

# 1. APPLICATION OF THE COVENANT

## 1.1. The Covenant in the Domestic Legal Order

### 1.1.1. Duty to Implement the Covenant

#### a. Harmonization of Domestic Legislation

The HR Committee noted that the rights under the Covenant have not been fully implemented in the domestic legal order in various States. Thus, the HR Committee requested the States to adopt domestic legislation to remedy the situation.<sup>1</sup> States were asked to ensure that these rights are applied by the domestic courts as well.<sup>2</sup>

In this regard, the HR Committee noted the failure of **Australia** to incorporate the Covenant into domestic law and took further notice that not all of the Covenant rights have been given full effect through domestic law in **Bangladesh** and **Pakistan**.<sup>3</sup>

**Bosnia and Herzegovina** and **Swaziland** were reminded by the HR Committee of its General Comment No. 31 on the nature of the general legal obligation imposed on State parties, as well as of their obligation under Article 2 (2), to ensure that their domestic laws are consistent with the provisions of the Covenant.<sup>4</sup>

The complexity of **Bosnia and Herzegovina's** constitutional structure and the difficulties of the central Government to carry out legal reforms in some parts of the country were noted to have hindered the full implementation of the Covenant.<sup>5</sup> Therefore, the State was recommended to ensure implementation of the Covenant in all parts of the federal State.<sup>6</sup>

Since treaties do not apply automatically in **Swaziland**, the HR Committee regretted that the Covenant has not yet been incorporated into domestic law.<sup>7</sup> It expressed concern about several conflicting laws which impede the efficient implementation of the Constitution.<sup>8</sup>

The HR Committee expressed concern about the lack of application of the Covenant by domestic courts in **Mongolia**, **Mauritius** and **Pakistan**.<sup>9</sup> In **Madagascar**, even though the Constitution establishes the primacy of international treaties over domestic law and courts may directly invoke the Covenant, the Covenant was rarely applied.<sup>10</sup> The HR Committee regretted the lack of information on the Covenant's application by domestic courts in **Romania**.<sup>11</sup>

The HR Committee appreciated the establishment of the Parliamentary Joint Committee on Human Rights in **Australia** to scrutinize bills with a view to ensure their compatibility with international Human Rights treaties, including the Covenant. Nevertheless, it expressed concern over reports of **Australia** questioning the quality of some statements of compatibility, notwithstanding the guidelines issued by the Attorney-General and the Parliamentary Joint Committee on Human Rights.<sup>12</sup> It was recommended that the State strengthen its legislative scrutiny

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<sup>1</sup> Concluding observations on the initial report of Bangladesh, UN Doc. CCPR/C/BGD/CO/1, 2017, **(Bangladesh)**, §8

<sup>2</sup> Concluding observations on the initial report of Pakistan, UN Doc. CCPR/C/PA/CO/1, 2017, **(Pakistan)**, §6; Concluding observations on the fifth periodic report of Romania, UN Doc. CCPR/C/ROU/CO/5, 2017, **(Romania)**, §6

<sup>3</sup> Concluding observations on the sixth periodic report of Australia, UN Doc. CCPR/C/AUS/CO/6, 2017 **(Australia)**, §5; Bangladesh, §7; Pakistan, §5

<sup>4</sup> Concluding observations on the third periodic report of Bosnia and Herzegovina, UN Doc. CCPR/C/BIH/CO/3, 2017, **(Bosnia and Herzegovina)**, §6; Concluding observations on Swaziland in the absence of a report, UN Doc. CCPR/C/SWZ/CO/1, 2017, **(Swaziland)**, §§8, 11

<sup>5</sup> Bosnia and Herzegovina, §5

<sup>6</sup> Bosnia and Herzegovina, §6

<sup>7</sup> Swaziland, §8

<sup>8</sup> Swaziland, §10

<sup>9</sup> Concluding observations on the sixth periodic report of Mongolia, UN Doc. CCPR/MNG/CO/6, 2017, **(Mongolia)**, §5; Concluding observations on the fifth periodic report of Mauritius, UN Doc. CCPR/MUS/CO/5, 2017, **(Mauritius)**, §5; Pakistan, §5

<sup>10</sup> Madagascar, §5

<sup>11</sup> Romania, §5

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<sup>13</sup> Australia, §12

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processes to ensure that no bills are adopted before the examination of their compatibility with the Covenant.<sup>13</sup>

In **Bangladesh**, some domestic legislations regarding counter-terrorism, non-discrimination, early marriage, voluntary termination of pregnancy, death penalty, as well as freedom of expression and association, were noted to contain provisions contrary to the Covenant.<sup>14</sup> Moreover, the Constitution of **Jordan** does not clarify the status of the Covenant. To ensure that the Covenant prevails in cases of conflict with sharia law, **Jordan** was advised to ensure that all domestic laws are interpreted and applied in conformity with the Covenant.<sup>15</sup>

Finally, the HR Committee expressed concern about certain provisions of the interim Constitution of **Thailand** in 2014, including a provision limiting access to effective remedies, which may lead to immunity of the National Council for Peace and Order for serious human rights violations.<sup>16</sup> Accordingly, the State was asked to amend the interim Constitution of 2014 in the light of its obligations under the Covenant, and make sure that all measures adopted are consistent with the Covenant.<sup>17</sup>

<sup>14</sup> Bangladesh, §§7, 9-10, 11-12, 13-14, 15-16, 23-24, 27-28

<sup>15</sup> Concluding observations on the fifth periodic report of Jordan, UN Doc. CCPR/C/JOR/CO/5, 2017, (**Jordan**), §4

<sup>16</sup> Concluding observations on the second periodic report of Thailand, UN Doc. CCPR/C/THA/CO/2, 2017, (**Thailand**), §7

<sup>17</sup> Thailand, §8

<sup>18</sup> Australia, §§13-14; Bangladesh, §§5-6; Bosnia and Herzegovina, §§9-10;

Concluding observations on the fifth periodic report of Cameroon, UN Doc. CCPR/C/CMR/CO/5, 2017, (**Cameroon**), §§7-8; Concluding observations on the sixth periodic report of Dominican Republic, UN Doc. CCPR/C/DOM/CO/6, 2017 (**Dominican Republic**), §§7-8;

Concluding observations on the fourth periodic report of Democratic Republic of Congo, UN Doc. CCPR/C/COD/CO/4, 2017, (**DRC**), §§9-10; Concluding observations on the second periodic report of Honduras; UN Doc. CCPR/C/HND/CO/2, 2017, (**Honduras**), §§6-7; Concluding observations on the sixth periodic report of Italy, UN Doc. CCPR/C/ITA/CO/6, 2017, (**Italy**), §§6-7; Madagascar, §8; Mauritius, §8; Pakistan, §10; Romania, §§9-10; Swaziland, §§14-15; Thailand, §§9-10

<sup>19</sup> Australia, §§13-14; Bangladesh, §5; Bosnia & Herzegovina, §9; Cameroon, §§7-8; Dominican Republic, §§7-8; DRC, §§9-10; Honduras, §§6-7; Jordan, §§6-7; Liechtenstein, §§7-8; Madagascar, §8; Mongolia, §§7-8; Pakistan, §10; Swaziland, §15; Switzerland, §§14-15

<sup>20</sup> Australia, §14; Dominican Republic, §7

<sup>21</sup> DRC, §9

<sup>22</sup> Concluding observations on the second periodic report of Liechtenstein, UN Doc. CCPR/C/LIE/CO/2, 2017, (**Liechtenstein**), §7

<sup>23</sup> Bangladesh, §5; Bosnia & Herzegovina, §10; DRC, §10; Jordan, §§6-7; Mauritius, §§7-8; Pakistan, §10; Swaziland, §15

<sup>24</sup> Australia, §§13-14; Bangladesh, §6; Cameroon, §§7-8; DRC, §9; Madagascar, §8; Mongolia, §§7-8; Romania, §§9-10; Swaziland, §15

<sup>25</sup> Pakistan, §9

## b. National Human Rights Institutions

States were generally recommended to adopt legislation that allows a national human rights institution (NHRI) to legally undertake activities in accordance with the Principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles). Such NHRIs should be able to fulfil their mandate, have an effective complaints mechanism, and promptly investigate and resolve cases, with full reparation to victims.<sup>18</sup>

As to the financial autonomy of the NHRIs, insufficient financial funding was reportedly perceived in almost all States.<sup>19</sup> In this regard, the HR Committee stated that **Australia** should pursue its stated intention to restore the budget of its NHRI and ensure adequate funding, and the **Dominican Republic** should use its annual budget properly and in its entirety.<sup>20</sup> In the **DRC**, only 30 per cent of the budget had actually been allocated and the Commission had not received any funding since March 2017. The HR Committee expressed concern that the NHRI in Kinshasa does not have regional offices allowing action in all territories.<sup>21</sup> It expressed concerns that present financial resources were insufficient for the **Liechtenstein** Human Rights Association to execute its broad mandate successfully and recommended that its ability to carry out its functions not depend on ongoing fundraising efforts.<sup>22</sup>

A lack of human resources was noted in **Bangladesh, Bosnia and Herzegovina, DRC, Jordan, Mauritius, Pakistan** and **Swaziland**.<sup>23</sup>

Concerning the preservation of an independent functioning of NHRIs, **Australia, Bangladesh, Cameroon, DRC, Dominican Republic, Madagascar, Mongolia, Pakistan, Romania** and **Swaziland** raised the HR Committee's concern.<sup>24</sup> The HR Committee expressed concern over the Chairperson of the NHRI in **Pakistan** reportedly being denied required authorization to travel to Geneva to meet with the HR Committee.<sup>25</sup>

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Regarding the criteria of sufficient transparency, the HR Committee expressed concern over the selection process of the members of the NHRI in **Cameroon**, which was neither participatory nor transparent, requesting the State to review Act No. 2004/016 of 22 July 2004 to ensure a transparent and independent process of selection and appointment of NHRI members, while including rules on conflict of interest for its members.<sup>26</sup> The HR Committee took notice of similar issues in **Honduras, Mauritius, Mongolia, Romania** and **Thailand**.<sup>27</sup>

**Liechtenstein** was recommended to ensure that the founding legislation of its NHRI ensures that membership is reflective of societal pluralism and diversity.<sup>28</sup> Furthermore, legal amendments were suggested to **Pakistan** where the Commission is, according to its constitutive status, prevented from fully cooperating with United Nations human rights mechanisms.<sup>29</sup> Moreover, **Swaziland** was asked to adopt an enabling legislation for the NHRI without delay.<sup>30</sup> The HR Committee expressed concern over **Italy** and **Switzerland** lacking any body that could be described as a NHRI, and recommended that they establish independent NHRIs with broad mandates and adequate human and financial resources, compliant with the Paris Principles.<sup>31</sup>

The Committee on Economic, Social and Cultural Rights (CESCR) raised this topic multiple times, especially in relation to newly established NHRIs. For instance, compliance with the Paris Principles was highlighted in relation to **Pakistan**; in the case of **Australia**, the Committee asked about the limited mandate of the Australian NHRI, which does not include a mandate to address economic, social and cultural rights.<sup>32</sup>

## c. Awareness-Raising and Capacity Building

The HR Committee requested **Bangladesh, Liechtenstein, Madagascar, Mauritius, Serbia, Swaziland** and **Pakistan** to raise awareness on the Covenant rights and domestic law giving effect to these rights among judges, lawyers, prosecutors and other public officials to ensure that the Covenant is upheld by the courts.<sup>33</sup> **Australia** was additionally requested to ensure the availability of specific training on the Covenant for federal immigration staff.<sup>34</sup> **Cameroon, Jordan, Romania** and **Swaziland** by contrast were recommended to continue their existing measures in sensitizing the judiciary and legal community.<sup>35</sup> **Honduras** was asked to increase training and education programmes, especially on the importance of freedoms of expression, association and assembly, for law enforcement officers, military personnel, private security companies' staff, judges and prosecutors.<sup>36</sup>

Regarding the **DRC**, the HR Committee took note of article 215 of the Constitution, which provides that treaties have greater authority than domestic laws. It regretted that no example was provided of cases in which the Covenant had been invoked before the courts or applied by them.<sup>37</sup> Thus, additional efforts in awareness-raising should be ensured by the **DRC**, but also by the **Dominican Republic** and **Mongolia** with regard to the First Optional Protocol.<sup>38</sup> **Switzerland** was asked to ensure that the authorities in all cantons are aware of the HR Committee's recommendations in order to guarantee their proper implementation.<sup>39</sup>

<sup>26</sup> Cameroon, §§7-8

<sup>27</sup> Honduras, §6; Madagascar, §8; Mongolia, §8; Romania, §§9-10; Thailand, §9

<sup>28</sup> Liechtenstein, §8

<sup>29</sup> Pakistan, §9

<sup>30</sup> Swaziland, §15

<sup>31</sup> Italy, §§6-7; Concluding observations on the fourth periodic report of Switzerland, UN Doc. CCPR/C/CHE/CO/4, 2017, **(Switzerland)**, §14-15

<sup>32</sup> CESCR, Concluding observations on the initial report of Pakistan, UN Doc. E/C.12/PAK/CO/1, 2017, §§11-12 **(CESCR, Pakistan)**; CESCR, Concluding observations on the fifth periodic report of Australia, UN Doc. E/C.12/AUS/CO/5, 2017, §§9-10 **(CESCR, Australia)**

<sup>33</sup> Bangladesh, §8; Liechtenstein, §6; Madagascar, §6; Mauritius, §6; Concluding observations on the third periodic report of Serbia, UN Doc. CCPR/C/SRB/CO/3, 2017, **(Serbia)**, §7; Swaziland, §45; Pakistan, §9

<sup>34</sup> Australia, §6

<sup>35</sup> Cameroon, §6; Jordan, §5; Romania, §6; Swaziland, §11

<sup>36</sup> Honduras, §4

<sup>37</sup> DRC, §5

<sup>38</sup> Dominican Republic, §6; DRC, §6; Mongolia, §5

<sup>39</sup> Switzerland, §9

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The HR Committee requested **Mongolia** to strengthen its efforts to promote the effective application of the provisions of the Covenant before domestic courts, including through institutionalized training of legal authorities on international human rights treaties, and awareness-raising among the public at large.<sup>40</sup> **Swaziland** was requested to redouble its for awareness-raising among the public at large.<sup>41</sup>

Finally, the limited consultations with civil society of the **Dominican Republic** and the **DRC** in the preparation of the reports for the HR Committee caused concern.<sup>42</sup> The HR Committee, in respect of both countries, recommended broad and open consultation with civil society in the preparation of States' periodic reports to the HR Committee and in the implementation of its recommendations.<sup>43</sup> The HR Committee found it regrettable that civil society was not even involved in the preparation of the periodic report for **Switzerland**.<sup>44</sup>

## 1.1.2. Implementation of the HR Committee's Decisions

In accordance with Article 2 (3) of the Covenant, some States were recommended to take all measures necessary to ensure that appropriate procedures exist for implementing the HR Committee's Views to guarantee the right of victims to an effective remedy when there has been a violation of the Covenant.<sup>45</sup> However, several States failed, in terms of time or substance, to implement fully the HR Committee's recommendations. **Cameroon** was asked to fulfil obligations of implementation under the Covenant within a reasonable period of time, especially with regard to compensation<sup>46</sup>

Accordingly, the HR Committee expressed concern over the lack of information on the implementation of the Views adopted under the Optional Protocol in the cases of the **DRC**, **Mongolia** and **Turkmenistan**.<sup>47</sup> Failure to implement the HR Committee's Views was observed in respect of **Bosnia and Herzegovina**, and repeatedly in respect of **Australia** and **Turkmenistan**.<sup>48</sup>

The HR Committee expressed concern over the delay in the adoption of the National Plan for Human Rights by the **Dominican Republic**,<sup>49</sup> and the State was advised to ensure an effective follow-up of the full implementation of the Views adopted by the HR Committee.<sup>50</sup> In **Honduras** recommendations made by the Truth and Reconciliation Commission in 2011 relating to violations during the 2009 coup were noted to not have been fully implemented.<sup>51</sup>

The HR Committee recalled its General Comment No. 33 on the obligations of State parties under the Optional Protocol to the ICCPR, stating that its Views exhibit some of the principal characteristics of a judicial decision and represent an authoritative determination by the organ established under the Covenant. Hence, the HR Committee regarded implementation of remedies indicated in its Views as part of the obligations of States under the Covenant and the Optional Protocol,<sup>52</sup> and **Australia** was asked to implement all pending Views of the HR Committee.<sup>53</sup>

## 1.1.3. Reservations to ICCPR and Party Status to the Optional Protocol

<sup>40</sup> Mongolia, § 6

<sup>41</sup> Swaziland, § 9

<sup>42</sup> Dominican Republic, § 5; DRC, § 5

<sup>43</sup> Dominican Republic, § 6; DRC, § 6

<sup>44</sup> Switzerland, § 8

<sup>45</sup> Australia, § 12; Cameroon, § 6; DRC, § 8;

Madagascar, §§ 5-6; Mongolia, § 6;

Serbia, § 6; Concluding observations on

the second periodic report of

Turkmenistan, UN Doc.

CCPR/C/TKM/CO/2, 2017,

(**Turkmenistan**), § 4

<sup>46</sup> Cameroon, §§ 5-6

<sup>47</sup> DRC, § 7; Mongolia, § 5; Turkmenistan,

§ 4

<sup>48</sup> Australia, § 11; Bosnia & Herzegovina,

§ 9; Turkmenistan, § 4

<sup>49</sup> Dominican Republic, § 5

<sup>50</sup> Dominican Republic, § 6

<sup>51</sup> Honduras, § 8<sup>52</sup> Australia, § 11

<sup>53</sup> Australia, §§ 11-12

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As to the Reservations to the Covenant, the HR Committee requested **Australia** to periodically review the justifications for, and the necessity of, maintaining its reservations to Articles 10, 14 (6) and 20 of the Covenant with a view to withdrawing them.<sup>54</sup> **Liechtenstein** was asked to consider withdrawing its remaining reservations to Articles 14, 17 and 26.<sup>55</sup>

The HR Committee expressed regret that **Pakistan** maintains its reservations to Articles 3 and 25, which limit the application of these Articles to the extent that they are in conformity with Muslim personal law and the law on evidence, and with some provisions of the Constitution.<sup>56</sup> The State was asked to consider withdrawing its reservations.<sup>57</sup>

Furthermore, the HR Committee reiterated its concern relating to the maintenance by **Switzerland** of its reservations to Articles 12 (1), 20 (1), 25 (b) and 26 owing to the supposed incompatibility of national law with the Covenant.<sup>58</sup> The State was asked to consider withdrawing its reservations and revise its national law if necessary, and refrain from introducing domestic law provisions that impede the withdrawal of the reservations.<sup>59</sup>

Regarding the First Optional Protocol to the Covenant, which establishes an individual complaint mechanism, the HR Committee said that it would appreciate it if **Bangladesh, Jordan** and **Swaziland** proceeded to its ratification without further delay.<sup>60</sup>

## 1.2. Individual Communications before the Human Rights

### Committee

Individual Communications constitute a key element for the application of the Covenant and OP 1 in the domestic legal order, whereby individuals can bring instances of non-compliance by the States with the ICCPR before the HR Committee. In the following sub-sections, the HR Committee's jurisprudence in selected key communications with regard to admissibility and remedies will be examined.

#### 1.2.1. Admissibility

##### a. Admissibility Criteria under Article 1 of OP 1

Article 1 of OP 1 states that the HR Committee is competent to receive claims from individuals subject to the jurisdiction (*ratione loci*) of a State Party to OP 1 (*ratione temporis*) who claim to be victims (*ratione personae*) of a violation of the rights contained in the Covenant (*ratione materiae*).

##### i. *Ratione loci*

In **C. v. Australia**, which addressed the absence of divorce proceedings in Australia for a same-sex marriage contracted abroad which was not recognized under Australian Law, the State argued that such a marriage lacked legal effects in its territory and the fact that the action took place overseas rendered the claim inadmissible *ratione loci*.<sup>61</sup> However, the HR Committee considered that the legal uncertainty of the

<sup>54</sup> Australia, §8

<sup>55</sup> Liechtenstein, §§9-10

<sup>56</sup> Pakistan, §7

<sup>57</sup> Pakistan, §8

<sup>58</sup> Switzerland, §10

<sup>59</sup> Switzerland, §1

<sup>60</sup> Bangladesh, §8; Jordan, §9; Switzerland, §9

<sup>61</sup> C. v. Australia, UN Doc. CCPR/C/119/D/2216/2012, 2017, §§8.4-8.5 (**C v. Australia**)

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author's position in Australia caused by the lack of access to divorce proceedings was a legal effect sufficient to render the case admissible.

## ii. *Ratione temporis*

The HR Committee referred to its jurisdiction *ratione temporis* vis-à-vis Kazakhstan in *S. Sh. v. Kazakhstan*, *M. Z. v. Kazakhstan*, *Dmitry Tyan v. Kazakhstan* and *Andrei Sviridov v. Kazakhstan*.<sup>62</sup> In all four cases the HR Committee observed that the claimed violations took place before the date of entry into force of OP 1 for the State Party, i.e. 16 September 2009, and declared the first three claims inadmissible. However, in the case of *Sviridov v. Kazakhstan*, it recalled the exception for violations continuing after the date of entry into force, or continuing to have effects which in themselves constitute a violation of the Covenant, or an affirmation of a prior violation. Therefore, it declared the case admissible as the violation of the author's rights continued after the entry into force of OP 1.<sup>63</sup>

## iii. *Ratione personae (victim status)*

Article 1 of OP 1 states that the HR Committee is competent to receive claims from individuals who claim to be victims of violation of the rights contained in the Covenant. The HR Committee explained who a victim is for the purposes of OP 1 in *M. A. K. v. Belgium*, *Reyes v. Chile*, *Zogo v. Cameroon* and *Yassin v. Canada*.

In *M. A. K. v. Belgium*, the HR Committee recalled that a person cannot claim to be a victim if the State has already taken action to redress the violation. In this case, the author claimed to be a victim of a violation of Article 14.3(c) due to the unreasonable length of 17 years that criminal proceedings took. The HR Committee recalled its jurisprudence on the reasonableness of proceedings having to be assessed case by case, considering the complexity of the issue, the behaviour of the accused and the actions of the authorities. It further noted that the Brussels's Tribunal considered the length of the proceedings when imposing the sentence and gave the author significantly reduced prison time in order to compensate for the violation. The HR Committee therefore concluded that the conduct of the authorities had redressed the author's complaint and that he did not have victim status for purposes of Article 1 of OP 1.<sup>64</sup>

It further explained in *Reyes v. Chile*, in view of the author making claims on behalf of citizens of Santiago de Chile for their right to receive information, that a person is not a victim unless their own rights have actually been violated. It also explained that a person may not object, by *actio popularis* or in theoretical terms, to a law or practice that they consider to be incompatible with the Covenant. In consequence, the claim was inadmissible to the extent that it referred to citizens' rights in general terms and not to a specific person.<sup>65</sup>

The victim status is strictly dependent on the particular text of the provision of the Covenant a violation is claimed under. In *Zogo v. Cameroon*, the HR Committee explained that as Article 14(5) refers to 'everyone convicted of a crime', someone who has

<sup>62</sup> *S. Sh. v. Kazakhstan*, UN Doc. CCPR/C/119/D/2842/2016, 2017, §4.3 (**S. Sh. v. Kazakhstan**); *Z. v. Kazakhstan*, UN Doc. CCPR/C/119/D/2145/2012, 2017, §11.3 (**M. Z. v. Kazakhstan**); *Dmitry Tyan v. Kazakhstan*, UN Doc. CCPR/C/119/D/2125/2011, 2017, §8.4 (**Dmitry Tyan v. Kazakhstan**); *Andrei Sviridov v. Kazakhstan*, UN Doc. CCPR/C/120/D/2158/2012, 2017, §9.4 (**Andrei Sviridov v. Kazakhstan**)

<sup>63</sup> *Andrei Sviridov v. Kazakhstan*, §9.4

<sup>64</sup> *M. A. K. v. Belgium*, UN Doc. CCPR/C/119/D/2148/2012, 2017, §6.4 (**M. A. K. v. Belgium**)

<sup>65</sup> *Claudia Andrea Marchant Reyes et al. v. Chile*, UN Doc. CCPR/C/121/D/2627/2015, 2017, §6.4 (**Reyes v. Chile**)

neither been judged nor convicted could not be considered a victim for the purposes of this provision.<sup>66</sup>

Finally, in *Yassin v. Canada*, the HR Committee recalled its jurisprudence, wherein only individuals, and not legal persons, have the right to submit a communication under Article 1 of OP 1. Here, two authors (the estate of the late Ahmed Issa Abdallah Yassin and the Bil'in Village Council, represented by its Vice-Chair) were legal entities, and the HR Committee therefore declared their claims inadmissible because of the lack of personal standing.<sup>67</sup>

#### iv. *Ratione materiae*

In *Zogo v. Cameroon*, which addressed the right to a fair trial of the author's father, the HR Committee recalled its jurisprudence on the prohibition of imprisonment for inability to fulfil a contractual obligation not being applicable to criminal prosecutions related to civil debts and that in cases of fraud or embezzlement, prison sentences may be imposed. It therefore declared the author's claim under Article 11 inadmissible *ratione materiae*.<sup>68</sup> It also found the author's claim under Article 15, of the law being applied retroactively as his father's criminal proceedings were transferred to a recently created jurisdiction, was inadmissible *ratione materiae*, as the change did not modify the qualification of the crime or the applicable penalties.<sup>69</sup>

Finally, the author also claimed a violation under Article 16, arguing that the juridical personality of the company was not being recognized and his father was being erroneously prosecuted instead. The HR Committee noted that the author's father was personally charged with certain crimes, declaring the claim inadmissible *ratione materiae*.<sup>70</sup>

### b. Admissibility Criteria under Article 5(2) of OP1

#### i. Article 5(2)(a) – Same matter under examination by another procedure of international investigation or settlement

The HR Committee had to address the issue in the individual communications of *S. L. v. Netherlands*, *N. K. v. Netherlands* and *M. A. K. v. Belgium*.<sup>71</sup> The authors had previously resorted to the European Court of Human Rights (ECtHR), but all three cases were declared inadmissible. The HR Committee, while confirming its jurisprudence, stated that the cases were no longer pending before the ECtHR, and were admissible before it.

#### ii. Article 5(2)(b) – Non-exhaustion of local remedies

In the individual communications assessed in 2017, the HR Committee elaborated on the situations that may constitute exceptions to the requirement under Article 5(2)(b). In *S. L. v. Netherlands*, the HR Committee stated that established case-law on an issue may render the domestic remedies ineffective, and the situation may therefore fall within the said exceptions. In this case, which addressed the mandatory DNA profiling of children in conflict with the law, the author argued that challenging the DNA collection in the context of the objection proceedings provided for by the DNA Testing Act would have been ineffective because it had already been determined by well-established domestic case-law in the Netherlands that the limited scope of the objections under the DNA Testing Act was compatible with the Covenant. In view of the lack of a rebuttal by the State before the HR Committee, the HR Committee concluded that there was

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<sup>66</sup> Cyrille Gervais Moutono Zogo v. Cameroon, UN Doc. CCPR/C/121/D/2764/2016, 2017, § 6.14 (*Zogo v. Cameroon*)

<sup>67</sup> Basem Ahmed Issa Yassin et al. v. Canada, UN Doc. CCPR/C/120/D/2285/2013, 2017, § 6.3 (*Yassin v. Canada*)

<sup>68</sup> Zogo v. Cameroon, § 6.11

<sup>69</sup> Zogo v. Cameroon, § 6.15

<sup>70</sup> Zogo v. Cameroon, § 6.16

<sup>71</sup> *S. L. v. Netherlands*, UN Doc. CCPR/C/120/D/2362/2014, 2017, § 9.2 (*S. L. v. Netherlands*); *N. K. v. Netherlands*, UN Doc. CCPR/C/120/D/2326/2013, 2017, § 8.3 (*N. K. v. Netherlands*); *M. A. K. v. Belgium*, UN Doc. CCPR/C/119/D/2148/2012, 2017, § 6.2 (*M. A. K. v. Belgium*)

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no need to exhaust domestic remedies and found the communication admissible.<sup>72</sup>

Similarly, the HR Committee reiterated that remedies without a real prospect of success fall within the said exceptions. In *C. v. Australia*, which addressed the lack of divorce proceedings for same-sex foreign couples who married abroad given that such unions were not recognized in Australia, the author argued that filing of an application for divorce would be futile and that it would have no real prospect of success, given the express, legislative provisions that denied her eligibility to bring such an application before any Australian court. The HR Committee declared that the claim satisfied the requirements of the Article. 5(2)(b).<sup>73</sup>

Under a comparable reasoning, in *X. v. Sri Lanka*, in view of the unreasonable delay of the criminal proceedings initiated by the author, i.e. 11 years at the moment of the initial submission of the communication, without a criminal conviction against the culprits and the lack of rebuttal by the State, the HR Committee declared the case admissible.<sup>74</sup>

However, in *B. Z. et al. v. Albania*, the HR Committee recalled that although there is no obligation to exhaust domestic remedies if there is no chance of success, authors of communications must exercise due diligence in the pursuit of available remedies, and that mere doubts or assumptions about their effectiveness do not absolve the authors from exhausting them.

It observed that even if specific proceedings were not available against an eviction order, the authors could have challenged the actions of the municipality under general administrative proceedings. It therefore declared the claim inadmissible.<sup>75</sup>

## 1.2.2. Remedies

The HR Committee adopted recommendations for effective remedies in the communications where it found violations of the Covenant, depending on the facts, including full reparations, like when the author suffered discrimination through the lack of access to divorce proceedings.<sup>76</sup> Full reparations may include adequate compensation,<sup>77</sup> but also other measures, such as when Chile was recommended to 'locate the missing banners and, where possible, return them or provide the authors with information on what happened to them'.<sup>78</sup> Appropriate means of satisfaction, including public acknowledgement or apology for the violation of rights, were also remedies used by the HR Committee.<sup>79</sup>

Findings of torture or ill-treatment prompted the HR Committee to ask for a prompt and effective investigation, and punishment for perpetrators,<sup>80</sup> and findings of violations of the right to fair trial led to the State being recommended to conduct a new trial, after quashing the previous conviction.<sup>81</sup>

<sup>72</sup> S. L. v. Netherlands, §9.3

<sup>73</sup> C. v. Australia, §8.3

<sup>74</sup> X. v. Sri Lanka, UN Doc. CCPR/C/120/D/2256/2013, 2017, §6.3

**(X. v. Sri Lanka)**

<sup>75</sup> B. Z. et al. v. Albania, UN Doc.

CCPR/C/121/D/2837/2016, 2017, §§6.3-6.4 **(B. Z. et al. v. Albania)**

<sup>76</sup> C. v. Australia, §11

<sup>77</sup> Fakhridin Ashirov v. Kyrgyzstan, UN Doc. CCPR/C/120/D/2435/2014, 2017,

§9 **(Ashirov v. Kyrgyzstan)**; X. v. Sri Lanka, §9; Khidirnazar Allakulov v. Uzbekistan, UN Doc.

CCPR/C/120/D/2430/2014, 2017, §9 **(Khidirnazar v. Uzbekistan)**

<sup>78</sup> Claudia Andrea Marchant Reyes et al. v. Chile, UN Doc.

CCPR/C/121/D/2627/2015, 2017, §9 **(Reyes v. Chile)**

**(Reyes v. Chile)**

<sup>79</sup> Zhaslan Suleimenov v. Kazakhstan, UN Doc. CCPR/C/119/D/2146/2012, 2017,

§11 **(Zhaslan v. Kazakhstan)**; X. v. Sri Lanka, §9; Khidirnazar v. Uzbekistan, §9

<sup>80</sup> Zhaslan v. Kazakhstan, §11; Ashirov v. Kyrgyzstan, §9

<sup>81</sup> Ashirov v. Kyrgyzstan, §9

Upon request made by the author alleging that the State authorities are pressuring the author to withdraw his complaint, the HR Committee, acting through its Rapporteur on new communications and interim measures, asked the State to prevent any “reprisals against the author, his family, witnesses and representatives as a result of the submission of the communication”.<sup>82</sup>

The HR Committee re-emphasised the States’ obligation to take steps to prevent similar violations in the future,<sup>83</sup> and to review its laws in accordance with the present Views.<sup>84</sup> The HR Committee also expressed wishes to receive time-bound reports within 180 days on implementation of its Views from the States and requested the States to publish the HR Committee’s Views.<sup>85</sup>

## 1. APPLICATION OF THE COVENANT

<sup>82</sup> Zhaslan v. Kazakhstan, §5.1  
fn.15

<sup>83</sup> C. v. Australia, §11; Reyes v. Chile, §9; Siobhán Whelan v. Ireland, UN Doc. CCPR/C/119/D/2425/2014, 2017, §10 (**Siobhán v. Ireland**); Zhaslan v. Kazakhstan, §10

<sup>84</sup> C. v. Australia, §11; Siobhán v. Ireland, §10

<sup>85</sup> C. v. Australia, §12; Reyes v. Chile, §10; Siobhán v. Ireland, §10; Zhaslan v. Kazakhstan, §10