Ernst Zündel v. Canada, Communication No. 953/2000, U.N. Doc. CCPR/C/78/D/953/2000 (2003).

Communication No. 953/2000 : Canada. 29/07/2003.
CCPR/C/78/D/953/2000. (Jurisprudence)

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Human Rights Committee

Seventy-eighth session

14 July - 8 August 2003

Decision of the Human Rights Committee under

the Optional Protocol to the International Covenant

on Civil and Political Rights*

- Seventy-eighth session -

Communication No. 953/2000**

Submitted by: Ernst Zündel (represented by counsel Mrs. Barbara Kulaszka)

Alleged victim: The author

State party: Canada

Date of communication: 21 August 2000 (initial submission)

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

Meeting on 27 July 2003,

Adopts the following:

Decision on admissibility

1. The author of the communication is Ernst Zündel, a German citizen born on 24 April 1939, residing in Canada since 1958. He claims to be a victim of a violation by Canada (1) of articles 3, 19 and 26 of the International Covenant on Civil and Political Rights (the Covenant). He is represented by counsel.

The facts as submitted:

2.1 The author describes himself as a publisher and activist who has defended the German ethnic group against false atrocity allegations concerning German conduct during World War II. His communication originates from a case before the Canadian Human Rights Tribunal in which he was held responsible under the Canadian Human Rights Act of exposing Jews to hatred and contempt on an Internet website known as the "Zundelsite". From the materials submitted to the Committee by the parties it transpires that, for instance, one of the author's articles posted on that site, entitled "Did Six Million Jews Really Die?", disputes that six million Jews were killed during the Holocaust.

2.2 In May 1997, after a Holocaust survivor had lodged a complaint with the Canadian Human Rights Commission against the author's website, the Canadian Human Rights Tribunal initiated an inquiry into the complaint. During the hearings, on 25 May 1998, the Human Rights Tribunal refused to permit the author to raise a defense of truth against the complaint by proving that the statements on the "Zundelsite" are true. The Tribunal did not consider it appropriate to debate the truth or falsity of the statements found on the author's website since this would only "add a significant dimension of delay, cost and affront to the dignity of those who are alleged to have been victimized by these statements". (2)

2.3 Shortly thereafter, the author obtained a booking from the Canadian Parliamentary Press Gallery, a non-governmental and non-profit organization to which the day to day administration of the Canadian Parliament's press facilities has been delegated, to hold a press briefing on 5 June 1998 in the Charles Lynch Press Conference Room in the Centre Block of the Parliament buildings. According to the author, he met the criteria for booking this conference room. In the press release announcing the press conference, dated 3 June 1998, the author indicated that he would discuss the interim ruling of the Human Rights Tribunal refusing to admit the defense of truth. In its pertinent parts, the press release reads:

"The New Inquisition in Toronto! Government tries to grab control of the Internet!

Ernst Zündel is told by the Canadian Human Rights Commission and its tribunal:

- Truth is not a defence

- Intent is not a defence

- That the statements communicated are true is irrelevant!

The interim ruling was rendered after one year of CHRT hearings, on May 25, 1998 by a Canadian Human Rights Tribunal now sitting in judgment over an American based website called the Zundelsite at http://www.webcom.com/ezundel

(For the complete decision see attached pages.)" (3)

2.4 On 4 June 1998, after several Members of Parliament had been contacted by opponents of the author's views who had protested against the author's use of the Charles Lynch Press Conference Room and, after the Press Gallery had refused to cancel the booking of the room, the House of Commons passed the following unanimous motion: "That this House order that Ernst Zundel be denied admittance to the precincts of the House of Commons during and for the remainder of the present session."

2.5 As a result of this motion, the author was banned from the parliamentary precincts and prevented from holding the press conference in the Charles Lynch Press Conference Room. He held an informal press conference outside the Parliament buildings on the sidewalk.

Exhaustion of domestic remedies:

3.1 The author's action against the political parties participating in the passing of the unanimous motion denying him access to the Parliamentary precincts as well as against certain individual members of Parliament, for violation of his right to freedom of expression (guaranteed under section 2 (b) of the Canadian Charter of Rights and Freedoms) was dismissed by the Ontario Court (General Division) on 22 January 1999. The Court held that the defendants, political parties, could be sued, whereas the claim against individual members of Parliament had to be struck out for failure to establish any reasonable cause of action. The Court argued that the House of Commons had exercised its parliamentary privilege in denying the author access to its premises. The test of necessity was met since the motion restricting the author's access to the parliamentary precincts had been necessary to preserve to the proper functioning of the House, the reason behind that decision being to preserve the dignity and integrity of Parliament. The Court noted that the restriction of the author's right to freedom of expression only concerned the use of the precincts of the House of Commons, without generally prohibiting him to express his views.

3.2 On 10 November 1999, the Court of Appeal for Ontario dismissed the author's appeal, specifying that the jurisdictional question for the Court to consider was whether, in order to ensure its proper functioning, it was necessary for the House of Commons to have control over its precincts, including the power to exclude strangers from its premises. The question was not, however, whether it had been necessary to exclude the author from parliamentary precincts, since that would amount to an inquiry into the rightfulness or wrongness of the decision, which would render any existing privilege nugatory. Since control over its premises was a necessary adjunct to the proper functioning of Parliament, the courts would be overstepping legitimate constitutional bounds if they sought to interfere with that privilege. Given that the motion to exclude the author was no more than an exercise of control over the access by strangers to parliamentary precincts, the author's claim was based entirely on matters of parliamentary privilege and had, therefore, been properly struck out.

3.3 On 29 June 2000, the Supreme Court of Canada dismissed the author's application for leave to appeal against the decision of the Ontario Court of Appeal.

The complaint:

4.1 The author claims that he is a victim of a violation of articles 3, 19 and 26 of the Covenant, as he was discriminatorily denied his right to freedom of expression.

4.2 He argues that his right to freedom of expression under article 19 of the Covenant was violated by the House of Commons' motion which excluded him from parliamentary precincts and, in particular, the Charles Lynch Press Conference Room. He argues that the motion was discriminatory and in violation of articles 3 and 26 of the Covenant, because he fulfilled all criteria for booking the press conference room, his exclusion being "the first time in Canadian history that a person has been banned from the precincts of Parliament […] because of his political views".

4.3 It is argued that the author has exhausted all domestic remedies and that the same matter has not been examined under another procedure of international investigation or settlement.

The State party's submission on the admissibility and merits of the communication:

5.1 By note verbale of 10 August 2001, the State party made its submission on the admissibility and merits of the communication.

5.2 The State party contests the admissibility of the communication, insofar as the alleged violations of articles 3 and 26 of the Covenant are concerned, arguing that these claims are insufficiently substantiated. In particular, the author has failed to substantiate that he does not enjoy the Covenant rights on the same basis as women in Canada (article 3), and that his exclusion from parliamentary precincts amounts to discrimination (article 26). Moreover, the State party argues that the author failed to exhaust domestic remedies with regard to these claims, since his court action was restricted to the claim that the motion of the House of Commons violated his freedom of expression under the Canadian Charter of Rights and Freedoms.

5.3 While the State party does not contest the admissibility of the remainder of the communication, it submits that the author's right to freedom of expression under article 19 has not been violated. It argues that, although the motion of the House of Commons excludes the author from entering parliamentary precincts, it does not prevent him from expressing his views outside these precincts. The State party submits that article 19 does not require States to ensure that individuals have access to any place they chose to exercise that right.

5.4 The State party contends that even if the author's exclusion from the precincts were to be considered a restriction of his right to freedom of expression, such restriction was justified pursuant to articles 19, paragraph 3, and 20, paragraph 2, of the Covenant. The motion banning the author constituted a valid exercise of the House of Commons' law-making power provided for in constitutional standards which, in the case of parliamentary privileges, satisfied the "provided by law" requirement in article 19, paragraph 3, of the Covenant. (4)

5.5 The restriction imposed on the author served the purpose of protecting the Jewish communities' right to religious freedom, freedom of expression, and their right to live in a society free of discrimination, and also found support in article 20, paragraph 2, of the Covenant. (5) Thus, the Human Rights Committee, in General Comment No. 11 on article 20 (6), had observed that this prohibition was "fully compatible with the right to freedom of expression as contained in article 19, the exercise of which carried with it special duties and responsibilities". The fact that the author had been active for almost thirty years in the worldwide distribution of materials that deny the Holocaust and other Nazi atrocities against the Jews sufficiently explained the House of Commons' concern that he would use the facilities of Parliament as a platform to disseminate Anti-Semitic views, thereby exposing the

Jewish community to hatred and discrimination. The State party argues that the motion was not only justified under articles 19, paragraph 3, 20, paragraph 2, and 5, paragraph 1, of the Covenant, but legally mandated under article 4 (7) of the International Convention on the Elimination of All Forms of Racial Discrimination, to take measures to suppress the dissemination of ideas based on racial discrimination and hatred.(8) In addition to the respect for the rights of reputation of others, the author's exclusion from parliamentary precincts served the purpose of protecting public order and public morals. Since the protection of parliamentary procedure constituted a legitimate goal of "public order" within the meaning of article 19, paragraph 3, (9) the privilege doctrine and its application in the present case were consistent with that notion. Given that Anti-Semitism is contrary to the values of tolerance, diversity and equality, as enshrined in the Canadian Charter of Rights and Freedoms and other domestic human rights legislation, the motion of the House of Commons further served the protection of public morals.

5.6 The State party contends that the restrictions placed on the author were "necessary", within the meaning of article 19, paragraph 3, of the Covenant, to protect the rights of the Jewish community, the dignity and integrity of Parliament, and the Canadian values of equality and cultural diversity. Compared to the potential harm of the author's planned press conference, the detrimental effects of hate propaganda on society at large, and the impression that such a press conference carried the official imprimatur of Parliament or the Government, the restriction on the author's freedom of expression was minimal and, therefore, proportionate. It had been limited only to a particular place, the parliamentary precincts, to which no member of the public had unfettered access, and did not curtail the author's freedom to use any other forum to express his opinion, provided that his statements did not denigrate the Jewish community.

5.7 The State party submits that parliamentary privileges (10) are among the unwritten conventions forming part of the Canadian Constitution, having their source in the preamble of the Canadian Constitution Act of 1867, in historical tradition and in the principle that the legislative branch must be presumed to possess such constitutional powers as are necessary for its proper functioning. One of these privileges is the authority of the legislature to regulate its own internal proceedings. This privilege is closely related to the right of Parliament to control access to its premises by excluding strangers. Both privileges are considered essential to the legislature's ability to uphold the dignity, integrity and efficiency of its work. The importance of these privileges was emphasized by the Supreme Court of Canada in its decision in New Brunswick Broadcasting Co. v. Nova Scotia, where the Court held that, in reviewing the Parliament's exercise of its inherent privileges, "[t]he courts may determine if the privilege claimed is necessary to the capacity of the legislature to function, but have no power to review the rightness or wrongness of a particular decision made pursuant to the privileges". (11)

5.8 The State party stresses that Parliament's right to exercise exclusive control over its internal proceedings – a comparatively small sphere of legislative activity – is vital to its ability to maintain its independence from the executive and judicial branches of government. Subjecting Parliament's decision to exclude a stranger from its precincts to a system of court review would not only infringe the separation of powers principle, but would mean that such decisions are not final, thereby creating uncertainty, delay and preventing Members of Parliament from performing their important legislative tasks. The State party argues that since the legislature is better placed than the courts to determine the conditions for its efficient

conduct of internal business, the courts should not interfere with the question how Parliament exercised its privileges.

5.9 In the alternative, if the Committee were to declare the author's claims under rticles 3 and 26 admissible, the State party challenges this part of the communication on the merits, reserving the right to make further submissions It contends that the author was not subject to discrimination, as his exclusion from parliamentary precincts was compatible with the provisions of the Covenant and was based on reasonable grounds, serving the legitimate purpose of preventing the dissemination of Anti-Semitic speech, and upholding the Covenant rights of the members of the Jewish community.

Comments by the author:

6.1 By letter of 13 November 2001, the author responded to the State party's submission. He reiterates that his complaint satisfies all admissibility requirements. Since his case had been dismissed by the courts on the very broad ground of parliamentary privilege, any complaint that he had been discriminated against would have been rejected on the same grounds. He notes that it had been argued before the Ontario Court of Appeal that its broad privilege would give Parliament the unbounded right to discriminate against any person or group.

6.2 The author argues that the privilege of Parliament to control access to its precincts does not exempt the legislative branch from the State party's international human rights obligations, especially since Parliament has consented to these obligations with the State party's ratification of the Covenant.

6.3 The author submits that, in the absence of any political means to oppose the State party's power, judicial remedies were the only avenue for the author to challenge his exclusion from the parliamentary precincts.

6.4 As far as the claim under article 19 is concerned, the author reiterates that the author fulfilled the necessary criteria for using the press conference room because the topic of the planned press conference was one of national interest. The House of Commons had banned the author from the Charles Lynch Press Conference Room to deny him the use of such a credible forum for expressing his opinion and to prevent the dissemination of his press conference by the nation-wide cable channel which broadcasts press conferences held in the parliamentary press facilities.

6.5 According to the author, there was no proof that the author intended to incite hatred against Jewish people during the planned press conference. Instead, the press release stated that he was going to discuss the decision of the Canadian Human Rights Tribunal that truth could not be invoked as a defense in proceedings under section 13 of the Canadian Human Rights Act. Copies of the Tribunal decision had been prepared for distribution. However, the State party tendentiously adduced arguments of morality to introduce that aspect in the case. The author stresses that, since the author became a Canadian resident in 1958, he has never been prosecuted for or found guilty of incitement of hatred against Jewish people. His previous conviction for "spreading false news" had been overturned by the Supreme Court of Canada in 1992 on the grounds that it had violated the author's constitutional right to freedom of expression. (12)

Additional observations by the State party:

7.1 By note verbale of 30 May 2002, the State party provided information on the judicial interpretation of parliamentary privilege and on the final decision of the Canadian Human Rights Tribunal in the Citron v. Zündel case. (13)

7.2 Pursuant to Section 40 of the Human Rights Act, any individual or group of individuals claiming to be a victim of discriminatory practice may file a complaint with the Canadian Human Rights Commission. Subject to specific admissibility criteria, the Commission is mandated to investigate the complaint and, if the complaint is not dismissed, to mediate in order to reach a friendly settlement. If no such settlement can be reached, the Commission may refer the complaint to the Canadian Human Rights Tribunal, an independent, quasi-judicial body empowered to conduct hearings and to adjudicate the matter by way of order.

7.3 In July and September 1996, the Toronto Mayor's Committee on Community and Race Relations and Sabina Citron, a Holocaust survivor, lodged two parallel complaints against the author under section 13 (1) of the Human Rights Act, alleging that by posting discriminatory material on his website, the author "caused repeated telephonic communication that was likely to expose Jews to hatred and contempt". After the Human Rights Commission had referred the complaint to the Human Rights Tribunal for a hearing on the merits, the Tribunal issued its final decision on 18 January 2002, ordering that the author "or any other individuals who act in the name of, or in concert with Ernst Zündel cease the discriminatory practise of communicating telephonically" material of the type before the Tribunal and found on the "Zundelsite", "or any other messages of a substantially similar form or content that are likely to expose a person or persons to hatred or contempt by reason of the fact that that person or persons are identifiable on the basis of a prohibited ground of discrimination, contrary to s. 13 (1) of the Canadian Human Rights Act".

7.4 Section 13 (1) of the Canadian Human Rights Act (1985) provides:

"It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination."

The prohibited grounds of discrimination are specified in Section 3 (1) of that Act:

"For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted."

7.5 In addition to the Human Rights Act, the Canadian Criminal Code contains three provisions relating to hate propaganda: (a) advocating genocide (section 318), (b) public incitement of hatred (section 319, paragraph 1) and (c) willful promotion of hatred (section 319, paragraph 2).

Issues and proceedings before the Committee:

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

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

8.3 In relation to the alleged violation of article 3 the Committee finds that the author has provided no substantiation for this claim which appears to be beyond the scope of the said provision. Consequently, the Committee considers that this part of the communication is inadmissible under articles 2 and 3 of the Optional Protocol.

8.4 With respect to the alleged violation of article 19, paragraph 2, of the Covenant, the Committee observes that the State party does not contest the author's claim that domestic remedies are exhausted in respect of the decision to exclude the author from the precincts of the House of Commons "during and for the remainder of the present session", with the consequence of preventing the author from holding the press conference he had announced. Consequently, the author's claim under article 19, paragraph 2, is not inadmissible under article 5, paragraph 2(b), of the Optional Protocol.

8.5 However, and despite the State party's willingness to address the merits of the communication, the Committee considers that the author's claim is incompatible with article 19 of the Covenant and therefore inadmissible ratione materiae under article 3 of the Optional Protocol. Although the right to freedom of expression, as enshrined in article 19, paragraph 2, of the Covenant, extends to the choice of medium, it does not amount to an unfettered right of any individual or group to hold press conferences within the Parliamentary precincts, or to have such press conferences broadcast by others. While it is true that the author had obtained a booking with the Press Gallery for the Charles Lynch Press Conference Room and that this booking was made inapplicable through the motion passed unanimously by Parliament to exclude the author's access to the Parliamentary precincts, the Committee notes that the author remained at liberty to hold a press conference elsewhere. The Committee therefore takes the position, after a careful examination of the material before it, that the author's claim, based on the inability to hold a press conference in the Charles Lynch press Conference Room, falls outside the scope of the right to freedom of expression, as protected under article 19, paragraph 2, of the Covenant.

8.6 Finally, in relation to the alleged violation of article 26 of the Covenant, the Committee finds that this part of the communication is inadmissible for failure to exhaust domestic remedies, under article 5, paragraph 2 (b), of the Optional Protocol. The Committee notes that, in his statement of claim submitted to the Ontario Court, the author claims to be a victim of a violation of his right to freedom of expression guaranteed by section 2 (b) of the Canadian Charter of Rights and Freedoms without, however, asserting a violation of his equality rights under section 15 (1) (14) of the Charter. The author's argument that any complaint to the effect that he was discriminated against would have been dismissed on grounds of parliamentary privilege is purely conjectural, and, therefore, does not absolve him from seeking to exhaust domestic remedies.

9. The Committee therefore decides:

(a) That the communication is inadmissible under articles 2, 3 and 5, paragraph 2 (b), of the Optional Protocol;

(b) That this decision shall be communicated to the author and, for information, to the State party.

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

** The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

Notes

1. The Covenant and the Optional Protocol to the Covenant both entered into force for the State party on 19 May 1976.

2. Canadian Human Rights Tribunal, Citron v. Zundel, interim decision of 25 May 1998.

3. Italics, bolds and underlines as used in the original press release.

4. The State party refers to a similar finding by the Human Rights Committee in Gauthier v. Canada, Communication No. 633/1995, views adopted on 7 April 1999, UN Doc. CCPR/C/65/D/633/1995, 5 May 1999, at para. 13.5.

5. In this regard, the State party refers to the Committee's jurisprudence in Ross v. Canada, Communication No. 736/1997, views adopted on 18 October 2000, UN Doc. CCPR/C/70/D/736/1997, 26 October 2000, at para. 11.5 and in Faurisson v. France, Communication No. 550/1993, views adopted on 8 November 1996, UN Doc. CCPR/C/58/D/550/1993, 16 December 1996, at para. 9.6.

6. Human Rights Committee, 19th session (1983), General Comment 11: Prohibition of propaganda for war and inciting national, racial or religious hatred (Article 20), adopted on 29 July 1983, at para. 2.

7. Article 4 of the International Convention on the Elimination of All forms of Racial Discrimination reads: "States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination."

8. The State party also emphasizes that, according to General Recommendation XV of the Committee on the Elimination of Racial Discrimination, "the prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression". See General Recommendation XV: Organized violence based on ethnic origin (Article 4), adopted on 23 March 1993, at para. 4.

9. The State party refers to the Committee's Views in Gauthier v. Canada, Communication No. 633/1995, Views adopted on 7 April 1999, UN Doc. CCPR/C/65/D/633/1995, 5 May 1999, at para. 13.6.

10. In Canadian constitutional law, the notion of "privileges" refers to the legal powers of Parliament.

11. Supreme Court of Canada, New Brunswick Broadcasting Co. v. Nova Scotia, [1993] 1 S.C.R., at pp. 384-385.

12. See Supreme Court of Canada, R. v. Zundel, [1992] 2 S.C.R., pp. 731-844.

13. Canadian Human Rights Tribunal, Citron v. Zündel, decision of 18 January 2002.

14. Section 15 (1) of the Canadian Charter of Rights and Freedoms reads: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."