



**Convention on the Elimination  
of All Forms of Discrimination  
against Women**

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**Committee on the Elimination of Discrimination  
against Women**

**Fifty-fifth session**

8-26 July 2013

**Communication No. [33/2011](#)**

**Decision adopted by the Committee at its fifty-fifth session,  
8-26 July 2013**

*Submitted by:* M. N. N. (represented by counsel, Niels-Erik Hansen)

*Alleged victim:* The author

*State party:* Denmark

*Date of communication:* 8 May 2010 (initial submission)

*References:* Working Group's decision under articles 5 and 6 of the Optional Protocol and rules 63 and 69 of the Committee's rules of procedure, transmitted to the State party on 13 July 2011 (not issued in document form)

*Date of adoption of decision:* 15 July 2013



## Annex

### **Decision of the Committee on the Elimination of Discrimination against Women under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (fifty-fifth session)**

#### **Communication No. 33/2011, *M. N. N. v. Denmark*\***

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|-------------------------------|--|
| <i>Submitted by:</i>          | M. N. N. (represented by counsel, Niels-Erik Hansen)   |
| <i>Alleged victim:</i>        | The author   |
| <i>State party:</i>           | Denmark  |
| <i>Date of communication:</i> | 8 May 2010 (initial submission)  |
| <i>References:</i>            | Working Group's decision under articles 5 and 6 of the Optional Protocol and rules 63 and 69 of the Committee's rules of procedure, transmitted to the State party on 13 July 2011 (not issued in document form) |

*The Committee on the Elimination of Discrimination against Women*, established under article 17 of the Convention on the Elimination of All Forms of Discrimination against Women,

*Meeting on 15 July 2013,*

*Adopts the following:*

#### **Decision on admissibility**

1.1 The author of the communication is M. N. N., a Ugandan national born on 26 December 1984. The author sought asylum in Denmark; her application was rejected and, at the time of submission of the communication, she was awaiting deportation from Denmark to Uganda. She claims that such deportation would constitute a violation by Denmark of articles 1, 2 (c), 2 (d) and 3 of the Convention on the Elimination of All Forms of Discrimination against Women. The author is represented by counsel, Niels-Erik Hansen. The Optional Protocol to the Convention entered into force for Denmark on 22 December 2000.

1.2 On 13 July 2011, pursuant to article 5 (1) of the Optional Protocol and rule 63 of its rules of procedure, the Committee requested the State party to refrain from expelling the author to Uganda while her communication was under consideration

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\* The following members of the Committee participated in the examination of the present communication: Ms. Ayse Feride Acar, Ms. Noor Al-Jehani, Ms. Barbara Bailey, Ms. Olinda Bareiro-Bobadilla, Mr. Niklas Bruun, Ms. Naéla Gabr, Ms. Hilary Gbedemah, Ms. Nahla Haidar, Ms. Ruth Halperin-Kaddari, Ms. Yoko Hayashi, Ms. Ismat Jahan, Ms. Dalia Leinarte, Ms. Violeta Neubauer, Ms. Theodora Nwankwo, Ms. Pramila Patten, Ms. Silvia Pimentel, Ms. Maria Helena Pires, Ms. Biancamaria Pomeranzi, Ms. Patricia Schulz, Ms. Dubravka Šimonović and Ms. Xiaoqiao Zou.

by the Committee. On 20 July 2011, the State party notified the Committee that the author's time limit for departure had been suspended until further notice.

### **Factual background**

2.1 The author is an unmarried woman who is an ethnic Mogadishu and a Christian. She was born in a village near Kampala. According to the author, her mother is an ethnic Muganda and her father an ethnic Mogishu from the eastern part of Uganda bordering Kenya. The author's father left her mother when the latter was pregnant and the author lived with her mother in Natete until the age of 9 years. On an unspecified date, the author's father, along with some other men, came to her mother's house to inquire about the author's whereabouts in order to compel her to be circumcised, but her mother hid her. After this incident, the author's mother sent her to an aunt in another part of the country to hide her from her father.

2.2 While the author had no contact with her father, he allegedly visited her mother on numerous occasions to ascertain her whereabouts. The father maintained during those visits that the author should be circumcised. When she turned 16, the author was told that her father knew her whereabouts. Subsequently, she ran away and lived alone in various places. When the author was 18 or 19, she fell pregnant with her first child and, two years later, fell pregnant again, on this occasion by a different man. She had no contact with the children's fathers and lived with her children before her departure from Uganda in the village of Kosubi, situated in the Kampala area.

2.3 The author entered Denmark on 20 November 2007 with a valid Ugandan passport and a three-month tourist Schengen visa. On 31 March 2008, the Immigration Service decided to expel the author from Denmark on the basis of section 25a (2) of the Aliens Act (illegal residency), with an entry ban for one year. On 2 April 2008, when she was arrested for illegal residency, she applied for asylum.

2.4 On 19 November 2008, the Immigration Service informed the author that she had been refused a residence permit under section 7 of the Aliens Act. On 8 February 2009, an ex officio lawyer submitted written observations on the author's case. On 19 March 2009, before the oral hearing of the author's case, the Refugee Appeals Board decided to seek information about female genital mutilation in Uganda through the Ministry of Foreign Affairs. On 3 September 2009, the Ministry provided the requested information.<sup>1</sup>

2.5 According to the author, the Ministry's information, confirming that female genital mutilation continued to be practised in Uganda but stating that a law had

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<sup>1</sup> According to the unofficial translation of the letter from the Ministry of Foreign Affairs of 3 September 2009 provided by the author, although female genital mutilation is forbidden by law in Uganda, it does occur, but to a lesser extent. Female genital mutilation is mainly practised in Kapchorwa, Bukwo, Bugiri, Nakapiripirit and Moroto areas, which are all situated in eastern Uganda. In the main, young girls reaching puberty (11-15 years) are at risk of being circumcised. Sources could not, however, exclude that a woman in her twenties who had given birth would not be circumcised. It is generally possible to live in Kampala without being at risk of circumcision and circumcisions are not normally performed there. By moving to eastern Uganda, the risk would be increased. Since female genital mutilation is forbidden by law in Uganda, it would in principle be possible for a single woman to seek protection from the authorities if she had a real fear of being a victim of female genital mutilation. One could, however, question the actual extent of protection that a woman would receive in the light of the general lack of capacity and efficiency of the police.

been passed prohibiting it, is incorrect, given that no such law was in force in November 2009 when the decision was taken by the Refugee Appeals Board. On the contrary, the author provided proof to the Board that a bill was being discussed but had not yet been passed by Parliament.

2.6 On 9 November 2009, the Refugee Appeals Board found that the author was unlikely to be in genuine danger of female genital mutilation if she were returned to Uganda. The Board underlined that the author had applied for asylum only in connection with her arrest for illegal residency and therefore did not meet the requirements for a residence permit under section 7 of the Aliens Act and should immediately leave Denmark. If she did not leave voluntarily, she could be forcefully returned to Uganda under section 32a of the Act.

2.7 According to the decision of the Refugee Appeals Board, the author has four half-siblings in Kampala on her mother's side who live with their fathers. The author did not know whether they had been circumcised. The author's children lived with her aunt in the village of Natete and she was in contact with them by telephone. She wished to be reunited with her children in Uganda when she no longer feared female genital mutilation. Her daughter was not circumcised. Having been asked whether she was not afraid that her daughter would be circumcised, since her daughter's father belonged to the Mogishu clan, the author explained that she was worried but there was nothing that she could do about it. The author also stated that she had had no contact with her mother, either before or after her departure from Uganda, because her mother lacked a telephone. The author did not know anyone who was circumcised but claimed that women did not share that private matter with others. The author knew of no tradition of circumcision in her father's clan,<sup>2</sup> had not seen her father since she was 9 years of age and had not been threatened either by him or by his family but feared what would happen if he found her. She argued that the police in Uganda could not protect her, as they "only help[ed] those who pa[id] bribes". Her father could still circumcise her even if she bribed the police and he would go unpunished if he chose to do so.

2.8 On 14 May 2010, the Committee, acting through its Working Group on Communications under the Optional Protocol to the Convention, requested the author's counsel in writing to, among other things, provide it with:

(a) Clarifications on the author's ethnicity/clan/tribe in Uganda, since it was being referred to differently in the communication as Mogadishu, Mogishu and Moghiso;

(b) Independent evidence supporting the author's claims that women belonging to the ethnic group/clan/tribe in question continued to be subjected to circumcision in Uganda. He was requested further to substantiate the risk of the author being subjected to circumcision if returned to Uganda in the light of the entry into force of the Prohibition of Female Genital Mutilation Act in Uganda on 9 April 2010.

2.9 Given that the Committee received no reply to its request for information of 14 May 2010, the Working Group decided, on 18 February 2011, to send the

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<sup>2</sup> During the hearing of her case by the Refugee Appeals Board, the author explained, however, that her father was from Mogishu clan, which had a tradition of circumcising women.

author's counsel a written reminder in which it reiterated its request for information and asked him to submit the requested information not later than 31 March 2011.

2.10 In the light of a partial reply received from the author's counsel on 29 March 2011, the Working Group again requested him, on 4 April 2011, to provide the Committee with independent evidence or research supporting the author's claims that the Mogishu ethnic group/tribe indeed existed in Uganda, that women belonging to the Mogishu ethnic group/tribe continued to be subjected to circumcision in Uganda and that female circumcision was being practised on adult women who gave birth to a child or children. The author's counsel was asked to submit the requested information not later than 31 May 2011. A partial reply was received on 31 May 2011 (see paras. 3.4 and 3.5).

### **Complaint**

3.1 The author invokes, without advancing any specific arguments, a violation of articles 1, 2 (c), 2 (d) and 3 of the Convention and submits that, according to the Convention relating to the Status of Refugees, gender-based violence can be a form of persecution with regard to women as a specific "social group"<sup>3</sup> and that, according to the Ministry of Foreign Affairs of Denmark, circumcision is practised in Uganda by some tribes.<sup>4</sup> Furthermore, according to the information from the Female Genital Cutting Education and Networking Project,<sup>5</sup> the problem remains widespread and the tradition of female circumcision continues to be practised among some tribes. She adds that victims cannot request protection since circumcision is not outlawed in Uganda.

3.2 According to the author, circumcision in Uganda is clan-related and does not depend on age. She must be circumcised so that she belongs to her father's clan. Her father used to live on the border with Kenya but moved to Kampala on an unspecified date. The author fears being circumcised by her father and his family if she returns to Uganda. She claims that the Ugandan authorities are corrupt and unwilling to help her, although she has never sought official protection.

3.3 Being a woman belonging to a clan — Moghiso/Mogishu — where circumcisions are carried out, and not having previously been circumcised, the author argues that she is in danger of treatment that would be in violation of article 7 of the International Covenant on Civil and Political Rights if deported by force to Uganda. She submits that it would also amount to a violation of her right to privacy under article 17 of the Covenant. Since such treatment is due to her status as a woman, the author also invokes a violation of articles 2, 3 and 26 of the Covenant and states that she should be protected against such discriminatory treatment.

3.4 The author submits that Bagishu and Mugisu are names for the same tribe and provides a description of the ritual of circumcision among Bagishu men. She states that, once a boy has been circumcised, he becomes a true and mature person. In

<sup>3</sup> Reference is made to the decision of the Immigration and Refugee Board of Canada in relation to case T93-12198 (no copy on file).

<sup>4</sup> Reference is also made to the 2002 concluding observations of the Committee on the Elimination of Discrimination against Women on the third periodic report of Uganda (A/57/38), paras. 135-136, and to the 2005 concluding observations of the Committee on the Rights of the Child on the second periodic report of Uganda (CRC/C/UGA/CO/2), paras. 55-56.

<sup>5</sup> Female Genital Cutting Education and Networking Project, "Uganda: Female circumcision hurts women's dignity", undated.

other words, her father was a Bagishu who was now a mature man and who had become a Mugisu through circumcision. The author refers to the report of the Immigration and Refugee Board of Canada,<sup>6</sup> according to which the Bagisu tribe practises male circumcision but not female genital mutilation. She notes, however, that the same report also states that it was made “within time constraints”. It is further stated that the report “was not and did not purport to be conclusive as to the merit of any particular claim to refugee status or asylum”. The author submits that the issues before the Committee are when female genital mutilation was made illegal in Uganda and whether the prohibition offers effective protection against her father. She notes that, as late as 11 March 2010, it was reported that female genital mutilation was practised in Uganda<sup>7</sup> and that, consequently, she has established a prima facie case.

3.5 While acknowledging that the Prohibition of Female Genital Mutilation Act entered into force in Uganda on 9 April 2010, the author submits that the decision of the Refugee Appeals Board was made on 9 November 2009, i.e. almost half a year earlier. She adds that the decision was, among other things, based on incorrect information provided by the Ministry of Foreign Affairs (dated 3 September 2009) that the legislation had already entered into force (see paras. 2.5 and 2.6). She argues that, since the decision was based on openly wrong information from the Ministry with regard to the status of the legislation in Uganda, the Danish asylum authorities did not provide a fair hearing in her case. She states that, now that the legislation is in force, a new hearing should be allowed in order to assess whether the legislation is an effective measure to protect Ugandan women who fear mutilation by their families and to what extent the police could provide effective remedies in this regard. Following this assessment, it should further be established whether she would risk persecution and whether she would have any real possibility of benefiting from the protection of the law.

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

4.1 On 10 January 2012, the State party submitted its observations on admissibility and the merits. It recalls that the author stated to the Danish asylum authorities that she had left Uganda because she feared that her father or one of his relatives would have her circumcised, given that her father’s clan (the Mogishu clan) had a tradition of circumcising both girls and boys. She could give no further information about the tradition and did not know whether other women had been circumcised. She further stated that she had had no conflicts with the Ugandan authorities and that she was not politically active. The reason for her flight was solely fear of circumcision. She had not applied for asylum in Denmark until her

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<sup>6</sup> Immigration and Refugee Board of Canada, “Uganda: the incidence of female genital mutilation among the Bagisu tribe”, 11 September 2000, available from [www.unhcr.org/refworld/docid/3df4beb814.html](http://www.unhcr.org/refworld/docid/3df4beb814.html) [accessed 7 December 2012].

<sup>7</sup> Reference is made to the following excerpt from the 2009 country reports on human rights practices of the Department of State of the United States of America released on 11 March 2010: “FGM [was] practiced by the Sabinu ethnic group in rural Kapchorwa District and the Pokot ethnic group along the north-eastern border with Kenya despite local laws that prohibit the practice. In 2006 the subcounties of Kapchorwa and Bukwo districts passed bylaws to make FGM illegal; however, the practice still occurred. The government, women’s groups, and international organizations continued to combat the practice through education. These programs, which received some support from local leaders, emphasized close cooperation with traditional authority figures and peer counselling.” [Source: [www.state.gov/g/drl/rls/hrrpt/2009/af/135982.htm](http://www.state.gov/g/drl/rls/hrrpt/2009/af/135982.htm)].

arrest four months after her arrival because she, being just a schoolgirl wishing to get away from her country of origin, did not know of the concept.

4.2 The State party further recalls that, in its decision of 9 November 2009, the Refugee Appeals Board accepted that the author's basis for asylum was the risk of forced circumcision if returned to Uganda. The Board also accepted the author's reference to a situation in which her father had approached her mother when the author was 9 years of age to have the author circumcised. The Board further noted that the author and her father had since had no contact, except for an accidental meeting in the street in Kampala when they did not speak to each other. The Board found that the author was not at risk of female genital mutilation if she were returned to Uganda, emphasizing that many years had passed since the author's father or any of his family members had approached her. Against that background, the Board did not find it probable that the author would be subjected to torture or inhuman or degrading treatment or punishment if she were returned to Uganda.

4.3 The State party provides detailed information about the tasks and composition of the Refugee Appeals Board and about the legal basis of its decisions pursuant to the Aliens Act. Pursuant to section 31 (1) of the Act, an alien may not be returned to a country where he or she will be at risk of the death penalty or of being subjected to torture or inhuman or degrading treatment or punishment, or where he or she will not be protected against being sent on to such country (non-refoulement). This absolute provision applies to all aliens and must be applied in accordance with the international legal obligations of Denmark.

4.4 The State party submits that, on an unspecified date, the author submitted a communication to the Human Rights Committee in which she stated that her deportation would constitute a violation of the Covenant. The communication was, however, rejected. The State party therefore argues that the present communication is inadmissible pursuant to article 4 (2) (a) of the Optional Protocol to the Convention, since the same matter has already been examined under another procedure of international investigation or settlement, i.e. the Human Rights Committee. It notes in this context that the entire communication, apart from the first short sentence, concerns alleged violations of the Covenant and not of the Convention. The alleged violations of the Convention are thus merely briefly mentioned in the first sentence.

4.5 The State party further submits that the communication should be declared inadmissible *ratione loci* and *ratione materiae* under article 2 of the Optional Protocol because Denmark is not responsible under the Convention for the acts cited as the basis for the author's communication. It notes that, while the Convention itself has no explicit jurisdiction clause limiting its scope of application, article 2 of the Optional Protocol clearly provides that communications "may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State party, claiming to be victims of a violation of any of the rights set forth in the Convention by that State party". Accordingly, the right of individual petition is clearly limited by a jurisdiction clause. The State party acknowledges that the author is temporarily residing in Denmark and therefore currently under Danish jurisdiction. The author's claims rest not, however, on any treatment that she will suffer in Denmark owing to the conduct of the State party's authorities, but rather on consequences that she may suffer if she is returned to Uganda. Accordingly, the only conduct by a Danish authority of which the author complains is the decision to

remove her to a place where she will allegedly suffer discriminatory treatment contrary to the Convention. The decision to return the author to Uganda, however, cannot engage the State party's responsibility under articles 1, 2 (c), 2 (d) and 3 of the Convention.

4.6 The State party further notes that the concept of jurisdiction for the purposes of article 2 of the Optional Protocol must be considered to reflect the meaning of the term in public international law, i.e. that a State's jurisdictional competence is primarily territorial. Only in exceptional circumstances can acts of States parties that produce effects in other States amount to responsibility for the acting State party ("extraterritorial effect"). The State party submits that no such exceptional circumstances exist in the current case and that Denmark cannot be held responsible for violations of the Convention that are expected to be committed by another State party outside both the Danish territory and Danish jurisdiction.

4.7 The State party submits that the question of extraterritorial effect has not been directly addressed in any published jurisprudence of the Committee and that there is no jurisprudence to indicate that the relevant provisions of the Convention have any extraterritorial effect.<sup>8</sup> The European Court of Human Rights, however, has clearly stressed in its case law<sup>9</sup> the exceptional character of extraterritorial protection of the rights contained in the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).

4.8 The State party further submits that article 1 of the Optional Protocol to the Covenant stipulates, just as article 2 of the Optional Protocol to the Convention, that the Human Rights Committee can receive communications from individuals subject to the jurisdiction of a State party who claim to be victims of a violation by that State party of any of the rights set forth in the Covenant. The Human Rights Committee has found on a number of occasions that the deportation of persons by States parties to other States that would result in a foreseeable breach of their right to life, as set out in article 6 of the Covenant, or their freedom from torture, as set out in article 7 of the Covenant, would entail a violation. The Human Rights Committee has, however, never considered a complaint on its merits regarding deportation of a person who feared a lesser human rights violation in the receiving State (e.g. violation of a derogable right) by the receiving State.<sup>10</sup>

4.9 The State party argues that the guidance that is to be found in the case law of the European Court of Human Rights and the Human Rights Committee clearly indicates that, except in wholly exceptional circumstances, aliens who are subject to deportation cannot claim an entitlement to remain in the territory of a State party simply to benefit from the right to non-discrimination that they would enjoy there and that would be denied to them in the receiving State. Accordingly, the returning of a woman who arrives in Denmark simply to escape from discriminatory treatment

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<sup>8</sup> Reference is made to communication No. 10/2005, *N. S. F. v. the United Kingdom of Great Britain and Northern Ireland*, inadmissibility decision of 30 May 2007.

<sup>9</sup> Judgement of the European Court of Human Rights in *Soering v. the United Kingdom* (application No. 14038/88), 7 July 1989, para. 88. See also the decisions of the Court in *F. v. the United Kingdom* (application No. 17341/03), 22 June 2004, and *Z. and T. v. the United Kingdom* (application No. 27034/05), 28 February 2006.

<sup>10</sup> See Sarah Joseph, Jenny Schultz and Melissa Castan, eds., *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 2nd ed. (New York, Oxford University Press, 2004), p. 94.



in her own country, however objectionable that treatment may be, cannot constitute a violation of the Convention. For the above reasons, the State party contends that Denmark is not responsible under the Convention for the alleged violations, if any, cited as the basis for the author's communication. Accordingly, it should be rejected as inadmissible *ratione loci* and *ratione materiae* pursuant to article 2 of the Optional Protocol.

4.10 The State party further submits that the communication should be declared inadmissible under article 4 (1) of the Optional Protocol for non-exhaustion of domestic remedies. It follows from the Committee's jurisprudence that the author must have raised the claim in substance at the domestic level that she wishes to bring before the Committee.<sup>11</sup> The State party observes that the articles of the Convention invoked by the author all concern discrimination against women. It notes, however, that no allegation based on discrimination against the author as a woman was ever formulated by her before the Immigration Service or the Refugee Appeals Board and that, as a consequence, the domestic authorities have had no opportunity to deal with the author's assertion that the decision involved gender-based discrimination.<sup>12</sup> Since the Committee in this case would be a court of first instance, the communication should be declared inadmissible pursuant to article 4 (1) of the Optional Protocol.

4.11 The State party further submits that, in her communication to the Committee, the author has neither clearly identified nor explained the rights under the Convention on which she is in fact relying, but rather simply referred to articles 1, 2 (c), 2 (d) and 3 of the Convention. The rest of her communication concerns alleged violations of the Covenant and not of the Convention. For that reason, the State party argues that the communication should also be declared inadmissible under article 4 (2) (c) of the Optional Protocol as not sufficiently substantiated.

4.12 Given that, for the reasons explained in paragraphs 4.5 to 4.9, the returning of the author to Uganda cannot engage the State party's responsibility under the Convention, it is submitted that no violation of the Convention would occur.

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

5.1 On 17 February 2012, the author commented on the State party's observations on admissibility and the merits. She submits that the definition of gender-based discrimination referred to in article 1 of the Convention has to be interpreted in the context of the existing human rights instruments, while adding further protection for women against specific forms of gender-based discrimination.

5.2 The author submits that, in its sixth periodic report to the Committee, the State party referred to the fact that the "requirement of the so-called dual criminality in relation to female genital mutilation was abolished", meaning that "it is now possible to punish Danish nationals as well as persons residing in Denmark who perform or who assist in performing female genital mutilation abroad, even when female genital mutilation is not a crime in the country where it is being

<sup>11</sup> See communication No. 8/2005, *Kayhan v. Turkey*, inadmissibility decision of 27 January 2006, para. 7.7.

<sup>12</sup> Reference is made to *N. S. F. v. the United Kingdom of Great Britain and Northern Ireland*, footnote 8 above, para. 7.3, and *Kayhan v. Turkey*, footnote 11 above.

performed”.<sup>13</sup> She adds that female genital mutilation has therefore, as from May 2003, had an extraterritorial effect in Denmark pursuant to section 245 (a) of the Criminal Code.

5.3 The author notes that the Committee has issued its general recommendation No. 19, on violence against women, and considered a number of individual communications that could provide guidance in the present communication.<sup>14</sup> The author argues that the use of female genital mutilation is a form of threat to a woman’s health and that the issue is therefore covered by article 12 of the Convention. She adds that the relevant provisions of the Convention are thus articles 1, 2 (c)-2 (f), 5 (a), 12 and 16 (1), in addition to general recommendation No. 19, supplementing the range of provisions in other human rights instruments that apply equally to men and women.

5.4 The author submits that the issue before the Committee is whether the Convention has extraterritorial effect, similar to article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) and article 7 of the Covenant. In other words, the author is asking whether there is a “positive” obligation on the State party to provide effective protection for a woman’s right to security of person if the threat against that woman is in another country or country of origin where there is no such protection. The author adds that this question has already been raised in a number of communications in which the authors argued that their deportation to their respective countries of origin would constitute a violation of the Convention.<sup>15</sup> Given that all these communications were declared inadmissible on grounds other than the extraterritorial applicability of the Convention, the Committee’s position on this issue is yet to be publicly stated. In this respect, the author notes, however, that the Committee has requested States parties to take interim measures in a number of these communications,<sup>16</sup> which may suggest that the Committee already has an opinion that such measures can be used in exceptional [deportation] cases, where the author risks torture or inhuman treatment on return.

5.5 The author draws the Committee’s attention to the fact that the Convention has not been directly incorporated as a legal norm into the State party’s national law,<sup>17</sup> unlike the European Convention on Human Rights. She adds that the State party’s failure to incorporate the United Nations human rights instruments into its legal order creates a high level of uncertainty in relation to the legal status of decisions adopted by the human rights treaty bodies under the individual communication procedure.

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<sup>13</sup> CEDAW/C/DNK/6, p. 60.

<sup>14</sup> Reference is made to communication No. 2/2003, *A. T. v. Hungary*, views adopted on 26 January 2005, paras. 9.3 and 9.6, and communication No. 4/2004, *A. S. v. Hungary*, views adopted on 14 August 2006.

<sup>15</sup> Reference is made, among others, to communication No. 26/2010, *Herrera Rivera v. Canada*, inadmissibility decision of 18 October 2011.

<sup>16</sup> Reference is made to *Herrera Rivera v. Canada*, footnote 15 above, and *N. S. F. v. the United Kingdom of Great Britain and Northern Ireland*, footnote 8 above.

<sup>17</sup> Reference is made, among others, to the conclusions and recommendations of the Committee against Torture on the fifth periodic report of Denmark (CAT/C/DNK/CO/5), para. 9, and the concluding observations of the Human Rights Committee on the fifth periodic report of Denmark (CCPR/C/DNK/CO/5), para. 6.

5.6 As to the State party's argument that the present communication is inadmissible pursuant to article 4 (2) (a) of the Optional Protocol, the author argues that it has not been examined under another procedure of international investigation or settlement. She submits that, while her first communication was indeed addressed to the Human Rights Committee, it was not registered as a formal communication (i.e. assigned a case number) and was thus never examined. The author therefore argues that article 4 (2) (a) of the Optional Protocol does not apply to the present situation.<sup>18</sup>

5.7 As to the State party's arguments that the communication should be declared inadmissible *ratione loci* and *ratione materiae* under article 2 of the Optional Protocol, the author reiterates that she fears that her forced deportation from Denmark to Uganda will lead to her being subjected to female genital mutilation without any protection from the Ugandan authorities. She recalls the State party's argument that it has no responsibility under the Convention in relation to any violations thereof, including female genital mutilation, which may occur in another country. With reference to the jurisprudence of the Committee against Torture and the Human Rights Committee, and to the case law of the European Court of Human Rights, the author submits that, under international law, "exceptional circumstances [when] acts of State parties which produce effects in other States amount to responsibility for the acting State party" (see para. 4.6) occur "if the effect amounts to torture or inhuman treatment, as well as other serious human rights violations".

5.8 The author submits that this exceptional circumstances requirement is met because she fears female genital mutilation if she returns to her home country. The State party's attempt to reduce her communication to the issue of gender discrimination under article 1 of the Convention, i.e. a less serious form of human rights violation, must therefore be rejected by the Committee. She adds that female genital mutilation is a serious human rights violation amounting to torture and inhuman treatment and that it is compounded by the lack of protection by law in Uganda. The author also submits that her argument is supported by the fact that the Committee has already requested the State party to take interim measures in the present communication.

5.9 The author further argues that the State party's legislation criminalizing female genital mutilation also appears to reflect that exceptional circumstances apply. According to section 245 (a) of the Criminal Code, female genital mutilation is a serious form of violence punishable by up to six years' imprisonment. Moreover, the State party has introduced penal sanctions for acts of female genital mutilation carried out in other countries, even when such acts are legal in that particular country. The author thus concludes that the State party's arguments for declaring the communication inadmissible under article 2 of the Optional Protocol are contrary to the law and practice in Denmark with regard to female genital mutilation.

5.10 In relation to the exhaustion of domestic remedies, the author notes that the State party does not argue that an appeal against the decision by the Refugee Appeals Board should have been made to a court or any other higher body in Denmark. She submits that, while she raised the issue of gender-based violence during the processing of her request for asylum, it was not reflected in the decision

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<sup>18</sup> Reference is also made to *N. S. F. v. the United Kingdom of Great Britain and Northern Ireland*, footnote 8 above, para. 7.4.

of the Board. In particular, the claim about gender-based violence was made by her counsel in written observations to the Board of 8 February 2009. Subsequently, during the oral hearing by the Board on 9 November 2009, her counsel quoted the Convention and made the argument about gender-based violence, albeit unsuccessfully given that the author's request for asylum was rejected. The author submits that the State party wrongly relies on the failure of the Board to reflect her claims about gender-based violence as a ground for arguing that she has not exhausted domestic remedies.

5.11 As to the State party's argument that the communication should be declared inadmissible under article 4 (2) (c) of the Optional Protocol, the author refers to the Committee's general recommendation No. 19, on violence against women. She adds that the State party itself considers that violence against women, including female genital mutilation, falls within the scope of article 12 of the Convention.<sup>19</sup> The author argues that the State party is perfectly aware that female genital mutilation as such is covered by the Convention and she invokes a violation of article 12 in addition to the earlier claims made in her communication to the Committee.

5.12 Lastly, the author refers to the Committee's decision in *N. S. F. v. the United Kingdom of Great Britain and Northern Ireland*<sup>20</sup> and submits that the Committee's jurisprudence shows that it is not necessary to invoke specific provisions of the Convention and to demonstrate how the Convention may have been violated for a communication to be considered admissible.

5.13 On 12 March 2012, the author submitted additional comments on the State party's observations. With regard to the reasoning of the Refugee Appeals Board (see para. 4.2), she submits that the fact that her father has previously been unable to have her circumcised is not the same as evidence that he would not want to do so if he could find her. She adds that, while the Board could have argued that she would have to request protection from the Ugandan authorities, such argument does not appear in the decision in question. That she stayed in Denmark for four months before applying for asylum is irrelevant to the assessment of whether she risks being subjected to female genital mutilation upon her return to Uganda.

5.14 The author argues that, although the Prohibition of Female Genital Mutilation Act was passed in 2010, it remains ineffective<sup>21</sup> and that effective protection is lacking. Consequently, female genital mutilation remains a real threat to girls and women in Uganda. The author adds that the Refugee Appeals Board did not question the credibility of her claims (see para. 4.2) but rather concluded that, because her father had previously been unable to have her circumcised, he would not do so later. She submits in this regard that there is every reason to believe that her father continues to want his traditional "right" to be carried out and that he is capable of doing so if he finds her. The author therefore argues that the decision of the Board of 9 November 2009 was in violation of the Convention and that even at present her

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<sup>19</sup> Reference is made to the sixth periodic report of Denmark to the Committee, footnote 13 above, pp. 54-60.

<sup>20</sup> See footnote 8 above, para. 7.4.

<sup>21</sup> Reference is made to the report of the Working Group on the Universal Periodic Review on Uganda ([A/HRC/19/16](#)), paras. 52 and 91 and recommendations 111.49, 111.50 and 111.54. See also the concluding observations of the Committee on the combined fourth to seventh report of Uganda ([CEDAW/C/UGA/CO/7](#)) and the concluding observations of the Human Rights Committee on the initial report of Uganda ([CCPR/CO/80/UGA](#)).

deportation to Uganda would amount to a violation of the Convention by the State party.

#### **State party's additional observations**

6.1 On 22 June 2012, the State party submitted additional observations. As to the deviation from the requirement of dual criminality in relation to female genital mutilation under the Criminal Code, the State party submits that it is irrelevant to assessing whether the Convention has extraterritorial effect. National provisions set out in the Criminal Code have no impact on the interpretation of the Convention and its non-extraterritorial effect. The deviation from the normal requirement of dual criminality provided for in section 7 (1) (ii) (a) of the Criminal Code and the separate criminalization of female genital mutilation stipulated in section 245 (a) of the Criminal Code merely reflect the desire of the State party's authorities to prosecute offenders performing female genital mutilation in countries that allow this act. The State party therefore does not share the author's interpretation that this implies or indicates that female genital mutilation should be seen as an exceptional circumstance resulting in the Convention being accorded extraterritorial effect.

6.2 The State party does not dispute that subjecting a child or an adult to female genital mutilation can amount to ill-treatment contrary to article 3 of the European Convention on Human Rights, article 3 of the Convention against Torture or articles 6 and 7 of the Covenant. The Convention on the Elimination of All Forms of Discrimination against Women, however, does not deal directly or indirectly with removal to torture or other serious threats to life and the security of a person. The author can therefore bring a communication concerning the State party only with regard to alleged violations of the Convention committed by and under the jurisdiction of Denmark.

6.3 The State party submits that it is aware that the Committee has emphasized in its general recommendation No. 19 that gender-based violence is a form of discrimination that can impair or nullify the enjoyment by women of human rights and fundamental freedoms, such as the right to life, the right to security of the person and the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Nevertheless, this does not change the fact that a State party is responsible only for obligations vis-à-vis individuals under its jurisdiction and cannot be held responsible for discrimination under the jurisdiction of another State, even if the author can establish that she would be subjected to discrimination contrary to the Convention owing to gender-based violence in Uganda.

6.4 With reference to article 5 (2) of the Optional Protocol, the State party observes that the Committee's application of urgent measures pursuant to article 5 (1) of the Optional Protocol in the present and other communications does not indicate that the Convention has extraterritorial effect.

6.5 The State party notes the author's argument that she did raise the issue of gender-based discrimination in the domestic proceedings, including in her written observations of 8 February 2009. It submits, however, that the only reference to the Convention in those observations is a brief quotation from the Committee's concluding comments of 23 August 2002 on the consideration of the third periodic report of Uganda. The State party therefore maintains that domestic remedies have not been exhausted.

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

7.1 On 13 July 2012, the author commented on the State party's additional observations. On the issue of the extraterritorial effect of the Convention, the author argues that the criminalization of female genital mutilation in Denmark is important proof that the State party has acknowledged the obligation to end impunity for those practising female genital mutilation anywhere in the world, if they are within Danish jurisdiction. When women are within Danish jurisdiction, a similar requirement follows from the Convention to protect those women from being returned to countries in which offenders performing female genital mutilation act with impunity, which is the case in Uganda.

7.2 The author notes the State party's argument that, while it accepts that female genital mutilation can amount to ill-treatment under the other United Nations human rights instruments, the Convention "does not deal directly or indirectly with removal to torture or other serious threats to life and the security of the person". She submits in this regard that this is a matter of interpretation of the Convention, which should be left to the Committee. The author argues that the Committee would likely conclude that it is mandated under the Convention to consider gender-based violence as its main concern and therefore also be able to consider whether some forms of gender-based violence may indeed reach such a level that the Convention would have extraterritorial effect. The author also notes that, although article 7 of the Covenant does not mention deportation either directly or indirectly, it nevertheless gives a mandate for the Human Rights Committee to deal with communications involving deportation.

7.3 The author agrees with the State party that the Committee's application of urgent measures does not imply a determination on the admissibility or the merits of the present communication as such. She submits, however, that the mere fact that the Committee applies urgent measures in such cases appears to indicate that the Committee is of the view that there may be situations in which the Convention can be invoked with regard to fear of gender-based violence in the country of origin in order to stay deportation from the receiving country. The author argues, therefore, that the Convention does have extraterritorial effect in some cases and that the present communication should thus be declared admissible and examined on the merits.

7.4 As to the exhaustion of domestic remedies, the author submits that the Danish Refugee Council invoked the Committee's concluding comments of 23 August 2002 on the consideration of the third periodic report of Uganda in its decision of 17 October 2008 and held that "it could not, on the basis available, agree to treating the [author's] case as manifestly unfounded". She recalls that the Immigration Service then refused to grant her a residence permit. The author further submits that, in his written observations of 8 February 2009, her counsel referred to the same concluding comments on Uganda as the Refugee Council. Furthermore, he stated that in Uganda the author could not receive the protection against female genital mutilation to which women and girls were entitled under the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women. Her counsel further stated that single women in

particular had no legal protection in Uganda and had to pay bribes if they wished to make a report to the police.<sup>22</sup>

7.5 The author further submits that, on 30 October 2009, her counsel submitted additional observations to the Refugee Appeals Board, including a reference to the combined fourth, fifth, sixth and seventh periodic report of Uganda to the Committee.<sup>23</sup> According to that report, the Ugandan authorities stated that a law prohibiting female genital mutilation had been drafted and presented to Parliament. That information was contrary to the information provided by the Ministry of Foreign Affairs, which stated that such a law already existed in Uganda. The author's counsel therefore argued that her deportation to Uganda would be in violation of the Convention and articles 2, 3, 7, 14 and 26 of the Covenant. He considered that the author "risk[ed] inhuman treatment because she [was] a woman and that the State party [was] not treating her on an equal footing with men, since she [was] not protected against violations that only affect[ed] women". The author notes that the decision of the Board does not mention the additional observations of 30 October 2009 at all.

7.6 The author maintains that, while the Convention was indeed invoked before the Danish asylum authorities on more than one occasion, there is not a single reference to the Convention in the decision of the Refugee Appeals Board. She submits that the Board has not even attempted to argue why she was not protected under the Convention.

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

8.1 In accordance with rule 64 of its rules of procedure, the Committee must decide whether the communication is admissible under the Optional Protocol. Pursuant to rule 66, the Committee may decide to consider the admissibility of the communication separately from its merits.

8.2 In accordance with article 4 (2) of the Optional Protocol, the Committee is satisfied that the same matter has not been and is not being examined under another procedure of international investigation or settlement. In this context, the Committee notes that the author's communication submitted under the Optional Protocol to the International Covenant on Civil and Political Rights was never registered for consideration by the Human Rights Committee.

8.3 The Committee takes note of the author's claims that her deportation to Uganda would constitute a violation by Denmark of articles 1, 2 (c), 2 (d), 3 and 12 of the Convention. The Committee also takes note of the State party's argument that the communication should be declared inadmissible *ratione loci* and *ratione materiae* under article 2 of the Optional Protocol, given that Denmark has obligations under the Convention only vis-à-vis individuals under its jurisdiction and cannot be held responsible for violations of the Convention, such as gender-based violence, expected to be committed by another State party outside Danish territory and jurisdiction. The Committee further takes note of the State party's reference to the concept of jurisdiction in public international law, in addition to its

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<sup>22</sup> Reference is made to the report of the United Nations High Commissioner for Human Rights on activities of the Office of the United Nations High Commissioner for Human Rights in Uganda (A/HRC/7/38/Add.2).

<sup>23</sup> CEDAW/C/UGA/7, para. 175.

contention that the Convention lacks extraterritorial effect and that, unlike other human rights treaties, does not deal, directly or indirectly, with removal to torture or other serious threats to life and the security of a person.

8.4 As to the author's argument that the Committee's request for interim measures would indicate that it has already taken a decision on the extraterritorial applicability of the Convention, the Committee recalls that, under article 5 (2) of the Optional Protocol, such request does not imply that any determination on the admissibility or on the merits of the communication has been made.

8.5 The first issue that needs to be addressed by the Committee is whether it is competent under the Convention to consider the present communication, involving the deportation of the author from Denmark to Uganda, where she claims she would be exposed to female genital mutilation, treatment prohibited by the Convention. The Committee would need to determine whether, by deporting the author to Uganda, the State party's responsibility would be engaged under the Convention for the consequences of such deportation, albeit outside its territory.

8.6 Under article 2 of the Optional Protocol to the Convention, "communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State party, claiming to be victims of a violation of any of the rights set forth in the Convention by that State party". The Committee recalls that it indicated in its general recommendation No. 28 that the obligations of States parties applied without discrimination both to citizens and non-citizens, including refugees, asylum seekers, migrant workers and stateless persons, within their territory or effective control, even if not situated within the territory. States parties are "responsible for all their actions affecting human rights, regardless of whether the affected persons are in their territories".<sup>24</sup>

8.7 The Committee recalls that article 1 of the Convention defines discrimination against women as "any distinction, exclusion or restriction made on the basis of sex, which has the effect or purpose of impairing or nullifying the recognition, enjoyment, or exercise by women ... of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field". The Committee further recalls its general recommendation No. 19, which has clearly placed violence against women within the ambit of discrimination against women by stating that gender-based violence is a form of discrimination against women and includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. With regard to the State party's argument that, unlike other human rights treaties, the Convention does not deal, directly or indirectly, with removal to torture or other serious threats to the life and the security of a person, the Committee recalls that, in the same recommendation, it also determined that such gender-based violence impaired or nullified the enjoyment by women of a number of human rights and fundamental freedoms, which included the right to life, the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, the right to liberty and security of the person and the right to equal protection under the law.

8.8 The Committee further notes that, under international human rights law, the principle of non-refoulement imposes a duty on States to refrain from returning a

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<sup>24</sup> General recommendation No. 28, on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, para. 12.



person to a jurisdiction in which he or she may face serious violations of human rights, notably arbitrary deprivation of life or torture or other cruel, inhuman or degrading treatment or punishment. The principle of non-refoulement also constitutes an essential component of asylum and international refugee protection.<sup>25</sup> The essence of the principle is that a State may not oblige a person to return to a territory in which he or she may be exposed to persecution, including gender-related forms and grounds of persecution. Gender-related forms of persecution are forms of persecution that are directed against a woman because she is a woman or that affect women disproportionately. An explicit non-refoulement provision is contained in article 3 of the Convention against Torture, which prohibits the removal of a person to a country where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. Obligations under the International Covenant on Civil and Political Rights, as interpreted by the Human Rights Committee in its jurisprudence,<sup>26</sup> also encompass the obligation on States not to extradite, deport, expel or otherwise remove a person from their territory where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by article 6, on the right to life, and article 7, on the right to be free from torture or other cruel, inhuman or degrading treatment or punishment, of the Covenant, in the country to which the person will, or may subsequently, be removed.<sup>27</sup>

8.9 The absolute prohibition of torture, which is part of customary international law, includes, as an essential corollary component, the prohibition of refoulement to a risk of torture, which entails the prohibition of any return of an individual where he or she would be exposed to a risk of torture. The same holds true for the prohibition of arbitrary deprivation of life. Gender-based violence is outlawed under human rights law primarily through the prohibition of torture and other cruel, inhuman or degrading treatment or punishment. The Committee against Torture, in its general comment No. 2, has explicitly situated gender violence and abuse within the scope of the Convention against Torture.<sup>28</sup>

8.10 As to the State party's argument that nothing in the Committee's jurisprudence indicates that any provisions of the Convention have extraterritorial effect, the Committee recalls that, under article 2 (d) of the Convention, States parties

<sup>25</sup> See article 33 (prohibition of expulsion or return ("refoulement")) of the Convention relating to the Status of Refugees.

<sup>26</sup> See, for example, communication No. 470/1991, *Kindler v. Canada*, views adopted on 30 July 1993, para. 6.2.

<sup>27</sup> See general comment No. 20 of the Human Rights Committee, on article 7 (prohibition of torture or other cruel, inhuman or degrading treatment or punishment), para. 9 ("States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement"); and general comment No. 31 of the Human Rights Committee, on the nature of the general legal obligation imposed on States parties to the Covenant, para. 12.

<sup>28</sup> *CAT/C/GC/2*, para. 18. See also Human Rights Committee, communication No. 1465/2006, *Kaba v. Canada*, views adopted on 25 March 2010. It is also worth noting that the European Court of Human Rights and the Inter-American Commission on Human Rights have found instances of rape of detainees to be tantamount to acts of torture. In addition, "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity" constitutes a crime against humanity under the Rome Statute of the International Criminal Court and "rape" constitutes a crime against humanity under the statutes of the international criminal tribunals for the Former Yugoslavia and Rwanda.

undertake to refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation. This positive duty encompasses the obligation of States parties to protect women from being exposed to a real, personal and foreseeable risk of serious forms of gender-based violence, irrespective of whether such consequences would take place outside the territorial boundaries of the sending State party: if a State party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that that person's rights under the Convention will be violated in another jurisdiction, the State party itself may be in violation of the Convention. For example, a State party would itself be in violation of the Convention if it sent back a person to another State in circumstances in which it was foreseeable that serious gender-based violence would occur.<sup>29</sup> The foreseeability of the consequence would mean that there was a present violation by the State party, even though the consequence would not occur until later. What amounts to serious forms of gender-based violence will depend on the circumstances of each case and would need to be determined by the Committee on a case-by-case basis at the merits stage, provided that the author had made a prima facie case before the Committee by sufficiently substantiating such allegations.

8.11 In the present case, the Committee takes note of the author's claim that she fears being subjected to female genital mutilation by her father and his family if she is returned to Uganda. It further notes that, according to the information provided by the author to the Danish asylum authorities and in the context of her communication to the Committee, she has not met her father since the age of 9 years and is unaware of any siblings, female relatives or any other women who have been circumcised. Furthermore, the author gave contradictory information as to her ethnicity/clan/tribe in Uganda and failed to provide, the repeated requests from the Committee notwithstanding (see paras. 2.8-2.10), any independent evidence supporting her claims that women belonging to the Mogishu ethnic group/tribe continued to be subjected to female genital mutilation in Uganda and that female circumcision was being practised on adult women who gave birth to a child or children. Even assuming that the name of the clan/tribe could have been misspelled by the Danish asylum authorities and the author's ethnicity/tribe is indeed Bagishu, Bagisu or Mugisu, she provided no independent evidence showing that women belonging to the Bagishu, Bagisu or Mugisu ethnic group/tribe were being subjected to female genital mutilation in Uganda. In this context, the Committee also notes that the Prohibition of Female Genital Mutilation Act entered into force in Uganda on 9 April 2010.

8.12 In the circumstances and in the absence of any other pertinent information on file, the Committee considers that the author has failed to sufficiently substantiate, for purposes of admissibility, the claim that her removal from Denmark to Uganda would expose her to the real, personal and foreseeable risk of serious forms of gender-based violence. The Committee notes that, under article 4 (2) (c) of the Optional Protocol, it must declare a communication inadmissible where it is not sufficiently substantiated. Accordingly, the Committee concludes that the communication is inadmissible under article 4 (2) (c) of the Optional Protocol.

8.13 In the light of this conclusion, the Committee decides not to examine any other inadmissibility grounds invoked by the State party.

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<sup>29</sup> See *Kindler v. Canada*, footnote 26 above.

9. The Committee therefore decides:

(a) That the communication is inadmissible under article 4 (2) (c) of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.

[Adopted in Arabic, Chinese, English, French, Russian and Spanish, the English text being the original version.]

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