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HUMAN RIGHTS COMMITTEE
Sixty-seventh session
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VIEWS

Communication Nº 666/1995

Submitted by:	Frédéric Foin (represented by François Roux, lawyer in France)
Alleged victim:	The author
State party:	France
Date of communication:	20 July 1995 (initial submission)
Documentation references:	Prior decisions - Special Rapporteur's rule 91 decision, transmitted to the State party on 16 November 1995 (not issued in document form) - CCPR/C/60/D/666/1995, decision on admissibility, dated 11 July 1997
Date of adoption of Views:	3 November 1999

On 3 November 1999 the Human Rights Committee adopted its Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 666/1995. The text of the Views is appended to the present document.

[ANNEX]

* Made public by decision of the Human Rights Committee.

ANNEX*

VIEWS OF THE HUMAN RIGHTS COMMITTEE UNDER ARTICLE 5, PARAGRAPH 4, OF THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS
- Sixty-seventh session -

concerning

Communication Nº 666/1995

Submitted by:	Frédéric Foin (represented by François Roux, lawyer in France)
Alleged victim:	The author
State party:	France
Date of communication:	20 July 1995 (initial submission)
Date of decision on admissibility:	11 July 1997

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

Meeting on 3 November 1999

Having concluded its consideration of communication No. 666/1995 submitted to the Human Rights Committee by Mr. Frédéric Foin under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

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*The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Lord Colville, Ms. Elizabeth Evatt, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Maxwell Yalden. Pursuant to rule 85 of the Committee's rules of procedure Ms. Christine Chanet did not participate in the examination of the case.

**The text of one individual opinion signed by three members is appended to this document.

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

1. The author of the communication is Frédéric Foin, a French citizen born in September 1966 and living in Valence, France. He claims to be a victim of violations by France of articles 18, 19 and 26, juncto article 8, of the International Covenant on Civil and Political Rights. The author is represented by Mr. François Roux of Roux, Lang-Cheymol, Canizares, a law firm in Montpellier.

The facts as submitted by the author

2.1 The author, a recognized conscientious objector to military service, was assigned to civilian service duty in the national nature reserve of Camargue in December 1988. On 23 December 1989, after exactly one year of civilian service, he left his duty station; he invoked the allegedly discriminatory character of article 116, paragraph 6, of the National Service Code (Code du service national), pursuant to which recognized conscientious objectors were required to perform civilian national service duties for a period of two years, whereas military service did not exceed one year.

2.2 As a result of his action, Mr. Foin was charged with desertion in peacetime before the Criminal Court (Tribunal Correctionel) of Marseille, under articles 398 and 399 of the Code of Military Justice. The challenge to his conviction in a default judgement pronounced on 12 October 1990 led to a new hearing on 20 March 1992 before the Court, which gave him an eight-month suspended prison sentence and ordered the withdrawal of his conscientious objector status (art. 116 (4) of the National Service Code). The Court rejected the author's arguments based in particular on articles 4 (3) (b), 9, 10 and 14 of the European Convention on Human Rights.

2.3 The Court's decision was appealed both by the State Prosecutor (Procureur de la République) and by the author. By a judgement of 18 December 1992, the Court of Appeal of Aix-en-Provence quashed the judgement of 20 March 1992 for misdirection. Notwithstanding, and deciding on the merits of the case, the Court of Appeal found Mr. Foin guilty of the offence of desertion in peacetime and gave him a six-month suspended prison sentence.

2.4 On 14 December 1994, the Court of Cassation rejected the author's further appeal. The Court held that the relevant provisions of the European Convention on Human Rights and of the International Covenant on Civil and Political Rights did not prohibit measures requiring conscientious objectors to perform a longer period of national service than persons performing military service, provided the enjoyment or exercise of their fundamental rights and freedoms was not affected.

The complaint

3.1 According to the author, article 116 (6) of the National Service Code (in its version of July 1983 prescribing a period of 24 months for civilian service) violates articles 18, 19 and 26, juncto article 8, of the Covenant in that it doubles the duration of alternative services for conscientious objectors in comparison with military service.

3.2 While acknowledging the Committee's views on communication No. 295/1988,[1] where it had been held, in a similar case, that an extended length of alternative service in comparison with military service was neither unreasonable nor punitive, and where no violation of the Covenant had been found, the author refers to the individual opinions appended to those views by three Committee members, who had concluded that the legislation under challenge was not based on reasonable or objective criteria, such as a more severe type of service or the need for special training in order to perform the longer service. The author endorses the conclusions of those individual opinions.

3.3 The author notes that under articles L.116 (2) to L.116 (4) of the National Service Code, each application for recognition as a conscientious objector has to be approved by the Minister for the Armed Forces. If he rejects the application, an appeal to the Administrative Tribunal is possible under article L.116 (3). In such circumstances, the author argues, it cannot be assumed that the length of civilian service was fixed for reasons of administrative convenience, since anyone accepting to perform civilian service twice as long as military service should be deemed to have genuine convictions. Rather, the length of civilian service must be deemed to have punitive elements, which are not based on any reasonable or objective criterion.

3.4 In support of his contention, the author invokes a judgement of the Italian Constitutional Court of July 1989, which held that civilian service lasting eight months longer than military service was incompatible with the Italian Constitution. He further points to a resolution adopted by the European Parliament in 1967 in which, on the basis of article 9 of the European Convention on Human Rights, it has been suggested that the duration of alternative service should not exceed that of military service. Moreover, the Committee of Ministers of the Council of Europe has declared that alternative service must not be of a punitive nature and that its duration, in relation to military service, must remain within reasonable limits (Recommendation No. R(87)8 of 9 April 1987). Finally, the author notes that the United Nations Commission on Human Rights has declared, in a resolution adopted on 5 March 1987,[2] that conscientious objection to military service constituted a legitimate exercise of the right to freedom of thought, conscience and religion, as recognized by the Covenant.

3.5 In any event, according to the author, the requirement to perform civilian service that is twice as long as military service constitutes prohibited discrimination on the basis of opinion, and the possibility of imprisonment for refusal to perform civilian service beyond the length of time of military service violates articles 18, paragraph 2, 19, paragraph 1, and 26 of the Covenant.

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[1] Järvinen v. Finland, Views adopted on 25 July 1990, paras. 6.4 to 6.6.

[2] Document E/CN.4/1987/L.73 of 5 March 1987.

The State party's observations on admissibility and the author's comments thereon

4.1 The State party contends firstly that the communication is incompatible ratione materiae with the provisions of the Covenant since, on the one hand, the Committee has acknowledged in its decision on communication No. 185/1984 (L.T.K. v. Finland)[3] that "the Covenant does not provide for the right to conscientious objection; neither article 18 nor article 19 of the Covenant, especially taking into account paragraph 3 (c) (ii) of article 8, can be construed as to imply that right" and since, on the other hand, by virtue of article 8, paragraph 3 (c) (ii) of the Covenant, the internal regulation of national service, and therefore of conscientious objector status for those States which recognize it, does not fall within the scope of the Covenant and remains a matter for domestic legislation.

4.2 Subsidiarily, the State party contends that the author does not qualify as a victim. With regard to articles 18 and 19 of the Covenant, the State party claims that by recognizing conscientious objector status and offering conscripts a choice as to the form of their national service, it allows them to opt freely for the national service appropriate to their beliefs, thus enabling them to exercise their rights under articles 18 and 19 of the Covenant. In this connection, the State party concludes, referring to the decision on communication No. 185/1984 cited above, that as the author was not prosecuted and sentenced because of his beliefs or opinions as such, but because he deserted his assigned service, he cannot therefore claim to be a victim of a violation of articles 18 and 19 of the Covenant.

4.3 With regard to the alleged violation of article 26 of the Covenant, the State party, noting that the author complains of a violation of this article because the length of alternative civilian service is double that of military service, submits first of all that "the Covenant, while prohibiting discrimination and guaranteeing equal protection of the law to everyone, does not prohibit all differences of treatment", which must be "based on reasonable and objective criteria"[4]. The State party stresses that the situation of conscripts performing alternative civilian service differs from that of those performing military service, notably in respect of the heavier constraints of service in the army. The State party quotes the Committee's views on communication No. 295/1988 (Järvinen v. Finland), where the Committee held that the 16-month period of alternative service imposed for conscientious objectors - double the 8-month period of military service - was "neither unreasonable nor punitive". The State party therefore concludes that the difference of treatment complained of by the author is based on the principle of equality, which requires different treatment of different situations.

4.4 For all of these reasons, the State party requests the Committee to declare the communication inadmissible.

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[3] L.T.K. v. Finland, communication declared inadmissible on 9 July 1985.

[4] See the Committee's views on communication No. 196/1985, Gueye v. France. Views adopted on 3 April 1989.

5.1 Concerning the State party's first argument as to the Committee's competence ratione materiae, the author cites the Committee's General Comment on article 18, where it is stated that the right to conscientious objection "can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief. When this right is recognized by law or practice, there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs; likewise, there shall be no discrimination against conscientious objectors because they have failed to perform military service"[5]. According to the author, it is clear from these comments that the Committee is competent to determine whether or not there has been a violation of the right to conscientious objection under article 18 of the Covenant.

5.2 Concerning the alleged violation of article 26, the author claims that requiring a period of alternative civilian service twice the length of military service constitutes a difference of treatment which is not based on "reasonable and objective criteria" and therefore constitutes discrimination prohibited by the Covenant (communication No. 196/1985 cited above). In support of this conclusion, the author argues that there is no justification for making alternative civilian service twice the length of military service; in fact, unlike in the Järvinen case (communication No. 295/1988 cited above), the longer duration is not justified by any relaxation of the administrative procedures for obtaining conscientious objector status since, under articles L.116 (2) and L.116 (4) of the National Service Code, applications for conscientious objector status are subject to approval by the Minister for the Armed Forces. Nor is it justified in the general interest. Furthermore, conscientious objectors derive no benefit or privilege from their status - unlike, for example, persons assigned to perform international cooperation services instead of military service, who have the opportunity to work abroad in a professional field corresponding to their university qualifications for 16 months (i.e. four months less than the civilian service for conscientious objectors) - and a difference of treatment is not, therefore, justified on that ground.

The Committee's admissibility decision

6.1 At its 60th session, the Committee considered the admissibility of the communication.

6.2 The Committee took note of the State party's arguments concerning the incompatibility of the communication ratione materiae with the provisions of the Covenant. In this regard, the Committee considered that the matter raised in the communication did not concern a violation of the right to conscientious objection as such. The Committee considered that the author had sufficiently demonstrated, for the purposes of admissibility, that the communication might raise issues under provisions of the Covenant.

7. Accordingly, on 11 July 1997 the Committee decided that the communication was admissible.

[5] General comment No. 22 (48), adopted at the Committee's 48th session, in July 1993.

State party's observations on the merits of the communication

8.1 By submission of 8 June 1998, the State party argues that the communication should be rejected because the author has failed to show that he is a victim, and because his complaints are ill-founded.

8.2 According to the State party, article L.116 of the National Service Code in its version of July 1983 instituted a genuine right to conscientious objection, in the sense that the sincerity of the objections is said to be shown by the request alone, if presented in accordance with the legal requirements (that is, motivated by an affirmation of the applicant that he has personal objections to using weapons). No verification of the objections took place. To be admissible, requests had to be presented on the 15th of the month preceding the incorporation into the military service. Thus a request could only be rejected if it was not motivated or if it was not presented in time. A right to appeal existed to the administrative tribunal.

8.3 Although the normal length of military service since January 1992 in France was 10 months, some forms of national service lasted 12 months (military service of scientists) and 16 months (civil service of technical assistance). The length of the service for conscientious objectors was 20 months. The State party denies that the length has a punitive or discriminatory character. It is said to be the only way to verify the seriousness of the objections, since the objections were no longer tested by the administration. After having fulfilled their service, conscientious objectors have the same rights as those who have finished civil national service.

8.4 The State party informs the Committee that on 28 October 1997 a law was adopted to reform the national service. Under this law, all young men and women will have to participate between their 16th and 18th birthday in a one day call-up to prepare for defence. Optional voluntary service can be done for a duration of 12 months, renewable up to 60 months. The new law is applicable to men born after 31 December 1978 and women born after 31 December 1982.

8.5 According to the State party, its system of conscientious objection as applied to the author, was in accordance with the requirements of articles 18, 19 and 26 of the Covenant, and with the Committee's general comment No. 22. The State party submits that its regime for conscientious objection did not make any difference on the basis of belief, and no process of verification of the motivation of applicants occurred, such as takes place in many neighbouring countries. No discrimination existed against conscientious objectors, as their service was a recognised form of the national service, on equal footing with military service or other forms of civil service. In 1997, just under 50% of those performing civil service were doing this on the basis of conscientious objections to military service.

8.6 The State party submits that the author of the present communication has not at all been discriminated on the basis of his choice to perform national service as a conscientious objector. It notes that the author was convicted for not complying with his obligations under the civil service freely chosen by him and that he never before objected to the duration of the service. His conviction was thus not because of his personal beliefs, nor on the basis of his choice for alternative civil service, but on the basis of his refusal to respect the

conditions of that type of service. In this context, the State party notes that it would have been open to the author to choose another form of unarmed national service, such as one of technical assistance. On this basis, the State party argues that the author has not established that he is a victim of a violation by the State party.

8.7 Subsidiarily, the State party argues that the author's claim is ill-founded. In this context, the State party recalls that according to the Committee's own jurisprudence, not all differences in treatment constitute discrimination, as long as they are based on reasonable and objective criteria. In this context, the State party refers to the Committee's Views in case No. 295/1988 (Järvinen v. Finland), where the service for conscientious objectors was 16 months and that for other conscripts 8 months, but the Committee found that no violation of the Covenant had occurred because the length of the service ensured that those applying for conscientious objector status would be serious, since no further verification of the objections took place. The State party submits that the same reasoning should apply to the present case.

8.8 In this context, the State party also notes that the conditions of the alternative civil service were less onerous than that of military service. The conscientious objectors had a wide choice of posts. They could also propose their own employer and could do their service within their professional interest. They also received a higher payment than those serving in the armed forces. In this context, the State party rejects counsel's claim that the persons performing international cooperation service received privileged treatment vis à vis conscientious objectors, and submits that those performing international cooperation service did so in often very difficult situations in a foreign country, whereas the conscientious objectors performed their service in France.

8.9 The State party concludes that the length of service for the author of the present communication had no discriminatory character compared with other forms of civil service or military service. The differences that existed in the length of the service were reasonable and reflected objective differences between the types of service. Moreover, the State party submits that in most European countries the time of service for conscientious objectors is longer than military service.

Counsel's comments

9.1 In his comments, counsel submits that at issue are the modalities of civil service for conscientious objectors. He submits that the double length of this service was not justified by any reason of public order and refers in this context to paragraph 3 of article 18 of the Covenant which provides that the right to manifest one's religion or beliefs may be subject only to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. He also refers to the Committee's general comment No. 22 where the Committee stated that restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner. He argues that the imposition upon conscientious objectors of civil service of double length as that of the military service constitutes a discriminatory restriction, because the manifestation of a conviction such as the refusal to carry arms, does not in itself affect the public safety, order,

health, or morals or the fundamental rights and freedoms of others since the law expressly recognizes the right to conscientious objection.

9.2 Counsel states that, contrary to what the State party has submitted, persons who requested status as a conscientious objector were subject to administrative verification and did not have a choice as to the conditions of service. In this context, counsel refers to the legal requirements that a request had to be submitted before the 15th of the month of incorporation into the military service, and that it had to be motivated. Thus, the Minister for the Armed Forces might refuse a request and no automatic right to conscientious objector status existed. According to counsel, it is therefore clear that the motivation of the conscientious objector was being tested.

9.3 Counsel rejects the State party's argument that the author himself had made an informed choice as to the kind of service he was going to perform. Counsel emphasizes that the author made his choice on the basis of his conviction, not on the basis of the length of service. He had no choice in the modalities of the service. Counsel argues that no reasons of public order exist to justify that the length of civil service for conscientious objectors be twice the length of military service.

9.4 Counsel maintains that the length of service constitutes discrimination on the basis of opinion. Referring to the Committee's Views in communication No. 295/1988 (Järvinen v. Finland), counsel submits that the present case is to be distinguished, since in the earlier case the extra length of service was justified, in the opinion of the majority in the Committee, by the absence of administrative formalities in having the status of conscientious objector recognized.

9.5 As far as other forms of civil service are concerned, especially those doing international cooperation service, counsel rejects the State party's argument that these were often performed in difficult conditions and on the contrary, asserts that this service was often fulfilled in another European country and under pleasant conditions. Those performing the service moreover built up a professional experience. According to counsel, the conscientious objector did not draw any benefit from his service. As regards the State party's argument that the extra length of service is a test for the seriousness of a person's objections, counsel argues that to test the seriousness of conscientious objectors constitutes in itself a flagrant discrimination, since those who applied for another form of civil service were not being subjected to a test of their sincerity. With regard to the advantages mentioned by the State party (such as no obligation to wear a uniform, not being under military discipline), counsel notes that the same advantages were being enjoyed by those performing other kinds of civil service and that these did not exceed 16 months. With regard to the State party's argument that the conscientious objectors received a higher pay than those performing military service, counsel notes that they worked in structures where they were treated as employees and that it was thus normal that they would receive a certain remuneration. He states that the pay was little in comparison with the work done and much less than that received by normal employees. According to counsel, those performing cooperation service were better paid.

Issues and proceedings before the Committee

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

10.2 The Committee has noted the State party's argument that the author is not a victim of any violation, because he was not convicted for his personal beliefs, but for deserting the service freely chosen by him. The Committee notes, however, that during the proceedings before the courts, the author raised the right to equality of treatment between conscientious objectors and military conscripts as a defence justifying his desertion and that the courts' decisions refer to such claim. It also notes that the author contends that, as a conscientious objector to military service, he had no free choice in the service that he had to perform. The Committee therefore considers that the author qualifies as a victim for purposes of the Optional Protocol.

10.3 The issue before the Committee is whether the specific conditions under which alternative service had to be performed by the author constitute a violation of the Covenant. The Committee observes that under article 8 of the Covenant, States parties may require service of a military character and, in case of conscientious objection, alternative national service, provided that such service is not discriminatory. The author has claimed that the requirement, under French law, of a length of 24 months for national alternative service, rather than 12 months for military service, is discriminatory and violates the principle of equality before the law and equal protection of the law set forth in article 26 of the Covenant. The Committee reiterates its position that article 26 does not prohibit all differences of treatment. Any differentiation, as the Committee has had the opportunity to state repeatedly, must however be based on reasonable and objective criteria. In this context, the Committee recognizes that the law and practice may establish differences between military and national alternative service and that such differences may, in a particular case, justify a longer period of service, provided that the differentiation is based on reasonable and objective criteria, such as the nature of the specific service concerned or the need for a special training in order to accomplish that service. In the present case, however, the reasons forwarded by the State party do not refer to such criteria or refer to criteria in general terms without specific reference to the author's case, and are rather based on the argument that doubling the length of service was the only way to test the sincerity of an individual's convictions. In the Committee's view, such argument does not satisfy the requirement that the difference in treatment involved in the present case was based on reasonable and objective criteria. In the circumstances, the Committee finds that a violation of article 26 occurred, since the author was discriminated against on the basis of his conviction of conscience.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights, is of the view that the facts before it disclose a violation of article 26 of the Covenant.

12. The Human Rights Committee notes with satisfaction that the State party has changed the law so that similar violations will no longer occur in the future. In the circumstances of the present case, the Committee considers that the finding of a violation constitutes sufficient remedy for the author.

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

Appendix

Separate, dissenting, opinion of members Nisuke Ando, Eckart Klein and David Kretzmer

1. We agree with the Committee's approach that article 26 of the Covenant does not prohibit all differences in treatment, but that any differentiation must be based on reasonable and objective criteria. (See, also, the Committee's General Comment No. 18). However, we are unable to agree with the Committee's view that the diferentiation in treatment in the present case between the author and those who were conscripted for military service was not based on such criteria.

2. Article 8 of the Covenant, that prohibits forced and compulsory labour, provides that the prohibition does not include "any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors." It is implicit in this provision that a State party may restrict the exemption from compulsory military service to conscientious objectors. It may refuse to grant such an exemption to all other categories of persons who would prefer not to do military service, whether the reasons are personal, economic or political.

3. As the exemption from military service may be restricted to conscientious objectors, it would also seem obvious that a State party may adopt reasonable mechanisms for distinguishing between those who wish to avoid military service on grounds of conscience, and those who wish to do so for other, unacceptable, reasons. One such mechanism may be establishment of a decision-making body, which examines applications for exemption from military service and decides whether the application for exemption on grounds of conscience is genuine. Such decision-making bodies are highly problematical, as they may involve intrusion into matters of privacy and conscience. It would therefore seem perfectly reasonable for a State party to adopt an alternative mechanism, such as demanding somewhat longer service from those who apply for exemption. (See the Committee's Views in Communication No. 295/1988, Järvinen v. Finland). The object of such an approach is to reduce the chance that the conscientious objection exemption will be exploited for reasons of convenience. However, even is such an approach is adopted the extra service demanded of conscientious objectors should not be punitive. It should not create a situation in which a real conscientious objector may be forced to forego his or her objection.

4. In the present case the military service was 12 months, while the service demanded of conscientious objectors was 24 months. Had the only reason advanced by the State party for the extra service been the selection mechanism, we would have tended to hold that the extra time was excessive and could be regarded as punitive. However, in order to assess whether the differentiation in treatment between the author and those who served in the military was based on reasonable and objective criteria all the relevant facts have to be taken into account. The Committee has neglected to do this.

5. The State party has argued that the conditions of alternative service differ from the conditions of military service (see paragraph 8.8 of the Committee's Views). While soldiers were assigned to positions without any choice, the conscientious objectors had a wide choice of posts. They could propose their own employers and could do service within their own professional fields. Furthermore, they received higher remuneration than people servicing in the armed forces. To this should be added that military service, by its very essence, carries with it burdens that are not imposed on those doing alternative service, such as military discipline, day and night, and the risks of being injured or even killed during military manoeuvers or military action. The author has not refuted the arguments relating to the differences between military service and alternative service, but has simply argued that people doing other civil service also enjoyed special conditions. This argument is not

relevant in the present case, as the authjor’s service was carried out befoe the system of civil service was instituted.

6. In light of all the circumstances of this case, the argument that the difference of twelve months between military service and the service required of conscientious objectors amounts to discrimination is unconvincing. The differentiation between those serving in the military and conscientious objectors was based on reasonable and objective criteria and does not amount to discrimination. We were therefore unable to join the Committee in finding a violation of article 26 of the Covenant in the present case.

N. Ando (signed) E. Klein (signed)

D. Kretzmer (signed)

[Done in English, French and Spanish, the English text being the original version. Subsequently to be translated also into Arabic, Chinese and Russian as part of the Committee’s annual report to the General Assembly.]