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**Human Rights Committee**

 Decision adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2859/2016[[1]](#footnote-2)\*,[[2]](#footnote-3)\*\*

*Communication submitted by*: D.V. (D.S.) (represented by counsels, Sladana Čanković and Goran Cvetic)

*Alleged victim*: The author

*State party*: Croatia

*Date of communication*: 14 July 2016 (initial submission)

*Date of adoption of decision*: 6 April 2018

*Subject matter*: Arbitrary detention; fair trial; ill-treatment; non-discrimination; and lack of effective remedy

*Procedural issues*:Exhaustion of domestic remedies; compatibility with the provisions of the Covenant, substantiation of claims

*Substantive issues*: Arbitrary detention; fair trial; ill-treatment and non-discrimination

*Articles of the Covenant*: 2; 7; 9 (1) and (4); 10 (1); 14; 15 and 26

*Articles of the Optional Protocol*:3; 5 (2) (b)

1. The author of the communication is Mr. D.V. (known as D. S. or “Captain Dragan”), a citizen of the Republic of Serbia and Australia, born on 12 December 1954. The author has been charged in the Republic of Croatia[[3]](#footnote-4) for war crimes, due to the killing of Croatian soldiers (prisoners of war) and civilians, committed when he was a commander of a Serbian paramilitary group on the territory of Croatia in 1991 and 1993. He was arrested in Australia on the basis of an extradition request by Croatia in January 2006, and placed in detention[[4]](#footnote-5) in anticipation of extradition to Croatia for prosecution. He was extradited to Croatia on 8 July 2015, after losing his thirteenth appeal in Australia.
	1. The author claims that Croatia[[5]](#footnote-6) has violated his rights under articles 2; 7; 9 (1) and (4); 10 (1); 14; 15 and 26 of the Covenant, and his trial is ongoing.[[6]](#footnote-7) The author has requested the Committee to issue interim or protection measures in the form of his immediate unconditional or conditional release on bail by Croatia. The Optional Protocol entered into force for Croatia on 12 January 1996. The author is represented by counsels, Ms. Sladana Čanković and Mr. Goran Cvetic (Zagreb, Croatia).
	2. On 16 November 2016, the Committee, acting through its Special Rapporteur on new communications and interim measures, registered the case while not granting the author’s request for interim or protection measures as the criminal trial for war crimes had remained pending in Croatia,[[7]](#footnote-8) and since the author had not *prima facie* substantiated that he would face any reprisals or discrimination while in detention[[8]](#footnote-9) pending the proceedings on the merits of the crimes alleged.[[9]](#footnote-10)

 The facts as submitted by the author

* 1. In 1969, the author moved from Serbia to Australia, where he acquired the Australian citizenship in 1975.[[10]](#footnote-11) The author returned to Yugoslavia in 1990. According to the Croatian authorities, he took part in the Balkan war as a commander of a Special Purpose Unit of Serbian paramilitary troops which involved in an armed conflict with Croatia’s armed forces in defence of the Serbian population living in the territory of Croatia (within the unrecognized Republic of Serbian Krajina).
	2. The author submits that when he moved to Australia in 2004, he did not know about any intended criminal charges for the offences he had reportedly committed in 1991 and 1993 in Croatia. In January 2006, Croatia[[11]](#footnote-12) issued a request to Australia for the author’s extradition to face prosecution in Croatia for charges of war crimes[[12]](#footnote-13) he allegedly committed as commander of the Serbian paramilitary troops during the Croatian-Serbian conflict.[[13]](#footnote-14) The author was arrested in Sydney, Australia, on 19 January 2006, pursuant to a provisional arrest warrant issued under the Australian Extradition Act 1988. He was remanded in custody on 20 January 2006. The Act applies when no extradition treaty has been concluded between the requesting and extraditing states.[[14]](#footnote-15) The author asserts that he was not formally charged by Croatia for any allegedly committed acts until 8 January 2016, namely only six months after his extradition to Croatia. At the time of his initial communication, the author was in prison in Split to stand trial, which opened on 20 September 2016.
	3. The author spent 8 years, 9 months and 10 days in extradition detention in Australian prisons due to an extremely lengthy extradition procedure before the Australian courts. The author made three unsuccessful applications for bail on 27 January 2006, 3 March 2006, and 12 December 2007, respectively.[[15]](#footnote-16)
	4. On 12 April 2007, the Sydney Local Court ruled that he was eligible for surrender to Croatia. On 2 September 2009, a full bench of Australia’s Federal Court granted the author’s appeal and reversed the extradition decision considering that he had established a substantial or real chance of prejudice if he were sent to Croatia for trial. The author was released on 4 September 2009 after over three years and seven months in prison. The Croatian Government appealed the decision before Australia’s High Court. On 30 March 2010, the Court again ruled that the author was to be extradited to Croatia. On 12 May 2010, the author was re-arrested by the Australian Police. On 16 November 2012, the Australian government decided to extradite the author to Croatia. The author complained about the unlawfulness of his extradition on different grounds before the High Court of Australia, the Federal Court (twice),[[16]](#footnote-17) and before the Full Court of the Federal Court (twice).[[17]](#footnote-18) On 2 January 2015, the Serbian Justice Minister sent a letter to the Justice Minister of Australia requesting that Belgrade be allowed to prosecute the author, referring to its right to prosecute its own citizens and questioning the Croatian judiciary’s ability to ensure a fair trial of the author. This request was also rejected.

2.5 Upon his extradition to Croatia on 8 July 2015, the author was immediately placed in an investigative detention for more than 12 months awaiting trial, on the basis of the Decision by the Sibenik County Court of 12 December 2005. All his appeals were rejected, ultimately by the Constitutional Court of Croatia on 5 April 2016.

2.6 His indictment of 8 January 2016 was formally confirmed on 13 June 2016 and the preparatory hearing took place on 14 July 2016. The author claims that all domestic remedies were exhausted in Australia on 15 May 2015, and on 5 April 2016 in Croatia.

 The complaint

3.1 The author claims that Croatia has violated articles 2, 7, 9(1) and 9(4), 10(1), 14, 15[[18]](#footnote-19) and 26 of the Covenant. The author claims the continuous nature of violations of his rights by the State party.

3.2 Regarding article 9(1) and (4), the author alleges that his rights have been violated due to the unlawful, excessively long and therefore arbitrary detention in both Australia and Croatia ,[[19]](#footnote-20) also in breach of his right to presumption of innocence, as he was denied bail and the right to effectively challenge the legality of his detention, without having been tried until July 2016. He claims that his unlawful and arbitrary detention in Australia and Croatia have the same legal basis, source and purpose, namely his prosecution in Croatia.

3.3 Regarding the claims of a violation of article 14(1), (2) and (5), he asserts that the examination of his detention was ill-founded in both countries as he was not notified about the correspondence between the two countries..

3.4 The author claims that Croatia has violated his rights under articles 2(3), 9(1) and (4) and 14(1) because he considers that all the decisions of the Croatian Courts on the investigative detention are illegal, arbitrary and developed *in abstracto*. He claims that there has been no risk that he would abscond or disturb the conduct of the criminal proceedings. He further submits that the Constitutional Court did not address the alleged shortcomings, including the absence of explanation as to how he could be “on the run” while in detention in Australia, why his request for bail[[20]](#footnote-21) was not acceptable, and why an amount of bail that would be satisfactory was never set, in violation of the Criminal Procedure Code. The Supreme Court, however, held that the trial court gave clear and sufficient and valid reasons to justify the need for investigative detention.[[21]](#footnote-22) The author also claims to be discriminated against as he is held in investigative detention due to being a foreigner who could never meet the conditions referred to by the Supreme Court.[[22]](#footnote-23)

3.5 The author also requests his immediate release from detention, and the payment of compensation by Croatia for the suffering inflicted by his unlawful and arbitrary detention, including the legal costs incurred.

 Issues and proceedings before the Committee

4.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether it is admissible under the Optional Protocol.

4.2 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.

4.3 The Committee notes that the author’s allegations under articles 2(3), 7, 9(1) and (4), 10 (1), 14, 15 and 26 of the Covenant mainly concern the impermissibility of his pre-trial detention due to the risk of absconding and the gravity of the criminal charges for war crimes; the absence of release on bail and the alleged discrimination in placing him in detention as a foreigner. In that context, the Committee observes the author’s claim that he never attempted to abscond.[[23]](#footnote-24) Furthermore, the Committee notes the author’s allegations that he has exhausted all available domestic remedies in respect to the articles invoked, by way of appeals against the decision of the Sibenik County Court of 12 December 2005, which authorized his investigative detention, including a complaint to the Constitutional Court of Croatia which was rejected on 5 April 2016. In the circumstances of the present case, the Committee considers, however, that it is not in a position to review the current grounds for the author’s detention in Croatia while his case remains pending for a decision on the merits of criminal charges against him, taking into account that he has been detained in compliance with domestic law, as part of the relevant criminal proceeding. The Committee is generally not in a position to review facts and evidence, or the application of domestic legislation, in a particular case, made by domestic courts, unless the author of the communication can demonstrate that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice, or that the courts otherwise violated its obligation of independence and impartiality.[[24]](#footnote-25) The Committee therefore finds the author’s claims inadmissible under article 5 (2) (b) of the Optional Protocol, for failure to exhaust domestic remedies as his case remains pending on the merits of criminal charges against him, as well as under article 3 of the Optional Protocol, as incompatible with the provisions of the Covenant, since the author’s appeals against his investigative detention were examined by the State party’s courts and nothing on file suggests that the decisions of the courts were arbitrary or amounted to a denial of justice.[[25]](#footnote-26)

5. The Human Rights Committee therefore decides:

 (a) That the communication is inadmissible under articles 3 and 5 (2) (b), of the Optional Protocol;

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

1. \* Adopted by the Committee at its 122nd session (12 March - 6 April 2018). [↑](#footnote-ref-2)
2. \*\* The following members of the Committee participated in the examination of the communication:
Yadh Ben Achour, Ilze Brands Kehris, Ahmed Fathalla, Olivier de Frouville, Christof Heyns, Yuji Iwasawa, Ivana Jelič, Bamariam Koita, Marcia V. J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, José Manuel Santos Pais, Yuval Shany and Margo Waterval. [↑](#footnote-ref-3)
3. He was sought on the basis of an arrest warrant by Interpol. [↑](#footnote-ref-4)
4. The decision of the High Court of Australia. [↑](#footnote-ref-5)
5. The author has claimed that both Australia and Croatia have continuously violated his rights under articles 2; 7; 9; 10; 14; 15 and 26 of the Covenant since he has been subjected to an excessively long extradition and pre-trial investigative detention (over 10 years in total), and his trial has been ongoing. [↑](#footnote-ref-6)
6. The author’s trial begun on 20 September 2016 in Split County Court by opening statements of the prosecution and defense. [↑](#footnote-ref-7)
7. On 11 October 2016, the Special Rapporteur decided to register 2 cases for a Special Rapporteur’s draft and deal with them jointly. On 6 April 2018, the Committee decided to deal with the claims against Australia separately and send them to the State party for observations on admissibility and the merits. [↑](#footnote-ref-8)
8. According to the information on file, the author’s extradition and detention have been justified by his charges for offences against articles 120 and 122 of the Basic Penal Code of the Republic of Croatia (war crimes). [↑](#footnote-ref-9)
9. On 21 September 2016, the author’s counsel informed that the author had sustained a heart attack on 11 August 2016 in the Split Bilice prison, and had a stent implanted in the Split Clinical Hospital, prompting a priority consideration of the case due to the fact that the author had spent 10 years in pre-trial detention and due to his deteriorating health. [↑](#footnote-ref-10)
10. When assuming Australian citizenship, the author changed his name to D.S.. [↑](#footnote-ref-11)
11. On 28 November 2005, the Sibenik County Public Prosecutor’s office submitted a request for investigation of the author for criminal offences, which was accepted by the Sibenik County Court on 12 December 2005. [↑](#footnote-ref-12)
12. According to the author, Croatia alleges that during June and July 1991 in Knin, in the Krajina region predominantly populated by the Serbs at the time, the author did not prevent members of the Unit who were his subordinates from mistreating captured members of the Croatian army and police and mistreated one such person himself. It also alleges that in February 1993, he commanded subordinate members of the Unit to interrogate and then execute two Croatian prisoners of war (alleged contraventions of article 122). He is further said to have commanded members of the Special Purpose Unit and a tank unit of the Yugoslav People’s Army to fire on a church and a school (alleged contraventions of article 120). [↑](#footnote-ref-13)
13. The extradition request reportedly did not contain the assurance that Croatia will not prosecute the person sought for other offences than those stated in the extradition request. [↑](#footnote-ref-14)
14. The author alleges that this act allows extradition to countries without evidence of a *prima facie* case against the wanted person, calling it “no evidence” procedure. [↑](#footnote-ref-15)
15. The decisions of the Australian authorities have been attached. [↑](#footnote-ref-16)
16. Examples of the decisions attached to the initial communication include: The Decision of the High Court of Australia of 15 June 2006 denying the claimed invalidity of the Extradition Act 1998; Decision of the Federal Court of 13 October 2006 reaffirming the authors eligibility for extradition; Decisions of the Federal Court of 3 February 2009, High Court of 19 May 2010 and of the Federal Court of 15 November 2013 and 12 December 2014 denying the author’s request for an order of habeas corpus against the Minister of Justice claiming that there was an excessive delay and thus no power of the Minister to extradite; and the High Court of Australia’s decision of 15 May 2015 to refuse the author’s special leave to appeal. [↑](#footnote-ref-17)
17. The decisions have been attached. [↑](#footnote-ref-18)
18. The author does not substantiate his claims of violation of article 15. [↑](#footnote-ref-19)
19. The author refers to the Committee’s jurisprudence in communication *Griffith v. Australia* (CCPR/C/112/D/1973/2010), para. 7.5. In that case, the author was held for two and a half years in extradition detention by Australia. [↑](#footnote-ref-20)
20. The author offered a bail of 700,000 EUR which was not accepted, and the courts did not set any alternative bail amount which would be considered as appropriate. [↑](#footnote-ref-21)
21. The Supreme Court held that the information on file shows that the defendant has no permanent or temporary residence in Croatia, and is not related to that country in any way, whether through personal, family or business ties or in any other way. Since the defendant has dual citizenship (Republic of Serbia and Australia), and the crimes of which he is indicted may attract a sentence of 20 years of imprisonment, the Court held that the author’s investigative detention is lawful and legitimate, as part of relevant criminal proceeding. [↑](#footnote-ref-22)
22. The author argues that as a non-Croat, he can never achieve the conditions referred above, and concludes that illegal basis for his indefinite detention by the Croatian judiciary have been applied. He also points to the General Comment No. 35 in which the Committee stated that the fact that a defendant is a foreigner, cannot be considered as sufficient to establish that he/she may flee the jurisdiction (para. 38). [↑](#footnote-ref-23)
23. The question of proportionality of the author’s detention in Croatia has been influenced by the proceedings in Australia and has therefore represented one of the reasons for a joint consideration of admissibility. [↑](#footnote-ref-24)
24. See e.g. General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial (CCPR/C/GC/32 of 23 August 2007), para. 26. See also e.g. communications *Pillai et al. v. Canada* (CCPR/C/101/D/1763/2008), para. 11.4; and *Simms v. Jamaica* (CCPR/C/53/D/541/1993), para. 6.2. [↑](#footnote-ref-25)
25. See e.g. communication *X. and Y. v. Canada* (CCPR/C/118/D/2771/2016), para. 4.3. [↑](#footnote-ref-26)