations regarding exhaustion of domestic remedies, the author had access to judicial review of the legality of his detention and a court might have ordered his release if the detention did not comply with the law.

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<sup>9</sup> The State party explains that on 3 September 2010, the matter was listed for a case review on 22 December 2010. The author's legal representatives indicated that witnesses would be required for cross-examination and gave an estimate that three days would be required. The first available date with three consecutive days was found to be 11 April 2011. The author was committed to trial in April and an indictment was presented in the Supreme Court of Queensland on 9 May 2011. A trial date was offered for September 2011 but the author's representatives were unavailable. The trial commenced on 21 November 2011, which was the first date when his representatives were available, and a finding was provided on 2 December 2011.

4.15 In contrast to the author's claims that he was denied access to legal representation until 29 June 2010, the author was made aware that he could contact legal representatives at an early stage of his detention and signed a notice in his language which included a statement to that effect.

4.16 Regarding the author's claims under article 10 (1), they are inadmissible and, in the alternative, without merit. During his stay in an immigration detention facility the author was able to contact family members or the Indonesian consulate at any time and was actively informed of this. He was assisted in contacting his family on his arrival on Christmas Island. He was able to purchase phone cards, in particular by participating in programmes and activities available inside the facility. While in Queensland Correctional Services facilities he had access to telephone and postal facilities like any other prisoner.

4.17 He was able to fund telephone calls to Indonesia from earnings and allowances he received while in prison. Records from Queensland Corrective Services show that the author made a total of 135 calls to Indonesia.<sup>10</sup> It would appear that the reason for the difficulty in contacting his daughters was not related to circumstances in Australia but to the fact that he was only able to receive news of them by telephoning a person who lived in a town three hours away from them. Complaint mechanisms exist at the facility, however he did not resort to them regarding his ability to contact his family, legal representatives or other persons of his choosing, or to receive visits.

4.18 The author was made aware that he could contact the Indonesian consulate when taken into immigration detention and again at the interview with the Australian Federal Police on 29 June 2010. He advised the police that he did not wish to contact the consulate as he had already spoken to a representative.<sup>11</sup>

4.19 Regarding the author's claim that the minimum mandatory sentence imposed on him breached article 14 (1) of the Covenant, the State party asserts that there has been no interference with the independence or impartiality of the judiciary in respect to the author and the allegations are without merit. The court retains its discretion to sentence those found guilty of the offence to a period between the mandatory minimum penalty of 5 years' imprisonment (3 years non-parole) to the statutory maximum of 20 years. Further, when exercising that discretion, the court is required to consider the individual circumstances by virtue of the factors set out in sections 16A (1) and (2) of the Crimes Act 1914. It is the legitimate role of the legislature to pass laws creating criminal offences, including the range of penalties that may be applied and to prescribe minimum evidentiary requirements, such as mandatory presumptions. Provided the legislative curb on judicial discretion does not infringe on the essential element of independence, which is that judges remain free to form opinions as to the facts and law without external political influence or pressure, the State party considers the right to a hearing before an independent court or tribunal is not breached by such legislation.

4.20 Regarding the claims under article 14 (3) (c) concerning the author's right to trial without delay, the State party asserts that they are without merit for the reasons indicated in its observations under article 9 (3). It adds that there were 9 months and 11 days between the trial decision of 2 December 2011 and the decision to dismiss his appeal (13 September 2012), a period of time which cannot be considered unreasonable. Furthermore, a review of the court proceedings confirms that there were no undue delays in the matter.<sup>12</sup>

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<sup>10</sup> The State party provides details concerning the earnings and allowances he received while in prison.

<sup>11</sup> Further details are contained in the State party's submission.

<sup>12</sup> Further details on the proceedings are contained in the State party's submission.



4.21 Regarding the author's claims under article 14 (5), the State party argues that they are without merit. The Queensland Court of Appeal considered whether there was sufficient evidence to prove beyond reasonable doubt one of the elements of the offence, whether the author was reckless as to whether the passengers had a lawful right to come to Australia. The Court reviewed the record of the trial and determined whether, on the whole of the evidence, it was open to the jury to have been satisfied beyond reasonable doubt that the author was guilty. In that way, the factual and legal dimensions of the case were reconsidered, as required by article 14 (5). The author chose not to pursue the further available avenue of appeal to the High Court.

4.22 Regarding the author's claims under articles 17 (1) and 23, the State party asserts that they are without merit. It is inherent that prisoners will be separated from family owing to their imprisonment and as this separation is a necessary and ordinary component of punishment for committing a criminal offence, it does not amount to arbitrary interference with the family. Any hardship arising as a result of a person's family residing in another country are outside the jurisdiction and control of the Government of Australia. Similarly, to the extent that the author claims that he has suffered as a result of his wife remarrying, that is a private matter and irrelevant to the claim at hand.

4.23 Article 23 (1) does not require that Australia exempt convicted criminals from serving lawfully imposed penalties, such as imprisonment, on the basis that this may have an impact on their family relationships in a foreign country. Those are private matters that are outside Australian obligations and jurisdiction.

#### **Author's comments on the State party's observations**

5.1 The author submitted comments regarding the admissibility and merits on 24 November 2014.

##### *Admissibility*

5.2 Regarding the State party's observations that a domestic remedy existed in relation to the author's claims under articles 9 (1) and 14 (1) and (5) of the Covenant, concerning his detention and mandatory minimum sentence, the author contends that an appeal to the High Court offered no reasonable prospect of success. At the time when the author's appeal to the Queensland Court of Criminal Appeal failed, the special leave had not yet been granted in the *Magaming* case and all jurisprudence on the issue of mandatory minimum penalties indicated that a constitutional challenge would not have been successful. The High Court had consistently upheld the domestic constitutional validity of mandatory minimums for over 60 years and decided against granting special leave to appeal in such cases. In any case, by dismissing the constitutional challenge against the Migration Act, the *Magaming* decision only confirmed that the author had no reasonable prospect of success. Also, the author's appeal to the Queensland Court of Appeal was denied on 13 September 2012 and his non-parole period was due to expire on 8 March 2013. Therefore, any eventual ruling by the High Court would have come after he had completed his sentence and would have therefore been ineffective.

5.3 The State party's submission that the author could have pursued a writ of habeas corpus for a claim under article 9 (4) with regard to his pretrial detention is unfounded. Such a remedy depends on a court finding that the author's detention is unfounded and that the detention is unlawful under domestic law. However, the author has not claimed that his detention was unlawful domestically, but rather that it was arbitrary under the Covenant. There is no constitutional or other basis under Australian law to challenge a detention on the grounds of arbitrariness if that detention is otherwise permitted by domestic law. It would have been futile to pursue a writ of habeas corpus.

5.4 Alternatively, the author contended that Australia has proved to be unwilling to redress such violations, rendering the exhaustion rule inapplicable.

5.5 With regard to his claims under articles 10, 17 and 23 of the Covenant, the author notes that he did not bring those claims on behalf of his family, but rather claimed that his own rights under those provisions had been violated. The fact that his family was outside Australian territory does not negate the State party's obligations to respect his rights under the articles invoked, since he himself was under the State party's jurisdiction. Furthermore, at no time did the author purport to make a claim on behalf of his family. His claims relate to a breach of his own right to family.

5.6 The author submitted that his claims under article 10 (1) of the Covenant were sufficiently substantiated by his evidence that he had no contact with his children during the entire time that he was in detention in Australia. The number of telephone calls he made to Indonesia does not prove that the calls were successful or sufficient.

#### *Merits*

5.7 Regarding his claims under article 9 (1), the author submits that his mandatory immigration detention, albeit lawful according to national law, was arbitrary for not meeting the standards of reasonableness, necessity and proportionality. He was detained by application of a "mandatory rule for a broad category" rather than by consideration of his personal circumstances, contrary to the Committee's requirements. The criminal justice stay certificate, which was issued nearly two months after his initial detention, and the police interview cannot be considered as proving that his personal circumstances were considered. Additionally, no less invasive means of achieving the same ends, such as reporting obligations, were considered and the author's detention was not subject to periodic review.

5.8 With regard to the mandatory minimum sentence, the author notes that the arbitrariness of a sentence must not be equated with it being "against the law" but must be interpreted more broadly to include such elements of inappropriateness and injustice. His sentence was neither reasonable nor proportionate when taking into account his individual characteristics, the gravity of the offence and the purpose of punishing and deterring him. Section 232A of the Migration Act criminalizes a broad range of activities and persons, including the organizers of the entire operation of bringing non-citizens into Australia and the cooks and deckhands, who have minimal or no complicity in the deed and often accept an offer of employment with no information as to the purpose of the trip. According to the submission by the Department of the Attorney-General to an inquiry on the repeal of mandatory minimums of 22 February 2012, only 5 of the 228 convictions under this offence were smuggling organizers. The author notes that the sentence imposed upon him was manifestly unreasonable, disproportionate and unjust in the circumstances, as it did not respond to the purposes of punishing, rehabilitating and deterring, as noted by the sentencing judge.<sup>13</sup> General deterrence is irrelevant when considering whether a sentence is disproportionate and, in the author's case, his incarceration had a negligible deterrence impact, as noted by the sentencing judge.<sup>14</sup>

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<sup>13</sup> The sentencing judge noted: "You have already been imprisoned for 632 days during which your family has been left destitute. The sentence of imprisonment is not, therefore, necessary to deter you any more than that has already done. ... I regard you as already having been adequately punished. However, I am obliged to impose further imprisonment upon you so as to comply with the obligation I have at law."

<sup>14</sup> The sentencing judge also noted that "it is clear that those people who employ men like you will just move to another village because they regard you as completely expendable and people in small

5.9 Concerning his claims under article 9 (3), the author maintains that his detention from 10 March 2010 until he appeared before a court on 5 August 2010 was for the purpose of administration of criminal justice and, as such, the delay of 149 days constituted a breach of article 9 (3) of the Covenant. Under section 159A of the Penalties and Sentences Act 1992, pretrial detention may only be taken to be part of the ultimate sentence where “the offender was held in custody in relation to proceedings for the offence and for no other reason”. Alternatively, the issuance of the stay certificate on 6 May 2010 indicates that the sole purpose of his remaining in Australia from that date onwards was for the administration of criminal justice. As such, the author had a right at that time to be brought promptly before a judge, which did not happen for a further 92 days. Upholding such a right was particularly important, given that the author was unable to challenge the stay certificate, as it constituted a “privative clause decision” under section 474 of the Migration Act and therefore could not be challenged or overturned.

5.10 Additionally, the 20 months that elapsed between his detention and the commencement of the trial on 23 November 2011 cannot be considered a reasonable period of time, even allowing for the small delays caused by his representatives. Alternatively, if his detention for criminal purposes was deemed to commence on 6 May 2010, the 18 months that elapsed before the commencement of the trial is similarly unreasonable. When a person has been detained the entire time from charge to trial, a breach of article 14 (3) (c) accompanies that of article 9 (3).

5.11 Regarding the claims under article 9 (4), the author reiterates that any judicial review would have been limited to the issue of the lawfulness of his detention, which is undisputed here, and that it would not have been possible to raise the issue of the arbitrariness of his detention.

5.12 Regarding his claim under article 10 (1) of the Covenant, the author notes that the State party failed to take into account his personal circumstances, including the difficulties and costs associated with making calls to Indonesia, to ensure his right to communicate with his family. Although he was assisted in calling his family on 19 March 2010 upon his arrival on Christmas Island, he had to pay for all subsequent calls, despite their prohibitive cost. He had to balance his obligation to support his family financially with his prison earnings and trying to maintain contact with them. Australia should have provided him with differentiated access to communication facilities so as to enable him to communicate with his family affordably and at regular intervals. Furthermore, he was unaware that he could use mechanisms of complaint while in prison. The ability to use those mechanisms must be considered in light of his inability to speak or read English.

5.13 Regarding his claims under article 14 (1), the author accepts that mandatory minimum sentences do not ipso facto constitute violations of article 14 (1). However, the mandatory minimum sentences referred to in the present communication constitute a violation because they are so disproportionate that in many cases they remove the power of the court to impose a proportionate sentence, inconsistent with the functions of an independent and impartial judiciary.

5.14 The author maintains his claim under article 14 (5). An appeal could not have resulted in a reduction in sentence beyond what had already been awarded, despite the admission of the trial judge that the sentence was disproportionate.

5.15 The author also maintains his claims regarding articles 17 and 23 of the Covenant. The conditions of detention, including mechanisms for providing contact with prisoners’

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villages without newspapers or the means of modern communication are most unlikely to hear of a sentence imposed in an Australian court”.

families, must be appropriately adapted to enable foreign nationals to maintain their right to family. The normal mechanisms of phoning or sending letters may be adequate for domestic prisoners but not for foreigners. The State party cannot claim a legitimate State interest to justify violations of articles 17 and 23. Instead, the impact of the separation of an individual from their family must be given due consideration.

### **Issues and proceedings before the Committee**

#### *Consideration of admissibility*

6.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether or not the claim is admissible under the Optional Protocol.

6.2 The Committee has ascertained, as required under article 5 2 (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee takes note of the State party's argument that domestic remedies have not been exhausted in relation to the author's claim that the mandatory minimum penalty violated articles 9 (1) and 14 (1) and (5) of the Covenant, because the author could have challenged the constitutionality of the relevant legislative provisions. The author notes in this respect that a constitutional challenge to the mandatory minimum sentence had no reasonable prospect of success in light of the longstanding jurisprudence of the High Court that confirmed the validity of mandatory minimum sentences at the time his appeal before the Queensland Court of Criminal Appeal failed. Furthermore, that jurisprudence was confirmed in the *Magaming* case. In the light of that jurisprudence, the Committee concludes that a challenge before the High Court had indeed no real prospect of success and considers that there is no obstacle to the admissibility of the claim under article 5 (2) (b) of the Optional Protocol.

6.4 The State party also contends that domestic remedies were not exhausted regarding the author's claim that his pre-charge detention for 146 days without access to judicial review violated article 9 (4) of the Covenant, as the author could have brought a writ of habeas corpus before the Federal Court of Australia or the High Court to challenge the legality of his detention. The author notes in this respect that the remedy relies on a court finding that the detention was unlawful under domestic law; that the issue at stake is not the legality of the detention under domestic law but whether or not it was arbitrary; and that there is no legal basis in Australia to challenge the arbitrariness of such detention. The Committee considers that the State party has not demonstrated the availability of an effective remedy for the author's claim regarding the arbitrariness of his detention. Accordingly, the Committee considers that it is not prevented under article 5 (2) (b) from examining the claim on its merits.

6.5 Regarding the author's claims that the conditions of detention in Australia, in particular the difficulty of keeping in regular telephone contact with his family in Indonesia, violated his rights under articles 10 (1), 17 (1) and 23 (1) of the Covenant, the Committee recognizes the importance for persons deprived of their liberty of being able to communicate regularly with their families, as recognized by the United Nations Standard Minimum Rules for the Treatment of Prisoners. However, the Committee considers that the author's inability to keep in contact with his family was to a large extent due to circumstances not attributable to the State party, such as the fact that the author's daughters lived in a village with very limited access to a telephone. Furthermore, such inability was also partially due to circumstances which are inherent to imprisonment. Accordingly, the Committee considers that those claims have been insufficiently substantiated for purposes of admissibility and declares them inadmissible under article 2 of the Optional Protocol.

6.6 Regarding the author's claim that the mandatory sentence violated his rights under article 14 (1) and (5) because the judges were unable to exercise independent judgment in determining the sentence the Committee notes the State party's submission that it is the legitimate role of the legislature to pass laws creating criminal offences, including the range of penalties that may be applied, and that judges remain free to form opinions as to the facts and law without external political influence or pressure. The Committee recalls that the requirement of independence refers to the actual independence of the judiciary from political interference by the executive branch and legislature, and that it is necessary to protect judges against conflicts of interest and intimidation.<sup>15</sup> The Committee notes that the binding nature of statutory law does not per se amount to a violation of judicial independence. The Committee further notes that the author does not allege any external political interference or pressure by the executive or legislative, nor does he claim that the sentencing judge was subjected to intimidation when he was sentenced to the minimum of five years imprisonment with a three-year non-parole period, as required under section 233C of the Migration Act. Accordingly, the Committee considers that this claim has been insufficiently substantiated for purposes of admissibility and declares it inadmissible under article 2 of the Optional Protocol.

6.7 In the light of the above, the Committee declares the communication admissible concerning claims under articles 9 (1), (3) and (4) and 14 (3) (c) of the Covenant.

#### *Consideration of the merits*

7.1 The Human Rights Committee has considered the present communication in light of all the information made available to it by the parties, as required under article 5 (1) of the Optional Protocol.

#### Claims regarding the author's pre-charge detention

7.2 The Committee takes note of the author's claim that his detention for 146 days without charge, without being brought before a judge and without the possibility of seeking a judicial review of his detention, and his lack of access to legal assistance for 110 days amounted to a violation of his rights under article 9 (1), (3) and (4) of the Covenant. The State party argues that the author's immigration detention was necessary throughout this period because he did not have a valid visa to enter or remain in Australia. Furthermore, once the criminal justice stay certificate was issued on 6 May 2010, he could not be removed from Australia, as he was required to be in the country for the administration of criminal justice.

7.3 The Committee recalls that, while detention of an individual in the course of proceedings for the control of immigration is not per se arbitrary, such detention must be justified as reasonable, necessary and proportionate in light of the circumstances of the case and reassessed as it extends in time.<sup>16</sup> The Committee further recalls that article 9 (4) entitles anyone who is deprived of liberty by arrest or detention to take proceedings before a court, in order that the court may decide, without delay, on the lawfulness of the detention and that the adjudication of the case should take place as expeditiously as possible.<sup>17</sup>

7.4 In the present case, the Committee notes that the author was under mandatory immigration detention for almost five months, from 13 March to 4 August 2010 without formal charges. The State party has failed to explain why it took almost five months before

<sup>15</sup> See the Committee's general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 19.

<sup>16</sup> See the Committee's general comment No. 35 (2014) on liberty and security of person, para. 18.

<sup>17</sup> *Ibid.*, para. 47. See also communication No. 1973/2010, *Griffiths v. Australia*, Views adopted on 21 October 2014, para. 7.5.

criminal charges were brought against the author. The Committee further notes that during this period, the author was deprived of legal safeguards allowing him to challenge the arbitrariness of his detention. In respect of the State party's contention that the term "lawfulness" under article 9 (4) must be interpreted as meaning lawful under domestic law, the Committee recalls its long-standing jurisprudence that judicial review of the lawfulness of detention under article 9 (4) is not limited to mere compliance of the detention with domestic law, but must include the possibility of ordering release if the detention is incompatible with the requirements of the Covenant, in particular those of article 9 (1).<sup>18</sup> For all these reasons and in the absence of further explanations by the State party, the Committee concludes that the author's detention during this period of time was not justified, was arbitrary, in violation of article 9 (1) of the Covenant and could not be challenged before a court, in violation of article 9 (4) of the Covenant.

7.5 In respect of the author's claim under article 9 (3) that he was not brought promptly before a judge, the Committee notes the State party's assertion that the author was not arrested or detained on a criminal charge when he was detained for immigration purposes; that the criminal justice stay certificate did not form the basis of his detention, that the interview with the police on 29 June 2010 did not transform the nature of the author's detention, and that to the extent that the author's immigration detention was prolonged by the need to conduct a criminal investigation, the time taken by the police to conduct the investigation was reasonable. However, the Committee recalls that the requirement that any person arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power pursuant to article 9 (3) applies even before formal charges have been asserted, so long as the person is arrested or detained on suspicion of criminal activity.<sup>19</sup> The Committee notes in this respect that under section 147 of the Australian Migration Act 1958, if the Attorney-General considers that an unlawful non-citizen should remain in Australia temporarily for the purposes of the administration of criminal justice in relation to an offence, he or she may issue a criminal justice stay certificate. In light of this, the Committee finds that from 6 May 2010, when the stay certificate was issued, the author was held in immigration detention for the purpose of the administration of criminal justice without being brought promptly before a judge or other officer authorized by law to exercise judicial power. For those reasons, the Committee concludes that the author's rights under article 9 (3) were violated.

#### Claims regarding the duration of proceedings

7.6 The Committee takes note of the author's claim that his right to be tried within a reasonable time and without undue delay under articles 9 (3) and 14 (3) (c) of the Covenant was violated because the 15-month period from the time when he was charged — or 21 months from the moment that he was detained — was not justified in the circumstances of the case. The State party has argued that such a period was reasonable and justified to allow sufficient time for criminal investigations and judicial proceedings, and that the case was actively managed. It has also signalled, without being contested by the author, that some judicial delays were caused by the author's representatives, who were unavailable on the trial date that was originally offered and not available until 21 November 2011, when the trial commenced. The Committee considers that the information on file does not allow it

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<sup>18</sup> See communications No. 1069/2002, *Bakhtiyari v. Australia*, Views adopted on 29 October 2003, para. 9.4, and Nos. 1255/2004, 1256/2004, 1259/2004, 1260/2004, 1266/2004, 1268/2004, 1270/2004 and 1288/2004, *Shams et al. v. Australia*, Views adopted on 20 July 2007, para.7.3.

<sup>19</sup> See general comment No. 35, para. 32, and communications No. 1128/2002, *Marques de Morais v. Angola*, Views adopted on 29 March 2005, paras. 6.3 and 6.4, and No. 1096/2002, *Kurbanova v. Tajikistan*, Views adopted on 6 November 2003, para.7.2.

to conclude that the time elapsed before the author was tried was unreasonable in the circumstances of the case, or that judicial proceedings experienced undue delays. The Committee therefore concludes that the facts before it do not reveal a violation of articles 9 (3) and 14 (3) (c) of the Covenant in respect of this part of the communication.

#### Claims regarding the mandatory minimum sentence

7.7 With regard to the author's claims relating to the mandatory minimum sentence under the Migration Act, the Committee notes the State party's argument that the author's conviction to the mandatory minimum sentence was necessary to achieve the legitimate objectives of punishing him and that the mandatory minimum sentence is necessary as a general deterrent against the crime of people smuggling and to ensure that courts consistently apply penalties commensurate with the seriousness of the crime. The Committee also notes the State party's statement that the aggravated offence of people smuggling for which the author was found guilty involves serious risks to the lives of asylum seekers and that the minimum sentence is commensurate with the seriousness of the crime. The author has argued, in turn, that the five-year sentence imposed on him with a three-year non-parole period was manifestly unreasonable, disproportionate and unjust in the light of his circumstances. The Committee recalls that article 9 expressly recognizes that individuals may be detained on criminal charges, that the Covenant is consistent with a variety of criminal sentencing schemes, and that convicted prisoners are entitled to have the duration of their sentences administered in accordance with domestic law.<sup>20</sup> The Committee also recalls that the imposition of a draconian penalty of imprisonment for minor offences without adequate explanation and without independent procedural safeguards is arbitrary.<sup>21</sup> In the present case, the Committee notes that the author was tried and found guilty for the aggravated offence of people smuggling by the Supreme Court of Queensland. He was convicted and sentenced to the mandatory minimum penalty for this offence, which is five years' imprisonment (three years non-parole). The statutory maximum penalty is 20 years imprisonment. The Committee further takes note of the State party's uncontested submission that the author's pre-conviction detention was taken into account in sentencing and that on 8 March 2013, the author was released from prison after the expiration of the three-year non-parole period of his sentence. In those circumstances and considering that the author's conviction was the result of a proper legal process in which he was legally represented, the Committee is not in a position to conclude that the length of his criminal detention was arbitrary and therefore concludes that it does not reveal a violation of article 9 (1) of the Covenant.

8. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose a violation by the State party of article 9 (1), (3) and (4) of the Covenant.

9. In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, inter alia, to provide the author with adequate compensation. The State party is also under an obligation to take steps to prevent similar violations in the future.

10. Bearing in mind that, by becoming a 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 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

<sup>20</sup> See the general comment No. 35, paras. 14 and 20.

<sup>21</sup> Ibid., para. 14, and communications No. 1189/2003, *Fernando v. Sri Lanka*, Views adopted on 31 March 2005, para. 9.2, and No. 1373/2005, *Dissanayake v. Sri Lanka*, Views adopted on 22 July 2008, para. 8.3.

rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely distributed.



## Annex I

### Opinion jointe (partiellement dissidente) des membres du Comité Olivier de Frouville, Victor Rodriguez-Rescia et Fabian Omar Salvioli

1. Nous sommes en désaccord avec la conclusion à laquelle arrive le Comité quant à l'absence de violation, dans cette affaire, du paragraphe 1 de l'article 9, du fait de l'application à l'auteur de la peine minimale obligatoire prévue l'article 236B de la loi australienne sur l'immigration de 1958 (§ 7.7. des constatations). Cet article oblige les tribunaux à prononcer une peine d'au moins cinq ans d'emprisonnement, dont une période de trois ans sans possibilité de demander une libération conditionnelle, pour toute personne condamnée pour infraction aggravée de trafic de migrants, prévue par l'article 233B de la même loi, que cette personne ait « organisé » ou bien « facilité » l'entrée ou la venue en Australie d'un groupe de plus de cinq personnes<sup>a</sup>. Comme l'indique la note de bas de page n° 5 des présentes constatations, la juge qui a prononcé la peine minimale de cinq ans d'emprisonnement a clairement exprimé sa préoccupation au regard du fait que l'article 236B *l'obligeait* à ne pas tenir compte des circonstances atténuantes dont l'auteur aurait dû bénéficier. De même, la note n° 17 reprend les termes de la juge de première instance, qui souligne sans ambiguïté le caractère injuste, disproportionné et non nécessaire de la peine que la loi l'a contrainte à prononcer : « Vous avez déjà été emprisonné pendant six cent trente-deux jours, durant lesquels votre famille a été laissée dans la misère. La peine d'emprisonnement n'est donc pas nécessaire pour vous dissuader davantage que cela n'a déjà fait [*sic*]. (...) Je considère que vous avez déjà été puni de manière appropriée. Cela étant, je suis obligée de vous infliger une peine d'emprisonnement supplémentaire pour m'acquitter de l'obligation que m'impose la loi. »

2. Dans ses observations finales relatives aux troisième et quatrième rapports périodiques de l'Australie, le Comité s'était prononcé sur une législation à l'époque applicable en Australie occidentale et dans le Territoire du Nord et prévoyant le même type de peine minimale obligatoire. Il avait constaté que « dans des bien des cas », cette législation aboutissait « à imposer des peines sans rapport avec la gravité des infractions commises », paraissait « incompatible avec les mesures prises par l'Etat partie pour réduire le nombre disproportionné d'autochtones aux prises avec la justice » et posait « de graves questions au regard de divers articles du Pacte ». Il invitait par ailleurs instamment l'Etat partie à « reconsidérer la législation sur l'emprisonnement obligatoire afin de garantir que tous les droits énoncés dans le Pacte soient respectés. »<sup>b</sup>

3. La question de la compatibilité de la peine minimale obligatoire avec le Pacte a également été soulevée sur le plan national. Comme le rappelle l'auteur dans sa communication, le 8 février 2012, la sénateur Sarah Hanson-Young a présenté au parlement australien une proposition de loi visant à l'abolition des peines minimales obligatoires. Une enquête a été lancée par le parlement au sujet des amendements proposés<sup>c</sup> et de nombreuses organisations ou experts indépendants, en réponse, ont appuyé l'abolition des peines minimales obligatoires, citant bien souvent le Pacte à l'appui de leur argumentation, et

<sup>a</sup> V. notamment les notes n°s 4 et 5 des présentes constatations.

<sup>b</sup> A/55/40 (vol. I), §§ 522-523.

<sup>c</sup> [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Completed\\_inquiries/2010-13/migrationamendment2012/index](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/migrationamendment2012/index).

notamment ses articles 9 et 14<sup>d</sup>. En août 2012, un panel d'experts nommé par le gouvernement a recommandé notamment de restituer aux tribunaux le droit de déterminer librement les peines pour les membres d'équipage des navires participant au trafic de migrants. Par la suite, toujours en 2012, le procureur général d'Australie (*Australian Attorney General*) a publié des directives à l'intention du directeur des poursuites (*Commonwealth Director of Public Prosecutions*) pour faire en sorte que les membres de l'équipage de navires participant au trafic de migrants, mais ne portant qu'une responsabilité mineure dans le trafic, soient poursuivis sur la base d'infractions différentes que celles étant de nature à emporter l'infliction d'une peine minimale obligatoire : seuls pouvaient désormais être accusés de l'infraction de « trafic aggravé de migrants » les récidivistes, les capitaines de bateaux ou les personnes ayant participé à des trafics ayant entraîné la mort de personnes. M. Nasir ayant été condamné avant la publication de la directive, il n'a pas pu en bénéficier.

4. Il est normal et même souhaitable que le législateur fixe le quantum des peines applicables en relation avec chaque infraction considérée, de manière à ne pas laisser celles-ci à la libre appréciation de juge, ce qui risquerait d'entraîner une violation du principe de légalité des peines et des discriminations entre les justiciables. Généralement, le législateur donnera un éventail de peine et/ou indiquera la peine maximale applicable pour telle infraction. Cependant, de telles prescriptions ne privent pas totalement le juge de sa liberté d'appréciation dans la détermination du montant de la peine, ceci notamment afin de prendre en compte un certain nombre de facteurs, notamment les circonstances personnelles à l'accusé, à savoir les circonstances atténuantes ou encore des garanties d'insertion ou de réinsertion. Ainsi, dans la loi australienne sur la migration de 1958, l'infraction de trafic de migrant (art. 233A) – contrairement à l'infraction de trafic *aggravé* pour laquelle l'auteur a été condamnée (art. 233C), est punissable de 10 années d'emprisonnement, ce qui s'entend d'une peine maximale mais laisse la possibilité au juge de prononcer une peine inférieure. Par la suite, la directive a été révoquée le 4 mars 2014 mais la législation n'a pas été modifiée.

5. Un certain nombre de pays ont toutefois choisi d'instituer des peines minimales obligatoires s'agissant de certaines infractions ou en cas de récidive de la commission d'une infraction donnée. Dans ce cas, le juge se voit prescrire non seulement une peine maximale, mais également une peine en dessous de laquelle il ne peut pas descendre. Une telle technique n'est pas en soi contraire à l'article 9 du Pacte, à condition toutefois qu'elle n'ait pas pour résultat d'obliger le juge à prononcer des peines *manifestement disproportionnées* au regard des faits qui sont reprochés à l'accusé. Cela peut être le cas lorsque la peine est automatiquement attribuée sur la base de la reconnaissance de culpabilité, quelle que soit par ailleurs le degré de responsabilité de l'auteur dans la commission ou la participation à la commission de l'infraction, et lorsque le juge ne peut faire jouer aucune exception lui permettant de prononcer une peine différente de la peine minimale prescrite. Comme l'indique les auteurs dans leurs communications, plusieurs cours suprêmes dans le monde<sup>e</sup> ont été conduites à sanctionner ce type de régime qui conduit de toute évidence à des résultats injustes et dont les effets dissuasifs n'ont par ailleurs jamais été prouvés. Il est

<sup>d</sup> Vingt contributions ont été reçues, plusieurs traitent de la compatibilité de la législation avec le Pacte : [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Completed\\_inquiries/2010-13/migrationamendment2012/submissions](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/migrationamendment2012/submissions).

<sup>e</sup> Dans sa communication, l'auteur cite plusieurs affaires au Canada, aux États-Unis et en Namibie. Pour un aperçu de droit comparé en la matière, v. Dominique Blanc, « Peines plancher : quelques éléments de droit comparé », *AJ Pénal*, 2007, p. 352 ; Sénat (France), Etude de législation comparée n° 165, septembre 2006, *Les peines minimales obligatoires*, [https://www.senat.fr/lc/lc165/lc165\\_mono.html](https://www.senat.fr/lc/lc165/lc165_mono.html).

intéressant également de noter à ce stade que les lois en vigueur en Australie occidentale et dans le Territoire du Nord qui avaient été critiquées notamment par le Comité dans ses observations finales de 2000 ont été abrogées en 2001<sup>f</sup>.

6. Or en l'espèce, la loi sur la base de laquelle l'auteur a été condamné présente des vices semblables. Même si le juge garde la liberté d'appliquer une peine supérieure (jusqu'à 20 ans), il doit au minimum attribuer une peine de cinq ans de prison, dont trois années « incompressibles » (c'est à dire durant lesquelles il est impossible de demander une libération conditionnelle). La peine minimale s'applique quel que soit le degré de responsabilité de l'auteur (en l'occurrence simple cuisinier du navire, un élément de fait qui n'est pas contesté par l'Etat partie). Enfin la seule exception prévue concerne les personnes qui avaient moins de 18 ans au moment de la commission des faits, ce qui constitue un élément objectif et ne permet pas la prise en compte, par exemple, de certaines circonstances atténuantes ou du rôle mineur joué par l'accusé dans la commission de l'infraction.

7. Comme l'avait déclaré le Comité en 2000, une telle loi pose « de graves questions au regard de divers articles du Pacte ». Le Pacte ne contient pas de manière explicite les principes d'individualisation, de proportionnalité et de nécessité des peines pénales<sup>g</sup> mais le Comité a clairement établi que de tels principes étaient inhérents, en matière de privation de liberté, à l'article 9 du Pacte et à l'interdiction générale de toute détention arbitraire<sup>h</sup>. Selon le Comité, « [l']adjectif “arbitraire” n'est pas synonyme de “contraire à la loi” mais doit recevoir une interprétation plus large, intégrant le caractère inapproprié, l'injustice, le manque de prévisibilité et le non-respect des garanties judiciaires, ainsi que les principes du caractère raisonnable, de la nécessité et de la proportionnalité. »<sup>i</sup>

<sup>f</sup> V. l'étude de législation comparée du Sénat (France) citée note n° 5 ci-dessus, p. 30 : après l'abrogation des dispositions en 2001, « [l]e Bureau de prévention de la criminalité du Territoire du Nord a publié en 2003 un rapport sur l'application des peines minimales obligatoires. Il a concluait notamment que ces mesures avaient touché de façon disproportionnée les communautés autochtones, abouti à une modification significative des jugements prononcés à l'encontre des primo délinquants et augmenté la population carcérale, sans pour autant représenter un moyen efficace de dissuasion. »

<sup>g</sup> En France, la jurisprudence constitutionnelle se fonde sur l'article 8 de la Déclaration des droits de l'Homme et du Citoyen du 26 août 1789 (qui fait partie du « bloc de constitutionnalité ») : « La Loi ne doit établir que des peines strictement et évidemment nécessaires (...) » Sur cette base, le Conseil constitutionnel exerce un contrôle restreint sur la nécessité des peines attachées aux infractions : il considère que la fixation des peines relève avant tout du pouvoir d'appréciation du législateur, mais se réserve toutefois le droit de s'assurer de l'absence de disproportion manifeste entre l'infraction et la peine encourue. V. notamment la Décision n° 2007-554 DC du 9 août 2007 relative à la *Loi renforçant la lutte contre la récidive des majeurs et des mineurs*, considérant n° 8. V. également la Décision n° 2000-433 DC du 27 juillet 2000, *Loi modifiant la loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication*, cons. 51 à 52, où le Conseil déclare contraire à l'article 8 de la Déclaration des droits de l'Homme et du Citoyen la sanction tenant à l'insertion *automatique* d'un communiqué dans les programmes, en cas de manquement à ses obligations par un éditeur de services de radiodiffusion sonore ou de télévision : « qu'une telle automaticité pourrait conduire, dans certaines hypothèses, à infliger une sanction non proportionnée aux faits reprochés ; qu'en conséquence, en interdisant au Conseil supérieur de l'audiovisuel d'adapter, en tenant compte des circonstances propres à l'espèce, la répression à la gravité du manquement reproché, le législateur a méconnu le principe de la nécessité des peines énoncé par l'article 8 de la Déclaration des droits de l'homme et du citoyen de 1789 ».

<sup>h</sup> Dans les constatations rendues la présente affaire, le Comité cite en note deux précédents très clairs à cet égard : *Fernando c. Sri Lanka*, comm. n° 1189/2003, 31 mars 2005, § 9.2 et *Dissanayake c. Sri Lanka*, comm. 1373/2005, 3 mars 2005, § 8.3.

<sup>i</sup> Observation générale n° 35 sur l'article 9 du Pacte (Liberté et sécurité de la personne), § 12, doc. CCPR/C/GC/35.

8. Sous cet angle, on peut dire que le fait pour un juge de prononcer une peine d'emprisonnement manifestement disproportionnée par rapport aux faits qui sont reprochés à l'accusé conduit à soumettre celui-ci à une détention arbitraire, à tout le moins pour toute la période qui excède la période d'emprisonnement que le juge aurait prononcée s'il n'avait pas été contraint de prononcer une peine minimale. En l'espèce, nous ne croyons pas, comme le Comité, qu'une telle loi soulève des questions au regard des paragraphes 1 et 5 de l'article 14 du Pacte. A cet égard, je me rallie au raisonnement du Comité s'agissant du paragraphe 1 de l'article 14 du Pacte au paragraphe 6.6 de ses constatations. Le Comité aurait cependant dû également répondre aux arguments de l'auteur concernant le paragraphe 5 du même article : à cet égard, le droit de toute personne de faire appel de sa condamnation n'est pas atteint dans sa substance, à tout le moins si le juge d'appel est en mesure, dans ces circonstances, de modifier la qualification des faits et par conséquent de faire échapper l'accusé à la peine minimale obligatoire. Cette question des pouvoirs du juge d'appel n'a pas été clairement abordée par les parties et en tout état de cause le grief semblait insuffisamment étayé par l'auteur. Par ailleurs, le principe d'une peine obligatoire, lorsque celle-ci comporte une part incompressible, est également susceptible de soulever des questions au regard du paragraphe 3 de l'article 10<sup>i</sup>. Les auteurs n'ont pas soulevé ce grief, probablement en raison du caractère relativement modéré de la peine en l'espèce, mais c'est un problème qu'il faut garder à l'esprit.

9. La violation du Pacte, en l'espèce, n'est pas directement le fait du juge, mais trouve son origine dans la législation elle-même qui est en soi contraire à l'article 9§1 du Pacte. Outre la libération de l'auteur et l'octroi d'une pleine réparation en vertu de l'article 9§5, le paragraphe 2 de l'article 2 fait obligation à l'Etat partie de modifier sa législation nationale afin de la rendre conforme aux exigences du Pacte<sup>k</sup>. Le fait que des « directives » soient émises par le procureur général n'est pas une mesure suffisante pour mettre fin à la violation, tant que la législation reste elle-même en vigueur.

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<sup>j</sup> V. Observation générale n° 21 : Article 10 (Droit des personnes privées de liberté d'être traitées avec humanité) (1992), § 10 : « Aucun système pénitentiaire ne saurait être axé uniquement sur le châtement ; il devrait essentiellement viser le redressement et la réadaptation sociale du prisonnier. »

<sup>k</sup> V. les constatations récentes du Comité dans l'affaire *Leonid Sudalenko c. Belarus*, comm. n° 2016/2010, § 10.

## Annex II

### Individual opinion of Committee member Sarah Cleveland (partly dissenting)

1. I concur in the Committee's findings of violations of article 9 relating to the author's mandatory immigration detention. Like my colleagues Mr. de Frouville and those joining him, I disagree with the Committee's conclusion with respect to the mandatory minimum sentence that was imposed on the author, and write separately to elaborate on why application of section 232A of the Australian Migration Act of 1958<sup>a</sup> violated article 9(1) and raises potential concerns under article 14(1) of the Covenant.

2. The Committee has long recognized that mandatory death sentences impose a sentence "based solely upon the category of crime for which the offender is found guilty, without regard to the defendant's personal circumstances or the circumstances of the particular offense"<sup>b</sup>. Such sentences thus can deprive a court of the ability to adequately take into account the culpability of a particular defendant in imposing sentence<sup>c</sup>. For these reasons, the Committee consistently has found mandatory death sentences to be arbitrary under article 6(1) of the Covenant<sup>d</sup>.

3. While the death penalty unquestionably raises special concerns, concerns regarding inappropriate constraint on judicial discretion, the inability to take into account individual circumstances, and the resulting risk of disproportionate sentences, potentially can arise with any mandatory sentencing scheme and thus could give rise to violations of the Covenant<sup>e</sup>. For example, a mandatory sentence that is imposed which fails to account for individual circumstances and is disproportionate given the facts of the particular case could be arbitrary or unlawful, contrary to article 9(1).<sup>f</sup> It potentially could also deny the defendant the right to a fair trial before an "independent and impartial tribunal" under article 14(1). The Committee accordingly repeatedly has expressed concerns regarding

<sup>a</sup> Section 232A(1), which defined the offense under which the author was charged, has been revised slightly as current section 233C of the Migration Act. Then-section 233C, under which the author was sentenced, has been reenacted as current section 236B.

<sup>b</sup> Communication No. 806/1998, *Thompson v. St. Vincent & the Grenadines* (Views adopted 18 October 2000), para. 8.2.

<sup>c</sup> Communication No. 845/1998, *Kennedy v. Trinidad and Tobago* (Views adopted 26 March 2002) (separate opinion of Mr. Kretzmer and Mr. Yalden) (mandatory death sentence for felony murder "denied the court the opportunity of considering whether the specific crime of the author was a most serious crime").

<sup>d</sup> *Kennedy, supra*, para. 7.3; Communication No. 1520/2006, *Mwamba v. Zambia* (Views adopted 10 March 2010), para. 6.3; cf. *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, IACHR (21 June 2002), paras. 103-109.

<sup>e</sup> See, e.g., *Thompson, supra* (separate opinion of Mr. Kretzmer, et al.), para. 8.

<sup>f</sup> Cf. Communication No. 1189/2003, *Fernando v. Sri Lanka* (Views adopted 31 March 2005), para. 9.2 (draconian penalty for contempt of court was arbitrary in violation of article 9(1)).

certain mandatory minimum sentences outside of the death penalty context,<sup>g</sup> including specifically with respect to Australia.<sup>h</sup>

4. There is no question in this case that the author was charged and convicted with the “aggravated offense of people smuggling” as defined under Australian law. Nor is there any question that people smuggling involves serious risks to the lives of asylum seekers, as the State party contends. The question in this case instead is whether the author’s particular conduct rendered him sufficiently culpable to make the five-year mandatory minimum sentence imposed on him manifestly disproportionate to the severity of his crime. More generally, the case raises the question whether the “aggravated offense of people smuggling” sweeps too broadly and thus captures a spectrum of conduct at the lower end that renders the five-year mandatory minimum arbitrary.

5. The author was convicted under then-section 232A(1) of the Australian Migration Act for the crime of “Organising bringing groups (5+) of non-citizens into Australia”. That statute and its successor does not apply only to “organisers”, however. Instead, aggravated people smuggling is committed by any person “who organises *or facilitates*” bringing to Australia five or more persons, reckless as to whether they are lawfully entitled to come to Australia. Because the presence of five or more persons is considered an “aggravating” element, the mandatory minimum sentence of five years (three years non-parole) under then-section 233C applies. In other words, the statute does not require the defendant to be an organizer, or in any way to have planned to bring aliens unlawfully into Australia.

6. Like the vast majority of people who have been prosecuted under this regime<sup>i</sup>, the author was a crew member, not an organizer. As the trial court found, he was a subsistence fisherman in Indonesia and his family’s sole breadwinner. He accepted a job to work as a cook on a boat and steered the boat at night on one occasion. He was found guilty of facilitating the bringing to Australia of a group of five or more people, reckless as to whether they had a lawful right to come to Australia.

7. The trial judge found that the author was not in charge of the boat and was performing relatively menial roles on the boat, and that the 632 days he had already served in prison was adequate to deter future violations by him and otherwise was reasonable and proportionate given the author’s case. (Footnote 17) Nevertheless, under section 233C of the Migration Act, she was required to impose a sentence that was nearly 300 per cent the length of the sentence she considered appropriate. The fact that the captain of the ship was

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<sup>g</sup> Concluding observations on the fourth periodic report of the United States of America, CCPR/C/USA/CO/4 (2014), para. 6 (“The State party should ... reform mandatory minimum sentencing statutes.”); Concluding observations of the Human Rights Committee on Grenada, CCPR/C/GRD/CO/1 (2009), para. 9.

<sup>h</sup> Concluding observations of the Human Rights Committee, Australia 24/07/2000, A/55/40, paras. 498-528 (expressing concern regarding “[l]egislation regarding mandatory imprisonment ... which leads in many cases to imposition of punishments that are disproportionate to the seriousness of the crimes committed and urging the state “to reassess the legislation regarding mandatory imprisonment so as to ensure that all Covenant rights are respected”). Cf. Communication No. 1968/2010, *Blessington and Elliot v. Australia* (Views adopted 22 Oct. 2014), para. 7.12 (mandatory sentence of life without parole for juvenile offenders violates article 7 in conjunction with articles 10(3) and 24).

<sup>i</sup> According to a submission by the Attorney General’s Department, of 228 persons convicted for this offense as of February 2012, only five were organizers and the remainder were crew (para. 5.8). This pattern continued: only 3.3 percent of all persons convicted for people smuggling in Australia between 1 June 2010 and 20 October 2014 were “organizers”. Answers to Questions on Notice to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Budget Estimates 2014-15 (Attorney-General’s Department), 20 Oct. 2014, Question No. 103 “People Smuggling Offences”, at 1.

also sentenced to the five-year mandatory minimum confirms that the author's sentence was manifestly disproportionate and that the conduct captured by the mandatory minimum sweeps too broadly.

8. The trial judge who sentenced the author made clear her view that the mandatory minimum sentence was disproportionate to his role and deprived her of the discretion to adequately take into account the author's level of contribution and his particular circumstances, including the personal circumstances that she otherwise would have been required to consider under Australian law. (Footnote 5) Australian law also barred the appellate court from evaluating the propriety of the mandatory minimum sentence in light of these issues.

9. The State party contends that mandatory minimum penalties apply to a very limited number of serious, aggravated people smuggling offences in the Migration Act, and that that the mandatory minimums are necessary to appropriately punish perpetrators and deter future criminal behaviour (para. 4.10). But the State's submissions provided no evidence that the law actually serves these purposes as applied to this author in particular or to ordinary boat crew in general, as the trial court also noted. And there is voluminous evidence to the contrary.

10. Indeed, all three branches of the Australian government have recognized that the goals of proportionality and deterrence are not served by application of the mandatory minimum sentence to menial boat crew. The trial court herself expressed scepticism that the sentence would have any general deterrent effect, stating "it is clear that those people who employ men like you will just move to another village because they regard you as completely expendable and people in small villages without newspapers or the means of modern communication are most unlikely to hear of a sentence imposed in an Australian court." (Footnote 18)<sup>j</sup> As the author noted in his communication, numerous other members of the judiciary have criticized the mandatory minimum as requiring them to impose excessive sentences in such cases.<sup>k</sup>

11. In 2012 the Australian Parliament considered a bill to repeal the mandatory minimum sentences for aggravated people smuggling. After receiving extensive evidence regarding the excessive and disproportionate nature of these sentences as applied to boat crew,<sup>l</sup> the Senate Committee recommended that the State party review the operation of the

<sup>j</sup> Craig & Schloenhardt, *Prosecutions and Punishment of People Smugglers in Australia* 46 (2011-2014) ("Questions about the effectiveness of general deterrence in sentencing and, in particular, its impact on would-be migrant smugglers are longstanding and have been raised by sentencing judges in a great number of people smuggling trials in the 2011–2014 period. The available information provides no proof that awareness of the criminality of migrant smuggling and about the penalties offenders may face in Australia affects in any way those whom the sentence seeks to deter." See also Schloenhardt and Craig, *Prosecutions of People Smugglers in Australia 2011-14*, 38 Sydney L. Rev. 49 (2016).

<sup>k</sup> The author's communication pointed to numerous such decisions during the period from 2009 to 2013. The Federal prosecutor's submission to the Senate Committee also noted ten cases since January 2011 in which sentencing judges criticized the mandatory minimum requirements. Commonwealth Director of Public Prosecutions, Response to Questions on Notice (23 March 2012), cited in Senate Report, para. 2.28. See also Judicial Conference of Australia, Submission No. 11 to the Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012*, 3 (significant number of Australian judges have found the sentences to be "manifestly unjust").

<sup>l</sup> Submissions to the Senate observed that the "aggravating" factor of five or more people renders the crime of standard people smuggling under current section 233A redundant, since, as the government

mandatory minimum penalties and in particular, to consider distinguishing between organizers and boat crew in sentencing and giving judges discretion to impose lesser sentences when warranted, to ensure compliance with Australia's international human rights obligations.<sup>m</sup>

12. The government publicly stated that it supported this recommendation and took steps to implement it.<sup>n</sup> The fact that those steps were later revoked by a subsequent government does not detract from the extensive record on which the Senate Committee and the previous government relied establishing that that boat crew members "often have limited culpability and mitigating circumstances, which make the application of the mandatory minimum sentences inappropriate and unjust."<sup>o</sup>

13. The facts of this case, and the supporting record regarding section 232A and its successor make clear that the threshold of conduct for "aggravated" people smuggling subject to the mandatory minimum is inappropriately low, and that the broad range of conduct that the statute encompasses, including menial facilitation by first time boat crew, means the statute will inevitably require imposition of sentences in some cases that are so manifestly disproportionate, unreasonable and unnecessary as to be arbitrary under Article 9(1).<sup>p</sup>

14. Legislatures have a vital role in setting maximum sentences and prescribing sentencing principles, including the power to set mandatory minimum sentences, and judges ordinarily must sentence accordingly. However it is ultimately the responsibility of the judiciary, and not the role of the legislative or executive branches of government, to pronounce individual sentences on individual offenders, taking the particular facts and personal circumstances into account. Mandatory minimum sentences may restrict judicial discretion when giving effect to this quintessentially judicial task, and when they do so in a manner that requires the court to impose an excessively disproportionate punishment, such as a manifestly unjust sentence, they may give rise to an unfair trial. For the reasons stated above with respect to article 9, the sentencing regime at issue thus may also implicate a defendant's right to a fair trial under article 14(1).<sup>q</sup>

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indicated, almost all boats intercepted for people smuggling have carried five or more passengers. Senate Report, *supra*, para. 2.9.

<sup>m</sup> Senate Report, *supra*, Recommendation 1, para. 2.68; see also *id.* paras. 2.63-2.65.

<sup>n</sup> Government Response to the Senate Legal and Constitutional Affairs Legislation Committee Report, *Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012* (Nov. 2012), at 3.

<sup>o</sup> Senate Report, *supra*, at 2.61.

<sup>p</sup> General Comment No. 35, para. 12. Cf. *R v. Smith*, 1 R.S.C. [1987], at 1087 (invalidating seven-year mandatory minimum sentence for drug crimes as cruel and unusual punishment under the Canadian Charter, on grounds that the broad scope of the conduct encompassed by the law made it "inevitable that, in some cases, a verdict of guilt will lead to the imposition of a term of imprisonment which will be grossly disproportionate").

<sup>q</sup> The author also claimed a violation of articles 14(1) and 14(5). It is important to underscore that in finding those claims inadmissible, the Committee noted that "the binding nature of statutory law does not *per se* amount to a violation of judicial independence" (emphasis added), and simply concluded that the author had not adequately substantiated such a violation here.



## **Annex III**

### **Individual opinion of Committee member Sir Nigel Rodley (concurring)**

I voted with the majority against finding the mandatory sentence incompatible with the Covenant with much uncertainty. The sentence was clearly unfair in the case of the author, but respect is due to a State party's aim of discouraging all types of complicity in people smuggling. Under the circumstances of the present case, the sentence cried out for the application of executive clemency or mercy, the non-resort to which did the State party no credit. Having read the persuasive dissents of Mr. de Frouville, Mr. Salvioli and Mr. Rodriguez-Rescia and of Ms. Cleveland, I am not sure that in a similar case, absent the humane exercise of clemency, I would vote the same way.

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