



**International Covenant on
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Human Rights Committee

Communication No. 1885/2009

**Views adopted by the Committee at its 110th session
(10-28 March 2014)**

<i>Submitted by:</i>	Corinna Horvath (represented by counsel Tamar Hopkins)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Australia
<i>Date of communication:</i>	19 August 2008 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 13 July 2009 (not issued in document form)
<i>Date of adoption of Views:</i>	27 March 2014
<i>Subject matter:</i>	Non enforcement of judgment providing compensation for police misconduct;
<i>Substantive issues:</i>	Right to an effective remedy;
<i>Procedural issues:</i>	Non-exhaustion of domestic remedies;
<i>Articles of the Covenant:</i>	2, paragraph 3; 7; 9, paragraphs 1 and 5; 10; 17;
<i>Articles of the Optional Protocol:</i>	5, paragraph 2 b). [Annex]

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 (110th session)

concerning

Communication No. 1885/2009*

Submitted by: Corinna Horvath (represented by counsel Tamar Hopkins)

Alleged victim: The author

State party: Australia

Date of communication: 19 August 2008 (initial submission)

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

Meeting on 27 March 2014,

Having concluded its consideration of communication No. 1885/2009, submitted to the Human Rights Committee by Ms. Corinna Horvath 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. The author of the communication is Ms. Corinna Horvath, an Australian national. She claims that her rights under articles 2; 7; 9, paragraphs 1 and 5; 10; and 17 were violated by Australia. The author is represented by counsel.

The facts as presented by the author

2.1 On 9 March 1996, around 9.40 p.m., two police officers, constables J. and D., arrived at the author's house in Summerville, State of Victoria, to inspect the author's car for evidence that it had been recently driven. The constables had issued an unroadworthy

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Pathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kaelin, Ms. Zonke Zanele Majodina, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabian Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Ms. Margo Waterval and Mr. Andrei Paul Zlatescu.

The texts of two individual opinions by Committee members Ms. Anja Seibert-Fohr, Mr. Yuji Iwasawa and Mr. Walter Kaelin, and by Mr. Gerald L. Neuman are appended to the present Views.

certificate the previous day. The author, who was then aged 21, did not allow the police to remain on the premises as they had no warrant, and she and her companion, C.L., used force to make them leave. The police officers called for reinforcements and, at about 10.30 p.m., a total of eight officers arrived at the house stating that they intended to arrest the author and C.L. for having attacked constables J. and D. on their first visit and that they did not need a warrant for that.

2.2 Constable J. kicked the front door open and in so doing struck D.K., one of a group of friends who were also present, on the face causing injury. Then, Constable J. brought D.K. to the floor, struck him on the right side of the head and hit him with a baton across his lower back region. Then, Constable J. pulled the author to the floor and punched her in the face. With the assistance of another policeman, Constable J. rolled the author over and, despite her bleeding nose, handcuffed her, dragged her out to their van and took her to the police station at Hastings.

2.3 As a result of Constable J.'s conduct the author suffered a fractured nose and other facial injuries, including bruising and a chipped tooth. She also had some bruising, scratches and abrasions to other parts of her body. The police officers handcuffed the author in a manner that restricted her from reducing the pain and blood flow from her nose or otherwise relieving her injuries. Rather than being taken directly to hospital she was taken to the police station and introduced in a cell. She was not provided with immediate medical treatment. Instead, she was left screaming in pain in the cell. She was eventually discovered by a police doctor who contacted her parents and they arranged to have her taken by ambulance to Frankston Hospital. After a week, she was re-admitted in hospital for five days in relation to her nose injury. After some months she recovered from her physical injuries but was left with some nose scars and possibly aggravation of hay fever. Besides suffering physical injuries, she also suffered from anxiety and depression in respect of which she received treatment.

2.4 On 6 June 1997, the author and three other plaintiffs filed proceedings for damages against four police officers individually, and against the State of Victoria under s. 123 of the Police Regulation Act 1958 (Vic.), before the County Court of Victoria. On 23 February 2001, Judge Williams of the County Court held that Constable J. was liable to the author for assault and malicious prosecution; that Sergeant C. was liable to the author for negligence; and that all four officers were jointly liable to the author for trespass, wrongful arrest and false imprisonment. The officers were also held liable for various similar claims to C.L. and the two remaining plaintiffs.

2.5 Judge Williams ordered the following damages awards: (a) AU\$120,000 for negligence (against Sergeant C., transferred to the State); (b) AU\$ 90,000 for assaults, against Constable J.; (c) AU\$30,000 for trespass, wrongful arrest and false imprisonment, against all defendants, transferred to the State; and (d) AU\$30,000 for malicious prosecution against Constable J. alone. The officers were also held liable for various similar claims to C.L. and the two remaining plaintiffs.¹

2.6 On 9 April 2001, the State of Victoria filed an appeal against Judge Williams' decision as to its liability for damages. On 7 November 2002, the Court of Appeal overturned Judge Williams' decision that the State was liable to pay for damages arising from the intentional actions of Constable J. and the negligence of Sergeant C.. The Court found that the latter's negligence was not a cause of the injuries to the author but rather they were caused by intentional actions that in effect severed the causal chain of liability of Sergeant C.. As a consequence, the liability of the officers remained but the liability of the

¹ See paragraph 4.8.

State of Victoria to pay damages was overturned. The author was awarded damages totalling AU\$143,525. With respect to the claim against the State of Victoria she sought leave to appeal against the judgment of the Court of Appeal in the High Court of Australia, which was refused on 18 June 2004.

2.7 The author filed a complaint to the Ethical Standards Department of Victoria Police. As a result, disciplinary proceedings were commenced, but were subsequently dismissed for lack of evidence, despite the strong findings of fact made against police during the court proceedings outlined above. The author had no standing in the proceedings and was not called as a witness. The author made a subsequent complaint to the Police Ombudsman on 4 August 2004, which was transferred to the Office of Police Integrity.

2.8 At the time the author submitted the communication to the Committee the situation in respect of compensation was as follows: (a) She had not received any damages from the individual police officers; (b) She had not received costs to pay her legal team; and (c) The State of Victoria continued to maintain a legal landscape that absolved its liability to compensate victims of intentional human rights abuses. The situation in respect of disciplinary matters was as follows: (a) All or most police involved in the incident remained employed by the State of Victoria, with no disciplinary or criminal action having been successfully taken against any of them, despite Judge Williams' findings of serious misconduct. None of the occupants of the house were spoken to by police investigators from Ethical Standards; and (b) The State of Victoria failed to maintain a system that ensures effective discipline or prosecution of police engaged in human rights abuses.

2.9 Meanwhile, Constable J. brought charges against the author for assault against police and traffic infringements, which were dismissed by the Magistrates' Court in Frankston on 9 November 1996. In the judgment of Judge Williams dated 23 February 2001, it was found that constable J. had conducted a prosecution for assault against the author that was not based upon a proper motive, but arose from a mixture of ill-will and a desire to justify *ex post facto* the general conduct of police throughout the whole affair. On this basis Judge Williams found the tort of malicious prosecution to be made out.

The complaint

Article 2

3.1 The author claims that the State party violated article 2 of the Covenant, as it did not provide her with an effective remedy. She received no compensation and there were no disciplinary actions against the perpetrators of the assault.

3.2 The State of Victoria does not have a statutory scheme that provides adequate compensation for human rights abuses. Under common law, the State is not responsible for police conduct because when police act on the basis of a power under law, they act independently and not as agents of the State. Section 123 of the Police Regulations Act 1958 (Vic) only partially remedies this situation by holding the State liable only where police act reasonably in good faith.² Moreover, the Act creates an exceptionally narrow

² Section 123 reads as follows:

123. Immunity of members

(1) A member of the force (...) is not personally liable for anything necessarily or reasonably done or omitted to be done in good faith in the course of his or her duty as a member of the force or police recruit.

(2) Any liability resulting from an act or omission that, but for subsection (1), would attach to a member of the force or police recruit, attaches instead to the State.

class of State liability for actions or omissions of police officers. In order for the State to be liable, the actions of the police must be negligent, yet also the police must be acting in good faith, and the act or omission must be “necessarily or reasonably done” in the course of their duty. It is very difficult to imagine a class of case that satisfies such criteria. In the present case the Trial Judge was satisfied that the negligent planning and supervision of the raid by Sergeant C. was a reasonable yet negligent action done in good faith, and that the abuse suffered by the author flowed from that negligence. However, the Court of Appeal overturned this analysis, holding that the actions of Police during the raid effectively severed the causal chain. The Court of Appeal found that there was a “common design” agreed between the officers to commit intentional torts that overtook any negligence of Sergeant C. in planning the raid.

3.3 Four States in Australia ensure State compensation for victims of police tort even when police actions are intentional or in bad faith. In two States, the State will pay for punitive damages awarded against officers.

3.4 The State party has failed to ensure that the perpetrators are tried before a criminal court. As a result of their status as police officers, they were not brought before the Courts as any other perpetrator of similar abuse would have been, thus undermining human rights protections guaranteed under the Covenant. The State party has an obligation to provide an effective and impartial framework to investigate and punish police officers who engage in criminal offences. Instead, the State has permitted the officers involved to continue to be employed in positions where their unacceptable behaviour could be repeated.

Article 7

3.5 The author claims that the treatment she received falls within the scope of article 7. She was the subject of cruel, inhuman and degrading treatment during the raid. This degradation was enhanced by her being handcuffed, taken into custody and later charged. The act of arresting her was cruel and unjustified.

3.6 The level of force used against the author during the raid went far beyond the force required to detain her and was not necessary by the author’s conduct, or the conduct of other civilians present at the time. The trial judge found that Constable J. “pulled her to the floor and began ‘brutally and unnecessarily’ to punch her in the face thereby fracturing her nose and rendering her senseless. In the result, Horvath had no recollection of [J]’s assault on her. With the assistance of [S.], [J.] then rolled Horvath over and, despite her bleeding nose, handcuffed her and then dragged her out to the van.”³

3.7 The author contends that article 7 imposes on States two obligations: A substantive (or negative) obligation to prevent violations and a procedural (or positive) obligation to provide an effective investigation into allegations of substantive violations. In the present case, the investigation into the author’s abuse was carried out by the Ethical Standards Department, a part of the Victoria Police. The Victoria Police disciplinary system was the subject of substantial criticism in a 2007 Office of Police Integrity Report entitled “A Fairer Police Disciplinary System”. The author’s case is mentioned in the report in a manner which makes it clear that the failure of the disciplinary process to have held police accountable is of concern.

(3) This section applies to acts or omissions occurring before as well as after the commencement of this section.

³ Details concerning the author’s injuries and psychological consequences are contained in the judgment of the County Court of Victoria.

3.8 The County Court of Victoria, in civil proceedings brought by the author came to clear findings of fault against the police. It is noteworthy that the standards of proof of civil proceedings are the same as for disciplinary proceedings. Despite the same standards of proof, the disciplinary process failed to achieve the same result as an independent judicial hearing. By reason of a failure to effectively investigate or use the findings in the civil proceedings as evidence to remove police perpetrators from duty, proven perpetrators of abuse are still employed without any form of discipline. This inaction condones and effectively authorizes further potential violation of Article 7. The State of Victoria plays a role in permitting a culture of impunity and immunity within the Police.

Article 9, paragraphs 1 and 5

3.9 The author was subjected to arbitrary arrest and detention, in violation of article 9, paragraph 1 of the Covenant. Without a warrant the police had no right to enter the premises of the author and to arrest her. At no point was the detention justified or lawful. In County Court proceedings, Judge Williams found that she had been falsely arrested and imprisoned. Furthermore, the State party did not grant her an enforceable right to compensation, which entails a violation of article 9, paragraph 5.

Article 10

3.10 The assault, constraint by handcuffing, arrest, detention and delay in medical treatment is inhumane and a violation of article 10, in addition to article 7. The detention in a situation where medical attention was required added to the trauma experienced by the author.

Article 17

3.11 Police forced their way into the author's home without a lawful basis. If they had reasonably believed that she had committed a serious indictable offence or had a warrant, their invasion might have been justified. Without such belief or authorization, the interference with her home, family and privacy was arbitrary and unlawful. The subsequent malicious prosecution of the author for assaulting Constable J. was an unlawful attack on her honour and reputation. It constituted a disproportionate police response which could not be justified by any conception of "pressing social need". In breach of article 17, paragraph 2, police failed to protect the author's right to privacy. They were instead the agents of the violation and used the law, through bringing charges against her, to further violate her rights.

Exhaustion of domestic remedies

3.12 The author claims that she exhausted domestic remedies in attempting to claim damages from the State of Victoria. The author learned through her lawyer that the individual police officers against whom judgment was entered did not have the resources to pay the judgment amount and cost or any substantial portion thereof. Furthermore, the author cannot obtain compensation through the Victims of Crime Compensation Tribunal, since the acts she was subjected to were non-criminal.

3.13 According to the author, s. 123 of the *Police Regulations Act 1958* provides no effective remedy for victims of police abuse, even where that abuse occurs through misconduct during police operations and procedures. Victims of police abuse in Victoria are reliant on damages being paid by the individual police perpetrators of that abuse. This is problematic, because police officers organize their assets in ways that shield them from potential liability to civil actions. In cases where the individual police officer has no capacity to pay (or has no assets in his/her name), the victim goes uncompensated. This is

neither an effective compensation scheme, nor does it provide any incentive to the Victorian Police Force to prevent further abuses.

Remedies sought

3.14 The author seeks : (1) Be awarded compensation, assessed according to the standards applicable under Australian domestic law; (2) The State party be directed to enact legislation allowing for compensation by the State party for the illegal activities of police officers; (3) The State party be directed to ensure genuine access and assistance to people taking civil action alleging police abuse, to ensure civil actions will have systemic impact on reform within police agencies and that the human rights of all are protected and promoted; (3) The State party be directed to review and implement reforms to the current disciplinary procedures applicable to police officers in the State of Victoria to ensure that: (a) All police who are found civilly liable for human rights abuses are disciplined and removed from the Force; (b) the State prosecutes Police who have committed criminal offences; and (c) police not subject to civil proceedings be investigated and subject to proceedings capable of leading to their removal from duty where appropriate.

Observations of the State party on admissibility and merits

4.1 The State party submitted observations on admissibility and merits on 24 March 2010.

Claims under article 2

4.2 The State party contends that the author has failed to substantiate a claim of violation of article 2. In particular, she has failed to substantiate her claim that the four members of the Victoria Police against whom judgment was made do not have capacity to pay and do not have any assets in their name. Furthermore, there are domestic legal avenues available to the author to determine whether her assertion is correct. The Victorian Supreme Court Rules set out a process for discovery in aid of enforcement. According to it, the Court may, on application by a person entitled to enforce a judgment, order a person bound by the judgment to attend court, be orally examined on material questions, and produce any document or thing in the possession, custody or power of the person relating to the material questions. There is no evidence that the author sought such an order.

4.3 Even if the four members of the police do not have capacity to pay and assets in their name, domestic avenues remain available to the author to recover all or part of the judgment debt. A judgment for the payment of money made in the Supreme Court of Victoria (which includes the Court of Appeal) may be enforced by a number of means, including warrant of seizure and sale, attachment of debts, attachment of earnings, a charging order against the property of the debtor and, in certain circumstances, committal for trial and sequestration (seizure of property). In particular, the Supreme Court Rules provide that a judgment creditor may apply to the Court for an attachment of earnings order. The effect of such an order is that the judgment debtor's employer must pay a reasonable proportion of the debtor's earnings to the creditor. The author is also entitled to apply to the Court of Appeal for an order that the judgment debt be paid by instalments, and specifying the amount of each instalment and the times at which they are to be paid. The author has made no attempt to recover the judgment debt, whether by an order for an attachment of earnings or otherwise.

4.4 In 2003, about six months after the Court of Appeal judgment against Constable J. was entered, he voluntarily chose to become bankrupt. The author has not provided information as to what contact, if any, she had with the trustee appointed to administer Constable J.'s estate in order to ensure that her interests were taken into account in the administration process. Constable J.'s bankruptcy was discharged at the expiry of three

years. As far as the State party can ascertain, the author has not sought to enforce the judgment against him following the discharge of his bankruptcy in July 2006.

4.5 According to a document submitted by the author, the author learned in 2007 that her lawyer had not taken any steps to recover the judgment debt. Although the author instructed her lawyers in 2008 to take bankruptcy proceedings against the remaining police officers, the bankruptcy register does not record any creditor's petition having been issued in relation to the individual police officers.

4.6 The author has not pursued compensation from the Victims of Crime Assistance Tribunal or its predecessor, the Crimes Compensation Tribunal, despite being eligible to make an application for compensation up to AUD 60,000. The absence of a criminal prosecution in respect of the acts of the individual police officers does not preclude application to the Victims of Crime Assistance Tribunal or its predecessor. Therefore, on this basis as well the author has failed to exhaust domestic remedies.

4.7 The State party contends that the author's claims under article 2 are without merits. In Australia, the common law rule set out in *Enever v. The King* provides that police officers are individually responsible for 'unjustifiable acts' done in the exercise of lawful authority. The liability for such acts is not transferred to the state. Section 123(1) of the Police Regulation Act 1958 modifies the common law position, providing that a police officer 'is not personally liable for anything necessarily or reasonably done or omitted to be done in good faith in the course of his or her duty'. Under section 123(2), liability for such an act or omission attaches instead to the state of Victoria. The outcome is a compensatory scheme whereby, in the event of any unlawful act or omission by a police officer, either the state or the individual police officer will be held liable. This scheme balances an appropriate level of protection and the need to ensure that there is no encouragement to develop an attitude of irresponsibility among police officers. It ensures that there is no scope for impunity and that compensation will be awarded where appropriate. Individual liability has an important deterrent effect. In particular, the function of awards of exemplary, aggravated or punitive damages would be undermined if they were simply to be transferred to the state. Consequently, the state's refusal to indemnify acts or omissions of police officers that fall outside the scope of section 123 of the Police Regulation Act 1958 is consistent with article 2.

4.8 The outcome of the Victorian Court of Appeal's decision was that the individual police officers were held personally liable to pay damages for assault, trespass, false imprisonment and malicious prosecution. The damages awarded to the author included compensatory damages, aggravated damages and exemplary damages totalling AUD 143,525. Of this amount, she was awarded AUD 93,525 for the assault against her by Constable J; AUD 30,000 for trespass and false imprisonment against all defendant officers; and AUD 20,000 for malicious prosecution against Constable J. Hence, the author's right to adequate and effective reparation has been realized. The State party does not accept that the author has successfully made out that she faced difficulties in enforcing the judgment made in her favour, as judicial processes for enforcement are available to her. In any event, a breach of article 2 cannot arise by reason of whether the individual police officers against whom judgment was made have capacity to pay, or have assets in their name.

4.9 Regarding the author's claim that the State party breached article 2 by failing to criminally prosecute those allegedly responsible for violation of her rights, the State party recalls the Committee's jurisprudence that the Covenant does not provide a right for an individual to require that the State party criminally prosecute another person. Further, the State party has effective legal processes in place to address any alleged violations of inhuman or degrading treatment or punishment by police officers, and these processes have been adequately invoked in the present case.

4.10 The Police Regulation Act 1958 establishes a disciplinary process for members of Victoria Police which is overseen by the Chief Commissioner of Police and undertaken by the Ethical Standards Department of Victoria Police. This Department is responsible for investigating police misconduct and corruption and dealing with service delivery and disciplinary issues. The Department deals with claims in a prompt and impartial manner. Since November 2004, the Office of Police Integrity has been the independent body that detects, investigates and prevents police corruption and serious misconduct. Furthermore, criminal sanctions are available for conduct constituting serious violations of human rights. The statutory requirement that the Deputy Ombudsman (Police Complaints) be informed of disciplinary investigations provides an important independent check on the adequacy and appropriateness of the disciplinary process.

4.11 As a result of a complaint filed by the author on 21 March 1996, preliminary investigations were undertaken. The Department informed the author about the status of the disciplinary investigations on several occasions. When the disciplinary file was opened, the Department also informed the author that she could make an additional complaint to the Deputy Ombudsman (Police Complaints). The Deputy Ombudsman responded on 30 April 1997 observing that the time taken to arrange medical treatment for the author was not unreasonable and that the proposal to charge Sergeant C. and Constable J. with disciplinary offences was appropriate in the circumstances. As a result of the preliminary investigation, Constable J. was charged with 'disgraceful conduct' and Sergeant C. with being 'negligent in the discharge of his duty'. An inquiry for Constable J. was conducted on 25 August 1998 and for Sergeant C. on 31 August 1998. On the basis that the hearing officer could not reasonably be satisfied on the evidence before him all charges were dismissed. In respect of the inquiry for Constable J., the hearing officer also noted inconsistencies in the evidence provided by civilian witnesses. At the time the inquiries were concluded, the civil proceedings had not concluded and no findings of fact had been made by the trial judge which could have been considered by the hearing officer. That outcome does not undermine the adequacy of the process to respond to complaints of alleged police misconduct. It is the general practice of the Committee not to question the evaluation of the evidence made in domestic processes.

4.12 The disparity between the findings of the trial judge and the outcome of the disciplinary proceeding can be explained by reference to the different standards of proof which apply in each forum. In disciplinary proceedings involving allegations of serious misconduct, the usual civil standard requiring proof on the balance of probabilities applies, but is heightened by an additional requirement that the degree of certainty required must be particularly high given the gravity of the consequences which flow from an adverse finding. This standard is consistent with the serious nature of such proceedings and the punishment (including dismissal) which can result.

Claims under article 7

4.13 Based on the author's failure to make use of all judicial and administrative avenues that offer her a reasonable prospect of redress, the State party submits that the author failed to exhaust domestic remedies. If the Committee finds that the claim under article 7 is admissible, the State party submits that the allegations are without merit.

4.14 The author's treatment did not amount to cruel, inhuman or degrading treatment or punishment. The State party accepts that a conclusion that the treatment was unacceptable or inappropriate is open on the facts, particularly in light of the Victorian Court of Appeal's decision to uphold the award of damages to the author for assault and false imprisonment. Nevertheless, her treatment during the incident did not amount to a breach of article 7. For treatment in the context of an arrest to be degrading, there must be an exacerbating factor beyond the usual incidents of arrest. Since arrest, like detention, contains an inherent aspect

of humiliation, an element of reprehensibleness must also be present for it to qualify as a violation of article 7. Any 'exacerbating factor' or 'element of reprehensibleness' in the author's purported arrest or detention was insufficient to meet the threshold level of severity required for a breach of article 7. Furthermore, the author has not substantiated that she suffered ongoing adverse physical or mental effects.

4.15 Failure to provide necessary medical attention can, in certain circumstances, amount to a breach of article 7. However, in the present case police records confirm that the author received appropriate and timely medical treatment while in custody. She was treated by a doctor within 20 minutes of arriving at the police station, at 11.00 pm on 9 March 1996. At midnight, an ambulance arrived at the station and began administering further treatment to her. She was released from custody shortly afterwards, at 12.20 am on 10 March 1996, and conveyed to hospital by ambulance at that time. She was readmitted to hospital after approximately one week in relation to her nose injury. There is nothing to suggest that she received anything other than appropriate and timely medical treatment while in detention. On 30 April 1997, the Deputy Ombudsman observed that the time taken to arrange medical treatment to the author was not unreasonable.

4.16 The author claims that the failure to effectively investigate and discipline police involved in the raid condones and effectively authorizes further potential violations of article 7. However, this claim overlaps with the claim made by the author in relation to article 2 and should be considered in conjunction with that claim. The State party recognizes that States have an obligation to ensure that complaints made in relation to article 7 are investigated promptly and impartially by competent authorities. In the present case, the successful civil action against members of Victoria Police demonstrates that individuals remain liable for their acts and omissions. If, as the author proposes, civil liability for all acts and omissions of police officers were to be transferred to the state, this would effectively absolve individuals of their potential individual civil liability. This liability acts as an important deterrent to police officers.

Claim under article 9, paragraph 1

4.17 In connection with this claim the State party argues that domestic remedies have not been exhausted and that the claim is without merit. The author's purported arrest and detention should not be characterized as 'unlawful' or 'arbitrary' in the context of article 9, paragraph 1. As was recognized by the Victorian Court of Appeal, the members of Victoria Police involved in the raid were of the opinion that they had authority to enter the premises and arrest the author under section 459A of the Crimes Act 1958 (Vic).

Claim under article 10

4.18 In connection with this claim the State party argues that domestic remedies have not been exhausted and that the claim is without merit. Further, the author does not clearly identify which treatment is alleged to fall within the scope of article 10.

4.19 The principle that treatment prohibited by the Covenant under article 7 must entail elements beyond the mere fact of deprivation of liberty is also relevant to article 10. Any element of humiliation that may have accompanied the handcuffing and detention was insufficient to meet the threshold required to establish a breach of article 10. Following her arrest, the author was brought directly to the police station where her handcuffs were removed. Handcuffing, in the context of what was considered to be a lawful arrest, and in the context of her clear non-cooperation with police, was not unreasonable in the circumstances. The alleged restriction of the author from 'reducing the pain and blood flow from her nose or otherwise relieving her injuries' was insufficient to reach the level of humiliation or debasement prohibited by article 10. Consequently, the purported arrest, handcuffing and detention cannot in themselves amount to a breach of article 10.

4.20 As to the alleged delay in medical treatment, the State party submits that the author's treatment in detention did not breach article 10. Police records confirm that the author received prompt medical treatment while in custody. There was no medical advice to indicate that she should not be detained. The nature of her injuries and the short period of detention are relevant considerations in this regard. The author was briefly admitted to hospital within hours of her purported arrest and was subsequently discharged. She did not spend a significant period in hospital until almost a week after the incident, indicating that the treatment she required was not urgent.

Claim under article 17

4.21 In connection with this claim the State party argues that domestic remedies have not been exhausted and that the claim is without merit. The State party reiterates its arguments in connection with article 9 of the Covenant and submits that the author has presented no evidence to suggest that her honour and reputation were 'maliciously attacked'. To the extent that the charges laid against the author may have been prosecuted without reasonable cause and maliciously, she was successful in her claim for malicious prosecution against Constable J.

Author's comments to the State party's observations

5.1 On 2 July 2010 the author submitted comments to the State party's observations. The author reiterates her allegations and states that she has exhausted all avenues in seeking to recover the judgment debt.

5.2 Once the judgements became enforceable against the individual police officers, letters of demand were forwarded to them seeking payment of the amounts owed to the author. In response, the police officers' counsel informed the author's counsel that Constable J. had declared himself bankrupt and therefore the author was prevented, under the provisions of the Bankruptcy Act, from pursuing any further action against him. As for the remaining defendants, they had minimal assets, as per the research undertaken by the author's counsel. Under Australian law, superannuation is not accessible in a bankruptcy, and therefore, effectively, if any of the defendants were declared bankrupt, they would have no assets which would be distributable to the author and the other plaintiffs. A Warrant of Seizure and Sale, or a Charging Order against a property of a debtor is only of benefit if there are assets which could be seized, or property which can be charged. It was the author's counsel view, having obtained information from the Defendants and carrying out his own searches⁴, that any application to issue a Warrant or a Charging Order would be futile and result in no monies being available. Accordingly, the author's counsel formed the view that the matter was best resolved by attempting to negotiate a settlement. As a result, the non-bankrupt defendants offered a final settlement of AU\$ 45,000.00 payable to the author and her three co-plaintiffs. This settlement was accepted. In relation to Constable J., he was obliged to notify the Trustee in Bankruptcy of the money owed to the author. As no communication was received from the Trustee, it was apparent that no funds were available for distribution to the creditors.

5.3 Regarding the State party's observation that she could have pursued a claim for compensation in the Victims of Crime Assistance Tribunal, the author states that the Tribunal does not provide compensation for pain and suffering and focusses on timely and practical measures to assist a victim of crime. The Tribunal may award amounts as 'financial assistance' and 'special financial assistance'. Financial assistance is granted for

⁴ Copies of the statements of assets regarding the four police officers concerned by the judgments are contained on file.

medical and counselling expenses, loss of earnings and damage to clothes during the act of violence. Special financial assistance may be seen as compensatory in nature. The Tribunal awards modest amounts when an applicant suffers any significant adverse effect as a direct result of an act of violence committed against him or her. The Tribunal uses categories of offences to determine the maximum level of special financial assistance to be awarded. It is possible that in the author's case, if she does not establish that she suffered a very serious injury, she would be eligible for financial assistance in the amounts of either \$130-\$650 or \$650-\$1300, being amounts awarded in respect of offences inflicting serious injury and assault respectively. The awards are symbolic and are not intended to reflect the level of compensation to which victims of crime may be entitled at common law or otherwise. An extendable time limit of two years applies to claims before the Tribunal. The presumption is that an out of time application will be struck out, since the incident in the present communication occurred in 1996.

5.4 Furthermore, the Tribunal does not make any findings of guilt. It may award financial assistance even though no person has been charged or found guilty of a criminal offence. Its investigative powers are limited to establishing whether an act of violence occurred and then whether the application for financial assistance should be granted to meet expenses related to that act. Perpetrators are not held liable in any way through the process. The Tribunal does not have the capacity to remedy the breaches outlined in the present communication. Accordingly, an award from it is not an effective remedy for the author. To comply with the requirement to exhaust domestic remedies an author must access those remedies which are available and effective in redressing the wrong. Such remedies must also provide the State with an opportunity to respond to and remedy the issue within its jurisdiction.

5.5 The author disagrees with the State party's arguments regarding the individual responsibility of perpetrators. It is the State's responsibility to ensure that its police do not violate human rights and to remedy violations of human rights by its police. By directly compensating the author, the State ensures that its obligations to compensate victims of human rights abuses are fulfilled. Such a position does not relieve the individual perpetrators of liability and the perpetrators must defend themselves in the civil proceedings. It is also open for the State to pursue the individual perpetrators for reimbursement. As it currently stands, the practical effect of section 123 of the Police Regulations Act is to absolve the State of responsibility for police who act in bad faith, those who act unreasonably and outside the course of their duty. In light of this, the State of Victoria is obliged to change its domestic laws, as other States already did. Even in situations where police act in bad faith, such activity does not occur in a vacuum. Police violence occurs in part due to systemic failures in training, oversight and disciplinary measures. State liability for the actions of its agents ensures that such systemic failures are addressed.

5.6 Regarding the State party's observations on the effectiveness of the Victoria's disciplinary system the author argues that the Ethical Standards Department lacks practical independence. Findings of criminal or torturous conduct against police are rare. In her case, the author was not called to give evidence into the hearing of the disciplinary charge against Constable J.. Neither were any of the civilians witnesses. The hearing occurred two years after the incident and the investigation took 11 months. Such a delay is inexcusable.

5.7 The author made a request for a copy of the disciplinary file related to her case, but it was denied to her on the grounds that it would divert too much of the State's resources. The only publicly released information about the process was contained in a brief paragraph of the Office of Police Integrity report "A Fairer Disciplinary System". There has been no public scrutiny of the investigation or hearing or the decision and there was no appeal mechanism for the author. As for the role of the Deputy Ombudsman as a safeguard of the

process, the author claims that mere notification was all that was required and that there is no supervision as such.

5.8 The State party's reference to the standard of proof to explain the difference between the disciplinary hearing result and the civil proceeding is unjustified and unsupported. It fails to address that the disciplinary hearing failed to adduce *viva voce* evidence from civilian witnesses to the police misconduct, which reflected a systemic and serious failure of the process in circumstances where it was purported that there was insufficient evidence to make a finding of misconduct. The difference in outcomes between the disciplinary process and the civil trial lies in the lack of adequacy, transparency, accountability and independence of the disciplinary hearing process.

5.9 Once the civil proceeding finding was made, where the judge found that the police had lied on matters of major significance, there was the opportunity to re-open or recommence disciplinary proceedings and to refer a prosecution brief to the Office of Public Prosecutions. The State failed to pursue these avenues.

5.10 The author reiterates that the treatment she was subjected to falls under the scope of article 7 of the Covenant. She was 21 at the time of the incident. The treatment was premeditated and its aim was to punish and intimidate her. She was repeatedly punched, causing very serious and cruel suffering in the form of a broken nose, facial injuries, bruising to face and other parts of her body, chipped tooth, loss of consciousness, fear, anguish, distress, intimidation and ongoing psychological conditions. The assault continued while the author was helpless and unconscious and on her back. The treatment was unnecessarily prolonged by the arrest and transport to the police station, where she continued to be cuffed. According to Judge Williams, the police viewed the author with "extraordinary bigotry and bias", describing her as a "filthy, dirty, drug-affected female". This attitude provides support for the author's claim that the intention of the treatment was to debase, degrade and punish her.

5.11 Regarding the State party's observations with respect to article 9, the author reiterates that the police entry into the house was inappropriate, unjust and unreasonable. It was also unlawful, as stated by Judge Williams. There were many less invasive steps that the police could have utilized to effect an arrest if it was truly necessary, such as obtaining a warrant or conducting static observations of the premises. Even if the entry to the premises was believed to be lawful by individual police officers, it does not mean that what occurred after entry was lawful, i.e. the assault and transportation to the police station, which was not proportionate in the circumstances and breached the author's right to liberty and security.

5.12 In the alternative, if the Committee is not satisfied that a breach of article 9, including paragraph 5, occurred, the author submits that these actions were in breach of her freedom of movement under article 12 of the Covenant.

5.13 The author reiterates her claims under article 17. She states that a malicious prosecution by necessity breaches the author's right to privacy and not to be subjected to unlawful attacks on her reputation.

Additional observations from the State party

6.1 In August 2011, the State party submitted further observations on admissibility and merits. With respect to the Compensation under Victims of Crime Assistance Scheme the State party argues that at the time of the incidents in question, the author would have been entitled to make a claim under the Criminal Injuries Compensation Act 1983 (Vic.). Had she made an application under that Act, she would have been entitled to compensation of up to AUD 50,000, including an award of compensation for pain and suffering of up to AUD 20,000. The categories of special financial assistance relied upon by the author did not

come into force until 2000. Awards made under the schemes serve similar purposes to public law damages available in other jurisdictions, in terms of both compensation and vindication.

6.2 The State party reiterates that the compensation available under the Victims of Crime Assistance Act 1996 is an effective remedy for the purposes of article 2. The author remains eligible to pursue compensation from the Victims of Crime Assistance Tribunal. As she has not done so, she has failed to exhaust all available domestic remedies.

6.3 In jurisdictions that have a separate public law cause of action for breach of human rights, public law damages may serve the objectives of compensating the claimant for loss and suffering caused by the breach, vindicating the right by emphasizing its importance and the gravity of the breach and deterring State agents from committing future breaches. Damages are generally not awarded unless one or more of these objects is served. Where damages are appropriate, the concern is to restore the claimant to the position she would have been in had the breach not been committed.

6.4 The State party rejects the author's claim that only full payment of compensatory damages, aggravated damages, exemplary damages and her full legal costs by the State of Victoria will meet the requirement of provision of an "effective remedy". Section 123 of the Police Regulation Act 1958 (Vic) means that the State of Victoria will be liable for breaches of human rights by individual police officers where those breaches occur in accordance with practices and procedures promulgated by Victoria Police or in circumstances in which the conduct is contributed to by systemic issues such as inadequate training, policies and procedures. It is only when a police officer acts well outside the authorized policies and procedures, such that Victoria Police and the State of Victoria cannot be said to have contributed in any way to the conduct, that the State of Victoria will not be liable for the breach.

6.5 Regarding the author's claim under article 12 the State party submits that the author has failed to exhaust domestic remedies, for the reasons specified above and that the claim is without merits. The right to liberty and freedom of movement are distinct concepts. While restrictions not amounting to a breach of the right to liberty may in some circumstances amount to a breach of freedom of movement, this will not always be the case. The facts of the current case do not give rise to issues regarding liberty of movement as contemplated in article 12. Even if this was the case, any restriction on the author's liberty of movement was within the scope of restrictions permitted under article 12, paragraph 3.

6.6 Section 459A of the Crimes Act 1958 (Vic) provides that a police officer may enter and search premises for the purpose of arresting a person where the officer believes, on reasonable grounds, that the person has committed a serious indictable offence and is on the premises. Entry onto premises, search and arrest in these circumstances are clearly actions provided for by law and are necessary to protect national security, public order and the rights and freedoms of others.

6.7 As was recognized by the Victorian Court of Appeal, the police officers were of the opinion that they had authority to enter the premises and arrest the author under section 459A. While the Victorian Court of Appeal ultimately found that the entry and arrest were unlawful, the State party submits that the belief of the police officers should be taken into consideration in assessing the actions of Victoria Police.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its Rules of procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

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

7.3 The author claims that the treatment she was subjected to in connection with the incidents that occurred on 9 March 1996 and subsequent events violated her rights under articles 7; 9, paragraphs 1 and 5; 10, paragraph 1; and 17 of the Covenant. The Committee notes that the essence of the claims made by the author before the Committee are based on the same grounds as those she brought before the national judicial authorities. In this regard, the County Court of Victoria established the liability of the police officers who raided her house on bases of trespass, assaults, wrongful arrest, false imprisonment, malicious prosecution and negligence. As for the Court of Appeal, it found that the individual police officers were liable to pay damages for assault, trespass, false imprisonment and malicious prosecution. The Committee considers that in addressing the substance of the author's claims the domestic courts acknowledged that the author's rights had been violated and established the civil responsibility of the perpetrators for acts which fall under the scope of the above provisions of the Covenant. In view of the acknowledgement by domestic courts of the civil responsibility of State agents for domestic law violations, which are covered by articles 7; 9, paragraph 1; and 17 of the Covenant, and their liability to pay damages, the Committee considers that the real issue before it is whether the author obtained an effective remedy for the violations of her rights under the Covenant, after the final decision of the domestic court became enforceable.

7.4 The Committee notes the author's claims under article 2 that she did not receive full compensation, as established by the national courts, and that there were no criminal and disciplinary actions against the perpetrators of the assault. The Committee also notes that the State party's challenge to the admissibility of the communication on the ground that domestic remedies were not exhausted, as the author did not seek the enforcement of the judgement in her favour, in application of the Victorian Supreme Court Rules regarding the process for discovery in aid of enforcement following the discharge of Constable J.'s bankruptcy. The State party also claims that the author did not pursue compensation from the Victims of Crime Assistance Tribunal. The Committee further notes the information provided by the author regarding the steps taken to seek the enforcement of the judgement and the final settlement that she and her co-plaintiffs felt obliged to accept. As to the awards provided by the Victims of Crime Assistance Tribunal, the Committee notes the author's argument that these awards are symbolic and are not intended to reflect the level of compensation to which victims of crime may be entitled at common law or otherwise.

7.5 The Committee considers that in choosing to file proceedings for damages against the police officers under the Crown Proceedings Act the author sought an appropriate avenue of redress, as demonstrated inter alia by the fact that she was successful in her judicial claims and that compensation was awarded to her under the Act. The fact that the judgement of the Court of Appeal was not fully enforced, despite the efforts she undertook subsequently in that respect, is not attributable to the author. Accordingly, for the purpose of admissibility, it cannot be expected that, in addition to those proceedings, the author would seek compensation from the Victims of Crime Assistance Tribunal. The Committee therefore concludes that domestic remedies have been exhausted.

7.6 As the Committee does not see any other obstacle to admissibility, it decides that the communication is admissible insofar as it appears to raise issues under articles 7; 9, paragraphs 1; 10, paragraph 1; and 17 of the Covenant on their own and read together with article 2 paragraph 3; and under article 9, paragraph 5 on its own.

Consideration of the merits

8.1 The Human Rights Committee has considered the communication in light of all the information made available to it by the parties, as provided for under article 5, paragraph 1, of the Optional Protocol.

8.2 The Committee notes the author's claims that the State party failed to ensure that the perpetrators be tried before a criminal court and that her complaints before the disciplinary bodies of the Victoria Police were unsuccessful. In this connection the Committee considers that article 2, paragraph 3 of the Covenant does not impose on State parties any particular form of remedy and that the Covenant does not provide a right for individuals to require that the State criminally prosecute a third party.⁵ However, article 2, paragraph 3 does impose on States parties the obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies.⁶ Furthermore, in deciding whether the victim of a violation of the Covenant has obtained adequate reparation the Committee can take into consideration the availability and effectiveness not just of one particular remedy but the cumulative effect of several remedies of different nature, such as criminal, civil, administrative or disciplinary.

8.3 In the present case, the disciplinary claims before the Police Department were dismissed for lack of evidence. In this respect, the Committee notes the author's allegations, uncontested by the State party, that neither the author nor the other civilian witnesses were called to give evidence; that the author was refused access to the file; that there was no public hearing; and that once the civil proceeding finding was made, there was no opportunity to reopen or recommence disciplinary proceedings. In view of these shortcomings and given the nature of the deciding body, the Committee considers that the State party failed to show that the proceedings met the requirements of an effective remedy under article 2, paragraph 3 of the Covenant.

8.4 The Committee further notes that the author was successful in her civil suit and that compensation was ordered by the national judicial bodies with reference to the police officers' liability in trespass, assaults, wrongful arrest, false imprisonment, malicious prosecution and negligence – unlawful acts of which she was found to be a victim. However, her efforts to seek the enforcement of the final judgement was unsuccessful. In the end, the author was left with no other option but to accept a final settlement involving a quantum which represented a small portion of the quantum granted to her at court.

8.5 With reference to Section 123 of the Police Regulations Act (Vic), the Committee notes that this provision limits the responsibility of the State for wrongful acts committed by its agents without providing for an alternative mechanism for full compensation for violations of the Covenant by State agents. Under these circumstances, the Committee considers that Section 123 is incompatible with article 2, paragraph 2, as well as with article 2, paragraph 3 of the Covenant, as a State cannot elude its responsibility for violations of the Covenant committed by its own agents. The Committee recalls in this respect that article 2, paragraph 2 requires States parties to take the necessary steps to give effect to the

⁵ Communication No. 563/1993, *Bautista de Arellana v. Colombia*, Views adopted on 27 October 1995, paragraph 8.6.

⁶ General Comment No. 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, paragraph 15.

Covenant rights in the domestic order, and to make such changes to domestic laws and practices as are necessary to ensure their conformity with the Covenant.⁷ The Committee also recalls that under article 2, paragraph 3, States Parties are required to make reparation to individuals whose Covenant rights have been violated. Without such reparation the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally requires appropriate compensation.⁸

8.6 The Committee further considers that actions for damages in the domestic courts may provide an effective remedy in cases of alleged unlawfulness or negligence by State agents. It recalls that the obligation of States under article 2, paragraph 3 encompasses not only the obligation to provide an effective remedy, but also the obligation to ensure that the competent authorities enforce such remedies when granted. This obligation, enshrined in article 2, paragraph 3(c) means that State authorities have the burden to enforce judgments of domestic courts which provide effective remedies to victims. In order to ensure this, State parties should use all appropriate means and organize their legal system in such a way so as to guarantee the enforcement of remedies in a manner that is consistent with their obligations under the Covenant.

8.7 In the present case, the success of the author in obtaining compensation in her civil claim has been nullified by the impossibility to have the judgement of the Court of Appeal adequately enforced, due to factual and legal obstacles. The procedure established in the domestic law of the State party to remedy the violation of the author's rights under articles 7; 9, paragraph 1; and 17 of the Covenant proved to be ineffective and the compensatory award finally proposed to the author has been inadequate, in view of the acts complained of, to satisfy the requirements of an effective reparation under article 2, paragraph 3 of the Covenant. The Committee considers that in situations where the execution of a final judgment becomes impossible in view of the circumstances of the case other legal avenues should be available in order for the State to comply with its obligation to provide adequate redress to a victim. However, in the present case the State party has not shown that such alternative avenues existed or were effective. The State party refers to the Compensation under Victims of Crime Assistance Scheme, but the Committee is not convinced that, given the nature of this Scheme, including its no-fault attributes, the author could indeed obtain adequate redress for serious harm inflicted by State agents through it. The Committee notes in this respect that the State party has not provided information about cases in which persons having claims similar to those of the author obtained adequate redress through this Scheme.

8.8 In view of the foregoing, including the shortcomings regarding the disciplinary proceedings, the Committee considers that the facts before it reveal a violation of article 2, paragraph 3 in connection with articles 7; 9, paragraph 1; and 17 of the Covenant. In view of this finding, the Committee will not consider whether the circumstances of the case constitute a separate violation of articles 7; 9, paragraphs 1; and 17. Neither will it consider whether there was a violation of article 10, paragraph 1, on its own and read together with article 2 paragraph 3; and of article 9, paragraph. 5.

9. 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 has violated the authors' rights under article 2, paragraph 3 in connection with articles 7; 9, paragraph 1; and 17 of the Covenant.

⁷ General Comment No. 31, para 13.

⁸ General Comment No. 31, paragraph 16.

10. In accordance with article 2, paragraph 3(a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including adequate compensation. The State party is also under an obligation to take steps to prevent similar violations in the future. In this connection, the State party should review its legislation to ensure its conformity with the requirements of the Covenant.

11. 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 and enforceable 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. The State party is also requested to publish the present Views, and to have them widely disseminated in 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.]

Appendix

Individual opinion of Committee member Ms. Anja Seibert-Fohr, joined by Committee members Mr. Walter Kälin and Mr. Yuji Iwasawa

The main issue of this case is the State party's failure to recognize its responsibility for the violent police misconduct suffered from by the author. On 9 March 1996, according to uncontested facts, the author was tackled by a police officer who pulled her to the floor and began to brutally punch her to the face rendering her senseless with a badly beaten and broken nose. She was rolled over and handcuffed despite her bleeding nose and dragged to a van. Though the County Court of Victoria in a civil suit established the individual police officer's liability on these grounds, the State party continues to deny responsibility for cruel, inhuman or degrading treatment. We fail, however, to recognize, as suggested by the State party, how this treatment in the present case could not be considered to go beyond the usual incidents of arrests. The facts as presented by the author and established by the Country Court of Victoria reveal a gross form of ill-treatment severe enough to involve article 7.

We regret that the majority of the Committee decided not to consider this important aspect of the case. It focused instead on the remedies available to the author without finding a primary violation. Furthermore, it characterized the remedies as the "real issue" of this case despite the fact that the author of the communication had explicitly claimed that the treatment she had received fell within the scope of article 7. To our mind, given the gravity of the ill-treatment and the State party's denial of responsibility, it was indispensable for the Committee to find that the police officer's acts which were clearly attributable to the State party amounted to a violation of article 7 of the Covenant. Such finding of a violation of a primary violation also would have provided the necessary precondition for the Committee's analysis of the author's compensation claim under article 2, paragraph 3 which does not provide for an independent free-standing right.

With respect to the question of remedies, we concur in the finding that the violation of article 7 was insufficiently remedied. But we fail to see why Section 123 of the Police Regulations Act 1958 (Vic) is incompatible with article 2, paragraphs 2 and 3 of the Covenant. On the contrary, this provision provides that the State incurs responsibility for a specific category of police misconduct. In fact, the County Court of Victoria in the present case had ordered a damage award of AU\$ 120,000 in favour of the author which was transferred to the State on the basis of this statute. The Court of Appeal later overturned the liability of the State of Victoria because it held the Act to be factually inapplicable in this case. The failure to provide for an effective remedy thus did not result from this Act but from the application of common law by the Court of Appeals to the particular factual situation of this case in combination with the State party's failure to establish the availability of an alternative readily available, adequate and effective remedy for cases in which individual officers lack the means to pay compensation. We emphasize this in order to highlight the particularity of this case and to avoid misunderstandings which could give rise to an overly broad interpretation of the Committee's views.

For this reason the following considerations are intended to explain in more detail the finding of a violation of article 7 read in conjunction with article 2, paragraph 3. Pursuant to article 2, paragraph 3 (a) each State Party to the Covenant undertakes to ensure that any person whose rights or freedoms are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity. In order to find whether the remedies are sufficient in a particular case the

Committee needs to consider whether the remedies provided are adequate according to the standards of the Covenant. In its General Comment No. 20 the Committee explained that complaints against ill-treatment prohibited by article 7 "must be investigated promptly and impartially by competent authorities so as to make the remedy effective. ... States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible." In the present case the author did not receive any payment for the ill-treatment inflicted on her by Constable J. despite the County Court's finding that the violation had occurred nor was her ill-treatment subject to an independent official investigation which she had access to. Therefore in the instant case the procedure established under the domestic law of the State party to remedy the violation did not provide the author with an effective remedy as required under article 2, paragraph 3 (a) of the Covenant. This is the basis for finding a violation of article 7 read in conjunction with article 2, paragraph 3.

The reference to article 2, paragraph 3 (c) in the Committee's reasoning, however, is misleading. Properly understood it was not the failure to enforce a judicial remedy but the failure to provide for an effective remedy in the first place which led to the violation of the right to an effective remedy for the violation of article 7. We emphasize this aspect because without this clarification the Committee's reasoning might be understood as granting a right to have domestic civil remedies effectuated even to the extent that they go beyond the requirements of article 2, paragraph 3 (a), e.g. by providing for punitive damages. This is not what article 2 requires. Accordingly, the Committee's conclusion that the State party is under an obligation to provide the author with an effective remedy, including adequate compensation, for the failure to provide for an effective remedy is to be read on the basis of an understanding which is informed by an autonomous interpretation of article 2.

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

**Individual opinion of Committee Member Gerald L. Neuman
(partly dissenting)**

The brutal attack by Constable J. on the author is the central fact in this case, and I regret the majority's decision not to make an explicit holding that the State party violated article 7 of the Covenant, particularly in view of the State party's surprising denial that the facts found by its own courts were severe enough to involve article 7. I would have preferred to hold that the State party violated article 7, and that it failed to provide an effective remedy for the violation, thereby violating article 2, paragraph 3, in conjunction with article 7.

There are further aspects of the Committee's Views that I cannot join.

The majority cuts too many corners in dealing with the other issues in the case. It treats most of the claims as a unit, although they are different in their character and in their factual bases, and it does not give sufficient consideration to the author's settlement with the other three officers. I will not discuss these problems in detail, but equating the other claims with the article 7 claim, which is the quantitative and rhetorical core of the case, has prevented a proper analysis.

Regarding the article 7 claim, I agree that the Covenant entitles the author to an effective remedy, including "adequate compensation," which I do not understand as referring to the huge amount of damages awarded within the domestic tort system. The domestic courts awarded compensatory damages in generous magnitudes that exceed international standards, and awarded her punitive damages that the Covenant does not require.

Despite the wording used in paragraphs 8.6 and 8.7 of the Committee's Views it would be wrong to suggest that the State party has refused to "enforce" a judgment of its domestic courts. There was no refusal to enforce the tort judgment, which by its own terms ran only against the individual officers. The fact that the judgment against Constable J. was not paid resulted primarily from the fact that he lacked the means to pay it; the author also admits (see paragraph 4.5 of the Views) that her lawyer made no attempt to recover any payment from Constable J. The possibility that Constable J. might be rendered insolvent was part of the legal background of the tort judgment, and not a subsequent unlawful interference with the judgment. The majority more appropriately shifts in paragraph 8.7 to the subject of "alternative avenues" by which the State party would compensate the author from public funds, which was definitely not what the court's judgment entailed. The failure to provide such alternative remedies is something quite different from non-enforcement of the tort judgment.

My concern about the majority's expression of its reasons relates not only to the disposition of this particular case, but also to the broader question of elaborating states parties' obligations under article 2, paragraph 3, to provide effective remedies. The overly generalized way in which the majority discusses the issues obscures significant distinctions among violations for which different remedial responses may be sufficient (and may have been sufficient in the present case). The Committee should engage in more nuanced discussion of such issues in the future.

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

