



Zienswijzen Mensenrechtencomité Verenigde Naties

In 2010 en 2011 stelde het Mensenrechtencomité van de Verenigde Naties, dat toezicht houdt op de naleving van het Internationaal Verdrag inzake Burgerrechten en Politieke Rechten, zijn zienswijzen vast in twee Nederlandse zaken, beide betreffende minderjarige Chinese asielzoekers. In de zaak Zhi Yang Chen verklaarde het comité de klacht niet ontvankelijk. In de zaak X.H.L. daarentegen constateerde het comité een schending van het verdrag en verzocht het comité de staat om de zienswijze, alsmede de reactie van de regering daarop, openbaar te maken. Aan dit verzoek wordt thans voldaan. De zienswijze in de zaak Zhi Yang Chen wordt daarbij eveneens gepubliceerd omdat de reactie van de regering in de zaak X.H.L. mede gebaseerd is op deze zienswijze. De zienswijzen en regeringsreactie volgen hieronder in chronologische volgorde.



United Nations

CCPR/C/99/D/1609/2007



**International Covenant on
Civil and Political Rights**

Distr.: Restricted*
4 August 2010

Original: English

Human Rights Committee
Ninety-ninth session
12 to 30 July 2010

Decision

Communication No. 1609/2007

<u>Submitted by:</u>	Chen, Zhi Yang (represented by counsel, Michel Arnold Collet)
<u>Alleged victim:</u>	The author
<u>State party:</u>	The Netherlands
<u>Date of communication:</u>	21 May 2007 (initial submission)
<u>Document references:</u>	Special Rapporteur's rule 97 decision, transmitted to the State party on 5 October 2007 (not issued in document form)
<u>Date of adoption of decision:</u>	26 July 2010
<i>Subject matter:</i>	Deportation of the author, [who was a minor at the time of his asylum application] to China
<i>Procedural issues:</i>	Non-exhaustion of domestic remedies; claim inadmissible <i>ratione materiae</i>
<i>Substantive issues:</i>	Inhuman or degrading treatment or punishment; arbitrary or unlawful interference with privacy and family life; measures of protection due to a child
<i>Articles of the Covenant:</i>	7, 17, and 24
<i>Articles of the Optional Protocol:</i>	2; 3; 5, paragraph 2 (b)

* Made public by decision of the Human Rights Committee.



Annex

Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political rights (ninety-ninth session)

concerning

*Communication No. 1609/2007*¹

Submitted by: Chen, Zhi Yang (represented by counsel, Michel Arnold Collet)
Alleged victim: The author
State party: The Netherlands
Date of communication: 21 May 2007 (initial submission)
The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights, Meeting on 26 July 2010, Adopts the following:

Decision on admissibility

1. The author of the communication, dated 21 May 2007, is Mr. Chen, Zhi Yang, a Chinese national from the Sichuan Province, born in 1988. He claims violations by the Netherlands of articles 7, 17, and 24 of the International Covenant on Civil and Political Rights. He is represented by counsel.

The facts as presented by the author

- 2.1 On 22 July 2003, upon his return from the market, the author found both his parents lying dead in the garden.² The author thought that they were killed because of his father's debts. After he buried his parents, the author approached the neighbours, but they could not help him. He did not find it necessary to go to the police, as he did not have money to pay them, and the police would only help people with the means to pay large bribes. Four days later, a man approached the author and informed him that he had 'bought' him from his late father, as a payment for his debts. This individual beat the author, locked him up, and finally abducted him to the Netherlands, where he arrived in August 2003. The author was able to escape from his abductor, and submitted an asylum application on 20 August 2003 at Schiphol Airport.
- 2.2 The first interview took place on 21 August 2003, followed by a second one on 26 February 2004. Both interviews were carried out in Mandarin, with the assistance of an interpreter. On 14 December 2004, in reaction to the delay in adoption of a decision on his asylum demand, the author applied for judicial review before the Hague District Court sitting in Zwolle. By decision of 5 July 2005, the Immigration and Naturalisation Office rejected the author's application for a temporary asylum residence permit and for the issuance, *ex proprio motu*, of a temporary regular residence permit, mainly on the ground that his account of facts was not credible, notably as he could not satisfactorily explain why he failed to seek the assistance and protection of the Chinese authorities. The Immigration and Naturalisation Office also found that there were sufficient institutions dedicated to the protection of minors in China, where the author could have sought refuge. On 5 December 2006, the Hague District Court confirmed the Immigration and Naturalisation Office decision. By judgement of 11 January 2007, the Administrative Jurisdiction Division of the Council of State rejected a further appeal by the author as inadmissible.

The complaint

- 3.1 The author claims that should it deport him to China, the State party would breach articles 7, 17 and 24 of the Covenant. Concerning article 7, he claims that he would be exposed to inhumane treatment or degrading treatment or punishment if returned to China, as he left China at the age of 15 years old, without a *Hukou* registration,³ which is obtained by adults. While it is possible to obtain an identity card at the age of 16, the *Hukou* is a prerequisite. As he will not be able to establish his identity, and cannot afford to pay the necessary bribes to public officials, the author

¹ The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati. Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Mahjoub El Haiba, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada Mr. Fabian Omar Salvioli and Mr. Krister Thelin.

² The author does not give indications on the place where he used to live with his parents.

³ A *Hukou* appears to refer to the system of residency permits prevailing in China, where household registration is required by law, and which officially records and identifies a person as a resident of an area. The *Hukou* includes identifying information such the name of the person, date of birth, the names of parents, and name of spouse, if relevant.



claims that he will be denied access to education, health care, as well as any other social assistance in China, in violation of article 7 of the Covenant. The author adds that the person who abducted him and 'bought' him may threaten him again and expose him to risks for his safety, as he will not be in a position to pay off his father's debts.

- 3.2 The author further claims that his deportation to China by the State party would be in breach of article 17, as he has been living in the Netherlands since the age of 15 years, where he currently goes to school, has developed a social life, and 'feels at home'.⁴ He adds that he does not have family in China, and claims that his return to China would entail a breach of his right to privacy and his family life, in violation of article 17.
- 3.3 He further claims that his deportation to China would be in breach of the State party's obligations under article 24 of the Covenant.⁵ He notes that he arrived in the Netherlands at the age of 15 as an unaccompanied minor, and while he is no longer a minor, he spent a crucial period of his development in the Netherlands, where he has proved to be integrated, and has learned the Dutch language. He claims that in their decisions, the immigration authorities did not take into account the author's best interest as a minor. Moreover, the author contends that during the asylum procedures, the burden to prove that he would not have an orphanage available in China was wrongly placed on him. He further reiterates that he does not have family in China, as well as the difficulties which would derive from his inability to prove his identity, thereby forcing him to live on the streets.
- 3.4 On 29 May 2007, the author informed the Committee that he was not receiving financial support in the Netherlands and that he was not legally entitled to work, rent a place to live and benefit from medical care. He had been deprived of his identity card by the State party's authorities at the end of the negative asylum procedure. In addition, he was unable to obtain a passport since he could not prove his Chinese origin and did not have a valid *Hukou* registration. The author therefore pointed to the difficulty of the situation, whereby he was not legally allowed to stay in the Netherlands, but could not return to China for lack of ability to establish his identity.

State party's observations on the admissibility and merits

- 4.1 On 27 November 2007, the State party raises the fact that the author's allegations under article 17 and 24 of the Covenant were not addressed before the State party's jurisdictions, and should as such be declared inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.
- 4.2 On 7 May 2008, the State party further states that the author's allegation that he will be denied access to social advantages in China, for lack of a *Hukou* registration, was not raised before the Courts of the State party. As far as his claim under article 7 of the Covenant is based on this factual element, the State party claims that this allegation should also be declared inadmissible under article 5, paragraph 2 (b), of the Optional Protocol for non-exhaustion of domestic remedies.
- 4.3 On the merits, the State party claims that concerning his allegations under article 7 of the Covenant, the author failed to raise sufficient information indicating that there is an inevitable and predictable consequence that he will be exposed to treatment contrary to article 7 should he be returned to China. The State party affirms that based on information from its Ministry of Foreign Affairs, every family in China has a *Hukou Ben*, which is a household booklet reflecting information such as birth, civil status, marriage and death. Any Chinese national can be registered under the *Hukou* system, even at an advanced stage in life, and even after a protracted stay abroad, even though bureaucratic obstacles may sometimes delay the process of registration. The author was once registered on his father's passport, and as he claimed in his asylum interviews that he went to school in China, his name must be recorded in the population register. He has not submitted any official document supporting his allegations, and did not ask the Chinese diplomatic representation in the Netherlands about his *Hukou* registration, so as to be able to credibly establish that he would not be able to prove his identity in China and, as a result, be denied the associated social benefits. The State party adds that upon his return to China, the author, who is now 22 years old, will be like any other young adult of his age, and, as such, presumed to be capable of supporting himself. He did not adduce evidence to the contrary. The State party further notes that the scope of article 7 of the Covenant does not extend to allowing the author the right to stay in the Netherlands so as to be able to access social benefits. Regarding his allegations that the person who once 'bought' him may threaten him, the State party contends that the author failed to show that the Chinese authorities are unwilling or incapable of offering him protection. The State party concludes that the author's allegations under article 7 of the Covenant are ill-founded.
- 4.4 Regarding article 17, the State party observes that the author was never granted a residence permit, nor was he given any assurance that he would be granted one. It is therefore at his own risk that he developed a social network and personal ties in the Netherlands. He has lived in China

⁴ The author refers to Ccommunications No. °930/2000, *Winata and Li v. Australia*, Views adopted on 26 July 2001, and No. °1069/2002, *Bakhtiyari v. Australia*, Views adopted on 29 October 2003.

⁵ The author also alleges a violation of art. 3 of the Convention on the Rights of the Child.



for most of his life, speaks Chinese, and is familiar with Chinese customs. He has not adduced evidence showing that he could no longer adapt to life in China. The State party adds that the author's references to previous jurisprudence of the Committee are irrelevant as, contrary to the facts in that case, the author does not have family in the Netherlands, and has already reached the age of majority.⁶

- 4.5 With regards to the author's allegations that his return to China would lead to a breach of the State party's obligation to provide measures of protection to minors under article 24, the State party notes that under Dutch asylum law⁷ and practice, due account is taken of the applicant's age when conducting interviews and assessing their account of the facts in support of their application. Unaccompanied minors whose asylum applications were denied must in principle return to their country of origin, or another country where they can reasonably be expected to go. Such minors may be granted a temporary residence permit, but are in principle required to return to their country of origin when adequate care and protection are deemed available in the country of return. The applicant can however adduce evidence showing that no such protection is available in the country of return, or that it is not adequate by local standards. In the author's case, the State party determined, based on various country reports, that adequate care is available in China for unaccompanied minors. The author did not adduce any evidence to the contrary. The State party reiterates that upon his return to China, the author, who is an adult, is presumed to be capable of supporting himself. The State party therefore concludes that his allegations under article 24 are ill-founded.

Author's comments to the State party's observations

5. On 21 July 2008, the author reaffirms that it was not in his best interest as a child to be sent back to a country where he no longer has relatives and a familiar social environment. This is *a fortiori* the case since, over the years, he has developed strong ties with the Netherlands. He adds that having left China illegally, it will be impossible for him to register again upon return without paying a fine. The author further claims that while it is possible to prove that one's name is registered by the authorities, the opposite is impossible to establish. The *Hukou* system is based on the household, and is regularly updated when people no longer live in the country or die. As he left the country as a minor, he did not have a *Hukou* of his own, and since his father died, his name must therefore have disappeared from all registers. As such, he cannot count on any protection from the police. The author claims that deporting him to China would be in violation of his right to his private life, as he is no longer familiar with the Chinese culture, and does not have family or friends on whom he can rely.

Issues and proceedings before the Committee

- 6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.
- 6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a), of the Optional Protocol.
- 6.3 Regarding his allegations under article 7 of the Covenant, the Committee takes note of the author's allegation that if deported to China, he would face a risk of torture or cruel, inhuman or degrading treatment or punishment prohibited by article 7 of the Covenant, as a result of his inability to prove his identity to the Chinese authorities. The State party contends that the author failed to exhaust domestic remedies on that count, and the author did not contest this. The Committee observes that before the State party's jurisdictions, the author's asylum claim was mainly based on his contention that, if returned to China, he would face a risk of persecution by the individuals who allegedly abducted him. Recalling that the requirement of exhaustion of domestic remedies, which allows the State party to remedy an alleged violation before the same issue is raised before the Committee, obliges authors to raise the substance of the issues submitted to the Committee before domestic courts, the Committee declares this part of the communication inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.
- 6.4 With regard to the author's allegation under article 7, that the individual who allegedly abducted him may threaten or harm him should he return to China, the Committee observes that these acts are attributed to a non-State actor, and the author has not demonstrated, for admissibility purposes, that the Chinese authorities are unable or unwilling to protect him from such private

⁶ *Winata v. Australia*, (note 3 above).

⁷ Aliens Act of 2000, Aliens Decree of 2000, Regulations on Aliens of 2000, and the Aliens Act Implementation Guidelines of 2000.



acts.⁸ The Committee hence declares this part of the communication inadmissible under article 2 of the Optional Protocol.

- 6.5 Concerning articles 17 and 24, the Committee takes note of the State party's contention that these claims were not raised before the domestic courts. The author does not contest this. The Committee thus declares this part of the communication inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.
- 6.6 The Committee further observes, concerning article 24, that the author, who was born in 1988, is at the present time no longer a minor. As a result, any future removal would not touch upon any right under this article. The author's claim under article 24 is therefore also inadmissible *ratione materiae* under article 3 of the Optional Protocol, as incompatible with the provisions of the Covenant.⁹
7. The Committee therefore decides:
- (a) That the communication is inadmissible under articles 2, 3 and 5, paragraph 2 (b) of the Optional Protocol;
 - (b) That this decision shall be communicated to the author and to the State party.

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

⁸ See communication No.1302/2004, *Khan v.Canada*, decision on admissibility adopted on 25 July 2006, para. 5.6.

⁹ See *Benaliv.the Netherlands*, decision on inadmissibility of 23 July 2004, para. 6.2.



United Nations

CCPR/C/102/D/1564/2007



**International Covenant on
Civil and Political Rights**

Distr.: General*
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Original: English

Human Rights Committee
102nd session
11 to 29 July 2011

Views

Communication No. 1564/2007

<u>Submitted by:</u>	X. H. L. (represented by counsel, M.A. Collet)
<u>Alleged victim:</u>	The author
<u>State party:</u>	The Netherlands
<u>Date of communication:</u>	8 January 2007 (initial submission)
<u>Document references:</u>	Special Rapporteur's rule 97 decision, transmitted to the State party on 15 May 2007 (not issued in document form) CCPR/C/97/D/1564/2007 – decision on admissibility dated 7 October 2009
<u>Date of adoption of Views:</u>	22 July 2011
<i>Subject matter:</i>	Unaccompanied minor claiming asylum
<i>Procedural issues:</i>	Exhaustion of domestic remedies
<i>Substantive issues:</i>	Inhuman treatment; arbitrary interference with the family; protection as a child
<i>Articles of the Optional Protocol:</i>	1; 2; and 5, paragraph 2 b)
<i>Articles of the Covenant:</i>	7; 17; and 24

On 22 July 2011, the Human Rights Committee adopted the annexed text as the Committee's Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1564/2007.

* Made public by decision of the Human Rights Committee.



Annex

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights (102nd session)

concerning

Communication No. 1564/2007¹

Submitted by: X. H. L. (represented by counsel, M.A. Collet)
Alleged victim: The author
State party: The Netherlands
Date of communication: 8 January 2007 (initial submission)
Date of Admissibility 7 October 2009

decision:

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

Meeting on 22 July 2011

Having concluded its consideration of communication No. 1564/2007, submitted to the Human Rights Committee on behalf of Mr. X. H. L. under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

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

- 1.1 The author of the communication, dated 8 January 2007, is Mr. X. H. L., a Chinese national, born in 1991. He claims to be a victim of violations by the Netherlands of articles 7, 17 and 24 of the Covenant. He is represented by counsel Mr. M. A. Collet
- 1.2 On 16 October 2007, the Committee, acting through its Special rapporteur on new communications, granted a request from the State party to split the consideration of the admissibility of the communication from its merits.

Facts as submitted by the author

- 2.1 The author entered the Netherlands as an unaccompanied minor when he was 12 years old. He states that he left China with his mother on 24 February 2004 by plane from Beijing to Kiev. They stayed in Kiev for three days. In the evening of 27 February they left Kiev by car and drove until the next evening. His mother then left with two unknown persons, and the author was taken by a man in a car to the Netherlands, where he arrived on 3 March 2004.
- 2.2 Upon arrival in the Netherlands, the author applied for asylum. His request was rejected on 24 March 2004 in the so-called '48-hour accelerated procedure'². On appeal, the District Court, by decision of 30 July 2004, quashed the Minister's decision and ordered a reconsideration of the author's application under the regular procedure.
- 2.3 On 21 April 2005, the Minister of Immigration rejected the author's application arguing that he had not provided any reasonable grounds for fear of persecution. In relation to the author's young age, the Minister considered that Chinese unaccompanied minors were not eligible for a special residence permit, as adequate care was provided in their country of origin. The District Court, by decision of 13 February 2006, rejected the author's appeal. A further appeal was rejected by the Council of State on 17 July 2006. The author continues to reside in the Netherlands.

The complaint

- 3.1 The author claims that the decision to return him to China violates article 7 of the Covenant because he would be subjected to inhumane treatment. He explains that, since he was only 12

¹ The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli. and Mr. Krister Thelin
Pursuant to rule 90 of the Committee's rules of procedure, Committee members, Mr. Cornelis Flinterman and Ms. Margo Waterval did not participate in the adoption of the present decision.
The texts of three individual opinions signed by Committee members, Sir Nigel Rodley, Mr. Krister Thelin, Mr. Gerald L. Neuman, Mr. Yuji Iwasawa and Mr. Fabian Omar Salvioli are appended to the present Views.

² The author notes that this accelerated procedure is used to decide on apparently weak asylum cases.



when he left China, he does not have his own identity card or *hukou* registration. Without these, he cannot prove his identity or access orphanages, healthcare, education, or any other kind of social assistance in China. He notes that, given that he has no contact or family connections in China, he would be forced to beg in the streets.

- 3.2 He further claims that the State party's decision to return him to China constitutes a breach of his right to private and family life recognised by article 17 of the Covenant. He notes that he considers his Dutch guardian as his only family, as he has no family left in China and is unaware of his mother's whereabouts.
- 3.3 Finally, he claims a violation of article 24 of the Covenant and article 3 of the Convention on the Rights of the Child, since the Netherlands did not take his best interests as a child into account by subjecting him to the accelerated asylum procedure. He claims that he was left with the burden to prove that he would not have access to an orphanage in China, which is too heavy a burden for a child. A further violation of article 24 is claimed because rejecting his request for asylum or for a permit on humanitarian grounds is against his best interests as a minor. He argues that he has integrated into Dutch society since his arrival in 2004 and has learned the language.

State party's observations concerning the admissibility of the communication

- 4.1 By submission of 16 July 2007, the State party requested that the Committee declare the communication inadmissible.
- 4.2 With regard to the author's claim under article 7, the State party argued that it had not been sufficiently substantiated for purposes of admissibility, because all documents submitted by the author were of a general nature and did not relate to his specific case.
- 4.3 The State party further submitted that the author had not brought his claim under article 17 before the domestic courts, and that this claim was thus inadmissible for non-exhaustion of domestic remedies.
- 4.4 With regard to the author's claim under article 24, the State party noted that the author's asylum application was at first rejected through an accelerated procedure, but that the District Court ordered the reassessment of the author's application under the regular asylum procedure, which was subsequently done. Accordingly, the author had ample opportunity to substantiate his claims. Therefore, the State party contended that this part of the communication was not sufficiently substantiated for the purposes of admissibility.
- 4.5 Finally, the State party claimed that the parts of the communication relating to alleged breaches of the CRC were inadmissible under article 1 of the Optional Protocol.

Author's comments

- 5.1 By submissions of 31 July 2008 and 2 December 2008, the author noted, with regard to his claim under article 17 of the Covenant, that it was not possible to address a breach of family life under Dutch asylum law. Nevertheless, he stated that he had raised a possible violation of article 8 of the European Convention on Human Rights before the Court of Appeal in the Netherlands, which was an equivalent provision.
- 5.2 With regard to his claim under article 7, the author claimed that he could not provide information relating to his personal situation in China, as he had been in the Netherlands since 2004. He referred to general information that showed that it was impossible to return and live in China without any documentation.
- 5.3 The author explained that he had invoked article 3 of the CRC only in conjunction with article 24 of the Covenant. He further maintained that the State party's intention to have his claim dealt with under the accelerated procedure was a violation of article 24 of the Covenant, even though this decision was later overturned by the District Court.

Committee's decision on admissibility

6. On 7 October 2009, the Committee declared the communication admissible under articles 7, 17 and 24. With regard to the State party's allegation that the author had not expressly invoked article 17 before national courts, the Committee noted the author's argument that it was not possible for the Courts to address such claims in the context of an asylum procedure, and that he had nevertheless raised in his appeal the possible violation of article 8 of the European Convention on Human Rights, which relates to a similar substantive right. With regard to the author's claim under article 24 because he had been subjected to the accelerated asylum procedure, the Committee considered that part of the claim inadmissible under article 2 of the Optional Protocol because the Court ordered the reassessment of the author's claim through the regular procedure, which was subsequently done. However, the Committee considered that there were no obstacles to the admissibility of the part of the author's claim that the decision to reject his application for asylum and for a permit on humanitarian grounds violated his rights under article 24 because he was well integrated into Dutch society.



State party's observations concerning the merits of the communication and author's comments

- 7.1 On 4 May 2010, the State party noted that it was the author's responsibility to prove that there were serious grounds for believing that, if returned to China, he would be subjected to a treatment in violation of article 7. The State party added that, according to the country report on China issued by the Minister of Foreign Affairs of the Netherlands, every family in China had a *hukou* or family book, and all *hukou* registers were kept indefinitely by regional authorities, even in the event that citizens left the country, in which case these were required to report the change of address to the *hukou* administrative body. The State party noted that the author had not supplied any information to conclude that he was not registered in China. In the State party's view, the fact that the author attended school and had access to health care in China supports the assumption that he was registered. The State party further noted that the author had now reached the age of majority and could be expected to care and provide for himself. The State party observed that the mere fact that the author's circumstances would be significantly less favourable if he were to be removed from the Netherlands could not in itself be considered a violation of article 7 of the Covenant. The State party added that there were no grounds for assuming that the author would not have access to adequate care in China. According to recent reports, China had made caring for orphans a priority and medical care provided was basic but acceptable by local standards.
- 7.2 With regard to the author's claim under article 17, the State party noted that the only issue raised by the author during the national procedures was his request to be reunited with his mother. The State party notes that the author did not make use of the opportunity to have his right to a private and/or family life assessed by applying for a regular residence permit under the Aliens Decree 2000. The State party also noted that the author's ties with his guardian could not be characterised as family ties, especially since he was now 18 years old and no longer in need for guardianship. Additionally, the State party noted that the author had not specified why his ties with the Netherlands were so important to him that he could not return to China, nor had he provided any evidence that he could not resettle in China. The State party concluded that, if the Committee were to conclude that there had been interference with the author's right under article 17, it should be nonetheless considered that such interference would be neither arbitrary nor unlawful.
- 7.3 With regard to the author's claim under article 24, the State party stressed that the author had now reached the age of majority and could be expected to care and provide for himself. The State party noted that the policy of returning unaccompanied minor asylum seekers was based on their own interest, since few uprooted or displaced children would benefit from being separated from their families. On the contrary, the best interest of the child required restoring their relationship with their parents, family and social surroundings.
8. On 31 December 2010, the author noted that the State party had not put forward any new arguments. Therefore, the author did not add any new comments on the merits of the case.

Issues and proceedings before the Committee

Reconsideration of the Committee's decision on admissibility with regard to the author's claim under article 17

9. With regard to the author's claim that his return to China would violate his right to private and family life, the Committee notes the State party's argument in the sense that the author failed to use his opportunity to invoke this right by not applying for a regular residence permit on grounds of exceptional personal circumstances, according to the relevant domestic legislation. In light of this new information, which has not been challenged by the author, the Committee considers that the author's claim under article 17 is inadmissible for non-exhaustion of domestic remedies.

Considerations on the merits

- 10.1 The Human Rights Committee has considered the present communication in the light of all the information received, in accordance with article 5, paragraph 1, of the Optional Protocol.
- 10.2 The Committee recalls that States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.³ The Committee must therefore assess whether there are substantial grounds for believing that there is a real risk that the author would be

³ See General Comment No. 20, on article 7 (Prohibition of torture or cruel, inhuman or degrading treatment or punishment), paragraph 9.



subjected to the treatment prohibited by article 7 if he were to be removed to China⁴. In the present case, the Committee takes note of the author's argument that, since he does not have an identity card or hukou registration, he is unable to prove his identity or access any social assistance services in China, and since he does not have any family or connection in the country, he would be forced to beg to survive. The Committee notes the State party's argument to the effect that the author must have been registered in China but considers that it cannot be expected from an unaccompanied 12-year-old that he know his administrative obligations regarding notification to the relevant hukou administrative body. Moreover, it would have been unreasonable to demand from the author that he notify his residence in the Netherlands to the Chinese authorities given the fact that he was seeking asylum. The Committee notes that the author's claim under article 7 is closely linked to his claim under article 24, namely, the treatment he may have been subjected to as a child had the deportation order been implemented at the time where it was adopted. Therefore, the Committee will examine both claims jointly.

- 10.3 With regard to the author's claim that the State party did not take his best interest as a child into consideration when deciding on his return to China, the Committee notes that, from the deportation decision and from the State party's submissions, it transpires that the State party failed to duly consider the extent of the hardship that the author would encounter if returned, especially given his young age at the time of the asylum process. The Committee further notes that the State party failed to identify any family members or friends with whom the author could have been reunited in China. In light of this, the Committee rejects the State party's statement that it would have been in the best interest of the author as a child to be returned to that country. The Committee concludes that, by deciding to return the author to China without a thorough examination of the potential treatment that the author may have been subjected to as a child with no identified relatives and no confirmed registration, the State party failed to provide him with the necessary measures of protection as a minor at that time.⁵
11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the State party's decision to return the author to China violates his rights under article 24, in conjunction with article 7 of the Covenant.
12. Pursuant to article 2, paragraph 3(a), of the Covenant, the Committee considers that the State party is under an obligation to provide the author with an effective remedy by reconsidering his claim in light of the evolution of the circumstances of the case, including the possibility of granting him a residence permit. The State party is also under an obligation to take steps to prevent similar violations 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 or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective 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 the Committee's Views. In addition, it requests the State party to publish the Committee's Views.

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

⁴ See General Comment No. 31, on article 2 (The Nature of the General Legal Obligation Imposed on States Parties to the Covenant), paragraph 12. See also the Committee's Views on communications No 1315/2004, *Singh v Canada*, 30 March 2006, paragraph 6.3, No. 706/1996, *T v Australia*, November 1997, paragraph 8.4, and No. 692/1996, *A.R.J.*, 28 July 1997, paragraph 6.12.

⁵ See also the Committee's Views in communication No. 1554/2007, *El-Hichou v Denmark*, 22 July 2010, paragraphs 7.4 and 7.5.



Appendix

Individual opinion of Committee members, Sir Nigel Rodley and Mr Krister Thelin (dissenting)

In a few short words and without explanation, the Committee has embarked on novel jurisprudence. In previous cases involving fears of adverse consequences if a decision to deport were implemented, the Committee has expressed the opinion that, if the decision were implemented, the rights at issue *would be* violated. This indeed was the case in *El-Hichou v Denmark*, the very one cited by the Committee as authority for its decision (see footnote 4). Also, the operative date for the Committee's analysis has typically been, not the date the authorities took their decision, but the date of its own decision, so as to ensure that serious harm is avoided.

Now, out of the blue, the Committee has decided that a mere unimplemented decision of the State party's authorities entails a violation of article 24 (protection of children - at the time of the authorities' decision the author was a child; now he is 19 or 20) and this read together with nothing less than article 7 (prohibition of torture and similar ill-treatment). The Committee invokes the notion of the best interests of the child, as if this were the only applicable criterion for the interpretation of article 24, a status it does not enjoy even under the Convention on the Rights of the Child, from which the Committee has imported it. According to article 3, paragraph 1, of the latter Convention, the best interests of the child are 'a primary consideration', not 'the primary consideration', and certainly not the only consideration.

Another factor for the Committee seems to have been the State party's failure to conduct a 'thorough examination' of the consequences of such a deportation. The fact that those consequences could have been addressed at the stage of the practical implementation of the decision is ignored by the Committee. In any event, the implementation never happened.

We therefore dissent from a decision that is unprecedented, unjustified and arbitrary. This dissent should not be interpreted as approval of the State party's actions. Humane behaviour by the State party would be demonstrated by a reversal of the decision to deport after the author has spent so much time and developed such roots in The Netherlands. It is just that the Committee has no basis in law for finding an unimplemented decision of this sort to violate the Covenant.

[*signed*] Sir Nigel Rodley

[*signed*] Krister Thelin

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

Individual opinion of Committee members Mr. Gerald L. Neuman and Mr. Yuji Iwasawa (dissenting)

The State party's Observations concerning this communication detail its efforts to ascertain that the author would benefit from appropriate supervision and care if he were returned to his own country. We cannot share in the majority's negative evaluation of its efforts to take into account the best interests of the child as a primary factor in its decision.

It might have been helpful for the State party also to specify the additional steps that it would have taken to clarify the author's status if it had attempted to implement the return order; but the order was never implemented and he is now an adult and no longer in need of supervision. We hope that the Committee's future approach in similar cases will not establish a pattern that provides encouragement to the needless placement of unaccompanied children, without documents, in the hands of smugglers, which exposes them to serious risks of human trafficking, injury, and death.

[*signed*] Gerald L. Neuman

[*signed*] Yuji Iwasawa

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



Individual opinion of Committee member Mr. Fabián Salvioli

1. I concur with the Committee's Views as expressed in communication No. 1564/2007 concerning *X.H.L. v. the Netherlands*, as I fully share the Committee's reasoning and conclusion that the State party has violated article 24, read together with article 7, of the Covenant. However, I consider that the Committee should have also found an independent violation of article 24 of the Covenant.
2. Paragraph 1 of article 24 of the International Covenant on Civil and Political Rights is a directive of great scope and power, as it states that all children shall have the right to such measures of protection as are required by their status as minors, on the part of the family, society and the State.
3. In its general comment No. 17, the Committee stated that the measures that should be adopted by virtue of article 24, paragraph 1, are not specified in the Covenant, and it is for each State to determine them in the light of the protection needs of children in its territory and within its jurisdiction.¹
4. Of course, those measures cannot be arbitrary and must be adopted within the framework of other international obligations which the State party has undertaken; in this case, that framework is provided by the Convention on the Rights of the Child,² which was ratified by the Netherlands in 1995.
5. The obligations established in the Convention, to the extent that they are relevant, go hand in hand with the obligations set forth in article 24 of the International Covenant on Civil and Political Rights. These obligations constitute the parameter for the analysis that the Human Rights Committee should undertake in all cases that involve a boy or a girl and a State party to both instruments. This should always be the case, and especially when a boy or a girl has been a victim of human trafficking. In those cases, States parties have an even greater duty to ensure that the children do not become victims again. Failing to carry out a comprehensive analysis of the obligations freely adopted by States parties creates an artificial division that is associated, no doubt, with approaches that have been superseded by a more coherent doctrine on the issue. The focus of that doctrine is invariably on ensuring that the provisions contained in human rights instruments have the proper effects.
6. In the current case, in addition to the violation of article 24, read together with article 7, the Committee should also have found an independent violation of article 24. Under the particular circumstances of the case, the decision by the Netherlands to return X.H.L. to China constituted in itself a violation of article 24 of the Covenant, independently of whether or not the decision could do harm to the minor's psychological well-being.
7. There is one final aspect that I consider important to highlight in this individual opinion. In paragraph 11 of its Views, the Committee correctly rules that the State party's decision to return the author to China violates his rights under article 24, in conjunction with article 7, of the Covenant, which indicates the presence of an actual, rather than a potential, violation.
8. If the Committee had decided that there was a 'potential violation' owing to the fact that X.H.L. is still living in the Netherlands and has not actually been sent to China, it would then have failed to consider the violation itself. The current case does not have anything to do with possible cases of deportation to a place where a person might be tortured; in that type of case, it is logical to consider *ratione temporis* the possible violation at the moment that the ordered deportation occurs, since the violation depends on the circumstances that exist in the country to which the person is sent.
9. In this case, which has completely different characteristics, the violations of article 24 and article 7 of the Covenant were actually committed when the decision was taken by the State party (i.e., the decision gave rise to international responsibility), and this was fully understood by the Human Rights Committee.

[Signed] Fabián Salvioli

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

¹ Human Rights Committee, general comment No. 17 (1989), para. 3.

² The Convention on the Rights of the Child, adopted in 1989, should, in my opinion, be entitled 'the Convention on the Rights of Boys and Girls', in view of the need to use appropriate language.



Response by the Government of the Netherlands to the Views of the Human Rights Committee in respect of Communication no. 1564/2007

X.H.L.

v.

The Netherlands

Introduction

1. On 2 September 2011 the Secretary-General of the United Nations sent the Government of the Netherlands the Views of the Human Rights Committee, adopted on 22 July 2011, on Communication no. 1564/2007 concerning X.H.L. The Committee holds that the Netherlands violated article 24 in conjunction with article 7 of the International Covenant on Civil and Political Rights in relation to the author by deciding that the author should return to China.
2. The Committee has asked the State to provide information, within 180 days of the notification of its Views, about the measures it has taken to give effect to the Committee's Views, and to publish the Committee's conclusions.
3. The members Sir Nigel RODLEY, Krister THELIN, Gerald L. NEUMAN and Yuji IWASAWA issued dissenting opinions, opposing the Committee's conclusions.

Considerations

4. Like the Committee, the Government is of the opinion that unaccompanied aliens under 18 ('unaccompanied minors') are especially vulnerable and deserve special attention. To safeguard the interests of minors, the Netherlands has a specific policy on unaccompanied minors. It also has a special 'policy for aliens who through circumstances beyond their control cannot return to their country of origin', which provides that if despite his own efforts and the State's support an alien cannot return to his country of origin, he will be granted a residence permit. The conditions applied to minors are more generous than those for adults.
5. The Dutch government will shortly present an elaborate review of its policy on unaccompanied minors, aimed at giving them more quickly a clear decision on their prospects: either a residence permit or return. This should expedite the return of unaccompanied minors who are not eligible for protection as asylum seekers. On the other hand, the Netherlands will liberalise its policy on unaccompanied minors who, through circumstances beyond their control, cannot return to their country of origin to receive adequate care (reception). Even when it has been established after a thorough asylum procedure that an unaccompanied minor is not eligible for an asylum residence permit, forcible return is only resorted to once it has been established that adequate care - by local standards - is available. Adequate care consists not only of care by the minor's parent(s) or other family members, but also of care, for example, by other residents of the same village who have cared for the minor in the past, or in general facilities (governmental or non-governmental) where adequate care is available.
6. Notwithstanding the above considerations and developments, however, the Government, bearing in mind that the Committee's views are not of a legally binding nature, will not take any measures to give effect to the Committee's Views for the following reasons.
7. First of all, in the Government's view, the Committee's decision is at variance with its earlier decisions in similar cases. In its present decision the Committee has without any explanation abandoned its usual *ex nunc* assessment and instead taken the time of the Government's decision as its reference point. This difference is nevertheless crucial to the case: the author is now an adult (20 years old). There is no reason at this time to assume that he is incapable of supporting himself. Adequate care is therefore no longer needed.
8. In its decision of 26 July 2010 in the case of Chen, Zhi Yang v. the Netherlands¹ the Committee declared a similar Communication inadmissible on the grounds that it was incompatible with the provisions of the Covenant, as the author was no longer a minor and any future removal would not touch upon the rights of the child. The Government fails to understand why two Communications which are so similar in nature lead to fundamentally different conclusions.
9. Furthermore, the Government considers that the Committee provided very little substantiation of its conclusions. The Committee does not discuss the arguments and information submitted by the Government concerning registration in China, the existence of adequate care facilities in that country, or the Netherlands' special policy for aliens who through circumstances beyond their control cannot return to their country of origin for former unaccompanied minors.
10. The Government would note that the Committee limits itself to stating that the Government failed to identify any family members whom the author has in China. Although the Government referred to the facilities mentioned in the Minister of Foreign Affairs' country reports on China - which

¹ Communication No. 1609/2007.



conclude that Chinese institutions provide adequate care for minors – the Committee does not discuss these facilities.

11. As the Government set out in its observations of 4 May 2010 in this case, adequate care is defined as care under conditions that do not differ fundamentally from those in which care is provided to the asylum seeker's peers in a comparable situation. According to successive country reports issued by the Minister of Foreign Affairs, Chinese minors are entitled to care under the responsibility of the Chinese Ministry of Civil Affairs. Country-specific policy in relation to China assumes, on the basis of those country reports, that there is adequate care for unaccompanied minors in China. The author has not demonstrated that adequate care is not available to him. The Government is therefore of the opinion that adequate care is available in China.
12. In addition, the Committee has accepted the author's unsubstantiated statements that he has no *hukou* registration in China, and would therefore have no access to social services and be forced to beg to survive. The Committee ignored the extensive arguments made by the Government on the basis of general, publicly available information as well as the author's own statements, that he is in fact registered. In short, the Government recalls that the author was included in his mother's passport and *hukou*, which must according to public sources mean that his name appears in the population register. The author's statements that he attended school in China and had access to health care there confirm the supposition that he was in fact registered. The Government would also note that the author has been unable to submit any documents issued by the Chinese authorities to substantiate his claim and, moreover, has apparently not asked the Chinese embassy in the Netherlands for information about his registration.
13. The Government observes that the Committee wrongly makes no distinction between asylum seekers whose procedure is still in progress and persons whose ineligibility for protection has been established through a careful asylum procedure. Persons in the latter situation may reasonably be expected to communicate with the authorities in their country of origin to obtain documents or – as in this case – information about their registration. The Committee's consideration on this point is all the more surprising in as much as the author in this case by his own account had economic motives for leaving China.
14. The Committee also did not discuss the special policy which is in place for failed unaccompanied minor asylum seekers who, through circumstances beyond their control, cannot leave the Netherlands. This policy, too, has been developed for the very reason that the Dutch Government recognises that children are a vulnerable group and attaches a great deal of importance to their interests. The Committee ignored the fact that the author – for reasons of his own – failed to submit an application on these grounds.
15. The Government's views are reinforced by the sharply divergent opinions within the Committee. The Government notes that two members of the Committee stated in a dissenting opinion that they considered the present decision 'unprecedented, unjustified and arbitrary'. As pointed out in one of the dissenting opinions, for the Government to act in any other way would encourage putting minors in the hands of people smugglers to obtain a Dutch residence permit, with all the dangers involved including the risk of exploitation. It would furthermore encourage asylum seekers not to submit documentation and those whose are found not to be eligible for protection not to cooperate with and even frustrate their return to their country of origin.

Conclusion

16. On the above grounds, the Government concludes that it cannot agree with the Committee's Views, which state that returning the author to his country of origin in a case such as the one at issue here constitutes a violation of article 24 in conjunction with article 7 of the International Covenant on Civil and Political Rights.
17. The Committee's Views will be published shortly, together with the present response of the Government, in the Netherlands' Government Gazette.

The Hague, 1 March 2012

*L. Egmond,
Deputy Agent of the Government of the Netherlands.*