THOUGHT, CONSCIENCE AND RELIGION - FREEDOM OF

III. JURISPRUDENCE

ICCPR

- *Hartikainen v. Finland* (R.9/40), ICCPR, A/36/40 (9 April 1981) 147 at paras.10.4 and 10.5.

  ...
  10.4 The Committee does not consider that the requirement of the relevant provisions of Finnish legislation that instruction in the study of the history of religions and ethics should be given instead of religious instruction to students in schools whose parents or legal guardians object to religious instruction is in itself incompatible with article 18 (4), if such alternative course of instruction is given in a neutral and objective way and respects the convictions of parents and guardians who do not believe in any religion. In any event, paragraph 6 of the School System Act expressly permits any parents or guardians who do not wish their children to be given either religious instruction or instruction in the study of the history of religions and ethics to obtain exemption therefrom by arranging for them to receive comparable instruction outside of school.

  10.5 The State party admits that difficulties have arisen in regard to the existing teaching plan to give effect to these provisions, (which teaching plan does appear, in part at least, to be religious in character), but the Committee believes that appropriate action is being taken to resolve the difficulties and it sees no reason to conclude that this cannot be accomplished, compatibly with the requirements of article 18 (4) of the Covenant, within the framework of the existing laws.

- *Muhonen v. Finland* (89/1981) (R.22/89), ICCPR, A/40/40 (8 April 1985) 164 at paras. 2.1-2.5, 11.2 11.3 and 12.

  ...
  2.1 In August 1976, at that time eligible for military service, Mr. Muhonen applied to the Military Service Examining Board to be permitted, on profound ethical grounds and in accordance with existing law (Unarmed and Alternative Service Act, 1969), to do alternative service subject to the civil authorities, instead of armed or unarmed service in the armed forces. By its decision of 18 October 1977, the Examining Board rejected the application on the ground that Mr. Muhonen had not proved that serious moral considerations based on ethical conviction prevented him from doing armed or unarmed military service and ordered that he should do armed service (with the details of posting and the time for reporting for duty to be communicated to him at a later date). The proceedings before the Examining Board were conducted in writing. Mr. Muhonen did not avail himself of the opportunity to

appear personally before the Examining Board, both because it was inconvenient for him to travel a long distance for a hearing and also because the Examining Board had indicated to him that a decision could be taken in his absence. Mr. Muhonen therefore concluded that his presence was not necessary and that his absence would not affect the disposition of the matter. Being dissatisfied with the decision of the Examining Board, Mr. Muhonen (as he was entitled to under the law) appealed to the Ministry of Justice to change the decision of the Examining Board. By a decision of 21 November 1977, the Ministry of Justice concluded that 'no cause for changing the decision of the Military Service Examining Board [had] been shown' and upheld the decision of the Examining Board. The text of the decision of the Ministry of Justice also states that under the law "this decision is not subject to appeal".

2.2 On 13 February 1978, Mr. Muhonen resubmitted to the Military Service Examining Board a declaration of refusal to bear arms. The Examining Board decided, on 1 September 1978, not to examine Mr. Muhonen's renewed declaration, "as the Ministry of Justice [had] already adopted a decision in this case". Mr. Muhonen again appealed to the Ministry of Justice, asking that he be called up for alternative service. In a decision of 3 November 1978, the Ministry of Justice, taking the view that the Examining Board should not have left Mr. Muhonen's declaration without a hearing on the grounds invoked, decided not to return the matter to the Board in view of the fact that the circumstances of the case were already clarified, but to give it direct consideration, reaching the conclusion that no cause had been shown for changing the final decision which the Examining Board had reached in its decision of 18 October 1977 and on the appeal against which the Ministry of Justice had adopted a decision on 21 November 1977. Again, the text of the decision of the Ministry of Justice stated that it was not subject to appeal."

2.3 In the meantime, i.e. before the Examining Board and the Ministry of Justice acted on his submission of 13 February 1978, Mr. Muhonen was called up for military service (15 February 1978). He reported to the military unit where he had been posted and there refused to do any military service. He was furloughed the same day. Criminal court proceedings were then initiated against Mr. Muhonen for refusal to do military service and an ordinary court of first instance sentenced him to 11 months imprisonment on 13 December 1978. The Eastern Finland Higher Court confirmed that verdict on 26 October 1979, and Mr. Muhonen started to serve his sentence on 4 June 1980.

2.4 In the autumn of 1980, Mr. Muhonen applied for a new hearing before the Military Service Examining Board, which acceded to this request and now found in favour of Mr. Muhonen. In a decision of 2 February 1981 the Examining Board stated as follows:

> "The Military Service Examining Board, having studied the documents relating to the original refusal to hear arms which are in the possession of the

> Ministry of Justice, and having provided Mr. Paavo Juhani Muhonen with an opportunity to explain his convictions personally to the Board, has considered Mr. Muhonen's application and has found that Mr. Muhonen who, as may be believed on the basis of a conversation which has now taken place, has an ethical conviction within the meaning of the Unarmed and Alternative Service Act (132/69) which prevents him from doing armed or unarmed service in the armed forces and who, having already reached the age of 30, may not be called up for service.
>
> "Accordingly, this case requires no further action by the Military Service Examining Board."

2.5 At this stage (2 February 1981) Mr. Muhonen had already been serving his 11 months' prison sentence since 4 June 1980. It is stated on his behalf that a number of persons then requested a presidential pardon in his case; that the case was handed over by 'the Ministry of Justice to the Highest Court of Finland; and that, as a result, Mr. Muhonen was pardoned on 27 March 1981 and released from prison two weeks later. It is claimed, however, that Mr. Muhonen has not been allowed any monetary relief for the wrongs which he has allegedly suffered. The facts, as submitted, do not indicate which steps, if any, have been taken by Mr. Muhonen, or on his behalf, to obtain such monetary relief.

...

11.2 The Committee's task is limited to determining whether, in the particular circumstances of the case, Mr. Muhonen was entitled to receive compensation in accordance with article 14, paragraph 6, of the Covenant. Such a right to compensation may arise in relation to criminal proceedings if either the conviction of a person has been reversed or if he or she "has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice". As far as the first alternative is concerned, the Committee observes that Mr. Muhonen's conviction, as pronounced in the judgement of the city court of Joensuu on 13 December 1978 and confirmed by the Eastern Finland Higher Court on 26 October 1979, has never been set aside by any later judicial decision. Furthermore, Mr. Muhonen was not pardoned because it had been established that his conviction rested on a miscarriage of justice. According to the relevant Finnish statute, the Law concerning the punishment of certain conscripts who decline to do military service (23/72), whoever refuses military service not having been recognized as a conscientious objector by the Examining Board commits a punishable offence. This means that the right to decline military service does not arise automatically once the prescribed substantive requirements are met, but only after due examination and recognition of the alleged ethical grounds by the competent administrative body. Consequently, the presidential pardon does not imply that there had been a miscarriage of justice. As the State party has pointed out in its submission of 22 October 1984, Mr. Muhonen's pardoning was motivated by

considerations of equity.

11.3 To be sure, Mr. Muhonen's conviction came about as a result of the decision of the Examining Board of 18 October 1977, denying him the legal status of conscientious objector. This decision was based on the evidence which the Examining Board had before it at that time. Mr. Muhonen succeeded in persuading the Examining Board of his ethical objection to military service only after he had personally appeared before that body following his renewed application in the autumn of 1980, while in 1977 he had failed to avail himself of the opportunity to be present during the Examining Board's examination of his case.

12. Accordingly, the Human Rights Committee is of the view that Mr. Muhonen has no right to compensation which the Finnish authorities have failed to honour and that consequently there has been no breach of article 14 (6) of the Covenant.

- *L. T. K. v. Finland* (185/1984), ICCPR, A/40/40 (9 July 1985) 240 at paras. 5.2 and 7.

...
5.2 The Human Rights Committee observes...that, according to the author's own account he was not prosecuted and sentenced because of his beliefs or opinions as such, but because he refused to perform military service. The Covenant does not provide for the right to conscientious objection; neither article 18 nor article 19 of the Covenant, especially taking into account paragraph 3 (c) (ii) of article 8, can be construed as implying that right. The author does not claim that there were any procedural defects in the judicial proceedings against him, which themselves could have constituted a violation of any of the provisions of the Covenant, or that he was sentenced contrary to law.
...
7. The Human Rights Committee therefore decides:

The communication is inadmissible.

- *V. M. R. B. v. Canada* (236/1987), ICCPR, A/43/40 (18 July 1988) 258 at para. 6.3. and 7.

...
6.3 ...With respect to articles 18 and 19 of the Covenant, the Committee notes that the author has not submitted any evidence to substantiate how his exercise of freedom of conscience or expression has been restricted in Canada. His apparent contention that the deportation proceedings resulted from the State party's disapproval of his political opinions is refuted by the State party's uncontested statement that, as early as November 1980, he had been

excluded from re-entering Canada on clear national security grounds...Deportation of an alien on security grounds does not constitute an interference with the rights guaranteed by articles 18 and 19 of the Covenant. With respect to articles 2 and 26 of the Covenant, the author has failed to establish how the deportation of an alien on national security grounds constitutes discrimination.

7. The Human Rights Committee therefore decides:

> (a) That the communication is inadmissible under articles 2 and 3 of the Optional Protocol because the author's claims are either unsubstantiated or incompatible with the provisions of the Covenant...

- *Bhinder v. Canada* (208/1986), ICCPR, A/45/40 vol. II (9 November 1989) 50 at paras. 6.1, 6.2 and 7.

...
6.1 The Committee notes that in the case under consideration legislation which, on the face of it, is neutral in that it applies to all persons without distinction, is said to operate in a way which discriminates against persons of the Sikh religion. The author has also claimed a violation of article 18 of the Covenant. The Committee has also examined the issue in relation to article 26 of the Covenant.

6.2 Whether one approaches the issue from the perspective of article 18 or article 26, in the view of the Committee the same conclusion must be reached. If the requirement that a hard hat be worn is regarded as raising issues under article 18, then it is a limitation that is justifies by reference to the grounds laid down in article 18, paragraph 3. If the requirement that a hard hat be worn is seen as a discrimination *de facto* against persons of the Sikh religion under article 26, then, applying criteria now well established in the jurisprudence of the Committee, the legislation requiring that workers in federal employment be protected from injury and electric shock by the wearing of hard hats is to be regarded as reasonable and directed towards objective purposes that are compatible with the Covenant.

7. The Human Rights Committee...is of the view that the facts which have been placed before it do not disclose a violation of any provision of the International Covenant on Civil and Political Rights.

THOUGHT, CONSCIENCE AND RELIGION - FREEDOM OF

- *Delgado Páez v. Colombia* (195/1985), ICCPR, A/45/40 vol. II (12 July 1990) 43 at paras. 2.1, 2.2, 2.4, 5.7 and 5.8.

...

2.1 In March 1983, the author was appointed by the Ministry of Education as a teacher of religions and ethics at a secondary school in Leticia, Colombia. He was elected vice-president of the teachers' union. As an advocate of "liberation theology", his social views differed from those of the then Apostolic Prefect of Leticia.

2.2 In October 1983, the Apostolic Prefect sent a letter to the Education Commission withdrawing the support that the Church had given to Mr. Delgado...

...

2.4 On 5 February 1984, Mr. Delgado was informed that he would no longer teach religion. Instead, a course in manual labour and handicrafts (*manualidades y artesanias*), for which he had no training or experience, was assigned to him...

...

5.7 With respect to article 18, the Committee is of the view that the author's right to profess or to manifest his religion has not been violated. The Committee finds, moreover, that Colombia may, without violating this provision of the Covenant, allow the Church authorities to decide who may teach religion and in what manner it may be taught.

5.8 Article 19 protects, *inter alia*, the right of freedom of expression and of opinion. This will usually cover the freedom of teachers to teach their subjects in accordance with their own views, without interference. However, in the particular circumstances of the case, the special relationship between Church and State in Colombia, exemplified by the applicable *Concordat*, the Committee finds that the requirement, by the Church, that religion be taught in a certain way does not violate article 19.

- *Brinkhof v. The Netherlands* (402/1990), ICCPR, A/48/40 vol. II (27 July 1993) 124 (CCPR/C/48/D/402/1990) at paras. 9.2 and 9.3.

...

9.2 The issue before the Committee is whether the differentiation in treatment as regards exemption from military service between Jehovah's Witnesses and other conscientious objectors amounts to prohibited discrimination under article 26 of the Covenant. The Committee has noted the State party's argument that the differentiation is based on reasonable and objective criteria, since Jehovah's Witnesses form a closely-knit social group with strict rules of behavior, membership of which is said to constitute strong evidence that the objections to military and substitute service are based on genuine religious convictions.

The Committee notes that there is no legal possibility for other conscientious objectors to be exempted from the service altogether; they are required to substitute service; when they refuse to do this for reasons of conscience, they are prosecuted and, if convicted, sentenced to imprisonment.

9.3 The Committee considers that the exemption of only one group of conscientious objectors and the inapplicability of exemption for all others cannot be considered reasonable. In this context, the Committee refers to its General Comment on article 18 and emphasizes that, when a right of conscientious objection to military service is recognized by a State party, no differentiation shall be made among conscientious objectors on the basis of the nature of their particular beliefs. However, in the instant case, the Committee considers that the author has not shown that his convictions as a pacifist are incompatible with the system of substitute service in the Netherlands or that the privileged treatment accorded to Jehovah's Witnesses adversely affected his rights as a conscientious objector against military service. The Committee therefore finds that (the author) is not a victim of a violation of article 26 of the Covenant.

- *Coeriel and Aurik v. The Netherlands* (453/1991), ICCPR, A/50/40 vol. II (31 October 1994) 21 (CCPR/C/52/D/453/1991) at para. 10.5.

...
10.5 In the present case, the authors' request for recognition of the change of their first names to Hindu names in order to pursue their religious studies had been granted in 1986. The State party based its refusal of the request also to change their surnames on the grounds that the authors had not shown that the changes sought were essential to pursue their studies, that the names had religious connotations and that they were not 'Dutch sounding'. The Committee finds the grounds for so limiting the authors' rights under article 17 not to be reasonable. In the circumstances of the instant case the refusal of the authors' request was therefore arbitrary within the meaning of article 17, paragraph 1, of the Covenant.

For dissenting opinions in this context, see Coeriel and Aurik v. The Netherlands (453/1991), ICCPR, A/50/40 vol. II (31 October 1994) 21 (CCPR/C/52/D/453/1991) at Individual Opinion by Mr. Nisuke Ando, 28 and Individual Opinion by Mr. Kurt Herndl, 28.

THOUGHT, CONSCIENCE AND RELIGION - FREEDOM OF

- *Tadman et al. v. Canada* (816/1998), ICCPR, A/55/40 vol. II (29 October 1999) 218 at paras. 1.2, 6.2 and 7.

...

1.2 In the province of Ontario Roman Catholic schools are the only non-secular schools receiving full and direct public funding. The authors, however, belong to different religious denominations, i.e. United Church of Canada, Lutheran Church, Serbian Orthodox Church and Humanist. They all have children in the school going age and their children are being educated in the public school system.

...

6.2 The State party has challenged the admissibility of the communication on the basis that the authors cannot claim to be victims of a violation of the Covenant. In this context, the Committee notes that the authors while claiming to be victims of discrimination, do not seek publicly funded religious schools for their children, but on the contrary seek the removal of the public funding to Roman Catholic separate schools. Thus, if this were to happen, the authors' personal situation in respect of funding for religious education would not be improved. The authors have not sufficiently substantiated how the public funding given to the Roman Catholic separate schools at present causes them any disadvantage or affects them adversely. In the circumstances, the Committee considers that they cannot claim to be victims of the alleged discrimination, within the meaning of article 1 of the Optional Protocol.

7. Accordingly, the Human Rights Committee decides:

(a) that the communication is inadmissible ...

For dissenting opinion in this context, see Tadman et al. v. Canada (816/1998), ICCPR, A/55/40 vol. II (29 October 1999) 218 at Individual Opinion by P. Bhagwati, E. Evatt, L. Henkin and C. Medina Quiroga, 226.

- *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.

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, 9.3-9.5 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.

THOUGHT, CONSCIENCE AND RELIGION - FREEDOM OF

...

9.3 With regard to the author's claim that his conviction was in violation of article 18 of the Covenant, the Committee observes that the right to freedom of conscience does not as such imply the right to refuse all obligations imposed by law, nor does it provide immunity from criminal liability in respect of every such refusal. Nevertheless, the Committee in its General Comment has expressed the view that the right to conscientious objection to military service can be derived from article 18 [General Comment 22, article 18, 48th session, 1993]. In its General Comment on article 18 the Committee considered that "the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief." The Committee notes that under Dutch law, there is a procedure for the recognition of conscientious objections against military service on the ground of insurmountable objection of conscience to military service because of the use of violent means...

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 ... As a consequence of the rejection of his claim for recognition as a conscientious objector the author's refusal to perform military duty made him liable to be charged with a criminal offence.

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" ...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.

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.

THOUGHT, CONSCIENCE AND RELIGION - FREEDOM OF

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.

- *Waldman v. Canada* (694/1996), ICCPR, A/55/40 vol. II (3 November 1999) 86 (CCPR/C/67/D/694/1996) at paras. 10.2, 10.4-10.6 and Individual Opinion by Martin Scheinin (concurring), 100 at paras. 3-5.

  ...
  10.2 The issue before the Committee is whether public funding for Roman Catholic schools, but not for schools of the author's religion, which results in him having to meet the full cost of education in religious school, constitutes a violation of the author's rights under the Covenant.
  ...
  10.4 The Committee begins by noting that the fact that a distinction is enshrined in the Constitution does not render it reasonable and objective. In the instant case, the distinction was made in 1867 to protect the Roman Catholics in Ontario. The material before the Committee does not show that members of the Roman Catholic community or any identifiable section of that community are now in a disadvantaged position compared to those members of the Jewish community that wish to secure the education of their children in religious schools. Accordingly, the Committee rejects the State party's argument that the preferential treatment of Roman Catholic schools is nondiscriminatory because of its Constitutional obligation.

  10.5 With regard to the State party's argument that it is reasonable to differentiate in the allocation of public funds between private and public schools, the Committee notes that it is not possible for members of religious denominations other than Roman Catholic to have their religious schools incorporated within the public school system. In the instant case, the author has sent his children to a private religious school, not because he wishes a private non-government dependent education for his children, but because the publicly funded school system makes no provision for his religious denomination, whereas publicly funded religious schools are available to members of the Roman Catholic faith. On the basis of the facts before it, the Committee considers that the differences in treatment between Roman Catholic religious schools, which are publicly funded as a distinct part of the public education system, and schools of the author's religion, which are private by necessity, cannot be considered reasonable and objective.

  10.6 The Committee has noted the State party's argument that the aims of the State party's secular public education system are compatible with the principle of non-discrimination laid

down in the Covenant. The Committee...notes, however, that the proclaimed aims of the system do not justify the exclusive funding of Roman Catholic religious schools...[T]he Covenant does not oblige States parties to fund schools which are established on a religious basis. However, if a State party chooses to provide public funding to religious schools, it should make this funding available without discrimination. This means that providing funding for the schools of one religious group and not for another must be based on reasonable and objective criteria. In the instant case, the Committee concludes that the material before it does not show that the differential treatment between the Roman Catholic faith and the author's religious denomination is based on such criteria. Consequently, there has been a violation of the author's rights under article 26 of the Covenant to equal and effective protection against discrimination.

Individual Opinion by Martin Scheinin

While I concur with the Committee's finding that the author is a victim of a violation of article 26 of the Covenant, I wish to explain my reasons for such a conclusion.
...
3. In the present case the Committee correctly focused its attention on article 26. Although both General Comment No. 22 [48] and the *Hartikainen* case are related to article 18, there is a considerable degree of interdependence between that provision and the non-discrimination clause in article 26. In general, arrangements in the field of religious education that are in compliance with article 18 are likely to be in conformity with article 26 as well, because non-discrimination is a fundamental component in the test under article 18 (4). In the cases of *Blom v. Sweden* (Communication No. 191/1985) and *Lundgren et al. and Hjord et al. v. Sweden* (Communications 288 and 299/1988) the Committee elaborated its position in the question what constitutes discrimination in the field of education. While the Committee left open whether the Covenant entails, in certain situations, an obligation to provide some public funding for private schools, it concluded that the fact that private schools, freely chosen by the parents and their children, do not receive the same level of funding as public schools does not amount to discrimination.

4. In the Province of Ontario, the system of public schools provides for religious instruction in one religion but adherents of other religious denominations must arrange for their religious education either outside school hours or by establishing private religious schools. Although arrangements exist for indirect public funding to existing private schools, the level of such funding is only a fraction of the costs incurred to the families, whereas public Roman Catholic schools are free. This difference in treatment between adherents of the Roman Catholic religion and such adherents of other religions that wish to provide religious schools for their children is, in the Committee's view, discriminatory. While I concur with this finding I wish to point out that the existence of public Roman Catholic schools in Ontario

is related to a historical arrangement for minority protection and hence needs to be addressed not only under article 26 of the Covenant but also under articles 27 and 18. The question whether the arrangement in question should be discontinued is a matter of public policy and the general design of the educational system within the State party, not a requirement under the Covenant.

5. When implementing the Committee's views in the present case the State party should in my opinion bear in mind that article 27 imposes positive obligations for States to promote religious instruction in minority religions, and that providing such education as an optional arrangement within the public education system is one permissible arrangement to that end. Providing for publicly funded education in minority languages for those who wish to receive such education is not as such discriminatory, although care must of course be taken that possible distinctions between different minority languages are based on objective and reasonable grounds. The same rule applies in relation to religious education in minority religions. In order to avoid discrimination in funding religious (or linguistic) education for some but not all minorities States may legitimately base themselves on whether there is a constant demand for such education. For many religious minorities the existence of a fully secular alternative within the public school system is sufficient, as the communities in question wish to arrange for religious education outside school hours and outside school premises. And if demands for religious schools do arise, one legitimate criterion for deciding whether it would amount to discrimination not to establish a public minority school or not to provide comparable public funding to a private minority school is whether there is a sufficient number of children to attend such a school so that it could operate as a viable part in the overall system of education. In the present case this condition was met. Consequently, the level of indirect public funding allocated to the education of the author's children amounted to discrimination when compared to the full funding of public Roman Catholic schools in Ontario.

- *Ross v. Canada* (736/1997), ICCPR, A/56/40 vol. II (18 October 2000) 69 at paras. 2.1-2.3, 3.2-3.6, 4.1-4.8, 6.2, 6.8, 10.5, 10.6 and 11.1-11.7

...
2.1 The author worked as a modified resource teacher for remedial reading in a school district of New Brunswick from September 1976 to September 1991. Throughout this period, he published several books and pamphlets and made other public statements, including a television interview, reflecting controversial, allegedly religious opinions. His books concerned abortion, conflicts between Judaism and Christianity, and the defence of the Christian religion. Local media coverage of his writings contributed to his ideas gaining notoriety in the community. The author emphasises that his publications were not contrary

to Canadian law and that he was never prosecuted for the expression of his opinions. Furthermore, all writings were produced in his own time, and his opinions never formed part of his teaching.

2.2 Following expressed concern, the author's in-class teaching was monitored from 1979 onwards. Controversy around the author grew and, as a result of publicly expressed concern, the School Board on 16 March 1988, reprimanded the author and warned him that continued public discussion of his views could lead to further disciplinary action, including dismissal. He was, however, allowed to continue to teach, and this disciplinary action was removed from his file in September 1989. On 21 November 1989, the author made a television appearance and was again reprimanded by the School Board on 30 November 1989.

2.3 On 21 April 1988, a Mr. David Attis, a Jewish parent, whose children attended another school within the same School District, filed a complaint with the Human Rights Commission of New Brunswick, alleging that the School Board, by failing to take action against the author, condoned his anti-Jewish views and breached section 5 of the Human Rights Act by discriminating against Jewish and other minority students. This complaint ultimately led to the sanctions set out in para 4.3 below.
...
3.2 ...Individuals concerned about speech that denigrates particular minorities may choose to file a complaint with a human rights commission rather than or in addition to filing a complaint with the police.

3.3 The complaint against the School Board was lodged under section 5(1) of the New Brunswick Human Rights Code...

3.4 In his complaint, Mr. Attis submitted that the School Board had violated section 5 by providing educational services to the public which discriminated on the basis of religion and ancestry in that they failed to take adequate measures to deal with the author. Under section 20(1) of the same Act, if unable to effect a settlement of the matter, the Human Rights Commission may appoint a board of inquiry composed of one or more persons to hold an inquiry. The board appointed to examine the complaint against the School Board made its orders pursuant to section 20 (6.2) of the same Act ...

3.5 Since 1982, the Canadian Charter of Rights and Freedoms (“the Charter”) has been part of the Canadian Constitution, and consequently any law that is inconsistent with its provisions is, to the extent of that inconsistency, of no force or effect.... Provincial human rights codes and any orders made pursuant to such codes are subject to review under the Charter. The limitation of a Charter right may be justified under section 1 of the Charter, if the Government can demonstrate that the limitation is prescribed by law and is justified in

a free and democratic society...

3.6 There are also several other legislative mechanisms both at the federal and provincial level to deal with expressions that denigrate particular groups in Canadian society...

4.1 On 1 September 1988, a Human Rights Board of Inquiry was established to investigate the complaint. In December 1990 and continuing until the spring of 1991, the first hearing was held before the Board... The Board found that there was no evidence of any classroom activity by the author on which to base a complaint of discrimination. However, the Board of Inquiry also noted that

> "... a teacher's off-duty conduct can impact on his or her assigned duties and thus is a relevant consideration... An important factor to consider, in determining if the Complainant has been discriminated against by Mr. Malcolm Ross and the School Board, is the fact that teachers are role models for students whether a student is in a particular teacher's class or not. In addition to merely conveying curriculum information to children in the classroom, teachers play a much broader role in influencing children through their general demeanour in the classroom and through their off-duty lifestyle. This role model influence on students means that a teacher's off-duty conduct can fall within the scope of the employment relationship. While there is a reluctance to impose restrictions on the freedom of employees to live their independent lives when on their own time, the right to discipline employees for conduct while off-duty, when that conduct can be shown to have a negative influence on the employer's operation has been well established in legal precedent".

4.2 In its assessment of the author's off-duty activities and their impact, the Board of Inquiry made reference to four published books or pamphlets entitled respectively Web of Deceit, The Real Holocaust, Spectre of Power and Christianity vs. Judeo-Christianity, as well as to a letter to the editor of The Miramichi Leader dated 22 October 1986 and a local television interview given in 1989. The Board of Inquiry stated, inter alia, that it had

> "... no hesitation in concluding that there are many references in these published writings and comments by Malcolm Ross which are prima facie discriminatory against persons of the Jewish faith and ancestry. It would be an impossible task to list every prejudicial view or discriminatory comment contained in his writings as they are innumerable and permeate his writings. These comments denigrate the faith and beliefs of Jews and call upon true Christians to not merely question the validity of Jewish beliefs and teachings

> but to hold those of the Jewish faith and ancestry in contempt as undermining freedom, democracy and Christian beliefs and values. Malcolm Ross identifies Judaism as the enemy and calls on all Christians to join the battle.
>
> Malcolm Ross has used the technique in his writings of quoting other authors who have made derogatory comments about Jews and Judaism. He intertwines these derogatory quotes with his own comments in a way such that he must reasonably be seen as adopting the views expressed in them as his own. Throughout his books, Malcolm Ross continuously alleges that the Christian faith and way of life are under attack by an international conspiracy in which the leaders of Jewry are prominent.
>
> ... The writings and comments of Malcolm Ross cannot be categorized as falling within the scope of scholarly discussion which might remove them from the scope of section 5 [of the Human Rights Act]. The materials are not expressed in a fashion that objectively summarizes findings and conclusions or propositions. While the writings may have involved some substantial research, Malcolm Ross' primary purpose is clearly to attack the truthfulness, integrity, dignity and motives of Jewish persons rather than the presentation of scholarly research."

4.3 The Board of Inquiry heard evidence from two students from the school district who described the educational community in detail. *Inter alia*, they gave evidence of repeated and continual harassment in the form of derogatory name calling of Jewish students, carving of swastikas into desks of Jewish children, drawing of swastikas on blackboards and general intimidation of Jewish students. The Board of Inquiry found no direct evidence that the author's off-duty conduct had impacted on the school district, but found that it would be reasonable to anticipate that his writings were a factor influencing some discriminatory conduct by the students. In conclusion, the Board of Inquiry held that the public statements and writings of Malcolm Ross had continually over many years contributed to the creation of a "poisoned environment within School District 15 which has greatly interfered with the educational services provided to the Complainant and his children". Thus, the Board of Inquiry held that the School Board was vicariously liable for the discriminatory actions of its employee and that it was directly in violation of the Act due to its failure to discipline the author in a timely and appropriate manner, so endorsing his out-of-school activities and writings. Therefore, on 28 August 1991, the Board of Inquiry ordered

> (2) That the School Board

> (a) immediately place Malcolm Ross on a leave of absence without pay for a period of eighteen months;
>
> (b) appoint Malcolm Ross a non-teaching position if... a non-teaching position becomes available in School District 15 for which Malcolm Ross is qualified.
>
> (c) terminate his employment at the end of the eighteen months leave of absence without pay if, in the interim, he has not been offered and accepted a non-teaching position.
>
> (d) terminate Malcolm Ross' employment with the School Board immediately if, at any time during the eighteen month leave of absence or of at any time during his employment in a non-teaching position, he (i) publishes or writes for the purpose of publication, anything that mentions a Jewish or Zionist conspiracy, or attacks followers of the Jewish religion, or (ii) publishes, sells or distributes any of the following publications, directly or indirectly: *Web of Deceit, The Real Holocaust (The attack on unborn children and life itself), Spectre of Power, Christianity vs Judeo-Christianity (The battle for truth)*."

4.4 Pursuant to the Order, the School Board transferred the author to a non-classroom teaching position in the School District. The author applied for judicial review requesting that the order be removed and quashed. On 31 December 1991, Creaghan J. of the Court of Queen's Bench allowed the application in part, quashing clause 2(d) of the order, on the ground that it was in excess of jurisdiction and violated section 2 of the Charter. As regards clauses (a), (b), and (c) of the order, the court found that they limited the author's Charter rights to freedom of religion and expression, but that they were saved under section 1 of the Charter.

4.5 The author appealed the decision of the Court of Queen's Bench to the Court of Appeal of New Brunswick. At the same time, Mr. Attis cross-appealed the Court's decision regarding section 2(d) of the Order. The Court of Appeal allowed the author's appeal, quashing the order given by the Board of Inquiry, and accordingly rejected the cross-appeal. By judgement of 20 December 1993, the Court held that the order violated the author's rights under section 2 (a) and (b) of the Charter in that they penalised him for publicly expressing his sincerely held views by preventing him from continuing to teach. The Court considered that, since it was the author's activities outside the school that had attracted the complaint, and since it had never been suggested that he used his teaching position to further his religious views, the ordered remedy did not meet the test under section 1 of the Charter ... To find otherwise would, in the Court's view, have the effect of condoning the suppression

of views that are not politically popular any given time. One judge, Ryan J.A., dissented and held that the author's appeal should have been dismissed and that the cross-appeal should have been allowed, with the result that section 2(d) of the Order should have been reinstated.

4.6 Mr. Attis, the Human Rights Commission and the Canadian Jewish Congress then sought leave to appeal to the Supreme Court of Canada, which allowed the appeal and, by decision of 3 April 1996, reversed the judgment of the Court of Appeal, and restored clauses 2(a), (b) and (c) of the order. In reaching its decision, the Supreme Court first found that the Board of Inquiry's finding of discrimination contrary to section 5 of the Human Rights Act on the part of the School Board was supported by the evidence and contained no error. With regard to the evidence of discrimination on the part of the School Board generally, and in particular as to the creation of a poisoned environment in the School District attributable to the conduct of the author, the Supreme Court held

> "...that a reasonable inference is sufficient in this case to support a finding that the continued employment of [the author] impaired the educational environment generally in creating a 'poisoned' environment characterized by a lack of equality and tolerance. [The author's] off-duty conduct impaired his ability to be impartial and impacted upon the educational environment in which he taught. (para. 49)
>
> ...The reason that it is possible to 'reasonably anticipate' the causal relationship in this appeal is because of the significant influence teachers exert on their students and the stature associated with the role of a teacher. It is thus necessary to remove [the author] from his teaching position to ensure that no influence of this kind is exerted by him upon his students and to ensure that educational services are discrimination free." (para 101)

4.7 On the particular position and responsibilities of teachers and on the relevance of a teacher's off duty conduct, the Supreme Court further commented:

> "...Teachers are inextricably linked to the integrity of the school system. Teachers occupy positions of trust and confidence, and exert considerable influence over their students as a result of their positions. The conduct of a teacher bears directly upon the community's perception of the ability of the teacher to fulfill such a position of trust and influence, and upon the community's confidence in the public school system as a whole.
>
> ...By their conduct, teachers as 'medium' must be perceived to uphold the values, beliefs and knowledge sought to be transmitted by the school system.

> The conduct of a teacher is evaluated on the basis of his or her position, rather than whether the conduct occurs within the classroom or beyond. Teachers are seen by the community to be the medium for the educational message and because of the community position they occupy, they are not able to 'choose which hat they will wear on what occasion'.
>
> ... It is on the basis of the position of trust and influence that we can hold the teacher to high standards both on and off duty, and it is an erosion of these standards that may lead to a loss in the community of confidence in the public school system. I do not wish to be understood as advocating an approach that subjects the entire lives of teachers to inordinate scrutiny on the basis of more onerous moral standards of behaviour. This could lead to a substantial invasion of the privacy rights and fundamental freedoms of teachers. However, where a 'poisoned' environment within the school system is traceable to the off-duty conduct of a teacher that is likely to produce a corresponding loss of confidence in the teacher and the system as a whole, then the off-duty conduct of the teacher is relevant." (paras. 43-45)

4.8 Secondly, the Court examined the validity of the impugned Order under the Canadian Constitution. In this regard, the Court first considered that the Order infringed sections 2(a) and 2(b) of the Charter as it in effect restricted respectively the author's freedom of religion and his freedom of expression. The Court went on to consider whether these infringements were justifiable under section 1 of the Charter, and found that the infringements had occurred with the aim of eradicating discrimination in the provision of educational services to the public, a 'pressing and substantial' objective. The Court further found that the measures (a) (b) and (c) imposed by the order could withstand the proportionality test, that is there existed a rational connection between the measures and the objective, the impairment of the author's right was minimal, and there was proportionality between the effects of the measures and their objective. Clause (d) was found not to be justified since it did not minimally impair the author's constitutional freedoms, but imposed a permanent ban on his expressions.

...

6.2 The State party submits that the communication should be deemed inadmissible as incompatible with the provisions of the Covenant because the publications of the author fall within the scope of article 20, paragraph 2, of the Covenant, i.e. they must be considered "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence". In this regard, the State party points out that the Supreme Court of Canada found that the publications denigrated the faith and beliefs of Jewish people and called upon "true Christians" to not merely question the validity of those beliefs but to hold those of the Jewish faith in contempt. Furthermore, it is stated that the author identified Judaism as the enemy and called upon "Christians" to join in the battle.

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...

6.8 As to the merits of the communication, the State party first submits that the author has not established how his rights to freedom of religion and expression have been limited or restricted by the Order of the Board of Inquiry as upheld by the Supreme Court. It is argued that the author is free to express his views while employed by the school board in a non-teaching position or while employed elsewhere.

...

10.5 The Committee notes that the State party has contested the admissibility of the remainder of the communication on several grounds. First, the State party invokes article 20, paragraph 2, of the Covenant, claiming that the author's publications must be considered "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence". Citing the decision of the Committee in *J. R. T. and W. G. v Canada*, the State party submits that, as a matter of consequence, the communication must be deemed inadmissible under article 3 of the Optional Protocol as being incompatible with the provisions of the Covenant.

10.6 While noting that such an approach indeed was employed in the decision in *J. R. T. and W. G. v Canada*, the Committee considers that restrictions on expression which may fall within the scope of article 20 must also be permissible under article 19, paragraph 3, which lays down requirements for determining whether restrictions on expression are permissible. In applying those provisions, the fact that a restriction is claimed to be required under article 20 is of course relevant. In the present case, the permissibility of the restrictions is an issue for consideration on the merits.

...

11.1 With regard to the author's claim under article 19 of the Covenant, the Committee observes that, in accordance with article 19 of the Covenant, any restriction on the right to freedom of expression must cumulatively meet several conditions set out in paragraph 3. The first issue before the Committee is therefore whether or not the author's freedom of expression was restricted through the Board of Inquiry's Order of 28 August 1991, as upheld by the Supreme Court of Canada. As a result of this Order, the author was placed on leave without pay for a week and was subsequently transferred to a non-teaching position. While noting the State party's argument (see para 6.8 supra) that the author's freedom of expression was not restricted as he remained free to express his views while holding a non-teaching position or while employed elsewhere, the Committee is unable to agree that the removal of the author from his teaching position was not, in effect, a restriction on his freedom of expression. The loss of a teaching position was a significant detriment, even if no or only insignificant pecuniary damage is suffered. This detriment was imposed on the author because of the expression of his views, and in the view of the Committee this is a restriction which has to be justified under article 19, paragraph 3, in order to be in compliance with the Covenant.

11.2 The next issue before the Committee is whether the restriction on the author's right to freedom of expression met the conditions set out in article 19, paragraph 3, i.e. that it must be provided by law, it must address one of the aims set out in paragraph 3 (a) and (b) (respect of the rights and reputation of others; protection of national security or of public order, or of public health or morals), and it must be necessary to achieve a legitimate purpose.

11.3 As regards the requirement that the restriction be provided by law, the Committee notes that there was a legal framework for the proceedings which led to the author's removal from a teaching position. The Board of Inquiry found that the author's off-duty comments denigrated the Jewish faith and that this had adversely affected the school environment. The Board of Inquiry held that the School Board was vicariously liable for the discriminatory actions of its employee and that it had discriminated against the Jewish students in the school district directly, in violation of section 5 of the New Brunswick Human Rights Act, due to its failure to discipline the author in a timely and appropriate manner. Pursuant to section 20 (6.2) of the same Act, the Board of Inquiry ordered the School Board to remedy the discrimination by taking the measures set out in para 4.3 *supra.* In effect, and as stated above, the discrimination was remedied by placing the author on leave without pay for one week and transferring him to a non-teaching position.

11.4 While noting the vague criteria of the provisions that were applied in the case against the School Board and which were used to remove the author from his teaching position, the Committee must also take into consideration that the Supreme Court considered all aspects of the case and found that there was sufficient basis in domestic law for the parts of the Order which it reinstated. The Committee also notes that the author was heard in all proceedings and that he had, and availed himself of, the opportunity to appeal the decisions against him. In the circumstances, it is not for the Committee to reevaluate the findings of the Supreme Court on this point, and accordingly it finds that the restriction was provided for by law.

11.5 When assessing whether the restrictions placed on the author's freedom of expression were applied for the purposes recognized by the Covenant, the Committee begins by noting8/ that the rights or reputations of others for the protection of which restrictions may be permitted under article 19, may relate to other persons or to a community as a whole. For instance, and as held in *Faurisson v. France*, restrictions may be permitted on statements which are of a nature as to raise or strengthen anti-semitic feeling, in order to uphold the Jewish communities' right to be protected from religious hatred. Such restrictions also derive support from the principles reflected in article 20(2) of the Covenant. The Committee notes that both the Board of Inquiry and the Supreme Court found that the author's statements were discriminatory against persons of the Jewish faith and ancestry and that they denigrated the faith and beliefs of Jews and called upon true Christians to not merely question the validity of Jewish beliefs and teachings but to hold those of the Jewish faith and ancestry in contempt

as undermining freedom, democracy and Christian beliefs and values. In view of the findings as to the nature and effect of the author's public statements, the Committee concludes that the restrictions imposed on him were for the purpose of protecting the "rights or reputations" of persons of Jewish faith, including the right to have an education in the public school system free from bias, prejudice and intolerance.

11.6 The final issue before the Committee is whether the restriction on the author's freedom of expression was necessary to protect the right or reputations of persons of the Jewish faith. In the circumstances, the Committee recalls that the exercise of the right to freedom of expression carries with it special duties and responsibilities. These special duties and responsibilities are of particular relevance within the school system, especially with regard to the teaching of young students. In the view of the Committee, the influence exerted by school teachers may justify restraints in order to ensure that legitimacy is not given by the school system to the expression of views which are discriminatory. In this particular case, the Committee takes note of the fact that the Supreme Court found that it was reasonable to anticipate that there was a causal link between the expressions of the author and the "poisoned school environment" experienced by Jewish children in the School district. In that context, the removal of the author from a teaching position can be considered a restriction necessary to protect the right and freedom of Jewish children to have a school system free from bias, prejudice and intolerance. Furthermore, the Committee notes that the author was appointed to a non-teaching position after only a minimal period on leave without pay and that the restriction thus did not go any further than that which was necessary to achieve its protective functions. The Human Rights Committee accordingly concludes that the facts do not disclose a violation of article 19.

11.7 As regards the author's claims under article 18, the Committee notes that the actions taken against the author through the Human Rights Board of Inquiry's Order of August 1991 were not aimed at his thoughts or beliefs as such, but rather at the manifestation of those beliefs within a particular context. The freedom to manifest religious beliefs may be subject to limitations which are prescribed by law and are necessary to protect the fundamental rights and freedoms of others, and in the present case the issues under paragraph 3 of article 18 are therefore substantially the same as under article 19. Consequently, the Committee holds that article 18 has not been violated.

Notes

...

8/ As it did in General Comment No. 10 and Communication No. 550/1993, *Faurisson v. France*, Views adopted on 8 November 1996.

For dissenting opinion in this context, see Ross v. Canada (736/1997), ICCPR, A/56/40 vol. II (18 October 2000) 69 at Individual Opinion by Hipólito Solari Yrigoyen (dissenting), 87.

- *Riley et. al. v. Canada* (1048/2002), ICCPR, A/57/40 vol. II (21 March 2002) 356 (CCPR/C/74/D/1048/2002) at paras. 2.1, 2.2, 4.2 and 5.

...

2.1 In 1990, the Canadian government revised the Royal Canadian Mounted Police ("RCMP") regulations allowing the Commissioner, under section 64 (2) of these regulations, to "exempt any member from wearing any item of the significant uniform...on the basis of the member's religious beliefs." Subsequently, one Khalsa Sikh officer was authorised to substitute turbans for the traditional wide brimmed "mountie" stetson and forage cap.

2.2 Riley and Davis are both retired from the Royal Canadian Mounted Police ("RCMP") and are members of an organisation whose goal is to maintain tradition within the RCMP. The authors sought an order from the Federal Court of Canada (Trial Division), that the Commissioner of the RCMP be prohibited from allowing the wearing of religious symbols as part of the RCMP uniform. In particular, they claimed that the Commissioner's decision to allow the wearing of the Khalsa Sikh turban instead of the stetson is unconstitutional. On 8 July 1994, the Federal Court dismissed the author's claim deciding that there was no violation of the Canadian Charter.

...

4.2 The Committee has noted the authors' claims that they are victims of violations of articles 3, 9, paragraph 1, 18, 23, paragraphs 3 and 4, 26, and 2, paragraph 1, because Khalsa Sikh officers of the RCMP are authorised to wear religious symbols as part of their RCMP uniform. In particular, the Committee notes the authors' claim under articles 26, and 2, paragraph 1, that this is a special status allowed to Khalsa Sikhs, which is denied to other religious groups. The Committee is of the view that the authors have failed to show how the enjoyment of their rights under the Covenant has been affected by allowing Khalsa Sikh officers to wear religious symbols. Therefore, they cannot be considered to be "victims" within the meaning of article 1 of the Optional Protocol.

5. The Committee, therefore, decides:

(a) that the communication is inadmissible;

...

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- *Boodoo v. Trinidad and Tobago* (721/1996), ICCPR, A/57/40 vol. II (2 April 2002) 76 (CCPR/C/74/D/721/1996) at paras. 2.1, 2.3-2.6, 6.6, 7 and 8.

...

2.1 The author states that he has been detained since 21 April 1989. On 24 January 1992, he was convicted and sentenced to ten years imprisonment for larceny. He states that his earliest release date is 31 December 1998.1/

...

2.3 As a result of his conditions of detention, the author is going blind. The prison doctor recommended at least 3 hours of sunlight a day for him, but this recommendation is not being implemented. While other inmates in the maximum security cell-block are allowed to take part in entertainment programs and to worship at Christian or Muslim prayer services, the author has been denied these privileges.

2.4 After his conviction, and on having his photograph taken, the photographer forced him to have his beard shaved off, despite the author's claim that his Muslim faith forbids him to do so. Later that day, the author complained to the Inspector of Prisons, who gave the author permission to grow a beard again.

2.5 On 1 December 1992, the author was threatened by the warders, assaulted, and then returned to his cell. On 8 December 1992, he learnt from the prison authorities that an inmate had told them that he was masterminding an escape from prison.

2.6 On 18 January 1993, the author was searched, his prayer clothes were taken from him and his beard was forcibly shaven off. He was then assaulted by prison warders. He received blows to the head, chest, groin and legs and his request for immediate medical attention were ignored. Some weeks later, on complaining of continual pain, the medical officer gave him painkillers. On 27 May 1993, the author complained in writing to the Inspector of Prisons, but no action was taken.

...

6.6 As to the author's claim that he has been forbidden from wearing a beard and from worshipping at religious services, and that his prayer books were taken from him, the Committee reaffirms that the freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts and that the concept of worship extends to ritual and ceremonial acts giving expression to belief, as well as various practices integral to such acts. In the absence of any explanation from the State party concerning the author's allegations in paragraphs 2.3 - 2.6, the Committee concludes that there has been a violation of article 18 of the Covenant.

...

7. The Human Rights Committee...is of the view that the facts before it disclose a violation

of articles 7, 9, paragraph 3, 10, paragraph 1, 14(3)(c), 17 and 18, of the International Covenant on Civil and Political Rights.

8. Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee considers that the author is entitled to an appropriate remedy including compensation for the treatment to which he has been subjected. The State party is under an obligation to ensure that similar violations do not occur in the future.

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Notes

1/ No up-to-date information has been provided as to whether the author is still in detention.

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- *Kang v. Republic of Korea* (878/1999), ICCPR, A/58/40 vol. II (15 July 2003) 152 (CCPR/C/78/D/878/1999) at paras. 2.1, 2.2, 2.5 and 7.2.

...

2.1 The author, along with other acquaintances, was an opponent of the State party's military regime of the 1980s. In 1984, he distributed pamphlets criticizing the regime and the use of security forces to harass him and others. At that time, he also made an unauthorized (and therefore criminal) visit to North Korea. In January, March and May 1985, he distributed dissident publications covering numerous political, historical, economic and social issues.

2.2 The author was arrested without warrant on 1 July 1985 by the Agency for National Security Planning (ANSP). He was held *incommunicado* and interrogated in ANSP detention, suffering "torture and other mistreatments", over 36 days. Under torture, he confessed to joining the North Korean Labour Party and receiving instructions for espionage from North Korea. Only on 5 August 1985, was a judicial warrant issued for his arrest. Remaining in detention, he was formally indicted on 4 September 1985 for alleged violations of the National Security Law of 31 December 1980.1/ These allegations encompassed meeting with another member of a spy ring, "enemy-benefitting activities" in favour of North Korea, gathering and divulging state or military secrets (espionage), and conspiracy.

...

2.5 After his conviction, the author was held in solitary confinement. He was classified as a communist "confident criminal"4/ under the "ideology conversion system", a system given legal foundation by the 1980 Penal Administration Law and designed to induce change to a prisoner's political opinion by the provision of favourable benefits and treatment in prison. Due to this classification, he was not eligible for more favourable treatment. On 14 March 1991, the author's detention regime was reclassified by the Regulation on the Classification

and Treatment of Convicts ('the 1991 Regulation') to "those who have not shown signs of repentance after having committed crimes aimed at destroying the free and democratic basic order by denying it". Moreover, having been convicted under the National Security Law, the author was subject to an especially rigorous parole process.5/

...

7.2 As to the author's claim that the "ideology conversion system" violates his rights under articles 18, 19 and 26, the Committee notes the coercive nature of such a system, preserved in this respect in the succeeding "oath of law-abidance system", which is applied in discriminatory fashion with a view to alter the political opinion of an inmate by offering inducements of preferential treatment within prison and improved possibilities of parole.15/ The Committee considers that such a system, which the State party has failed to justify as being necessary for any of the permissible limiting purposes enumerated in articles 18 and 19, restricts freedom of expression and of manifestation of belief on the discriminatory basis of political opinion and thereby violates articles 18, paragraph 1, and 19, paragraph 1, both in conjunction with article 26.

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Notes

1/ The Law was enacted by the "National Security Legislative Council", an unelected body organized as a legislature following the 1980 military *coup d'état*. Forming or joining an "anti-State organization", and espionage or other activities under instruction of an anti-State organization are punishable with heavy penalties under articles 3 and 4, respectively.

...

4/ "Confident criminal" is not specifically defined, but appears from the context of the communication to be a prisoner who fails to comply with the ideology conversion system and its renunciation requirements...

5/ Under the Parole Administration Law, in such cases, the Parole Examination Committee "shall examine whether the convict has converted the [sic] thought, and, when deemed necessary, shall request the convict to submit an announcement or statement of conversion".

...

15/ See the comments of the State party arguing the contrary with regard to the Committee's Concluding Observations on their second periodic report. (CCPR/C/79/Add.122, at para 2).

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- *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.

- *Jazairi v. Canada* (958/2000), ICCPR, A/60/40 vol. II (26 October 2004) 304 at paras. 2.2, 2.3 and 7.4.

...
2.2 In July 1989, the author complained to the Ontario Human Rights Commission, alleging that his right to equal treatment with respect to employment without discrimination and harassment had been infringed because of his race, ethnic origin, creed and association, in contravention of the Ontario Human Rights Code, 1981 (henceforth "the Ontario Code") 1/. He alleged that certain members of his faculty had come to view him as anti-Semitic, and that his political opinions at the relevant time that Israel could be criticized for not doing more to resolve the Palestinian question, together with other facts, including his race, ethnic origin and religion, became an issue which adversely affected his right to equal treatment in employment, and specifically in his application for promotion to full professor. Between December 1989 and May 1993, the Commission investigated the complaint.

2.3 The Commission rejected the author's complaint on 29 August 1994, finding that: (i) while the evidence indicated that his application for promotion to Full Professor did not receive a fair and timely evaluation, the irregularities in the process did not appear to be related to any prohibited ground of discrimination; and (ii) while the evidence indicated that he might have been differently treated, there was insufficient evidence to indicate that this was a result of his creed rather than his political beliefs, the latter not being a prohibited

ground of discrimination under the Ontario Code. The Commission decided not to request the appointment of a Board of Inquiry and dismissed the complaint. The author requested reconsideration of the Commission's decision.

...

7.4 Turning to the major claim that the omission of political belief from the enumerated grounds of prohibited discrimination in the Ontario Code violates the Covenant, the Committee observes that an absence of protection against discrimination on this ground does raise issues under the Covenant 8/. Moreover, the exclusion in the Ontario Code of political opinion as a prohibited basis of discrimination suggests that the State party may have failed to ensure that, in an appropriate case, there would be a remedy available to a victim of discrimination on political grounds in the field of employment. The Committee observes however that the Court of Appeal, having found that the author's views did not amount to a protected "creed", went on to conclude that even considering the matter in the light most favourable to the author, there was nothing on the record to suggest that the author's political beliefs had disentitled him to consideration for advancement in the Department of Economics. It is not for the Committee to substitute its views for the judgement of the domestic courts on the evaluation of facts and evidence in a case, unless the evaluation is manifestly arbitrary or amounts to a denial of justice. If a particular conclusion of fact is one that is reasonably available to a trier of fact on the basis of the evidence before it, *ipso facto* a showing of manifest arbitrariness or a denial of justice will not have been made out. In the Committee's view, the author has failed to discharge the burden of showing that the factual assessment of the domestic courts was thus flawed. In the light of this conclusion, the claim under article 26 concerning the absence of protection of political belief in the Ontario Code is rendered hypothetical. The claim is accordingly unsubstantiated and inadmissible under article 2 of the Optional Protocol.

Notes

...

1/ Section 5 (1) of the Ontario Code provides: "Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or handicap."

...

8/ See *Love et al. v. Australia*, case No. 983/2001, Views adopted on 25 March 2003.

For dissenting opinion in this context, see Jazairi v. Canada (958/2000), ICCPR, A/60/40 vol. II (26 October 2004) 304, at Individual Opinion of Ms. Christine Chanet, Mr. Maurice Glele Ahanhanzo, Mr. Ahmed Tawfik Khalil and Mr. Rajsoomer Lallah, at 313.

THOUGHT, CONSCIENCE AND RELIGION - FREEDOM OF

- *Leirvåg v. Norway* (1155/2003), ICCPR, A/60/40 vol. II (3 November 2004) 203 at paras. 2.3, 2.4, 2.8, 2.9, 14.2-14.7, 15 and 16.

...

2.3 In August 1997, the Norwegian government introduced a new mandatory religious subject in the Norwegian school system, entitled "Christian Knowledge and Religious and Ethical Education" (hereafter referred to as CKREE) replacing the previous Christianity subject and the life stance subject. This new subject only provides for exemption from certain limited segments of the teaching. The new Education Act's §2 (4) stipulates that education provided in the CKREE subject shall be based on the schools' Christian object clause 1/ and provide "thorough knowledge of the Bible and Christianity as a cultural heritage and Evangelical-Lutheran Faith". During the preparation of the Act, the Parliament instructed the Ministry to obtain a professional evaluation of the Act's relationship with human rights. This evaluation was carried out by the then Appeals Court judge Erik Møse, who stated that:

"*As the situation stands, I find that the safest option is a general right of exemption. This will mean that the international inspectorate bodies will not involve themselves with the questions of the doubt raised by compulsory education. However, I cannot state that the partial exemption will be in contravention of the conventions. The premise is that one establishes an arrangement that in practice lies within their (the conventions') frameworks. Much will depend on the further legislative process and the actual implementation of the subject*."

2.4 The Ministry's circular on the subject states that: "*When pupils request exemption, written notification of this shall be sent to the school. The notification must state the reason for what they experience as the practice of another religion or affiliation to a different life stance in the tutoring.*" A later circular from the Ministry states that demands for exemption on grounds other than those governed by clearly religious activities must be assessed on the basis of strict criteria.

...

2.8 Several organizations representing minorities with different beliefs voiced strong objections to the CKREE subjects. After school started in the autumn of 1997, a number of parents, including the authors, demanded full exemption from relevant instruction. Their applications were rejected by the schools concerned, and on administrative appeal to the Regional Director of Education, on the ground that such exemption was not authorized under the Act.

2.9 On 14 March 1998, the NHA and the parents of eight pupils, including the authors in the present case, instituted proceedings before the Oslo City Court. By judgement of 16 April

1999, the Oslo City Court rejected the authors' claims. On 6 October 2000, upon appeal, the Borgarting Court of Appeal upheld this decision. The decision was confirmed upon further appeal, by the Supreme Court in its judgement of 22 August 2001, thus it is claimed that domestic remedies have been exhausted. Three of the other parents in the national court suit, and the NHA, decided to bring their complaint to the European Court of Human Rights (hereinafter denominated ECHR)).

...

14.2 The main issue before the Committee is whether the compulsory instruction of the CKREE subject in Norwegian schools, with only limited possibility of exemption, violates the authors' right to freedom of thought, conscience and religion under article 18 and more specifically the right of parents to secure the religious and moral education of their children in conformity with their own convictions, pursuant to article 18, paragraph 4. The scope of article 18 covers not only protection of traditional religions, but also philosophies of life, 12/ such as those held by the authors. Instruction in religion and ethics may in the Committee's view be in compliance with article 18, if carried out under the terms expressed in the Committee's general comment No. 22 on article 18: "*[A]rticle 18.4 permits public school instruction in subjects such as the general history of religions and ethics if it is given in a neutral and objective way*", and "*public education that includes instruction in a particular religion or belief is inconsistent with article 18, paragraph 4 unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents or guardian*s." The Committee also recalls its Views in *Hartikainen et al. v. Finland*, where it concluded that instruction in a religious context should respect the convictions of parents and guardians who do not believe in any religion. It is within this legal context that the Committee will examine the claim.

14.3 Firstly, the Committee will examine the question of whether or not the instruction of the CKREE subject is imparted in a neutral and objective way. On this issue, the Education Act, section 2-4, stipulates that: "*Teaching on the subject shall not involve preaching. Teachers of Christian Knowledge and Religious and Ethical Education shall take as their point of departure the object clause of the primary and lower secondary school laid down in section 1-2, and present Christianity, other religions and philosophies of life on the basis of their distinctive characteristics. Teaching of the different topics shall be founded on the same educational principles*". In the object clause in question it is prescribed that the object of primary and lower secondary education shall be "in agreement and cooperation with the home, to help to give pupils a Christian and moral upbringing". Some of the *travaux préparatoires* of the Act referred to above make it clear that the subject gives priority to tenets of Christianity over other religions and philosophies of life. In that context, the Standing Committee on Education concluded, in its majority, that: *the tuition was not neutral in value, and that the main emphasis of the subject was instruction on Christianity.* The State party acknowledges that the subject has elements that may be perceived as being

of a religious nature, these being the activities exemption from which is granted without the parents having to give reasons. Indeed, at least some of the activities in question involve, on their face, not just education in religious knowledge, but the actual practice of a particular religion...It also transpires from the research results invoked by the authors, and from their personal experience that the subject has elements that are not perceived by them as being imparted in a neutral and objective way. The Committee concludes that the teaching of CKREE cannot be said to meet the requirement of being delivered in a neutral and objective way, unless the system of exemption in fact leads to a situation where the teaching provided to those children and families opting for such exemption will be neutral and objective.

14.4 The second question to be examined thus is whether the partial exemption arrangements and other avenues provide "*for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents or guardians"*. The Committee notes the authors' contention that the partial exemption arrangements do not satisfy their needs, since teaching of the CKREE subject leans too heavily towards religious instruction, and that partial exemption is impossible to implement in practice. Furthermore, the Committee notes that the Norwegian Education Act provides that "on the basis of written notification from parents, pupils shall be exempted from attending those parts of the teaching at the individual school that they, on the basis of their own religion or philosophy of life, perceive as being the practice of another religion or adherence to another philosophy of life".

14.5 The Committee notes that the existing normative framework related to the teaching of the CKREE subject contains internal tensions or even contradictions. On the one hand, the Constitution and the object clause in the Education Act contain a clear preference for Christianity as compared to the role of other religions and worldviews in the educational system. On the other hand, the specific clause on exemptions in section 2-4 of the Education Act is formulated in a way that in theory appears to give a full right of exemption from any part of the CKREE subject that individual pupils or parents perceive as being the practice of another religion or adherence to another philosophy of life. If this clause could be implemented in a way that addresses the preference reflected in the Constitution and the object clause of the Education Act, this could arguably be considered as complying with article 18 of the Covenant.

14.6 The Committee considers, however, that even in the abstract, the present system of partial exemption imposes a considerable burden on persons in the position of the authors, insofar as it requires them to acquaint themselves with those aspects of the subject which are clearly of a religious nature, as well as with other aspects, with a view to determining which of the other aspects they may feel a need to seek - and justify - exemption from. Nor would it be implausible to expect that such persons would be deterred from exercising that right, insofar as a regime of partial exemption could create problems for children which are

different from those that may be present in a total exemption scheme. Indeed as the experience of the authors demonstrates, the system of exemptions does not currently protect the liberty of parents to ensure that the religious and moral education of their children is in conformity with their own convictions. In this respect, the Committee notes that the CKREE subject combines education on religious knowledge with practising a particular religious belief, e.g. learning by heart of prayers, singing religious hymns or attendance at religious services...While it is true that in these cases parents may claim exemption from these activities by ticking a box on a form, the CKREE scheme does not ensure that education of religious knowledge and religious practice are separated in a way that makes the exemption scheme practicable.

14.7 In the Committee's view, the difficulties encountered by the authors, in particular the fact that Maria Jansen and Pia Suzanne Orning had to recite religious texts in the context of a Christmas celebration although they were enrolled in the exemption scheme, as well as the loyalty conflicts experienced by the children, amply illustrate these difficulties. Furthermore, the requirement to give reasons for exempting children from lessons focusing on imparting religious knowledge and the absence of clear indications as to what kind of reasons would be accepted creates a further obstacle for parents who seek to ensure that their children are not exposed to certain religious ideas. In the Committee's view, the present framework of CKREE, including the current regime of exemptions, as it has been implemented in respect of the authors, constitutes a violation of article 18, paragraph 4, of the Covenant in their respect.

...

15. The Human Rights Committee...is of the view that the facts before it disclose a violation of article 18, paragraph 4, of the Covenant.

16. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective and appropriate remedy that will respect the right of the authors as parents to ensure and as pupils to receive an education that is in conformity with their own convictions. The State party is under an obligation to avoid similar violations in the future.

Notes

1/ Paragraph 2 (4) of the Education Act reads as follows: "Section 2-4. Teaching the subject CKREE. Exemption from regulations, etc: Teaching in CKREE shall:

- Provide a thorough knowledge of the Bible and Christianity both as cultural heritage and Evangelical-Lutheran faith;
- Provide knowledge of other Christian denominations;

- Provide knowledge of other world religions and philosophies of life, ethical and philosophical topics;
- Promote understanding and respect for Christian and humanist values and;
- Promote understanding, respect and the ability to carry out a dialogue between people with different views concerning beliefs and philosophies of life.

CKREE is an ordinary school subject that shall normally be attended by all pupils. Teaching in the subject shall not involve preaching.

Teachers of CKREE shall take as their point of departure the objects clause of the primary and lower secondary school laid down in section 1-2, and present Christianity, other religions and philosophies of life on the basis of their distinctive characteristics. Teaching of the different topics shall be founded on the same educational principles.

On the basis of written notification from parents, pupils shall be exempted from attending those parts of the teaching at the individual school that they, on the basis of their own religion or philosophy of life, perceive as being the practice of another religion or adherence to another philosophy of life. This may involve religious activities either in or outside the classroom. In cases where exemption is notified, the school shall, as far as possible and especially in the lower primary school, seek solutions involving differentiated teaching within the curriculum.

Pupils who have reached the age of 15 may themselves give written notification pursuant to the fourth paragraph."

...

12/ General comment No. 22 on article 18, adopted on 30 July 1993.

- *Hudoyberganova v. Uzbekistan* (931/2000), ICCPR, A/60/40 vol. II (5 November 2004) 44 at paras. 2.1-2.4, 6.2, 7 and Individual Opinion of Sir Nigel Rodley (concurring), at 52.

...

2.1 Ms. Hudoyberganova was a student at the Farsi Department at the Faculty of languages of the Tashkent State Institute for Eastern Languages since 1995 and in 1996 she joined the newly created Islamic Affairs Department of the Institute. She explains that as a practicing Muslim, she dressed appropriately, in accordance with the tenets of her religion, and in her second year of studies started to wear a headscarf ("hijab"). According to her, since September 1997, the Institute administration began to seriously limit the right to freedom of belief of practicing Muslims. The existing prayer room was closed and when the students

complained to the Institute's direction, the administration began to harass them. All students wearing the hijab were "invited" to leave the courses of the Institute and to study at the Tashkent Islamic Institute instead.

2.2 The author and the concerned students continued to attend the courses, but the teachers put more and more pressure on them. On 5 November 1997, following a new complaint to the Rector of the Institute alleging the infringement of their rights, the students' parents were convoked in Tashkent. Upon arrival, the author's father was told that Ms. Hudoyberganova was in touch with a dangerous religious group which could damage her and that she wore the hijab in the Institute and refused to leave her courses. The father, due to her mother's serious illness, took his daughter home. She returned to the Institute on 1 December 1997 and the Deputy Dean on Ideological and Educational matters called her parents and complained about her attire; allegedly, following this she was threatened and there were attempts to prevent her from attending the lectures.

2.3 On 17 January 1998, she was informed that new regulations of the Institute have been adopted, under which students had no right to wear religious dress and she was requested to sign them. She signed them but wrote that she disagreed with the provisions which prohibited students from covering their faces. The next day, the Deputy Dean on Ideological and Educational matters called her to his office during a lecture and showed her the new regulations again and asked her to take off her headscarf. On 29 January the Deputy Dean called the author's parents and convoked them, allegedly because Ms. Hudoyberganova was excluded from the students' residence. On 20 February 1998, she was transferred from the Islamic Affairs Department to the Faculty of languages. She was told that the Islamic Department was closed, and that it was possible to reopen it only if the students concerned ceased wearing the hijab.

2.4 On 25 March 1998, the Dean of the Farsi Department informed the author of an Order by which the Rector had excluded her from the Institute. The decision was based on the author's alleged negative attitude towards the professors and on a violation of the provisions of the regulations of the Institute. She was told that if she changed her mind about the hijab, the order would be annulled.

...

6.2 The Committee has noted the author's claim that her right to freedom of thought, conscience and religion was violated as she was excluded from University because she refused to remove the headscarf that she wore in accordance with her beliefs. The Committee considers that the freedom to manifest one's religion encompasses the right to wear clothes or attire in public which is in conformity with the individual's faith or religion. Furthermore, it considers that to prevent a person from wearing religious clothing in public or private may constitute a violation of article 18, paragraph 2, which prohibits any coercion

that would impair the individual's freedom to have or adopt a religion. As reflected in the Committee's general comment No. 22 (para. 5), policies or practices that have the same intention or effect as direct coercion, such as those restricting access to education, are inconsistent with article 18, paragraph 2. It recalls, however, that the freedom to manifest one's religion or beliefs is not absolute and may be subject to limitations, which are prescribed by law and are necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others (article 18, paragraph 3, of the Covenant). In the present case, the author's exclusion took place on 15 March 1998, and was based on the provisions of the Institute's new regulations. The Committee notes that the State party has not invoked any specific ground for which the restriction imposed on the author would in its view be necessary in the meaning of article 18, paragraph 3. Instead, the State party has sought to justify the expulsion of the author from University because of her refusal to comply with the ban. Neither the author nor the State party have specified what precise kind of attire the author wore and which was referred to as "hijab" by both parties. In the particular circumstances of the present case, and without either prejudging the right of a State party to limit expressions of religion and belief in the context of article 18 of the Covenant and duly taking into account the specifics of the context, or prejudging the right of academic institutions to adopt specific regulations relating to their own functioning, the Committee is led to conclude, in the absence of any justification provided by the State party, that there has been a violation of article 18, paragraph 2.

...

7. The Human Rights Committee...is of the view that the facts before it disclose a violation of article 18, paragraph 2, of the Covenant.

...

Individual Opinion of Sir Nigel Rodley (concurring)

I agree with the finding of the Committee and with most of the reasoning in paragraph 6.2. I feel obliged, however, to dissociate myself from one assertion in the final sentence of that paragraph, in which the Committee describes itself as "duly taking into account the specifics of the context".

The Committee is right in the implication that, in cases involving such "clawback" clauses as those contained in articles 12, 18, 19, 21 and 22, it is necessary to take into account the context in which the restrictions contemplated by those clauses are applied. Unfortunately, in this case, the State party did not explain on what basis it was seeking to justify the restriction imposed on the author. Accordingly, the Committee was not in a position to take any context into account. To assert that it has done so, when it did not have the information on the basis of which it might have done so, enhances neither the quality nor the authority of its reasoning.

THOUGHT, CONSCIENCE AND RELIGION - FREEDOM OF

For dissenting opinions in this context, see Hudoyberganova v. Uzbekistan (931/2000), ICCPR, A/60/40 vol. II (5 November 2004) 44 at Individual Opinion of Mr. Hipolitio Solari Yrigoyen, 50, and Individual Opinion of Ms. Ruth Wedgwood, 53.

- *Lee v. Republic of Korea* (1119/2002), ICCPR, A/60/40 vol. II (20 July 2005) 174 at paras. 2.1-2.5, 7.2-7.4, 8 and 9.

...

2.1 In March 1993, the author began his studies at the faculty of architecture of Konkuk University. In his fourth year, he was elected Vice-President of the General Student Council of Konkuk University. As such, he automatically became a member of the Convention of Representatives, the highest decision-making body of the Korean Federation of Student Councils (*Hanchongnyeon*), a nationwide association of university students established in 1993, comprising 187 universities (as of August 2002), including Konkuk University, and pursuing the objectives of democratization of Korean society, national reunification and advocacy of campus autonomy.

2.2 In 1997, the Supreme Court of the Republic of Korea ruled that *Hanchongnyeon* was an "enemy-benefiting group" and an anti-State organization within the meaning of article 7, paragraphs 1 and 3, 2/ of the National Security Law, because the platform and activities of the fifth-year 3/ *Hanchongnyeon* were said to support the strategy of the Democratic People's Republic of Korea (DPRK) to achieve national unification by "communizing" the Republic of Korea.

2.3 In 2001, the author became a member of the Convention of Representatives of the ninth year *Hanchongnyeon*. On 8 August 2001, he was arrested and subsequently indicted under article 7 of the National Security Law. By judgement dated 28 September 2001, the East Branch Division of the Seoul District Court sentenced him to one year imprisonment and a one-year "suspension of eligibility". His appeal was dismissed by the Seoul High Court on 5 February 2002. On 31 May 2002, the Supreme Court dismissed his further appeal.

2.4 The courts rejected the author's defence that the ninth year *Hanchongnyeon* had revised its platform to endorse the "June 15 North-South Joint Declaration" (2000) on national reunification agreed to by both leaders of North and South Korea and that, even if the programme of *Hanchongnyeon* was to some extent similar to North Korean ideology, this alone did not justify its characterization as an "enemy-benefiting group".

2.5 At the time of the submission of the communication, the author was serving his prison term at Gyeongju Correctional Institution.

THOUGHT, CONSCIENCE AND RELIGION - FREEDOM OF

...

7.2 The issue before the Committee is whether the author's conviction for his membership in *Hanchongnyeon* unreasonably restricted his freedom of association, thereby violating article 22 of the Covenant. The Committee observes that, in accordance with article 22, paragraph 2, any restriction on the right to freedom of association to be valid must cumulatively meet the following conditions: (a) it must be provided by law; (b) it may only be imposed for one of the purposes set out in paragraph 2; and (c) it must be "necessary in a democratic society" for achieving one of these purposes. The reference to a "democratic society" indicates, in the Committee's view, that the existence and functioning of a plurality of associations, including those which peacefully promote ideas not favourably received by the government or the majority of the population, is one of the foundations of a democratic society. Therefore, the existence of any reasonable and objective justification for limiting the freedom of association is not sufficient. The State party must further demonstrate that the prohibition of the association and the criminal prosecution of individuals for membership in such organizations are in fact necessary to avert a real, and not only hypothetical danger to the national security or democratic order and that less intrusive measures would be insufficient to achieve this purpose.

7.3 The author's conviction was based on article 7, paragraphs 1 and 3, of the National Security Law. The decisive question which must therefore be considered is whether this measure was necessary for achieving one of the purposes set out in article 22, paragraph 2. The Committee notes that the State party has invoked the need to protect national security and its democratic order against the threat posed by the DPRK. However, it has not specified the precise nature of the threat allegedly posed by the author's becoming a member of *Hanchongnyeon*. The Committee notes that the decision of the Supreme Court of the Republic of Korea, declaring this association an "enemy-benefiting group" in 1997, was based on article 7, paragraph 1, of the National Security Law which prohibits support for associations which "may" endanger the existence and security of the State or its democratic order. It also notes that the State party and its courts have not shown that punishing the author for his membership in *Hanchongnyeon*, in particular after its endorsement of the "June 15 North-South Joint Declaration" (2000), was necessary to avert a real danger to the national security and democratic order of the Republic of Korea. The Committee therefore considers that the State party has not shown that the author's conviction was necessary to protect national security or any other purpose set out in article 22, paragraph 2. It concludes that the restriction on the author's right to freedom of association was incompatible with the requirements of article 22, paragraph 2, and thus violated article 22, paragraph 1, of the Covenant.

7.4 In the light of this finding, the Committee need not address the question whether the author's conviction also violated his rights under articles 18, paragraph 1, and 19 of the

Covenant.

8. The Human Rights Committee...is of the view that the facts before it reveal a violation of article 22, paragraph 1, of the Covenant.

9. In accordance with article 2, paragraph 3, of the Covenant, the author is entitled to an effective remedy, including appropriate compensation. The Committee recommends that the State party amend article 7 of the National Security Law, with a view to making it compatible with the Covenant. The State party is under an obligation to ensure that similar violations do not occur in the future.

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Notes

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2/ Article 7 (1) of the National Security Law reads: "Any person who praises, incites or propagates the activities of an anti-State organization, a member thereof, or a person who has received an order from it, or who acts in concert with it, or propagates or instigates a rebellion against the State, with the knowledge of the fact that it may endanger the existence and security of the State or democratic fundamental order, shall be punished by imprisonment for a term not exceeding seven years."

Article 7 (3) of the National Security Law reads: "Any person who forms or joins an organization aiming at the acts referred to in paragraph (1) shall be punished by imprisonment for a term of one year or more."

3/ The Convention of Representatives of *Hanchongnyeon* establishes committees on a yearly basis to carry out the organization's activities.

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- *Malakhovsky v. Belarus* (1207/2003), ICCPR, A/60/40 vol. II (26 July 2005) 237 at paras. 2.1-2.6, 7.2-7.6, 8, 9 and Individual Opinion of Ms. Ruth Wedgwood (concurring), at 245-246.

...

2.1 The authors are members of the Minsk Vaishnava community (community of Krishna consciousness), one of seven such communities registered in Belarus. The applicable law distinguishes between a registered religious community and a registered religious association. The authors state that certain activities which are essential to the practice of their religion may only be undertaken by a religious association. According to the domestic statute on "freedom of conscience and religious organizations" ("the Statute"), and the Decree of the

Council of Ministers on "approval of invitation of foreign clerics and their activity in Belarus" ("the Decree"), only religious associations are entitled to establish monasteries, religious congregations, religious missions and spiritual educational institutions, or invite foreign clerics to visit the country for the purposes of preaching or conducting other religious activity.

2.2 On 10 May 2001, the authors filed an application with the Committee on Religions and Nationalities ("the C.R.N."), seeking the registration of the seven Krishna communities in Belarus as a religious association. The application included a draft statute and other pertinent documentation required by law, including documents identifying an officially approved "legal address" of the association, 11 Pavlova Street, Minsk, which satisfied all relevant requirements under the Housing Code, including regulations regarding fire and sanitation facilities.

2.3 On 5 June 2001, the C.R.N. returned these documents with a direction that certain changes be made. The authors resubmitted the documents, but on 27 July 2001, they were returned again with a direction for further changes. On each occasion, most of the required changes were not based on applicable laws, and appeared to reflect the personal views of the officials processing the application. The authors submitted the documents for a third time on 11 August 2001.

2.4 Although the Statute required the authors' application to be determined within one month, a period of over a year elapsed after the documents were initially filed, without any decision from the C.R.N. On 30 May 2002, the authors filed an application in the Central Court of Minsk seeking an order to direct the C.R.N. to determine their application. On 4 July 2002, the Court issued an order requiring the C.R.N. to decide on the authors' application within a month.

2.5 On 2 August 2002, the C.R.N. refused the authors' application, on the ground that they had not provided a proper legal address. It found that the earlier decision of the Central Regional Administration of the City of Minsk to approve the legal address for the religious association was invalid, as it had been based on an earlier decision of the Minsk City Executive Committee, which, by virtue of another law, did not apply to the registration of religious organizations.

2.6 As a result of the C.R.N.'s refusal to register the association, members of the seven Krishna communities, including the authors, have been deprived of the right to establish spiritual educational institutions to train their priests, making it impossible to support religious doctrine appropriately. They cannot invite foreign priests to visit the country, resulting in a decline of spiritual standards due to their inability to associate with more

spiritually advanced believers. They have also been unable to create monasteries and missions, for the purpose of realizing certain essential tenets of their religion.

...

7.2 In relation to the authors' claim under article 18, paragraphs 1 and 3, the Committee recalls its general comment No. 22, which states that article 18 does not permit any limitation whatsoever on freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice 1/. By contrast, the right to freedom to manifest one's religion or beliefs may be subject to certain limitations, but only those prescribed by law and necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others. Further, the right to freedom to manifest one's beliefs in worship, observance, practice and teaching encompasses a broad range of acts, including those integral to the conduct by the religious group of its basic affairs, such as the freedom to choose religious leaders, priests, and teachers, and the freedom to establish seminaries or religious schools 2/. In the present case, the Committee notes that the State party's law distinguishes between religious communities and religious associations, and that the possibility of conducting certain activities is restricted to the latter. Not having been granted the status of a religious association, the authors and their fellow believers cannot invite foreign clerics to visit the country, or establish monasteries or educational institutions. Consistent with its general comment, the Committee considers that these activities form part of the authors' right to manifest their beliefs.

7.3 The Committee must now address the question of whether the relevant limitations on the authors' right to manifest their religion are "necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others", within the meaning of article 18, paragraph 3, of the Covenant. The Committee recalls its general comment No. 22, which states that paragraph 3 of article 18 is to be interpreted strictly, and that limitations may only be applied for those purposes for which they are prescribed and must be directly related to and proportionate to the specific need on which they are predicated 3/.

7.4 In the present case, the limitations placed on the authors' right to manifest their belief consist of several conditions which attach to the registration of a religious association. One of the criteria which the authors' application for registration did not meet was the requirement to have an approved legal address, which satisfied certain health and fire safety standards necessary for premises used for purposes such as religious ceremonies. These limitations must be assessed in the light of the consequences which arise for the authors and their religious association.

7.5 The Committee considers that the precondition, whereby a religious association's right to carry out its religious activities is predicated on it having the use of premises which satisfy relevant public health and safety standards, is a limitation which is necessary for public

safety, and proportionate to this need.

7.6 The Committee notes, however, that the State party has not advanced any argument as to why it is necessary for the purposes of article 18, paragraph 3, for a religious association, in order to be registered, to have an approved legal address which not only meets the standards required for the administrative seat of the association but also those necessary for premises used for purposes of religious ceremonies, rituals, and other group undertakings. Appropriate premises for such use could be obtained subsequent to registration. The Committee also notes that the argument of the State party in its comments on the communication that the authors' community sought to monopolize representation of Vishnuism in Belarus did not form part of the domestic proceedings. Also taking into account the consequences of refusal of registration, namely the impossibility of carrying out such activities as establishing educational institutions and inviting foreign religious dignitaries to visit the country, the Committee concludes that the refusal to register amounts to a limitation of the authors' right to manifest their religion under article 18, paragraph 1 that is disproportionate and so does not meet the requirements of article 18, paragraph 3. The authors' rights under article 18, paragraph 1 have therefore been violated.
...
8. The Human Rights Committee...is of the view that the facts before it disclose violations of article 18, paragraphs 1 and 3, of the Covenant.

9. Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee considers that the authors are entitled to an appropriate remedy, including a reconsideration of the authors' application in accordance with the principles, rules and practice in force at the time of the authors' request, and duly taking into account of the provisions of the Covenant.

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Notes

1/ General comment 22, para. 3.

2/ General comment 22, para. 4.

3/ General comment 22, para. 8.

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Individual Opinon of Ms. Ruth Wedgwood (concurring)

The right of a religious community to establish monasteries, educational institutions, or missions, and to invite foreign religious figures to speak, has been sharply restricted by the government of Belarus. Only those groups officially registered with the state as "religious

associations" can enjoy these aspects of the free practice of religion.

The seven "Krishna" religious communities of Belarus have attempted to gain the state's approval as a registered association, applying to the "Committee on Religions and Nationalities." The state committee denied the application, after a year's delay, on the ground that the Krishna group lacked a proper "legal address." The address used by the applicants was located in a residential housing bloc. The same address had earlier been approved by the Minsk City Executive Committee.

The refusal to register the Krishna group as a religious "association" was appealed to the Minsk Central District Court in 2002. One month after the first-level dismissal of the appeal, the state amended the applicable law to add further new restrictions on the registration of religious associations.

Under the additional test, a religious group seeking qualification as an "association" must show that it has been active in Belarus for at least 20 years, and that it has at least 10 "communities" within the country. The Krishna does not have the minimum number of communities, and cannot point to a 20-year history within Belarus.

The Human Rights Committee now properly finds that the state party violated article 18 of the Covenant by refusing to accept the legal address of the Krishna community as an "administrative seat" for a religious association. I join my colleagues in their conclusion that the state has a valid interest in assuring safe conditions for large public gatherings, but that such gatherings can also be held in other locations. The refusal to register the Krishna group because of its residential address was thus unreasonable.

However, the state party's new "grandfathering" rule is also highly problematic - as an added obstacle to free religious practice in Belarus. It is hard to imagine why a newer faith should be forbidden to engage in religious education, and thus the demand for 20 years of prior practice is doubtful. It is difficult to fathom why 10 "communities" could be a prerequisite to educational activity, especially since one "community," such as that in Minsk, may be larger than many small separate communities.

Having found a violation of article 18, the Committee does not have occasion to reach these further issues. But it is well to remember that the Covenant recognizes and guarantees the freedom of every person "either individually or in community with others and in public or private to manifest his religion or belief in worship, observance, practice and teaching." See article 18 (1). This right is not limited to old and established religions, or to large congregations, and it is fundamental to the freedom of religious conscience.

THOUGHT, CONSCIENCE AND RELIGION - FREEDOM OF

- *Mahuika et al. v. New Zealand* (547/1993), ICCPR, A/56/40 vol. II (27 October 2000) 11 at paras. 5.1, 5.4, 5.10, 5.12, 6.2 and 9.7-9.9. For text of communication, see **INDIGENOUS PEOPLES**.

CAT

- *A. K. v. Australia* (148/1999), CAT, A/59/44 (5 May 2004) 123 at paras. 1.1, 2.1-2.4, 2.8, 2.10, 2.11, 6.1 and 6.3-6.6.

  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...

  2.1 The complainant alleges that he is Ansari and a member of the Umma Party, which is one of the two traditionalist parties of the North opposing the current Government. From 1990 to 1995, the complainant attended Cairo University, Khartoum Branch, where he completed a law degree. The Umma Party had about 100 members at Cairo University, and the complainant became the leader of this group.

  2.2 In April 1992, the complainant alleges to have organized rallies and demonstrations against the Government. Following one of these rallies, he was detained by members of the security forces. He was threatened, forced to sign an undertaking that he would not participate in political activities and then released. Following this incident, the security forces kept him under surveillance.

  2.3 While he was attending university, the complainant alleges that students were compelled to join the People's Defence Force (PDF), the army of the ruling party, the National Islamic Front (NIF). To avoid conscription the complainant became a police officer, and from 1993 to 1995, he worked at the head office of the Khartoum prison administration and sometimes at Kober prison.

  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.

THOUGHT, CONSCIENCE AND RELIGION - FREEDOM OF

...

2.8 The complainant outlines the recent political history of Sudan and claims that there is a consistent pattern of gross, flagrant and mass violations of human rights. He refers, *inter alia*, to the adoption of a country resolution in April 1997 by the United Nations Commission on Human Rights, according to which human rights violations in Sudan included "extrajudicial killings, arbitrary arrests, detentions without due process, enforced or involuntary disappearances, violations of the rights of women and children, slavery and slavery-like practices, forced displacement of persons and systematic torture, and denial of the freedoms of religion, expression, association and peaceful assembly".

...

2.10 The complainant alleges that although much of the religious persecution has been directed against non-Muslims, the fundamentalist nature of the current regime is such that many Muslims, including the Sufis, are not free to practise their own brand of Islam under the NIF regime. The Ansar (consisting largely of Sufis) have been subjected to government control with the confiscation of their mosques. In addition, Muslim groups critical of the Government continue to suffer harassment. b/ On the political level, the complainant submits that contrary Islamist political opinions, including centrist Islamic parties such as the Umma are not tolerated.

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...

...

6.3 Concerning the allegations of political involvement and previous ill-treatment at the hands of the Sudanese authorities as grounds for fearing that the complainant would be subjected to torture on return, the Committee notes that even if it were to discount the above-mentioned inconsistencies and accept these claims as true, the complainant does not claim

to have been politically involved since 1992, and at no time during the domestic proceedings nor in his complaint to the Committee did he claim to have been tortured by the Sudanese authorities.

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

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b/ The complainant refers to Amnesty's Annual Report of 1999 in which it reported that those detained in 1997 included five imams who were reported to have cast doubt on the religious credentials of Hassan al-Turabi, Secretary-General of the National Congress and ideological mentor of the Government.

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