PUBLIC AND PRIVATE ACTORS - MILITARY

II. JURISPRUDENCE

ICCPR

- *Borda v. Colombia* (R.11/46), ICCPR, A/37/40 (27 July 1982) 193 at para. 13.3.

  ...
  13.3 The allegations as to breaches of the provision of article 14 of the Covenant concerning judicial guarantees and fair trial, seem to be based on the premise that civilians may not be subject to military penal procedures and that when civilians are nevertheless subjected to such procedures, they are in effect deprived of basic judicial guarantees aimed at ensuring fair trial, which guarantees would be afforded to them under the normal court system, because military courts are neither competent, independent and impartial. The arguments of the author in substantiation of these allegations are set out in general terms and principally linked with the question of constitutionality of Decree No.1923. He does not, however, cite any specific incidents of facts in support of his allegations of disregard for the judicial guarantees provided for by article 14 in the application of Decree No.1923 in the cases in question. Since the Committee does not deal with questions of constitutionality, but with the question whether a law is in conformity with the Covenant, as applied in the circumstances of this case, the Committee cannot make any finding of breaches of article 14 of the Covenant.

- *M. J. G. v. The Netherlands* (267/1987), ICCPR, A/43/40 (24 March 1988) 271 at para. 3.2.

  ...
  3.2 The Committee notes that the author claims he is a victim of discrimination on the grounds of "other status"(Covenant, art. 26 *in fine*) because, being a soldier during the period of his military service, he could not appeal against a summons like a civilian. The Committee considers, however, that the scope of application of article 26 cannot be extended to cover situations such as the one encountered by the author. The Committee observes, as it did with respect to communication No.245/1987 (*R.T.Z. v. The Netherlands*), that the Covenant does not preclude the institution of compulsory military service by States parties, even though this means that some rights of individuals may be restricted during military service, within the exigencies of such service. The Committee notes, in this connection, that the author has not claimed that the Netherlands military penal procedures are not being applied equally to all Netherlands citizens serving in the Netherlands armed forces. It therefore concludes that the author has no claim under article 2 of the Optional Protocol.

PUBLIC AND PRIVATE ACTORS - MILITARY

See also:

- *R. T. Z. v. The Netherlands* (245/1987), ICCPR, A/43/40 (5 November 1987) 265.

- *H. C. M. A. v. The Netherlands* (213/1986), ICCPR, A/44/40 (30 March 1989) 267 at paras. 2.3 and 11.6.

  ...
  2.3 The author...claims that article 14 of the Covenant has been violated because he has been unable to prosecute a police officer falling under exclusive military jurisdiction. Moreover, he maintains that the existing complaints procedure against members of the police is unjust, since police officers themselves investigate such complaints and exercise discretionary powers in their own favour. He alleges that an independent system of control does not exist in the Netherlands legal system.
  ...
  11.6 With respect to the author's allegation of a violation of article 14, paragraph 1, of the Covenant, the Committee observes that the Covenant does not provide for the right to see another person criminally prosecuted. Accordingly, it finds that this part of the communication is inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

- *Vuolanne v. Finland* (265/1987), ICCPR, A/44/40 (7 April 1989) 249 at paras. 9.3-9.6 and 10.

  ...
  9.3 The Committee has noted the contention of the State party that the case of Mr. Vuolanne does not fall within the ambit of article 9, paragraph 4, of the Covenant. The Committee considers that this question must be answered by reference to the express terms of the Covenant as well as its purpose. It observes that, as a general proposition, the Covenant does not contain any provision exempting from its application certain categories of persons. According to Article 2, paragraph 1, "each State party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or other origin, property, birth or other status". The all-encompassing character of the terms of this article leaves no room for distinguishing between different categories of persons, such as civilians and members of the military, to the extent of holding the Covenant to be applicable in one case but not in the other. Furthermore, the *travaux préparatoires* as well as the Committee's general comments indicate that the purpose of the Covenant was to proclaim and define certain human rights for all and to guarantee their enjoyment. It is, therefore, clear that the

Covenant is not, and should not be conceived in terms of whose rights shall be protected but in terms of what rights shall be guaranteed and to what extent. As a consequence the application of article 9, paragraph 4, cannot be excluded in the present case.

9.4 The Committee acknowledges that it is normal for individuals performing military service to be subjected to restrictions in their freedom of movement. It is self evident that this does not fall within the purview of article 9, paragraph 4. Furthermore, the Committee agrees that a disciplinary penalty or measure which would be deemed a deprivation of liberty by detention, were it to be applied to a civilian may not be termed such when imposed upon a serviceman. Nevertheless, such penalty or measure may fall within the scope or application of article 9, paragraph 4, if it takes the form of restrictions that are imposed over and above the exigencies of normal military service and deviate from the normal conditions of life within the armed forces of the State party concerned. In order to establish whether this is so, account should be taken of a whole range of factors such as the nature, duration, effects and manner of the execution of the penalty or measure in question.

9.5 In the implementation of the disciplinary measure imposed on him, Mr. Vuolanne was excluded from performing his normal duties and had to spend a day and night for a period of 10 days in a cell measuring 2 x 3 metres. He was allowed out of his cell solely for the purposes of eating, going to the toilet and taking air for a half an hour every day. He was prohibited from talking to other detainees and from making any noise in his cell. His correspondence and personal notes were interfered with. He served a sentence in the same way as a prisoner would. The sentence imposed on the author is of a significant length, approaching that of the shortest prison sentence that may be imposed under Finnish criminal law. In light of the circumstances, the Committee is of the view that this sort of solitary confinement in a cell for 10 days and nights is in itself outside the usual service and exceeds the normal restrictions that military life entails. The specific disciplinary punishment led to a degree of social isolation normally associated with arrest and detention in the sense of article 9, paragraph 4. In this connection, the Committee recalls its General Comment No. 8 (16) according to which most of the provisions of article 9 apply to all deprivations of liberty, whether in criminal cases or in other cases of detention as, for example, for mental illness, vagrancy, drug addiction, educational purposes and immigration control. The Committee cannot accept the State party's contention that because military disciplinary detention is firmly regulated by law, it does not necessitate the legal and procedural safeguards stipulated in article 9, paragraph 4.

9.6 The Committee further notes that whenever a decision depriving a person of his liberty is taken by an administrative body or authority, there is no doubt that article 9, paragraph 4, obliges the State party to make available to the person detained the right of recourse to a court of law. In this particular case it matters not whether the court be civilian or military. The Committee does not accept the contention of the State party that the request for review

before a superior military officer according to the Law on Military Disciplinary Procedure currently in effect in Finland is comparable to judicial or quasi-judicial manner. The procedure followed in the case of Mr. Vuolanne cannot be deemed to be a "court" within the meaning of article 9, paragraph 4; therefore, the obligations laid down therein have not been complied with by the authorities of the State party...

...

10. The Human Rights Committee...is of the view that the communication discloses a violation of article 9, paragraph 4 of the Covenant, because Mr. Voulanne was unable to challenge his detention before a court.

- *Arhuacos v. Colombia* (612/1995), ICCPR, A/52/40 vol. II (29 July 1997) 173 (CCPR/C/60/D/612/1995) at para. 8.7.

...

8.7 Counsel has claimed a violation of article 14 of the Covenant in connection with the interrogation of the Villafañe brothers by members of the armed forces and by a civilian with military authorization without the presence of a lawyer and with total disregard for the rules of due process. As no charges were brought against the Villafañe brothers, the Committee considers it appropriate to speak of arbitrary detention rather than unfair trial or unfair proceedings within the meaning of article 14. The Committee accordingly concludes that José Vicente and Amado Villafañe were arbitrarily detained, in violation of article 9 of the Covenant.

- *Polay Campos v. Peru* (577/1994), ICCPR, A/53/40 vol. II (6 November 1997) 36 at paras. 8.8 and 10.

...

8.8 As to Mr. Polay Campos' trial and conviction on 3 April 1993 by a special tribunal of "faceless judges", no information was made available by the State party, in spite of the Committee's request to this effect in the admissibility decision of 15 March 1996...[S]uch trials by special tribunals composed of anonymous judges are incompatible with article 14 of the Covenant. It cannot be held against the author that she furnished little information about her husband's trial: in fact, the very nature of the system of trials by "faceless judges" in a remote prison is predicated on the exclusion of the public from the proceedings. In this situation, the defendants do not know who the judges trying them are and unacceptable impediments are created to their preparation of their defence and communication with their lawyers. Moreover, this system fails to guarantee a cardinal aspect of a fair trial within the meaning of article 14 of the Covenant: that the tribunal must be, and be seen to be, independent and impartial. In a system of trial by "faceless judges", neither the independence

nor the impartiality of the judges is guaranteed, since the tribunal, being established *ad hoc*, may comprise serving members of the armed forces. In the Committee's opinion, such a system also fails to safeguard the presumption of innocence, which is guaranteed by article 14, paragraph 2. In the circumstances of the case, the Committee concludes that paragraphs 1, 2 and 3 (b) and (d) of article 14 of the Covenant were violated.

...

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Victor Polay Campos with an effective remedy. The victim was sentenced on the basis of a trial that failed to provide the basic guarantees of a fair trial. The Committee considers that Mr. Polay Campos should be released unless Peruvian law provides for the possibility of a fresh trial that does offer all the guarantees required by article 14 of the Covenant.

- *Foin v. France* (666/1995), ICCPR, A/55/40 vol. II (3 November 1999) 30 at para. 10.3.

...

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

PUBLIC AND PRIVATE ACTORS - MILITARY

For dissenting opinion in this context, see Foin v. France (666/1995), ICCPR, A/55/40 vol. II (3 November 1999) 30 at Individual Opinion by Nisuke Ando, Eckart Klein and David Kretzmer, 39.

See also:

- *Maille v. France* (689/1996), ICCPR, A/55/40 vol. II (10 July 2000) 62 at para. 10.4.
- *Venier and Nicolas v. France* (690/1996 and 691/1996), ICCPR, A/55/40 vol. II (10 July 2000) 75 at para. 10.4.

- *Westerman v. The Netherlands* (682/1996), ICCPR, A/55/40 vol. II (3 November 1999) 41 at paras. 2.1, 2.2, 9.4, 9.5 and 10.

...

2.1 The author states that he has conscientious objections to military service, but that his application to be recognized as a conscientious objector under the *Wet Gewetensbezwaarden Militaire Dienst* (Military Service (Conscientious Objections) Act) was refused by the Dutch authorities. The author's appeals against the refusal were dismissed by the Minister of Defence, and subsequently the *Raad van State* (Council of State). As a result, the author became eligible for military service.

2.2 In the beginning of his military service, on 29 October 1990, the author was told by a military officer to put on a uniform, which he refused. The author stated that he refused any sort of military service because of his conscientious objections. Although the officer reminded him that insubordination is a criminal offence, the author persisted in refusing any military orders.

...

9.4 The author sought recognition as a conscientious objector. The Minister of Defence held that his objection that he would not be able to take decisions for himself did not constitute grounds for recognition under Dutch law ...

9.5 The question for the Committee is whether the imposition of sanctions to enforce the performance of military duty was, in the case of the author, an infringement of his right to freedom of conscience. The Committee observes that the authorities of the State party evaluated the facts and arguments advanced by the author in support of his claim for exemption as a conscientious objector in the light of its legal provisions in regard to conscientious objection and that these legal provisions are compatible with the provisions of article 18. 2/ The Committee observes that the author failed to satisfy the authorities of the State party that he had an "insurmountable objection of conscience to military service.. because of the use of violent means" (para. 5). There is nothing in the circumstances of the case which requires the Committee to substitute its own evaluation of this issue for that of the national authorities.

PUBLIC AND PRIVATE ACTORS - MILITARY

10. The Human Rights Committee...is of the view that the facts before it do not disclose a violation of any of the articles of the International Covenant on Civil and Political Rights.

_____

Notes

...

2/ See General Comment 22 (48), paragraph 11 dealing with the right to conscientious objection.

_____

For dissenting opinion in this context, see Westerman v. The Netherlands (682/1996), ICCPR, A/55/40 vol. II (3 November 1999) 41 at Individual Opinion by P. Bhagwati, L. Henkin, C. Medina Quiroga, F. Pocar and M. Scheinin, 48 and Individual Opinion by H. Solari Yrigoyen, 49.

- *Marín Gómez v. Spain* (865/1999), ICCPR, A/57/40 vol. II (22 October 2001) 198 (CCPR/C/73/D/865/1999) at paras. 2.1-2.4, 3.1, 9.2, 9.3 and 10.

...

2.1 The author joined the Guardia Civil on 1 March 1981, when he was 19,1/ and remained on active duty until 15 November 1990, when he went on "active reserve" status owing to the loss of psychological and physical fitness.2/ On 15 November 1994, when he had been in the active reserve for four years, the District Military Medical Court handed down a ruling unanimously recognizing him as fit for active duty. 3/

2.2 In a decision dated 28 April 1995, the Ministry of Defence rejected the application the author made to return to active duty in February 1995. The decision was based on the fact that "the transitional provision in question, which allows a return to active duty, does not apply to the person in question because the reason for his change to active reserve status was not that referred to in article 4, paragraph 1 (a), of Act No. 20/1981,4/ but, rather, psychological and physical unfitness, as referred to in article 4, paragraph 1 (d)".

2.3 The author applied for judicial review against the decision by the Ministry of Defence dated 28 April 1995; the application was ruled on by the Fifth Administrative Law Division of the National High Court on 28 February 1997, which upheld the decision by the Ministry of Defence. That Division based its decision on the fact that, unlike the acceptance of the return to active duty of persons who were on reserve status for reasons of age, the rejection of the return to active duty by persons who were on active reserve status owing to the loss of psychological and physical fitness, which was later recovered, does not involve a violation of the right to equal access to public service. The National High Court concluded that the two situations are different and that there is thus no discrimination.

PUBLIC AND PRIVATE ACTORS - MILITARY

2.4 The author filed a remedy of *amparo*, which was rejected by the Constitutional Court on 3 November 1997 on the grounds that the ruling in question is not contrary to the principle of equality, since it deals with different problems on the basis of different criteria.
...
3.1 The author considers that the rights provided for in articles 25 (c) and 26 of the Covenant were violated when he was prevented from returning to active duty in the Guardia Civil after being declared fit by a Medical Court following the illness which had led to his change to reserve status, since reincorporation is allowed for civil guards who were on active reserve status for reasons of age. In this regard, the author maintains that the second transitional provision of Act No. 28/1994 (5) creates discrimination. It is also contrary to the right to access to public service in the Guardia Civil, which must be performed in conditions of equality.
...
9.2 With regard to the author's allegations that he is a victim of a violation of article 26 of the Covenant, the Committee notes that he was declared fit for active duty on 15 November 1994 and that he was notified of the Medical Court's agreement on 15 December. However, the author did not request a transfer to active duty at that time. The Committee notes that new Act No. 20/1994 entered into force on 20 January 1995 and that it eliminated the "active reserve status" category, leaving only the "reserve status" category, which, according to article 103 of Act No. 17/1989, does not allow military personnel on reserve status to change to active duty. The Committee notes that the author was affected by Act No. 20/1994 only to the extent that, as of 20 January 1995, he could not request a transfer to active duty. The Committee also notes that, since the author did not take the opportunity to request a transfer to active duty prior to 20 January 1995, the situation is of his own making, not that of the State party. The Committee takes note of the author's allegation that Act No. 20/1994 is discriminatory because it allows a return to active duty only for persons who went on reserve status for reasons of age. However, the Committee considers that this Act is not discriminatory, since it merely extends the retirement age to 56 years and allows persons who went on active reserve status at age 50 to apply to return to active duty, as provided for by law, and then base themselves on the new age to change to reserve status. Consequently, the Committee takes the view that the facts as submitted by the author do not disclose a violation of article 26 of the Covenant.

9.3 For the same reasons as those cited in the preceding paragraph, the Committee considers that there has been no violation of the right to equality of access to public service, as provided for in article 25 (c) of the Covenant.

10. The Human Rights Committee...is of the view that the facts before it do not disclose a violation by Spain of any of the provisions of the Covenant.

Notes

1/ He was born on 25 July 1961.

2/ Article 4, paragraph 1 (d), of Act No. 20/1981 of 6 July establishing active reserve status and setting ages of retirement for professional military personnel.

3/ He has not submitted a copy of the ruling to the secretariat.

4/ Article 4, paragraph 1 (a), refers to a change to active reserve status upon reaching the ages set in article 5 of Act No. 20/1981.

For dissenting opinion in this context, see Marín Gómez v. Spain (865/1999), ICCPR, A/57/40 vol. II (22 October 2001) 198 (CCPR/C/73/D/865/1999) at Individual Opinion by Ms. Christine Chanet, 205.

- *Coronel et al. v. Colombia* (778/1997), ICCPR, A/58/40 vol. II (24 October 2002) 40 (CCPR/C/76/D/778/1997) at paras. 2.1-2.4, 2.8, 2.10-2.15, 9.3-9.8 and 10.

...

2.1 Between 12 and 14 January 1993, troops of the "Motilones" Anti-Guerrilla Battalion (No. 17), attached to the Second Mobile Brigade of the Colombian National Army, conducted a military operation in the indigenous community of San José del Tarra (municipality of Hacari, department of Norte Santander) and launched a search operation in the region, making incursions into a number of neighbouring settlements and villages. During these operations, the soldiers raided several houses and arrested a number of people, including Ramón Villegas Téllez, Gustavo Coronel Navarro, Nahún Elías Sánchez Vega, Ramón Emilio Sánchez, Ramón Emilio Quintero Ropero and Luis Honorio Quintero Ropero. Both the raids and the arrests were carried out illegally, since the soldiers did not have the judicial warrants prescribed by Colombian law on criminal procedure to conduct searches or make arrests.

2.2 Ramón Villegas Téllez, Gustavo Coronel Navarro, Nahún Elías Sánchez Vega, Ramón Emilio Sánchez, Ramón Emilio Quintero Ropero, Luis Honorio Quintero Ropero and others were tortured by the soldiers, and some of them were forced to put on military uniforms and go on patrol with the members of the "Motilones" Anti-Guerrilla Batallion (No. 17). All of them were "disappeared" between 13 and 14 January 1993.

2.3 On 26 January 1993, Luis Ernesto Ascanio Ascanio, aged 16, disappeared while on his way home, abducted by soldiers who, a few days before, had raided the home of the Ascanio Ascanio family, ill-treating and harassing the family members, who included six minors and

also a 22-year-old mentally deficient young man, whom they attempted to hang. The soldiers remained in the house until 31 January, holding its inhabitants hostage. Luis Ernesto Ascanio Ascanio was seen for the last time some 15 minutes away from the family home. On the same day, members of the Ascanio family heard shouts and shots coming from outside the house. On 27 January, two of the brothers of Luis Ernesto Ascanio Ascanio succeeded in evading the military guards and fled to Ocaña, where they advised the local authorities and submitted a complaint to the Provincial Office of the Attorney-General. Once the military patrol had withdrawn, the search for Luis Ernesto Ascanio Ascanio began; the outcome was the discovery of a pocket knife belonging to him some 300 metres away from the house.

2.4 The Second Mobile Brigade reported various alleged armed clashes with guerrillas of the Revolutionary Armed Forces of Colombia (FARC) - the first on 13 January 1993, the second on 18 January 1993 and two incidents on 27 January 1993. The version given by the military authorities was that during the clashes the regular troops had killed a number of guerrillas. On 13 January 1993, three bodies were removed by the judicial police (SIJIN) in Ocaña, one of which was identified as the body of Gustavo Coronel Navarro. On 18 January, the soldiers deposited at the hospital the bodies of four alleged guerrillas "killed in combat". The SIJIN removed these corpses and confirmed the deaths of Luis Honorio Quintero Ropero, Ramón Emilio Quintero Ropero, Nahún Elías Sánchez Vega and Ramón Emilio Sánchez. On 29 January 1993, the Second Mobile Brigade brought in the bodies of four persons killed in the alleged clashes of 27 January 1993; again the SIJIN removed the bodies. On 21 May 1993, the bodies of the last four dead were exhumed in the cemetery of Ocaña; one of these was the body of Luis Ernesto Ascanio Ascanio, which was recognized by his relatives. The forensic report stated that one of the bodies brought to the hospital on 18 January contained a number of bullet entry holes with powder burns. In the records relating to the removal of the bodies on 21 May 1993, SIJIN officials stated that the bodies were clothed in uniforms used exclusively by the National Police.

...

2.8 The military criminal jurisdiction undertook various preliminary investigations into the facts as described. Judge No. 47 of the Military Criminal Investigation Unit, attached to the Second Mobile Brigade, opened preliminary inquiries Nos. 27, 30 and 28, 2/ the findings of which are contained in file No. 979, throughout which the incidents are referred to as "deaths in combat".

...

2.10 The authors state that the Special Investigations Unit in the National Office of the Attorney-General opened a file (No. 2291-93/DH) on the incidents in question following complaints submitted by the relatives to the Provincial Office of the Attorney-General in Ocaña, and officials were appointed to conduct the investigation. On 22 February 1993, a preliminary report from the officials in charge of the investigation drew attention to contradictions between the versions of the relatives and those of the military, and also to the way in which the judge in charge of Court No. 47 in the Military Criminal Investigation

Department had hampered and obstructed them in their task. They suggested that further evidence should be sought and that disciplinary investigation proceedings should be instituted against Judge No. 47 of the Military Criminal Investigation Department.

2.11 The director of the Special Investigations Unit ordered a new investigation, including an investigation into the conduct of Judge No. 47 of the Military Criminal Investigation Department. The investigating officials submitted several reports to the director; one of them, relating to Luis Honorio Quintero Ropero, Ramón Emilio Ropero Quintero, Nahún Elías Sánchez Vegas and Ramón Emilio Sánchez, stated that "it is fully demonstrated that material responsibility lies with anti-guerrilla section C of battalion 17 ('Motilones') of the Second Mobile Brigade under the command of Captain Serna Arbelaez Mauricio".

2.12 On 29 June 1994, in their final report, the officials confirmed that it was fully proved that the peasants had been detained by members of anti-guerrilla battalion No. 17 ("Motilones") of the Second Mobile Brigade, on the occasion of a military operation carried out in compliance with operation order No. 10 issued by the commander of that military unit; that the peasants were last seen alive when in the hands of the soldiers and appeared to have died later in the course of two alleged clashes with units of the military. They also established that Luis Ernesto Ascanio Ascanio, a minor, was last seen alive heading home some 15 minutes' walk from home and that the boy was found dead after another alleged clash with the military. The officials identified the commanders, officers, non-commissioned officers and privates who formed part of the patrols that captured the peasants and occupied the dwelling of the Ascanio family. The report concluded that, "on the basis of the evidence advanced, the allegation of combats in which the victims could have taken part is discredited, since they were already being held by troops of the National Army, in a manner which was, moreover, irregular; some of them bear marks on the skin that demonstrate even more clearly the defenceless condition they were in...". The report recommended that the case should be referred to the Armed Forces Division in the Procurator's Office.

2.13 On 25 October 1994, the Armed Forces Division in the Attorney-General's Office referred the file to the Human Rights Division of the same office on jurisdictional grounds. The transmission document indicates that "the following has been established … the state of complete defencelessness of the victims …, the close range at which the bullets that killed them were fired and the fact that they had been detained before they died; the foregoing, together with other evidence, disproves the existence of an alleged combat that allegedly was the central circumstance causing the deaths recorded".

2.14 On 28 November 1994, the Human Rights Division opened disciplinary proceedings file No. 008-153713 and began preliminary investigations. On 26 April 1996, it informed one of the NGOs that the proceedings were still at the preliminary inquiry stage.

PUBLIC AND PRIVATE ACTORS - MILITARY

2.15 On 13 January 1995, the families of the victims lodged a claim against Colombia in the administrative court for the deaths of Luis Honorio Quintero Ropero, Ramón Emilio Quintero Ropero, Ramón Emilio Sánchez, Luis Ernesto Ascanio Ascanio, Nahún Elías Sánchez Vega and Ramón Villegas Téllez; the claims were declared admissible between 31 January and 24 February 1995.

...

9.3 With regard to the authors' claim that there was a violation of article 6, paragraph 1, of the Covenant, the Committee notes that, according to the authors, the Special Investigations Unit of the Attorney-General's office established, in its final report of 29 June 1994, that State officials were responsible for the victims' detention and disappearance. Moreover, in its decision of 27 February 1998, which the Committee had before it, the Human Rights Division of the Attorney-General's Office acknowledged that State security forces had detained and killed the victims. Considering, furthermore, that the State party has not refuted these facts and that it has not taken the necessary measures against the persons responsible for the murder of the victims, the Committee concludes that the State did not respect or guarantee the right to life of Gustavo Coronel Navarro, Nahún Elías Sánchez Vega, Ramón Emilio Sánchez, Ramón Emilio Quintero Ropero, Luis Honorio Quintero Ropero, Ramón Villegas Téllez and Luis Ernesto Ascanio Ascanio, in violation of article 6, paragraph 1, of the Covenant.

9.4 With regard to the claim under article 9 of the Covenant, the Committee takes note of the authors' allegations that the detentions were illegal in the absence of any arrest warrants. Bearing in mind that the State party has not denied this fact, and since, in the Committee's opinion, the complaint is sufficiently substantiated by the documents mentioned in paragraph 9.3, the Committee concludes that there has been a violation of article 9 of the Covenant in respect of the seven victims.

9.5 With regard to the authors' allegations of a violation of article 7 of the Covenant, the Committee notes that, in the decision of 27 February 1998 referred to in the preceding paragraphs, the Attorney-General's Office acknowledged that the victims Gustavo Coronel Navarro, Nahún Elías Sánchez Vega, Luis Ernesto Ascanio Ascanio and Luis Honorio Quintero Ropero had been subjected to treatment incompatible with article 7. Taking into account the circumstances of the disappearance of the four victims and that the State party has not denied that they were subjected to treatment incompatible with that article, the Committee concludes that the four victims were the object of a clear violation of article 7 of the Covenant.

9.6 However, with regard to the allegations concerning Ramón Emilio Sánchez, Ramón Emilio Quintero Ropero and Ramón Villegas Téllez, the Committee considers that it does not have sufficient information to determine whether there has been a violation of article 7 of the Covenant.

9.7 With regard to the claim under article 17 of the Covenant, the Committee must determine whether the specific conditions in which the raid on the homes of the victims and their families took place constitute a violation of that article. The Committee takes note of the authors' allegations that both the raids and the detentions were carried out illegally, since the soldiers did not have search or arrest warrants. It also takes note of the corroborating testimony gathered from witnesses by the Attorney-General's Office showing that the procedures were carried out illegally in the private houses where the victims were staying. In addition, the Committee considers that the State party has not provided any explanation in this regard to justify the action described. Consequently, the Committee concludes that there has been a violation of article 17, paragraph 1, inasmuch as there was unlawful interference in the homes of the victims and their families or in the houses where the victims were present, including the home of the minor Luis Ernesto Ascanio Ascanio, even though he was not there at the time.

9.8 The Human Rights Committee...is of the view that the facts that have been set forth constitute violations of article 6, paragraph 1; article 7 in respect of Gustavo Coronel Navarro, Nahún Elías Sánchez Vega, Luis Ernesto Ascanio Ascanio and Luis Honorio Quintero Ropero; article 9; and article 17 of the Covenant.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party has an obligation to provide the victims' relatives with effective remedy, including compensation. The Committee urges the State party to conclude without delay the investigations into the violation of articles 6 and 7 and to speed up the criminal proceedings against the perpetrators in the ordinary criminal courts. The State party is also obliged to take steps to prevent similar violations from occurring in the future.

_____

Notes

...

2/ On 25 January, 2 February and 10 February 1993, respectively.

_____

- *Sarma v. Sri Lanka* (950/2000), ICCPR, A/58/40 vol. II (16 July 2003) 248 (CCPR/C/78/D/950/2000) at paras. 2.1-2.6, 9.2-9.4 and 11.

...

2.1 The author alleges that, on 23 June 1990, at about 8.30 a.m., during a military operation, his son, himself and three others were removed by army members from their family residence in Anpuvalipuram, in the presence of the author's wife and others. The group was then handed over to other members of the military, including one Corporal Sarath, at another location (Ananda Stores Compound Army Camp). The author's son was apparently

suspected of being a member of the LTTE (Liberation Tigers of Tamil Eelam) and was beaten and tortured. He was thereafter taken into military custody at Kalaimagal School allegedly after transiting through a number of other locations. There, he was allegedly tortured, hooded and forced to identify other suspects.

2.2 In the meantime, the author and other persons arrested were also transferred to Kalaimagal School, where they were forced to parade before the author's hooded son. Later that day, at about 12.45 p.m., the author's son was taken to Plaintain Point Army Camp, while the author and others were released. The author informed the Police, the International Committee of the Red Cross (ICRC) and human rights groups of what had happened.

2.3 Arrangements were later made for relatives of missing persons to meet, by groups of 50, with Brigadier Pieris, to learn about the situation of the missing ones. During one of these meetings, in May 1991, the author's wife was told that her son was dead.

2.4 The author however claims that, on 9 October 1991 between 1:30 and 2 p.m., while he was working at "City Medicals Pharmacy", a yellow military van with license plate No. 35 Sri 1919 stopped in front of the pharmacy. An army officer entered and asked to make some photocopies. At this moment, the author saw his son in the van looking at him. As the author tried to talk to him, his son signalled with his head to prevent his father from approaching.

2.5 As the same army officer returned several times to the pharmacy, the author identified him as star class officer Amarasekara. In January 1993, as the "Presidential Mobile Service" was held in Trincomalee, the author met the then Prime Minister, Mr. D. B. Wijetunghe and complained about the disappearance of his son. The Prime Minister ordered the release of the author's son, wherever he was found. In March 1993, the military advised that the author's son had never been taken into custody.

2.6 In July 1995, the author gave evidence before the "Presidential Commission of Inquiry into Involuntary Removals and Disappearances in the Northern and Eastern Provinces" (The Presidential Commission of Inquiry), without any result. In July 1998, the author again wrote to the President, and was advised in February 1999 by the Army that no such person had been taken into military custody. On 30 March 1999, the author petitioned to the President, seeking a full inquiry and the release of his son.

...

9.2 With regard to the author's claim in respect of the disappearance of his son, the Committee notes that the State party has not denied that the author's son was abducted by an officer of the Sri Lankan Army on 23 June 1990 and has remained unaccounted for since then. The Committee considers that, for purposes of establishing State responsibility, it is irrelevant in the present case that the officer to whom the disappearance is attributed acted

ultra vires or that superior officers were unaware of the actions taken by that officer13/. The Committee therefore concludes that, in the circumstances, the State party is responsible for the disappearance of the author's son.

9.3 The Committee notes the definition of enforced disappearance contained in article 7, paragraph 2 (i) of the Rome Statute of the International Criminal Court14/: *"Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time*. Any act of such disappearance constitutes a violation of many of the rights enshrined in the Covenant, including the right to liberty and security of person (art. 9), the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (art. 7), and the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person (art. 10). It also violates or constitutes a grave threat to the right to life (art. 6).15/

9.4 The facts of the present case clearly illustrate the applicability of article 9 of the Covenant concerning liberty and security of the person. The State party has itself acknowledged that the arrest of the author's son was illegal and a prohibited activity. Not only was there no legal basis for his arrest, there evidently was none for the continuing detention. Such a gross violation of article 9 can never be justified. Clearly, in the present case, in the Committee's opinion, the facts before it reveal a violation of article 9 in its entirety.

...

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author and his family with an effective remedy, including a thorough and effective investigation into the disappearance and fate of the author's son, his immediate release if he is still alive, adequate information resulting from its investigation, and adequate compensation for the violations suffered by the author's son, the author and his family. The Committee considers that the State party is also under an obligation to expedite the current criminal proceedings and ensure the prompt trial of all persons responsible for the abduction of the author's son under section 356 of the Sri Lankan Penal Code and to bring to justice any other person who has been implicated in the disappearance. The State party is also under an obligation to prevent similar violations in the future.

Notes

...

13/ See article 7 of the Draft articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its fifty-third session 2001 and article 2, paragraph 3 of the Covenant.

14/ Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by *procès-verbaux* of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002.

15/ See article 1, paragraph 2 of the Declaration on the Protection of All Persons from Enforced Disappearances, General Assembly Resolution 47/133, 47 UN GAOR Supp. (No. 49) at 207, U.N. Doc. A/47/49 (1992). Adopted by General Assembly resolution 47/133 of 18 December 1992.

- *Kurbanova v. Tajikistan* (1096/2002), ICCPR, A/59/40 vol. II (6 November 2003) 354 (CCPR/C/79/D/1096/2002) at paras. 2.2, 2.3, 3.3, 7.6, 7.7, 8 and 9.

...
2.2 On 9 June 2001, a criminal investigation was opened in relation to the triple murder of Firuz and Fayz Ashurov and D. Ortikov, which had occurred in Dushanbe on 29 April 2001...

2.3 On 2 November 2001, the Military Chamber of the Supreme Court sentenced the author's son to death (with confiscation of his property). On 18 December 2001 the judgement was confirmed by the Supreme Court, following extraordinary appeal proceedings.
...
3.3 The author contends that article 14, paragraph 1, of the Covenant was violated, as the court proceedings were partial. She alleges that the court proceedings were unfair from the beginning, as the families of the victims exercised pressure on the judges. All requests of the defence were rejected.
...
7.6 As to the author's claim that her son's rights under article14, paragraph 1 were violated through a death sentence pronounced by an incompetent tribunal, the Committee notes that the State party has neither addressed this claim nor provided any explanation as to why the trial was conducted, at first instance, by the Military Chamber of the Supreme Court. In the absence of any information by the State party to justify a trial before a military court, the Committee considers that the trial and death sentence against the author's son, who is a civilian, did not meet the requirements of article 14, paragraph 1.

7.7 The Committee recalls5/ that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes a violation of article 6 of the Covenant. In the current case, the sentence of death was passed in violation of the right to a fair trial as set out in article 14 of the Covenant, and thus also in breach of

article 6.

...

8. The Human Rights Committee...is of the view that the facts before it disclose a violation of the rights of Mr. Kurbanov under article 7, article 9, paragraphs 2 and 3, article 10, article 14, paragraph 1 and paragraph 3 (a) and (g), and of article 6 of the Covenant.

9. Under article 2, paragraph 3 (a), of the Covenant, the author's son is entitled to an effective remedy entailing compensation and a new trial before an ordinary court and with all the guarantees of article 14, or, should this not be possible, release. The State party is under an obligation to take measures to prevent similar violations in the future.

_____

Notes

...

5/ See *Conroy Levy v. Jamaica*, communication No. 719/1996, and *Clarence Marshall v. Jamaica*, communication No. 730/1996.

_____

- *Borzov v. Estonia* (1136/2002), ICCPR, A/59/40 vol. II (26 July 2004) 369 at paras. 2.1, 2.2, 7.2-7.4 and 8.

...

2.1 From 1962 to 1967, the author attended the Sevastopol Higher Navy College in the specialty of military electrochemical engineer. After graduation, he served in Kamchatka until 1976 and thereafter in Tallinn as head of a military factory until 1986. On 10 November 1986, the author was released from service with rank of captain due to illness. The author has worked, since 1988, as a head of department in a private company, and he is married to a naturalized Estonian woman. In 1991, Estonia achieved independence.

2.2 On 28 February 1994, the author applied for Estonian citizenship. In 1994, an agreement between Estonia and the Russian Federation entered into force which concerned the withdrawal of troops stationed on the former's territory (the 1994 treaty). In 1995, the author obtained an Estonian residence permit, pursuant to the Aliens Act's provisions concerning persons who had settled in Estonia prior to 1990. In 1996, an agreement between Estonia and the Russian Federation entered into force, concerning "regulation of issues of social guarantees of retired officers of the armed forces of the Russian Federation in the territory of the Republic of Estonia" (the 1996 treaty). Pursuant to the 1996 treaty, the author's pension has been paid by the Russian Federation. Following delays occasioned by deficiencies of archive materials, on 29 September 1998, the Estonian Government, by order No. 931-k, refused the application. The refusal was based on section 8 of the Citizenship Act of 1938, as well as section 32 of the Citizenship Act of 1995 which precluded citizenship for

a career military officer in the armed forces of a foreign country who had been discharged or retired therefrom.

...

7.2 Turning to the substance of the admissible claim under article 26, the Committee refers to its jurisprudence that an individual may be deprived of his right to equality before the law if a provision of law is applied to him or her in arbitrary fashion, such that an application of law to an individual's detriment is not based on reasonable and objective grounds 3/. In the present case, the State party has invoked national security, a ground provided for by law, for its refusal to grant citizenship to the author in the light of particular personal circumstances.

7.3 While the Committee recognizes that the Covenant explicitly permits, in certain circumstances, considerations of national security to be invoked as a justification for certain actions on the part of a State party, the Committee emphasizes that invocation of national security on the part of a State party does not, ipso facto, remove an issue wholly from the Committee's scrutiny. Accordingly, the Committee's decision in the particular circumstances of *V.M.R.B* 4/ should not be understood as the Committee divesting itself of the jurisdiction to inquire, as appropriate, into the weight to be accorded to an argument of national security. While the Committee cannot leave it to the unfettered discretion of a State party whether reasons related to national security existed in an individual case, it recognizes that its own role in reviewing the existence and relevance of such considerations will depend on the circumstances of the case and the relevant provision of the Covenant. Whereas articles 19, 21 and 22 of the Covenant establish a criterion of necessity in respect of restrictions based on national security, the criteria applicable under article 26 are more general in nature, requiring reasonable and objective justification and a legitimate aim for distinctions that relate to an individual's characteristics enumerated in article 26, including "other status". The Committee accepts that considerations related to national security may serve a legitimate aim in the exercise of a State party's sovereignty in the granting of its citizenship, at least where a newly independent State invokes national security concerns related to its earlier status.

7.4 In the present case, the State party concluded that a grant of citizenship to the author would raise national security issues generally on account of the duration and level of the author's military training, his rank and background in the armed forces of the then USSR. The Committee notes that the author has a residence permit issued by the State party and that he continues to receive his pension while living in Estonia. Although the Committee is aware that the lack of Estonian citizenship will affect the author's enjoyment of certain Covenant rights, notably those under article 25, it notes that neither the Covenant nor international law in general spells out specific criteria for the granting of citizenship through naturalization, and that the author did enjoy a right to have the denial of his citizenship application reviewed by the courts of the State party. Noting, furthermore, that the role of the State party's courts in reviewing administrative decisions, including those decided with

reference to national security, appears to entail genuine substantive review, the Committee concludes that the author has not made out his case that the decision taken by the State party with respect to the author was not based on reasonable and objective grounds. Consequently, the Committee is unable, in the particular circumstances of this case, to find a violation of article 26 of the Covenant.

8. The Human Rights Committee...is of the view that the facts before it do not disclose a violation of article 26 of the Covenant.

_____

Notes

...

3/ See *Kavanagh v. Ireland* (No. 1), case No. 819/1998, Views adopted on 4 April 2001.

4/ [Case No. 236/1987, decision adopted on 18 July 1988].

_____

CAT

- *M. S. v. Australia* (154/2000), CAT, CAT/C/27/D/154/2000 (23 November 2001) at paras. 2.5, 6.6, 6.7 and 7.

...

2.5 The petitioner submits that he left Algeria in 1994 after he heard of an official decree calling up reservists who had only served 18 months of military service for an extra six months. The petitioner had served in the National Republic Army from May 1988 to March 1990. The petitioner submits that in March 1994 it was reported that the Algerian Minister of the Interior announced the Government's intention to draft thousands of army reservists and that these reports were not before the RRT when it reviewed the case.

...

6.6 With regard to the claim that the petitioner will be targeted and that an anti-Government opinion will automatically be attributed to him, the Committee notes that the petitioner did not present evidence that there was, in fact, a military recall of the petitioner at all. From the evidence before the Committee, it also cannot be established that the petitioner is at risk of being tortured if interviewed at the airport upon his return to Algeria.

6.7 The Committee recalls that, for the purposes of article 3 of the Convention, a foreseeable, real and personal risk must exist of being tortured in the country to which a person is returned. On the basis of the considerations above, the Committee considers that the petitioner has not presented sufficient evidence to convince the Committee that he faces a personal risk of being subjected to torture if returned to Algeria.

PUBLIC AND PRIVATE ACTORS - MILITARY

7. The Committee against Torture...concludes that the removal of the petitioner to Algeria, on the basis of the information submitted, would not entail a breach of article 3 of the Convention.

- *U. S. v. Finland* (197/2002), CAT, A/58/44 (1 May 2003) 153 (CAT/C/30/D/197/2002) at paras. 7.5-7.8.

...

7.5 The Committee observes 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".

7.6 As to the possibility of the complainant suffering torture at the hands of the State upon his return to Sri Lanka, the Committee has taken due note of the complainant's claim that he was previously detained and tortured by members of the Sri Lankan army. It further observes that the complainant provided medical reports attesting to injuries that were "possibly caused by torture", though none of the reports conclusively confirms that he was tortured during his detention in 1998. The State party does not challenge the authenticity of these reports but notes that the reports themselves attest to a gradual improvement of the author's health and that treatment for his current medical condition would be available in Sri Lanka. The State party does not concede that such torture as the complainant might have been subjected to was suffered at the hands of the Sri Lankan army - in any case, such events would have occurred years ago.

7.7 The Committee notes the relevance of the ongoing peace process, which led to the conclusion of the February 2002 ceasefire agreement between the Government and LTTE, and the negotiations between the parties to the conflict which have taken place since. It further recalls the results of the proceedings concerning its inquiry on Sri Lanka under article 20 of the Convention and its conclusion that, although a disturbing number of cases of torture and ill-treatment as defined by articles 1 and 16 of the Convention are taking place, its practice is not systematic in the State party.e/ It finally notes the opinion of UNHCR of March 1999, according to which those who do not fulfil the refugee criteria, including those

of Tamil origin, may be returned to Sri Lanka, and that a large number of Tamil refugees returned to Sri Lanka in 2001 and 2002. In this context, it should also be noted that the complainant has not been politically active since the mid-1980s.

7.8 The Committee recalls that, for article 3 of the Convention to apply, the individual concerned must face a foreseeable and real risk of being subjected to torture in the country to which he/she is being returned, and that this danger must be personal and present. In the light of the observations in paragraphs 7.6 and 7.7 above, the Committee does not consider that the existence of a personal and real risk has been established by the complainant.

_____

Notes

...

e/ [Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 44 (A/56/44)] chap. IV, sect. B, para. 181.

_____

- *S. S. v. The Netherlands* (191/2001), CAT, A/58/44 (5 May 2003) 115 (CAT/C/30/D/191/2001) at paras. 2.1, 2.3, 6.2, 6.5, 6.6 and 6.7.

...

2.1 The complainant lived in the Jaffna peninsula from 1989 until 1995, where he worked as a karate teacher. He also gave lessons to members of the Liberation Tigers of Tamil Eelam (LTTE) but, although he sympathized with LTTE, he refused to give lessons at their military camps. When the Sri Lankan army took over Jaffna in late 1995, he fled to Chavakachchery, and thereafter to Killinochi, together with his wife and children.

...

2.3 On 13 December 1996, two days after LTTE bombed a Sri Lankan army camp, the army overran Trincomalee and arrested a large number of people, including the complainant. Everyone above the age of 12 had to stand in front of a temple where a masked man picked out the complainant and other men. The complainant was brought to a military camp in Trincomalee where he was detained for approximately two months. He was locked with four other men in a narrow cell with little light and a concrete floor and without any furniture. He was given one daily meal of poor quality. Since the cell did not have a toilet, the prisoners had to relieve themselves in the corners of the room, excrement being removed from the cell occasionally. Reportedly, the soldiers entered the cell regularly, especially following armed attacks by LTTE, to kick and beat the prisoners, sometimes asking questions at the same time. The complainant states that he was asked whether he was a karate teacher, which he denied. He and the other men were often naked or dressed only in underwear. Frequently, the soldiers poured water on them before beating them. The complainant was beaten with the flat of the hand, the fist, the butt of a rifle and a rubber rod.

Once he was allegedly beaten on the soles of his feet with a round stick, causing severe pain in his feet for several days. Another time, he was put against a cupboard with his hands up and was hit on the back with a rubber rod, causing him chronic pain in the back which allegedly persists to date. He was punched on the eye, leaving an injury on one eyebrow. Soldiers also beat him on the genitals and on the kidneys, which resulted in a swollen testicle and blood in his urine. Moreover, he was allegedly burned with a hot stick on his left arm, leaving scars. The big toe of his right foot was severely injured when his torturers stamped on that foot with their boots. When the soldiers hit his right hand with a broken bottle and asked him "Aren't you a karate teacher?", he lost consciousness. b/

...

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...

...

6.5 With respect to the risk that the complainant might be subjected to torture at the hands of State agents upon return to Sri Lanka, the Committee has noted the complainant's claim that he is at high personal risk owing to his previous activities as a karate teacher, that he has allegedly already been severely maltreated by soldiers of the Sri Lankan army, and that he bears scars which the authorities would likely assume to have been caused by fighting for LTTE. It has considered the claim that, because of the failure by IND to take a decision on the complainant's refugee application within the prescribed time limit, the complainant was precluded from filing an objection regarding the merits of the IND final decision, dated 20 May 1999. The Committee has further noted that IND took this decision before BMA gave its advice on the complainant's medical condition. Similarly, the Committee has noted the attention drawn by the State party to a number of inconsistencies and contradictions in the complainant's account which are said to cast doubt on the complainant's credibility and the veracity of his allegations.

6.6 The Committee notes that the medical evidence submitted by the complainant confirms physical as well as psychological symptoms which might be attributed to his alleged maltreatment at the hand of the Sri Lankan army. However, the Committee observes that, even if the complainant's allegation that he was severely tortured during his detention at the Trincomalee military camp in 1996 were sufficiently substantiated, these alleged acts of torture did not occur in the recent past.

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

...

b/ The complainant's description of most of the details of his torture is documented in a medical report, dated 14 June 2001, by the medical examination group of the Dutch Section of Amnesty International.

...

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.

_____

- *A. K. v. Australia* (148/1999), CAT, A/59/44 (5 May 2004) 123 at paras. 1.1, 2.4, 2.11, 6.1 and 6.4-6.6.

1.1 The complainant is A.K., a Sudanese national, currently detained at the Immigration Detention Centre, New South Wales. He claims that his forcible return to Sudan would constitute a violation of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment by Australia...

...

2.4 In 1994, the Government sent students who were seen as troublemakers and opponents of the regime to fight in Southern Sudan. On 1 June 1996, the complainant allegedly received a summons stating that he had to report to the PDF within 72 hours as he had been chosen "to fulfil the duty of Jihad". As he did not want to fight against his own people or to clear minefields, he decided to flee the country. He was unable to use his passport because of the summons and therefore used his older brother's passport. After his departure the military allegedly visited his home.

...

2.11 According to the complainant, there is evidence that military deserters will face torture and death. Amnesty International reported in April 1998 that: "Scores of student conscripts died as hundreds of youths broke out of a military training camp at al-Ayfun near Khartoum. The authorities announced that more than 50 deserters had drowned trying to cross the Blue

Nile. However, other reports said that over 100 were killed, many of whom had been shot and others beaten to death." He also submits that both the UNHCR and Amnesty International have reported on the detention centres in Sudan and on the risk of ill-treatment and torture, in particular during interrogation in security offices. c/ According to the complainant, "a failed Sufi", Umma Party asylum-seeker, who has spent considerable time in the West, and who has qualified in law, whether or not his military service has been completed, would face considerable difficulty on return to Sudan.

...

6.1 The Committee must decide whether the forced return of the complainant to Sudan 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 On the issue of his alleged desertion, the Committee notes that the State party did examine the letter, dated 1 June 1996, in which the complainant was allegedly drafted by the PDF, but considered it not to be genuine. The Committee considers that due weight must be accorded to findings of fact made by domestic, judicial or competent government authorities unless it can be demonstrated that such findings are arbitrary or unreasonable. Even if the Committee were to consider that the complainant is a deserter or evaded the draft, he has not demonstrated that he would be subjected to torture upon his return to Sudan. The Committee observes that the State party considered a significant amount of information from various different sources before arriving at this conclusion.

6.5 The Committee notes the claim that if returned to Sudan, the complainant would be compelled to perform military service, despite the fact that he is a conscientious objector, and the implication that this would amount to torture, as defined by article 3 of the Convention. The Committee considers that the letter of 1 June 1996, the veracity of which has been challenged, as well as the complainant's allegation that opponents of the regime are called up to fight in the civil war, is insufficient to demonstrate that he either is a conscientious objector or that he would be drafted on return to Sudan. As with the other reasons for claiming a fear of torture on return, the State party's evaluation of the facts in this respect has not been shown to be unreasonable or arbitrary.

6.6 On the basis of the foregoing, the Committee considers that the complainant has not provided a verifiable basis to conclude that substantial grounds exist for believing that he would face a foreseeable, real and personal risk of being subjected to torture upon his return to Sudan, within the meaning of article 3 of the Convention.

Notes

...

c/ He refers to Amnesty International's Urgent Action of 21 January 1997.

PUBLIC AND PRIVATE ACTORS - MILITARY