

**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. 2118/2011<sup>\*</sup>,<sup>\*\*</sup>**

<i>Submitted by:</i>	Mr. Rakesh Saxena (represented by counsel, Mr. Jeremy McBride)
<i>Alleged victims:</i>	The author
<i>State party:</i>	Canada
<i>Date of communication:</i>	8 October 2011 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 92 and rule 97 of the Committee's rules of procedure, transmitted to the State party on 12 December 2011 (not issued in a document form)
<i>Date of adoption of Views:</i>	3 November 2016
<i>Subject matter:</i>	Extradition from Canada to Thailand
<i>Procedural issue:</i>	Incompatibility of claims with the Covenant, level of substantiation of claims
<i>Substantive issues:</i>	Prosecution for criminal offences in Thailand not listed in the original extradition request and surrender order.
<i>Articles of the Covenant:</i>	9 and 13
<i>Articles of the Optional Protocol:</i>	2 and 3

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<sup>\*</sup> Adopted by the Committee at its 118th session (17 October - 4 November 2016).

<sup>\*\*</sup> The following members of the Committee participated in the examination of the present communication: Yadh Ben Achour, Ladhari Bouzid, Sarah Cleveland, Olivier de Frouville, Yuji Iwasawa, Duncan Muhumuza Laki, Photini Pazartzis, Mauro Politi, Sir Nigel Rodley, Fabián Omar Salvioli, Dheerujlall Seetulsingh, Yuval Shany and Konstantine Vardzelashvili.

1.1 The author of the communication is Mr. Rakesh Saxena, a national of India, born on 13 July 1952. He was extradited from Canada to Thailand in 2009 to face criminal charges for conspiracy to embezzle money from the Bangkok Bank of Commerce (BBC). He alleges that after he was extradited to Thailand, Canada consented to his prosecution for two other offences against him, therefore allowing his prosecution for charges not listed in the original extradition request and surrender order, in breach of the *specialty rule*.<sup>1</sup> The author claims that Canada's consent to waive the specialty rule violated his rights under articles 9 and 13 of the International Covenant on Civil and Political Rights (the Covenant). The Optional Protocol entered into force for Canada on 19 May 1976. The author is represented by counsel, Mr. Jeremy McBride.

1.2 The author requested that the Committee issue interim measures to request that Canada refrain from acceding to any further requests of Thailand to consent to waive the specialty rule in respect of offences not covered by the amended surrender order, while his communication is being examined by the Committee. Pursuant to rule 92 of its rules of procedure, the Committee, acting through its Special Rapporteur on New Communications and Interim Measures, decided not to issue a request for interim measures. The author was extradited to Thailand on 29 October 2009.

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

2.1 The author submits that he worked in Thailand between 1985 and 1995 as a consultant for various financial institutions, including the BBC, where he served as an advisor to its president for one year. In 1996, his consultancy ended and he moved to Canada.

2.2 Subsequently, politically motivated loans made by the BBC were disclosed in the course of a parliamentary debate and the BBC management was taken over by the Bank of Thailand. On 4 June 1996, the Bank of Thailand submitted a brief to the Attorney General of Thailand, alleging that the President of the BBC and others, including the author, were involved in a conspiracy to embezzle money from the BBC.

2.3 On 5 June 1996, the Economic Crime Investigation Division (ECID) of the Thai police issued an arrest warrant for the author accusing him of "conspiring with accomplice to embezzle properties". The Thai police requested the arrest of the author by the Canadian authorities pending the presentation of a formal diplomatic request for extradition, in accordance with the 1911 Treaty on Extradition of Fugitive Criminals between the United Kingdom and Siam.

2.4 On 7 July 1996, the author was arrested pursuant to a warrant of apprehension issued by an extradition judge under section 10 of the Canadian Extradition Act "for conspiracy to embezzle money" from the BBC. Subsequently, the ECID issued a further warrant on 25 July 1996 in respect of the author for offences under the Securities and Exchange Act. On 30 August 1996, Thailand requested the extradition of the author based on charges under the Criminal Code and the Securities and Exchange Act. The charges concerned a loan made to the City Trade Corporation in 1995. The extradition request and the evidence submitted by Thailand were reviewed by the Supreme Court of British Columbia, which concluded on 15 September 2000 that there was evidence of "a trier of fact, properly instructed and acting reasonably, [which] could convict the author of offences alleged

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<sup>1</sup> The *specialty rule* means that a person extradited should only be tried, in the requesting state, for the offences specified in the extradition order, unless such offences have been committed since the extradition order was issued. This rule was applicable to the extradition proceedings in the author's case between Canada and Thailand by virtue of article 6 of the 1911 Treaty on Extradition of Fugitive Criminals between the United Kingdom and Siam and section 33 of the Canadian Extradition Act.

against him". The Court issued an order of committal to await a decision on the extradition request.

2.5 On 18 November 2003, a surrender order for the author was issued, and amended on 1 December 2005. The amended surrender order did not include the Criminal Code offences allegedly committed, since the relevant statutory period had expired. It therefore only covered the following matters: "causing the Managing Director [...] to commit the offences under Sections 307, 308, 309, 311, 313 and 315 of the [Securities and Exchange Act] by ordering, advising, threatening or otherwise". The penalties that could be imposed for these offences were 5 to 10 years of imprisonment and considerable fines.

2.6 Between 2006 and 2009, the author submitted a number of unsuccessful challenges to the surrender order. On 15 May 2009, the Court of Appeal dismissed his application for judicial review of the amended surrender order. On 29 October 2009, the Supreme Court of Canada dismissed his application for leave to appeal, and the author was immediately surrendered to the Thai authorities, who arranged for his flight to Thailand. The author, who suffered a stroke in March 2009 and has since been bound to a wheelchair, has been detained at the Bangkok Remand prison since his return to Thailand.

2.7 The author has contested his extradition, *inter alia*, on the ground that, once returned there, Thailand would charge him with offences not reflected in the extradition order in violation of the *specialty rule*. As evidence, he submitted a letter from Thailand to Switzerland, requesting assistance in respect of offences he had allegedly committed and were different from the ones cited in the extradition request, and a report in the newspaper Bangkok Post, which stated that the Criminal Litigation Division was gathering evidence and was planning to indict him for additional criminal offences. He also submitted copy of a case similar to his, where the defendant was charged after extradition with an offence not included in the extradition request. In that case, the English and Thai versions of the extradition treaty were different: the former included a prohibition for trial for other offences, while the latter limited the prohibition to serving sentences for such offences.<sup>2</sup> However, Canada repeatedly dismissed the author's submissions in this regard. On 18 November 2003 and 19 December 2008, the Minister of Justice of Canada stated that there was no evidence that Thailand would not respect its treaty obligations to Canada, and that the Court of Appeal relied on these opinions when confirming the surrender order. On 29 October 2009, the Senior Counsel of the Ministry of Justice assured the author that he could only be prosecuted for the offences for which the surrender had been ordered, and that she had received oral assurances from the Thai authorities in that sense.

2.8 Following the author's return to Thailand, the Thai Attorney General's office sent a correspondence to the Canadian Ministry of Justice regarding other offences unrelated to those for which he had been extradited. Not all this correspondence was disclosed to the author's counsel, but it appears that the Thai authorities had requested a waiver of specialty in respect of 16 cases involving the author. On 29 July 2010, the Minister of Justice of Canada admitted the request for waiver of specialty for the detention, prosecution and punishment of the author with respect to two of the cases in which he was charged.<sup>3</sup> However, the author was charged with several other charges that were not included in the waiver. The Court in Thailand asked for confirmation that a waiver of specialty in respect of these cases had also been obtained. However, the prosecution has claimed that the discussion with the authorities of the State party is confidential, not attending to the request

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<sup>2</sup> Copies of documents confirming the above allegations have been provided by the author.

<sup>3</sup> The Consent to waiver of Specialty covered charges under sections 83, 352 and 354 of the Criminal Code and new charges under sections 307, 308, 309, 311, 313 and 314 of the Securities and Exchange Act.

by the Court. In Thailand, the author's applications for bail were repeatedly refused. The author contends that he has exhausted all available and effective domestic remedies.

### **The complaint**

3.1 The author submits that, in the circumstances of his case, the consent to the waiver of specialty by Canada has resulted in a violation of his rights under articles 9(1) and 13 of the Covenant.

3.2 The author submits that, for an extradition to be in compliance with article 13 of the Covenant, it must be in accordance with the law and the person to be extradited must have the opportunity to contest such action and to have the relevant decision reviewed. He submits that in his case, the amended surrender order and the consent to the waiver of specialty must be taken together; and that by granting the waiver, the Canadian courts breached the specialty rule. He therefore considers that his extradition did not comply with the law of the State party.

3.3 The author further submits that, even if it were considered that his surrender had formal legal basis, the decision to extradite him should be viewed as arbitrary. In this connection, he submits that the repeated assurances of the State party that he would not be prosecuted were rendered useless because of the State party's agreement to waive the rule of specialty. The author considers that by repeatedly assuring the author that the specialty rule would not be breached while it was willing to authorize the surrender, the State party deprived him of the procedural guarantees required under article 13 for any extradition decision.<sup>4</sup> The author claims that the offences for which he has become liable for prosecution as a result of the waiver were not subjected to judicial scrutiny, and that he did not have the opportunity to challenge them before any Canadian court.

3.4 The author further submits that the State party's responsibility under the Covenant can be engaged when its decisions result in the infringement of a person's rights and freedoms by another state, especially in cases of extradition.<sup>5</sup> He maintains that his surrender and the subsequent waiver of specialty have exposed him to a much longer period of imprisonment than if the State party's rules governing extradition had been observed, and that such consequence was foreseeable. In this regard, the author submits that the rules requiring that sentences be served concurrently do not apply where the convictions concern unrelated sets of facts, as was the case of the offences covered by the waiver. The author further submits that the institution of new charges following his extradition made it impossible for him to get bail in respect of the charges for which he was extradited. He therefore considers that the State party has exposed him to the clear risk of extended imprisonment and that any sentence of imprisonment imposed on him for the offences covered by the consent to waive the specialty rule will result from a decision taken arbitrarily, in violation of the procedural guarantees required by the Covenant.

3.5 For the reasons set above, the author submits that the State party has violated his rights under articles 9 and 13 of Covenant, through extraditing him to Thailand for certain offences and then authorizing his prosecution for other offences in breach of the specialty rule.

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

4.1 On 11 June 2012, the State party submitted its observations on the admissibility and merits of the communication.

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<sup>4</sup> The author submits that the exception to the requirements of article 13 are only envisaged in cases of threats to national security and maintains that in his case, there was no such element.

<sup>5</sup> The author refers to the Communication no. 539/1993, *Cox v. Canada*, Views adopted on 31 October 1994, para. 16.1.

4.2 The State party recalls that the rule of specialty is an obligation between extradition partners that may lawfully be waived by the state from which the person was extradited. It was not a breach of the rule of specialty for Thailand to request that Canada waive the rule, nor for Canada to consent to the waiver.

4.3 As regards the author's allegations concerning article 13 of the Covenant, the State party submits that the author has conceded that his extradition proceedings in Canada complied with the requirements of the Covenant. His complaint only refers to the additional criminal charges to which he is now subjected in Thailand, while they were not previously scrutinized by the Canadian courts. The State party submits that article 13 is limited to expulsion proceedings and does not apply to the consent to the waiver of specialty which occurred only after the author's extradition to Thailand. In the alternative, the State party considers that the author has not substantiated his allegation that the scrutiny of his additional criminal charges in Thailand by a Canadian court is a right recognized under the Covenant.

4.4 As regards the author's allegations under article 9(1) of the Covenant, the State party considers that the author fails to provide any substantiation: he does not allege that his trial in Thailand is in any way unfair, and his detention can therefore not be considered as arbitrary.<sup>6</sup> The author's sole complaint under article 9 is that Canada's consent to waiver of specialty has exposed him to a much longer period of detention in case of being convicted for the additional charges against him in Thailand. The State party considers that at the time it consented to the waiver of specialty, the author was already in Thailand and no longer subject to Canada's jurisdiction or within its effective control. In addition, a fair trial and potential imprisonment as a result of a conviction on a number of criminal charges is not the type of "irreparable harm" envisioned by the Committee when attributing responsibility to one State for potential human rights violations in another state. Moreover, the State party considers that Canada's consent to the prosecution of the author for new charges, in circumstances where his right to a fair trial is guaranteed and he has benefited of diplomatic assurances that he will be treated well, does not amount to a violation of article 9(1) of the Covenant. In this regard, the State party submits that article 9(1) does not apply to consent to waiver of specialty, even when it may result in additional criminal charges and conviction in another State. Being exposed to additional criminal charges, a fair trial and a potentially longer period of imprisonment upon conviction as a result of consent to waiver of specialty does not amount to an arbitrary detention within the meaning of article 9(1) and does not constitute an arbitrary expulsion under article 13 of the Covenant. Should the Committee consider the communication to be admissible, the State party submits that the author's allegations are without merit.

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

5.1 In his comments dated 9 August 2012, the author submits that he was convicted on the charges for which he was originally surrendered by the State party to Thailand.<sup>7</sup> He clarifies that the consent to waiver of specialty by the State party of 28 June 2012

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<sup>6</sup> The State party refers to a decision by the European Court of Human Rights, *Wooley v. the United Kingdom* (application No. 28019/10, 2012), also concerning an alleged violation of the rule of specialty, in order to argue that any potential longer term of detention that the author may face upon extradition cannot be considered "arbitrary".

<sup>7</sup> The author was convicted by the Southern Bangkok Criminal Court on 8 June 2012 of participating and facilitation in the commission of offences against the property of a "legal person" – the BBC. He was sentenced to 10 years' imprisonment and a fine of Bht. 1,000,000, as well as being ordered to return money in the amount of Bht. 1,132,000,000.

concerned a case different from the two cases referred to in his initial communication.<sup>8</sup> The author *inter alia* submits that Thailand instituted criminal proceedings in the *Somprasong Intercommunication (Somprasong)* and *Zilar International Service Co. Ltd. (Zilar)* cases on 29 March 2011 – before it had received Canada’s consent to waiver of specialty in their respect – in order to avoid the cases becoming time-bared under Thai law, on 3 July 2011 and 7 May 2011 respectively.

5.2 The author submits that the rule of specialty only comes into play in the State party at the executive stage in extradition proceedings, and that the offences for which extradition was granted and in relation to which specialty was waived all arose from the same set of circumstances.

5.3 He also submits that the three reasons given by the State party for suggesting that article 13 does not apply to his case are unfounded. He considers that the violation of article 13 arose from the inextricable link between the amended surrender order adopted by the State party and its subsequent consent to waive the specialty rule, which the State party granted despite its repeated assurances to the author that he would only be tried for the offences for which he was surrendered. The author also claims that Canada’s consent to waive the rule of specialty in the *Somprasong* case was given without the State party seeking or receiving any statement from him concerning the new offences, in violation of article 14 of the United Nations Model Treaty on Extradition.

5.4 The author further asserts that the State party’s submission that its responsibility under article 9 is not engaged by its consent to waive the specialty rule is unfounded because such consent directly exposed him to the risk of extended imprisonment, despite the State party’s assurances that the rule of specialty would not be breached.

5.5 With respect to the State party’s submission that his allegations under articles 9 and 13 of the Covenant are unsubstantiated, the author submits that the waiver of specialty nullified the procedural protection required by article 13. He argues that any sentence of imprisonment for the offences concerned results from an arbitrary decision, taken in violation of procedural guarantees.

5.6 The author further notes that the State party does not explain why it considers that the communication should be held without merit.

5.7 In light of the above, the author requests the Committee to declare the communication admissible, and to find a violation of articles 9(1) and 13 of the Covenant; to declare that the State party is under an obligation to provide him with an effective remedy, including compensation in accordance with article 2(3)(a) of the Covenant; and to ensure that he is not subjected to prosecution in Thailand on matters not covered by the amended surrender order.

5.8 On 12 February 2013, the author informed that the State party had refused to grant waiver of specialty in the *Zilar International Service Co. Ltd. Case (Zilar case)*, which was under consideration at the time of submission of his initial comments. Notwithstanding this refusal, the Southern Bangkok Criminal Court on 4 December 2012 merged the *Zilar* case with the *Somprasong* case, in which waiver of specialty had been granted. Further proceedings in the merged cases were expected in April 2013.

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<sup>8</sup> The waiver of specialty concerned the *Somprasong Intercommunication* case (the *Somprasong* case). The consent to waiver of specialty was granted without the State party ever seeking or receiving from the author any statement regarding the offences in respect of which waiver of specialty had been sought by Thailand. Such a statement – essential to protect the interests of an accused person – is required by article 14 of the United Nations Model Treaty on Extradition, which has established the standard for international practice in respect of any consent to waiver of specialty.

### State party's additional observations

6.1 In its additional observations of 6 May 2013, the State party responds to the author's new allegations. The State party notes the author's allegations that on 28 June 2012 Canada consented to the waiver of specialty in the *Somprasong* case, and was still considering whether to grant waiver of specialty in the *Zilar* case. It further noted the author's claim that Thailand instituted criminal proceedings in both cases on 29 March 2011 – before it had received Canada's consent – in order to avoid the cases becoming time-bared under Thai law. The State party asserts that pursuant to the extradition treaty between Canada and Thailand, the specialty provision only prohibits detention or trial, and that the laying of criminal charges prior to consent to waiver of specialty does not constitute a violation of the specialty rule.

6.2 The State party considers that as long as the author was not being detained or tried in connection with the offences for which the waiver of specialty was sought, the specialty rule was not violated pursuant to the Treaty between Great Britain and Siam Respecting the Extradition of Fugitive Criminals,<sup>9</sup> since nothing prohibits the laying of charges. The State party observes that many states have limitation periods to lay criminal charges, and that prosecution may occur outside the limitation period if, as in the present case, consent to waive the rule of specialty is obtained.

6.3 With respect to the author's complaint related to the *Zilar* case, the State party informs that upon learning that Canada had refused to waive the rule of specialty in the *Zilar* case, the Attorney General of Thailand withdrew the prosecution, which resulted in the dismissal of the case by the Bangkok Criminal Court on 1 April 2013.

6.4 The State party further submits that the UN Model Treaty has no legal status in Canada, or internationally, and that article 14 of the Model Treaty does not impose an obligation on the requested state to obtain a statement from the accused. This provision would rather require Thailand, as the requesting state, to provide any statement made by the author. The State party also submits that the relevant instrument to the author's extradition is the 1911 Extradition Treaty between the Great Britain and Siam.

6.5 Although the author presents his allegations in a number of different ways, the main claim before the Committee is that during his extradition proceedings in Canada, the State party had repeatedly stated to him that specialty would not be breached in his case, and that the State party has acted contrary to those statements by subsequently consenting to waive the specialty rule. The State party emphasizes that specialty may lawfully be waived, and that even if it may have confirmed to the author that specialty would not be breached in his case, it had never said that it would not consent to the waiver of specialty. The State party therefore considers that the author's allegation that the Canadian courts should not have authorized his extradition while they knew that the specialty rule would be breached<sup>10</sup> is irrelevant, as there was no such breach.

<sup>9</sup> Article VI of the *Treaty between Great Britain and Siam Respecting the Extradition of Fugitive Criminals* states: "A person surrendered can in no case be detained or tried in the State to which the surrender has been made, for any other crime or on account of any other matters than those for which the extradition shall have taken place, until he has been restored to or had an opportunity of returning to the State by which he has been surrendered".

<sup>10</sup> In his comments of 9 August 2012, the author claims that the Court of Appeal of British Columbia, in confirming the decision to issue the Surrender Order, rejected the author's submissions to the amended surrender order of 15 May 2009 and stated that there is no doubt concerning the charges on which the applicant is being ordered to be surrendered, nor about the conduct which comprises the activity for which Thailand seeks to prosecute him. It further stated that it was not probable that an extradition partner would fail to honour its obligations under the rule of specialty. This is pre-

6.6 As regards the author's assertion that Canada breached article 9 of the Covenant by exposing him to a foreseeable risk of extended imprisonment in Thailand by consenting to waiver of specialty "notwithstanding its repeated and categorical assurances that there would be no breach of the specialty rule"<sup>11</sup>, the State party reiterates that, as there was no breach of specialty, there could be no breach of article 9. Consequently, the State party reiterates its position that the author's communication is inadmissible for incompatibility with the terms of the Covenant or, in the alternative, for non-substantiation.

6.7 Should the Committee determine that the author's communication is admissible, the State party submits for the same reasons that it is without merit.

#### **Author's further comments**

7.1 On 21 July 2013, the author submitted further comments to the State party's additional observations. While reiterating his arguments, the author adds that his surrender must be considered together with the subsequent consent to waive the specialty rule, which was adopted in violation of the procedural guarantees enshrined in article 13 in cases of expulsion.

7.2 The author submits that the violation of article 9(1) of the Covenant is a consequence of the violation of article 13 since the effect of his surrender, combined with the consent to waive the specialty rule, have exposed him to a much longer period of imprisonment than if he had only been tried for the matter with respect to which the State party had authorised his extradition.

7.3 The author adds that it was foreseeable for the State party that Thailand would not respect the rule of specialty, and that he had raised this issue with the executive, and in the context of various judicial proceedings relating to the decision to surrender him to Thailand. This was not considered by the courts as something likely to occur. The author also argues that he could not have been surrendered on the additional charges without further evidence being adduced.

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eminently a matter primarily to be considered by the Minister as opposed to the Courts. If there existed some obvious indication of a likely breach of this solemn state obligation, a court would not countenance it. In the instant case, the Ministers have concluded that, "there is nothing to suggest such a course of action by the requesting state. A decision by the Minister on this sort of issue is entitled to a high level of deference. There is simply no basis demonstrated for this Court to interfere with the decision of the Minister on this subject and the judge would not accede to the submissions to the contrary advanced in this Court by the applicant". The author claims that this view taken by the Canadian courts is material to the responsibility of Canada under the Covenant for consenting to waiver of specialty despite giving the author assurances that he would not be prosecuted in Thailand for offences additional to those in the amended Surrender Order. The author adds that, while consent to waiver of specialty might normally be an entirely discrete act from an extradition measure, it would be inappropriate in his case to separate these two acts because of the repeated and emphatic assurances by the State party that specialty would not be breached by Thailand. This assumption was of fundamental importance for the courts of the State party in rejecting the author's challenge to his extradition.

<sup>11</sup> *Ibid* - the author submits that the issue in this case is not about the impermissibility of extradition because a risk of additional imprisonment was foreseeable, but about the State party itself having exposed him to a clear risk of extended imprisonment through its consent to waiver of specialty notwithstanding its repeated and categorical assurances that there would be no breach of the specialty rule.



7.4 The author further submits that the *Zilar* case was indeed dismissed on 1 April 2013, but that the withdrawal of the prosecution by the Attorney General of Thailand did not occur “upon learning that Canada had refused consent to waiver of specialty” in this case: it had occurred at least 7 months after that refusal. He adds that the alleged offences in the *Somprasong* case have become time-barred on 12 September 2010, and not on 7 July 2011. The author disputes the assertions of the State party in regard to: (i) the laying of a criminal charge which is allegedly not a violation of the specialty rule; (ii) the allegation that the author was not detained or tried for matters other than those for which he had been extradited; and (iii) the fact that prosecution may occur outside the limitation period if consent to waiver of specialty is obtained. He asserts that by granting consent to the waiver of specialty in the *Somprasong* case outside the limitation period for the alleged offences, the State party’s consent to waive the specialty rule resulted in a breach of specialty by Thailand and in the pursuit of charges that had become time-barred. This was something that the State party had previously refused to do, having amended the surrender order to remove the offences for which the limitation period had expired.

7.5 The author considers that the State party’s conclusion that the laying of the charges was effective to stop the expiry of the limitation period because it amounted to the institution of the trial proceedings, implies that there was a breach of the specialty rule by Thailand when the author was charged in March 2010 with respect to the *Silver Star Investment* and *Special Passing Card 112J* cases. The author adds that he was detained in the context of the *Somprasong* case by a warrant of detention of the Southern Bangkok Criminal Court on 29 March 2011, while the limitation period had expired. The author was therefore tried for an offence for which he had not been extradited, and he was detained for the offence he was charged with in the *Somprasong* case, in breach of the specialty rule.

7.6 As regards the State party’s argument that article 14 of the Model Treaty is not a binding international norm but a summary of international good practices, the author claims that he referred to it only to underline the State party’s failure to make any effort to protect his interests before granting its consent to waiver of specialty. The author further submits that the State party was already aware that the operation of limitation periods was a material consideration in respect of the proceedings brought against him, as these had made it impossible to pursue some of the charges in the original extradition requested. The author submits that, had he been consulted about the request for the grant of waiver of specialty in the *Somprasong* case, he would have alerted the State party that the charges in that case were time-barred and that it was therefore not appropriate to waive the specialty rule.

7.7 The author reiterates that the violation of article 13, and consequently, of article 9(1) in his case stems from the fact that the State party gave consent to the waiver of specialty after Thailand had already instituted proceedings against him in the three cases concerned, in the purported attempt to evade the operation of the applicable limitation periods. By instituting the proceedings against the author and authorizing his detention, Thailand breached the rule of specialty. Such breach cannot be regarded as having been cured by the State party’s subsequent consent to waiver of specialty.

7.8 The author emphasizes that he is not claiming that an extradited person should enjoy immunity in respect of matters not covered by the surrender order. However, he considers that a State party violates the Covenant where it disregards the assurances it has given to that person that he or she will not be charged with matters not covered by a surrender order. Although the reasons for advancing the extradition request were object of judicial scrutiny, thereby enabling the author to test the quality of the evidence for the claim that an extraditable offence was to be tried, such scrutiny was not possible in respect of the matters for which consent to waiver of specialty was given.

#### **State party’s further observations**

8.1 On 12 February 2014, the State party comments on the author's allegations of 25 July 2013 that he was detained in Thailand in the *Somprasong* case for which he had not been extradited, and with regard to which the limitation period had expired before the waiver of speciality was granted by Canada. The State party recalls that speciality, as an obligation between extradition partners, may lawfully be waived by the State from which the person was extradited. As such, it considers that it was not a breach of speciality for Thailand to request that Canada waive speciality, and for Canada to consent to waive it.

8.2 The State party reiterates that article 13 of the Covenant only applies to the author's removal (expulsion) from Canada by extradition and to the legal processes governing the decision to extradite him while he was still in Canada. Article 13 has no application to consent to waiver of speciality. It submits that Canada's consent to the author's prosecution by Thailand, for new charges and in compliance with the principles of a fair trial, is not a violation of his right to be free from arbitrary detention under article 9(1) of the Covenant.

8.3 The State party further objects to the author's assertion that the Thai court ordered his detention on the warrant dated 29 March 2011 although Canada did not waive speciality with respect to the *Somprasong* case until 28 June 2012. The State party submits that it was informed by the Thai authorities that when the author was originally surrendered to Thailand on 29 October 2009 to face charges in the *City Trading Corporation* case, he was detained without bail by order of the court. According to Thai authorities, since the author was already in detention, no further detention orders were required in respect of the *Somprasong*, *Special Passing card* or the *Silver Star Investment* cases, as there was already an existing detention order against him. The State party is of the view that Thai authorities have respected speciality.

8.4 The State party admits that it does not have an expertise of Thai criminal law, and that it relies on the good faith of Thai authorities for the accuracy of the information received in relation to the author's case. The State party further submits that the intricacies of Thai criminal law with respect to the grounds of the author's detention are beyond the scope of the Committee's competence.

#### **Author's additional comments**

9.1 In its observations of 10 June 2014, the author notes that the State party does not contest (i) that Thailand's likely failure to respect the rule of speciality was raised by the author not just with the executive but also in various judicial proceedings relating to the decision to surrender him to Thailand, and that this was not considered by the courts as something likely to occur; and (ii) that the author could not have been surrendered on the additional charges without the need for significant additional evidence being adduced.

9.2 The author also claims that the State party has not disputed his submissions that consent to waiver or speciality could not, contrary to what was asserted by the State party's further observations of 3 May 2013, authorise a prosecution outside the prescribed limitation period. The offences alleged in the *Somprasong* case had already become time-barred well before 29 March 2011 – when the Prosecutor requested the Southern Bangkok Criminal Court to accept the charges against the author – since the applicable limitation period for those offences expired in September 2010 – fifteen years after the latest date when the offences were allegedly committed. Furthermore, on 23 January 2012, before the State party consented to waive the speciality rule in the *Somprasong* case, the Southern Bangkok Criminal Court granted the prosecution's request for a postponement of the hearing. The criminal proceedings against the author therefore initiated in breach of speciality and contrary to the extradition treaty. The author argues that by granting the waiver of speciality on 28 June 2012, after his trial had commenced, the State party was endorsing a breach the speciality rule, and the continuation of proceedings that were already time-barred.

9.3 The author also reiterates that the Minister of Justice never attempted to seek any comments from him regarding the applications by Thailand for the grant of waiver of specialty in respect of the cases concerned – the *Silver Star Investment*, *Special Passing Card 112J* and *Somprasong* cases. The author considers this omission erroneous given the repeated assurances made by the State party before his extradition to Thailand that specialty would be respected. Thereby, the State party seems to be ill-informed about the nature of all the offences for which waiver of specialty had been sought by Thailand.

9.4 The author further notes that the Minister of Justice and his officials expressed legitimate concerns in two letters from the State party to Thailand, of 29 July 2010 and 28 June 2012, that a further request for extradition would delay the existing extradition request long enough to cause the remaining charges in the *City Trading Corporation* case to become statute barred.<sup>12</sup> Indeed, had the author not been surrendered on 29 October 2009, the remaining charges would have been statute barred effective July 2010. The author considers that this supports his submission that the violation of article 13 of the Covenant, and consequently of article 9, stems from the fact that the State party was fully aware that Thailand had already announced that it would initiate proceedings against him with respect to offences not covered by the extradition request.

9.5 The author thus reaffirms that the State party consented to the waiver of specialty after Thailand had already instituted proceedings against him in all three cases concerned in the attempt to evade the operation to the limitation periods applicable to them. Thailand breached the rule of specialty, which cannot be regarded as having been ‘cured’ by the State party’s subsequent consent to waiver of specialty, in so far as this consent was inconsistent with the assurances that the State party had repeatedly given to the author.

## Issues and proceedings before the Committee

### *Consideration of admissibility*

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

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

10.3 The Committee notes that the State party has not objected to the admissibility of the communication with regard to the exhaustion of domestic remedies. It also observes that the author submitted a number of unsuccessful challenges to the surrender order of 18 November 2003, as amended on 1 December 2005, that the Court of Appeal dismissed his application for judicial review of the surrender order, and that the Supreme Court of Canada dismissed his application for leave to appeal against the above ruling, following which the author was surrendered to Thailand. Accordingly, the Committee considers that the author has exhausted all available domestic remedies.

10.4 The Committee notes the objections by the State party that the author’s allegations of a violation of article 13 should be found inadmissible under article 3 of the Optional Protocol, since the extradition proceedings in Canada complied with the requirements of the Covenant, and its consent to waiver of specialty was not a violation of specialty or of its

<sup>12</sup> The author refers to the two letters from the State party to Thailand, of 29 July 2010 and 28 June 2012, in connection with the grant of waiver of specialty in the *Silver Star Investment*, *Special Passing Card* and *Somprasong* cases.

statements to the author that specialty would be respected in his case. The State party further submits that the author has not substantiated his allegations that having his additional criminal charges by Thailand scrutinized by a Canadian court is a right recognized under the Covenant. The Committee also notes the State party's claim that imprisonment upon conviction in another state, in the absence of evidence of any arbitrariness, does not amount to arbitrary detention within the meaning of article 9(1) of the Covenant, submitting that the author's claims in that regard are therefore inadmissible *ratione loci* and *ratione materiae*. The Committee however notes that the State party did not ask the author for his views on the request for consent to a waiver of specialty despite the assurances granted in the context of extradition proceedings that he would not face further charges following his surrender to Thailand, and therefore considers that the author's claims under articles 9 and 13, are adequately substantiated for the purpose of admissibility. The Committee therefore considers those claims admissible and turns to their examination on the merits.

*Consideration of the merits*

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

11.2 The main issue before the Committee is whether the consent by Canada, after the author was extradited to Thailand, to his prosecution for two offences on charges not listed in the original extradition request and surrender order, amounted to a violation of the author's rights under articles 9 and 13 of the Covenant.

11.3 The Committee notes the author's allegations that, subsequent to his extradition to Thailand, Canada violated article 13 of the Covenant by giving consent to the waiver of specialty after Thailand had initiated criminal proceedings against him in the three cases that were allegedly time-barred. It also notes his allegations that as the proceedings in which the State party consented to the waiver of specialty were closely related to the extradition proceedings, he should have benefited from the guarantees stipulated in article 13 of the Covenant. The author in particular claims that during the proceedings to grant consent to the waiver of specialty, he was not afforded the procedural guarantees of article 13 of the Covenant, as Canada did not ask for his views on the request for consent to the waiver of specialty; the offences concerned had become time-barred; and there was no judicial scrutiny of the reasons for granting waiver of specialty. The Committee further notes the author's assertion that Thailand's breach of the rule of specialty cannot be considered as 'cured' by Canada's subsequent consent to waive the specialty rule, as that consent was inconsistent with the assurances that the State party had repeatedly given to him. The Committee also notes the State party's assertion that article 13 is limited to expulsion proceedings and has no application to consent to the waiver of specialty, which can be legally granted under the respective bilateral extradition agreement.

11.4 As regards the author's claim under article 9, the Committee notes the author's argument that by his surrender and the subsequent consent to waiver of specialty, without seeking his views or hearing by a court, Canada has exposed him to a much longer period of detention and imprisonment than he would have faced if the State party had not consented to waive the specialty rule, and if the State party's rules governing extradition had been observed. The Committee also notes the State party's submission that at the time when the consent to waiver of specialty was given, the author was already in Thailand and no longer subject to Canada's jurisdiction. The Committee further notes that, according to the State party, the author would enjoy a fair trial and a potential imprisonment following a criminal conviction on a number of charges would not fall within the notion of "irreparable

harm”, as interpreted by the Committee to attribute responsibility to one state for a potential violation of rights by another state.

11.5 The Committee observes that the author availed himself of all procedural guarantees, as set out in article 13 of the Covenant, during his extradition proceedings in Canada, and that the author was extradited to Thailand in October 2009 and was in prison there when Canada consented to the waiver of specialty. While noting the State party’s claim that the consent to waiver of specialty was granted in compliance with the bilateral 1911 Extradition Treaty in force, the Committee observes that this agreement enabled the prosecution of the author for criminal charges other than those for which he was extradited from Canada to Thailand. The Committee recalls its jurisprudence that extradition falls under the protection of the Covenant.<sup>13</sup>

11.6 The Committee notes that during the extradition proceedings, the author raised concerns that he could be charged, prosecuted and tried for offences other than those for which he was surrendered, and the State party’s judicial and administrative authorities provided him with assurances that the specialty rule would be respected. The Committee further notes that, pursuant to article 13 of the Covenant, the competent extradition authority is a court, whereas in the particular circumstances of the present case the consent to waive the specialty rule was granted by the Ministry of Justice, without a judicial review, and in the absence of other due process guarantees.

11.7 The Committee also notes the author’s allegations that the Thai authorities signaled their intent to present additional criminal charges against the author prior to his actual surrender in October 2009, but waited to launch further criminal proceedings only after the author was extradited, submitting a request for the waiver of specialty rule shortly after the author’s arrival in Thailand. The Committee also notes that the State party does not provide any explanation as to why the charges for the latter offences were not made part of the initial or amended extradition order of 2003 and 2005, while the author had been detained and investigated since 1996.

11.8 The Committee notes that the State party does not deny that it would not have granted the waiver of specialty had it known that the author would be charged for other offences committed prior to issuing the extradition order which had not been covered by the surrender order. It also notes that the waiver was granted notwithstanding its repeated and emphatic assurances that there would be no breach of the specialty rule, i.e. that he would not be tried in Thailand for offences other than those for which he was extradited. It further notes that the author was not given the opportunity to challenge the decision on granting consent to the waiver of specialty, thereby depriving him of the due process guarantees he was entitled to in compliance with article 13 of the Covenant, and that, as a consequence of the procedure, the author might have been exposed to a much longer detention and imprisonment. The Committee further notes that during the proceedings related to the request by Thailand for granting consent to a waiver of specialty, the author remained within the jurisdiction of Canada.

12. The Committee thereby concludes that by depriving the author of the possibility to comment on the request to waive the specialty rule, and foreclosing the possibility for the author to seek a review of such request by the court, the State party violated his rights under article 13 of the Covenant. In the light of its findings on article 13, the Committee will not further examine the author’s claims under article 9 of the Covenant.

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<sup>13</sup> See Communication No. 743/1997, *Ngoc Si Truong v. Canada*, Decision of the Committee adopted on 28 March 2003, para. 7.6; and Communication No. 961/2000, *Ronald Everett v. Spain*, Decision of the Committee adopted on 9 July 2004, para. 6.4.

13. 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 revise and amend its extradition legislation including a procedure for consent to a waiver of specialty, in full compliance with the State party's obligations under the Covenant, and the Committee's present Views.

14. 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 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 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

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