



**Convention on the Elimination
of All Forms of Discrimination
against Women**

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**Committee on the Elimination of Discrimination
against Women**

Fifty-fifth session

8-26 July 2013

Communication No. 35/2011

**Decision adopted by the Committee at its fifty-fifth session,
8-26 July 2013**

Submitted by: M. E. N. (represented by counsel, Niels-Erik Hansen)

Alleged victim: The author

State party: Denmark

Date of communication: 6 October 2011 (initial submission)

References: Working Group's decision under articles 5 and 6 of the Optional Protocol and rules 63 and 69 of the Committee's rules of procedure, transmitted to the State party on 7 October 2011 (not issued in document form)

Date of adoption of decision: 26 July 2013

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Annex

Decision of the Committee on the Elimination of Discrimination against Women under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (fifty-fifth session)

Communication No. 35/2011, M. E. N. v. Denmark*

<i>Submitted by:</i>	M. E. N. (represented by counsel, Niels-Erik Hansen)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Denmark
<i>Date of communication:</i>	6 October 2011 (initial submission)
<i>References:</i>	Working Group's decision under articles 5 and 6 of the Optional Protocol and rules 63 and 69 of the Committee's rules of procedure, transmitted to the State party on 7 October 2011 (not issued in document form)

The Committee on the Elimination of Discrimination against Women, established under article 17 of the Convention on the Elimination of All Forms of Discrimination against Women,

Meeting on 26 July 2013,

Adopts the following:

Decision on admissibility

1.1 The author of the communication, dated 6 October 2011, is M. E. N., a Burundian national born on 1 July 1988. The author is an asylum seeker whose application for asylum has been rejected. At the time of submission of the communication, she was awaiting deportation from Denmark to Burundi. She claims to be a victim of a violation by Denmark of articles 1, 2 (c), 2 (d) and 3 of the Convention on the Elimination of All Forms of Discrimination against Women. The author is represented by counsel, Niels-Erik Hansen. The Convention and the Optional Protocol thereto entered into force for the State party on 21 May 1983 and 22 December 2000, respectively.

* The following members of the Committee participated in the examination of the present communication: Ms. Ayse Feride Acar, Ms. Noor Al-Jehani, Ms. Nicole Ameline, Ms. Barbara Bailey, Ms. Náela Gabr, Ms. Hilary Gbedemah, Ms. Nahla Haidar, Ms. Ruth Halperin-Kaddari, Ms. Yoko Hayashi, Ms. Ismat Jahan, Ms. Dalia Leinarte, Ms. Violeta Neubauer, Ms. Theodora Nwankwo, Ms. Pramila Patten, Ms. Silvia Pimentel, Ms. Maria Helena Pires, Ms. Biancamaria Pomeranzi, Ms. Patricia Schulz, Ms. Dubravka Šimonović and Ms. Xiaoqiao Zou. The text of an individual opinion (dissenting) of Committee member Ms. Dubravka Šimonović, joined by Ms. Ruth Halperin-Kaddari, Ms. Violeta Neubauer and Ms. Silvia Pimentel, is appended to the present document.

1.2 When registering the communication on 7 October 2011, and pursuant to article 5 (1) of the Optional Protocol and rule 63 of its rules of procedure, the Committee requested the State party to refrain from expelling the author to Burundi while her communication was under consideration by the Committee.

Factual background

2.1 The author submits that she was a member of the women's department of the Front national de libération (FNL), in the town of Ruziba in Burundi, and had participated in several meetings of that political party, although she had no specific responsibility in it.¹ Her husband, A. M. Z, was responsible for collecting funds during the party's meetings in Ruziba.

2.2 In 2010, elections were held in Burundi. The author voted for Agato Rwasa, the leader of FNL, who was not elected. The Conseil national pour la défense de la démocratie (CNDD) became the ruling party. According to the author, however, the results of those elections were rigged, which prompted leaders of various political parties, including Agato Rwasa, to protest and found a coalition called Alliance des démocrates pour le changement — Ikibiri (ADC).

2.3 The author submits that, a few days later, the Burundian authorities decided to arrest Agato Rwasa, blaming him for the non-recognition by ADC of the election results. On 16 June 2010, some 200 members of FNL, including the author, who had learned about the decision, went to Agato Rwasa's residence and sought to prevent his arrest by organizing a protest. On the first day of the protest, the demonstrators were requested to leave, but refused. On the second day, the police used tear gas to disperse them. The FNL leader was not arrested, however.

2.4 The author further submits that, after these events, two members of CNDD were killed, with FNL members suspected of being responsible. As a reprisal, on 10 July 2010, the author's town, where many FNL members lived, was bombarded by air. Villagers began fleeing and some were killed during the bombardment. During the chaos, the author was separated from her husband and decided to hide in a hole until the evening.

2.5 The author claims that, after eventually leaving her hiding place, she decided to go to the town of Kibenga. On her way, she was raped by three men² armed with knives. As all members of FNL were about to flee or had already fled, she assumed that her aggressors were not members of FNL. Out of fear, the author did not report the event to the police, given that she was trying to hide from them.

2.6 The author submits that, on the same day (10 July 2010), she found refuge with one of her husband's friends, Mathilde (called "Maman Oredi" by the author because she does not know her surname). Maman Oredi was also a member of FNL. On 13 July 2010, while the author was still there, the police came asking for her and her husband. The author managed to escape and offered a driver 10,000 Burundian francs (\$8) to be taken to Rwanda to a friend of hers called E. C.

¹ During her interview with the Immigration Service, the author reportedly presented a membership card, but no copy of it was submitted with the communication.

² The author does not specify whether they were wearing uniforms or otherwise appeared to be associated with the State.

2.7 The author submits that she remained in Rwanda for one month but, knowing that she would be unable to find employment and fearing for her security, she decided to go to Denmark. E. C. informed the author that she knew someone who could help her to get there in exchange for \$6,000. The author telephoned one of her husband's friends and asked him to provide her with money and a new identity card, given that she had not taken her previous card with her. The author suggested to her husband's friend that he should buy her husband's boat so that she could pay for her new card and her trip. He did so and the author was able to pay the required sum and go to Denmark. She arrived there on 22 August 2010 and applied for asylum on the same day.

2.8 The author submits that, to support her application, she invoked her fear of being killed or imprisoned by the Burundian authorities owing to her political affiliation. She added that, just before the elections, in April 2010, she and her husband had received anonymous threatening letters in which her husband had been asked to leave FNL if he did not want his wife to be killed. The author also submitted that a grenade had been thrown at their house in May 2010.

2.9 The author claims that her sister, who stayed in Burundi, also told her that FNL members had been killed or imprisoned and that the author's former neighbours, who were members of CNDD, had promised to kill her if she came home. Moreover, her sister informed her that Maman Oredi and her son had been arrested and that the cousin of the author's husband, N. S., also a member of FNL, had been killed on 29 March 2011.

2.10 The author submits that, on 28 April 2011, the State party's Immigration Service rejected her asylum application and forwarded her case to the Refugee Appeals Board. The Immigration Service considered that the author's allegations, according to which the Burundian authorities had learned that she was a member of FNL owing to her husband's membership of the party, were not credible. The Immigration Service underlined the fact that the author's identity card made no mention that she was married.³ The authorities could not have known, therefore, of her marriage to a member of FNL. The Immigration Service added that it was unlikely that her husband's affiliation to FNL was known by non-members. Moreover, the author's participation in the attempt to prevent the arrest of the leader of FNL could not have been sufficient for her to be singled out as a member of the party within the massive crowd gathered. Thus, for the Immigration Service, the author's allegations rested only upon her allegation that, on 13 July 2010, having escaped from her village, police officers had come to arrest her and her husband, without indicating why they were searching for them, nor how they had learned that the author had found refuge in Kibenga. The Immigration Service further stressed that the author's allegations that she had been threatened and beaten a couple of times on her way from work could not be taken into account, given that she did not know the identity of her aggressors. Lastly, the Immigration Service gave no weight to her allegations that she had been raped by three men. The Immigration Service took note that the author had said that her aggressors had not chosen her for any particular reason. The Immigration Service also emphasized that the author had been

³ The author was questioned about this fact by the Immigration Service. She explained that her new identity card stated that she was unmarried because it was a duplicate of her previous identity card that she had obtained before her wedding. Moreover, she attaches a marriage certificate to her communication.

an ordinary member of FNL, performing limited and subordinated tasks. As such, the Immigration Service concluded that she would not risk persecution in Burundi.

2.11 The author further submits that, on 29 September 2011, the Refugee Appeals Board confirmed the decision of the Immigration Service,⁴ reiterating that the author's activities in FNL had been of limited importance. It also noted that there was no evidence that the rape of the author had been motivated by her membership of FNL. The Board added that it was unlikely that the police inquiry in Kibenga had been made with the purpose of arresting the author. Moreover, it noted that the author's husband had been responsible for collecting funds for FNL, which did not mean that the author herself would be persecuted as a result of his activities. While the Board did not deny that the author's house had been hit by a grenade in May 2010, it noted that there was no evidence that the author and her husband had been the targets. Moreover, it considered that the threats and harassment suffered by the author were not of such intensity and character to justify an asylum request, concluding that the author had failed to establish that she would face a real risk of persecution upon her return to Burundi.

2.12 The author maintains that she has exhausted all domestic remedies, given that the decisions of the Refugee Appeals Board are final.

Complaint

3. The author claims that her deportation to Burundi would violate articles 1, 2 (c), 2 (d) and 3 of the Convention, given that she was raped by three men in Burundi before she fled owing to political persecution by the Burundian authorities and, as a woman, could be subjected to rape or other forms of bodily harm upon her return.⁵

State party's observations on admissibility and the merits

4.1 In its submission of 3 April 2012, the State party challenges the admissibility of the communication. It submits that, in her asylum application, the author claimed that she was an ethnic Hutu and a Protestant who was persecuted as a member of FNL.

4.2 The State party notes that the author has never been arrested or imprisoned, that her house has never been searched and that, unlike her husband, she has never held a formal position in FNL. The State party acknowledges that, in April 2010, the author's family received threats and that, in May 2010, a grenade was thrown at the family home when the family was not present. Following the elections in July 2010, the Government of Burundi shelled the author's home town, after which she fled. On her way to Kibenga, she was raped by three armed men. The author did not know their motives or identity.

⁴ When a case is processed according to the "normal procedure", an appeal against a decision by the Immigration Service to reject an application for asylum is automatically filed with the Refugee Appeals Board.

⁵ The author underlines the fact that, even if the Immigration Service had doubts about her credibility, the Refugee Appeals Board accepted her rape as a fact. She also cites the 2010 annual report on Burundi by Amnesty International, in which it is stated that "levels of rape and other sexual violence against women and girls remain high".

4.3 The State party submits that the Refugee Appeals Board accepted the author's evidence, including her involvement in FNL activities, but found that the author's political activities were of limited nature. The Board found no evidence that the rape committed by three unknown men related to her FNL activities. The Board further found no basis to assume that the purpose of the police inquiry in Kibenga, at the house where the author was staying, was to apprehend her.

4.4 The State party submits that, according to section 7 (2) of the Aliens Act, a residence permit will be issued to an applicant if the applicant is at risk of the death penalty or of being subjected to torture or inhuman or degrading treatment or punishment should he or she return to his or her country of origin. The conditions for such residence permit are met if the individual factors render it probable that the asylum seeker runs a real risk of torture should he or she return.

4.5 The State party submits that such an assessment is made by the Refugee Appeals Board, which makes a decision on the basis of all relevant evidence, including information on the situation in the asylum seeker's country of origin. For this purpose, the Board has a comprehensive collection of general background material on the situation in the countries from which the State party receives asylum seekers. The State party further submits that the Board makes its decisions in accordance with the international obligations of Denmark.

4.6 The State party submits that the return of the author to Burundi will not lead to a violation of the provisions of the Convention, as claimed by the author. It contends that the communication should be declared inadmissible *ratione loci* and *ratione materiae* under article 2 and article 4 (2)(b) of the Optional Protocol. The State party further submits that the alleged violations in the author's complaint relate to Burundi⁶ and not to Denmark. The State party argues that the Committee lacks jurisdiction over the relevant violations in respect of Denmark and, therefore, the communication is incompatible with the provisions of the Convention. The author's claims are based not on any treatment that she will suffer at the hands of the State party, but on consequences that she may suffer if she is returned to Burundi. The decision to return the author to Burundi cannot trigger the State party's responsibility under articles 1, 2 (c), 2 (d) and 3 of the Convention.

4.7 The State party submits that the concept of jurisdiction for the purposes of article 2 of the Optional Protocol must be considered within the general meaning of the term in public international law. Thus, the words "under the jurisdiction of a State party" must be understood to mean that a State's jurisdictional competence is primarily territorial and that State jurisdiction is presumed to be exercised throughout its territory. Only in exceptional circumstances can certain acts of a State party produce effects outside its territory, triggering its responsibility ("extraterritorial effect"). The State party submits that no such exceptional circumstances exist in this case.

4.8 The State party further submits that there is no jurisprudence by the Committee that indicates that the provisions of the Convention have extraterritorial effect. The State party submits that the European Court of Human Rights has in past decisions stressed the exceptional character of extraterritorial protection of the rights contained in the European Convention for the Protection of Human Rights

⁶ Burundi is a State party to the Convention and has signed but not ratified the Optional Protocol.

and Fundamental Freedoms (European Convention on Human Rights).⁷ The Human Rights Committee has similar jurisprudence, where it has found on a number of occasions that the deportation of individuals by States parties to other countries would result in the foreseeable violation of their right to life, as set out in article 6 of the International Covenant on Civil and Political Rights, or their right to be protected against torture, as set out in article 7 of the Covenant. The State party further submits that the Human Rights Committee has never considered a complaint on its merits regarding the deportation of a person who feared less serious human rights violations. In this context, the State party points out that the provisions of the Convention do not deal with questions of torture or other serious threats to the life and security of the person.

4.9 The State party submits that, under the Committee's general recommendation No. 19, gender-based violence is a form of discrimination that could impair or nullify the enjoyment by women of their human rights and fundamental freedoms, such as the right to life and the right not to be subjected to torture. The State party argues that it is responsible only for obligations vis-à-vis individuals under its jurisdiction and cannot be held responsible for discrimination in another country. Returning a person who comes to the State party simply to escape from discriminatory treatment in her own country, however objectionable that treatment may be, cannot constitute a violation of the Convention by that State party.

4.10 The State party further submits that the communication should be declared inadmissible under article 4 (1) of the Optional Protocol for non-exhaustion of domestic remedies. The State party contends that the author failed to raise any allegations of sex-based discrimination before the Immigration Service or the Refugee Appeals Board. Consequently, domestic authorities have not had an opportunity to deal with the author's allegations regarding sex-based discrimination. According to the Committee's established jurisprudence, the author must have raised the claim in domestic proceedings before bringing it to the Committee to consider.⁸ While the author may not have to refer to specific provisions of the Convention, she must at a minimum have made specific claims regarding the alleged discrimination.

4.11 The State party further submits that the author's claims are not substantiated. Instead of explaining which specific right granted by the Convention has been violated, the author simply refers to articles 1, 2 (c), 2 (d) and 3. The author also mentions article 14, which concerns problems of women in rural areas, in addition to the significant roles that rural women play in the economic survival of their families. According to the State party, article 14 is not relevant in the circumstances.

Author's comments on the State party's submission

5.1 The author provided comments on the State party's observations on admissibility and the merits on 20 June 2012. She submits that, since the issue of extraterritorial effect has not been considered by the Committee, the Committee should decide on the issue and confirm the extraterritorial application of the provisions of the Convention.

⁷ The State party refers to the judgement of the Court in *Soering v. the United Kingdom*, application No. 14038/88.

⁸ The State party refers to communication No. 8/2005, *Kayhan v. Turkey*, decision dated 27 January 2006, para. 7.7.

5.2 The author submits that the Committee, through its general recommendations Nos. 12 and 19, has provided significant guidance on issues of violence against women. More importantly, the Committee has concluded in several cases that State parties have a “positive obligation” to provide effective protection with regard to the right to security of the person⁹ and the Committee has dealt with several cases involving gender-related crimes, especially rape.¹⁰ The author further submits that rape committed in wartime can amount to a crime against humanity or a form of torture.

5.3 The author submits that the questions of positive obligations by the State party and the extraterritorial effect of the provisions of the Convention have been raised before the Committee in previous cases. In communication No. 26/2010, the Government of Canada argued against the extraterritorial effect of the Convention. The communication was, however, considered inadmissible for other reasons and the Committee therefore never reached a conclusion on the extraterritorial applicability of the Convention.

5.4 The author submits that, under the Convention, the State party must not only prosecute violations such as rape and other forms of gender-specific violence, but also protect women on its territory against deportation to a third country where women cannot receive such protection. The extraterritorial effect of the Convention can be invoked, in the author’s opinion, when violations are gender-specific crimes against humanity and/or torture. In such instances, States parties cannot deport women to such countries, given that to do so would be to act in breach of the Convention.

5.5 The author submits that the State party lacks the most up-to-date information on the human rights situation in Burundi. According to the author, political violence is increasing, as is impunity for its perpetrators, including members of youth militias. She refers to reports about extrajudicial killings in Burundi¹¹ and alleges that, during what she terms the “Ruziba massacre” in July 2010, the army sent combat helicopters and troops to Ruziba to arrest the killers of two members of the ruling party.¹² The author further refers to two reports by Amnesty International on the issue of rape in Burundi¹³ and notes that, in its 2010 annual report, Centre Seruka reported that “at least 1,397 women ha[d] been raped in Bujumbura and the surrounding area”. The author also submits that the universal periodic review of Burundi in 2008/09 cited crimes against humanity, rape and violence against women. The Committee against Torture, in its 2007 report on Burundi, also referred to “rape as a crime against humanity”. The Committee on the Elimination of Discrimination against Women addressed the same issue in its 2008 report.¹⁴

⁹ The author refers to communication No. 2/2003, *A. T. v. Hungary*, para. 9.3.

¹⁰ The author refers to communication No. 18/2008, *Vertido v. Philippines*.

¹¹ The author refers, among others, to a May 2010 report by Human Rights Watch, entitled “We’ll tie you up and shoot you”, and to a report by the Special Representative of the Secretary-General for Liberia, Karin Landgren.

¹² No further detail or an explanation is provided by the author.

¹³ The author refers to a 2004 report entitled “Burundi: rape — the hidden human rights abuse” and a 2007 report entitled “Burundi: no protection from rape in war and peace”, both by Amnesty International.

¹⁴ CEDAW/C/BDI/CO/4.

5.6 The author refutes the State party's statement that the present communication does not constitute exceptional circumstances such as to trigger the extraterritorial application of the Convention. She reiterates that she was raped by a group of men, whom she believed were members of the Imberakure youth militia supported by the ruling party, and that she fears being subjected to the same treatment if she is returned to her country of origin. The author fears being imprisoned and raped while in custody by prison guards and being unable to report such crimes to the police because of the prevailing impunity for rape perpetrators in Burundi.

5.7 The author submits that the fact that the Committee decided to request interim measures appears to indicate the exceptional character of the present communication. She also contends that the extent of her fear of rape upon return pertains to the merits of the case and not its admissibility.

5.8 The author further refutes the State party's claim that she did not exhaust domestic remedies. The issue of gender-based violence was indeed raised during the proceedings before the Immigration Service and the Refugee Appeals Board. She explained to the Board that her home town of Ruziba had been attacked and members of FNL had fled or been killed. She also told the Board that she had been raped by three men, whom she thought were members of the militia affiliated with the ruling party, but that she had no proof of that. The author therefore argues that the communication should be considered admissible under article 4 (1) of the Optional Protocol.

5.9 The author further submits that her claims are well substantiated, contrary to the State party's assertions. The State party appears to be of the opinion that "rape is just something that a woman has to suffer in situations of conflict in Africa" and that women cannot be subjected to political persecution. Lastly, the author clarifies that she alleged a violation of article 12 of the Convention, not article 14, given that she has been experiencing mental suffering in the aftermath of the rape and fears that she may have been infected with HIV/AIDS.

State party's additional observations

6.1 On 27 August 2012, the State party informed the Committee that the Refugee Appeals Board had submitted an additional opinion regarding the author's communication. In that opinion, the Board, referring to its decision of 29 September 2011,¹⁵ states that its collection of background material on the situation in the countries from which the State party receives asylum seekers is published on its website and updated regularly, meaning that it is accessible to members of the Board and parties to the case. The relevant material is also directly sent to the parties, including counsel assigned to the asylum seeker, before Board hearings. When the Board rendered its decision on 29 September 2011, the Board members were therefore acquainted with the situation in Burundi. The Board carried out research for background material, including reports referred to by the author, which it took into account when deciding on the appeal.

6.2 Regarding the author's allegations before the Committee of rape by members of the Imberakure youth militia,¹⁶ the State party notes a contradiction with her allegations during asylum proceedings. When specifically asked whether the rape

¹⁵ See para. 2.11 above.

¹⁶ See para. 5.6 above.

related to her membership of FLN, the author had replied in the negative,¹⁷ later reporting during the Board hearing of 29 September 2011 that she did not know the perpetrators. The State party reiterates that at no time during the domestic proceedings did the author assert that the rape was an instance of politically motivated persecution.

6.3 Concerning interim measures of protection granted by the Committee, the State party submits that these are interim procedural measures comparable to those requested by other treaty-based committees and other international procedures and that the use of such measures does not imply that the Convention has been breached in a specific case, nor can it be interpreted to establish that the Convention has extraterritorial effect.¹⁸

6.4 With regard to the author's argument that the State party recognizes only political persecution against men, the State party indicates that the Refugee Appeals Board has assessed the author's own circumstances, including her political activities and situation vis-à-vis her spouse's political activities, as part of a comprehensive assessment in case of return to Burundi. The State party also reiterates the view of the Board that the grenade attack of May 2010 was apparently not directed against the author or her spouse.

6.5 The State party reiterates that, in its decision of 29 September 2011, the Refugee Appeals Board determined that the author would not be at risk of assault in case of return to Burundi. That assessment took into account the relevant national and international sources of law by which the Board is bound when making its decisions.¹⁹

6.6 Regarding the question of extraterritoriality, and the author's argument that the prohibition of certain crimes by the State party, such as crimes against humanity and torture, has granted extraterritorial effect, the State party submits that the Convention does not deal with such crimes. While it does not dispute that violence against women in the form of rape can amount to ill-treatment, the State party submits that the Convention does not encompass removal to torture or other serious threats to life and the security of the person, whether directly or indirectly. The author can therefore bring a communication concerning the State party only with regard to alleged violations of the Convention committed by and under the jurisdiction of the State party, even if the author can establish that she would be subjected to discrimination contrary to the Convention owing to gender-based violence in Burundi.²⁰ Referring to two recent decisions adopted by the Committee,²¹ the State party invites the Committee to express its view on the issue of the extraterritorial application of the Convention.

6.7 As to the question of exhaustion of domestic remedies, the State party maintains that the author failed to invoke the Convention during domestic proceedings. Consequently, it reiterates that domestic remedies have not been exhausted.

¹⁷ The State party refers to the report of her second interview on 14 April 2011.

¹⁸ The State party later refers to article 5 (2) of the Optional Protocol in this regard.

¹⁹ The State party refers to the European Convention on Human Rights, the Convention against Torture and the International Covenant on Civil and Political Rights.

²⁰ The State party refers to the Committee's general recommendation No. 19.

²¹ Communication No. 25/2010, *M. P. M. v. Canada*, and communication No. 26/2010, *Herrera Rivera v. Canada*.

6.8 With regard to the invocation by the author of article 12 of the Convention, rather than article 14, the State party reiterates that, just as the other provisions of the Convention, the article cannot be considered to have extraterritorial effect. The State party adds that there is no obligation under the Convention not to return aliens to countries in which health conditions are not in accordance with the Convention.²²

6.9 Lastly, the State party reiterates to the Committee that, should it declare the communication admissible, it should determine, on the merits, that the decision to return the author to Burundi does not constitute a violation of the Convention.

Author's comments on the State party's additional observations

7.1 On 20 September 2012, the author submits that one of the reports used by the State party as background information on the situation in Burundi was dated 1 May 2010,²³ whereas the author escaped from events that took place from the middle of May 2010 (when her house was hit by a grenade) to the summer of 2010 (the election period). Consequently, the information used by the State party falls short of properly reflecting the author's situation, including the massacre that took place in July 2010 in her home town and that targeted her and other members of the opposition in the area. The author reiterates that no relevant background information was used in her case before the Refugee Appeals Board.

7.2 Second, the author clarifies that the fact that she replied in her interview before the Refugee Appeals Board that she did not know her attackers²⁴ does not mean that she was approached only by coincidence, but rather that she did not know the identity of her aggressors. She reiterates that she was under the clear impression that her aggressors had participated in the violent attack against her town. After raping her, one of the offenders wanted to kill her, but another member of the group intervened, claiming that what they had done to her was "worse than death". The men then allowed her to go. The author adds that that approach is a means of spreading terror among female members of the opposition, so as to deter further political activism.

7.3 The author also reiterates that, while she is unaware whether her attackers were members of the Imberakure militia, they were supporters of the Government of Burundi. She rejects the State party's contention that she did not qualify the rape as politically motivated²⁵ and repeats that she has no doubt that the offenders were supporters of the Government.

7.4 Regarding domestic remedies, the author admits that she did not invoke the Convention itself before domestic jurisdictions, given that the pleadings mainly aimed at clarifying facts and determining the author's credibility. Nonetheless,

²² The State party refers to the European Court of Human Rights judgement in *N. v. the United Kingdom*, application No. 26565/05, in which the Court held that health-care considerations in a deportation case did not entail a violation of article 3 of the European Convention on Human Rights. The State party holds that it would a fortiori not be the case for the Convention on the Elimination of All Forms of Discrimination against Women, which does not deal with removal to torture or other serious threats to the life and security of the person, whether directly or indirectly.

²³ Human Rights Watch, "We'll tie you up and shoot you", 1 May 2010.

²⁴ The author claims that the Board's question was deliberately confusing and was phrased as follows: "Did you know them [the attackers] or were they there by coincidence?"

²⁵ See para. 6.2 above.

during the oral hearing, she raised a number of human rights provisions and international human rights standards.

7.5 Lastly, the author regrets that the State party claims that it reserves the right to submit further observations concerning the merits of the communication. According to the author, by delaying the case further, the State party is holding the author “hostage” as an asylum seeker, whereby she is forced to live in an asylum camp with no possibility of working and pursuing normal activities. She adds that she is in a bad condition²⁶ and requests the Committee to decide on her case as soon as possible.

Issues and proceedings before the Committee concerning admissibility

8.1 In accordance with rule 64 of its rules of procedure, the Committee must decide whether the communication is admissible under the Optional Protocol to the Convention. Pursuant to rule 66, the Committee may examine the admissibility of the communication separately from the merits.

8.2 In accordance with article 4 (2) of the Optional Protocol, the Committee is satisfied that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

8.3 The Committee takes note of the author’s claims that her deportation to Burundi would violate articles 1, 2 (c), 2 (d) and 3 of the Convention, given that she was raped by three men in Burundi before she fled the country owing to political persecution, and of her fears that she may be subjected to rape or other forms of bodily harm upon being returned to Burundi. The Committee takes note of the State party’s allegation that the author failed to raise any right protected under the Convention and to submit any allegation of gender-based discrimination before the Immigration Service or the Refugee Appeals Board. The Committee recalls that, under article 4 (1) of the Optional Protocol, authors must use the remedies in the domestic legal system that are available to them. It also recalls its jurisprudence, according to which the author must have raised in substance at the domestic level the claim that he or she wishes to bring before the Committee²⁷ so as to enable domestic authorities and/or courts to have an opportunity to deal with such a claim.²⁸ In this regard, the Committee observes that the author’s asylum application before the Immigration Service, and related interview reports, indicate that the author raised as ground in support of her application for a residence permit only the fact that she feared being killed or imprisoned by the Government if she returned to Burundi, given that the regime persecuted all members of FNL. She referred to her membership of an opposition party as the reason for being wanted in her country of origin.²⁹ The Committee further observes that even the alleged rape was not raised as a ground per se in support of her application for asylum. Instead, during the asylum interviews, when questioned about the alleged rape, the author stated that she did not know the identity of the perpetrators, nor why they had raped her in particular, and added that she believed that it was coincidental that she had been

²⁶ The author provides no additional details.

²⁷ See communication No. 8/2005, *Kayhan v. Turkey*, decision of 27 January 2007, para. 7.7.

²⁸ See *N. S. F. v. United Kingdom of Great Britain and Northern Ireland*, communication No. 10/2005, decision of 30 May 2007, para. 7.3.

²⁹ Report of 13 December 2010 of the author’s asylum interview before the State party’s Immigration Service.

raped. She also replied in the negative to a question as to whether the rape related to her membership of FNL.³⁰ Consequently, the State party's authorities clearly had no opportunity to consider her gender-based allegations, which are at the heart of her communication before the Committee, and were therefore deprived of the opportunity to examine such claims. Accordingly, the Committee finds the present communication inadmissible under article 4 (1) of the Optional Protocol.

8.4 Having found the communication inadmissible under article 4 (1) of the Optional Protocol, the Committee need not, in principle, examine the additional inadmissibility grounds invoked by the State party. The Committee wishes, nonetheless, to address the issue of State parties' responsibilities under the Convention in situations in which a State party extradites, deports, expels or otherwise removes an individual to a country where he or she claims that he or she would suffer a violation of his or her rights under the Convention. In connection with the present communication, the State party disputes the applicability of the Convention in such circumstances.

8.5 Under article 2 of the Optional Protocol to the Convention, "communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State party, claiming to be victims of a violation of any of the rights set forth in the Convention by that State party". The Committee recalls that it indicated in its general recommendation No. 28 that the obligations of States parties applied without discrimination both to citizens and non-citizens, including refugees, asylum seekers, migrant workers and stateless persons, within their territory or effective control, even if not situated within the territory. States parties are "responsible for all their actions affecting human rights, regardless of whether the affected persons are in their territories".³¹

8.6 The Committee recalls that article 1 of the Convention defines discrimination against women as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment, or exercise by women ... of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field". The Committee further recalls its general recommendation No. 19, which has clearly placed violence against women within the ambit of discrimination against women by stating that gender-based violence is a form of discrimination against women and includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. With regard to the State party's argument that, unlike other human rights treaties, the Convention does not deal, directly or indirectly, with removal to torture or other serious threats to the life and security of a person, the Committee recalls that, in the same recommendation, it also determined that such gender-based violence impaired or nullified the enjoyment by women of a number of human rights and fundamental freedoms, which included the right to life, the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, the right to liberty and security of the person and the right to equal protection under the law.

8.7 The Committee further notes that, under international human rights law, the principle of non-refoulement imposes a duty on States to refrain from returning a

³⁰ Report of the author's second interview, dated 14 April 2011.

³¹ General recommendation No. 28, on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, para. 12.

person to a jurisdiction in which he or she may face serious violations of human rights, notably arbitrary deprivation of life or torture or other cruel, inhuman or degrading treatment or punishment. The principle of non-refoulement also constitutes an essential component of asylum and international refugee protection.³² The essence of the principle is that a State may not oblige a person to return to a territory in which he or she may be exposed to persecution, including gender-related forms and grounds of persecution. Gender-related forms of persecution are forms of persecution that are directed against a woman because she is a woman or that affect women disproportionately. An explicit non-refoulement provision is contained in article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which prohibits the removal of a person to a country where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. Obligations under the International Covenant on Civil and Political Rights, as interpreted by the Human Rights Committee in its jurisprudence,³³ also encompass the obligation of States parties not to extradite, deport, expel or otherwise remove a person from their territory where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by article 6, on the right to life, and article 7, on the right to be free from torture or other cruel, inhuman or degrading treatment or punishment, of the Covenant, in the country to which the person will, or may subsequently, be removed.³⁴

8.8 The absolute prohibition of torture, which is part of customary international law, includes, as an essential corollary component, the prohibition of refoulement to a risk of torture, which entails the prohibition of any return of an individual where he or she would be exposed to a risk of torture. The same holds true for the prohibition of arbitrary deprivation of life. Gender-based violence is outlawed under human rights law, primarily through the prohibition of torture and other cruel, inhuman or degrading treatment or punishment. The Committee against Torture, in its general comment No. 2, has explicitly situated gender violence and abuse within the scope of the Convention against Torture.³⁵

8.9 As to the State party's argument that nothing in the Committee's jurisprudence indicates that any provisions of the Convention have extraterritorial effect, the

³² See article 33 (prohibition of expulsion or return ("refoulement")) of the Convention relating to the Status of Refugees.

³³ See, for example, communication No. 470/1991, *Kindler v. Canada*, views adopted on 30 July 1993, para. 6.2.

³⁴ See general comment No. 20 of the Human Rights Committee, on article 7 (prohibition of torture or cruel, inhuman or degrading treatment or punishment), para. 9 ("States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement"); and general comment No. 31 of the Human Rights Committee, on the nature of the general legal obligation imposed on States parties to the Covenant, para. 12.

³⁵ CAT/C/GC/2, para. 18. See also Human Rights Committee, communication No. 1465/2006, *Kaba v. Canada*, views adopted on 25 March 2010. It is also worth noting that the European Court of Human Rights and the Inter-American Commission on Human Rights have found instances of rape of detainees to be tantamount to acts of torture. In addition, "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity" constitutes a crime against humanity under the Rome Statute of the International Criminal Court and "rape" constitutes a crime against humanity under the statutes of the international criminal tribunals for the Former Yugoslavia and Rwanda.

Committee recalls that, under article 2 (d) of the Convention, States parties undertake to refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation. This positive duty encompasses the obligation of States parties to protect women from being exposed to a real, personal and foreseeable risk of serious forms of gender-based violence, irrespective of whether such consequences would take place outside the territorial boundaries of the sending State party: if a State party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that that person's rights under the Convention will be violated in another jurisdiction, the State party itself may be in violation of the Convention. For example, a State party would itself be in violation of the Convention if it sent back a person to another State in circumstances in which it was foreseeable that serious gender-based violence would occur.³⁶ The foreseeability of the consequence would mean that there was a present violation by the State party, even though the consequence would not occur until later. What amounts to serious forms of gender-based violence will depend on the circumstances of each case and would need to be determined by the Committee on a case-by-case basis at the merits stage, provided that the author had made a prima facie case before the Committee by sufficiently substantiating such allegations. In the present case, the author failed to sufficiently substantiate her allegations for purposes of admissibility and the Committee need not examine them further.

9. The Committee therefore decides:

(a) That the communication is inadmissible under article 4 (1) of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.

[Adopted in Arabic, Chinese, English, French, Russian and Spanish, the English text being the original version.]

³⁶ See *Kindler v. Canada*, footnote 35 above.

Appendix

Individual opinion (dissenting) by Committee member Ms. Dubravka Šimonović, joined by Ms. Ruth Halperin-Kaddari, Ms. Violeta Neubauer and Ms. Silvia Pimentel

1. At its meeting on 26 July 2013, the Committee on the Elimination of All Forms of Discrimination against Women decided to rule communication No. 35/2011 inadmissible under article 4 (1) of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women for non-exhaustion of domestic remedies. In the communication, the author, whose application for asylum had been rejected, claims that the State party violated articles 1, 2 (c), 2 (d) and 3 of the Convention, given that she was raped by three men in Burundi before she fled the country owing to political persecution, and voices her fears that she may be subjected to rape or other forms of bodily harm upon being returned to Burundi.

2. The majority of the Committee is of the view that the author's complaint is inadmissible for non-exhaustion of domestic remedies under article 4 (1). This inadmissibility ground under the Committee's jurisprudence includes the obligation of the author to raise in substance at the domestic level the claim that she wishes to bring before the Committee so as to enable the domestic authorities and/or courts to have an opportunity to deal with such claim.¹ In the present case, the Committee observed that "the alleged rape was not raised as a ground per se in support of her application for asylum" and concluded "that the State party's authorities clearly had no opportunity to consider her gender-based allegations, which are at the heart of her communication before the Committee, and were therefore deprived of the opportunity to examine such claims" (para. 8.3).

3. I disagree with the Committee and hold the view that the communication is admissible. Article 4 (1) of the Optional Protocol stipulates that "the Committee shall not consider a communication unless it has ascertained that all available domestic remedies have been exhausted unless the application of such remedies is unreasonably prolonged or unlikely to bring effective relief". The State party has referred to the fact that the author's asylum claim was examined by the Immigration Service and the Refugee Appeals Board. Given that the State party did not refer to any other tribunal to which she may file an appeal against this decision, it should be concluded that the author has exhausted all procedurally available domestic remedies. The State party objected to admissibility for the reason of non-exhaustion of domestic remedies, recalling that, according to the Committee's jurisprudence, the author needs to raise any allegations of sex-based discrimination at the domestic level. The State party contends that the author failed to raise any allegations of sex-based discrimination before the Immigration Service or the Refugee Appeals Board and that the State party's authorities therefore had no opportunity to deal with her allegations regarding sex-based discrimination.

4. The pertinent question in the present case is whether the author raised sex-based discrimination, whether intersecting other grounds of persecution or alone, as the basis for her claim during the asylum procedure. That the author mentioned

¹ See *N. S. F. v. United Kingdom of Great Britain and Northern Ireland*, communication No. 10/2005, decision of 30 May 2007, para. 7.3.

during her asylum proceedings that she fled Burundi owing to political persecution, and that she had been raped by three men while fleeing, should be sufficient for the State party to consider rape to be a form of discrimination against women and gender-related persecution, whether alone or intersecting with alleged political persecution. The author should not be required to make explicit reference to rape as a form of discrimination against women but to raise the substance of her claim, which is what she did. Sexual violence and rape is universally accepted as a form of gender-based violence against women and a form of discrimination against women falling under article 1 of the Convention, as elaborated in the Committee's general recommendation No. 19, which has clearly placed violence against women within the ambit of discrimination against women by stating that gender-based violence is a form of discrimination against women and includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.

5. In fact, for the purpose of admissibility, the author needs to sufficiently substantiate that she has a well-founded fear of being persecuted under the 1951 Convention relating to the Status of Refugees (Refugee Convention). She did this by explaining facts relating to her political persecution as a member of the Front national de libération (FNL), the opposition party, whose members were expelled and killed; that her home town, where many FNL members lived, was bombarded by the Government of Burundi (see para. 4.2); that she was raped by three men armed with knives while she was fleeing; and that she was unable to seek justice because the attack by government forces.

6. Furthermore, the State party also submitted that it assessed and rejected "the author's argument that the State party recognizes only political persecution against men" (para. 6.4.). This claim of the author and the assessment of the State party present clear evidence that the author raised in substance a claim of sex-based discrimination relating to political persecution at the national level.

7. Consequently, the State party's authorities had an opportunity to consider sex-based discrimination with regard to political persecution and to rape as a form of sexual violence that is recognized as a form of gender-related persecution and as a form of discrimination against women, together or separately. Accordingly, I find the present communication admissible under article 4 (1) of the Optional Protocol.

8. I support the Committee's findings on the admissibility *ratione loci* with regard to article 2 of the Optional Protocol (paras. 8.5-8.8). In addition, I find it also admissible *ratione materiae* under article 4 (2)(b). This case is also admissible under articles 4 (2)(c) and 4 (2)(d), given that it is compatible with the provision of the Convention that addresses sex-based or gender-based discrimination. In the present case, I find that the author has sufficiently substantiated her allegations for the purpose of admissibility.

9. With regard to violations of articles 1, 2 (c), 2 (d) and 3 of the Convention, I find violations of articles 2 (c) and 2 (d), in conjunction with articles 1 and 3, by the State party. Article 2 (c) establishes a positive duty of States parties to ensure the effective protection of women against any act of discrimination, while article 2 (d) requires States parties to refrain from engaging in any act or practice of discrimination during the entire asylum process. This applies in respect of both the substantive analysis and application of the provisions of the Convention on the Elimination of All Forms of Discrimination against Women and of the Refugee

Convention. A gender-sensitive approach should be applied at every stage of the asylum process under the latter instrument, which defines a refugee in article 1A(2) as someone who has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. A State party must interpret that definition in line with the obligations of non-discrimination against women and substantive equality under article 2 (a) of the Convention on the Elimination of All Forms of Discrimination against Women. States parties are required also to ensure that each of five grounds enumerated in the Refugee Convention is given a gender-sensitive interpretation. Persecution, while not defined in the Refugee Convention, is widely understood to refer to threats to one's life or freedom, serious human rights violations or other serious harm.² Such other serious human rights violations and harm would include those proscribed by the Convention on the Elimination of All Forms of Discrimination against Women, including rape as a serious violation of women's human rights.

10. Under article 2 (c) of the Convention on the Elimination of All Forms of Discrimination against Women, a State party must establish legal protection of the rights of women on an equal basis with men and ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination. This means, in the present case, that the author's request for asylum on grounds of sexual violence and political persecution should be determined by an asylum system that has a thorough understanding of the particular forms of persecution and human rights abuses that women and girls experience because of their sex or gender.

11. With regard to the author's political persecution, the State party submitted "that the Refugee Appeals Board accepted the author's evidence, including her involvement in FLN activities, but found that the author's political activities were of limited nature" (para. 4.3) and "assessed that the author would not be at risk of assault in case of return to Burundi" (para. 6.5). Based on such formal categorization of the author's political activities as of limited nature, the State party ignored that fact that women are, in general, underrepresented at the high level of political parties and that women's political activity may not always look like male political activity or may not be equally valued in the male-dominated political environment. The State party's authorities also failed to assess in a non-discriminatory manner the risk of the author's future political persecution or gender-related persecution or whether the author could benefit from State protection, taking into account all relevant facts relating to her claim of political persecution and sexual violence, i.e. that members of FLN, including the author, were attacked, killed or imprisoned by government forces; that her house was the subject of a grenade attack; that the police were asking for the author and her husband (para. 2.6); that her former neighbours who were members of the Conseil national pour la défense de la démocratie had promised to kill her if she returned home; that she was raped by three men armed with knives and that out of fear she did not report the events to the police "given that she was trying to hide from them" (para. 2.4); and that she feared that she might be subjected to rape and other bodily harm upon being returned to Burundi.

² See the Guidelines on International Protection: gender-related persecution within the context of article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (HCR/GIP/02/01).

12. Under article 2 (c) of the Convention, States parties must ensure that women are not discriminated against and that gender-related forms and grounds of persecution are addressed during the asylum procedure. Gender-related forms of persecution are those that are directed against a woman because she is a woman or that affect women disproportionately. Gender-related claims to asylum may intersect with other proscribed grounds of persecution, such as membership of a particular social group or political opinion. In refugee status determination proceedings, the author has to provide relevant factual information, while the decision maker should ask further relevant questions and apply this information to the legal framework. As such, it should not be incumbent upon the asylum seeker to use in her asylum claim words such as “discrimination based on sex” and/or “gender-related persecution”. Rather, the asylum seeker should provide facts or substantiate her claim with regard to discrimination based on sex and/or gender-related persecution. The author did this and that should be sufficient for the State party to assess her claim fully in respect of those aspects.

13. Under articles 2 (c) and 2 (d), the State party should also put in place asylum procedural safeguards to ensure that women’s claims are properly heard and assessed, especially because women may not know the motivation or reasons for the acts perpetrated against them, or the identity of their perpetrators, as in the present case. In refugee status determination proceedings, because of the particular vulnerability of asylum seekers, the burden of proof is to be shared between the examiner and the asylum seeker.³ It should be noted that there are discrepancies between the facts as presented by the State party and the facts as presented by the author. For example, the State party submits that “the Board found no evidence that the rape committed by three unknown men related to her FNL activities” (para. 4.3) and “that at no time during the domestic proceedings did the author assert that the rape was an instance of politically motivated persecution” (para. 6.2). On the other hand, the author submits that she “told the Board that she had been raped by three men, whom she thought were members of the militia affiliated with the ruling party, but that she had no proof of that” (para. 5.8). She also claims that “the State party appears to be of the opinion that ‘rape is just something that a woman has to suffer in situations of conflict in Africa’ and that women cannot be subjected to political persecution” (para. 5.9). The author also further clarifies (para. 7.2) that:

The fact that she replied in her interview before the Refugee Appeals Board that she did not know her attackers does not mean that she was approached only by coincidence, but rather that she did not know the identity of her aggressors. She reiterates that she was under the clear impression that her aggressors had participated in the violent attack against her town. After raping her, one of the offenders wanted to kill her, but another member of the group intervened, claiming that what they had done to her was ‘worse than death’. The men then allowed her to go. The author adds that that approach is a means of spreading terror among female members of the opposition, so as to deter further political activism.

³ See Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (January 1992 — re-edited) (HCR/IP/4/Eng/REV.1), paras. 190 and 196.

14. The author also reiterates that, while she is unaware whether her attackers were members of the Imberakure militia, they were supporters of the Government of Burundi. She rejects the State party's contention that she did not qualify the rape as politically motivated and repeats that she has no doubt that the offenders were supporters of the Government (para. 7.3).

15. The rape as described by the author (by three men armed with knives) was not disputed as such by the State party, but the State party did dispute that such rape in such circumstances constituted a separate or intersecting ground for gender-related persecution under the Refugee Convention and sex-based discrimination against women under the Convention on the Elimination of All Forms of Discrimination against Women. Rape is the most notorious form of sexual violence directed against women because of their sex or gender. It constitutes a gender-related form of persecution under the Refugee Convention and sex/gender-based discrimination and violence against women under the Convention on the Elimination of All Forms of Discrimination against Women. Rape is considered to be brutal when it is gang rape, such as in the present case, but was completely neglected by the State party. Rape inflicts severe mental and physical pain and suffering and is also tearing apart social units. For that reason, it has been acknowledged as a particularly effective tool of genocide,⁴ as a crime against humanity, as a war crime and as a human rights violation.⁵ Rape has been used as a form of persecution by State and non-State actors and various country guidelines on refugee claims specifically list rape and fear of rape as a form of persecution.⁵

16. In the present case, the State party found the gang rape perpetrated by three men armed with knives unrelated to the author's asylum claim and ignored its links with the overarching violence and impunity created by the conflict when it occurred. In so doing, the State party failed to adequately consider the environment surrounding the rape, including impunity for the crime. The State party failed to recognize the rape of the author as a separate or intersecting form of gender-related persecution and sex-based discrimination. In so doing, it failed to afford the author protection under the Convention on the Elimination of All Forms of Discrimination against Women and to exercise its positive duty to protect the author from being exposed to a real, personal and foreseeable risk of serious forms of gender-based violence if returned to Burundi.

[Done in English. Subsequently to be issued also in Arabic, Chinese, French, Russian and Spanish.]

⁴ See *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, October 1998, International Criminal Tribunal for Rwanda, para. 731.

⁵ See Valerie Oosterveld, "Women and girls fleeing conflict: gender and the interpretation and application of the 1951 Refugee Convention", September 2012, p. 21. Available from www.refworld.org/docid/504dcb172.html.