PUBLIC AND PRIVATE ACTORS - GENERAL

III. JURISPRUDENCE

CERD

- *C. P. and M. P. v. Denmark* (5/1994), CERD, A/50/18 (15 March 1995) 151 (CERD/C/46/D/5/1994) at para. 6.2.

  ...
  6.2 The Committee has noted the arguments of the parties in respect of the issue of exhaustion of domestic remedies concerning Mr. P.'s claim of unlawful dismissal by the Technical School of Roskilde. It recalls that the Court of Roskilde heard the complaint on 19 November 1991 and delivered its reasoned judgement on 5 May 1992; said judgement was notified to the author by his lawyer on 6 May 1992. The author affirms that he did convey to his lawyer in time that he wanted to appeal this judgement, and he blames the lawyer for having acted negligently by failing to file the appeal within statutory deadlines. The Committee notes that the file before it reveals that the author's lawyer was privately retained. In the circumstances, this lawyer's inaction or negligence cannot be attributed to the State party. Although the State party's judicial authorities did provide the author with relevant information on how to file his appeal in a timely manner, it is questionable whether, given the fact that the author alleged to have been the victim of racial harassment, the authorities have really exhausted all means to ensure that the author could enjoy effectively his rights in accordance with article 6 of the Convention. However, since the author did not provide prima facie evidence that the judicial authorities were tainted by racially discriminatory considerations and since it was the author's own responsibility to pursue the domestic remedies, the Committee concludes that the requirements of article 14, paragraph 7 (a), of the International Convention on the Elimination of All Forms of Racial Discrimination, are not met.

- *Habassi v. Denmark* (10/1997), CERD, A/54/18 (17 March 1999) 86 at paras. 9.2-9.4, 10 and 11.1.

  ...
  9.2 Financial means are often needed to facilitate integration in society. To have access to the credit market and be allowed to apply for a financial loan on the same conditions as those which are valid for the majority in the society is, therefore, an important issue.

  9.3 In the present case the author was refused a loan by a Danish bank on the sole ground of his non-Danish nationality and was told that the nationality requirement was motivated by the need to ensure that the loan was repaid. In the opinion of the Committee, however, nationality is not the most appropriate requisite when investigating a person's will or capacity

to reimburse a loan. The applicant's permanent residence or the place where his employment, property or family ties are to be found may be more relevant in this context. A citizen may move abroad or have all his property in another country and thus evade all attempts to enforce a claim of repayment. Accordingly, the Committee finds that, on the basis of article 2, paragraph (d), of the Convention, it is appropriate to initiate a proper investigation into the real reasons behind the bank's loan policy vis à vis foreign residents, in order to ascertain whether or not criteria involving racial discrimination, within the meaning of article 1 of the Convention, are being applied.

9.4 The Committee notes that the author, considering the incident an offence under the Danish Act against Discrimination, reported it to the police. First the police and subsequently the State Prosecutor in Viborg accepted the explanations provided by a representative of the bank and decided not to investigate the case further. In the Committee's opinion, however, the steps taken by the police and the State Prosecutor were insufficient to determine whether or not an act of racial discrimination had taken place.

...

10. In the circumstances, the Committee is of the view that the author was denied effective remedy within the meaning of article 6 of the Convention in connection with article 2 (d).

11.1 The Committee recommends that the State party take measures to counteract racial discrimination in the loan market.

- *B. J. v. Denmark* (17/1999), CERD, A/55/18 (17 March 2000) 116 (CERD/C/56/D/17/1999) at paras. 6.2, 6.3 and 7.

...

6.2 The Committee considers that the conviction and punishment of the perpetrator of a criminal act and the order to pay economic compensation to the victim are legal sanctions with different functions and purposes. The victim is not necessarily entitled to compensation in addition to the criminal sanction of the perpetrator under all circumstances. However, in accordance with article 6 of the Convention, the victim's claim for compensation has to be considered in every case, including those cases where no bodily harm has been inflicted but where the victim has suffered humiliation, defamation or other attack against his/her reputation and self esteem.

6.3 Being refused access to a place of service intended for the use of the general public solely on the ground of a person's national or ethnic background is a humiliating experience which, in the opinion of the Committee, may merit economic compensation and cannot always be adequately repaired or satisfied by merely imposing a criminal sanction on the perpetrator.

PUBLIC AND PRIVATE ACTORS - GENERAL

7. While the Committee considers that the facts described in the present communication disclose no violation of article 6 of the Convention by the State party, the Committee recommends that the State party take the measures necessary to ensure that the victims of racial discrimination seeking just and adequate reparation or satisfaction in accordance with article 6 of the Convention, including economic compensation, will have their claims considered with due respect for situations where the discrimination has not resulted in any physical damage but humiliation or similar suffering.

- *Lacko v. Slovakia* (11/1998), CERD, A/56/18 (9 August 2001) 130 at paras. 2.1-2.3, 7.9, 7.10, 10 and 11.

...

2.1 On 24 April 1997 the petitioner, accompanied by other persons of Romany ethnicity, went to the Railway Station Restaurant located in the main railway station in Kosice, Slovakia, to have a drink. Shortly after entering the restaurant the applicant and his company were told by a waitress to leave the restaurant. The waitress explained that she was acting in accordance with an order given by the owner of the restaurant not to serve Roma. After requesting to speak with her supervisor, the petitioner was directed to a man who explained that the restaurant was not serving Roma, because several Roma had previously destroyed equipment in the restaurant. When the petitioner related that neither he nor his company had damaged any equipment, the person in charge repeated that only polite Roma would be served.

2.2 On 7 May 1997, the petitioner filed a complaint with the General Prosecutor's Office in Bratislava, requesting an investigation to determine whether an offence had been committed. The case was assigned to the County Prosecutor's Office in Kosice who referred the matter to the Railway Police. In the meantime the applicant also sought remedy from the Slovak Inspectorate of Commerce, responsible for overseeing the lawful operation of commercial enterprises. In a letter to the petitioner, dated 12 September 1997, the Inspectorate reported that it had conducted an investigation into the complaint during the course of which it had been observed that Roma women had been served at the restaurant and that the owner had arranged that there would be no other discrimination of any polite customers, Roma included.

2.3 By resolution dated 8 April 1998, the Railway Police Department in Kosice reported that it had conducted an investigation into the case and found no evidence that an offence had been committed. The petitioner appealed to the County Prosecutor who, in a resolution dated 24 April 1998, ruled that the decision of the Railway Police Department was valid and indicated that there was no further legal remedy available.

...

7.9 After reviewing the files concerned, the Prosecutor General disagreed with the legal

opinion of the Regional Prosecution Office concerning the degree of dangerousness of the act. It considered that the Regional Prosecution Office had manifestly overestimated the immediate rectification by the head of the restaurant after a discussion with the petitioner. In a written instruction to the Regional Prosecution Office the Prosecutor General stated that the results of the review sufficiently justified the suspicion that the head of the restaurant had committed a crime of instigation to national and racial hatred under Section 198a para 1 of the Penal Code and instructed the subordinate prosecution office accordingly.

7.10 On 19 April 2000, the Kosice District Prosecutor indicted Mr. J. T. On 28 April 2000, the court declared Mr. J. T. guilty of the crime described in article 198a, sec.1 of the Penal Code and sentenced him to pay a fine of SKK 5000 or, alternatively, to serve a term of three months' imprisonment. The sentence became effective on 25 July 2000.
...
10. In the view of the Committee, the condemnation of Mr. J. T. and the penalty imposed, even though after a long period of time following the events, constitutes sanctions compatible with the obligations of the State party. Taking due account of this condemnation, even if delayed, the Committee makes no finding of a violation of the Convention by the State party.

11. Acting under article 14, paragraph 7 (b), of the Convention, the Committee recommends to the State party that it complete its legislation in order to guarantee the right of access to public places in conformity with article 5 (f) of the Convention and to sanction the refusal of access to such places for reason of racial discrimination. The Committee also recommends to the State party to take the necessary measures to ensure that the procedure for the investigation of violations is not unduly prolonged.

- *Hagan v. Australia* (26/2002), CERD, A/58/18 (20 March 2003) 139 (CERD/C/62/D/26/2002) at paras. 1, 2.1, 7.2, 7.3 and 8.

1. The petitioner, Stephen Hagan, is an Australian national, born in 1960, with origins in the Kooma and Kullilli tribes of south-western Queensland. He alleges to be a victim of a violation by Australia of articles 2, in particular, paragraph 1 (c); 4; 5, paragraphs d (i) and (ix), e (vi) and f; 6 and 7 of the International Convention on the Elimination of All Forms of Racial Discrimination. He is represented by counsel.

2.1 In 1960, the grandstand of an important sporting ground in Toowoomba, Queensland, where the author lives, was named the "E.S. 'Nigger' Brown Stand", in honour of a well-known sporting and civic personality, Mr. E.S. Brown. The word "nigger" ("the offending term") appears on a large sign on the stand. Mr. Brown, who was also a member of the body overseeing the sports ground and who died in 1972, was of white Anglo-Saxon extraction

who acquired the offending term as his nickname, either "because of his fair skin and blond hair or because he had a penchant for using 'Nigger Brown' shoe polish". The offending term is also repeated orally in public announcements relating to facilities at the ground and in match commentaries.

...

7.2 The Committee has taken due account of the context within which the sign bearing the offending term was originally erected in 1960, in particular the fact that the offending term, as a nickname probably with reference to a shoeshine brand, was not designed to demean or diminish its bearer, Mr. Brown, who was neither black nor of Aboriginal descent. Furthermore, for significant periods neither Mr. Brown (for 12 years until his death) nor the wider public (for 39 years until the petitioner's complaint) objected to the presence of the sign.

7.3 Nevertheless, the Committee considers that use and maintenance of the offending term can at the present time be considered offensive and insulting, even if for an extended period it may not have necessarily been so regarded. The Committee considers, in fact, that the Convention, as a living instrument, must be interpreted and applied taking into the circumstances of contemporary society. In this context, the Committee considers it to be its duty to recall the increased sensitivities in respect of words such as the offending term appertaining today.

8. The Committee therefore notes with satisfaction the resolution adopted at the Toowoomba public meeting of 29 July 1999 to the effect that, in the interest of reconciliation, racially derogatory or offensive terms will not be used or displayed in the future. At the same time, the Committee considers that the memory of a distinguished sportsperson may be honoured in ways other than by maintaining and displaying a public sign considered to be racially offensive. The Committee recommends that the State party take the necessary measures to secure the removal of the offending term from the sign in question, and to inform the Committee of such action it takes in this respect.

- *L. R. et al. v. Slovakia* (31/2003), CERD, A/60/18 (7 March 2005) 119 at paras. 2.1-2.4, 10.2-10.10, 11 and 12.

...

2.1 On 20 March 2002, the councillors of the Dobšiná municipality adopted resolution No. 251-20/III-2002-MsZ, whereby they approved what the petitioners describe as a plan to construct low-cost housing for the Roma inhabitants of the town.a/ About 1,800 Roma live in the town in what are described as "appalling" conditions, with most dwellings comprising thatched huts or houses made of cardboard and without drinking water, toilets, or drainage or sewage systems. The councillors instructed the local mayor to prepare a project aimed at

securing finance from a government fund set up expressly to alleviate Roma housing problems in the State party.

2.2 Thereupon, certain inhabitants of Dobšiná and surrounding villages established a five-member "petition committee", led by the Dobšiná chairman of the Real Slovak National Party. The committee drafted a petition with the following text:

> "I do not agree with the building of low-cost houses for people of Gypsy origin on the territory of Dobšiná, as it will lead to an influx of inadaptable citizens of Gypsy origin from the surrounding villages, even from other districts and regions."b/

The petition was signed by some 2,700 inhabitants of Dobšiná and deposited with the municipal council on 30 July 2002. On 5 August 2002, the council considered the petition and unanimously voted, "having considered the factual circumstances", to cancel the earlier resolution by means of a second resolution which included an explicit reference to the petition.c/

2.3 On 16 September 2002, in the light of the relevant law,d/ the petitioners' counsel requested the Rožňava District Prosecutor to investigate and prosecute the authors of the discriminatory petition, and to reverse the council's second resolution as it was based on a discriminatory petition. On 7 November 2002, the District Prosecutor rejected the request on the basis of purported absence of jurisdiction over the matter. The Prosecutor found that "...the resolution in question was passed by the Dobšiná Town Council exercising its self-governing powers; it does not constitute an administrative act performed by public administration and, as a result, the prosecution office does not have the competence to review the legality of this act or to take prosecutorial supervision measures in non-penal area".

2.4 On 18 September 2002, the petitioners' counsel applied to the Constitutional Court for an order determining that articles 12 and 33 of the Constitution, the Act on the Right of Petition and the Framework Convention for the Protection of National Minorities (Council of Europe) had been violated, cancelling the second resolution of the council and examining the legality of the petition. Further information was provided on two occasions at the request of the Court. On 5 February 2003, the Court, in closed session, held that the petitioners had provided no evidence that any fundamental rights had been violated by the petition or by the council's second decision. It stated that as neither the petition nor the second resolution constituted legal acts, they were permissible under domestic law. It further stated that citizens have a right to petition regardless of its content.

...

10.2 The Committee observes, at the outset, that it must determine whether an act of racial discrimination, as defined in article 1 of the Convention, has occurred before it can decide which, if any, substantive obligations in the Convention to prevent, protect against and

remedy such acts have been breached by the State party.

10.3 The Committee recalls that, subject to certain limitations not applicable in the present case, article 1 of the Convention defines racial discrimination as follows: "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field".

10.4 The State party argues firstly that the challenged resolutions of the municipal council make no reference to Roma, and must thus be distinguished from the resolutions at issue in, for example, the *Koptova* y/ case that were racially discriminatory on their face. The Committee recalls that the definition of racial discrimination in article 1 expressly extends beyond measures which are explicitly discriminatory to encompass measures that are not discriminatory at face value but are discriminatory in fact and effect, that is, if they amount to indirect discrimination. In assessing such indirect discrimination, the Committee must take full account of the particular context and circumstances of the petition, as by definition indirect discrimination can only be demonstrated circumstantially.

10.5 In the present case, the circumstances surrounding the adoption of the two resolutions by the municipal council of Dobšiná and the intervening petition presented to the council following its first resolution make abundantly clear that the petition was advanced by its proponents on the basis of ethnicity and was understood as such by the council as the primary, if not the exclusive basis for revoking its first resolution. As a result, the Committee considers that the petitioners have established a distinction, exclusion or restriction based on ethnicity, and dismisses this element of the State party's objection.

10.6 The State party argues, in the second instance, that the municipal council's resolution did not confer a direct and/or enforceable right to housing, but rather amounted to but one step in a complex process of policy development in the field of housing. The implication is that the second resolution of the council, even if motivated by ethnic grounds, thus did not amount to a measure "nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field", within the meaning of article 1, paragraph 1 *in fine*. The Committee observes that in complex contemporary societies the practical realization of, in particular, many economic, social and cultural rights, including those related to housing, will initially depend on and indeed require a series of administrative and policymaking steps by the State party's competent relevant authorities. In the present case, the council resolution clearly adopted a positive development policy for housing and tasked the mayor with pursuing subsequent measures by way of implementation.

PUBLIC AND PRIVATE ACTORS - GENERAL

10.7 In the Committee's view, it would be inconsistent with the purpose of the Convention, and elevate formalism over substance, to consider that the final step in the actual implementation of a particular human right or fundamental freedom must occur in a non-discriminatory manner, while the necessary preliminary decision-making elements directly connected to that implementation were to be severed and be free from scrutiny. As a result, the Committee considers that the council resolutions in question, taking initially an important policy and practical step towards realization of the right to housing, followed by its revocation and replacement with a weaker measure, taken together, do indeed amount to the impairment of the recognition or exercise on an equal basis of the human right to housing, protected by article 5, paragraph (e) (iii), of the Convention and further in article 11 of the International Covenant on Economic, Social and Cultural Rights. The Committee thus dismisses the State party's objection on this point.

10.8 In light of this finding that an act of racial discrimination has occurred, the Committee recalls its jurisprudence [n/]...to the effect that acts of municipal councils, including the adoption of public resolutions of legal character such as in the present case, amount to acts of public authorities within the meaning of Convention provisions. It follows that the racial discrimination in question is attributable to the State party.

10.9 Accordingly, the Committee finds that the State party is in breach of its obligation under article 2, paragraph 1 (a), of the Convention to engage in no act of racial discrimination and to ensure that all public authorities act in conformity with this obligation. The Committee also finds that the State party is in breach of its obligation to guarantee the right of everyone to equality before the law in the enjoyment of the right to housing, contrary to article 5, paragraph (e) (iii), of the Convention.

10.10 With respect to the claim under article 6, the Committee observes that, at a minimum, this obligation requires the State party's legal system to afford a remedy in cases where an act of racial discrimination within the meaning of the Convention has been made out, whether before the national courts or, in this case, the Committee. The Committee having established the existence of an act of racial discrimination, it must follow that the failure of the State party's courts to provide an effective remedy discloses a consequential violation of article 6 of the Convention.

...

11. The Committee on the Elimination of Racial Discrimination...is of the view that the facts before it disclose violations of article 2, paragraph 1 (a), article 5, paragraph (e) (iii), and article 6 of the Convention.

12. In accordance with article 6 of the Convention, the State party is under an obligation to provide the petitioners with an effective remedy. In particular, the State party should take measures to ensure that the petitioners are placed in the same position that they were in upon

adoption of the first resolution by the municipal council. The State party is also under an obligation to ensure that similar violations do not occur in the future.

_____

Notes

a/ The State party provides, with its submissions on the merits of the petition, the following full text of the resolution:

> "On its 25th extraordinary session held on 20 March 2002 the Town Council of the town of Dobšiná adopted the following resolution from discussed reports and points:
>
> RESOLUTION 251-20/III-2002-MsZ
>
> After discussing the proposal by Lord Mayor Ing. Ján Vozár concerning the building of low-cost housing the Town Council of Dobšiná
>
> Approves
>
> the low-cost housing - family houses or apartment houses - development policy and
>
> Recommends
>
> the Lord Mayor to deal with the preparation of project documentation and acquisition of funds for this development from State subsidies."

b/ Petitioners' translation, which reflects exactly the text of the petition set out in the translated judgement of the Constitutional Court provided by the State party annexed to its submissions on the merits. The State party suggests in its submissions on the merits that a more appropriate translation would be: "I do not agree with the construction of flats for the citizens of Gypsy nationality (ethnicity) within the territory of the town of Dobšiná, as there is a danger of influx of citizens of Gypsy nationality from surrounding area [sic] and even from other districts and regions."

c/ The State party provides, with its submissions on the merits of the petition, the following full text of the resolution:

> "RESOLUTION 288/5/VIII-2002-MsZ
>
> I. After discussing the petition of 30 July 2002 and after determining the facts, the Town Council of Dobšiná, through the Resolution of the Town Council is in compliance with the law, on the basis of the citizens' petition

Cancels

Resolution 251-20/III-2002-MsZ approving the low-cost housing - family houses or apartment houses - development policy.

II. Tasks

The Town Council commissions with elaborating a proposal for solving the existence of inadaptable citizens in the town of Dobšiná and then to discuss it in the bodies of the town and at a public meeting of the citizens.

Deadline: November 2002
Responsible: Chairpersons of commissions."

d/ The petitioners refer to:

(i) Article 1 of the Act on the Right of Petition, which provides:
"A petition cannot call for a violation of the Constitution of the Slovak Republic and its laws, nor deny or restrict individual rights";

(ii) Article 12 of the Constitution, which provides:
(1) All human beings are free and equal in dignity and in rights. Their fundamental rights and freedoms are sanctioned; inalienable, imprescriptible and irreversible.
(2) Fundamental rights shall be guaranteed in the Slovak Republic to everyone regardless of sex, race, colour, language, belief and religion, political affiliation or other conviction, national or social origin, nationality or ethnic origin, property, descent or any other status. No one shall be aggrieved, discriminated against or favoured on any of these grounds.
(3) Everyone has the right to decide freely which national group he or she is a member of. Any influence and all manners of pressure that may affect or lead to a denial of a person's original nationality shall be prohibited.
(4) No injury may be inflicted on anyone, because of exercising his or her fundamental rights and freedoms;

(iii) Article 33 of the Constitution, which provides:
"Membership in any national minority or ethnic group may not be used to the detriment of any individual"; and

(iv) The Act on the Public Prosecution Office, which provides that the Prosecutor has a duty to oversee compliance by public administration bodies with laws and regulations, and to review the legality of binding regulations issued by public administration bodies.

...
n/ [See *Koptova v. Slovak Republic*, case No. 13/1998, Opinion of 8 August 2000], at para. 6.6.
...
y/ [*Koptova v. Slovak Republic*, case No. 13/1998, Opinion of 8 August 2000].

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- *Quereshi v. Denmark* (33/2003), CERD, A/60/18 (9 March 2005) 142 at paras. 2.5, 2.6, 2.8, 2.11, 2.13, 7.3, 8 and 9.

...
2.5 Speeches made at the Progressive Party's annual meeting, held on 20 and 21 October 2001, were broadcast on the State party's public television system, which has a duty to broadcast from annual meetings of political parties seeking election. The petitioner contends that the following statements were made at the meeting from the podium:b/

> Vagn Andreasen (party member): "The State has given the foreigners work. They work in our slaughterhouses where they can easily poison our food and endanger the agricultural exports. Another form of terrorism is to break into our waterworks and poison the water."
>
> Mogens Glistrup (former leader of the party): "The Mohammedans will exterminate the populations of the countries to which they have advanced." On 22 October, an article in the *Dagbladet Politiken* daily quoted this statement as: "Their holiest duty is, in the name of Allah, to exterminate the populations in the countries to which they have advanced."
>
> Erik Hammer Sørensen (party member, commenting on immigration to the State party): "There are fifth columnists about. Those that we have got in commit violence, murder and rape."
>
> Margit Petersen (party member, referring to her earlier conviction under section 266 (b) in the State party's courts): "I'm glad to be a racist. We want a Mohammedan-free Denmark"; "the Blacks breed like rats".
>
> Peter Rindal (party member): "Concerning Mohammedan burial grounds in Denmark, of course we should have such ones. And they should preferably be so large that there is room for all of them, and hopefully in one go."
>
> Bo Warming (party member): "The only difference between Mohammedans and rats

is that rats don't draw social benefits." He allegedly distributed a drawing of a rat with the Koran under its arm to journalists present at the conference.

2.6 Upon viewing the meeting, the petitioner requested the Documentation and Advisory Centre on Racial Discrimination (DRC) to file complaints against the above individuals, as well as the members of the executive board of the Progressive Party for its approval of the statements made.

...

2.8 On 25 October 2001, DRC filed a complaint with the Varde police, alleging that the statement made by Mr. Andreasen violated section 266 (b) (1) and (2) on the basis that it insulted and degraded a group of people on account of their religious origin. DRC added that the statement postulated that immigrants and refugees were potential terrorists, thereby generally and unobjectively equating a group of people of an ethnic origin other than Danish with crime. The same day, DRC filed a complaint with the Varde police, alleging that the statement made by Mr. Rindal violated section 266 (b) (1) and (2) on the basis that it threatened a group of people on account of their race and ethnic origin.

...

2.11 On 28 March 2003, the Varde Police Chief Constable forwarded the six cases to the Sønderborg Regional Public Prosecutor with the following recommendations:

...

- The charges against Mr. Andreasen and Mr. Sørensen should be withdrawn under sections 721 (1) (ii) of the Administration of Justice Act.

...

2.13 After receipt of further information, the Regional Public Prosecutor, on 18 June 2003, made the following recommendations to the Director of Public Prosecutions (DPP), in relation to prosecution of the above; DPP accepted them on 6 August 2003:

...

- The charges against Mr. Andreasen should be withdrawn on the basis that that further prosecution could not be expected to lead to conviction and sentence. DPP observed that the *actus reus* of section 266 (b) (1) required a statement to be directed at a group of persons on account of, *inter alia*, race, colour, national or ethnic origin and religion. In the view of DPP, this requirement had not been met as the concept of "foreigners" employed by Mr. Andreasen was "so diffuse that it does not signify a group within the meaning of the law".

...

7.3 The Committee recalls that Mr. Andreasen made offensive statements about "foreigners" at the party conference. The Committee notes that, regardless of what may have been the position in the State party in the past, a general reference to foreigners does not at present single out a group of persons, contrary to article 1 of the Convention, on the basis of a specific race, ethnicity, colour, descent, or national or ethnic origin. The Committee is thus unable to conclude that the State party's authorities reached an inappropriate conclusion in

determining that Mr. Andreasen's statement, in contrast to the more specific statements of the other speakers at the conference, did not amount to an act of racial discrimination contrary to section 266 (b) of the Danish Criminal Code. It also follows that the petitioner was not deprived of the right to an effective remedy for an act of racial discrimination in respect of Mr. Andreasen's statement.

8. Nevertheless, the Committee considers itself obliged to call the State party's attention (i) to the hateful nature of the comments concerning foreigners made by Mr. Andreasen and of the particular seriousness of such speech when made by political figures and, in this context, (ii) to its general recommendation XXX, adopted at its sixty-fourth session, on discrimination against non-citizens.

9. The Committee on the Elimination of Racial Discrimination...is of the opinion that the facts before it do not disclose a violation of the Convention.

_____

Notes

...

b/ The form of the statements is as reported in the criminal complaints to the police lodged by the Documentation and Advisory Centre on Racial Discrimination.

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ICCPR

- *Casariego v. Uruguay* (56/1979) (R.13/56), ICCPR, A/36/40 (29 July 1981) 185 at paras. 10.1, 10.3, 12 and Individual Opinion by Mr. Christian Tomuschat, 189.

...

10.1 The Human Rights Committee...observes that although the arrest and initial detention and mistreatment of Lilian Celiberti de Casriego allegedly took place on foreign territory, the Committee is not barred either by virtue of article 1 of the Optional Protocol ("...individuals subject to its jurisdiction...") or by virtue of article 2 (1) of the Covenant ("...individuals within its territory and subject to its jurisdiction...") from considering these allegations, together with the claim of subsequent abduction into Uruguayan territory, inasmuch as these acts were perpetrated by Uruguayan agents acting on foreign soil.

...

10.3 Article 2 (1) of the Covenant places an obligation upon a State party to respect and to ensure rights "to all individuals within its territory and subject to its jurisdiction", but it does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it...According to article

5 (1) of the Covenant:

> "1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destructon of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant."

In line with this, it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.
...
12. The Committee, accordingly, is of the view that the State party is under an obligation, pursuant to article 2 (3) of the Covenant, to provide Lilian Celiberti de Casariego with effective remedies, including her immediate release, permission to leave the country and compensation for the violations which she has suffered, and to take steps to ensure that similar violations do not occur in the future.

Individual Opinion by Mr. Christian Tomuschat:

I concur in the views expressed by the majority. None the less, the arguments set out in paragraph 10 for affirming the applicability of the Covenant also with regard to those events which have taken place outside Uruguay need to be clarified and expanded. Indeed, the first sentence in paragraph 10.3, according to which article 2 (1) of the Covenant does not imply that a State party "cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State", is too broadly framed and might therefore give rise to misleading conclusions. In principle, the scope of application of the Covenant is not susceptible to being extended by reference to article 5, a provision designed to cover instances where formally rules under the Covenant seem to legitimize actions which substantially run counter to its purposes and general spirit. Thus, Governments may never use the limitation clauses supplementing the protected rights and freedoms to such an extent that the very substance of those rights and freedoms would be annihilated; individuals are legally barred from availing themselves of the same rights and freedoms with a view to overthrowing the regime of the rule of law which constitutes the basic philosophy of the Covenant. In the present case, however, the Covenant does not even provide the pretext for a "right" to perpetrate the criminal acts which, according to the Committee's conviction, have been perpetrated by the Uruguayan authorities.

To construe the words "within its territory" pursuant to their strict literal meaning as excluding any responsibility for conduct occurring beyond the national boundaries would, however, lead to utterly absurd results. The formula was intended to take care of objective

difficulties which might impede the implementation of the Covenant in specific situations. Thus, a State party is normally unable to ensure the effective enjoyment of the rights under the Covenant to its citizens abroad, having at its disposal only the tools of diplomatic protection with their limited potential. Instances of occupation of foreign territory offer another example of situations which the drafters of the Covenant had in mind when they confined the obligation of States parties to their own territory. All these factual patterns have in common, however, that they provide plausible grounds for denying the protection of the Covenant. It may be concluded, therefore, that it was the intention of the drafters, whose sovereign decision cannot be challenged, to restrict the territorial scope of the Covenant in view of such situations where enforcing the Covenant would be likely to encounter exceptional obstacles. Never was it envisaged, however, to grant States parties unfettered discretionary power to carry out wilful and deliberate attacks against the freedom and personal integrity of their citizens living abroad. Consequently, despite the wording of article 2 (1), the events which took place outside Uruguay come within the purview of the Covenant.

See also:

- *Burgos v. Uruguay* (52/1979) (R.12/52), ICCPR, A/36/40 (29 July 1981) 176 at paras. 12.1 and 12.3.

- *B. d. B. v. The Netherlands* (273/1989), ICCPR, A/44/40 (30 March 1989) 286 at para. 6.5.

  ...
  6.5 With regard to an alleged violation of article 26, the Committee recalls that its first sentence stipulates that "all persons are entitled without discrimination to the equal protection of the law." In this connection, it observes that this provision should be interpreted to cover not only entitlements which individuals entertain *vis-à-vis* the State but also obligations assumed by them pursuant to law. Concerning the State party's argument that the [Industrial Insurance Board for Health and for Mental and Social Interests] BVG is not a State organ and that the Government cannot influence concrete decisions of industrial insurance boards, the Committee observes that a State party is not relieved of its obligations under the Covenant when some of its functions are delegated to other autonomous organs.

- *Lundgren et al. v. Sweden* (298/1988 and 299/1988), ICCPR, A/46/40 (9 November 1990) 253 (CCPR/C/40/D/298-299/1988) at para. 10.4.

  ...
  10.4 The authors also allege discrimination by the State party because different private schools receive different benefits from the municipalities...the Committee recalls its

jurisprudence that the State party's responsibility is engaged by virtue of decisions of its municipalities and that no State party is relieved of its obligations under the Covenant by delegating some of its functions to autonomous organs or municipalities. a/ The State party has informed the Committee that the various municipalities decide upon the appropriateness of private schools in their particular education system. This determines whether a subsidy will be awarded...When a municipality makes such a decision, it should be based on reasonable and objective criteria and made for a purpose that is legitimate under the Covenant. In this cases under consideration, the Committee cannot conclude...that the denial of a subsidy for textbooks and school meals of students...was incompatible with article 26 of the Covenant.

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Notes

a/ Communication No. (273/1989) 273/1988 (*B.d.B. et al. v. The Netherlands*) declared inadmissible on 30 March 1989, para. 6.5.

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- *Nahlik v. Austria* (608/1995), ICCPR, A/51/40 vol. II (22 July 1996) 259 (CCPR/C/57/D/608/1995) at para. 8.2.

...

8.2 The Committee has noted the State party's argument that the communication is inadmissible under article 1 of the Optional Protocol since it relates to alleged discrimination within a private agreement, over which the State party has no influence. The Committee observes that under article 2 and 26 of the Covenant the State party is under an obligation to ensure that all individuals within its territory and subject to its jurisdiction are free from discrimination, and consequently the courts of States parties are under an obligation to protect individuals against discrimination, whether it occurs within the public sphere or among private parties in the quasi-public sector of, for example, employment. The Committee further notes that the collective agreement at issue in the instant case is regulated by law and does not enter into force except on confirmation by the Federal Minister for Labour and Social Affairs. Moreover, the Committee notes that this collective agreement concerns the staff of the Social Insurance Board, an institution of public law implementing public policy. For these reasons, the Committee cannot agree with the State party's argument that the communication should be declared inadmissible under article 1 of the Optional Protocol.

- *Dias v. Angola* (711/1996), ICCPR, A/55/40 vol. II (20 March 2000) 111 at paras. 3, 8.3 and 10.

PUBLIC AND PRIVATE ACTORS - GENERAL

...
3. The author claims that Angola has violated the Covenant, since it failed to investigate the crimes committed, keeps those responsible for the crimes in high positions, and harasses the author and the witnesses so that they can't return to Angola, with as a consequence for the author that he has lost his property...
...
8.3 The Committee recalls its jurisprudence that article 9(1) of the Covenant protects the right to security of person also outside the context of formal deprivation of liberty. An interpretation of article 9 which would allow a State party to ignore threats to the personal security of non-detained persons subject to its jurisdiction would render totally ineffective the guarantees of the Covenant. 1/ In the present case, the author has claimed that the authorities themselves have been the source of the threats. As a consequence of the threats against him, the author has been unable to enter Angola, and he has therefore been prevented from exercising his rights. If the State party neither denies the threats nor cooperates with the Committee to explain the matter, the Committee must give due weight to the author's allegations in this respect. Accordingly, the Committee concludes that the facts before it disclose a violation of the author's right of security of person under article 9, paragraph 1, of the Covenant.
...
10. ...[T]he State party is under the obligation to provide Mr. Dias with an effective remedy and to take adequate measures to protect his personal security from threats of any kind. The State party is under an obligation to take measures to prevent similar violations in the future.

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Notes

1/ See the Committee's Views in case No. 195/1985, *Delgado Paez v. Colombia*, paragraph 5.5, adopted on 12 July 1990, document CCPR/C/39/D/195/1985.

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- *Chongwe v. Zambia* (821/1998), ICCPR, A/56/40 vol. II (25 October 2000) 137 at paras. 2.1-2.3, 2.8, 2.13, 2.14, 5.2, 5.3, 6 and 7.

...
2.1 The author, a Zambian advocate and chairman of a 13-party opposition alliance, states that in the afternoon of 23 August 1997, he and Dr. Kenneth Kaunda, for 27 years the President of Zambia, were shot and wounded by the police. The author states that the incident occurred in Kabwe, a town some 170 kilometres north of Lusaka, while the author and Dr. Kaunda were to attend a major political rally to launch a civil disobedience campaign. He annexes reports by Human Rights Watch and Inter-African Network for

Human Rights and Development as part of his communication.

2.2 The author states that the police fired on the vehicle on which he was travelling, slightly wounding former President Kaunda and inflicting a life threatening wound on the author. The police force subsequently promised to undertake its own investigation. The Zambian Human Rights Commission was also said to be investigating the incident; but no results of any investigations have been produced.

2.3 He further refers to the Human Rights Watch Report for May 1998, Vol. 10, No 2 (A), titled "Zambia, no model for democracy") which includes 10 pages on the so-called "Kabwe shooting", confirming the shooting incident that took place by quoting witness statements and medical reports.

...

2.8 According to the Human Rights Watch report, President Chiluba on 26 August 1997, denied that the Kabwe shooting was a state-sponsored assassination plot. He said that the Zambian police had instigated an investigation and that Nungu Sassasali, the commanding officer at Kabwe, was suspended. However, he rejected calls for an independent inquiry into the incident. The report refers to the ZNBC radio, stating that on 28 August, President Chiluba said the government would not apologise over the Kabwe shooting as it could not be held responsible for it.

...

2.13 Secondly, in its report, submitted by the author, on the investigation of the Kabwe-shooting, the Inter-African Network for Human Rights and Development concluded that the shooting incident took place, and that an international tribunal should investigate the assassination attempt on the former President Kenneth Kaunda. This report, which is based on evidence taken from persons directly concerned in the incident, shows that the car in which the author was travelling, had left the centre of Kabwe. Before it did so, there is evidence that the local police commander had given orders to his men to fire on the car without giving any details as to the objective of such shooting; this information was relayed on the police radio network. At a roundabout at the outskirts of Kabwe, a police vehicle whose registration number and driver have been identified attempted to block the path of the car. The car's driver evaded this attempt, and there is evidence that two policemen standing on the back of the police vehicle opened fire on the car.

2.14 The author claims that on 28 November 1997, while on board a British Airways plane in Harare, he was told by airport and airline personnel that there was a VIP plane on the runway sent by the Zambian Government to collect him. He decided not to go back to Zambia, and has since this incident been residing in Australia. He will not return to Zambia, as he fears for his life.

...

5.2 The Committee observes that article 6, paragraph 1, entails an obligation of a State party

to protect the right to life of all persons within its territory and subject to its jurisdiction. In the present case, the author has claimed, and the State party has failed to contest before the Committee that the State party authorised the use of lethal force without lawful reasons, which could have led to the killing of the author. In the circumstances, the Committee finds that the State party has not acted in accordance with its obligation to protect the author's right to life under article 6, paragraph 1, of the Covenant.

5.3 The Committee recalls its jurisprudence that article 9(1) of the Covenant protects the right to security of person also outside the context of formal deprivation of liberty.1/ The interpretation of article 9 does not allow a State party to ignore threats to the personal security of non-detained persons subject to its jurisdiction. In the present case, it appears that persons acting in an official capacity within the Zambian police forces shot at the author, wounded him, and barely missed killing him. The State party has refused to carry out independent investigations, and the investigations initiated by the Zambian police have still not been concluded and made public, more than three years after the incident. No criminal proceedings have been initiated and the author's claim for compensation appears to have been rejected. In the circumstances, the Committee concludes that the author's right to security of person, under article 9, paragraph 1 of the Covenant, has been violated.

6. The Human Rights Committee...is of the view that the facts before it disclose a violation of articles 6, paragraph 1, and 9, paragraph 1, of the Covenant.

7. Under article 2, paragraph 3(a), of the Covenant, the State party is under the obligation to provide Mr. Chongwe with an effective remedy and to take adequate measures to protect his personal security and life from threats of any kind. The Committee urges the State party to carry out independent investigations of the shooting incident, and to expedite criminal proceedings against the persons responsible for the shooting. If the outcome of the criminal proceedings reveals that persons acting in an official capacity were responsible for the shooting and hurting of the author, the remedy should include damages to Mr Chongwe. The State party is under an obligation to ensure that similar violations do not occur in the future.

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Notes

1/ See the Committee's Views in case No 195/1985, Delgado Paez, paragraph 5.5, adopted on 12 July 1990, document CCPR/C/39/D/195/1985, and in case No 711/1996 Carlos Dias, paragraph 8.3, adopted on 20 March 2000, document CCPR/C/68/D/711/1996.

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PUBLIC AND PRIVATE ACTORS - GENERAL

- *Karakurt v. Austria* (965/2000), ICCPR, A/57/40 vol. II (4 April 2002) 304 (CCPR/C/74/D/965/2000) at paras. 3.1-3.4 and 8.2.

...

3.1 The author possesses (solely) Turkish citizenship, while holding an open-ended residence permit in Austria. He is an employee of the 'Association for the Support of Foreigners' in Linz, which employs 10 persons in total. On 24 May 1994, there was an election for the Association's work-council ('Betriebsrat') which has statutory rights and responsibilities to promote staff interests and to supervise compliance with work conditions. The author, who fulfilled the formal legal requirements of being over 19 years old and having been employed for over six months, and another employee, Mr Vladimir Polak, were both elected to the two available spaces on the work-council.

3.2 On 1 July 1994, Mr Polak applied to the Linz Regional Court for the author to be stripped of his elected position on the grounds that he had no standing to be a candidate for the work-council. On 15 September 1994, the Court granted the application, on the basis that the relevant labour law, that is s. 53(1) Industrial Relations Act (Arbeitsverfassungsgesetz), limited the entitlement to stand for election to such work-councils to Austrian nationals or members of the European Economic Area (EEA). Accordingly, the author, satisfying neither criteria, was excluded from standing for the work-council.

3.3 On 15 March 1995 the Linz Court of Appeal dismissed the author's appeal and upheld the lower Court's reasoning. It also held that no violation of Art. 11 of the European Convention on Human Rights (ECHR) was involved, considering that the right to join trade unions had not been interfered with. On 21 April 1995, the author appealed to the Supreme Court, including a request for a constitutional reference (including in terms of the ECHR) of s. 53(1) of the Act by the Constitutional Court.

3.4 On 21 December 1995, the Supreme Court discussed the author's appeal and denied the request for a constitutional reference. The Court considered that the work-council was not an 'association' within the meaning of Art. 11 ECHR. The work-council was not an association formed on a voluntary and private basis, but its organisation and functions were determined by law and was comparable to a chamber of trade. Nor were the staff as such an independent association, as they were not a group of persons associated on a voluntary basis. As to arguments of discrimination against foreigners, the Supreme Court, referring to the State party's obligations under the International Convention for the Elimination of All Forms of Racial Discrimination, considered the difference in treatment between Austrian nationals and foreigners to be justified both under the distinctions that the European economic treaties draw in labour matters between nationals and non-nationals, and also on account of the particular relationship between nationals and their home State. Moreover, as a foreigner's stay could be limited and subjected to administrative decision, the statutory period of

membership in a work-council was potentially in conflict.

...

8.2 As to the State party's argument that the claim is, in truth, one under article 25 of the Covenant, the Committee observes that the rights protected by that article are to participation in the public political life of the nation, and do not cover private employment matters such as the election of an employee to a private company's work-council. It accordingly finds article 25, and any adverse consequences possibly flowing for the author from it, not applicable to the facts of the present case.

- *Chira Vargas v. Peru* (906/2000) ICCPR, A/57/40 vol. II (22 July 2002) 228 (CCPR/C/75/D/906/2000) at paras. 2.3-2.5, 2.7-2.10, 7.4, 8 and 9.

...

2.3 On 16 October 1991, an administrative decision relieved the author of his duties as a disciplinary measure, after 26 years of service.1/ The decision was based on a report dated 8 October 1991, which contained conclusions based on a police report that the author claims never existed, and a second disciplinary report dated 16 October 1991, in which the author was accused of violating article 84.C.6 of the Disciplinary Regulations, although he contends that the article in question was intended to cover a different situation.

2.4 The same day, an order was issued for the author's arrest, without a judicial order and without his being apprehended in *flagrante delicto*. The author was taken to Lima, where he was forced to attend a press conference. The author claims that no charges were ever brought against him, in either the ordinary or the military courts, for criminal negligence or liability in the course of his duties, or for any other criminal offence arising from the death of Mr. Pérez Arévalo, and that he was neither tried nor sentenced.

2.5 On 25 October 1991, the Office of the National Police Headquarters Legal Adviser issued a report stating that the author, in his capacity as Chief of the Drug Department, had failed to inform his superiors of the action he had taken against Mr. Pérez Arévalo for illicit drug trafficking. The author, however, maintains that the Institutional Command was informed immediately and expediently of the detention of certain individuals for drug trafficking, in the report of the Trujillo Police Department secretariat dated 1 October 1991. The Ministry of the Interior was also informed of the arrest of Mr. Pérez Arévalo and others, in a letter dated 4 October 1991 from the National Police Directorate-General.

...

2.7 On 30 January 1995, the author submitted an application for *amparo* to the Trujillo Third Special Civil Court, requesting that the Supreme Decision relieving him of his duties should be declared unenforceable. In its judgement of 2 March 1995, the Court declared the decision unenforceable and ordered the reinstatement of the author to active service in the

National Police with the rank of commander. The judgement was appealed by the Public Prosecutor of the Ministry of the Interior in the Trujillo First Civil Division which, on 20 June 1995, upheld the order for the author's reinstatement. The Public Prosecutor then appealed to the Constitutional Division of the Supreme Court, which, in its decision of 6 December 1995, declared itself incompetent to hear the appeal. On 27 December 1995, the appeal was declared inadmissible by the Trujillo First Civil Division.

2.8 On 12 January 1996, the Trujillo Third Special Civil Court ordered the execution of the judgement of 2 March 1995, with the reinstatement of the author as commander in the police force. In a written submission dated 1 February 1996, the Public Prosecutor opposed the author's reinstatement, arguing that administrative procedures must be carried out prior to such reinstatement.

2.9 On 15 February 1996, the author requested the Trujillo Third Special Civil Court to urge the Ministry of the Interior to implement the Supreme Decision ordering his reinstatement and to publish it in the Official Gazette. On 23 May 1996, the Court issued a decision giving the Ministry of the Interior 10 days to implement and publish the Supreme Decision. However, on 28 May 1996, the National Police Public Prosecutor declared the decision null and void, claiming that the relevant procedures had not been completed and that the decision should be signed by the President of the Republic.

2.10 The author sent notarized communications to the Ministry of the Interior and to the President of the Republic on 8 and 12 August 1996 respectively, informing them that the judicial order had not been executed. The Trujillo Third Special Civil Court sent a note dated 9 April 1997 to the Secretary of the Office of the President of Peru requesting information on the outcome of the draft Supreme Decision that the Minister of the Interior had transmitted to the President on 15 February 1996. On 25 June 1997, the Court again requested the President to sign the decision, to no avail.

...

7.4 Although not explicitly stated by the author, the Committee considers that the communication raises issues under article 25 (c) concerning every citizen's right to have access, on general terms of equality, to public service in his country, together with the right to the execution of decisions and judgements. In this regard, the Committee notes the author's claims that, notwithstanding the Supreme Decision of 21 August 1997, he was never reinstated in his post, and that another Supreme Decision was issued on 29 August 1997 forcing him to retire owing to the reorganization of the police force. Considering that the State party has not demonstrated in what way it reinstated the author in service, what rank he was given or on what date he resumed his post, as required by law in the light of the annulment ruling of 2 March 1995, the Committee considers that there has been a violation of article 25 (c), in conjunction with article 2, paragraph 3, of the Covenant.

PUBLIC AND PRIVATE ACTORS - GENERAL

8. The Human Rights Committee...is of the view that the facts that have been set forth constitute violations of article 25 (c) of the Covenant, in conjunction with article 2, paragraph 3, of the Covenant.

9. Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee is of the view that the author is entitled to an appropriate remedy, namely: (a) effective reinstatement to his duties and to his post, with all the consequences that that implies, at the rank that he would have held had he not been dismissed in 1991, or to a similar post;4/ (b) compensation comprising a sum equivalent to the payment of the arrears of salary and remuneration that he would have received from the time at which he was not reinstated to his post.5/ Finally, the State party must ensure that similar violations do not recur in the future.

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Notes

1/ According to the decision, the author had committed serious breaches of discipline and police regulations through his improper handling of a drug trafficking case, which resulted in the death of the suspect, Áureo Pérez Arévalo.

...

4/ See the Committee's Views concerning communication No. 630/1995, *Abdoulaye Mazou v. Cameroon*, paragraph 9, and communication 641/1995, *Gedumbe v. Democratic Republic of the Congo*.

5/ See the Views concerning communications No. 422/1990, No. 423/1990 and No. 424/1990, *Adimado M. Aduayom, Sofianou T. Diasso and Yawo S. Dobou v. Togo*, paragraph 9.

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- *Nam v. Republic of Korea* (693/1996), ICCPR, A/58/40 vol. II (28 July 2003) 390 (CCPR/C/78/D/693/1996) at para. 10.

...

10. In the light of the submissions by the parties, the Committee observes that the communication, as construed by the parties, does not relate to a prohibition of non-governmental publication of textbooks as was originally complained of...and found admissible by the Committee...Rather, the communication relates to the author's allegation that there is no process of scrutiny in place for the purpose of submitting non-governmental publications for approval by the authorities, for their use as school textbooks. While affirming that the right to write and publish textbooks intended for use at school falls under the protection of article 19 of the Covenant, the Committee notes that the author claims that he is entitled to have the textbook prepared by him scrutinized and approved/rejected by the

authorities for use as textbook in public middle schools. This claim, in the Committee's opinion, falls outside the scope of article 19 and consequently it is inadmissible under article 3 of the Optional Protocol.

- *Cabal and Pasini v. Australia* (1020/2002), ICCPR, A/58/40 vol. II (7 August 2003) 346 (CCPR/C/78/D/1020/2002) at para. 7.2.

...
7.2 Prior to considering the admissibility of the individual claims raised, the Committee must consider whether the State party's obligations under the Covenant apply to privately-run detention facilities, as is the case in this communication, as well as State-run facilities. While this is not an argument put forward by the State party, the Committee must consider *ex officio* whether the communication concerns a State party to the Covenant in the meaning of article 1 of the Optional Protocol. It recalls its jurisprudence in which it indicated that a State party "is not relieved of its obligations under the Covenant when some of its functions are delegated to other autonomous organs."21/ The Committee considers that the contracting out to the private commercial sector of core State activities which involve the use of force and the detention of persons does not absolve a State party of its obligations under the Covenant, notably under articles 7 and 10 which are invoked in the instant communication. Consequently, the Committee finds that the State party is accountable under the Covenant and the Optional Protocol of the treatment of inmates in the Port Philip Prison facility run by Group 4.

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Notes

...
21/ *B. d. B. v. The Netherlands,* Case No. 273/88, Decision of 30 March 1989, and *Lindgren et al v. Sweden,* Case No. 298-299/88, Views adopted on 9 November 1990.

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- *Wilson v. The Philippines* (868/1999), ICCPR, A/59/40 vol. II (30 October 2003) 48 (CCPR/C/79/D/868/1999) at paras. 2.1, 2.3-2.5, 7.3, 8 and 9.

...
2.1 On 16 September 1996, the author was forcibly arrested without warrant as a result of a complaint of rape filed by the biological father of the author's twelve year old step-daughter and transferred to a police station. He was not advised of his rights, and, not speaking the local language, was unaware as to the reasons for what was occurring. At the police station, he was held in a 4 x 4 ft cage with three others, and charged on the second day with attempted rape of his stepdaughter. He was then transferred to Valenzuela municipal jail,

where the charge was changed to rape. There he was beaten and ill-treated in a "concrete coffin". This 16 x 16 ft cell held 40 prisoners with a 6 inch air gap some 10 ft from the floor. One inmate was shot by a drunken guard, and the author had a gun placed to his head on several occasions by guards. The bottoms of his feet were struck by a guard's baton, and other inmates struck him on the guards' orders. He was ordered to strike other prisoners and was beaten when he refused to do so. He was also constantly subjected to extortion by other inmates with the acquiescence and in some instances on the direct instruction of the prison authorities, and beaten when he refused to pay or perform the directed act(s). There was no running water, insufficient sanitary conditions (a single non-flush bowl in the cell for all detainees), no visiting facility, and severe food rationing. Nor was he segregated from convicted prisoners.

...

2.3 On 30 September 1998 the author was convicted of rape and sentenced to death, as well as to P50,000 indemnity, by the Regional Trial Court of Valenzuela...

2.4 The author was then placed on death row in Muntinlupa prison, where 1,000 death row prisoners were kept in three dormitories. Foreign inmates were continually extorted by other inmates with the acquiescence, and sometimes at the direction of, prison authorities. The author refers to media reports that the prison was controlled by gangs and corrupt officials, at whose mercy the author remained throughout his confinement on death row. Several high-ranking prison officials were sentenced for extortion of prisoners, and large amounts of weapons were found in cells. The author was pressured and tortured to provide gangs and officials with money. There were no guards in the dormitory or cells, which contained over 200 inmates and remained unlocked at all times. His money and personal effects had been removed from him en route to the prison, and for three weeks he had no visitors, and therefore no basic necessities such as soap or bedding. Food comprised unwashed rice and other inappropriate substances. Sanitation consisted of two non-flushing toilet bowls in an area which was also a 200-person communal shower.

2.5 The author was forced to pay for the 8 x 8 ft area in which he slept and financially to support the eight others with him. He was forced to sleep alongside drug-deranged individuals and persons who deliberately and constantly deprived him of sleep. He was forcibly tattooed with a permanent gang mark. Inmates were stretched out on a bench on public display and beaten with wood across the thighs, or otherwise "taught a lesson". The author states he lived in constant fear coming close to death and suicidal depression, watching six inmates walk to their execution while five others died violent deaths. Fearing death after a "brutally unfair and biased" trial, he suffered severe physical and psychological distress and felt "total helplessness and hopelessness". As a result, he is "destroyed both financially and in many ways emotionally".

...

7.3 As to the author's claims under articles 7 and 10 regarding his treatment in detention and

the conditions of detention, both before and after conviction, the Committee observes that the State party, rather than responding to the specific allegations made, has indicated that they require further investigation. In the circumstances, therefore, the Committee is obliged to give due weight to the author's allegations, which are detailed and particularized. The Committee considers that the conditions of detention described, as well as the violent and abusive behaviour both of certain prison guards and of other inmates, as apparently acquiesced in by the prison authorities, are seriously in violation of the author's right, as a prisoner, to be treated with humanity and in with respect for his inherent dignity, in violation of article 10, paragraph 1. As at least some of the acts of violence against the author were committed either by the prison guards, upon their instigation or with their acquiescence, there was also a violation of article 7. There is also a specific violation of article 10, paragraph 2, arising from the failure to segregate the author, pre-trial, from convicted prisoners.

...

8. The Human Rights Committee...is of the view that the facts as found by the Committee reveal violations by the Philippines of article 7, article 9, paragraphs 1, 2 and 3, and article 10, paragraphs 1 and 2, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy. In respect of the violations of article 9 the State party should compensate the author. As to the violations of articles 7 and 10 suffered while in detention, including subsequent to sentence of death, the Committee observes that the compensation provided by the State party under its domestic law was not directed at these violations, and that compensation due to the author should take due account both of the seriousness of the violations and the damage to the author caused. In this context, the Committee recalls the duty upon the State party to undertake a comprehensive and impartial investigation of the issues raised in the course of the author's detention, and to draw the appropriate penal and disciplinary consequences for the individuals found responsible. As to the imposition of immigration fees and visa exclusion, the Committee takes the view that in order to remedy the violations of the Covenant the State party should refund to the author the moneys claimed from him. All monetary compensation thus due to the author by the State party should be made available for payment to the author at the venue of his choice, be it within the State party's territory or abroad. The State party is also under an obligation to avoid similar violations in the future.

- *Nicholas v. Australia* (1080/2002), ICCPR, A/59/40 vol. II (19 March 2004) 320 at paras. 2.1-2.6, 7.2-7.7 and 8.

...

2.1 On 23 September 1994, Thai and Australian law enforcement officers conducted a "controlled importation" of a substantial (trafficable) quantity of heroin. A Thai narcotics

investigator and a member of the Australian Federal Police (AFP) travelled from Bangkok, Thailand, to Melbourne, Australia, to deliver heroin which had been ordered from Australia. After arrival, the Thai investigator, operating in conjunction with the AFP, made a variety of calls arranging for handover of the narcotics, which were duly collected by the author and a friend.

2.2 On 24 September 1994, the author and his friend were arrested shortly after handover of the narcotics, and charged on a variety of federal offences under the *Customs* Act, as well as State offences. An ingredient of the federal offences was that the narcotics were imported into Australia "in contravention of [the federal *Customs* Act]"1/. In April 1995, the High Court of Australia handed down its decision in the unrelated case of *Ridgeway v. The Queen*,2/ concerning an importation of narcotics in 1989, where it held that that evidence of importation should be excluded when it resulted from illegal conduct on the part of law enforcement officers.

2.3 At arraignment and re-arraignment in October 1995 and March 1996, the author pleaded not guilty on all counts. It was uncontested that the law enforcement officers had imported the narcotics into Australia in contravention of the *Customs* Act.

2.4 In May 1996, at a pre-trial hearing, the author sought a permanent stay of the proceedings on the federal offences, on the basis that (as in *Ridgeway v. The Queen*) the law enforcement officers had committed an offence in importing the narcotics. On 27 May 1996, the stay was granted, however leaving the State offences unaffected.

2.5 On 8 July 1996, the federal *Crimes Amendment (Controlled Operations)* Act 1996, which was passed in response to the High Court's decision in *Ridgeway v. The Queen*, entered into force. Section 15X 3/ of the Act directed the courts to disregard past illegal conduct of law enforcement authorities in connection with the importation of narcotics. On 5 August 1996, the Director of Public Prosecutions applied for the stay order to be vacated. In turn, the author challenged the constitutionality of section 15X of the Act. On 2 February 1998, the High Court, by a majority of five justices to two, upheld the constitutional validity of the amending legislation as well as the validity of lifting the stay on prosecution in the author's case. The matter was thus remitted to the County Court for further hearing.

2.6 As a result, on 1 October 1998, the County Court lifted the stay order and directed that the author be tried. On 27 November 1998, he was convicted of one count of possession of a trafficable quantity of heroin and one count of attempting to obtain possession of a commercial quantity of heroin. The Court sentenced him to 10 years' imprisonment on the first count and 15 years' imprisonment concurrently on the second count. The total effective sentence was thus 15 years' imprisonment, with possibility of release on parole after 10 years. On 7 April 2000, the Victoria Court of Appeal rejected the author's appeal against

conviction, but reduced the sentence to 12 years' imprisonment, with a possibility of release on parole after 8 years. On 16 February 2001, the High Court refused the author special leave to appeal.

...

7.2 Before addressing the merits of the author's claim under article 15, paragraph 1, of the Covenant, the Committee notes that the issue before it is not whether the possession by the author of a quantity of heroin was or could under the Covenant permissibly be subject to criminal conviction within the jurisdiction of the State party. The communication before the Committee and all the arguments by the parties are limited to the issue whether the author's conviction under the federal *Customs* Act, i.e. for a crime that was related to the import of the quantity of heroin into Australia, was in conformity with the said provision of the Covenant. The Committee has noted that the author was apparently also charged with some State crimes but it has no information as to whether these charges related to the same quantity of heroin and whether the author was convicted for those charges.

7.3 As to the claim under article 15, paragraph 1, the Committee observes that the law applicable at the time the acts in question took place, as subsequently held by the High Court in *Ridgeway v. The Queen*, was that the evidence of one element of the offences with which the author was charged, that is to say, the requirement that the prohibited materials possessed had been "imported into Australia in contravention of the *Customs* Act", was inadmissible as a result of illegal police conduct. As a result, an order staying the author's prosecution was entered, which was a permanent obstacle to the criminal proceedings against the author on the (then) applicable law. Subsequent legislation, however, directed that the evidence of illegal police conduct in question be regarded as admissible by the courts. The two issues that thus arise are, firstly, whether the lifting of the stay on prosecution and the conviction of the author resulting from the admission of the formerly inadmissible evidence is a retroactive criminalization of conduct not criminal, at the time it was committed, in violation of article 15, paragraph 1, of the Covenant. Secondly, even if there was no proscribed retroactivity, the question arises whether the author was convicted for an offence, the elements of which, in truth, were not all present in the author's case, and that the conviction was thus in violation of the principle of *nullum crimen sine lege*, protected by article 15, paragraph 1.

7.4 As to the first question, the Committee observes that article 15, paragraph 1, is plain in its terms in that the offence for which a person is convicted to be an offence at the time of commission of the acts in question. In the present case, the author was convicted of offences under section 233 B of the *Customs* Act, which provisions remained materially unchanged throughout the relevant period from the offending conduct through to the trial and conviction. That being so, while the procedure to which the author was subjected may raise issues under other provisions of the Covenant which the author has not invoked, the Committee considers that it therefore cannot conclude that the prohibition against retroactive

criminal law in article 15, paragraph 1, of the Covenant was violated in the instant case.

7.5 Turning to the second issue, the Committee observes that article 15, paragraph 1, requires any "act or omission" for which an individual is convicted to constitute a "criminal offence". Whether a particular act or omission gives rise to a conviction for a criminal offence is not an issue which can be determined in the abstract; rather, this question can only be answered after a trial pursuant to which evidence is adduced to demonstrate that the elements of the offence have been proven to the necessary standard. If a necessary element of the offence, as described in national (or international) law, cannot be properly proven to have existed, then it follows that a conviction of a person for the act or omission in question would violate the principle of *nullum crimen sine lege*, and the principle of legal certainty, provided by article 15, paragraph 1.

7.6 In the present case, under the State party's law as authoritatively interpreted in *Ridgeway v. The Queen* and then applied to the author, the Committee notes that it was not possible for the author to be convicted of the act in question, as the relevant evidence of the unlawful import of narcotics by the police was inadmissible in court. The effect of the definitive interpretation of domestic law, at the time the author's prosecution was stayed, was that the element of the crime under section 233 B of the *Customs* Act that the narcotics had been imported illegally, could not be established due to the fact that although the import had been based on a ministerial agreement between the authorities of the State party exempting import of narcotics by the police from customs scrutiny, its illegality had not technically been removed and the evidence in question was hence inadmissible.

7.7 While the Committee considers that changes in rules of procedure and evidence after an alleged criminal act has been committed, may under certain circumstances be relevant for determining the applicability of article 15, especially if such changes affect the nature of an offence, it notes that no such circumstances were presented in the author's case. As to his case, the Committee observes that the amending legislation did not remove the past illegality of the police's conduct in importing the narcotics. Rather, the law directed that the courts ignore, for the evidentiary purposes of determining admissibility of evidence, the illegality of the police conduct. Thus, the conduct of the police was illegal, at the time of importation, and remained so ever since, a fact unchanged by the absence of any prosecution against the officers engaging in the unlawful conduct. In the Committee's view, nevertheless, all of the elements of the crime in question existed at the time the offence took place and each of these elements were proven by admissible evidence by the rules applicable at the time of the author's conviction. It follows that the author was convicted according to clearly applicable law, and that there is thus no violation of the principle of *nullum crimen sine lege* protected by article 15, paragraph 1.

8. The Human Rights Committee...is of the view that the facts before it do not disclose a

violation of article 15, paragraph 1, of the Covenant.

Notes

1/ Section 233 B (1) (c) of the Customs Act provides:

> "Any person who:
> (c) without reasonable excuse (proof whereof shall lie upon him) has in his possession any prohibited imports to which this section applies which have been imported into Australia in contravention of this Act:…
> shall be guilty of an offence".

2/ (1995) 184 CLR 19 (High Court of Australia).

3/ The full text of section 15X of the Act provides, in material part:

> "In determining, for the purposes of a prosecution for an offence against section 233 B of the Customs Act 1901 or an associated offence, whether evidence that narcotic goods were imported into Australia in contravention of the Customs Act 1901 should be admitted, the fact that a law enforcement officer committed an offence in importing the narcotic goods, or in aiding, abetting, counselling, procuring, or being in any way knowingly concerned in their importation, is to be disregarded, if:
> (a) the law enforcement officer, when committing the offence, was acting in the course of duty for the purposes of a [duly exempted] controlled operation …"

- *Arenz v. Germany* (1138/2002), A/59/40 vol. II (24 March 2004) 548 at paras. 1, 2.1-2.5, 3.1-3.4, 4.1, 8.5, 8.6 and 9.

1. The authors of the communication are Paul Arenz (first author) and Thomas Röder (second author), as well as his wife Dagmar Röder (third author), all German citizens and members of the "Church of Scientology" (Scientology). They claim to be victims of violations by Germany 1/ of articles 2, 18, 19, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights...

2.1 On 17 December 1991, the Christian Democratic Union (CDU), one of the two major political parties in Germany, adopted resolution C 47 at its National Party Convention, declaring that affiliation with Scientology is not "compatible with CDU membership". This resolution still continues to operate.

2.2 By letter of 22 September 1994, the chairman of the municipal branch of the CDU at Mechernich (Northrhine-Westphalia), with the subsequent support of the Federal Minister

of Labour and regional party leader of the CDU in Northrhine-Westphalia, asked the first author, a long-standing CDU member, to terminate his membership in the CDU with immediate effect by signing a declaration of resignation, stating that he had learned of the first author's affiliation with Scientology. When the latter refused to sign the declaration, the Euskirchen CDU District Board decided, on 17 October 1994, to initiate exclusion proceedings against him, thereby stripping him of his rights as a party member until the delivery of a final decision by the CDU party courts.

2.3 By letter of 24 October 1994, the President of the Euskirchen District Party Court informed the first author that the Board had decided to expel him from the CDU because of his membership in the Scientology Church and that it had requested the District Party Court to take a decision to that effect after providing him with an opportunity to be heard. After a hearing was held on 2 December 1994, the District Party Court, on 6 December 1994, informed the first author that it had confirmed the decision of the District Board to expel him from the party. On 2 October 1995, the Northrhine-Westphalia CDU State Party Court dismissed the first author's appeal. His further appeal was rejected by the CDU Federal Party Court on 18 December 1996.

2.4 In separate proceedings, the second author, a long-standing member and later chairman of the Municipal Board of the CDU at Wetzlar-Mitte (Hessia), as well as the third author, who had also been a CDU member for many years, were expelled from the party by decision of 29 January 1992 of the CDU District Association of Lahn-Dill. This decision was preceded by a campaign against the second author's party membership, culminating in the organization of a public meeting attended by approximately 1,000 persons, in January 1992, during which the second author's reputation and professional integrity as a dentist were allegedly slandered because of his Scientology membership.

2.5 On 16 July 1994, the Middle Hessia District Party Court decided that the expulsion of the second and third authors from the party was in conformity with the relevant CDU statutes. The authors' appeals to the Hessia CDU State Party Court and to the Federal Party Court at Bonn were dismissed on 26 January 1996 and, respectively, on 24 September 1996.

3.1 On 9 July 1997, the Bonn Regional Court (*Landgericht Bonn*) dismissed the authors' legal action against the respective decisions of the CDU Federal Party Tribunal, holding that these decisions were based on an objective investigation of the facts, were provided by law, and complied with the procedural requirements set out in the CDU statutes. As to the substance of the complaint, the Court limited itself to a review of arbitrariness, owing to the fundamental principle of party autonomy set out in article 21, paragraph 1,2/ of the Basic Law.

3.2 The Court considered the decisions of the Federal Party Tribunal not to be arbitrary,

given that the authors had acted in a manner contrary to resolution C 47, which spelled out a party principle of the CDU, within the meaning of article 10, paragraph 4, 3/ of the Political Parties Act. The resolution itself was not arbitrary or inconsistent with the party's obligation to a democratic internal organization under article 21, paragraph 1, of the Basic Law, because numerous publications of Scientology and, in particular, its founder Ron Hubbard objectively indicated a conflict with the CDU's principles of free development of one's personality, tolerance and protection of the socially disadvantaged. This ideology could, moreover, be personally attributed to the authors, based on their self-identification with the organization's principles and their considerable financial contributions to it.

3.3 Although the CDU was bound to respect the authors' basic rights to freedom of expression and religious freedom, by virtue of its obligation to a democratic internal organization, the restriction of these rights was justified by the need to protect the autonomy and proper functioning of political parties, which by definition could not represent all political and ideological tendencies and were thus entitled to exclude opponents from within the party. Taking into account that the authors had considerably damaged the public image of the CDU and thereby decreased its electoral support at the local level, the Court considered that their expulsion was not disproportionate since it was the only means to restore party unity, the authors being at liberty to found a new party. Lastly, the Court considered that the authors could not invoke their rights under the European Convention on the Protection of Human Rights and Fundamental Freedoms or under the International Covenant on Civil and Political Rights *vis-à-vis* the CDU, which was not bound by these treaties as a private association.

3.4 By judgement of 10 February 1998, the Cologne Court of Appeals dismissed the authors' appeal, endorsing the reasoning of the Bonn Regional Court and reiterating that political parties, by virtue of article 21, paragraph 1, of the Basic Law, had to balance their right to party autonomy against the competing rights of party members. In addition, the Court found that political parties were entitled to adopt resolutions on the incompatibility of their membership with parallel membership in another organization, in order to distinguish themselves from competing parties or other associations pursuing opposite objectives, unless such decisions are arbitrary. However, Resolution C 47, as well as the decision of the Federal Party Tribunal that the teachings of Scientology were incompatible with basic CDU principles, was not considered arbitrary by the Court.

...

4.1 The authors allege violations of their rights under articles 2, paragraph 1, 18, 19, 22, 25, 26 and 27 of the Covenant, as a result of their expulsion from the CDU, based on their affiliation with Scientology, and as a result of the German courts' decisions confirming these actions. In the authors' view, they were deprived of their right to take part in their communities' political affairs, as article 25 of the Covenant protected the right of "every citizen", meaning that "[n]o distinctions are permitted between citizens in the enjoyment of

these rights on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"4/. Their expulsion from the CDU amounted to an unreasonable restriction of that right, in the absence of any reference to a right of party autonomy in article 25.

...

8.5 With regard to the State party's argument that it cannot be held responsible for the authors' exclusion from the CDU, this being the decision not of one of its organs but of a private association, the Committee recalls that under article 2, paragraph 1, of the Covenant, the State party is under an obligation not only to respect but also to ensure to all individuals within its territory and subject to its jurisdiction all the rights recognized in the Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Where, as in the present case, the domestic law regulates political parties, such law must be applied without consideration. Furthermore, States parties are thus under an obligation to protect the practices of all religions or beliefs from infringement 11/ and to ensure that political parties, in their internal management, respect the applicable provisions of article 25 of the Covenant12/.

8.6 The Committee notes that although the authors have made some references to the hardship they have more generally experienced due to their membership in the Church of Scientology, and to the responsibility of the State party to ensure their rights under the Covenant, their actual claims before the Committee merely relate to their exclusion from the CDU, an issue in respect of which they also have exhausted domestic remedies in the meaning of article 5, paragraph 2 (b), of the Optional Protocol. Consequently, the Committee need not address the broader issue of what legislative and administrative measures a State party must take in order to secure that all citizens may meaningfully exercise their right of political participation under article 25 of the Covenant. The issue before the Committee is whether the State party violated the authors' rights under the Covenant in that its courts gave priority to the principle of party autonomy, over their wish to be members in a political party that did not accept them due to their membership in another organization of ideological nature. The Committee recalls its constant jurisprudence that it is not a fourth instance competent to re-evaluate findings of fact or re-evaluate the application of domestic legislation, unless it can be ascertained that the proceedings before the domestic courts were arbitrary or amounted to a denial of justice. The Committee considers that the authors have failed to substantiate, for purposes of admissibility, that the conduct of the courts of the State party would have amounted to arbitrariness or a denial of justice. Therefore, the communication is inadmissible under article 2 of the Optional Protocol.

9. The Human Rights Committee therefore decides:

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

Notes

1/ The Covenant and the Optional Protocol to the Covenant entered into force for the State party on 23 March 1976 and 25 November 1993 respectively. Upon ratification of the Optional Protocol, the State party entered the following reservation: "The Federal Republic of Germany formulates a reservation concerning article 5 paragraph 2 (a) to the effect that the competence of the Committee shall not apply to communications:

(a) Which have already been considered under another procedure of international investigation or settlement; or

(b) By means of which a violation of rights is reprimanded having its origin in events occurring prior to the entry into force of the Optional Protocol for the Federal Republic of Germany;

(c) By means of which a violation of article 26 of the [said Covenant] is reprimanded, if and insofar as the reprimanded violation refers to rights other than those guaranteed under the aforementioned Covenant."

2/ Article 21, paragraph 1, of the Basic Law reads: "Political parties shall participate in the formation of the political will of the people. They may be freely established. Their internal organization must conform to democratic principles. They must publicly account for their assets and for the sources and use of their funds."

3/ Article 10, paragraphs 4 and 5, of the Political Parties Act read: "(4) A member may only be expelled from the party if he or she deliberately infringes the statutes or acts in a manner contrary to the principles or discipline of the party and thus seriously impairs its standing. (5) The arbitration court competent in accordance with the Code on Arbitration Procedure shall decide on expulsion from the party. The right to appeal to a higher court shall be granted. Reasons for the decisions shall be given in writing. In urgent and serious cases requiring immediate action, the executive committee of the party or a regional association may exclude a member from exercising his rights pending the arbitration court's decision."

4/ The authors quote the Committee's general comment 25, at para. 3.
...
11/ Cf. CCPR, forty-eighth session (1993), general comment No. 22, at para. 9.

12/ See CCPR, fifty-seventh session (1996), general comment No. 25, at para. 26.

PUBLIC AND PRIVATE ACTORS - GENERAL

- *Wallman v. Austria* (1002/2001), ICCPR, A/59/40 vol. II (1 April 2004) 183 at paras. 2.1-2.4, 3.1, 8.10, 9.2-9.5 and 10.

...
2.1 The first author is the director of a hotel in Salzburg, the "Hotel zum Hirschen", a limited partnership (*Kommanditgesellschaft*) acting as the third author. Until December 1999, the first author and Mr. Josef Wallmann were the company's partners, in addition to its general partner, the "Wallmann Gesellschaft mit beschränkter Haftung", a limited liability company (*Gesellschaft mit beschränkter Haftung*). Since December 1999, when the first author and Josef Wallmann left the limited partnership, the second author holds 100 per cent of the shares of both the limited liability company and the limited partnership.

2.2 The "Hotel zum Hirschen Josef Wallmann", a limited partnership (*Kommanditgesellschaft*) is a compulsory member of the Salzburg Regional Section of the Austrian Chamber of Commerce (*Landeskammer Salzburg*), as required under section 3, paragraph 2, of the Chamber of Commerce Act (*Handelskammergesetz*). On 26 June 1996, the Regional Chamber requested the limited partnership to pay its annual membership fees (*Grundumlage*) for 1996, in the amount of ATS 10,230.00 2/.

2.3 On 3 July 1996, the first author appealed on behalf of the limited partnership to the Federal Chamber of Commerce (*Wirtschaftskammer Österreich*) claiming a violation of his right to freedom of association protected under the Austrian Constitution (*Bundesverfassungsgesetz*) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). On 9 January 1997, the Federal Chamber of Commerce rejected the appeal.

2.4 The first author lodged a constitutional complaint with the Austrian Constitutional Court (*Verfassungsgerichtshof*), which declared the complaint inadmissible on 28 November 1997, since it had no prospect of success in the light of the Court's jurisprudence regarding compulsory membership in the Chamber of Commerce, and referred the case to the Supreme Administrative Court (*Verwaltungsgerichtshof*) to review the calculation of the annual fees. Accordingly, that tribunal did not address the question of the limited partnership's compulsory membership.
...
3.1 The authors claim to be victims of a violation of article 22, paragraph 1, of the Covenant, because the limited partnership's compulsory membership in the Regional Chamber of Commerce, combined with the obligation to pay annual membership fees, effectively denies them their right to freedom of association, including the right to found or join another

association for similar commercial purposes.
...
8.10 To the extent that the second author complains that the practical effect of the annual membership fees is to prevent her from founding or joining alternative associations, the Committee finds that she failed to substantiate, for purposes of admissibility, that the annual payments to the Chamber is so onerous as to constitute a relevant restriction on her right to freedom of association. The Committee concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.
...
9.2 The issue before the Committee is whether the imposition of annual membership fees on the "Hotel zum Hirschen" (third author) by the Salzburg Regional Chamber of Commerce amounts to a violation of the second author's right to freedom of association under article 22 of the Covenant.

9.3 The Committee has noted the authors' contention that, although the Chamber of Commerce constitutes a public law organization under Austrian law, its qualification as an "association" within the meaning of article 22, paragraph 1, of the Covenant has to be determined on the basis of international standards, given the numerous non-public functions of the Chamber. It has equally taken note of the State party's argument that the Chamber forms a public organization under Austrian law, on account of its participation in matters of public administration as well as its public interest objectives, therefore not falling under the scope of application of article 22.

9.4 The Committee observes that the Austrian Chamber of Commerce was founded by law rather than by private agreement, and that its members are subordinated by law to its power to charge annual membership fees. It further observes that article 22 of the Covenant only applies to private associations, including for purposes of membership.

9.5 The Committee considers that once the law of a State party establishes commerce chambers as organizations under public law, these organizations are not precluded by article 22 of the Covenant from imposing annual membership fees on its members, unless such establishment under public law aims at circumventing the guarantees contained in article 22. However, it does not appear from the material before the Committee that the qualification of the Austrian Chamber of Commerce as a public law organization, as envisaged in the Austrian Constitution as well as in the Chamber of Commerce Act of 1998, amounts to a circumvention of article 22 of the Covenant. The Committee therefore concludes that the third author's compulsory membership in the Austrian Chamber of Commerce and the annual membership fees imposed since 1999 do not constitute an interference with the second author's rights under article 22.

10. The Human Rights Committee is of the view that the facts before it do not disclose a

violation of article 22, paragraph 1, of the Covenant.

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Notes

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2/. 1 euro is equivalent to ATS 13.76.

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CEDAW

- *A. T. v. Hungary* (2/2003), CEDAW, A/60/38 part I (26 January 2005) 80 at paras. 2.1-2.7, 3.1 and 9.2-9.6.

...

2.1 The author states that for the past four years she has been subjected to regular severe domestic violence and serious threats by her common law husband, L. F., father of her two children, one of whom is severely brain-damaged. Although L. F. allegedly possesses a firearm and has threatened to kill the author and rape the children, the author has not gone to a shelter, reportedly because no shelter in the country is equipped to take in a fully disabled child together with his mother and sister. The author also states that there are currently no protection orders or restraining orders available under Hungarian law.

2.2 In March 1999, L. F. moved out of the family apartment. His subsequent visits allegedly typically included battering and/or loud shouting, aggravated by his being in a drunken state. In March 2000, L. F. reportedly moved in with a new female partner and left the family home, taking most of the furniture and household items with him. The author claims that he did not pay child support for three years, which forced her to claim the support by going to the court and to the police, and that he has used this form of financial abuse as a violent tactic in addition to continuing to threaten her physically. Hoping to protect herself and the children, the author states that she changed the lock on the door of the family's apartment on 11 March 2000. On 14 and 26 March 2000, L. F. filled the lock with glue and on 28 March 2000, he kicked in a part of the door when the author refused to allow him to enter the apartment. The author further states that, on 27 July 2001, L. F. broke into the apartment using violence.

2.3 L. F. is said to have battered the author severely on several occasions, beginning in March 1998. Since then, 10 medical certificates have been issued in connection with separate incidents of severe physical violence, even after L. F. left the family residence, which, the author submits, constitute a continuum of violence. The most recent incident took place on 27 July 2001 when L. F. broke into the apartment and subjected the author to a severe beating, which necessitated her hospitalization.

2.4 The author states that there have been civil proceedings regarding L. F.'s access to the family's residence, a 2 and a half room apartment (of 54 by 56 square metres) jointly owned by L. F. and the author. Decisions by the court of the first instance, the Pest Central District Court (*Pesti Központi Kerületi Bíróság*), were rendered on 9 March 2001 and 13 September 2002 (supplementary decision). On 4 September 2003, the Budapest Regional Court (*Fővărosi Bíróság*) issued a final decision authorizing L. F. to return and use the apartment. The judges reportedly based their decision on the following grounds: (a) lack of substantiation of the claim that L. F. regularly battered the author; and (b) that L. F.'s right to the property, including possession, could not be restricted. Since that date, and on the basis of the earlier attacks and verbal threats by her former partner, the author claims that her physical integrity, physical and mental health and life have been at serious risk and that she lives in constant fear. The author reportedly submitted to the Supreme Court a petition for review of the 4 September 2003 decision, which was pending at the time of her submission of supplementary information to the Committee on 2 January 2004.

2.5 The author states that she also initiated civil proceedings regarding division of the property, which have been suspended. She claims that L. F. refused her offer to be compensated for half of the value of the apartment and turn over ownership to her. In these proceedings the author reportedly submitted a motion for injunctive relief (for her exclusive right to use the apartment), which was rejected on 25 July 2000.

2.6 The author states that there have been two ongoing criminal procedures against L. F., one that began in 1999 at the Pest Central District Court (*Pesti Központi Kerületi Bíróság*) concerning two incidents of battery and assault causing her bodily harm and the second that began in July 2001 concerning an incident of battery and assault that resulted in her being hospitalized for a week with a serious kidney injury. In her submission of 2 January 2004, the author states that there would be a trial on 9 January 2004. Reportedly, the latter procedure was initiated by the hospital *ex officio*. The author further states that L. F. has not been detained at any time in this connection and that no action has been taken by the Hungarian authorities to protect the author from him...

2.7 The author also submits that she has requested assistance in writing, in person and by phone, from the local child protection authorities, but that her requests have been to no avail since the authorities allegedly feel unable to do anything in such situations.

The Claim

3.1 The author alleges that she is a victim of violations by Hungary of articles 2 (a), (b) and (e), 5 (a) and 16 of the Convention on the Elimination of All Forms of Discrimination against Women for its failure to provide effective protection from her former common law husband. She claims that the State party passively neglected its "positive" obligations under the

Convention and supported the continuation of a situation of domestic violence against her.
...
9.2 The Committee recalls its general recommendation No. 19 on violence against women, which states that "...[T]he definition of discrimination includes gender-based violence" and that "[G]ender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence". Furthermore, the general recommendation addresses the question of whether States parties can be held accountable for the conduct of non-State actors in stating that "...discrimination under the Convention is not restricted to action by or on behalf of Governments..." and "[U]nder general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation". Against this backdrop, the immediate issue facing the Committee is whether the author of the communication is the victim of a violation of articles 2 (a), (b) and (e), 5 (a) and 16 of the Convention because, as she alleges, for the past four years the State party has failed in its duty to provide her with effective protection from the serious risk to her physical integrity, physical and mental health and her life from her former common law husband.

9.3 With regard to article 2 (a), (b), and (e), the Committee notes that the State party has admitted that the remedies pursued by the author were not capable of providing immediate protection to her against ill-treatment by her former partner and, furthermore, that legal and institutional arrangements in the State party are not yet ready to ensure the internationally expected, coordinated, comprehensive and effective protection and support for the victims of domestic violence. While appreciating the State party's efforts at instituting a comprehensive action programme against domestic violence and the legal and other measures envisioned, the Committee believes that these have yet to benefit the author and address her persistent situation of insecurity. The Committee further notes the State party's general assessment that domestic violence cases as such do not enjoy high priority in court proceedings. The Committee is of the opinion that the description provided of the proceedings resorted to in the present case, both the civil and criminal proceedings, coincides with this general assessment. Women's human rights to life and to physical and mental integrity cannot be superseded by other rights, including the right to property and the right to privacy. The Committee also takes note that the State party does not offer information as to the existence of alternative avenues that the author might have pursued that would have provided sufficient protection or security from the danger of continued violence. In this connection, the Committee recalls its concluding comments from August 2002 on the State party's combined fourth and fifth periodic report, which state "...[T]he Committee is concerned about the prevalence of violence against women and girls, including domestic violence. It is particularly concerned that no specific legislation has been enacted to combat domestic violence and sexual harassment and that no protection or exclusion orders or shelters exist for the immediate protection of women victims of domestic violence". Bearing

this in mind, the Committee concludes that the obligations of the State party set out in article 2 (a), (b) and (e) of the Convention extend to the prevention of and protection from violence against women, which obligations in the present case, remain unfulfilled and constitute a violation of the author's human rights and fundamental freedoms, particularly her right to security of person.

9.4 The Committee addressed articles 5 and 16 together in its general recommendation No. 19 in dealing with family violence. In its general recommendation No. 21, the Committee stressed that "the provisions of general recommendation 19...concerning violence against women have great significance for women's abilities to enjoy rights and freedoms on an equal basis with men". It has stated on many occasions that traditional attitudes by which women are regarded as subordinate to men contribute to violence against them. The Committee recognized those very attitudes when it considered the combined fourth and fifth periodic report of Hungary in 2002. At that time it was concerned about the "persistence of entrenched traditional stereotypes regarding the role and responsibilities of women and men in the family...". In respect of the case now before the Committee, the facts of the communication reveal aspects of the relationships between the sexes and attitudes towards women that the Committee recognized *vis-à-vis* the country as a whole. For four years and continuing to the present day, the author has felt threatened by her former common law husband, the father of her two children. The author has been battered by this same man, her former common law husband. She has been unsuccessful, either through civil or criminal proceedings, to temporarily or permanently bar L. F. from the apartment where she and her children have continued to reside. The author could not have asked for a restraining or protection order since neither option currently exists in the State party. She has been unable to flee to a shelter because none are equipped to accept her together with her children, one of whom is fully disabled. None of these facts have been disputed by the State party and, considered together, they indicate that the rights of the author under articles 5 (a) and 16 of the Convention have been violated.

9.5 The Committee also notes that the lack of effective legal and other measures prevented the State party from dealing in a satisfactory manner with the Committee's request for interim measures.

9.6 Acting under article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, the Committee is of the view that the State party has failed to fulfil its obligations and has thereby violated the rights of the author under article 2 (a), (b) and (e) and article 5 (a) in conjunction with article 16 of the Convention on the Elimination of All Forms of Discrimination against Women, and makes the following recommendations to the State party:

I. Concerning the author of the communication

PUBLIC AND PRIVATE ACTORS - GENERAL

(a) Take immediate and effective measures to guarantee the physical and mental integrity of A. T. and her family;

(b) Ensure that A. T. is given a safe home in which to live with her children, receives appropriate child support and legal assistance as well as reparation proportionate to the physical and mental harm undergone and to the gravity of the violations of her rights;

II. General

(a) Respect, protect, promote and fulfil women's human rights, including their right to be free from all forms of domestic violence, including intimidation and threats of violence;

(b) Assure victims of domestic violence the maximum protection of the law by acting with due diligence to prevent and respond to such violence against women;

(c) Take all necessary measures to ensure that the national strategy for the prevention and effective treatment of violence within the family is promptly implemented and evaluated;

(d) Take all necessary measures to provide regular training on the Convention on the Elimination of All Forms of Discrimination against Women and the Optional Protocol thereto to judges, lawyers and law enforcement officials;

(e) Implement expeditiously and without delay the Committee's concluding comments of August 2002 on the combined fourth and fifth periodic report of Hungary in respect of violence against women and girls, in particular the Committee's recommendation that a specific law be introduced prohibiting domestic violence against women, which would provide for protection and exclusion orders as well as support services, including shelters;

(f) Investigate promptly, thoroughly, impartially and seriously all allegations of domestic violence and bring the offenders to justice in accordance with international standards;

(g) Provide victims of domestic violence with safe and prompt access to justice, including free legal aid where necessary, in order to ensure them available, effective and sufficient remedies and rehabilitation;

(h) Provide offenders with rehabilitation programmes and programmes on non-violent conflict resolution methods.

PUBLIC AND PRIVATE ACTORS - GENERAL

CAT

- *G. R. B. v. Sweden* (83/1997), CAT, A/53/44 (15 May 1998) 92 at paras. 2.3, 2.5, 6.2, 6.4, 6.5, 6.7 and 7.

...

2.3 On 16 May 1991, the author took a bus...According to the author, the bus was stopped on the way by two men belonging to the *Sendero Luminoso*. They forced the author off the bus and she was raped and held as a prisoner for one or two nights before she managed to escape. Her parents reported the matter to the police, but according to the author they did not show any interest in the matter.

...

2.5 The author arrived in Sweden...and requested asylum...[T]he Swedish Immigration Board rejected her application, considering that there were no indications that she was persecuted by the Peruvian authorities, and that the acts by *Sendero Luminoso* could not be considered as persecution by authorities, but criminal activities...

...

6.2 ...Before the Committee is...the issue of whether, pursuant to article 16, paragraph 1, the forced return *per se* would constitute cruel, inhuman or degrading treatment or punishment not amounting to torture as defined in article 1.

...

6.4 The Committee notes that the facts on which the author's claim are based, are not in dispute. The Committee further notes that the author has never been subjected to torture or ill-treatment by the Peruvian authorities and that she has not been politically active since 1985 when she left Peru to study abroad. According to unchallenged information, the author has been able to visit Peru on two occasions without encountering difficulties with the national authorities.

6.5 ...For the purposes of the Convention, according to Article 1, "the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, *when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity*". The Committee considers that the issue whether the State party has an obligation to refrain from expelling a person who might risk pain or suffering inflicted by a non-governmental entity, without the consent or acquiescence of the Government, falls outside the scope of article 3 of the Convention.

...

6.7 The Committee must...decide whether, pursuant to paragraph 1 of article 16, the author's forced return would constitute cruel, inhuman or degrading treatment or punishment not amounting to torture as defined in article 1, in view of the author's poor state of health. The Committee notes the medical evidence presented by the author demonstrating that she suffers severely from post-traumatic stress disorder, most probably as the consequence of the abuse faced by the author in 1991. The Committee considers, however, that the aggravation of the author's state of health possibly caused by her deportation would not amount to the type of cruel, inhuman or degrading treatment envisaged by article 16 of the Convention, attributable to the State party.

7. The Committee against Torture...is of the view that the facts as found by the Committee do not reveal a breach of...article 16 of the Convention.

See also:

- *S.V. et al. v. Canada* (49/1996), CAT, A/56/44 (15 May 2001) 102 at para. 9.5.

- *Elmi v. Australia* (120/1998),CAT, A/54/44 (14 May 1999) 109 at paras. 6.5 and 6.9.

...

6.5 The Committee does not share the State party's view that the Convention is not applicable in the present case since, according to the State party, the acts of torture the author fears he would be subjected to in Somalia would not fall within the definition of torture set out in article 1 (i.e. pain or suffering inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity, in this instance for discriminatory purposes). The Committee notes that for a number of years Somalia has been without a central government, that the international community negotiates with the warring factions and that some of the factions operating in Mogadishu have set up quasi-governmental institutions and are negotiating the establishment of a common administration. It follows then that, *de facto*, those factions exercise certain prerogatives that are comparable to those normally exercised by legitimate governments. Accordingly, the members of those factions can fall, for the purposes of the application of the Convention, within the phrase "public officials or other persons acting in an official capacity" contained in article 1.

...

6.9 In the light of the above the Committee considers that substantial grounds exist for believing that the author would be in danger of being subjected to torture if returned to Somalia.

PUBLIC AND PRIVATE ACTORS - GENERAL

- *V. X. N. and H. N. v. Sweden* (130 and 131/1999), CAT, A/55/44 (15 May 2000) 133 at paras. 13.8 and 14.

...
13.8 The Committee recalls that, for the purposes of the Convention, one of the prerequisites for "torture" is that it is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. The Committee considers that the issue whether a State party has an obligation to refrain from expelling a person who might risk pain or suffering inflicted by a private person, without the consent or acquiescence of the State, falls outside the scope of article 3 of the Convention.

14. The Committee...is of the view that the facts as found by the Committee do not reveal a breach of article 3 of the Convention.

- *M. P. S. v. Australia* (138/1999), CAT, A/57/44 (30 April 2002) 111 at para. 7.4.

...
7.4 With regard to the complainant's claim that he was in danger of being subjected to torture by the LTTE [Liberation Tigers of Tamil Eelam], the Committee recalls that the State party's obligation to refrain from forcibly returning a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture is directly linked to the definition of torture as found in article 1 of the Convention. For the purposes of the Convention, according to article 1, "the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity". The Committee recalls its previous jurisprudence that the issue whether the State party has an obligation to refrain from expelling a person who might risk pain or suffering inflicted by a non-governmental entity, without the consent or acquiescence of the Government, falls outside the scope of article 3 of the Convention 3/.

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3/ *G.R.B. v. Sweden*, case No. 83/1997, Views adopted on 15 May 1998, para. 6.5.

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PUBLIC AND PRIVATE ACTORS - GENERAL

- *H. M. H. I. v. Australia* (177/2001), CAT, A/57/44 (1 May 2002) 166 at paras. 2.1-2.5, 6.4-6.6 and 7.

...

2.1 The complainant is a member of the Dabarre sub-clan of the Rahanwein clan. His uncle was a Minister for Higher Education of the former Said Barre regime. Upon the outbreak of clan violence in 1991, the complainant and his family resided in Baidoa, largely populated by Rahanwein, but controlled by Said Barre's brother-in-law, a member of the Marehan sub-clan of the Darod clan. According to the complainant, a competing sub-clan destroyed the city, killing many, only for Rahanwein forces to return, followed by pillaging Marehan forces.

2.2 Following the destruction of the complainant's house, Marehan forces detained the complainant and his wife. Upon learning they were Rahanwein, they were taken prisoner and forced to work on local farms. The complainant alleges that his wife was raped, but they escaped in April 1992. After the death of his brother at the hands of the forces of a militia warlord, Hussain Aideed, of the Hawiye clan, the complainant and his wife reached an area where some of his Dabarre sub- clan lived and where he left his family. He departed the area as Aideed forces had killed many of his relatives. In November 1992, close to the national border, the complainant heard that his Dabarre sub-clan had been attacked by another sub-clan of the Rahanwein. In December 1994, he heard that his uncle, the former Minister, had died at the hands of Aideed forces.

2.3 On 25 December 1997, the complainant reached Sydney, Australia, via Thailand, without valid documentation. From that point he has remained in immigration detention. On 2 January 1998, the complainant applied for a "protection visa" (refugee status) and was granted legal representation. He claimed to fear treatment amounting to persecution in Somalia (torture or execution) on the basis of either his race or, alternatively, on the basis of his nationality, political opinion or membership of a particular social group due to his clan membership and familial ties to a political figure of the former Barre Government. On 15 January 1998, the complainant's application was refused.

2.4 On 8 July 1998, following a hearing with the complainant on 9 April 1998, the Refugee Review Tribunal (RRT) refused his application for review of the first instance decision. The RRT found the complainant to be credible and accepted his account of his clan's and sub-clan's experiences. However, it found that the human rights violations he feared were not "persecution" within the meaning of the 1951 Convention relating to the Status of Refugees since he was, instead, a victim of civil war.

2.5 On 15 October 1998, the Federal Court of Australia dismissed the complainant's application for review of the RRT's decision. On 9 April 1999, the Full Federal Court upheld

the complainant's appeal against the Federal Court decision. On 26 October 2000 a majority of the High Court upheld an appeal by the Minister of Immigration and Multicultural Affairs against the decision of the Full Federal Court, and affirmed the RRT's decision.

2.6 On 30 November 2000 and 2 February 2001, the Department of Immigration and Multicultural Affairs rejected applications for a discretionary ministerial waiver under the Migration Act of the RRT decision.

...

6.4 The Committee recalls its jurisprudence that the State party's obligation under article 3 to refrain from forcibly returning a person to another State where there are substantial grounds of a risk of torture, as defined in article 1 of the Convention, which requires actions by "a public official or other person acting in an official capacity". Accordingly, in *G.R.B. v. Sweden*9/ the Committee considered that allegations of a risk of torture at the hands of Sendeero Luminoso, a non-State entity controlling significant portions of Peru, fell outside the scope of article 3 of the Convention. In *Elmi v. Australia*,10/ the Committee considered that, in the exceptional circumstance of State authority that was wholly lacking, acts by groups exercising quasi-governmental authority could fall within the definition of article 1, and thus call for the application of article 3. The Committee considers that, with three years having elapsed since the *Elmi* decision, Somalia currently possesses a State authority in the form of the Transitional National Government, which has relations with the international community in its capacity as central Government, though some doubts may exist as to the reach of its territorial authority and its permanence. Accordingly, the Committee does not consider this case to fall within the exceptional situation in *Elmi*, and takes the view that acts of such entities as are now in Somalia commonly fall outside the scope of article 3 of the Convention.

6.5 Moreover, the Committee has taken into account all relevant considerations, including the existence in the State party of a consistent pattern of gross, flagrant or mass violations of human rights, although the existence of such a pattern does not as such constitute sufficient grounds for determining whether the particular person would be in danger of being subjected to torture upon his return to that country; additional grounds must be adduced to show that the individual concerned would be personally at risk. In this case, the Committee considers that the complainant has failed to show that there are substantial grounds for believing that he is personally at a risk of being subjected to torture in the event of return to Somalia.

6.6 The Committee also takes note that the State party does not intend to return the complainant to Mogadishu, and that the complainant will be at liberty to avail himself of the UNHCR voluntary repatriation programme and choose the area of Somalia to which he wishes to return.

PUBLIC AND PRIVATE ACTORS - GENERAL

7. The Committee against Torture...is of the view that the removal of the complainant from Australia would not entail a breach of article 3 of the Convention.

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9/ [Communication No. 83/1997.]

10/ [Communication No. 120/1998.]

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- *Hajrizi Dzemajl et al. v. Serbia and Montenegro* (161/2000), CAT, A/58/44 (21 November 2002) 85 (CAT/C/29/D/161/2000) at paras. 2.1-2.24, 9.2-9.6, 10, 11 and Individual Opinion by Mr. Fernando Mariño and Mr. Alejandro González Poblete (concurring), 97.

...

2.1 On 14 April 1995 at around 10 p.m., the Danilovgrad Police Department received a report indicating that two Romani minors had raped S.B., a minor ethnic Montenegrin girl. In response to this report, around midnight, the police entered and searched a number of houses in the Bozova Glavica Roma settlement and brought into custody all of the young male Romani men present in the settlement (all of them presently among the complainants to this Committee).

2.2 The same day, around midnight, two hundred ethnic Montenegrins, led by relatives and neighbours of the raped girl, assembled in front of the police station and publicly demanded that the Municipal Assembly adopt a decision expelling all Roma from Danilovgrad. The crowd shouted slogans addressed to the Roma, threatening to "exterminate" them and "burn down" their houses.

2.3 Later, two Romani minors confessed under duress. On 15 April, between 4 and 5 a.m., all of the detainees except those who confessed were released from police custody. Before their release, they were warned by the police to leave Danilovgrad immediately with their families because they would be at risk of being lynched by their non-Roma neighbours.

2.4 At the same time, police officer Ljubo Radovic came to the Bozova Glavica Roma settlement and told the Romani residents of the settlement that they must evacuate the settlement immediately. The officer's announcement caused panic. Most residents fled towards a nearby highway, where they could take buses for Podgorica. Only a few men and women remained in the settlement to safeguard their homes and livestock. At approximately 5 a.m., police officer Ljubo Radovic returned to the settlement, accompanied by police inspector Branko Micanovic. The officers told the remaining Roma still in their homes

(including some of the complainants) to leave Danilovgrad immediately, as no one could guarantee their safety or provide them with protection.

2.5 At around 8 a.m. the same day, a group of non-Roma residents of Danilovgrad entered the Bozova Glavica Roma settlement, hurling stones and breaking windows of houses owned by the complainants. Those Roma who had still not left the settlement (all of them presently among the complainants to this Committee) were hidden in the cellar of one of the houses from which they eventually managed to flee through the fields and woods towards Podgorica.

2.6 In the course of the morning of 15 April, a police car repeatedly patrolled the deserted Bozova Glavica settlement. Groups of non-Roma residents of Danilovgrad gathered in different locations in the town and in the surrounding villages. Around 2 p.m. the non-Roma crowd arrived in the Bozova Glavica settlement - in cars and on foot. Soon a crowd of at least several hundred non-Roma (according to different sources, between 400 and 3,000 persons were present) assembled in the then deserted Roma settlement.

2.7 ...Shortly after 3 p.m., the demolition of the settlement began. The mob, with stones and other objects, first broke windows of cars and houses belonging to Roma and then set them on fire. The crowd also destroyed and set fire to the haystacks, farming and other machines, animal feed sheds, stables, as well as all other objects belonging to the Roma. They hurled explosive devices and "Molotov" cocktails that they had prepared beforehand, and threw burning cloths and foam rubbers into houses through the broken windows. Shots and explosions could be heard amid the sounds of destruction. At the same time, valuables were looted and cattle slaughtered. The devastation endured unhindered for hours.

2.8 Throughout the course of this pogrom, police officers present failed to act in accordance with their legal obligations. Shortly after the attack began, rather than intervening to halt the violence, these officers simply moved their police car to a safe distance and reported to their superior officer. As the violence and destruction unfolded, police officers did no more than feebly seek to persuade some of the attackers to calm down pending a final decision of the Municipal Assembly with respect to a popular request to evict Roma from the Bozova Glavica settlement.

2.9 The outcome of the anti-Roma rage was the levelling of the entire settlement and the burning or complete destruction of all properties belonging to its Roma residents. Although the police did nothing to halt the destruction of the Roma settlement, they did ensure that the fire did not spread to any of the surrounding buildings, which belonged to the non-Roma.

2.10 The police and the investigating magistrate of the Basic Court in Danilovgrad subsequently drew up an on-site investigation report regarding the damage caused by those who took part in the attack.

PUBLIC AND PRIVATE ACTORS - GENERAL

2.11 Official police documents, as well as statements given by a number of police officers and other witnesses, both before the court and in the initial stage of the investigation, indicate that the following non-Roma residents of Danilovgrad were among those who took part in the destruction of the Bozova Glavica Roma settlement: Veselin Popovic, Dragisa Makocevic, Gojko Popovic, Bosko Mitrovic, Joksim Bobicic, Darko Janjusevic, Vlatko Cacic, Radojica Makocevic.

2.12 Moreover, there is evidence that police officers Miladin Dragas, Rajko Radulovic, Dragan Buric, Djordjije Stankovic and Vuk Radovic were all present as the violence unfolded and did nothing or not enough to protect the Roma residents of Bozova Glavica or their property.

2.13 Several days following the incident, the debris of the Roma settlement was completely cleared away by heavy construction machines of the Public Utility Company. All traces of the existence of the Roma in Danilovgrad were obliterated.

2.14 Following the attack, and pursuant to the relevant domestic legislation, on 17 April 1995, the Podgorica Police Department filed a criminal complaint with the Basic Public Prosecutor's Office in Podgorica. The complaint alleged that a number of unknown perpetrators had committed the criminal offence of causing public danger under article 164 of the Montenegrin Criminal Code and, inter alia, explicitly stated that there are "reasonable grounds to believe that, in an organized manner and by using open flames … they caused a fire to break out ... on 15 April 1995 … which completely consumed dwellings … and other propert[ies] belonging to persons who used to reside in … [the Bozova Glavica] settlement".

2.15 On 17 April 1995 the police brought in 20 individuals for questioning. On 18 April 1995, a memorandum was drawn up by the Podgorica Police Department which quoted the statement of Veselin Popovic as follows: "... I noticed flames in a hut which led me to conclude that the crowd had started setting fire to huts so I found several pieces of foam rubber which I lit with a lighter I had on me and threw them, alight, into two huts, one of which caught fire."

2.16 On the basis of this testimony and the official police memorandum, the Podgorica Police Department ordered, on 18 April 1995, that Veselin Popovic be remanded into custody, on the grounds that there were reasons to believe that he had committed the criminal offence of causing public danger in the sense of article 164 of the Montenegrin Criminal Code.

2.17 On 25 April 1995, and with respect to the incident at the origin of the present complaint, the Public Prosecutor instituted proceedings against one person only - Veselin Popovic.

2.18 Veselin Popovic was charged under article 164 of the Montenegrin Criminal Code. The same indictment charged Dragisa Makocevic with illegally obtaining firearms in 1993 - an offence unrelated to the incident at issue notwithstanding the evidence implicating him in the destruction of the Roma Bozova Glavica settlement.

2.19 Throughout the investigation, the investigating magistrate of the Basic Court of Danilovgrad heard a number of witnesses all of whom stated that they had been present as the violence unfolded but were not able to identify a single perpetrator. On 22 June 1995, the investigating magistrate of the Basic Court of Danilovgrad heard officer Miladin Dragas. Contrary to the official memorandum he had personally drawn up on 16 April 1995, officer Dragas now stated that he had not seen anyone throwing an inflammable device, nor could he identify any of the individuals involved.

2.20 On 25 October 1995, the Basic Public Prosecutor in Podgorica requested that the investigating magistrate of the Basic Court of Danilovgrad undertake additional investigation into the facts of the case. Specifically, the prosecutor proposed that new witnesses be heard, including officers from the Danilovgrad Police Department who had been entrusted with protecting the Bozova Glavica Roma settlement. The investigating magistrate of the Basic Court of Danilovgrad then heard the additional witnesses, all of whom stated that they had seen none of the individuals who had caused the fire. The investigating magistrate took no further action.

2.21 Due to the "lack of evidence", the Basic Public Prosecutor in Podgorica dropped all charges against Veselin Popovic on 23 January 1996. On 8 February 1996, the investigating magistrate of the Basic Court of Danilovgrad issued a decision to discontinue the investigation. From February 1996 up to and including the date of filing of the present complaint, the authorities took no further steps to identify and/or punish those individuals responsible for the incident at issue - "civilians" and police officers alike.

2.22 In violation of domestic legislation, the complainants were not served with the court decision of 8 February 1996 to discontinue the investigation. They were thus prevented from assuming the prosecution of the case themselves, as was their legal right.

2.23 Even prior to the closing of the proceedings, on 18 and 21 September 1995, the investigating magistrate, while hearing witnesses (among them a number of the complainants), failed to advise them of their right to assume the prosecution of the case in the event that the Public Prosecutor should decide to drop the charges. This contravened domestic legislation which explicitly provides that the Court is under an obligation to advise ignorant parties of avenues of legal redress available for the protection of their interests.

2.24 On 6 September 1996, all 71 complainants filed a civil claim for damages, pecuniary

and non-pecuniary, with the first instance court in Podgorica - each plaintiff claiming approximately US$ 100,000. The pecuniary damages claim was based on the complete destruction of all properties belonging to the plaintiffs, while the non-pecuniary damages claim was based on the pain and suffering of the plaintiffs associated with the fear they were subjected to, and the violation of their honour, reputation, freedom of movement and the right to choose their own place of residence. The plaintiffs addressed these claims against the Republic of Montenegro and cited articles 154, 180 (1), 200, and 203 of the Federal Law on Obligations. More than five years after the submission of their claim, the civil proceedings for damages are still pending.

...

9.2 As to the legal qualification of the facts that have occurred on 15 April 1995, as they were described by the complainants, the Committee first considers that the burning and destruction of houses constitute, in the circumstances, acts of cruel, inhuman or degrading treatment or punishment. The nature of these acts is further aggravated by the fact that some of the complainants were still hidden in the settlement when the houses were burnt and destroyed, the particular vulnerability of the alleged victims and the fact that the acts were committed with a significant level of racial motivation. Moreover, the Committee considers that the complainants have sufficiently demonstrated that the police (public officials), although they had been informed of the immediate risk that the complainants were facing and had been present at the scene of the events, did not take any appropriate steps in order to protect the complainants, thus implying "acquiescence" in the sense of article 16 of the Convention. In this respect, the Committee has reiterated on many instances its concerns about "inaction by police and law-enforcement officials who fail to provide adequate protection against racially motivated attacks when such groups have been threatened" ... Although the acts referred to by the complainants were not committed by public officials themselves, the Committee considers that they were committed with their acquiescence and constitute therefore a violation of article 16, paragraph 1, of the Convention by the State party.

9.3 Having considered that the facts described by the complainants constitute acts within the meaning of article 16, paragraph 1 of the Convention, the Committee will analyse other alleged violations in the light of that finding.

9.4 Concerning the alleged violation of article 12 of the Convention, the Committee, as it has underlined in previous cases (see *inter alia, Encarnacion Blanco Abad v. Spain*, Case No. 59/1996, decided on 14 May 1998), is of the opinion that a criminal investigation must seek both to determine the nature and circumstances of the alleged acts and to establish the identity of any person who might have been involved therein. In the present case, the Committee notes that, despite the participation of at least several hundred non-Roma in the events of 15 April 1995 and the presence of a number of police officers both at the time and at the scene of those events, no person nor any member of the police forces has been tried

by the courts of the State party. In these circumstances, the Committee is of the view that the investigation conducted by the authorities of the State party did not satisfy the requirements of article 12 of the Convention.

9.5 Concerning the alleged violation of article 13 of the Convention, the Committee considers that the absence of an investigation as described in the previous paragraph also constitutes a violation of article 13 of the Convention. Moreover, the Committee is of the view that the State party's failure to inform the complainants of the results of the investigation by, *inter alia*, not serving on them the decision to discontinue the investigation, effectively prevented them from assuming "private prosecution" of their case. In the circumstances, the Committee finds that this constitutes a further violation of article 13 of the Convention.

9.6 Concerning the alleged violation of article 14 of the Convention, the Committee notes that the scope of application of the said provision only refers to torture in the sense of article 1 of the Convention and does not cover other forms of ill-treatment. Moreover, article 16, paragraph 1, of the Convention while specifically referring to articles 10, 11, 12, and 13, does not mention article 14 of the Convention. Nevertheless, article 14 of the Convention does not mean that the State party is not obliged to grant redress and fair and adequate compensation to the victim of an act in breach of article 16 of the Convention. The positive obligations that flow from the first sentence of article 16 of the Convention include an obligation to grant redress and compensate the victims of an act in breach of that provision. The Committee is therefore of the view that the State party has failed to observe its obligations under article 16 of the Convention by failing to enable the complainants to obtain redress and to provide them with fair and adequate compensation.

10. The Committee...is of the view that the facts before it disclose a violation of articles 16, paragraph 1, 12 and 13 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

11. In pursuance of rule 111, paragraph 5, of its rules of procedure, the Committee urges the State party to conduct a proper investigation into the facts that occurred on 15 April 1995, prosecute and punish the persons responsible for those acts and provide the complainants with redress, including fair and adequate compensation and to inform it, within 90 days from the date of the transmittal of this decision, of the steps it has taken in response to the views expressed above.

Individual Opinion by Mr. Fernando Mariño and Mr. Alejandro González Poblete

We are issuing this opinion to emphasize that, in our judgement, the illegal incidents for which the Yugoslav State is responsible constitute "torture" within the meaning of article 1,

paragraph 1, of the Convention, not merely "cruel, inhuman or degrading treatment" as covered by article 16. The failure of the State authorities to react to violent evictions, forced displacement and the destruction of homes and property by individuals amounts to unlawful acquiescence which, in our judgement, violates article 1, paragraph 1, particularly when read in conjunction with article 2, paragraph 1, of the Convention.

We believe that, in fact, the suffering visited upon the victims was severe enough to qualify as "torture", because:

(a) The inhabitants of the Bozova Glavica settlement were forced to abandon their homes in haste given the risk of severe personal and material harm;

(b) Their settlement and homes were completely destroyed. Basic necessities were also destroyed;

(c) Not only did the resulting forced displacement prevent them from returning to their original settlement, but many members of the group were forced to live poorly, without jobs or fixed places of abode;

(d) Thus displaced and wronged, these Yugoslav nationals have still not received any compensation, seven years after the fact, although they have approached the domestic authorities;

(e) All the inhabitants who were violently displaced belong to the Romani ethnic group, which is known to be especially vulnerable in many parts of Europe. In view of this, States must afford them greater protection;

The above amounts to a presumption of "severe suffering", certainly "mental" but also inescapably "physical" in nature even if the victims were not subjected to direct physical aggression.

We thus consider that the incidents at issue should have been categorized as "torture".

- *S. S. v. The Netherlands* (191/2001), CAT, A/58/44 (5 May 2003) 115 (CAT/C/30/D/191/2001) at paras. 6.2, 6.4 and 6.7.

...
6.2 The Committee must decide whether the forced return of the complainant to Sri Lanka would violate the State party's obligation, under article 3, paragraph 1, of the Convention, not to expel or return (*refouler*) an individual to another State where there are substantial

grounds for believing that he would be in danger of being subjected to torture...

...

6.4 With regard to the complainant's claim that he would be in danger of being subjected to torture by LTTE [Liberation Tigers of Tamil Eelam] for having left the LTTE-controlled area of Sri Lanka without express permission to do so and without designating someone to vouch for him, the Committee recalls that the State party's obligation to refrain from forcibly returning a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture is directly linked to the definition of torture as found in article 1 of the Convention. For the purposes of the Convention, according to article 1, "the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity". The Committee observes that the issue of whether the State party has an obligation to refrain from expelling a person who might risk pain or suffering inflicted by a non-governmental entity, without the consent or acquiescence of the Government, falls outside the scope of article 3 of the Convention, unless the non-governmental entity occupies and exercises quasi-governmental authority over the territory to which the complainant would be returned. j/ Since the complainant can be returned to territory other than that under the control of LTTE, the issue, on which he bases part of his claim, that he would suffer retribution from LTTE upon his return to Sri Lanka cannot be considered by the Committee.

...

6.7 In the Committee's view, the complainant has not demonstrated any other circumstances, other than the fact that he worked as a karate teacher in Jaffna until 1996 and the presence of scars on his body, which would appear to make him particularly vulnerable to the risk of torture if he were to be returned to Sri Lanka. Moreover, the Committee again notes that the positive development of the peace negotiations between the Government of Sri Lanka and LTTE and the implementation of the peace process under way give reason to believe that a person in the situation of the complainant would not be under such risk upon return to Sri Lanka. The Committee therefore finds that the complainant has not provided sufficient evidence for substantiating that he would be in danger of being subjected to torture were he to be returned to Sri Lanka, and that such danger is present and personal.

...

Notes

...

j/ See *Sadi Shek Elmi v. Australi*a, communication No. 120/1998, ibid., *Fifty-fourth Session, Supplement No. 44* (A/54/44), annex VII, sect. A, para. 6.5; *M.P.S. v. Australi*a, ibid., *Fifty-*

seventh Session, Supplement No. 44 (A/57/44), annex VII, sect. A, para. 7.4; *S.V. et al. v. Canad*a, ibid., *Fifty-sixth Session, Supplement No. 44* (A/56/44), annex VII, sect. A, para. 9.5.

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