4

Forty Years and Counting

CERD's Ongoing Search for a Clear Evidentiary Path

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4.1 Introduction

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) was adopted by the United Nations (UN) General Assembly in 1965 and entered into force in 1969.[1] Almost all states have acceded to the treaty, making its coverage nearly universal.[2] ICERD was the first UN human rights treaty, and the Committee on the Elimination of Racial Discrimination (CERD, the Committee) was the first UN treaty monitoring body.[3] As Keane and Waughray rightly hold, the Committee 'pioneered' the different monitoring mechanisms for all the UN human rights treaty bodies (UNTBs) that were to follow.[4] Given this longstanding history, one might expect that CERD would by now have had the chance to consolidate its evidentiary regime; such consolidation, however, has not materialised yet. This chapter traces CERD's development in this area by drawing the contours of its evidentiary

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[1] International Convention on the Elimination of All Forms of Racial Discrimination, New York, 21 December 1965, in force 4 January 1969, 660 UNTS 195.

[2] In June 2025, ICERD counted 182 states parties: UN Treaty Collection, 'ICERD', https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-2&chapter=4&clang=_en.

[3] D. Keane and A. Waughray, 'Introduction' in D. Keane and A. Waughray (eds.), *Fifty Years of the International Convention on the Elimination of All Forms of Racial Discrimination: A Living Instrument* (Manchester: Manchester University Press, 2017), pp. 1–31, 1.

[4] Keane and Waughray, 'Introduction', p. 2.

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regime through an assessment of its overall case law, before offering a closer analysis of two cases that can be considered exemplary of its approach.

It is important to start by locating the Convention in its broader political context, which arguably impacts the way the Committee assesses evidence to this day. Racial discrimination was on the UN General Assembly's agenda from early on, often in connection with discrimination based on religion.[5] Following a global wave of anti-Semitic incidents in 1959/1960, the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities issued a resolution condemning these 'manifestations of anti-Semitism and other forms of racial and national hatred and religious and racial prejudices of a similar nature'.[6] In the 1960s, the two issues – discrimination based on race and discrimination based on religion – were split and separate conventions proposed. This split was partly triggered by political opposition to the inclusion of anti-Semitism in ICERD, due to some states' perception of potential implications for the recognition of the State of Israel. In addition, ICERD's intended focus, establishing an explicit link between racism, colonialism and apartheid, moved the Convention's scope away from discrimination based on religion. After this split, ICERD was dealt with as a matter of priority. This was preferred by especially Soviet and Eastern European states, which considered tackling racial discrimination to be more urgent than religious discrimination.[7] Although ICERD's origins were shaped by the Second World War and *anti*-Semitism, its realisation was strongly influenced by African and Asian states and their fight against apartheid and colonialism. Yet, due to the Global North–dominated composition of the drafting Sub-Commission, Southern states and actors such as liberation movements could only comment on the process from the sidelines, such as through

[5] Keane and Waughray, 'Introduction', p. 2; UN General Assembly, Persecution and Discrimination (A/RES/103(I)), 19 November 1946.

[6] Keane and Waughray, 'Introduction', p. 3; Report of the 12th session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities to the Commission on Human Rights (E/CN.4/Sub.2/206), 1960, p. 69 (Resolution 3 (XII)); P. Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary* (Oxford: Oxford University Press, 2016), pp. 24ff.

[7] Keane and Waughray, 'Introduction', p. 3; Thornberry, *Commentary*, p. 27; UN General Assembly, Preparation of a draft declaration and a draft convention on the elimination of all forms of racial discrimination (A/RES/1780 (XVII)), 7 December 1962; UN General Assembly, Preparation of a draft declaration and a draft convention on the elimination of all forms of religious intolerance (A/RES/1781 (XVII)), 7 December 1962.

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UN General Assembly debates.[8] While ICERD was adopted in 1965, efforts to combat religious discrimination resulted only in a non-binding declaration adopted by the UN General Assembly in 1981.[9]

As this brief historical account illustrates, the application of the Convention is prone to generating political tensions – and even CERD's role was controversial. Initially, CERD's membership was dominated by diplomats. This had the effect of the Committee and its tasks being considered as more of a diplomatic rather than a legal platform. Stronger engagement with and criticism of state reports only made its way into CERD's practice once it began to include members from less government-bound and more independent backgrounds, and the number of members with legal expertise increased.[10] While the perception of the Committee as a primarily diplomatic forum has thankfully changed, some underlying constraints remain. These are grounded in CERD's (and indeed any UNTB's) dependence on support, cooperation and funding from the states that it might criticise for racist behaviour in the context of monitoring or views on individual communications. This dependence can lead to a fragility within UNTBs, which, crucially, can also affect their ability to ascertain facts and evaluate evidence. This can be seen in a chronic lack of resources – in particular, trained staff – to deal with incoming individual communications. Furthermore, Committee members frequently lack time to discuss individual communications due to insufficient funding or the refusal of states to cooperate and deliver relevant evidence that is solely within their control.[11]

These general complexities may contribute to explaining why CERD's evidentiary path is not as well settled as one might have expected after more than forty years of activity. Assessing CERD's journey so far, this chapter starts by outlining ICERD's key concepts and the Committee's evidentiary framework (Section 4.2), before examining how the latter has

[8] Keane and Waughray, 'Introduction', pp. 5–6.

[9] Keane and Waughray, 'Introduction', p. 4; UN General Assembly, Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (A/RES/36/55), 25 November 1981.

[10] Keane and Waughray, 'Introduction', p. 10.

[11] R. Niezen and M. Sapignoli, 'Introduction' in R. Niezen and M. Sapignoli (eds.), *Palaces of Hope: The Anthropology of Global Organizations* (Cambridge: Cambridge University Press, 2017), pp. 1–30, 12ff; R. A. Wilson, 'Propaganda on Trial: Structural Fragility and the Epistemology of International Legal Institutions' in R. Niezen and M. Sapignoli (eds.), *Palaces of Hope: The Anthropology of Global Organizations* (Cambridge: Cambridge University Press, 2017), pp. 266–293, at 270ff; see also Chapter 1, this volume; on uncooperative states, see Chapter 6, this volume.

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been applied in merits decisions (Section 4.3). The findings indicate the use of a lower standard of proof for racial discrimination in the application of procedural rights, but the Committee has not taken a discernible stance on evidentiary questions regarding substantive rights yet.[12] The chapter then proceeds with a more detailed discussion of two cases that illustrate the importance of CERD taking a clearer position: *Dawas and Shava* v. *Denmark* (2012) in Section 4.4 and *Zapescu* v. *Moldova* (2021) in Section 4.5. In *Dawas*, the Committee did not engage with the unclear factual situation and the underlying evidence as it was examining the case, resulting in heated debates during the follow-up process. In *Zapescu*, however, CERD was more transparent on the evidence required from the parties and its relevance for its own decision-making process. This not only provided more direct engagement with evidence but also greater clarity for the handling of future individual communications. Section 4.6 offers concluding reflections on CERD's continuing efforts to consolidate its evidentiary approach and the need for greater consistency.

4.2 CERD's Evidentiary Framework

Racial discrimination is difficult to prove due to a number of compounding factors. One is that petitioners[13] need to prove the causal link between the violation and either the motivation for or effects of racial discrimination (corresponding to direct and indirect discrimination, respectively).[14] Generating proof of such motivation or effect is often

[12] The difference between the substantive and procedural dimensions of discrimination can be explained (and is understood here) as follows: 'the first being the prohibition to engage in discriminatory violence and the second concerning duties to properly investigate incidents of possible discriminatory violence': K. Henrard, 'The European Court of Human Rights and the "Special" Distribution of the Burden of Proof in Racial Discrimination Cases: The Search for Fairness Continues', *European Convention on Human Rights Law Review* 4 (2023): 426–446, 439.

[13] While most UNTBs refer to the complainant as *author*, CERD more frequently uses the term *petitioner*.

[14] These two concepts are defined in EU legislation (featuring later in this chapter) as follows: '(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin; (b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary': Article 2 (2) of Council Directive 2000/43/CE of 29 June 2000 on implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Race Equality Directive).

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more difficult than proving the act itself. Furthermore, discrimination describes differential treatment in comparable situations – requiring evidence of how the situation would have unfolded if there had been no discrimination. This presupposes that an appropriate comparator has been selected to assess whether a difference in treatment has occurred. In order to take these complexities into account, Section 4.3 starts with some introductory remarks on CERD and ICERD before diving into CERD's evidentiary framework.[15]

CERD consists of eighteen experts who are elected by states parties but serve in their personal capacity.[16] The Committee monitors the implementation of ICERD through issuing general and country-specific recommendations; an early warning procedure and urgent action procedure; and – most importantly in the context of this chapter – the handling of communications, which can be brought by individuals or states.[17] The individual communications procedure under Article 14 is optional and has been recognised by fifty-nine states parties so far.[18] The decisions on the merits adopted by CERD in individual communications are called views and have an advisory character.[19]

ICERD defines racial discrimination in Article 1 (1) as 'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life'. This definition makes

[15] Unless otherwise indicated, all mentioned articles refer to ICERD.

[16] Art. 8 ICERD; Thornberry, *Commentary*, pp. 43–44.

[17] Arts. 9, 11–13, 14 ICERD; Annex III: Prevention of racial discrimination, including early warning and urgent procedures (A/48/18), 15 September 1993; Report of the Committee on the Elimination of Racial Discrimination, Annex III: Guidelines for the early warning and urgent action procedures (A/62/18), 70th and 71st Session, 2007; Thornberry, *Commentary*, pp. 45ff.

[18] Thornberry, *Commentary*, pp. 56ff; Declarations under Article 14 ICERD as 1 June 2025: UN Treaty Collection, 'ICERD', https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-2&chapter=4&clang=_en#35.

[19] M. Banton, 'Extending the Rule of Law' in D. Keane and A. Waughray (eds.), *Fifty Years of the International Convention on the Elimination of All Forms of Racial Discrimination: A Living Instrument* (Manchester: Manchester University Press, 2017), pp. 35–50, 44; note how the terminology has changed from 'opinion' to 'view' with the most recent revision of the Rules of Procedure: CERD, Rules of Procedure (CERD/C/35/Rev.4), 23 May 2025, Rule 113 (3); previous version: CERD, Rules of Procedure (CERD/C/35/Rev.3), 1986, Rule 95 (3). Unless otherwise indicated, all mentioned Rules refer to the 2025 CERD Rules of Procedure).

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clear that ICERD covers both direct and indirect discrimination (as reflected in the 'purpose or effect' phrasing).[20] In line with the principles set out in General Recommendation 32, ICERD addresses unequal treatment in comparable situations and equal treatment in non-comparable situations.[21] Differential treatment can only be justified if it pursues a legitimate aim and achieves this through proportionate means.[22] The special measures under Article 1 (4) aimed at advancing effective equality are an explicit example of justified differential treatment. Other kinds of differential treatment will be assessed based on whether they have an 'unjustifiable disparate impact'.[23] However, discussion of such justifications has not been very explicit in CERD's opinions on individual communications.[24] While notions such as the *comparator* and *comparable situation* do feature in a few opinions, it is not standard for the Committee to have an introductory paragraph in opinions setting out these general principles. Rather, these notions tend to come up in CERD's references to party submissions.[25]

Paragraphs 2 and 3 of Article 1, which limit the scope of the prohibition of racial discrimination regarding distinctions based on citizenship and nationality, contain a note on evidentiary principles in their supplementary material. Any distinctions falling under these two paragraphs 'must be construed so as to avoid undermining the basic prohibition of discrimination'.[26] In this context, there is an explicit statement regarding

[20] Thornberry, *Commentary*, p. 115; W. Vandenhole, *Non-discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (Antwerp: Intersentia, 2005), p. 6; CERD, General Recommendation No. 32, The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination (CERD/C/GC/32), 2009, paras. 7–8.

[21] CERD, General Recommendation No. 32, para. 8; Thornberry, *Commentary*, p. 129.

[22] CERD, General Recommendation No. 30, Discrimination Against Non-Citizens (CERD/C/64/Misc.11/rev.3), 2004, para. 4; for a general overview of the features of discrimination and further references see: Henrard, 'The European Court of Human Rights'.

[23] CERD, General Recommendation No. 14, Article 1, paragraph 1, of the Convention, (A/48/18), 1993.

[24] According to Thornberry, CERD has not yet developed a clear mode of review in this regard, pointing to the ECtHR as contrasting example: Thornberry, *Commentary*, p. 133.

[25] *V.S.* v. *Slovakia*, CERD/C/88/D/56/2014, 4 December 2015, ('comparator'); *Breleur* v. *France,* CERD/C/107/D/66/2018, 30 August 2022, ('comparable situation'); *Kotor* v. *France*, CERD/C/105/D/65/2018, 25 November 2021, ('comparable situation'); *D.R.* v. *Australia*, CERD/C/75/D/42/2008, 14 August 2009, ('unjustified or disproportionate distinctions'); *Habassi* v. *Denmark,* CERD/C/54/D/10/1997, 17 March 1999, ('objectively justified').

[26] CERD, General Recommendation No. 30, para. 2.

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evidence, as General Recommendation 30 calls on states parties to enact legislation providing for a shift in the burden of proof applied in civil proceedings once a non-citizen has established a prima facie case of discrimination.[27]

Having set out these general principles, we can turn to the question of which evidentiary principles guide the practical assessment of racial discrimination. The one explicit reference in General Recommendation 30 has already been mentioned. In addition, Article 14 contains an evidentiary hint by providing that CERD will consider individual communications 'in the light of all information made available to it by the State Party concerned and by the petitioner', indicating a shared burden of production of evidence.[28] Beyond this, no other ICERD provisions expressly address evidentiary issues.

Continuing the search for evidentiary principles, it is worth looking into CERD's Rules of Procedure, which were adopted in 1970 and have been amended several times since then.[29] In the first edition, no rules were laid out for individual communications as the system was not yet operational – the required number of ten states parties was reached only in 1982.[30] In the following years, close to thirty rules (Rules 91 to 117) pertaining to this procedure were adopted. Already at the admissibility stage, there is an option for CERD to request additional information from the parties (Rule 107). The parties can also submit further information at the merits stage and respond to each other's submissions within a given time limit (Rule 111). Furthermore, the Committee has the option to invite both parties to provide information in person. While this has been considered an exceptional measure in the past, the fact that the 2025 Rules of Procedure contain a new rule on the conduct of hearings, even through videoconferencing, might make this avenue more

[27] CERD, General Recommendation No. 30, para. 24; see also: *L.G.* v. *Korea*, CERD/C/86/D/51/2012, 1 May 2015.

[28] Art. 14 (7) (a); Rule 113; P. Thornberry, 'The Committee on the Elimination of Racial Discrimination (CERD)' in Frédéric Mégret and Philip Alston (eds.), *The United Nations and Human Rights: A Critical Appraisal*, 2nd edn. (Oxford: Oxford University Press, 2020), pp. 309–338, 318ff.

[29] Report of the Committee on the Elimination of Racial Discrimination, 25th Session, Supplement No. 27, Annex II (A/8027), 1970; the version most frequently cited and referred to in the following unless, otherwise indicated, is: Rules of Procedure of the Committee on the Elimination of Racial Discrimination, 1986, CERD/C/35/Rev.3.

[30] The tenth declaration was received on 3 December 1982: UN Treaty Collection, 'ICERD', https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&clang=_en#35.

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accessible in future.[31] The rather brief rules for the actual phase of considering a communication on its merits include just one provision related to evidence – regarding the ability of CERD to obtain additional information from other UN bodies.[32]

In addition to individual communications, states can submit interstate communications to CERD. Although interstate communications are not the focus of this chapter, they are briefly mentioned to take note of evidentiary issues in this area of CERD activity. The interstate communications procedure is designed as a friendly settlement process where CERD deals with jurisdiction and admissibility. The merits decision is then adopted by an ad hoc Conciliation Commission, which is established for each case anew.[33] In 2018, the first three cases were brought under this procedure. While two of them were discontinued per request of the applicant State,[34] the third case – *Palestine* v. *Israel* – has been decided on the merits.[35] CERD has issued new Rules of Procedure relating to interstate communications, but there are no specific rules on evidence, apart from the possibility of an information request.[36] Furthermore, ad hoc Conciliation Commissions adopt their own rules of procedure, which means that the procedure for interstate communications is even more flexible than for individual communications.[37]

[31] Rule 103; OHCHR, Individual Complaint Procedures, Fact Sheet No.7/Rev.2 (2013), p. 16.

[32] Rule 113.

[33] D. Angst and E. Lantschner, 'Artikel 11 – 13' in D. Angst and E. Lantschner (eds.), *ICERD: Internationales Übereinkommen zur Beseitigung jeder Form von Rassendiskrimi nierung: Handkommentar* (Baden-Baden: Nomos, 2020), pp. 473–488, 476ff.

[34] *Qatar* v. *Kingdom of Saudi Arabia,* ICERD-ISC 2018/1, 8 March 2018; *Qatar* v. *The United Arab Emirates,* ICERD-ISC 2018/2, 8 March 2018.

[35] *Palestine* v. *Israel*, ICERD-ISC 2018/3, 23 April 2018; Report of the Ad Hoc Conciliation Commission (case *State of Palestine* v. *Israel*), CERD/C/113/3, 22 August 2024; for further analysis, see C. Klocker and D. Casalin, 'Discriminatory Practices in Armed Conflict Contexts: Exploring (Parallel) Proceedings Under the European Convention on Human Rights and the International Convention on the Elimination of All Forms of Racial Discrimination', *The International Journal of Human Rights* 27 (2023): 896–924; D. Keane, 'A Missed Opportunity: The Decision in Palestine v Israel', *EJIL:Talk!* (blogpost dated 5 September 2024).

[36] Report of the Committee on the Elimination of Racial Discrimination, Annex II: Rules of Procedure specific to the hearings held pursuant to Article 11 of the International Convention on the Elimination of All Forms of Racial Discrimination, 96th and 97th Session (A/74/18), 2018; J. Eiken and D. Keane, 'New Rules of Procedure of the Ad Hoc Conciliation Commission in Palestine v Israel', *EJIL:Talk!* (blogpost dated 23 May 2022).

[37] Rules of Procedure of the ad hoc Conciliation Commission on the interstate communication submitted by the State of Palestine against Israel under Article 11: OHCHR.

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This brief outline already shows that discussions on a general level about the treatment of evidence under ICERD are rare, and the structural framework leaves many questions unanswered. The Committee's approach towards evidence is thus characterised by flexibility – or, to put it less positively, by uncertainty or a lack of clarity.[38] With general rules and principles barely being defined, a look at the individual communications procedure and the handling of evidence in practice becomes all the more important.

4.3 CERD's Approach to Evidence in Practice

Before turning to the two selected case studies, some general remarks are in order about the way CERD handles evidence in its examination of individual communications. This is based on a study of the Committee's opinions up to November 2024 (excluding the text of petitioners' communications or potential internal minutes of Committee meetings, neither of which is publicly available).[39] In this period, the Committee handed down forty-six opinions on the merits.[40] The majority do not directly engage with questions of evidence. The few that do (sometimes only tangentially) confirm that the evidentiary norms are far from clear. It appears that in several cases, evidentiary matters have been discussed by the parties but not so much by the Committee itself.[41] One example is

CERD, 'Inter-state communications', www.ohchr.org/en/treaty-bodies/cerd/inter-state-communications.

[38] K. Henrard, The Impact of International Non-discrimination Norms in Combination with General Human Rights for the Protection of National Minorities (DH-MIN(2006) 021), 2006, p. 16; on flexible approaches towards evidence, E. K. Murimi, 'Fluctuating Standards of Proof at the African Court: A Case for Principled Flexibility', *African Human Rights Yearbook* 7 (2023): 158–182; T. Stirner, *The Procedural Law Governing Facts and Evidence in International Human Rights Proceedings* (Leiden: Brill Nijhoff, 2021); C. Roberts, 'Reversing the Burden of Proof Before Human Rights Bodies', *The International Journal of Human Rights* 25 (2021): 1682–1703; A. Riddell, 'Evidence, Fact-Finding, and Experts' in C. P. R. Romano, K. J. Alter and Y. Shany (eds.), *The Oxford Handbook of International Adjudication* (Oxford: Oxford University Press, 2013), pp. 848–870.

[39] There are exceptions; see, e.g., the full submission of the State of Palestine of its interstate communication: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCERD%2fISC%2f9325&Lang=en.

[40] A search effected on the OHCHR JURIS Database (OHCHR, Jurisprudence Database, https://juris.ohchr.org/) on 1 June 2025 for CERD opinions on individual communications returned 60 hits. However, this list comprised several duplications.

[41] See, e.g., *B.M.S.* v. *Australia*, CERD/C/54/D/8/1996, 12 March 1999; *Durmic* v. *Serbia and Montenegro*, CERD/C/68/D/29/2003, 6 March 2006; *Er* v. *Denmark*, CERD/C/71/D/40/

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the case of *Er* v. *Denmark*, concerning a carpentry student who was denied a traineeship based on a company's discriminatory policies.[42] Here, the petitioner and the State advanced different concepts of the burden of proof, including with reference to Danish legislation that specifically shares this burden. In addition, the State noted the need for the petitioner to present a prima facie case before CERD.[43] The Committee's assessment, however, did not engage directly with these arguments. It was observed that one aspect of the petitioner's claim had not been 'sufficiently substantiated', indicating the threshold for the standard of proof (see further down below in Section 4.3).[44] It did not mention the burden of proof specifically, but simply noted that the existence of racial discrimination in the case was an 'uncontroversial fact', before finding a violation of the petitioner's right to education.[45]

In a similar fashion, the Committee made short work of a few cases dealing with hate speech (Article 4), where neither the petitioners nor the States seemed to have directly taken issue with evidence: the racist statements in question were uttered at a public event, printed in newspapers and even featured in resolutions adopted by public authorities.[46] Being readily available, they could be assessed as to their potentially racist content. In those cases, the Committee found not only procedural (investigative failure) but also substantive (actual racist motivation) violations of ICERD. Another example where evidence was not discussed is *Habassi* v. *Denmark*, where a Tunisian citizen was denied a bank loan because he was not Danish. The petitioner submitted proof of his nationality as well as the bank's loan form asking whether he was a Danish national, without discussing evidence further; the Committee also did not mention evidence at either the admissibility or the merits stage while confirming a violation of his right to an effective remedy under ICERD.[47]

2007, 8 August 2007; *Jama* v. *Denmark*, CERD/C/75/D/41/2008, 21 August 2009; *L.G.* v. *Korea*, CERD; *Adan* v. *Denmark*, CERD/C/77/D/43/2008, 13 August 2010.

[42] *Er* (CERD), para. 2.1.

[43] *Er* (CERD), paras. 2.5, 3.3, 4.7, 4.9.

[44] *Er* (CERD), para. 7.2.; see also Chapter 3, this volume.

[45] *Er* (CERD), para. 7.3.

[46] *Jewish Community of Oslo et al.* v. *Norway,* CERD/C/67/D/30/2003, 15 August 2015; *Gelle* v. *Denmark*, CERD/C/68/D/34/2004, 6 March 2006; *TBB-Turkish Union in Berlin/Brandenburg* v. *Germany*, CERD/C/82/D/48/2010, 26 February 2013; *Koptova* v. *Slovakia*, CERD/C/57/D/13/1998, 8 August 2000; *L.R. et al.* v. *Slovakia*, CERD/C/66/D/31/2003, 7 March 2005.

[47] *Habassi* v. *Denmark*, CERD.

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One element that CERD generally does not expect petitioners to prove is discriminatory intent. A good example of this is *Gabaroum* v. *France*, concerning a black employee who was not given the same opportunities for career advancement as other employees in a comparable position in the car company at which he worked.[48] The Committee referred to the reversal of the burden of proof which domestic legislation commanded to take place in such a case. In so doing, it endorsed the view that the petitioner could not be expected to prove discriminatory intent.[49] However, instead of then setting out its own evidentiary principles regarding the burden of proof, it contented itself with observing that the national legislation requiring the burden to be shifted had not been applied properly. The way CERD relies on the resulting domestic legislation, however, can have the effect of leaving out any recognition of a substantive violation by limiting itself to a discussion of procedural matters in the light of domestic law. In the context of individual communications brought against member states of the European Union (EU), this recurring reference to domestic legislation can be explained by an EU directive requiring the shift of the burden of proof once a prima facie case of discrimination has been established.[50]

Given that UNTBs have a smaller caseload and therefore also a smaller pool of their own case law to draw from compared to other legal fora, it makes sense for CERD to look beyond the UN context for inspiration, such as the example based on EU legislation just mentioned. Yet what is missing still is the Committee's explicit engagement with information on the way in which standards and burdens of proof are handled by other bodies in cases that are brought before it. This can be observed in several cases, potentially suggesting the Committee does not wish to pronounce itself on the allocation of the burden of proof explicitly, while

[48] *Gabaroum* v. *France*, CERD/C/89/D/52/2012, 10 May 2016, paras. 2.1ff.
[49] *Gabaroum* (CERD), para. 7.2; *V.S.* (CERD), para. 7.4.
[50] Race Equality Directive (2000/43/CE); Council Directive 2000/78/CE of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. All these directives contain a reaffirmation of a shift of the burden of proof in their preambles and articles requiring a shift of the burden of proof after a prima facie case has been presented (2000/43, Art. 8; 2000/78, Art. 10; 2006/54, Art. 19); on this point, see also Henrard, 'The European Court of Human Rights', pp. 428–429.

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the reversal enshrined in domestic legislation might reflect its own preferred stance.[51]

Terminologies such as *prima facie*, *sufficiently substantiated* or *arguable*, which hint at the Committee's implicit application of evidentiary standards and burdens, can be found in its decision-making practice.[52] For instance, the Committee has found cases were admissible after having qualified them as *sufficiently substantiated*, due to the petitioner having made their case *prima facie*.[53] However, the Committee did not explain why and how it was reaching the conclusion that the petitioner had managed to sufficiently substantiate their claim. In *Hagan* v. *Australia*, a case concerning a racist term appearing within the name of a sports ground, the Committee described the petitioner's claim at the admissibility stage as having been *sufficiently substantiated*. However, the phrase was used without further elaboration on its meaning, apart from CERD stating that the petitioner's claim fell within the scope of the Convention and that the details would be discussed at the merits stage – which they were not.[54]

The terms *prima facie* and *sufficiently substantiated* appear most often at the admissibility stage.[55] At the merits stage, reference is made to the case being *arguable*, although only in relation to the procedural right to effective remedies under Article 6.[56] The Committee explained its rationale in the case *Durmic* v. *Serbia and Montenegro*, which concerned a Roma individual who had been denied access to a public place (a discotheque):

> the State party must provide for the determination of this right ... a guarantee which would be void were it unavailable in circumstances where a violation had not yet been established. While a State party cannot be reasonably required to provide for the determination of rights under the Convention no matter how unmeritorious such claims may be, article 6, provides protection to alleged victims if their claims are *arguable* under the Convention.[57]

[51] See, e.g., *V.S.* (CERD); *Gabaroum* (CERD); *Breleur* (CERD); *Zapescu* v. *Moldova*, CERD/C/103/D/60/2016, 22 April 2021.

[52] For a penetrating analysis of the use of these terms across the UNTB, see Chapter 3, this volume.

[53] See, e.g., *Jallow* (CERD), paras. 6.3–6.4; *Jama* (CERD), para. 6.2.

[54] *Hagan* v. *Australia*, CERD/C/62/D/26/2002, 20 March 2003, para. 6.2.

[55] Exceptions are *Er* (CERD), para. 7.2 and *Ågren et al.* (CERD), para. 6.24, where the Committee had found a part of the petitioner's claim not *sufficiently substantiated* at the merits stage of its opinion, which rather read like a delayed admissibility decision.

[56] *Pjetri* (CERD); *Durmic* (CERD); *Ågren et al.* (CERD); *Zapescu* (CERD).

[57] *Durmic* (CERD), para. 9.6 (emphasis by the author).

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CERD found that by not investigating the petitioner's substantive claim under Article 5 (f) (equal access to services), the State had violated Article 6.[58] The quoted passage indicates that the Committee applies a specific threshold to cases related to procedural rights. However, it is unclear how the petitioner can prove their case is *arguable*. Apart from the qualifier at the lower end of the spectrum – *unmeritorious* – there is not much information on the evidence that the parties need to provide. In circumstances where procedural violations barred the Committee from examining the substantive part of a claim (such as where it had no access to the information pertaining to the case due to a flawed investigation), the standard for the merits assessment seems lower, but there is no determination of its exact degree. However, evidentiary matters are even less discussed in relation to substantive violations, and the case examples mentioned above read more as if CERD would be inclined to take an approach that tends to favour the petitioner.[59] It could therefore be inferred that the *arguable case* standard is to be understood as lower than other standards, such as *preponderance of evidence* or *more probable than not*, and thus more akin to prima facie.

This brief overview indicates that CERD has not yet developed a clear evidentiary path. While there are evidentiary hints in the form of recurrent terminology here and there, these have not been incorporated by the Committee into a fully fledged system for the treatment of evidence. Furthermore, discussions of evidence mostly arise in respect of complaints concerning procedural rights under Article 6. Evidence is rarely discussed when substantive violations are assessed, in which case CERD seems to be inclined to take a generous stance towards petitioners' narratives, simply adopting them unless disputed. This lack of a clear evidentiary path creates uncertainty for all parties involved. In addition, the absence of direction may leave the Committee to produce contradictory decisions and/or outliers, as arguably happened in the two cases discussed below.

4.4 *Dawas and Shava* v. *Denmark*: The Late Resurfacing of Unresolved Evidentiary Questions

At first sight, the *Dawas* case, decided in 2012 and dealing with direct discrimination in the form of racist violence, may appear to be like many

[58] *Durmic* (CERD), para. 10.

[59] A similar phenomenon (on the impact of the HRC's too quick acceptance of complainants' factual allegations regarding the addition of persons on the Sami electoral roll in Finland) is highlighted in Chapter 10, this volume.

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other cases decided by the Committee. Usual points were made: for example, the government argued that the petitioners had failed to present a prima facie case, while the Committee found their claims sufficiently substantiated without further elaboration. Uncommonly, however, both the facts of the case and the relevant evidence were hotly disputed between the parties. Not only does the opinion start with a section entitled 'facts as submitted by the petitioner' instead of 'factual background' (which would indicate a general agreement about the facts), but these facts are subsequently the main point of argument between the State and the petitioners, as is laid out in a response and counter-response in the opinion. As we shall see, the Committee failed to engage with these factual disputes appropriately, showing that CERD's use of a few recurring phrases is not enough to establish a clear evidentiary path that securely guides its decision-making. In *Dawas*, unanswered evidentiary questions lingered and ended up being debated even after the Committee had handed down its opinion. What makes the case stand out, then, is not so much the Committee's lack of engagement with evidence as the reaction of the respondent State to the Committee's opinion.[60] The follow-up procedure saw an exchange emerging between the petitioners and the State regarding core facts of the case, which still had not been established at the merits stage.

4.4.1 Overview

The two petitioners were Iraqi citizens living as recognised refugees in Denmark. In June 2004, a group of young people (numbering thirty-five at the highest point) attacked the petitioners' home. One of the attackers managed to break into the house and physically assaulted the petitioners. These acts were accompanied by chants exhorting the petitioners to 'go home' and referring to foreigners in offensive language. This led the petitioners and their family to relocate.[61] In the criminal trial that followed the attack, four perpetrators (aged between fifteen and seventeen) were convicted on counts of violence, vandalism and weapon possession, but the question of a racist motive was not discussed.[62] The petitioners claimed that the Danish authorities had failed to investigate the racist motive behind the attack and did not provide them with

[60] Thornberry, *Commentary*, p. 62.
[61] *Dawas and Shava* (CERD), para. 2.1.
[62] *Dawas and Shava* (CERD), paras. 2.2ff.

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effective remedies for the violations they had suffered (Articles 2 (1)(d) and 6). In addition, they claimed that the racist motive, in combination with the demand that the petitioners leave the municipality, amounted to a violation of Article 3 on racial segregation and apartheid and Article 4 on hate speech.[63]

The summary of Denmark's submission, as reproduced in the Committee's opinion, concluded that there was no evidence of a racist motive and called on CERD to dismiss the communication.[64] The racist language used during the attack, and the 'no blacks allowed' sign on the door of two offenders in the same neighbourhood, were not investigated – the domestic court merely noted that it was unclear who had put up the sign.[65] In addition, the police had referred the case to the Security and Intelligence Service, as required for potentially racially or religiously motivated criminal incidents, meaning that it had been aware of the potentially racist nature of the attack.[66] The State claimed that none of this was sufficient to prove a racist motive;[67] it further stressed that the police, having interviewed witnesses and undertaken an investigation, had found 'no possible inference' of a racist motive.[68]

The Committee declared the communication admissible on all counts except Article 3, about which it said that the petitioners had not substantiated how the attackers' intent to make them leave the municipality amounted to an act of racial segregation or apartheid.[69] With regard to the remainder of the communication, CERD held that the petitioners had 'sufficiently substantiated' their claim for purposes of admissibility. It deferred any further discussion of whether or not the assault constituted racial discrimination to the merits stage (where this was ultimately not further addressed).[70] On the merits, the Committee first noted 'that it is not its role to review the interpretation of facts . . ., unless the [domestic] decisions were manifestly arbitrary, or otherwise amounted to a denial of justice'.[71] The Committee nonetheless moved to criticise the summary

[63] *Dawas and Shava* (CERD), paras. 3.1–3.2.
[64] *Dawas and Shava* (CERD), para. 4.1.
[65] *Dawas and Shava* (CERD), para. 4.14.
[66] *Dawas and Shava* (CERD), para. 5.1.
[67] *Dawas and Shava* (CERD), para. 4.14.
[68] *Dawas and Shava* (CERD), para. 4.17.
[69] *Dawas and Shava* (CERD), para. 6.2.
[70] *Dawas and Shava* (CERD), para. 6.3.
[71] *Dawas and Shava* (CERD), para. 7.2. This is otherwise known as the no-fourth-instance principle; see Chapter 2, this volume.

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nature of the domestic proceedings, the shift from a more severe to a more lenient sentence, and the lack of adjudication on the racist motive.[72] As a result, the Committee found that the State party had failed to carry out an effective investigation into the possible racist nature of the attack. It confirmed that this obligation is held by the State and cannot be passed on to the petitioners – who shouldered the burden of proof in the civil proceedings.[73] Nevertheless, as the investigation into the attack was 'incomplete' and the facts of the case remained in dispute, the Committee held that it was unable to find a violation of Article 4 on hate speech; it only declared a violation of the right to an effective remedy, which it based on the ineffective investigation.[74] CERD recommended that the petitioners be adequately compensated and that Denmark undertake a review of its policies regarding investigating racial discrimination.[75]

During the merits assessment, the Committee stayed away from assessing the original facts of the incident. Its observations were mainly directed at the domestic proceedings rather than at the claims in dispute between the parties, such as whether the racist door sign was relevant to the case. In *Hagan* v. *Australia*, the Committee had called upon the State to ensure the removal of a racist sign.[76] Yet in *Dawas*, the Committee did not explore this potential avenue and failed to assess whether there had been a substantive violation of the prohibition of hate speech. Its only constructive evidentiary engagement was noting that the State had not submitted any information on the outcome of the referral to the Security and Intelligence Service. However, the Committee did not specifically request this information from the State, but simply mentioned at the merits stage that this piece of information was missing, without elaborating on its relevance.[77] It is important to add that the Committee held that some facts were 'undisputed' between the parties, such as the number of assailants and that the petitioners were exposed to racist language. Yet, these points were challenged by the State in the follow-up procedure, and it is unclear how the Committee came to the conclusion that they were settled.[78]

[72] *Dawas and Shava* (CERD), para. 7.2.
[73] *Dawas and Shava* (CERD), para. 7.4.
[74] *Dawas and Shava* (CERD), para. 7.5.
[75] *Dawas and Shava* (CERD), paras. 9, 10.
[76] *Hagan* (CERD), para. 8.
[77] *Dawas and Shava* (CERD), para. 7.3.
[78] *Dawas and Shava* (CERD), para. 7.3.

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4.4.2 *The Afterlife of Evidence*

As seen above, the facts of the *Dawas* case were contested right from the start of the proceedings, which put the Committee in a difficult position. Yet, apart from the remark that the petitioners were left with the burden of proof in civil proceedings and the relatively low threshold at the admissibility stage, the Committee did not go into further detail about what principles would properly guide its treatment of evidence and what kind of evidence it expected the parties to present in order to prove their claims. Having addressed these points might perhaps have prevented what was to come in the follow-up procedure, where evidence seems to have led some kind of afterlife after having been sidelined by the Committee when it would have mattered most.

In 2018, what had happened in the follow-up procedure was laid out in two CERD reports to the UN General Assembly.[79] The first of these reported that Denmark had requested outright that the Committee reconsider its opinion and objected to its obligation to disseminate the Committee's findings. CERD's Rapporteur on Communications had met with a Danish official in 2013 and reaffirmed that CERD would not reconsider its opinion, that the findings had to be disseminated widely and that the petitioners should be adequately compensated. In December 2013, Denmark had responded that it 'did not wish to make further comments'.[80]

The second report revealed another layer to the discussion, revolving around evidence. Denmark had claimed that CERD's opinion was 'based on number [sic] of misunderstandings regarding the facts of the case and the legal provisions applicable to the case'.[81] Regarding the assessment of evidence, Denmark had argued that the Committee had been wrong to find that Danish authorities had not investigated the racist motive, as 'it would not be possible during the trial to prove that the assault was indeed racially motivated'.[82] With reference to a video recording of parts of the attack and to witness statements, Denmark submitted that there were no indications of a racist motive.[83] Furthermore, Denmark disputed the

[79] Report of the Committee on the Elimination of Racial Discrimination, 81st and 82nd Session (A/68/18), 2012/2013, pp. 160ff; Report of the Committee on the Elimination of Racial Discrimination, 83rd and 84th Session (A/69/18), 2013/2014, pp. 159–160.
[80] CERD Report, A/69/18, p. 160.
[81] CERD Report, A/68/18, p. 161; Report of the Committee on the Elimination of Racial Discrimination, 85th and 86th Session (A/70/18), 2014/2015, Annex II.
[82] CERD Report, A/68/18, p. 162.
[83] CERD Report, A/68/18, pp. 162–163.

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number of assailants and the use of offensive language. According to the State, witness statements rather indicated a smaller group, possibly only the four individuals who were eventually charged, while others had merely been 'spectators'.[84] In addition, Denmark argued that the petitioners had not made any reference to a racist motive in their initial statements, therefore diminishing the credibility of their allegations. Reading Denmark's comments, one could assume that the only potential indicator of a racist motive would have been the racist sign on the offenders' door,[85] regarding which the State asserted that it was unclear who had put it up and whether it was directed at the petitioners.[86]

The petitioners had responded to the State's comments. As to the number of people involved in the attack, the petitioners stated that the police had not made any effort to establish a complete account of everyone present and their reasons for being there. Furthermore, their arrival by invitation spoke against the idea that those present at the scene would have been mere spectators, but rather bolstered their characterisation as 'supporters'.[87] According to the petitioners, these additional persons had never been interviewed by the police. Regarding the video recording, the petitioners noted that in addition to documenting only parts of the attack, its quality was not very good, and it did not include offensive language shouted at the petitioners. This led them to dispute that the recording should even have been considered admissible evidence. Furthermore, they pointed out that the racist sign was only taken down after their complaint to local authorities.[88] Another round of exchanges had followed, which had seen Denmark and the petitioners restating their positions. In 2014, Denmark provided additional information regarding legislative changes that had occurred since the attack in 2004, but remained insistent that it would not consider paying compensation in the case at hand. The Committee then decided to close the follow-up procedure, with the outcome defined as 'partly satisfactory'.[89]

As highlighted above in the case law overview, it is rare for the Committee to address evidence in its discussion of the merits of a case. In *Dawas*, general principles were nonetheless mentioned both by the

[84] CERD Report, A/68/18, p. 162.
[85] CERD Report, A/68/18, p. 163.
[86] CERD Report, A/68/18, p. 163.
[87] CERD Report, A/68/18, pp. 163–164.
[88] CERD Report, A/68/18, p. 164.
[89] CERD Report, A/70/18, Annex II.

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State and the Committee. However, there was no effort to link these principles specifically and coherently to the concrete evidentiary issues which arose in the case. The facts were disputed by the parties, but the Committee did not spell out what proof each side would have been expected to provide for them to be considered established. Addressing only the ineffective domestic investigation, it failed to engage with the substantive hate speech complaint. It contented itself with noting that some aspects were contested between the parties and others 'undisputed', without either explaining the reasons for its conclusions or identifying which was which. Its factual findings were not received well by the State, which strongly opposed them in the follow-up. In other words, questions of evidence left unaddressed at the right time came back to haunt the Committee. A conscious engagement with the facts and with evidence at the merits stage would have been preferable, as illustrated in the second case selected for review (Section 4.5).

4.5 *Zapescu* v. *Moldova*: Towards Direct Engagement With Evidence

Whether or not Committee members had *Dawas* in mind as they were examining *Zapescu* in 2021, they did not make the same mistakes as nine years earlier. *Zapescu*, another direct discrimination case, saw the Committee take a clearer stance on the evidence the parties should have provided to substantiate their claim. It also offered direct reasoning on several pieces of evidence, as well as on the role that this evidence played in the Committee's decision-making.

4.5.1 Overview

In 2012, the petitioner and his friend simultaneously applied for a position as a waiter at a pizza restaurant. On the questionnaire, the petitioner stated that Romani was his mother tongue, and he allegedly confirmed his Roma ethnicity during the interview.[90] He and his friend were interviewed for the job on the same day. The petitioner's friend was offered the position, but he himself never heard back from the restaurant. The only manifest difference he could see between him and his friend was his ethnicity, with their language skills and work experience otherwise

[90] *Zapescu* (CERD), paras. 2.1, 3.4.

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being similar. He initiated civil proceedings on grounds of discrimination, but to no avail, whether at first instance or on appeal.[91]

Before CERD, the petitioner claimed violations of Article 5 (e)(i) (right to work) and Articles 6 (right to a remedy) and 7 (measures in education to combat racial discrimination), read in conjunction with Article 2 (1) (d) (state obligation to prohibit discrimination and bring it to an end).[92] The petitioner argued that although Moldovan legislation prohibited racial discrimination, the implementation of some of the laws relevant to his case was insufficient (an argument which could also have counteracted the State defence in *Dawas* that legal provisions had been changed – on paper).[93] Referencing cases from the European Court of Human Rights, the Court of Justice of the European Union and the UN Human Rights Committee, the petitioner argued for the burden of proof to be shifted since he had established a prima facie case.[94] This argument first appears in the complaint section of the text of the opinion, but is then reiterated when the petitioner's comments on the merits are reported (rather than featuring only when admissibility is discussed). This indicates the relevance of this point for the merits of the case.[95] As noted above in the general discussion as well as regarding *Dawas*, at admissibility, the Committee has at times deferred its examination of whether the claim had been sufficiently substantiated to the merits stage but had then failed to return to this issue later. Such a deferral (as long as it is properly taken up again), however, can make sense in the context of an Article 6 complaint. This is because the substance of Article 6 is precisely procedural issues, including the reversal of the burden of proof after a prima facie case has been submitted.[96] Read together with the arguable case standard, this indicates that the standard of proof required from the petitioner in support of allegations related to Article 6 is relatively low.

The State party's submission contained several statements from governmental authorities, some of which will now be discussed. First, the State seemed to have taken for granted that the recruitment process of the restaurant chain had been non-discriminatory. To quote the

[91] *Zapescu* (CERD), paras. 2.1–2.2, 3.1.
[92] *Zapescu* (CERD), para. 3.1.
[93] *Zapescu* (CERD), para. 3.2.
[94] *Zapescu* (CERD), para. 3.4.
[95] *Zapescu* (CERD), para. 5.3.
[96] *Zapescu* (CERD), para. 8.5; for a similar approach, see: *V.S.* (CERD).

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Moldovan Ministry of Health, Labour and Social Protection, 'the selection process was governed by a regulation, adopted at the company level, that establishes clear and non-discriminatory recruitment criteria. Consequently, the outcome of the selection process should be considered to have been based on legitimate grounds.'[97] However, how the Ministry arrived at this conclusion is not discussed, and no evidence is provided in support of the statement. Indeed, the lack of any information detailing the 'clear and non-discriminatory' criteria was criticised by the petitioner and the Committee.[98]

The Ombudsman's Office had contributed to the State's submission. It noted that the Moldovan Council on Preventing and Eliminating Discrimination and Ensuring Equality (CDE) had issued an advisory opinion on the case, in which it drew the domestic courts' attention to the need to reverse the burden of proof in cases dealing with discrimination.[99] The Ombudsman's Office also held that while the petitioner had proven a prima facie case of discrimination, the Court of Appeal of Chisinau had noted that several employees of the company with different ethnicities had 'confirmed the friendly and tolerant attitude of the company's administration toward its employees'.[100] This, however, is not convincing. Such general statements offered by other employees cannot outweigh the petitioner's individual prima facie case, the more so since it is questionable how much credibility can be given to feedback gathered from active employees, especially when it is unclear how they were questioned and by whom. Indeed, as will be shown below, the Committee took issue with this part of the State's submission as well.

In their refutation of the State's arguments, both the petitioner and a third-party intervention by the Legal Resources Centre from Moldova referenced international case law.[101] They also backed their submissions with information regarding the Moldovan judicial system and its specific shortcomings, including a 'systemic failure regarding the understanding

[97] *Zapescu* (CERD), para. 4.2.
[98] *Zapescu* (CERD), paras. 5.3, 8.3.
[99] *Zapescu* (CERD), paras. 4.3, 5.1.
[100] *Zapescu* (CERD), para. 4.3.
[101] Including: *D.H. and Others* v. *Czech Republic*, ECtHR, 57325/00, Judgment, 13 November 2007; *Handels- og Kontorfunktionrerernes Forbund I Denmark* v. *Dansk Arhejdsgiverforening, acting on behalf of Danfoss,* CJEU, C-109/88, 17 October 1989; *Dr. Pamela Mary Enderby v. Frenchay Health Authority and Secretary of State for Health,* CJEU, C-127/92, 27 October 1993.

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of how the burden of proof should apply in discrimination cases'.[102] The Legal Resources Centre highlighted the failure of the courts to draw inferences from the company's refusal to submit the petitioner's application form as evidence. It also criticised the domestic courts' readiness to draw inferences, by contrast, from the petitioner's actions, including his decision not to seek a court order compelling the company to hire him.[103]

Presented with these claims and arguments, how did CERD decide the case? Regarding admissibility, it did not discuss whether the petitioner had substantiated his case. Instead, the focus was on points brought forward by the State, such as the non-exhaustion of domestic remedies, which it refuted one by one.[104] At the merits stage, the two pertinent provisions became Article 5 (e)(i) addressing the right to work and Article 6 on effective remedies.[105] As to the former, the Committee held that simply enacting legislation prohibiting discriminatory employment practices was insufficient, as effective implementation in practice also needed to be ensured. The Committee further noted 'with concern' that the State party seemingly took for granted that the recruitment criteria adopted by the restaurant chain were non-discriminatory, without this being supported by any further information.[106] Having adopted these findings, the Committee decided not to rule on the right to work or on Article 7 (education measures), but only to examine the merits related to Article 6, as most claims were about effective protection and remedies rather than access to work.[107]

With regard to the standard of proof required for Article 6, meaning procedural violations, the Committee noted that the petitioner only needs to present an arguable case.[108] CERD also noted that the State 'did not provide any specific arguments' regarding the effectiveness of the available domestic remedies, including on whether and how the burden

[102] *Zapescu* (CERD), para. 6.2.
[103] *Zapescu* (CERD), paras. 5.1ff, 6.2; on drawing presumptions and a useful discussion of decision-making in situations of uncertainty see, T. Altwicker and A. E. Hansen, 'Presumptions as Secondary Rules in the Judicial Interpretation of International Human Rights' in G. Kajtár, B. Çalı and M. Milanovic (eds.), *Secondary Rules of Primary Importance in International Law* (Oxford: Oxford University Press, 2022), pp. 167–182.
[104] *Zapescu* (CERD), paras. 7.1–7.5.
[105] *Zapescu* (CERD), para. 8.3.
[106] *Zapescu* (CERD), para. 8.3.
[107] *Zapescu* (CERD), para. 8.3.
[108] *Zapescu* (CERD), para. 8.4.

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of proof is reversed in discrimination cases.[109] Following this, CERD restated its general position that petitioners should not be required to prove discriminatory intent and held that, despite the reversal of the burden of proof being enshrined in domestic legislation, it was not applied in the petitioner's case. Instead, the domestic courts held it against the petitioner that he had not provided further evidence of his ethnic origin apart from his own statement – thus contradicting the generally accepted principle of self-identification.[110] Furthermore, the Committee rightly confirmed that the domestic courts had placed too much emphasis on the fact that the petitioner had asked for compensation instead of employment by the restaurant.[111] In response to the domestic courts' view that the petitioner's decision not to approach the CDE confirmed 'the absence of a "real situation of discrimination"',[112] the Committee persuasively noted that the petitioner's choice to seek a judicial remedy instead of a CDE decision, which had only declaratory effect, could not be taken to diminish the credibility of his claim.

The Committee further criticised the domestic courts for not requiring the company to detail the specific reasons why the petitioner had not been hired, and for putting the emphasis on witness testimonies and general statements collected from other employees instead. In other words, the Committee put the burden of producing relevant evidence on the State (meaning on the domestic courts to have requested this information from the company in the course of the proceedings). In the context of any future similar individual communication, this logically should mean that the state party would be expected to produce evidence as to whether the domestic courts actually did request information from the company, as well as on the results of this request. Furthermore, CERD criticised the courts for ignoring the guidance submitted by the CDE on reversing the burden of proof. Regarding the statements of other employees, the Committee made the important point that these statements were not only general in nature, but were also made by persons 'of a different age, gender and ethnicity than the petitioner and who are employed in other positions'. This could 'not guarantee that these persons were in an identical situation to the petitioner', thus questioning the

[109] *Zapescu* (CERD), para. 8.5.
[110] *Zapescu* (CERD), para. 8.6.
[111] *Zapescu* (CERD), para. 8.7.
[112] *Zapescu* (CERD), para. 8.8.

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choice of comparator group.[113] In the Committee's opinion, this also led to a failure to appreciate the potential effects of intersectionality and 'ethnic hierarchies' on access to the labour market.[114]

Concluding on Article 6, the Committee found that the petitioner had presented an 'arguable case', but 'that he was nonetheless left with a disproportionate burden to prove the respondent company's discriminatory intent'.[115] While domestic legislation did call for the reversal of the burden of proof, this had not been applied here, leaving the petitioner without effective protection from discrimination. Consequently, the Committee found a violation of Article 6 caused by the failure of domestic courts to properly shift the burden of proof.[116] The Committee recommended that the State party convey an apology to the petitioner, as well as provide adequate compensation and undertake measures to ensure the proper enforcement of anti-discrimination legislation. The latter included a recommendation on the training of judges to make sure 'that the principle of shifting the burden of proof is fully observed'.[117]

4.5.2 *Breathing New Life Into Evidentiary Practices*

As can readily be seen, in *Zapescu*, the Committee specified at length the kind of evidence that would be required to prove or disprove a claim, and from whom. It also provided more direct information on its own assessment of particular pieces of evidence. By doing so, the Committee brought abstract principles to life and made them more tangible. This is an important step, as this clarification of the Committee's approach will both help future parties to prepare their cases and support Committee members in their decision-making.

Zapescu is part of an ongoing line of cases where the Committee has found that the failure to shift the burden of proof amounts to a violation of Article 6.[118] However, this finding is generally linked to a failure by the

[113] *Zapescu* (CERD), para. 8.9.
[114] *Zapescu* (CERD), para. 8.9; CERD, Concluding observations on the combined tenth and eleventh periodic reports of the Republic of Moldova (CERD/C/MDA/CO/10-11), 8 May 2017; CERD, Concluding observations of the Committee on the Elimination of Racial Discrimination: Republic of Moldova (CERD/C/MDA/CO/8-9), 10 March 2011.
[115] *Zapescu* (CERD), para. 8.10.
[116] *Zapescu* (CERD), para. 8.10.
[117] *Zapescu* (CERD), para. 10; see also: *Gabaroum* (CERD), para. 9; *V.S.* (CERD), para. 9.
[118] See, e.g., *Breleur* (CERD); *Kotor* (CERD); *Gabaroum* (CERD); *V.S.* (CERD).

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state to respect its own domestic legislation requiring this shift. The Committee has not gone as far as holding that *under the Convention*, the failure to reverse the burden of proof would amount to such a violation. Still, this is an important recurring finding that could at least be indicative of the Committee's own stance in this regard. What was new in *Zapescu* is that CERD took more time to address the evidence than in previous cases. A good counter-example here is *V.S.* v. *Slovakia*. This case, decided in 2015, concerned discriminatory recruitment practices by a public elementary school. The school did not hire the petitioner, a qualified teacher of Roma origin, but instead a non-Roma individual who was less qualified.[119] Here, the Committee did not address the evidence presented by the parties in any detail. How relevant were: general reports on the situation of Roma in Slovakia; the statement by the head of school that the petitioner should not look for a job but instead have children like other Roma women; or the point made by the State that the school had employed Roma before?[120] In its assessment of the right to work, the Committee simply found that the State had 'not satisfactorily replied to the petitioner's allegations' and that it had failed to provide 'persuasive arguments to justify the differential treatment'. There is no further mention of these points in the assessment of Article 6.[121] While in *V.S.,* CERD did not comment further on the evidence that the State would have needed to provide to comply with the burden of production imposed on it after a shift, it did so in *Zapescu*. This gave the parties a better idea of the Committee's understanding of what shifting the burden of proof would entail in practice. The Committee commented on the burden of production of evidence regarding the company's recruitment criteria, on the relevance of testimonies by other employees, on the inferences (not) drawn by domestic courts, and on the relevance it attributed to this information. This made the decision-making process of the Committee more transparent. While it is regrettable that CERD only had discussed but not ruled on the substantive violations in *Zapescu*, its more direct guidance on what amounts to relevant evidence is a welcome step towards greater clarity for future parties and Committee members alike.[122]

[119] *V.S.* (CERD), paras. 2.1ff.
[120] *V.S.* (CERD), paras. 5.8, 2.2, 4.10.
[121] *V.S.* (CERD), para. 7.3.
[122] This trend seems to be continuing, as CERD was more direct regarding the evidence required in *U.I. and G.I.* v. *Switzerland*, CERD/C/112/D/74/2021, 26 April 2024, as well.

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4.6 CERD and Evidence: Still Trying to Find Its Feet

After more than forty years of practice, the Committee is still clearly trying to find its evidentiary feet. The cases discussed above show that there is no clear stance on the assessment of evidence yet, and that this uncertainty has resulted in some outlier cases. In *Dawas*, the facts of the case were disputed, and the Committee struggled to engage with them, leading to a fierce debate about the core issues of the case even after the Committee had adopted its opinion. *Zapescu*, by contrast, may be considered as a case that indicates a way forward, as the Committee strived to spell out which evidence it would expect from the parties to prove their claim. The Committee could nonetheless be more forthcoming in its use of information requests (also through hearings as laid out in its new Rules of Procedure), instead of later informing the parties, as it discusses the merits, that some information that it considered relevant was missing. Such information requests would be a good opportunity to trigger a reaction by the respective party, who then would have the chance to deliver the evidence requested before their claim fails.

Procedural violations under Article 6 seem to be at the centre of the evidentiary debate. There are indications that the standard of proof is lower in this context and that the failure to shift the burden of proof after presenting a prima facie case amounts to a violation. Regarding substantive violations, there is little to no discussion of evidence, and the Committee either simply finds a violation or focuses on procedural aspects under Article 6 instead. Given that the opinions the Committee has adopted so far offer several diverging scenarios, it is not possible to discern a clear line of decision-making practice (even implicitly) in this regard just yet.

Although CERD is a longstanding actor in the UNTB system, there is still a lot of uncertainty regarding key questions of evidence and their treatment in principle and in practice. The complexities in proving racial discrimination or indeed any form of discrimination do not make the Committee's task any easier. Yet developing a clearer approach to the handling of evidence and the guiding principles behind it could help the Committee in doing its work, at the same time as making the individual communications procedure more accessible and predictable. Beyond these practical considerations, a clearer stance on evidentiary principles would also have broader benefits as it would enhance the Committee's credibility and legitimacy and ultimately, the fairness of the individual communications procedure as a whole.

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