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Human Rights Committee

Communication No. 2007/2010

Views adopted by the Committee at its 110th session (10-28 March 2014)

Submitted by:	X (represented by counsel Niels-Erik Hansen)
Alleged victim:	X
State party:	Denmark
Date of communication:	23 November 2010 (initial submission)
Document references:	Special Rapporteur's rules 92 and 97 decision, transmitted to the State party on 25 May 2011 (not issued in document form)
Date of adoption of Views:	26 March 2014
Subject matter:	Deportation of the author to Eritrea
Procedural issues:	Substantiation of claims; admissibility *ratione materiae*
Substantive issues:	Risk of irreparable harm in country of origin
Articles of the Covenant:	7, 14, 18
Article of the Optional Protocol:	5 (para. 2 (b))

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Annex

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (110th session)

concerning

Communication No. 2007/2010*

Submitted by:	X (represented by counsel, Niels-Erik Hansen)
Alleged victim:	X
State party:	Denmark
Date of communication:	23 November 2010 (initial submission)

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

Meeting on 26 March 2014,

Having concluded its consideration of communication No. 2007/2010 submitted to the Human Rights Committee by X under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

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

1.1 The author of the communication is X, an Eritrean national born in 1987 and residing in Denmark. Following the rejection of his asylum claim, he was ordered to leave Denmark immediately. He submits that by forcibly returning him to Eritrea, Denmark would violate his rights under articles 7, 14[1] and 18 of the International Covenant on Civil and Political Rights. He is represented by counsel, Niels-Erik Hansen.

1.2 On 25 November 2010, pursuant to rule 92 of its rules of procedure, the Committee, acting through its Special Rapporteur on new communications and interim measures,

* The following members of the Committee participated in the examination of the present communication: Yadh Ben Achour, Lazhari Bouzid, Christine Chanet, Ahmad Amin Fathalla, Cornelis Flinterman, Yuji Iwasawa, Walter Kaelin, Zonke Zanele Majodina, Gerald L. Neuman, Sir Nigel Rodley, Victor Manuel Rodríguez-Rescia, Fabian Omar Salvioli, Anja Seibert-Fohr, Yuval Shany, Margo Waterval and Andrei Paul Zlatescu. The text of an individual opinion by Committee member Gerald L. Neuman is appended to the present Views.

[1] The author refers to article 9 of the Covenant, making reference to the right to a fair trial. The related arguments are therefore dealt with under article 14 of the Covenant.

requested the State party not to remove the author to Eritrea while the communication was under consideration by the Committee. The author remains in Denmark.

The facts as submitted by the author

2.1 The author is a citizen of Eritrea and a member of a Christian religious minority, the Pentecostal Movement. Pentecostal Christians refuse to perform military service owing to religious conviction. Although he is an Eritrean national, the author has spent his entire life outside of Eritrea.

2.2 The author was born and raised in Addis Ababa, Ethiopia, and lived there with his mother until he was 13 years old. During the armed conflict between Ethiopia and Eritrea in 1999 and 2000, many Eritreans who lived in Addis Ababa were forced to return to Eritrea. The author's mother was among those forced to leave Ethiopia. The author remained in Addis Ababa and lived in the household of his uncle, who was married to an Ethiopian citizen and therefore was authorized to remain in the country.

2.3 On an unspecified date, the author's uncle was accused by the Ethiopian authorities of helping the Government of Eritrea and he was arrested. The author decided to flee the country and travelled to Denmark via the Sudan and Germany. He arrived in Denmark on 4 February 2010 and immediately applied for asylum.

The complaint

3.1 The author claims that his deportation to Eritrea would constitute a violation of his rights under articles 7 and 18 of the Covenant. The author states that he refuses to bear arms owing to his adherence to the Christian Pentecostal Movement. He asserts that he will therefore be regarded as an opponent of the regime in Eritrea, where all men and women between the ages of 18 and 40 are required to perform military service even if they object on conscientious grounds.[2] The author maintains that because he is of eligible age he would be conscripted if returned to Eritrea. He also argues that the Eritrean authorities subject conscientious objectors to coercion, incarceration without trial (sometimes for up to 14 years) and torture in detention.[3] Accordingly, he submits that "as a member of a banned church community" he risks being persecuted upon arrival at the airport and further risks abuse or torture upon objecting to bear arms.

3.2 The author submits that, if returned, he would be exposed to "very serious abuse", because the Eritrean authorities subject returning asylum seekers to prolonged detention and torture.[4] On a separate ground, the author asserts that draft evaders are "reported to be frequently subjected to torture".[5] The author asserts that he would not be able to demonstrate that he left Eritrea legally, because he has never lived in Eritrea and has no

[2] The author cites *Amnesty International Report 2009* and *2007*; Eritrea Proclamation on National Service No. 82/1995 (23 October 1995).

[3] The author cites the following authorities: Office of the United Nations High Commissioner for Refugees (UNHCR), *UNHCR Guidelines for Assessing the International Protection Needs of Asylum Seekers from Eritrea* (2009), pp. 14-15; Amnesty International, *Amnesty International Report 2007*; United States Department of State, *Country Report on Human Rights Practices: Eritrea* (2006); Jehovah's Witnesses, *Eritrea Country Profile* (October 2008); Jehovah's Witnesses Office of Public Information, *Jehovah's Witnesses in Eritrea* (October 2008); UNHCR, Position paper (April 2009); an unspecified article in *The Guardian* dated 23 May 1995; and an unspecified UNHCR handbook (paras. 169-174).

[4] The author cites page 34 of an unspecified UNHCR report.

[5] The author cites UNHCR, *Guidelines for Assessing the International Protection Needs of Asylum Seekers from Eritrea* (April 2009), pp. 14-15.

passport or exit stamp from that country. He maintains that he would therefore be apprehended at the airport and subjected to interrogation and detention.

3.3 As to the exhaustion of domestic remedies, the author states that the Immigration Service rejected his application and, on 10 July 2010, denied him a residence permit. The author asserts that, on 13 October 2010, the Refugee Appeals Board rejected his appeal and ordered him to leave the country immediately. No further information is provided as to the exhaustion of domestic remedies.

The State party's observations on the admissibility and the merits of the communication

4.1 In its submission of 25 May 2011, the State party first provides additional facts concerning the author's asylum application, which was filed on 4 February 2010 and denied on 29 July 2010. The State party considers that the communication is inadmissible owing to insufficient substantiation. The decision of the Refugee Appeals Board was well-founded, as it was based on an individual assessment of the author's motive for seeking asylum and relied on a wide range of updated sources providing background information. Regarding article 7 of the Covenant, it is unlikely that the author will come into conflict with the authorities if returned to Eritrea. The Appeals Board found that the Eritrean authorities were unlikely to know of the author's religious affiliation insofar as (a) the author had never resided in Eritrea; (b) his activities with the Pentecostal Movement were limited to meeting several times a week with other church members to sing and pray to God, and assisting in collecting money for the Movement; (c) he had limited knowledge of the Movement;[6] and (d) he had not informed anyone in Eritrea, including his mother, of his religious affiliation.[7] The Appeals Board further noted that the author had never been called up for military service and that he had not been in direct contact with the authorities in Eritrea in connection with the exercise of his religion. The Appeals Board drew attention to the assertion that he was baptized as a Pentecostal at the age of 19. The State party considers that the author was unable to give adequate details at the Appeals Board hearing about being baptized at the age of 19 insofar as, despite questioning, he did not mention any details about having water poured over his head at the ceremony. However, the background material cited by the Appeals Board stated that a baptism into the Pentecostal Church normally takes place by full immersion of the body into water and that water must in any case be poured over the head three times during the baptism ceremony. In response to the author's assertion that he will be arrested and imprisoned upon return to Eritrea because he has no passport and exit stamp, illegal departure does not bar an Eritrean national from obtaining a passport at an Eritrean embassy. The State party considers that it has provided substantive and factual arguments to rebut each of the author's allegations with regard to article 7 of the Covenant.[8]

4.2 The State party also considers that the author's implied claim under article 18 of the Covenant (relating to the right to freedom of religion) is inadmissible. Article 18 has no extraterritorial application and does not prohibit a State from removing a person to another State where a risk of a violation of article 18 may exist. A right to conscientious objection,

[6] The State party refers to the author's following statements, as reported in the Appeals Board decision: "The applicant believed in Penta Costa. That meant believing in one God. The applicant chose the religion when he was 18 years old. The applicant read the Bible, which said something about Jesus. He then became interested in the religion. After he had read about Penta Costa, he was baptized."

[7] The State party notes that the author did state that he had informed his uncle of his membership in the Pentecostal Movement.

[8] The State party cites Human Rights Committee Views, Communication No. 1222/2003 (1 November 2004), *Jonny Robin Byaruhanga v. Denmark.*

while not explicit under the Convention, may be derived from article 18.[9] However, the author has not substantiated that he will in fact face such a risk upon his return to Eritrea, and the author's affiliation and involvement with the Pentecostal Church appears to be limited.

4.3 In the alternative, the State party considers that on the merits and following the same arguments, there is no basis for finding that the author's deportation will breach articles 7 or 18 of the Covenant.

The author's comments on the State party's submission

5.1 On 1 September 2011, the author submitted his comments on the State party's submission. The author asserts that his deportation would violate articles 7 and 18 of the Covenant and that he has a well-founded fear of persecution due to religious and imputed political convictions. The author considers that Eritrea fails to regard refusal to perform military service as a form of political protest and that this constitutes persecution due to imputed political opinion. The author also considers that the decision of the Danish Immigration Service was flawed because it rejected the notion that a person may be eligible for refugee status when a country's authorities fail to consider his genuine religious convictions as a valid reason for being excused from required military service.[10] The author considers that the Immigration Service erroneously focused on the undisputed fact that no one in Eritrea knows about the author's religious affiliation. According to the author, the problem arises not from this fact, but rather from the risk the author will face if interrogated by the Eritrean authorities at the airport. The author maintains that the Eritrean authorities will learn of his religious affiliation at that time. He claims that he will be identified as an asylum seeker because he will be escorted by the Danish police. He further argues that, upon seeing that he has no exit permit from Eritrea, the authorities will realize that he has not completed military service, because exit permits are required in Eritrea specifically in order to prevent the departure of persons not having fulfilled the military service requirement. The author considers that the Danish Refugee Appeals Board in fact admitted that the complainant risks forced military service in Eritrea.[11] The author considers that the Appeals Board erroneously concluded that forced military service is not a basis for asylum, regardless of the author's religious affiliation. The author disputes the State party's position that Covenant provisions are always taken into account and argues that the Appeals Board did not consider application of article 18 of the Covenant.

5.2 The author also considers that the State party has violated his right to a fair trial. The author considers that the Appeals Board exceeded its mandate by assessing his credibility and the facts, instead of assessing the correctness of the Immigration Service's decision.[12]

[9] The State party cites Human Rights Committee general comment No. 22 (30 July 1993) and notes the author's reference to Commission on Human Rights resolution 1989/59 (8 March 1989), reaffirmed, inter alia, in Commission resolutions 1991/65 (6 March 1991) and 1993/84 (10 March 1993).

[10] On this issue, the author cites the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, paras. 172 and 174; the *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Eritrea* (April 2009), pp. 14-15; and recommendation 816 (1977) on the right of conscientious objection to military service (1977), adopted by the Parliamentary Assembly of the Council of Europe at its twenty-ninth ordinary session (5-13 October 1977).

[11] The author cites the Appeals Board decision, which states: "The fact that the applicant risks being called up by the authorities to do his military service to Eritrea cannot in itself lead to a residence permit under section 7 of the Aliens Act, regardless of the applicant's religious affiliation."

[12] In this regard, the author states that the Appeals Board erroneously made a "specific and individual assessment of [the] applicant's motive for seeking asylum combined with the background knowledge on the general situation in the country of origin and any specific details of importance to the case".

The author further considers that, because he has never lived in Eritrea, he has obviously not suffered past persecution there and this fact cannot be considered as determinative of his future risk of persecution in the country. The author considers that the State party's observations mischaracterize the Appeals Board decision. For example, the author states that the State party's observations describe the author's Pentecostal affiliation as being of "extremely limited scope", whereas the Appeals Board described the affiliation as being merely of "limited scope". In addition, the author considers that, contrary to the State party's assertion, the Appeals Board decision never stated in its decision that illegal departure from Eritrea was not a bar to the issuance of Eritrean passports. The author considers that the Immigration Service never asked him about immersion during baptism and that the Appeals Board repeatedly questioned him on this subject without ever alluding to the alleged background information stating that immersion is a universal baptismal practice for Pentecostals. The author further confirms that he was baptised without immersion in Ethiopia. The author considers that although the State party relies on the UNHCR Handbook as a "source of law" with respect to persecution on political or religious grounds, it does not cite the Handbook's most relevant paragraphs.[13] The author also considers that the State party has not provided an adequate factual basis for its position.[14] The author submits that the communication is admissible with respect to claims under articles 7, 14 and 18 of the Covenant.

Additional observations by the State party on admissibility and on the merits

6. In its submissions dated 24 November 2011 and 12 April 2012, the State party responded to the author's comments and provided additional opinions of the Refugee Appeals Board. The Board considers that the author's criticism of the oral hearing before the Board is wholly unfounded, because the hearing was conducted impartially and afforded the author the opportunity to present his case. The Board was under an obligation to make an objectively correct decision and adequately elicit the facts. Although the

[13] The author cites paragraphs 169 to 172 as the most relevant paragraphs of the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (1992): "169. A deserter or draft-evader may also be considered a refugee if it can be shown that he would suffer disproportionately severe punishment for the military offence on account of his race, religion, nationality, membership of a particular social group or political opinion. The same would apply if it can be shown that he has well-founded fear of persecution on these grounds above and beyond the punishment for desertion. 170. There are, however, also cases where the necessity to perform military service may be the sole ground for a claim to refugee status, i.e. when a person can show that the performance of military service would have required his participation in military action contrary to his genuine political, religious or moral convictions, or to valid reasons of conscience. 171. Not every conviction, genuine though it may be, will constitute a sufficient reason for claiming refugee status after desertion or draft-evasion. It is not enough for a person to be in disagreement with his government regarding the political justification for a particular military action. Where, however, the type of military action, with which an individual does not wish to be associated, is condemned by the international community as contrary to basic rules of human conduct, punishment for desertion or draft-evasion could, in the light of all other requirements of the definition, in itself be regarded as persecution. 172. Refusal to perform military service may also be based on religious convictions. If an applicant is able to show that his religious convictions are genuine, and that such convictions are not taken into account by the authorities of his country in requiring him to perform military service, he may be able to establish a claim to refugee status. Such a claim would, of course, be supported by any additional indications that the applicant or his family may have encountered difficulties due to their religious convictions."

[14] Accordingly, the author considers that the State party errs by distinguishing the case at hand from the facts in Human Rights Committee, communication No. 1222/2003, *Jonny Robin Byaruhanga v. Denmark*, decision adopted on 1 November 2004.

Appeals Board decision did not make express reference to the Covenant, the international human rights conventions are included as central elements in the implementation of the Board's activities. The Board considers that its decision did not discuss the author's religious affiliation in order to discredit his testimony. The Board further notes that it is not bound by any particular rules of evidence and is therefore not obligated to base its decision on specific factual circumstances to the same extent as the Danish Immigration Service. As such, a decision by the Board may uphold an Immigration Service decision for reasons of fact other than those stated in the Service's decisions.

Further comments by the author

7.1 In submissions dated 24 January 2012 and 30 April 2012, the author presented his comments on the State party's additional observations. The author states that the Appeals Board did not question the author's faith and that the Immigration Service should not have done so during the oral hearing with the objective of questioning the author's credibility. In this regard, the author considers that he did not have a fair opportunity to prepare for the Board's line of questioning, which was not neutral or objective. The author considers that the State party only started to question his credibility in its observations, while none of the responsible authorities did so at any stage of the immigration/asylum proceedings. The author also maintains that, because the State party considers the Appeals Board to be a "court", it must ensure a fair trial.[15]

7.2 The author further asserts that the Appeals Board website features outdated memorandums on human rights standards.[16] As an example, the author states that the Board's 2008 memorandum on the Covenant does not mention the importance of article 18 or military service or draft evasion. The author argues that another Board memorandum ignores recent jurisprudence of the European Court of Human Rights indicating that the risk of prolonged punishment for desertion or evasion is within the scope of article 3 of the European Convention on Human Rights,[17] and that countries requiring military service should provide alternative civil service opportunities.[18]

[15] The author cites concluding observations of the Committee on the Elimination of Racial Discrimination: "The Committee notes with concern that decisions by the Refugee Board on asylum requests are final and may not be appealed before a court." (CERD/C/DEN/CO/17, para. 13) and "The Supreme Court attached importance to the fact that the Refugee Board is an expert board of court-like character. The Supreme Court has since repeated this position in several other judgments." (CERD/C/DEN/CO/17/Add.1, para. 12).

[16] The author refers to the website www.fln.dk.

[17] The author cites the Board's memorandum entitled "Protection of asylum seekers under the UN Refugee Convention and the European Convention on Human Rights", which in turn refers to EMD case *Said v. The Netherlands* (Application No. 2345/02), judgment of 5 July 2005, confirmed by the Grand Chamber on 5 October 2005.

[18] The author cites the following jurisprudence of the European Court of Human Rights: *Bayatyan v. Armenia* (Application No. 23459/03, 7 July 2011); and *Ercep v. Turkey* (Application No. 43965/04), judgment of 22 November 2011. The author also states that several communications before the Human Rights Committee have been filed against the Republic of Korea, which does not allow civil service as an alternative to military service (citing Human Rights Committee communications Nos. 1321-1322/2-04; 1593-1603/2007; 1642-1741/2007).

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

8.2 The Committee notes, as required by article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under any other procedure of international investigation or settlement.

8.3 The Committee recalls its jurisprudence to the effect that authors must avail themselves of all domestic remedies in order to fulfil the requirement of article 5, paragraph 2 (b), of the Optional Protocol, insofar as such remedies appear to be effective in the given case and are de facto available to the author.[19] The Committee has noted that the author unsuccessfully appealed the negative asylum decision to the Danish Appeals Board and that the State party does not challenge the exhaustion of domestic remedies by the author.

8.4 The Committee notes the State party's argument that the author's claims with respect to articles 7 and 18 of the Covenant should be held inadmissible owing to insufficient substantiation, and its objections with regard to the extraterritorial application of article 18 of the Covenant. However, the Committee considers that the author has adequately explained the reasons for which he fears that forcible return to Eritrea would result in a risk of treatment incompatible with article 7 of the Covenant. The Committee further notes the information provided as to the risks of torture and detention faced by Eritreans who are eligible for conscription. The Committee is, therefore, of the opinion that, for the purposes of admissibility, the author has sufficiently substantiated his allegations under article 7 with plausible arguments in support thereof. As for the allegations concerning a violation of article 18, the Committee considers that they cannot be dissociated from the author's allegations under article 7, which must be determined on the merits.

8.5 As to the author's claim that he was not afforded a fair trial by the Refugee Appeals Board, in breach of article 14 of the Covenant, the Committee refers to its jurisprudence that proceedings relating to the expulsion of aliens do not fall within the ambit of a determination of "rights and obligations in a suit at law" within the meaning of article 14, paragraph 1, but are governed by article 13 of the Covenant.[20] The Committee therefore considers that the author's claim under article 14 is inadmissible *ratione materiae* pursuant to article 3 of the Optional Protocol.

8.6 In the light of the foregoing, the Committee considers that, under article 5, paragraph 2 (b), of the Optional Protocol, the communication is admissible insofar as it raises issues relating to articles 7 and 18 of the Covenant.

[19] See communication No. 1959/2010, *Warsame v. Canada*, Views adopted on 21 July 2011, para. 7.4; communication No. 1003/2001, *P.L. v. Germany*, inadmissibility decision adopted on 22 October 2003, para. 6.5.

[20] See, inter alia, communication No. 1494/2006, *A.C. and her children, S., M. and E.B. v. The Netherlands*, inadmissibility decision adopted on 22 July 2008, para 8.4: "The Committee refers to its jurisprudence that deportation proceedings did not involve either 'the determination of any criminal charge' or 'rights and obligations in a suit at law' within the meaning of article 14" (citing communication No. 1234/2003, *P.K. v. Canada*, inadmissibility decision of 20 March 2007, paras. 7.4 and 7.5).

Consideration of the merits

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

9.2 The Committee considers that it is necessary to bear in mind the State party's obligation under article 2, paragraph 1, of the Covenant to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, including in the application of its processes for expulsion of non-citizens.[21] The Committee further recalls that States parties are under an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where the necessary and foreseeable consequence of the deportation would be a real risk of irreparable harm, such as that contemplated by article 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.[22] The Committee has also indicated that the risk must be personal[23] and that there is a high threshold for providing substantial grounds to establish that a real risk of irreparable harm exists.[24] Thus, all relevant facts and circumstances must be considered, including the general human rights situation in the author's country of origin.[25]

9.3 The Committee recalls its jurisprudence that, while important weight should be given to the assessment conducted by the State party, it is generally for the courts of the States parties to the Covenant to evaluate the facts and evidence of a particular case, unless it is found that the evaluation was clearly arbitrary or amounted to a denial of justice.[26] In the present communication, the Committee notes the author's assertions that his lack of an Eritrean passport and exit stamp will make him a target because he will be unable to prove that he has never lived in Eritrea and left the country legally. The Committee further takes note of the author's claim that the Eritrean authorities subject returning failed asylum seekers to ill-treatment. The Committee also notes the State party's assertion that the author may obtain an Eritrean passport at the Eritrean embassy in Denmark. However, the Committee further notes that credible sources indicate that illegal emigrants, failed asylum seekers and draft evaders risk serious ill-treatment upon repatriation to Eritrea and that the author asserts that he would have to refuse to undertake military service on the basis of his conscience.[27] It considers that the State party did not adequately address the concern that

[21] See general comments Nos. 6 and 20 of the Committee; see also communication No. 1544/2007, *Mehrez Ben Abde Hamida v. Canada*, Views adopted on 18 March 2010, para. 8.2.

[22] General comment No. 31 on the nature of the general legal obligation on States parties to the Covenant (2004), para. 12; see, inter alia, communication No. 1544/2007, *Mehrez Ben Abde Hamida v. Canada*, Views adopted on 18 March 2010, para. 8.7; communication No. 692/1996, *A.R.J. v. Australia*, Views adopted on 28 July 1997, para. 6.14.

[23] Communication No. 692/1996, *A.R.J. v. Australia*, Views adopted on 28 July 1997, para. 6.6.

[24] Communication 1833/2008, *X. v. Sweden*, Views adopted on 1 November 2011, para. 5.18.

[25] Ibid.

[26] See, inter alia, ibid. and communication No. 541/1993, *Errol Simms v. Jamaica*, inadmissibility decision adopted on 3 April 1995, para. 6.2.

[27] See *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Eritrea* (April 2009): "Draft evaders/deserters are reported to be frequently subjected to torture" (p.14); "Eritreans who are forcibly returned may, according to several reports, face arrest without charge, detention, ill-treatment, torture or sometimes death at the hands of the authorities. They are reportedly held *incommunicado*, in over-crowded and unhygienic conditions, with little access to medical care, sometimes for extended periods of time … UNHCR is aware of at least two Eritrean asylum-seekers who have arrived in Sudan having escaped from detention following deportation from Egypt in June 2008. Eritreans forcibly returned from Malta in 2002 and Libya in 2004 were arrested on arrival in Eritrea and tortured. The returnees were sent to two prisons on

the author's personal circumstances, including his inability to prove that he left Eritrea legally, might lead to him being designated as a failed asylum seeker and as an individual who has not completed the compulsory military service requirement in Eritrea or as a conscientious objector. Accordingly, the Committee considers that the State party failed to recognize the author's potential status as an individual subject to a real risk of treatment contrary to the requirements of article 7. Therefore, the Committee is of the view that the author's deportation to Eritrea, if implemented, would constitute a violation of article 7 of the Covenant.

9.4 In the light of its findings on article 7, the Committee will not further examine the author's claims under article 18 of the Covenant.

9.5 The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the author's expulsion to Eritrea would, if implemented, violate article 7 of the Covenant.

9.6. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including a full reconsideration of the author's claim regarding the risk of treatment contrary to article 7 if he is returned to Eritrea, taking into account the State party's obligations under the Covenant.

9.7. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in the event that a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

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

Dahlak Island and on the Red Sea coast, where most are still believed to be held *incommunicado*. There are also unconfirmed reports that some of those returned from Malta were killed. In another case, a rejected asylum-seeker was detained by the Eritrean authorities upon her forcible return from the United Kingdom. On 14 May 2008, German immigration authorities forcibly returned two rejected asylum-seekers to Eritrea. They were reportedly detained at Asmara airport upon arrival and are being held *incommunicado*, and believed to be at risk of torture or other ill-treatment" (pp. 33-34).

Appendix

Individual opinion of Committee member Gerald L. Neuman (concurring)

I concur fully in the Committee's Views. I write separately in the hope of shedding some light on the legal issue the Committee avoids in paragraphs 8.4 and 9.4 of the Views, regarding the author's effort to bring his situation within a non-refoulement obligation derived directly from article 18 of the Covenant. The State party argues that this claim should be dismissed as inadmissible, because the obligation not to transfer an individual to a country where a Covenant right would be violated applies only to article 6 (protecting the right not to be deprived of life) and article 7 (prohibiting torture and cruel, inhuman or degrading treatment or punishment). The Committee addresses the admissibility of the claim obliquely, finding that it "cannot be dissociated from the author's allegations under article 7 of the Covenant", which are clearly admissible and provide the basis on which the Committee decides. This formulation has been used by the Committee repeatedly to avoid resolving the question whether such non-refoulement obligations can be derived from provisions of the Covenant other than articles 6 and 7.

The argument that the author should not be sent to Eritrea because of the real risk that his right to freedom of thought, conscience and religion under article 18 would be violated there resembles the claim of refugees not to be sent back to a country where they face persecution on account of religion, under article 33 of the 1951 Convention relating to the Status of Refugees (also incorporated in its 1967 Protocol).[a] On the facts of the present case, given the author's justified fear of ill-treatment, the threatened harm undoubtedly rises to the level of "persecution" within the meaning of the Refugee Convention.

The article 18 argument therefore could be supported either by interpreting the Covenant in light of the Refugee Convention, or by the abstract argument that a State's duty not to violate an individual's right under the Covenant always includes the duty not to send the individual to a country where there is a real risk that the individual's right will be violated. Both of these lines of argument have a superficial attraction, but both raise serious questions on closer inspection.

Thus far, when the Committee has recognized derived non-refoulement obligations under the Covenant, it has defined them as absolute. The State cannot send the individual to the other country so long as a "real risk" of the violation of article 6 or 7 exists, regardless of the particular circumstances, including dangers posed by the individual within the sending country. This absolute obligation is modeled on the absolute and non-derogable prohibition on refoulement to torture in article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The non-refoulement obligation under the Refugee Convention, however, is more limited. First, it is circumscribed by the definition of "refugee", which contains exclusion clauses, some of which deny individuals protection as a "refugee" because of reprehensible actions such as war crimes, crimes against humanity and serious non-political crimes.[b] Second,

[a] See UNHCR, "Guidelines on international protection No. 10: Claims to refugee status related to military service within the context of article 1A (2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees" (HCR/GIP/13/10) (2013).

[b] See ibid., para. 2, explaining that the Guidelines on claims to refugee status related to military service do not address the application of the exclusion clauses, which "will need to be properly assessed"

article 33 of the Refugee Convention itself contains an exception clause, specifically making the prohibition on refoulement inapplicable to individuals, even recognized refugees, who have been convicted of particularly serious crimes or pose a danger to the security of the sending State.[c] Thus the Refugee Convention takes into account both the interests of the person who fears persecution and other important interests of States and their residents.

If the Committee were to recognize a non-refoulement obligation under article 18, it would need to decide whether that obligation is absolute like the obligation under article 7, or subject to exceptions like the obligation under the Refugee Convention, and if the latter, then how the interests of the person resisting return and the rights of others should be reconciled. As a complicating factor, article 18 has multiple subcomponents, some of which involve rights understood as absolute (such as the right to have a religion or belief) and some of which are expressly subject to limitation (such as the right to manifest one's religion or belief in practice). One might question why the prohibition on return would be absolute when the underlying right itself is not.

Meanwhile, the Committee would also need to decide what degree or kind of interference with rights under article 18 rises to the level justifying the implication of a non-refoulement obligation. Under the Refugee Convention, the threatened interference with freedom of religion must rise to the level of "persecution" for the victim to claim refugee status.[d] Not every violation of article 18 would be severe enough to justify a prohibition against refoulement under the Covenant. It may be doubted, for example, that discriminatory funding of private religious schools, burdens of seeking exemption from Christian education in public schools, or discriminatory public school dress codes would require a State party to avoid returning claimants to Canada, Norway and France (respectively), despite the fact that the Committee has found violations of article 18 on each of those grounds.[e]

Those examples also suggest the fallacy of the abstract argument that a State's duty not to violate a right always entails an obligation not to send an individual to a second State where there is a real risk that the second State will violate the right. The Committee's general comment No. 31 speaks of "irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant" as the kind of injury that is severe enough to justify a non-refoulement obligation. Some violations of the Covenant have only financial consequences and are easily reparable; but beyond that, the language of the general comment suggests that it is referring to irreparability in a deeper sense. It is difficult to imagine that article 25 of the Covenant forbids sending a politician back to a country merely because there is a "real risk" − or even a certainty − of an unreasonable restriction on the politician's right to stand as a candidate for the national legislature, although I recognize that the loss of that opportunity cannot be fully repaired. It is also unlikely that a notorious systemic violation of article 25,

(citing UNHCR "Guidelines on international protection No. 5: Application of the exclusion clauses: Article 1F of the 1951 Convention relating to the Status of Refugees" (HCR/GIP/03/05) (2003).

[c] More precisely, article 33(2) denies the benefit of the prohibition on refoulement in article 33(1) to "a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country".

[d] I leave aside here the fact that the Refugee Convention also requires that the feared persecution be based on enumerated grounds of race, religion, nationality, political opinion, or membership of a particular social group.

[e] See communication Nos. 694/1996, *Waldman v. Canada*, Views adopted on 3 November 1999; 1155/2003, *Leirvåg v. Norway*, Views adopted on 3 November 2004; 1852/2008, *Bikramjit Singh v. France*, Views adopted on 1 November 2012.

such as the open failure of a State to hold genuine periodic elections, entails a non-refoulement obligation for the benefit of all its citizens in other States. The abstract argument that all potential violations of the Covenant entail non-refoulement obligations is untenable.

In the present case, the author's religious convictions are relevant to the question whether he would face a real risk of treatment contrary to article 7 if he were returned to Eritrea. Taking them into account in that manner provides a sufficient basis for the Committee's decision.

[Done in English. Subsequently to be issued also in Arabic, Chinese, English, Russian and Spanish as part of the Committee's annual report to the General Assembly.]