PART 7.1: NOTE ON THE EUROPEAN COURT OF HUMAN RIGHTS

The European Court of Human Rights (the Court) is the judicial mechanism set up to enforce the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR). It is composed of a number of judges equal to that of the State Parties to the ECHR and it delivers binding Judgements.

This note briefly presents the main features of the judicial procedure before the European Court of Human Rights, focusing on individual applications. Information in 28 languages on how to apply to the Court, including notes for the guidance of persons wishing to apply to the Court, an application form, and an explanatory note can be found on the Council of Europe's website at http://www.echr.coe.int/BilingualDocuments/ApplicantInformation.htm#English.

The present system allows for both individual and inter-State applications without restrictions or specific declarations (Article 33 and Article 34 of the ECHR). All State Parties to the ECHR recognise *ipso facto* the jurisdiction of the Court.

The Procedure before the Court is regulated by the ECHR itself and by the Rules of the Court. An individual application starts with the lodging of a complaint, after exhaustion of all effective domestic remedies (Article 35 of the ECHR). The complaint is made by the applicant himself, who until a positive decision on the admissibility does not need to be represented by a lawyer, even though that is desirable in order to present the claim properly.

The complaint is first communicated to the respondent government, which must present its views on the admissibility of the case. Following this communication and the response of the government, a judge-rapporteur will decide on the admissibility of the case. If the case is declared inadmissible the procedure is terminated and there is no appeal. If the case is declared admissible, a Chamber of the Court will make a decision on the merits of the complaint. The parties can, however, come to a friendly settlement before a decision on the merits is reached (Article 39 of the ECHR).

Following a Judgement on the merits, one of the parties can request that the case be referred to a Grand Chamber. This is a sort of appeal, admissible under certain circumstances (Article 43 of the ECHR).

It is the executive organ of the Council of Europe, the Committee of Ministers, which is responsible for supervising the execution of Judgements (Article 46 of the ECHR). It does so by asking the respondent State to take the measures necessary to implement the Court's decision.

PART 7.2: COMPARATIVE CHART OF PROVISIONS OF THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES, THE 1950 EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS AND THE 1984 CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

	Convention relating to the Status of Refugees of 28 July 1951	**European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950**	**UN Convention against Torture and Other Inhuman or Degrading Treatment or Punishment of 10 December 1984**
Non-refoulement principle	▪ Article 33(1): "No Contracting State shall expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."	▪ Article 3: "No one shall be subjected to torture, inhuman or degrading treatment or punishment." ▪ *Soering v. UK*, Judgement of 7 July 1989, extradition ▪ *Cruz Varas v. Sweden*, Judgement of 20 March 1991, expulsion ▪ *Vilvarajah and Others v. UK*, Judgement of 30 October 1991, expulsion	▪ Article 3: "No State Party shall expel, return ('*refouler*') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."
Chain *refoulement*	▪ Includes protection against chain *refoulement*	▪ *T.I. v. UK*, Admissibility Decision of 21 March 2000: "The Court finds that the indirect removal in this case to an intermediary country, which is also a Contracting State, does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention."	▪ CAT General Comment No. 1: "The Committee is of the view that the phrase 'another State' in article 3 refers to the State to which the individual concerned is being expelled, returned or extradited, as well as to any State to which the author may subsequently be expelled, returned or extradited." ▪ *Korban v. Sweden* Communication No. 88/1997: "The State party … also has an

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			obligation to refrain from forcibly returning the author to Jordan, in view of the risk he would run of being expelled from that country to Iraq. In this respect the Committee refers to paragraph 2 of its general comment on the implementation of article 3 of the Convention in the context of article 22, according to which 'the phrase "another State" in article 3 refers to the State to which the individual concerned is being expelled, returned or extradited, as well as to any State to which the author may subsequently be expelled, returned or extradited.'"
Beneficiaries	▪ "No Contracting State shall expel or return ('*refouler*') a refugee …" ▪ Asylum-seekers according to Executive Committee Conclusion No. 6 and declaratory nature of refugee status	▪ Article 1 of ECHR: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in section I of this Convention."	▪ "No State Party shall expel, return ('*refouler*') or extradite a person …" ▪ Persons within the Contracting State's jurisdiction.
Acts from which the individual is protected	▪ Threat to life or freedom on account of one of the five grounds (race, religion, nationality, membership of a particular social group or political opinion) ▪ Persecution, paras. 51–60 in UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, 1979, reedited 1992	▪ Torture, inhuman or degrading treatment or punishment ▪ *Ireland v. UK*, Judgement of 18 January 1978, interrogation methods used by Irish police and which included wall-standing, hooding, subjection to noise, deprivation of sleep and deprivation of food and drink amounted to inhuman treatment	▪ Article 1 of CAT: "1. For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any

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		- para. 167: "The techniques were also degrading since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance." - para. 167: distinction between torture, inhuman and degrading treatment "derives principally from a difference in the intensity of the suffering inflicted"; the Court attaches "a special stigma to deliberate inhuman treatment causing very serious and cruel suffering". - The Court made a reference to Article 1 of GA Resolution 3452 (XXX) which declares: "Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment." ▪ *Selmouni v. France*, Judgement of 28 July 1999, police officers subjecting the applicant to many blows, dragging him by his hair, making him run along a corridor with police officers watching him, a police officer showing him his penis before urinating on the applicant etc. amounted to torture	reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions." ▪ Seems to exclude pain or suffering arising from lawful sanctions which would make its scope narrower than the ECHR

	Convention relating to the Status of Refugees of 28 July 1951	European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950	UN Convention against Torture and Other Inhuman or Degrading Treatment or Punishment of 10 December 1984
		- Para. 100: "…it remains to establish in the instant case whether the 'pain or suffering' inflicted on Mr Selmouni can be defined as 'severe' within the meaning of Article 1 of the United Nations Convention (CAT). The Court considers that this 'severity' is, like the 'minimum severity' required for the application of Article 3, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc." - Para. 101: "[T]he Court considers that certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in future." ▪ *D. v. UK*, Judgement of 2 May 1997, <u>removal of man suffering from AIDS would constitute inhuman treatment</u> - para. 52: "There is a serious danger that the conditions of adversity which await him in St Kitts will further reduce his already limited life expectancy and subject him to acute <u>mental</u> and <u>physical</u> suffering."	

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		- para. 53: "[H]is removal would expose him to a real risk of dying under most distressing circumstances and would thus amount to inhuman treatment." ▪ *Jabari v. Turkey*, Judgement of 11 July 2000, paras. 31–32, 41–42: stoning (as a punishment for adultery) constituted treatment contrary to Article 3 ▪ *Tyrer v. UK*, Judgement of 25 April 1978, judicial corporal punishment inflicted on the applicant by police officers amounted to degrading punishment - Para. 33: "…institutionalized violence … ordered by the judicial authorities of the State and carried out by the police authorities of the State … punishment – whereby he [the applicant] was treated as an object in the power of the authorities – constituted an assault on precisely that which it is one of the main purposes of Article 3 to protect, namely a person's dignity and physical integrity. Neither can it be excluded that the punishment may have had adverse psychological effects …"	

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		- para. 30: "… the humiliation or debasement involved must attain a particular level … the assessment is, in the nature of things, relative: it depends on all the circumstances of the case and, in particular, on the nature and context of the punishment itself and the manner and method of its execution." - para. 32: "… the Court does not consider that absence of publicity will necessarily prevent a given punishment from falling into that category: it may well suffice that the victim is humiliated in his own eyes, even if not in the eyes of others."	
Agents of persecution	▪ Authorities of a country ▪ UNHCR *Handbook*, para. 65: "Persecution … may emanate from sections of the population"; "Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution of they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection."	▪ *Soering v. UK*, Judgement 7 July 1989, para. 91: "There is no question of adjudicating on or establishing the responsibility of the receiving country … it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment." ▪ *Ahmed v. Austria*, Judgement of 17 December 1996, para. 44: "The country was still in a state of civil war	▪ Article 1 CAT: "… inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity …" ▪ *Elmi v. Australia*, Communication No. 120/1998 - Para. 6.5: "The Committee does not share the State party's view that the Convention is not applicable in the present case since, according to the State party, the acts of torture the author fears he would be subjected to in Somalia would not fall within the definition of torture set out in article 1… The

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		and fighting was going on between a number of clans vying with each other for control of the country. There was no indication that the dangers to which the applicant would have been exposed in 1992 had ceased to exist or that any public authority would be able to protect him." ▪ *H.L.R. v. France*, Judgement of 29 April 1997, para. 40: "The Court does not rule out the possibility that Article 3 of the Convention may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection." ▪ *D. v. UK*, Judgement of 2 May 1997, para. 49: "… the Court must reserve to itself sufficient flexibility to address the application of that Article in other contexts which might arise. It is not therefore prevented from scrutinizing an applicant's claim under Article 3 where the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or	Committee notes that for a number of years Somalia has been without a central government, that the international community negotiates with the warring factions and that some of the factions operating in Mogadishu have set up quasi-governmental institutions and are negotiating the establishment of a common administration. It follows then that, de facto, those factions exercise certain prerogatives that are comparable to those normally exercised by legitimate governments. Accordingly, the members of those factions can fall, for the purposes of the application of the Convention, within the phrase 'public officials or other persons acting in an official capacity' contained in article 1."

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		indirectly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of that Article." ▪ *T.I. v. UK*, Judgement of 21 March 2000: "The Court's case-law further indicates that the existence of this obligation is not dependent on whether the source of the risk of the treatment stems from factors which involve the responsibility, direct or indirect, of the authorities of the receiving country."	
Individual basis of ill-treatment	▪ UNHCR *Handbook* para. 44: "refugee status must normally be determined on an individual basis", but where "entire groups have been displaced under circumstances indicating that members of the group could be considered individually as refugees" then "each member of the group is regarded *prima facie* … as a refugee". ▪ Para. 45: An applicant must normally show good reasons why he individually fears persecution. ▪ 1951 Convention does not exclude	▪ *Vilvarajah and Others v. UK*, Judgement of 15 November 1996, para. 111: "The evidence before the Court concerning the background of the applicants, as well as the general situation, does not establish that their personal position as any worse than the generality of other members of the Tamil community or other young male Tamils who were returning to their country." ▪ *H.L.R. v. France*, Judgement of 29 April 1997, para. 42: " Moreover, there are no documents to support the	▪ Individual risk ▪ Article 3.2 CAT: "For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights." ▪ *Mutombo v. Switzerland, Khan v. Canada, Paez v. Sweden* etc., "The aim of the determination, however, is to establish whether the individual concerned would be personally at risk of being subjected to

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	groups or categories of the population that are targeted for reasons relevant according to the refugee definition. For example, phenomena such as ethnic or religious "cleansing" or genocide which are carried out, not because of acts or beliefs of the individual, but because of the mere fact of affiliation to the targeted group could, if they were perpetrated by State or non-State agents of persecution fall within the 1951 Convention.	claim that the applicant's personal situation would be worse than that of other Colombians, were he to be deported."	torture in the country to which he or she would return. It follows that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a particular person would be in danger of being subjected to torture upon his return to that country; additional grounds must exist to show that the individual concerned would be personally at risk. Similarly, the absence of a consistent pattern of gross violations of human rights does not mean that a person cannot be considered to be in danger of being subjected to torture in his or her specific circumstances."
Exceptions to the principle of *non-refoulement*	▪ Article 33(2): "The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country."	▪ *Chahal v. UK*, Judgement of 15 November 1996, paras. 80–81: "In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration… It should not be inferred from the Court's remarks [in the *Soering* case] concerning the risk of undermining the foundations of extradition … that there is any room for balancing the risk of ill-treatment against the reasons for expulsion in determining whether a State's responsibility under Article 3 is engaged."	▪ Article 2(2) CAT: "No exceptional circumstances whatsoever, whether a state of war or threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." ▪ *Paez v. Sweden*, Communication No. 39/1996, para. 14.5: "The Committee considers that the test of article 3 of the Convention is absolute. Whenever substantial grounds exist for believing that an individual would be in danger of being subjected to torture upon expulsion to another State, the State party is under obligation not to return the person concerned to that State. The nature

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		engaged." ▪ *D. v. UK*, Judgement of 2 May 1997, para. 47: "… the Court has repeatedly stressed in its line of authorities involving extradition, expulsion or deportation of individuals to third countries that Article 3 prohibits in absolute terms torture, inhuman or degrading treatment or punishment and that its guarantees apply irrespective of the reprehensible nature of the conduct of the person in question."	of the activities in which the person concerned engaged cannot be a material consideration when making a determination under article 3 of the Convention."
Probability	▪ Article 33 "… life or freedom <u>would be threatened</u> …".	▪ Real risk ▪ Foreseeable consequence ▪ *Cruz Varas v. Sweden*, Judgement of 20 March 1991: - para. 75: "In determining whether substantial grounds have been shown for believing in the existence of a <u>real risk</u> of treatment contrary to Article 3 the Court will assess the issue in the light of all the material placed before it or, if necessary, material obtained *proprio motu*." - Para. 76: "… the existence of the risk must be assessed primarily with	▪ CAT General Comment No. 1: "… the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable." ▪ *Mutombo v. Switzerland*, Communication No. 13/1993, para. 9.1: "The Committee must decide, pursuant to paragraph 1 of article 3, whether there are substantial grounds for believing that Mr Mutombo <u>would be in danger</u> of being subjected to torture." ▪ *Khan v. Canada*, Communication No. 15/1994, para. 12.6: "The Committee

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		reference to those facts which were known or ought to have been known to the Contracting State at the time of the expulsion; the Court is not precluded, however, from having regard to information which comes to light subsequent to the expulsion." ▪ *Vilvarajah and Others v. UK*, Judgement of 15 November 1996 - para. 111: "A mere possibility of ill-treatment, however, in such circumstances, is not in itself sufficient to give rise to a breach of Article 3." - Para. 108: "The Court's examination of the existence of a risk of ill-treatment in breach of Article 3 at the relevant time must necessarily be a rigorous one in view of the absolute character of this provision and the fact that it enshrines one of the fundamental values of the democratic societies making up the Council of Europe… It follows from the above principles that the examination of this issue in the present case must focus on the foreseeable consequences of the removal of the applicants to Sri Lanka in the light of the general situation there in February 1988 as well as on	therefore concludes that substantial grounds exist for believing that the author would be in danger of being subjected to torture" ▪ *Aemei v. Switzerland*, Communication No. 34/1995, para. 9.5: "In the present case, therefore, the Committee has to determine whether the expulsion of Mr Aemei (and his family) to Iran would have the foreseeable consequence of exposing him to a real and personal risk of being arrested and tortured." ▪ *S.M.R. and M.M.R. v. Sweden*, Communication No. 103/1998, para. 9.4: "In the case under consideration the Committee notes the State party's statement that the risk of torture should be a 'foreseeable and necessary consequence' of an individual's return. In this respect the Committee recalls its previous jurisprudence, '…that the requirement of necessity and predictability should be interpreted in the light of its general comment on the implementation of article 3, which reads: "Bearing in mind that the State party and the Committee are obliged to assess whether there are substantial grounds for believing that the author would be in danger of being subjected to torture were he/she to be expelled, returned or extradited, the risk of torture must be assessed on grounds that go beyond mere

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		their personal circumstances."	theory or suspicion. However, the risk does not have to meet the test of being highly probable.'" (A/53/44, annex IX, para. 6).
Burden and standard of proof	▪ UNHCR, *Handbook*, para. 196: "It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule ... while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner … if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt." - Para. 197: "The requirement of evidence should thus not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself. Allowance for such possible lack of evidence does not, however, mean that unsupported statements must necessarily be accepted	▪ Burden of proof is on the applicant. ▪ *Cruz Varas v. Sweden*, Judgement of 20 March 1991, para. 75: "In determining whether substantial grounds have been shown for believing in the existence of a real risk of treatment contrary to Article 3 the Court will assess the issue in the light of all the material placed before it or, if necessary, material obtained *proprio motu*." ▪ *Hatami v. Sweden*, Judgement of 9 October 1998, para. 106 "The Commission considers, however, that complete accuracy is seldom to be expected by victims of torture. Furthermore, the Commission considers that the inaccuracies which may exist are not due to the applicant's presentation of facts and do not raise doubts about the general veracity of his claims."	▪ CAT General Comment No. 1: "The Committee is of the opinion that it is the responsibility of the author to establish a *prima facie* case for the purpose of admissibility of his or her communication"; "With respect to the application of article 3 of the Convention to the merits of a case, the burden is upon the author to present an arguable case." ▪ Article 22(4): "The Committee against Torture shall consider communications received under article 22 in the light of all information made available to it by or on behalf of the individual and by the State party concerned." ▪ *Mutombo v. Switzerland*, Communication No. 13/1993 - Para. 9.1: "The Committee must decide, pursuant to paragraph 1 of article 3, whether there are substantial grounds for believing that Mr Mutombo would be in danger of being subjected to torture." - Para. 9.2: "The Committee considers that, even if there are doubts about the facts adduced by the author, it must ensure that his

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	as true if they are inconsistent with the general account put forward by the applicant." ▪ In assessing the overall credibility of the applicant's claim, the adjudicator should take into account such factors as the reasonableness of the facts alleged, the overall consistency and coherence of the applicant's story, corroborative evidence adduced by the applicant in support of his/her statements, consistency with common knowledge or generally known facts, and the known situation in the country of origin. Credibility is established where the applicant has presented a claim which is coherent and plausible, not contradicting generally known facts, and therefore is, on balance, capable of being believed.		security is not endangered." ▪ *Aemei v. Switzerland*, Communication No. 34/1995, para. 9.6: "However, the Committee is of the opinion that, even though there may be some remaining doubt as to the veracity of the facts adduced by the author of a communication, it must ensure that his security is not endangered… In order to do this, it is not necessary that all the facts invoked by the author should be proved; it is sufficient that the Committee should consider them to be sufficiently substantiated and reliable." ▪ *Tala v. Sweden*, Communication No. 43/1996, para. 10.3: "The State party has pointed to contradictions and inconsistencies in the author's story, but the Committee considers that complete accuracy is seldom to be expected by victims of torture and that the inconsistencies that exist in the author's presentation of the facts do not raise doubts about the general veracity of his claims, especially since it has been demonstrated that the author suffers from post-traumatic stress disorder."
Interim measures		▪ Rules of the Court, Rule 39: "The Chamber or, where appropriate, its President may, at the request of a	▪ Procedural Rules of the Committee, Rule 108 para. 9: "In the course of the consideration of the question of the admissibility of a

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		party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interest of the parties or of the proper conduct of the proceedings before it." • Where the Court accepts the Rule 39 request, it will request that the national authorities, within 24 hours after the reception of the application, suspend the expulsion. Rule 39 has been successfully invoked to prevent the immediate expulsion of asylum-seekers on the grounds that a violation of Article 3 might occur. • An application for a "Rule 39 request" to prevent the immediate expulsion of an asylum-seeker can be made by the applicant himself, the applicant's lawyer or someone with power of attorney. A Rule 39 request can only be made when there is no reasonable prospect that national remedies will be effective to prevent the expulsion and where it has been shown that the removal of the individual would result in irreversible harm to life or limb.	communication, the Committee or the Working Group or a special rapporteur designated under rule 106, paragraph 3, may request the State party to take steps to avoid a possible irreparable damage to the person or persons who claim to be victim(s) of the alleged violation. Such a request addressed to the State party does not imply that any decision has been reached on the question of the admissibility of the communication." ▪ Procedural Rules of the Committee, Rule 110 paragraph 3, "In the course of its consideration, the Committee may inform the State party of its views on the desirability, because of urgency, of taking interim measures to avoid possible irreparable damage to the person or persons who claim to be victim(s) of the alleged violation. In doing so, the Committee shall inform the State party concerned that such expression of its views on interim measures does not prejudge its final views on the merits of the communication." ▪ *T.P.S. v. Canada*, Communication No. 99/1997, para. 15.6: "The Committee considers that the State party, in ratifying the Convention and voluntarily accepting the Committee's competence under article 22, undertook to cooperate with it in good faith

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			in applying the procedure. Compliance with the provisional measures called for by the Committee in cases it considers reasonable is essential in order to protect the person in question from irreparable harm, which could, moreover, nullify the end result of the proceedings before the Committee. The Committee is deeply concerned by the fact that the State party did not accede to its request for interim measures under rule 108, paragraph 3, of its rules of procedure and removed the author to India.”