



International Covenant on Civil and Political Rights

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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2531/2015*, **, ***

<i>Communication submitted by:</i>	Nimo Mohamed Aden and Liban Muhammed Hassan (represented by counsel, Eddie Omar Rosenberg Khawaja)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Denmark
<i>Date of communication:</i>	15 September 2014 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 16 January 2015 (not issued in document form)
<i>Date of adoption of Views:</i>	25 July 2019
<i>Subject matter:</i>	Rights to private and family life
<i>Procedural issue:</i>	Exhaustion of domestic remedies
<i>Substantive issue:</i>	Family unification
<i>Articles of the Covenant:</i>	17, 23 and 26
<i>Articles of the Optional Protocol:</i>	2 and 5 (2) (b)

1. The authors of the communication are Nimo Mohamed Aden, a national of Somalia born on 1 January 1990 in Somalia and residing in Kenya and Liban Muhammed Hassan, a national of Denmark born on 17 October 1984 in Somalia.¹ They claim that the State party has violated their rights under articles 17, 23 and 26 of the Covenant. The Optional Protocol

* Adopted by the Committee at its 126th session (1–26 July 2019).

** The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Arif Bulkan, Ahmed Amin Fathalla, Shuichi Furuya, Christof Heyns, Bamariam Koita, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany, Hélène Tigroudja, Andreas Zimmermann and Gentian Zyberi.

*** Individual opinions by Committee members Yuval Shany and Andreas Zimmermann are annexed to the present Views.

¹ According to the information provided to the Committee, Mr. Hassan had entered Denmark on 28 February 1993. He was granted a residence permit on 30 April 1993, followed by a permanent residence permit on 17 June 2003, and he obtained Danish citizenship on 27 December 2004.



entered into force for the State party on 23 March 1976. The authors are represented by counsel.

The facts as submitted by the authors

2.1 In early 2012, the authors were introduced to each other by Mr. Hassan's brother and initiated a relationship by telephone. In their telephone conversations, they decided to marry. They met in person for the first time on 6 June 2012 in Nairobi and were married there three days later, on 9 June 2012. Mr. Hassan went back to Denmark and Ms. Aden remained in Kenya. On 13 December 2012, they applied for family reunification in Denmark, through the Embassy of Denmark in Kenya, where Ms. Aden resided.²

2.2 On 6 February 2013, the Danish Immigration Service refused to grant a residence permit to Ms. Aden, pursuant to section 9 (8) of the Aliens Act,³ on the grounds that the authors, as cousins, were considered closely related under that section of the Act and that, under the presumption of that provision, it was therefore considered unlikely that the marriage had been contracted according to the desire of both parties. The Immigration Service found that no exceptional reasons had been provided to support nonetheless granting a residence permit to Ms. Aden. The Immigration Service found that it could not be assumed that the authors had had a long and thorough acquaintance, as they had not lived together prior to or even after the marriage, except during the three holiday visits of Mr. Hassan to Kenya. It further considered that the declaration of the authors, according to which they were married at their own will, and the fact that Ms. Aden was pregnant, could not lead to a different result.

2.3 On 18 February 2013, the authors sent a follow-up letter to the Immigration Service, in which they stated that they both had entered the marriage voluntarily and that it was not a forced marriage.⁴ The Immigration Service considered the letter to be an appeal against its decision and forwarded it to the Immigration Appeals Board. On 25 July 2013, the authors had their first child, who is a Danish citizen.

2.4 On 13 August 2013, the authors decided to reapply for family reunification through the Embassy of Denmark in Kenya, on the basis that the marriage had lasted over a year. On 15 October 2013, the Immigration Service again rejected their application, pursuant to section 9 (8) of the Aliens Act, on the same grounds.

2.5 On 13 November 2013, the Immigration Appeals Board held an oral hearing in connection with the appeal dated 18 February 2013. Although Mr. Hassan provided a statement, Ms. Aden was not heard and no other witnesses were called. On the same day, the Board upheld the decision of the Immigration Service of 6 February 2013 not to grant a residence permit to Ms. Aden on the grounds that it remained questionable whether the marriage had been entered into voluntarily, as they were cousins and that there were no exceptional circumstances that would justify changing the assessment made by the Immigration Service. The Board found that the authors had not had a long and thorough acquaintance prior to the marriage, as their contact had only been by telephone before they decided to get married, and they were married only three days after they first met on 6 June 2012 in Nairobi. The Board clarified that the presumption could be reversed if the marriage

² The authors did not have legal representation during the application process before the Immigration Service or the subsequent appeal procedure before the Immigration Appeals Board.

³ According to section 9 (8) of the Aliens Act: "Unless exceptional reasons conclusively make it appropriate, ... a residence permit under subsection (1) (i) cannot be issued if it must be considered doubtful that the marriage was contracted or the cohabitation was established at both parties' own desire. If the marriage has been contracted or the cohabitation established between close relatives or otherwise closely related parties, it must be considered doubtful, unless particular reasons make it inappropriate, including regard for family unity, that the marriage was contracted or the cohabitation was established at both parties' own desire."

⁴ The authors alleged that Mr. Hassan had lived in Denmark for more than 20 years and was against forced marriage, and that he was concerned for the safety of his wife and of the child that they were expecting, which he could prove was his own child with a blood test.

was followed by cohabitation of considerable duration.⁵ It determined, however, that, in the case of the authors, their statement that the marriage was based on their will and love, their daily telephone contact, Mr. Hassan's three visits to his wife in Kenya after the marriage and the fact that they had a child were not sufficient to reverse the presumption.

2.6 Mr. Hassan wished to pursue the case before the Danish courts in order to seek a judicial review of the decision of the Immigration Appeals Board. As he lacked financial means, he submitted an application for free legal aid to the Legal Aid Office at the Department of Civil Affairs on 19 December 2013.⁶ His application was rejected on 13 March 2014. The Department of Civil Affairs found that there were no reasonable grounds to believe that the Danish courts would issue a different decision and rule in favour of the authors.⁷

2.7 On 7 July 2014, Mr. Hassan appealed the decision of the Department of Civil Affairs before the Appeals Permission Board, which upheld the decision to refuse the authors' application for legal aid on the same grounds as the Department of Civil Affairs had.

The complaint

3.1 The authors claim that the rejection of their application for family reunification constitutes an unlawful interference by the State party in their right to family life, as protected by articles 17 and 23 of the Covenant. They argue that the application in their case of the presumption contained in section 9 (8) of the Aliens Act amounts to a reversal of the burden of proof. They submit that they were not able to effectively challenge and reverse the presumption, as Ms. Aden was not given the opportunity to provide an oral statement before the Immigration Appeals Board. Thus, the authors claim that the migration authorities concluded that their marriage was a forced marriage, without having conducted a thorough investigation and by placing the burden of proof solely on them, which amounts to a violation of both articles 17 and 23 of the Covenant.⁸

3.2 The authors also claim a violation of their rights under article 26 of the Covenant, since the application of the presumption contained in section 9 (8) has affected them disproportionately and differently from other spouses who have a different ethnic origin from that of the authors.⁹

3.3 The authors submit that all available domestic remedies have been exhausted, as the decision of the Immigration Appeals Board of 13 November 2013 cannot be further appealed administratively. The authors claim that the judicial review for which they appeal the decision of the Board is not accessible or effective, as both the Department of Civil Affairs and the Appeals Permission Board rejected their application for free legal aid on the basis of their assessment that the Danish courts would not reach a different decision from that of the Immigration Appeals Board.

⁵ According to the Immigration Appeals Board, in their administrative practice, the required duration of cohabitation is over two years, and a distinction is made between whether cohabitation has taken place in Denmark or in the applicant's home country.

⁶ This follows the procedure under sections 325, 327 and 328 of the Administration of Justice Act, in which it is stipulated that legal aid can be granted to those who fulfil financial requirements and are found to have a reasonable reason to carry out a lawsuit in relation to the case.

⁷ On 9 April 2014, Ms. Aden applied for a residence permit again through the Embassy of Denmark in Kenya on the grounds of family reunification with her daughter, who lives in Denmark. On 23 June 2014, the Immigration Service refused the application. On 6 November 2014, after the authors submitted the allegation of their human rights violation to the Committee on 15 September 2014, the Immigration Appeals Board upheld the decision of the Immigration Service of 23 June 2014, refusing Ms. Aden's application for residence permit.

⁸ *Ngambi and Nébol v. France* (CCPR/C/81/D/1179/2003), para. 6.4, which includes family reunification in the protection afforded by article 23 of the Covenant.

⁹ The authors refer to the definition of indirect discrimination in *Althammer et al. v. Austria* (CCPR/C/78/D/998/2001), para. 10.2, and in *Derksen v. Netherlands* (CCPR/C/80/D/976/2001), para. 9.3. The authors also explain that, for spouses of Somali Muslim origin, marriages between cousins are more common than in other cultures.

State party's observations on admissibility and the merits

4.1 In its observations on the admissibility of the communication dated 13 March 2015, the State party submits that the communication should be considered inadmissible for non-exhaustion of domestic remedies under article 5 (2) (b) of the Optional Protocol.

4.2 The State party notes that, pursuant to section 63 of the Constitution of Denmark, as well as in Danish case law, decisions of the Immigration Appeals Board by which an application for residence is refused under section 9 (1) (i), with reference to section 9 (8), of the Aliens Act may be brought before the Danish courts. Therefore, the State party submits that the authors have had the opportunity to bring the decision of the Board of 13 November 2013 before the Danish courts, which could have reviewed whether the decision was consistent with the current law, including the international obligations of Denmark.¹⁰ The submission of the case to the domestic courts may have constituted an effective remedy available to the authors in this case. Therefore, the State party submits that, by having refrained from bringing the decision of the Board before the courts, the authors have failed to exhaust all available domestic remedies.

4.3 The State party further observes that the assessment by the Department of Civil Affairs that there was no prospect of legal review in favour of the authors' allegation in its decision of 13 March 2014 on legal aid, as well as the affirmation by the Appeals Permission Board on 7 July 2014, do not affect the authors' right under section 63 of the Constitution to challenge the decisions of the Immigration Appeals Board in a court, and therefore they have failed to exhaust all available domestic remedies.

4.4 In its further observations on the merits and admissibility dated 6 November 2015,¹¹ the State party reiterates that the authors have failed to exhaust all available domestic remedies and that the communication should be considered inadmissible pursuant to article 5 (2) (b) of the Optional Protocol.¹² If the Committee finds no basis for considering the communication inadmissible pursuant to article 5 (2) (b) of the Optional Protocol, the State party contends that the authors have failed to establish a prima facie case for the purpose of admissibility of their communication under articles 17, 23 and 26 of the Covenant and that the communication should therefore be considered inadmissible as it is manifestly unfounded. In the alternative, the State party submits that the authors' claims are without merit as it has not been established that the decision made by the Immigration Appeals Board on 13 November 2013 is in violation of articles 17, 23 and 26 of the Covenant.

4.5 The State party submits that the fact that the authors were refused free legal aid has no significance regarding the admissibility of the communication. The State party observes that the reason that the authors were refused free legal aid in Denmark was that neither the Department of Civil Affairs nor the Appeals Permission Board, which is an independent quasi-judicial body, found that the authors had reasonable grounds for reasonable prospects of success in a judicial review.¹³ The State party further finds that the court fee for civil non-pecuniary claims (500 Danish kroner)¹⁴ is not a prohibitive cost for the authors to proceed to a judicial review. The State party also observes that nothing prevents the authors

¹⁰ In particular, the Convention for the Protection of Human Rights and Fundamental Freedoms, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Covenant.

¹¹ The split request from the State party has been denied and the admissibility and the merits have been examined jointly.

¹² *P.S. v. Denmark* (CCPR/C/45/D/397/1990), para. 5.4; *Patiño v. Panama* (CCPR/C/52/D/437/1990), para. 5.2; and *R.T. v. France* (CCPR/C/35/D/262/1987), para 7.4. The State party also refers to the cases of European Court of Human Rights, including *D v. Ireland* (application No. 26499/02), decision of 27 June 2006; *Cyprus v. Turkey* (application No. 25781/94), judgment of 10 May 2001; *Van Oosterwijck v. Belgium* (application No. 7654/76), judgment of 6 November 1980; and *Akdivar et al. v. Turkey* (application No. 21893/93); judgment of 16 September 1996.

¹³ The State party notes that it is not true that for the grant of free legal aid it is always a condition that the applicant must have reasonable grounds for instituting legal proceedings. Such a condition will not apply if particular reasons make it appropriate to grant free legal aid. See section 329 of the Administration of Justice Act, under which free legal aid can be granted in cases that concern a matter of general public importance or of public interest and in cases of essential importance to the applicant's social or occupational situation.

¹⁴ 500 Danish kroner is equivalent to approximately 67 euros.

from instituting proceedings before the courts without legal representation. It further submits that legal aid (oral advice) under section 323 (2) of the Administration of Justice Act can be invoked.

4.6 Regarding the authors' claims regarding the violation of articles 17 and 23, the State party notes that the authors fall within the rule of presumption in section 9 (8) of the Aliens Act because they are closely related. The State party observes that during the proceedings the authors have failed to substantiate that the marriage was contracted at the desire of both parties. On the contrary, the State party notes that several circumstances have confirmed the statutory presumption that the marriage was not contracted at the desire of both parties.¹⁵

4.7 The State party further notes that the rule of presumption in section 9 (8) of the Aliens Act was drafted while taking into account the international obligations of Denmark, including a generally recognized principle of international law that marriage should be entered into only with the free and full consent of the intending spouses.¹⁶ Moreover, the immigration authorities are obliged to apply the provision in accordance with the country's international obligations.

4.8 As for the procedure of assessment of the immigration authorities, the State party observes that a specific and individual assessment was conducted on the basis of information provided by the authors. The State party notes that both authors had the opportunity to submit written briefs in the case, and Mr. Hassan had the opportunity to make an oral statement before the Immigration Appeals Board on 13 November 2013.

4.9 The State party stipulates that there is no basis for doubting the assessment made by the Immigration Appeals Board, according to which the authors have failed to establish that they have a family life worthy of protection. Therefore, the marriage between the authors must be considered to have been contracted against the desire of both parties, for which reason the authors cannot claim protection under articles 17 and 23 of the Covenant.

4.10 The State party notes the authors' claim that Ms. Aden also ought to have been given the opportunity to make an oral statement before the Immigration Appeals Board. However, the State party reiterates that she had the opportunity to submit a written brief on her own initiative, but that the Board, on the basis of a specific assessment, did not consider it necessary to obtain further information from her for the case. It is also observed that the Board may only summon applicants staying lawfully in Denmark to make an oral statement before it.¹⁷ Against this background, the State party submits that articles 17 and 23 of the Covenant have not been violated.

4.11 With regard to article 26, the State party submits that the authors have not been subject to direct or indirect discrimination in connection with section 9 (8) of the Aliens Act.¹⁸ The State party points out that the Aliens Act applies to all aliens applying for residence in Denmark under the general rules of the Act, regardless of their nationality and ethnicity. Against this background, the State party finds that the rule in section 9 (8) of the Aliens Act does not exclusively or disproportionately affect persons having a particular race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The State party finds that the authors have failed to substantiate and prove how they have been subject to indirect discrimination.

¹⁵ The State party observes that those circumstances include the following facts: that Ms. Aden was only 22 years old when she married; that the authors are also cousins; that the contact between the spouses was established by Ms. Hassan's brother; that they allegedly decided to marry without having met each other; that the authors first met each other only three days before the marriage; that the authors did not live together before the marriage; and that their alleged family life has been enjoyed only on Ms. Hassan's alleged three visits to Kenya.

¹⁶ See article 16 (2) of the Universal Declaration of Human Rights, article 23 (3) of the International Covenant on Civil and Political Rights, article 10 (1) of the International Covenant on Economic, Social and Cultural Rights and article 16 (1) of the Convention on the Elimination of All Forms of Discrimination against Women.

¹⁷ See section 31 (2), second sentence, of the Executive Order on Rules of Procedure for the Immigration Appeals Board (Executive Order No. 207 of 26 February 2015). See also the explanatory notes to Act No. 571 of 18 June 2012 and the general notes to Bill No. L 178 of 25 April 2012.

¹⁸ See general comment No. 18 (1989) on non-discrimination and *Althammer et al. v. Austria* (CCPR/C/78/D/998/2001), para 10.2.

4.12 The State party further notes that the rule in section 9 (8) of the Aliens Act is based on objective and reasonable grounds.¹⁹

Authors' comments on the State party's observations on admissibility and the merits

5.1 On 6 May 2015, the authors submitted their comments on the State party's observations on the admissibility of the communication. They reiterated their previous arguments on the admissibility of the case and insisted that article 5 (2) (b) of the Optional Protocol had to be assessed in the light of whether the specific domestic remedies that were claimed to be available by a State party were effective and available to the authors in reality.

5.2 The authors invoke the jurisprudence of the Committee that the requirement of exhaustion of the domestic remedies does not render a communication inadmissible if the specific remedy in a case does not have any prospect of offering effective redress.²⁰ In this regard, the authors reiterate that the Department of Civil Affairs refused their application for legal aid, owing to the fact that there was no reasonable basis to believe that a different decision would be reached by the Danish courts.²¹ The authors reiterate that this decision of the Department of Civil Affairs was appealed to the Appeals Permission Board, which also refused the request for legal aid on the same basis.

5.3 The authors further invoke the jurisprudence of the Committee that the requirement of exhaustion of domestic remedies does not render the communication inadmissible if the specific remedy in a case is not available to an indigent applicant who does not have access to legal aid to pursue that remedy.²² The authors refer again to the fact that they requested free legal aid to bring litigation to the Danish courts because they fulfilled the requirement of low income, as stipulated of section 325 of the Administration of Justice Act.

5.4 On 25 January 2016, following the State party's additional observations on the question of admissibility and the merits of the communication dated 6 November 2015, the authors submitted their additional comments.

5.5 In their comments on admissibility, the authors reiterate their comment dated 6 May 2015. In addition, they consider that the case laws referred to in the State party's observation on admissibility do not apply to the present case. Those cases mainly pertain to questions of a lack of financial means to initiate legal proceedings before the courts. At the

¹⁹ The State party notes that the purpose of the rule in section 9 (8) of the Aliens Act is to help people who risk being forced or pressured into marrying a close relative or an otherwise closely related party against their own desire. The rule further addresses the integration problems arising when a pattern develops in which immigrants or their descendants living in Denmark bring their spouses to Denmark from their own or their parents' country of origin owing to pressure from their parents. Such a pattern contributes to the retention of these persons in a situation in which they, more than others, experience problems of isolation and maladjustment relative to Danish society. The State party finds that the rule in section 9 (8) of the Aliens Act strikes the right balance in a situation in which an applicant finds it difficult to inform the immigration authorities of a forced or semi-forced marriage. Under the rule, it is sufficient for the applicant to inform the authorities that the marriage is with a close relative or with an otherwise closely related person. This would, to some extent, relieve applicants of the fear of reprisals from their family, which may otherwise deter them from informing the immigration authorities that their marriage is a forced or semi-forced marriage.

²⁰ The authors refer to *Toala v. New Zealand* (CCPR/C/63/D/675/1995), para. 6.4, *Chongwe v. Zambia* (CCPR/C/70/D/821/1998), para. 4.3, and *Saker v. Algeria* (CCPR/C/86/992/2001), para. 8.3 (in which the Committee mentions that the burden of proof that a remedy is indeed to be considered effective in the light of the facts of a case is on the State party), as well as the jurisprudence of the European Court of Human Rights (*L.L. v. France* (application No. 7508/02), judgment of 10 October 2006, para. 23, and *Gnahoré v. France* (application No. 40031/98), judgment of 19 September 2000, paras. 46–48).

²¹ The authors note that the Department of Civil Affairs referred to the decision of the Supreme Court of Denmark on 30 January 2007, which held that a marriage between related spouses could not form the basis for family reunification under article 9 (8) of the Alien Act where the applicant was granted free legal aid.

²² The authors refer to *Sextus v. Trinidad and Tobago* (CCPR/C/72/D/818/1998), para. 6.2; *Siewpersaud et al. v. Trinidad and Tobago* (CCPR/C/81/D/938/2000), para. 5.3; *Dean v. New Zealand* (CCPR/C/95/D/1512/2006), paras. 5.7 and 6.9; *Howell v. Jamaica* (CCPR/C/79/D/798/1998), para. 5.3; *Pryce v. Jamaica* (CCPR/C/80/D/793/1998), para. 5.4; *El Ghar v. Libyan Arab Jamahiriya* (CCPR/C/82/D/1107/2002), para. 6.3; and *Dudko v. Australia* (CCPR/C/90/D/1347/2005), para. 6.2.

same time, in the authors' case, it is declared by the authorities that the authors had no reasonable grounds to succeed with legal proceedings before the Danish courts when they applied for free legal aid to initiate legal proceedings. The authors submit that, according to international case law, the State party has to provide evidence that the remedy available in the authors' case offers a reasonable prospect of success for the authors.²³ In this case, the authors note that the State party fails to provide any evidence of a reasonable prospect of success for the judicial review of their case.

5.6 The authors also object to the arguments of the State party on the question of the cost of bringing proceedings before the Danish courts. The State party alleges that the refusal of legal aid did not have an impact on the procedure, as the very low legal fees would not hinder access to the remedy even for indigent persons. The authors agree that the court fee for initiating legal proceedings is a maximum of 500 Danish kroner, but court cases of alleged violations of international obligations and the Aliens Act reveal that the costs for the losing party would be between 25,000 and 60,000 Danish kroner, depending on whether a judgment is appealed or not.²⁴ The authors claim that, given that the State party has already found that the authors had no prospect of succeeding in their claim before the courts, the potential cost is very likely to be between 25,000 and 60,000 Danish kroner, not 500.²⁵

5.7 With respect to the merits of the case, the authors uphold the submission that the State party has violated the authors' rights under articles 17, 23 and 26 of the Covenant. On articles 17 and 23, the authors claim that, when couples are legally married, protected family life should exist and family life is not dependent on whether the spouses live together.²⁶ The authors reiterate that the mere fact of being cousins does not provide any indication in itself that the marriage is not voluntary. They further claim that all the elements raised by the State party, such as Ms. Aden's age, the fact that her brother initiated the contact between the spouses, the fact that the spouses met only three days before the marriage and the fact that they do not live together, do not separately or jointly provide any evidence to label their relationship a forced marriage.

5.8 The authors note section 323 (2) of the Administration of Justice Act, which refers to oral legal aid provided under section 323 (1), which corresponds to the financial support provided by the Ministry of Justice of Denmark to give legal assistance in the form of oral legal advice. However, such advice is usually very basic and general, in particular on family law, consumer law or basic social law issues. If citizens attempt to obtain advice on litigation, they are requested to seek proper legal assistance through specific counsel. This also applies when advice is sought on issues pertaining to specialized legal areas.

5.9 With regard to article 26, the authors further claim that the impact of section 9 (8) of the Aliens Act, on the basis of the default rule of presumption of forced marriages, is much greater on a spouse of non-Danish ethnic origin and with a Muslim background, given that it is more common for cousins to marry in the Muslim culture than in other cultures. The authors therefore submit that the effect of section 9 (8) of the Aliens Act amounts to indirect discrimination, as it affects applicants and spouses of non-Danish ethnic or national origin in a disproportionate manner. The authors note that the State party has failed to provide any statistical support for its submission that the rule applies to all persons applying for residence, and has not shown any evidence that the rule has been applied at all in cases involving non-Muslim applicants. The authors claim that this indirect differential treatment can therefore only be justified if the rule of presumption in section 9 (8) of the Aliens Act

²³ See European Court of Human Rights, *Earl and Countess Spencer v. United Kingdom* (application Nos. 28851/95 and 28852/95), judgment of 16 January 1998.

²⁴ Equivalent to between 3,345 and 8,030 euros.

²⁵ It is also noted that the authors have been granted free legal aid under the Danish act on filing complaints to international human rights bodies (Act No. 940 of 20 December 1999). The use of counsel to handle the communication before the Committee is therefore irrelevant for the assessment of the admissibility of the communication filed on 12 September 2014. Furthermore, the authors do not see any relevance of the scheme under section 323 (2) of the Administration of Justice Act, which refers to oral legal aid provided by lawyers with general legal knowledge for advice on basic legal issues.

²⁶ See European Court of Human Rights, *Abdulaziz, Cabales and Balkandali v. UK* (application Nos. 9214/80, 9473/81 and 9474/81), judgment of 28 May 1985, para. 62.

pursues a legitimate aim and has a reasonable relationship of proportionality between the means employed and the aim sought to be realized.²⁷

5.10 The authors do not contest that, in section 9 (8) of the Aliens Act, the State party pursues the legitimate aim of ensuring that forced marriage does not constitute the basis for a residence permit. However, the authors contest the use of the fact that the spouses are related as the sole and decisive factor and claim that the provision does not strike the right balance. It is furthermore emphasized that less intrusive means could be applied in order to achieve a goal of withholding residence permits on the basis of forced marriage.²⁸ The authors conclude that the State party's application of section 9 (8) of the Aliens Act to the applicants' marriage, resulting in the rejection of their application for family reunification, constitutes indirect discrimination in violation of article 26 of the Covenant.

State party's additional observations

6.1 On 27 June 2016, the State party submitted additional observations on the authors' comments. The State party observes that the conditions for providing free legal aid to assess the reasonable prospects of success of the case does not mean that the case has been decided, or that the courts are bound by the assessment of the viability of the case made in the administrative decision of the application for free legal aid. As regards the authors' submission that the State party must provide evidence that the remedy available in their case offered them reasonable prospects of success, the State party claims that the decisions of migration authorities in which family reunification is refused under section 9 (8) of the Aliens Act have been reviewed by the courts, which set aside the administrative decisions and conducted a specific assessment of the parties' statements and information in the light of the international obligations of Denmark. Accordingly, the State party finds that it has sufficiently established the following facts: that the authors had the opportunity to bring before the Danish courts the decisions of the Immigration Appeals Board in which the applications for family reunification were refused; that the Danish courts were capable of providing redress for the authors' complaints; and that this opportunity offered them reasonable prospects of success.

6.2 With regard to the authors' submission concerning legal costs for unsuccessful legal proceedings, the State party observes that the applicable rules ensure that legal costs are shared in a reasonable manner.²⁹ The State party also observes that the fact that the authors may be ordered to pay the costs of unsuccessful legal proceedings does not prevent them from instituting proceedings before the Danish courts. The State party reiterates that there is no statutory requirement for legal representation in cases concerning family reunification or for the examination by the court of whether the refusal of family reunification is in accordance with the international obligations of Denmark. The State party also notes that there is no requirement to exhaust futile remedies, namely remedies that objectively have no prospect of success. However, the State party observes that the authors' subjective belief in the futility of domestic remedies does not absolve them of the requirement to exhaust such remedies.³⁰

6.3 The State party also maintains that there is no violation of articles 17 and 23 of the Covenant, as the authors failed to substantiate in the proceedings that their marriage was contracted at the desire of both parties and they do not have a family life that Denmark is obliged to protect. The State party reiterates that Ms. Aden had the opportunity to submit a

²⁷ *Althammer et al. v. Austria*, para. 10.2, and *Derksen v. Netherlands*, para. 9.3.

²⁸ The authors note that it is possible to completely disregard the fact that spouses are related, or only take such a factor into consideration if other factors indicate and support the forced nature of a marriage, such as interviews with the spouses to ascertain the voluntary nature of a marriage or subsequent investigations after residence has been granted.

²⁹ See section 312 (1) of the Administration of Justice Act, in which it is stipulated that the party that loses a case must pay the other party's legal costs, unless otherwise agreed by the parties. Moreover, it follows from section 312 (3) of the Act that the court may decide that the party that loses a case is not to pay all or some of the other party's legal costs if this is justified for particular reasons.

³⁰ See the Views adopted by the Committee on 30 March 1989 in *R.T. v. France* (CCPR/C/35/D/262/1987), para. 7.4, and on 5 November 1996 in *Kaaber v. Iceland* (CCPR/C/58/D/674/1995), para. 6.2.

written brief on her own initiative and that, on the basis of a specific assessment, the Immigration Appeals Board did not consider it necessary to obtain further information from her for the present case.

6.4 The State party also rejects the authors' submission that they have been subject to discrimination as Muslims from Somalia in the light of the statistical data that they provided.³¹ The State party reiterates that the Aliens Act applies to all aliens applying for residence in Denmark regardless of their ethnic origins and other traits. It added that, when section 9 (8) of the Aliens Act is applied, an individual assessment is made for each case.

Authors' comments on the State party's additional observations

7.1 On 12 July 2016, the authors provided their comments on the State party's additional observations dated 27 June 2016. The authors reiterate that the Danish immigration authorities' conclusion that the authors did not have any reasonable prospects of success in a judicial review should be considered a decisive element in assessing whether domestic remedies have been exhausted. The authors claim that the State party concluded, through the final decision of the Appeals Permission Board, that the court decision would not be favourable to them, and has removed the presumed effectiveness of that legal remedy. The authors allege that it would then be unreasonable for them to pursue that remedy. They reiterate that the reason that they did not appeal to the Danish courts was not because they believed that it would be ineffective, but because they were de facto barred from accessing the courts as they lacked the financial means to initiate court proceedings by virtue of the State party's assessment that such proceedings would be ineffective. The authors further reiterate there was no direct and clear proof that they would have a reasonable prospect of success before the courts, which they allege the State party should provide.

7.2 On the question of relevant and realistic costs to initiate legal proceedings before the courts, the authors submit that the State party fails to provide any case law supporting the view that section 312 (3) of the Administration of Justice Act can be and has been applied in cases similar to theirs and has resulted in alleviating their risk of facing legal costs. The authors find that the State party's argument that there are no statutory requirements for legal representation in family reunification cases is misleading, as the State party failed to provide any case law from Danish courts in which litigation in a case related to family reunification has been carried out without legal representation. The authors refer once again to the case law listed in their additional observations of 25 January 2016, in which they indicate that legal costs cannot be limited to 500 Danish kroner and that there are no cases in which the State party has actively supported the application of the rules for legal cost sharing, such as section 312 (3) of the Administration of Justice Act.

7.3 With regard to the violation of article 26, the authors contend that the statistical information presented by the State party shows that section 9 (8) of the Aliens Act is mostly applied to applicants from specific countries and with a Muslim religious background. The authors thus reiterate that the application of section 9 (8) is without doubt biased against Muslim applicants.

7.4 The authors further reject the State party's argument that such an assessment is based on factual and objective criteria. They claim that the use of the status of spouses being related as the sole and decisive factor for assessment, which shifts the burden of

³¹ The State party refers in this regard to the circumstances in 2013, 2014 and 2015, in which the Immigration Appeals Board considered 28, 26 and 51 cases, respectively, totalling 105 cases in which applicants were refused residence under the second sentence of section 9 (8) of the Aliens Act. Seven of those cases were closed without being decided by the Board, as the applicants withdrew their appeals. In 75 cases, the Board upheld the decision made by the Immigration Service. Eight cases were remitted to the Immigration Service for reconsideration at first instance. In seven cases, the decision of the Immigration Service was reversed by the Board as it found that residence should not have been refused under the second sentence of section 9 (8) of the Aliens Act. Finally, eight cases were dismissed because the time limit for appeal had been exceeded. The relevant cases involved persons from Afghanistan, Egypt, Eritrea, Iran (Islamic Republic of), Iraq, Lebanon, Morocco, Pakistan, Somalia, Sri Lanka, the Syrian Arab Republic and Turkey, as well as stateless Palestinians and other stateless persons.

proof on the voluntary nature of their marriage to the spouses, does not strike the right balance in the light of the purpose of the law. They allege that Denmark has failed to show that there were compelling or very weighty reasons unrelated to ethnic origin to justify the differential treatment.³² In this regard, the authors further submit that the State party is trying to legitimize the differential treatment with biased and unsubstantiated views on the lifestyle and religious practices of specific non-Danish ethnic groups and Muslims, as read in the preparatory work for section 9 (8) of the Aliens Act.

Additional observations

From the State party

8.1 On 8 November 2016, in response to the authors' comments dated 12 July 2016, the State party submitted additional observations, in which it generally refers to its observations of 13 March 2015 and 6 November 2015 and to its additional observations of 27 June 2016. The State party initially observes that the authors' observations of 12 July 2016 do not provide any new or specific information beyond the information taken into account by the State party in its previous observations.

8.2 Regarding the authors' claim under article 26 of the Covenant and their comments on the statistical data provided by the State party, the latter reiterates that all applications for family reunification from spouses who are also close relatives or otherwise closely related parties are examined in the light of section 9 (8) of the Aliens Act regardless of the spouses' nationality, religion and ethnicity.

8.3 The State party rejects the authors' allegation that the decision under section 9 (8) was based only on one sole and decisive factor, namely the family relationship between the spouses. The State party reiterates that decisions on applications for residence in Denmark are made on the basis of all information available on the matter. The couple was thus given the opportunity to rebut the presumption that their marriage was contracted against the desire of both parties, and if that presumption is rebutted, section 9 (8) of the Aliens Act does not prevent the granting of residence when the spouses are relatives.³³

8.4 With regard to the authors' claim that the State party failed to show that there were compelling or very weighty reasons unrelated to ethnic origin to justify the indirect differential treatment, the State party further claims that any differential treatment, if it occurs, is based on factual and objective criteria. The purpose of section 9 (8) is to help persons at risk of being forced or pressured into marrying a close relative or an otherwise closely related party against their own will, and that this objective must be considered a compelling or very weighty reason.³⁴

³² See the decision of the European Court of Human Rights in *Biao v. Denmark* (application No. 38590/10), judgment of 24 May 2016, in which Denmark was found to have violated article 14, in conjunction with article 8, of the Convention for the Protection of Human Rights and Fundamental Freedoms when applying a requirement for spouses to have greater ties to Denmark than to another country. The court found initially that the relevant provision in the Aliens Act on greater ties to Denmark than to another country affected Danish citizens of non-Danish descent more than Danish citizens of Danish descent and thus amounted to indirect differential treatment. The court subsequently concluded that Denmark had failed to show that there were compelling or very weighty reasons unrelated to ethnic origin to justify the indirect differential treatment.

³³ As regards the authors' reference to the judgment delivered by the European Court of Human Rights on 24 May 2016 in *Biao v. Denmark* (application No. 38590/10), the State party points out that that case concerned the attachment requirement applicable to spousal reunification under section 9 (7) of the Aliens Act. The State party finds that the cases are not comparable, as the case of the authors concerns section 9 (8) of the Aliens Act.

³⁴ The State party also notes that article 26 of the Convention is specifically mentioned in its *travaux préparatoires* for Act No. 1204 of 27 December 2003 amending the Aliens Act.

Issues and proceedings before the Committee

Consideration of admissibility

9.1 Before considering any claims contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

9.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

9.3 The Committee observes that, under article 5 (2) (b) of the Optional Protocol, it is precluded from considering a communication unless it has been ascertained that domestic remedies have been exhausted.

9.4 The Committee notes the State party's challenge to the admissibility of the communication on the grounds that domestic remedies have not been exhausted. The Committee notes that the authors have only exhausted administrative procedures and did not institute proceedings before a court to challenge the Immigration Appeals Board decision of 13 November 2013, in which their application for family reunification was refused. However, the Committee also notes that the authors submit that domestic legal remedies were not available or effective in their case, as their application for free legal aid was refused by the Legal Aid Office at the Department of Civil Affairs and the Appeals Permission Board on the basis of the decision of the Supreme Court of Denmark on 30 January 2007,³⁵ and that there were no grounds for reasonable prospects of success in a judicial review.

9.5 In this connection, for the purpose of article 5 (2) (b) of the Optional Protocol, the Committee recalls that domestic remedies must not only be available, but also effective, which also depends on the nature of the alleged violation.³⁶ It also recalls that an applicant must make use of all judicial or administrative avenues that offer a reasonable prospect of redress.³⁷ The Committee recalls that domestic remedies need not be exhausted if they objectively have no prospect of success: where under applicable domestic laws the claim would inevitably be dismissed, or where established jurisprudence of the highest domestic tribunals would preclude a positive result.³⁸

9.6 In the present case, the Committee notes the arguments of the State party according to which the fact that the authors were not granted free legal aid because the case had no prospect of success was not enough justification for the authors not to pursue the legal avenue at their disposal, since courts are not bound by the assessment of the Legal Aid Office. The Committee also notes that the State party does not argue that the court could have reached a different interpretation of the impugned sections of article 9 (8) of the Aliens Act, on the basis of which the authors' application was denied. In this respect, the State party fails to establish sufficiently that there were reasonable grounds to believe that the Danish courts would issue a different decision from that of the Immigration Service and that the courts would rule in their favour. The Committee, taking into account the clear wording of the decision of 13 March 2014 by the Legal Aid Office to reject the authors' request for legal aid on the basis of the unlikely prospect of a judicial review, concludes that the lack of prospects regarding the remedies rendered them ineffective.

9.7 The Committee thus considers that the requirements of article 5 (2) (b) of the Optional Protocol have been met in the present case.

9.8 The Committee notes the State party's challenge to the admissibility of the communication on the grounds that the authors' claim under articles 17, 23 and 26 of the Covenant is unsubstantiated. However, the Committee considers that, for the purpose of

³⁵ See footnote 21 and the decision of the court in which it was held that a marriage between related spouses could not form the basis for family reunification.

³⁶ *Vicente et al. v. Colombia* (CCPR/C/60/D/612/1995), para 5.2.

³⁷ *Patiño v. Panama* (CCPR/C/52/D/437/1990), para. 5.2.

³⁸ *Young v. Australia* (CCPR/C/78/D/941/2000), para. 9.4, and *Barzhig v. France* (CCPR/C/41/D/327/1988), para 5.1.

admissibility, the authors have adequately explained the reasons for which their rights to family reunification are violated under articles 17 and 23 of the Covenant. In terms of the authors' claim of a violation of their rights under article 26 of the Covenant, the Committee considers that the authors have not substantiated their allegation that the application of the presumption contained in section 9 (8) has affected them disproportionately and differently from other spouses who have a different ethnic origin from the authors. It therefore declares the communication admissible insofar as it raises issues under articles 17 and 23 and proceeds with its consideration of the merits.

Consideration of the merits

10.1 The Committee has considered the communication in the light of all the information submitted to it by the parties, in accordance with article 5 (1) of the Optional Protocol.

10.2 The Committee notes the authors' claim that the rejection of their application for family reunification constitutes an unlawful interference by the State party in their right to family life, as protected by articles 17 and 23 of the Covenant, because of the presumption contained in section 9 (8) of the Aliens Act, which amounts to a reversal of the burden of proof.

10.3 The Committee recalls its general comment No. 16 (1988) on the right to privacy, in which, regarding the term "family", it is stated that the objective of the Covenant is to require that for the purpose of article 17 the term be given a broad interpretation to include all those comprising the family, as understood in the society of the State party concerned. In its general comment No. 19 (1990) on the family, the Committee also notes that the concept of family may differ in some respects from State to State, and even from region to region within a State, and emphasizes that, when a group of persons is regarded as a family under the legislation and practice of a State, it must be given the protection referred to in article 23.

10.4 The Committee recalls that, under article 23 of the Covenant, the protection of family life, including the interest in family reunification, is guaranteed. The Committee recalls that the term "family", for the purposes of the Covenant, must be understood broadly as including all those comprising a family as understood in the society concerned. The right to the protection of family life is not necessarily displaced by geographical separation, infidelity or the absence of conjugal relations.³⁹ However, there must first be a family bond to protect.

10.5 The Committee recalls that it is generally for the organs of States parties to examine the facts and evidence of the case in question in order to determine the application of the domestic law, in this case section 9 (8) of the Aliens Act, unless it can be established that the assessment was clearly arbitrary or amounted to a manifest error or denial of justice.

10.6 In the present case, the Committee observes that it is uncontested that the authors are legally married in Kenya and that what is contested is mainly how the authors could have proved that their relationship was not a forced marriage and that they entered into a marital relationship on the basis of their free and full consent. The Committee notes the finding of the Immigration Appeals Board that the authors failed to establish that there were substantial grounds for believing that, with the result that the authors were not able to effectively challenge and reverse the presumption of forced marriage under section 9 (8) of the Aliens Act. The Committee notes that the Board based its reasoning on the fact that the authors are cousins and did not live together before and after their marriage, and concluded that they failed to prove that they had a family bond to be protected. However, the Committee recalls that this decision was made without giving Ms. Aden the opportunity to provide an oral statement and with no other witness called before the Board. Therefore, the Danish immigration authority did not assess the authors' marital relationship on the basis of Ms. Aden's direct testimony. The Committee also observes that the State party's assessment criteria regarding how the authors could prove their marital relationship other than by their cohabitation was not clear after the authors had repeatedly informed the Danish authorities that their marriage was based on their consent, that they had a child and

³⁹ *Ngambi and Nébol v. France* (CCPR/C/81/D/1179/2003), para. 6.4.

that they frequently communicated by telephone and during Mr. Hassan's visit to his spouse, which suggests that their relationship, lasting for the past seven years, falls within the meaning of "family" under articles 17 and 23.

10.7 The Committee notes the State party's claim that the rule of presumption in section 9 (8) of the Aliens Act was drafted for the purpose of protecting marriage entered into with free and full consent. However, in view of the above, the Committee considers that the immigration authorities, in the assessment of the marital relationship of the authors, failed to adequately take into consideration the authors' marital relationship in the context of their personal situation and the cultural context in their country of origin.

10.8 With regard to the authors' claims under articles 17 and 23, the Committee observes that the State party's action amounted to a barrier to the family being reunited in Denmark. The Committee takes the view that the common residence of husband, wife and child has to be considered as the normal situation of a family.⁴⁰ Hence, the rejection of the visa of a spouse to a country where another spouse and their child live could amount to an interference within the meaning of article 17. The Committee thus considers that the State party failed to discharge its obligation under articles 17 and 23 to respect the family unit.

11. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose an unjustified interference in family life and a violation by the State party of articles 17 and 23 of the Covenant in respect of Mr. Hassan. Having concluded that, in the present case, there has been a violation of articles 17 and 23 of the Covenant with regard to Mr. Hassan, the Committee decides not to examine separately the claim of his spouse.

12. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide Mr. Hassan with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated to provide the author with an effective re-evaluation of his claim, on the basis of an assessment of family reunification. The State party is also under an obligation to prevent similar violations from occurring in the future.

13. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official languages of the State party.

⁴⁰ *Aumeeruddy-Cziffra et al. v. Mauritius* (CCPR/C/12/D/35/1978), para. 9.2, in which it is stated that, in principle, article 17 (1) also applies when one of the spouses is an alien.

Annex I

Individual opinion of Committee member Yuval Shany (dissenting)

1. I regret not being able to join the members of the Committee who supported the finding of a violation in this case. While I agree that the facts of the case disclose a violation of the Covenant on their merits, I believe that the Committee should have rejected the communication for lack of exhaustion of domestic remedies. I also have some doubts regarding the Committee's jurisdiction *ratione personae* over Nimo Mohamed Aden.

2. It is uncontested that the authors' application was rejected by the Danish Immigration Service, that their appeal to the Immigration Appeals Board was rejected and that they did not pursue further their application before the Danish courts. However, Mr. Hassan did try to obtain financial aid to submit his case to the court, and his application was rejected by the Department of Civil Affairs on the basis of an assessment that litigation had no reasonable chances of success. The Committee regarded this latter assessment as indicative of a lack of effective remedies and noted that the State party failed to refute this indication (para. 9.6).

3. As indicated by the Committee, the standard applied in previous Views by the Committee is that remedies are ineffective if they "objectively have no prospects of success: where under applicable domestic laws the claim would inevitably be dismissed, or where established jurisprudence of the highest domestic tribunals would preclude a positive result".¹ The Committee has also opined before that "mere doubts" about the success of remedies do not render them ineffective.²

4. Clearly, the authors had doubts about the prospects of their appeal, given the presumption against the authenticity of contracted marriage and marriage between relatives found in article 9 (8) of the Aliens Act, and the restrictive interpretation by the Supreme Court of the exception to the presumption in its decision on the matter of 30 January 2007. These doubts were compounded by the negative assessment of the likelihood of success by the legal aid authorities – a decision that was, however, issued in connection with the authors' eligibility criteria for legal aid and has no legal effect on the merits of the case itself.

5. Nevertheless, low prospects for success in a legal process are not tantamount to having no prospects for success or facing inevitable failure, especially in a case that is fact-based (whether a marriage was genuine) and where there does not appear to be a series of court decisions constituting "established jurisprudence", which would necessarily preclude a positive result.

6. One may recall in this connection that the requirement of exhaustion of domestic remedies is intended to allow a State party to have an opportunity "to redress it by its own means, within the framework of its own domestic legal system" an alleged violation of international law.³ By allowing the authors to circumvent the Danish legal system and come directly before the Committee, by reason of the assessment of the low probability of success, the Committee has deprived the State party, without good reason, of an opportunity to redress a violation of the Covenant (a legal claim that does not appear to have been raised before the immigration bodies).

¹ *Young v. Australia* (CCPR/C/78/D/941/2000), para. 9.4.

² *J.B and H.K. v. France* (CCPR/C/34/D/324/1988), para. 3.3.

³ International Court of Justice, *Switzerland v. United States of America*, judgment of 21 March 1959.

7. It can also be noted in this regard that the legal fees for accessing the Danish legal system in immigration cases are low (500 Danish kroner) and that, although the authors claim that a loss in the case might have resulted in the imposition of costs (para. 5.6), the State party has established that courts have the discretion not to impose costs if such a waiver is justified for particular reasons (para. 6.2). Under these conditions, I find it difficult to regard recourse to Danish courts, even without legal aid, as ineffective or prohibitively expensive.

8. Finally, I have doubts as to the applicability of the protections offered under articles 17 and 23 of the Covenant with regard to Ms. Aden while she was present in Kenya. Unlike Mr. Hassan, whose rights under the Covenant have clearly been implicated, as he was living in Denmark and under its jurisdiction, Ms. Aden submitted an application to enter Denmark for family reunification purposes through the Embassy of Denmark in Kenya, and it is not clear whether such an interaction with the Danish authorities brings her under the jurisdiction of Denmark for the purposes of her ability to enjoy the rights set forth in articles 17 and 23. Since I am of the view that the case is inadmissible, I would, however, defer judgment on this point.

Annex II

Individual opinion of Committee member Andreas Zimmermann (partly dissenting)

1. While I concur with the outcome of the complaint, as adopted by the majority of the Committee, I have to respectfully dissociate myself as far as the reasoning for the complaint brought by Nimo Mohamed Aden is concerned.
2. As confirmed by previous decisions of the Committee, before taking a decision on the admissibility of a given complaint, it must first examine, if necessary *ex officio* (without the State party having raised the matter), whether it has jurisdiction to receive and consider the communication under article 1 of the Optional Protocol, taking into account article 2 (1) of the Covenant.¹
3. Accordingly, by dismissing the complaint of Ms. Aden for not having exhausted local remedies, be it only as a matter of judicial expediency, the opinion of the majority might be misunderstood as implying that, even as far as her complaint is concerned, the Committee had jurisdiction to receive and consider her communication.
4. However, Ms. Aden never had any form of territorial contact with Denmark nor had she ever been subject to the State party's jurisdiction. The mere fact of submitting a request for family unification with the Danish authorities from abroad and the fact that her husband lived in Denmark did not expose her to the jurisdiction of Denmark, even if broadly interpreted.
5. Accordingly, the Committee ought to have rejected her communication for being outside the Committee's competence under the Optional Protocol, while rejecting her husband's communication as being inadmissible for not having exhausted available domestic remedies.

¹ *Montero v. Uruguay* (CCPR/C/18/D/106/1981), para. 5; see also *mutatis mutandis Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, p. 52 (91), para. 118.