EQUALITY AND DISCRIMINATION - RACIAL DISCRIMINATION

III. JURISPRUDENCE

CERD

- *Yilmaz-Dogan v. The Netherlands* (1/1984), CERD, A/43/18 (10 August 1988) 59 (CERD/C/36/D/1/1984) at paras. 2.1, 2.2, 9.2. 9.3 and 10.

...

2.1 The petitioner states that she had been employed, since 1979, by a firm operating in the textile sector. On 3 April 1981, she was injured in a traffic accident and placed on sick leave. Allegedly as a result of the accident, she was unable to carry out her work for a long time; it was not until 1982 that she resumed part-time duty of her own accord. Meanwhile, in August 1981, she married Mr. Yilmaz.

2.2 By a letter dated 22 June 1982, her employer requested permission from the District Labour Exchange in Apeldoorn to terminate her contract. Mrs.Yilmaz was pregnant at that time. On 14 July 1982, the Director of the Labour Exchange refused to terminate the contract on the basis of article 1639h (4) of the Civil Code, which stipulates that employment contracts may not be terminated during the pregnancy of the employee. He pointed, however, to the possibility of submitting a request to the competent Cantonal Court. On 19 July 1982, the employer addressed the request for termination of the contract to the Cantonal Court in Apeldoorn. The request included the following passage: [...]

> "When a Netherlands girl marries and has a baby, she stops working. Our foreign women workers, on the other hand, take the child to neighbours or family and at the slightest setback disappear on sick leave under the terms of the Sickness Act. They repeat that endlessly. Since we all must do our utmost to avoid going under, we cannot afford such goings-on."

After hearing the request on 10 August and 15 September 1982, the Cantonal Court agreed, by a decision of 29 September 1982, to terminate the employment contract with effect from 1 December 1982. Article 1639w (former numbering) of the Civil Code excludes the possibility of an appeal against a decision of the Cantonal Court.

...

9.2 The main issues before the Committee are (a) whether the State party failed to meet its obligation, under article 5 (e) (i), to guarantee equality before the law in respect of the right to work and protection against unemployment, and (b) whether articles 4 and 6 impose on States parties an obligation to initiate criminal proceedings in cases of alleged racial discrimination and to provide for an appeal mechanism in cases of such discrimination.

9.3 With respect to the alleged violation of article 5 (e) (i), the Committee notes that the

final decision as to the dismissal of the petitioner was the decision of the Sub-District Court of 29 September 1982, which was based on article 1639w (2) of the Netherlands Civil Code. The Committee notes that this decision does not address the alleged discrimination in the employer's letter of 19 July 1982, which requested the termination of the petitioner's employment contract. After careful examination, the Committee considers that the petitioner's dismissal was the result of a failure to take into account all the circumstances of the case. Consequently, her right to work under article 5 (e) (i) was not protected.

...

10. The Committee on the Elimination of Racial Discrimination...is of the opinion that the information as submitted by the parties sustains the claim that the petitioner was not afforded protection in respect of her right to work. The Committee suggests that the State party take this into account and recommends that it ascertain whether Mrs. Yilmaz-Dogan is now gainfully employed and, if not, that it use its good offices to secure alternative employment for her and/or to provide her with such other relief as may be considered equitable.

- *Diop v. France* (2/1989), CERD, A/46/18 (18 March 1991) 124 (CERD/C/39/D/2/1989/Rev.2) at paras. 3.1, 6.5 and 6.6.

...

3.1 The author considers that he was denied the right to work on the ground of national origin, and alleges that the French judicial authorities violated the principle of equality, enshrined in article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination. Allegedly, his right to equal treatment before the tribunals was violated in two respects: First, whereas he was denied to practice law in Nice, six lawyers of Senegalese nationality are members of the Paris Bar. According to the author, his application would have been granted had he submitted it in Paris; he considers it unacceptable that the State party should allow such differences within the national territory. Secondly, it is submitted that the principle of equality and reciprocity at the international level is also affected by virtue of the fact that on the basis of the above-mentioned bilateral instruments, all French lawyers have the right to exercise their profession in Senegal and *vice versa*.

...

6.5 Finally, inasmuch as the allegation of racial discrimination within the meaning of article 1, paragraph 1, of the Convention is concerned, the Committee notes that article 11, paragraph 1, of the French Act No. 71.1130 of 31 December 1971 stipulates that no one may accede to the legal profession if he is not French, except as provided for in international conventions.

6.6 This provision operates as a preference or distinction between citizens and non-citizens within the meaning of article 1, paragraph 2, of the Convention: the refusal to admit Mr.

Diop to the Bar was based on the fact that he was not of French nationality, not on any of the grounds enumerated in article 1, paragraph 1. The author's allegation relates to a situation in which the right to practice law exists only for French nationals, not to a situation in which this right has been granted in principle and may be generally invoked; accordingly, the Committee concludes that article 1, paragraph 1, has not been violated.

- *L. K. v. The Netherlands* (4/1991), CERD, A/48/18 (16 March 1993) 130 (CERD/C/42/D/4/1991) at paras. 2.1, 3.1, 6.3-6.6 and 6.8.

...

2.1 On 9 August 1989, the author, who is partially disabled, visited a house for which a lease had been offered to him and his family, in the Nicholas Ruychaverstraat, a street with municipal subsidized housing in Utrecht. He was accompanied by a friend, A.B. When they arrived, some 20 people had gathered outside the house. During the visit, the author heard several of them both say and shout: "No more foreigners". Others intimated to him that if he were to accept the house, they would set fire to it and damage his car. The author and A.B. then returned to the Municipal Housing Office and asked the official responsible for the file to accompany them to the street. There, several local inhabitants told the official that they could not accept the author as their neighbour, owing to a presumed rule that no more than 5 per cent of the street's inhabitants should be foreigners. Told that no such rule existed, street residents drafted a petition, which noted that the author could not be accepted and recommended that another house be allocated to his family.

...

3.1 The author submits that the remarks and statements of the residents of the street constitute acts of racial discrimination within the meaning of article 1, paragraph 1, of the Convention, as well as of article 137, *literae* (c), (d), and (e), of the Dutch Criminal Code; the latter provisions prohibit public insults of a group of people solely on the basis of their race, public incitement of hatred against people on account of their race, and the publication of documents containing racial insults of a group of people.

...

6.3 The Committee finds on the basis of the information before it that the remarks and threats made on 8 and 9 August 1989 to L.K. constituted incitement to racial discrimination and to acts of violence against persons of another colour or ethnic origin, contrary to article 4 (a) of the International Convention on the Elimination of All Forms of Racial Discrimination, and that the investigation into these incidents by the police and prosecution authorities was incomplete.

6.4 The Committee cannot accept any claim that the enactment of law making racial discrimination a criminal act in itself represents full compliance with the obligations of States parties under the Convention.

6.5 The Committee reaffirms its view as stated in its Opinion on Communication No. 1/1984 of 10 August 1987 (*Yilmaz-Dogan v. The Netherlands*) that "the freedom to prosecute criminal offenses - commonly known as the expediency principle - is governed by considerations of public policy and notes that the Convention cannot be interpreted as challenging the *raison d'être* of that principle. Notwithstanding, it should be applied in each case of alleged racial discrimination in the light of the guarantees laid down in the Convention".

6.6 When threats of racial violence are made, and especially when they are made in public and by a group, it is incumbent upon the State to investigate with due diligence and expedition. In the instant case, the State party failed to do this.

...

6.8 The Committee recommends that the State party review its policy and procedures concerning the decision to prosecute in cases of alleged racial discrimination, in the light of its obligations under article 4 of the Convention.

- *Narrainen v. Norway* (3/1991), CERD, A/49/18 (15 March 1994) 119 (CERD/C/42/D/3/1991) at paras. 2.1, 3.1, 3.2, 9.2-9.5 and 10.

...

2.1 The author is of Tamil origin and was born in Mauritius; in 1972, he was naturalized and became a Norwegian citizen. On 25 January 1990, he was arrested in connection with a drug-related offence. On 8 February 1991, before the Eidsivating High Court (Court of Appeal - "Lagmannsretten"), a jury of 10 found him guilty of offences against section 162 of the Criminal Code (drug trafficking), and the author was sentenced to six and a half years' imprisonment. The author appealed to the Supreme Court, but leave to appeal was denied in early March 1991. On 17 February 1992, the author filed a petition for reopening of the case. By order of 8 July 1992, the Court of Appeal refused the request. The author again appealed the order to the Supreme Court which, on 24 September 1992, ruled that the case was not to be reopened.

...

3.1 The author claims that racist considerations played a significant part in his conviction, as the evidence against him would not have supported a guilty verdict. He adds that he could not have expected to obtain a fair and impartial trial, as "all members of the jury came from a certain part of Oslo where racism is at its peak". He asserts that this situation violated his rights under the International Convention on the Elimination of All Forms of Racial Discrimination.

3.2 The author claims that other factors should be taken into consideration in assessing whether he was the victim of racial discrimination. In this context, he mentions the amount

of time spent in custody prior to the trial (381 days), out of which a total of nine months were allegedly spent in isolation, and the quality of his legal representation: thus, although he was assigned legal counsel free of charge, his representative "was more of a prosecutor than a lawyer of the defence." Finally, the author considers that a previous drug-related conviction, in 1983, was disproportionably and unreasonably used as character evidence against him during the trial in 1991.

...

9.2 The Committee considers that in the present case the principal issue before it is whether the proceedings against Mr. Narrainen respected his right, under article 5 (a) of the Convention, to equal treatment before the tribunals, without distinction as to race, colour or national or ethnic origin. The Committee notes that the rule laid down in article 5 (a) applies to all types of judicial proceedings, including trial by jury. Other allegations put forward by the author of the communication are in the Committee's view outside the scope of the Convention.

9.3 If members of a jury are suspected of displaying or voicing racial bias against the accused, it is incumbent upon the national judicial authorities to investigate the issue and to disqualify the juror if there is a suspicion that the juror might be biased.

9.4 In the present case, the inimical remarks made by juror Ms. J. were brought to the attention of the Eidsivating High Court, which duly suspended the proceedings, investigated the issue and heard testimony about the allegedly inimical statement of Ms. J. In the view of the Committee, the statement of Ms. J. may be seen as an indication of racial prejudice and, in the light of the provision of article 5 (a) of the Convention, the Committee is of the opinion that this remark might have been regarded as sufficient to disqualify the juror. However, the competent judicial bodies of Norway examined the nature of the contested remarks and their potential implications for the course of the trial.

9.5 Taking into account that it is neither the function of the Committee to interpret the Norwegian rules on criminal procedure concerning the disqualification of jurors, nor to decide as to whether the juror had to be disqualified on that basis, the Committee is unable to conclude, on the basis of the information before it, that a breach of the Convention has occurred. However, in the light of the observations made in paragraph 9.4, the Committee makes the following recommendations pursuant to article 14, paragraph 7, of the Convention.

10. The Committee recommends to the State party that every effort should be made to prevent any form of racial bias from entering into judicial proceedings which might result in adversely affecting the administration of justice on the basis of equality and non-discrimination. Consequently, the Committee recommends that in criminal cases like the one it has examined due attention be given to the impartiality of juries, in line with the principles underlying article 5 (a) of the Convention.

EQUALITY AND DISCRIMINATION - RACIAL DISCRIMINATION

- *B. M. S. v. Australia* (8/1996), CERD, A/54/18 (12 March 1999) 78 (CERD/C/54/D/8/1996) at paras. 3.1, 9.2, 9.3 and 10.

...
3.1 Counsel claims that both the [Australian Medical Council] examination system for overseas doctors as a whole and the quota itself are unlawful and constitute racial discrimination. In this respect the judgement of the Federal Court of Australia condones the discriminatory acts of the Australian Government and the AMC and thereby reduces the protection accorded to Australians under the Racial Discrimination Act. At the same time, it eliminates any chance of reform of this discriminatory legislation.
...
9.2 The main issue before the Committee is whether the examination and the quota system for overseas-trained doctors respect the author's right, under article 5 (e) (i) of the Convention, to work and to free choice of employment. The Committee notes in this respect that all overseas-trained doctors are subjected to the same quota system and are required to sit the same written and clinical examinations, irrespective of their race or national origin. Furthermore, on the basis of the information provided by the author it is not possible to reach the conclusion that the system works to the detriment of persons of a particular race or national origin. Even if the system favours doctors trained in Australian and New Zealand medical schools such an effect would not necessarily constitute discrimination on the basis of race or national origin since, according to the information provided, medical students in Australia do not share a single national origin.

9.3 In the Committee's view, there is no evidence to support the author's argument that he has been penalized in the clinical examination for having complained to the HREOC, in view of the fact that an independent observer, appointed by him, was present during two of his attempts.

10. The Committee on the Elimination of Racial Discrimination...is of the opinion that the facts as submitted do not disclose a violation of article 5 (e) (i) or any other provision of the Convention.

- *Habassi v. Denmark* (10/1997), CERD, A/54/18 (17 March 1999) 86 (CERD/C/54/D/10/1997) at paras. 2.1, 2.2, 9.2-9.4, 10, 11.1 and 11.2.

...
2.1 On 17 May 1996 the author visited the shop "Scandinavian Car Styling" to purchase an alarm set for his car. When he inquired about procedures for obtaining a loan he was informed that "Scandinavian Car Styling" cooperated with Sparbank Vest, a local bank, and

was given a loan application form which he completed and returned immediately to the shop. The application form included, *inter alia*, a standard provision according to which the person applying for the loan declared himself or herself to be a Danish citizen. The author, who had a permanent residence permit in Denmark and was married to a Danish citizen, signed the form in spite of this provision.

2.2 Subsequently, Sparbank Vest informed the author that it would approve the loan only if he could produce a Danish passport or if his wife was indicated as applicant. The author was also informed that it was the general policy of the bank not to approve loans to non-Danish citizens.

...

9.2 Financial means are often needed to facilitate integration in society. To have access to the credit market and be allowed to apply for a financial loan on the same conditions as those which are valid for the majority in the society is, therefore, an important issue.

9.3 In the present case the author was refused a loan by a Danish bank on the sole ground of his non-Danish nationality and was told that the nationality requirement was motivated by the need to ensure that the loan was repaid. In the opinion of the Committee, however, nationality is not the most appropriate requisite when investigating a person's will or capacity to reimburse a loan. The applicant's permanent residence or the place where his employment, property or family ties are to be found may be more relevant in this context. A citizen may move abroad or have all his property in another country and thus evade all attempts to enforce a claim of repayment. Accordingly, the Committee finds that, on the basis of article 2, paragraph (d), of the Convention, it is appropriate to initiate a proper investigation into the real reasons behind the bank's loan policy *vis à vis* foreign residents, in order to ascertain whether or not criteria involving racial discrimination, within the meaning of article 1 of the Convention, are being applied.

9.4 The Committee notes that the author, considering the incident an offence under the Danish Act against Discrimination, reported it to the police. First the police and subsequently the State Prosecutor in Viborg accepted the explanations provided by a representative of the bank and decided not to investigate the case further. In the Committee's opinion, however, the steps taken by the police and the State Prosecutor were insufficient to determine whether or not an act of racial discrimination had taken place.

10. In the circumstances, the Committee is of the view that the author was denied effective remedy within the meaning of article 6 of the Convention in connection with article 2 (d).

11.1 The Committee recommends that the State party take measures to counteract racial discrimination in the loan market.

11.2 The Committee further recommends that the State party provide the applicant with reparation or satisfaction commensurate with any damage he has suffered.

- *Ahmad v. Denmark* (16/1999), CERD, A/55/18 (13 March 2000) 109 (CERD/C/56/D/16/1999) at paras. 2.1, 3.1, 3.2, 6.1-6.4, 8 and 9.

...

2.1 On 16 June 1998 family members and friends had come to meet pupils after the exams at the Avedore Gymnasium, Hvidovre, as is the usual practice in Danish high schools. The author and his brother were waiting with a video camera outside an examination room, where a friend of theirs was taking an exam. While they were waiting, a teacher, Mr. K.P., asked them to leave. Since they refused the teacher informed the headmaster, Mr. O.T., who immediately called the police. Mr. O.T. publicly referred to the author and his brother as "a bunch of monkeys". When the author told Mr. O.T. that he was going to complain about the manner in which he had been treated, Mr. K.P. expressed doubts about the effectiveness of such a complaint and said that the author and his brother were "a bunch of monkeys" who could not express themselves correctly. When the police arrived the author and his friends discussed the matter with them. The police promised to have a discussion with Mr. O.T.

...

3.1 It is submitted that the case was not examined properly by the national authorities and that the author never obtained an apology or sufficient satisfaction or reparation. As a result the State party has violated its obligations under article 2, subparagraph 1 (d) and article 6 of the Convention.

3.2 Counsel claims that neither the police department of Hvidovre nor the State Attorney examined, in particular, the following issues: (a) had Mr. O.T. and Mr. K.P. said that the author and his brother were "a bunch of monkeys" and that they could not express themselves correctly; (b) had that been used with reference to the Pakistani origin of the author and his brother; (c) had that expression amounted to a discriminatory opinion about the author and his brother. According to counsel, the police limited themselves to interviewing Mr. O.T. and Mr. K.P; they did not even consider interviewing the author and his brother, or the six witnesses whose names and addresses were known to them.

...

6.1 The State party submits that Mr. K.P. did not deny having called the author and his group "monkeys". It also submits that Mr. O.T. did not deny having said something similar. It is also established that these utterances were made in the course of a tense episode in a school corridor and in the presence of several witnesses. Thus, the Committee is of the opinion that the author was insulted in public, at least by Mr. O.T.

6.2 The District Public Prosecutor did not establish whether the author had been insulted on

the grounds of his national or ethnic origin, in violation of the provisions of article 2, paragraph 1 (d), of the Convention. It is the opinion of the Committee that if the police involved in the case had not discontinued their investigations, it might have been established whether the author had indeed been insulted on racial grounds.

6.3 From information submitted by the State party in its fourteenth periodic report (CERD/C/362/Add.1), the Committee gathers that on several occasions persons have been convicted by Danish courts for breaches of section 266b of the Criminal Code for insulting or degrading statements similar to the ones uttered in the present case. Therefore, the Committee does not share the opinion of the State party that the statements in question do not fall within section 266b of the Criminal Code.

6.4 Owing to the failure of the police to continue their investigations, and the final decision of the Public Prosecutor against which there was no right of appeal, the author was denied any opportunity to establish whether his rights under the Convention had been violated. From this it follows that the author has been denied effective protection against racial discrimination and remedies attendant thereupon by the State party.

...

8. As for the merits, the Committee considers that, in the light of the above findings, the facts as presented constitute a violation of article 6 of the Convention.

9. The Committee recommends to the State party to ensure that the police and the public prosecutors properly investigate accusations and complaints related to acts of racial discrimination which should be punishable by law according to article 4 of the Convention.

- *B. J. v. Denmark* (17/1999), CERD, A/55/18 (17 March 2000) 116 (CERD/C/56/D/17/1999) at paras. 6.2, 6.3 and 7.

...

6.2 The Committee considers that the conviction and punishment of the perpetrator of a criminal act and the order to pay economic compensation to the victim are legal sanctions with different functions and purposes. The victim is not necessarily entitled to compensation in addition to the criminal sanction of the perpetrator under all circumstances. However, in accordance with article 6 of the Convention, the victim's claim for compensation has to be considered in every case, including those cases where no bodily harm has been inflicted but where the victim has suffered humiliation, defamation or other attack against his/her reputation and self esteem.

6.3 Being refused access to a place of service intended for the use of the general public solely on the ground of a person's national or ethnic background is a humiliating experience

which, in the opinion of the Committee, may merit economic compensation and cannot always be adequately repaired or satisfied by merely imposing a criminal sanction on the perpetrator.

7. While the Committee considers that the facts described in the present communication disclose no violation of article 6 of the Convention by the State party, the Committee recommends that the State party take the measures necessary to ensure that the victims of racial discrimination seeking just and adequate reparation or satisfaction in accordance with article 6 of the Convention, including economic compensation, will have their claims considered with due respect for situations where the discrimination has not resulted in any physical damage but humiliation or similar suffering.

- *Koptova v. Slovak Republic* (13/1998), CERD, A/55/18 (8 August 2000) 136 at paras. 2.1-2.3 and 10.1-10.3.

...

2.1 The author reports that in 1981 seven Romany families from the villages of Rovne and Zbudske Dlhe, Slovak Republic, came to work in an agricultural cooperative located in the municipality of Krasny Brod. Shortly after their arrival each of the families sought and received permanent residence under Slovak Law (135/1982 Act) in what are today the municipalities of Nagov and Rokytovce (at the time part of Krasny Brod). When, at the end of 1989, the agricultural cooperative ceased operations the Romany families lost their jobs. Insofar as their living quarters at the cooperative were linked to their employment, they were compelled to leave the cooperative. Upon their departure, the authorities demolished the stables which they had occupied.

2.2 In May 1991 the Romany families returned to the municipalities where they were legally registered, i.e. Rokytovce and Nagov. For various periods over the following six years, they lived in temporary housing provided reluctantly by local authorities in the county of Medzilaborce. On more than one occasion during that period, however, anti-Roma hostility on the part of local officials and/or non-Romany residents forced the Romany families to flee. Thus, between May and December 1991 the Medzilaborce County Department of Social Affairs reserved a trailer for the families to rent. Although the families raised the money no village (Krasny Brod, Cabiny, Sukov, Rokytovce, Nagov or Cabalovce) allowed them to place the trailer on its territory. In 1993, after they had built temporary dwellings in the village of Cabiny, the dwellings were torn down by non-Romany residents. Throughout this period the Romany families were moving frequently from one town to another, in search of a permanent and secure home.

2.3 In spring 1997 the families again established temporary dwellings on agricultural land

located in Cabiny. Local authorities from neighbouring villages met to discuss the situation. The mayor of Cabiny characterized as illegal the movement of Roma to Cabiny and warned of a possible negative reaction from the rest of the population. The mayors of Cabalovce and Nagov agreed to accommodate the homeless Roma. On 8 June 1997 the Municipal Council of Rokytovce, whose mayor had not been present at the above-mentioned meeting, enacted a resolution which expressly forbade the Romany families from settling in the village and threatened them with expulsion should they try to settle there. The resolution also declared that they were not native inhabitants of Rokytovce, since after the separation of Rokytovce and Krasny Brod in 1990 they had neither resided in the village nor claimed their permanent residence there. On 16 July 1997 the Municipality of Nagov adopted resolution No. 22 which also forbade Roma citizens to enter the village or to settle in shelters in the village district. The resolution explicitly provided that its effect was of permanent duration.

...

10.1 Having received the full texts of resolutions 21 and 22 the Committee finds that, although their wording refers explicitly to Romas previously domiciled in the concerned municipalities, the context in which they were adopted clearly indicates that other Romas would have been equally prohibited from settling, which represented a violation of article 5(d)(i) of the Convention.

10.2 The Committee notes, however, that the resolutions in question were rescinded in April 1999. It also notes that freedom of movement and residence is guaranteed under article 23 of the Constitution of the Slovak Republic.

10.3 The Committee recommends that the State party take the necessary measures to ensure that practices restricting the freedom of movement and residence of Romas under its jurisdiction are fully and promptly eliminated.

- *E. I. F. v. The Netherlands* (15/1999), CERD, A/56/18 (21 March 2001) 116 at paras. 2.1-2.3, 6.2 and 7.

...

2.1 The author claims to have been discharged from the Netherlands Police Academy (NPA) on racial grounds and mentions a number of instances of discrimination that allegedly took place during his training at the Academy between 1991 and 1993, such as the following:

> He used to be told repeatedly that he was a bad learner, that his Dutch was insufficient and that he should pattern himself on the white male police officers;
>
> When a white student was late for his classes it was not registered. If the

> author arrived slightly late, it was registered, resulting in a permanent minus point;
>
> His sports teacher made him perform an exercise. When it appeared that he did not perform well enough the teacher told the group: "The muscles needed for performing this exercise well are poorly developed in apes";
>
> As part of a sports test, a distance had to be covered within a certain time. When the author had run the distance it appeared that the sports teacher had forgotten to register the time. White students did not experience such problems;
>
> The Academy received an invitation to participate in a football tournament. As a committee member of the sports group, the author had to decide on the composition of the team. One of the lecturers told him: "See to it that the academy is well represented, so don't select too many blacks";

On 9 July 1993 the principal of the Academy informed the author in writing that he would like to have a discussion with him in the course of August 1993 about his study results. The author was to be informed during that meeting that he had to finish his examinations before the end of October 1993. The author, however, was in Suriname from 8 July to 26 August 1993. Therefore, he could not know anything about the "agreement" with respect to the deadline of October 1993. As a result, the author did not finish his examinations before the end of October 1993. The Academy later argued that he had to leave because he had not taken his examinations.

2.2 The author further alleges that he was dismissed from the Academy in 1994 after a group of students led by him made a public statement in which they complained about the situation of foreign students. That statement, as well as pressure from the media, led to the appointment by the Minister of the Interior of the Boekraad Committee, whose mandate was to examine the complaints about the Police Academy. According to the author, the Committee recognized in its final report that the Academy had committed irregularities which had resulted in the discourteous treatment of a certain group of students and addressed a number of recommendations to the Minister.

2.3 The author brought his case before the Administrative Law Division of the Amsterdam Court, which in its judgement of 3 April 1996 annulled the dismissal and recognized that the author had been subjected to discrimination. However, by decision of 6 November 1997 the Central Appeals Court for the public service and social security matters in Utrecht ruled that the decision should stand.

...

6.2 With respect to the merits of the communication, the Committee considers that some of the allegations submitted by the author and summarized in paragraph 2.1 above have racial connotations of a serious nature. However, they did not constitute the subject of the claims brought before the Amsterdam District Court and the Central Appeals Tribunal, which dealt mainly with the question of the dismissal from the Police Academy. Furthermore, it does not appear from the information received by the Committee that the decision to terminate the author's participation in the Police Academy was the result of discrimination on racial grounds. Nor has any evidence been submitted to substantiate the claim that his poor academic results were related to the incidents referred to in paragraph 2.1.

7. The Committee on the Elimination of Racial Discrimination...is of the opinion that the facts, as submitted, do not disclose a violation of the Convention by the State party.

- *Lacko v. Slovakia* (11/1998), CERD, A/56/18 (9 August 2001) 130 at paras. 2.1-2.3, 7.9, 7.10, 10 and 11.

...

2.1 On 24 April 1997 the petitioner, accompanied by other persons of Romany ethnicity, went to the Railway Station Restaurant located in the main railway station in Kosice, Slovakia, to have a drink. Shortly after entering the restaurant the applicant and his company were told by a waitress to leave the restaurant. The waitress explained that she was acting in accordance with an order given by the owner of the restaurant not to serve Roma. After requesting to speak with her supervisor, the petitioner was directed to a man who explained that the restaurant was not serving Roma, because several Roma had previously destroyed equipment in the restaurant. When the petitioner related that neither he nor his company had damaged any equipment, the person in charge repeated that only polite Roma would be served.

2.2 On 7 May 1997, the petitioner filed a complaint with the General Prosecutor's Office in Bratislava, requesting an investigation to determine whether an offence had been committed. The case was assigned to the County Prosecutor's Office in Kosice who referred the matter to the Railway Police. In the meantime the applicant also sought remedy from the Slovak Inspectorate of Commerce, responsible for overseeing the lawful operation of commercial enterprises. In a letter to the petitioner, dated 12 September 1997, the Inspectorate reported that it had conducted an investigation into the complaint during the course of which it had been observed that Roma women had been served at the restaurant and that the owner had arranged that there would be no other discrimination of any polite customers, Roma included.

2.3 By resolution dated 8 April 1998, the Railway Police Department in Kosice reported that it had conducted an investigation into the case and found no evidence that an offence had

been committed. The petitioner appealed to the County Prosecutor who, in a resolution dated 24 April 1998, ruled that the decision of the Railway Police Department was valid and indicated that there was no further legal remedy available.

...

7.9 After reviewing the files concerned, the Prosecutor General disagreed with the legal opinion of the Regional Prosecution Office concerning the degree of dangerousness of the act. It considered that the Regional Prosecution Office had manifestly overestimated the immediate rectification by the head of the restaurant after a discussion with the petitioner. In a written instruction to the Regional Prosecution Office the Prosecutor General stated that the results of the review sufficiently justified the suspicion that the head of the restaurant had committed a crime of instigation to national and racial hatred under Section 198a para 1 of the Penal Code and instructed the subordinate prosecution office accordingly.

7.10 On 19 April 2000, the Kosice District Prosecutor indicted Mr. J. T. On 28 April 2000, the court declared Mr. J. T. guilty of the crime described in article 198a, sec.1 of the Penal Code and sentenced him to pay a fine of SKK 5000 or, alternatively, to serve a term of three months' imprisonment. The sentence became effective on 25 July 2000.

...

10. In the view of the Committee, the condemnation of Mr. J. T. and the penalty imposed, even though after a long period of time following the events, constitutes sanctions compatible with the obligations of the State party. Taking due account of this condemnation, even if delayed, the Committee makes no finding of a violation of the Convention by the State party.

11. Acting under article 14, paragraph 7 (b), of the Convention, the Committee recommends to the State party that it complete its legislation in order to guarantee the right of access to public places in conformity with article 5 (f) of the Convention and to sanction the refusal of access to such places for reason of racial discrimination. The Committee also recommends to the State party to take the necessary measures to ensure that the procedure for the investigation of violations is not unduly prolonged.

- *Hagan v. Australia* (26/2002), CERD, A/58/18 (20 March 2003) 139 (CERD/C/62/D/26/2002) at paras. 1, 2.1, 7.2, 7.3 and 8.

1. The petitioner, Stephen Hagan, is an Australian national, born in 1960, with origins in the Kooma and Kullilli tribes of south-western Queensland. He alleges to be a victim of a violation by Australia of articles 2, in particular, paragraph 1 (c); 4; 5, paragraphs d (i) and (ix), e (vi) and f; 6 and 7 of the International Convention on the Elimination of All Forms of Racial Discrimination. He is represented by counsel.

EQUALITY AND DISCRIMINATION - RACIAL DISCRIMINATION

2.1 In 1960, the grandstand of an important sporting ground in Toowoomba, Queensland, where the author lives, was named the "E.S. 'Nigger' Brown Stand", in honour of a well-known sporting and civic personality, Mr. E.S. Brown. The word "nigger" ("the offending term") appears on a large sign on the stand. Mr. Brown, who was also a member of the body overseeing the sports ground and who died in 1972, was of white Anglo-Saxon extraction who acquired the offending term as his nickname, either "because of his fair skin and blond hair or because he had a penchant for using 'Nigger Brown' shoe polish". The offending term is also repeated orally in public announcements relating to facilities at the ground and in match commentaries.

...

7.2 The Committee has taken due account of the context within which the sign bearing the offending term was originally erected in 1960, in particular the fact that the offending term, as a nickname probably with reference to a shoeshine brand, was not designed to demean or diminish its bearer, Mr. Brown, who was neither black nor of Aboriginal descent. Furthermore, for significant periods neither Mr. Brown (for 12 years until his death) nor the wider public (for 39 years until the petitioner's complaint) objected to the presence of the sign.

7.3 Nevertheless, the Committee considers that use and maintenance of the offending term can at the present time be considered offensive and insulting, even if for an extended period it may not have necessarily been so regarded. The Committee considers, in fact, that the Convention, as a living instrument, must be interpreted and applied taking into the circumstances of contemporary society. In this context, the Committee considers it to be its duty to recall the increased sensitivities in respect of words such as the offending term appertaining today.

8. The Committee therefore notes with satisfaction the resolution adopted at the Toowoomba public meeting of 29 July 1999 to the effect that, in the interest of reconciliation, racially derogatory or offensive terms will not be used or displayed in the future. At the same time, the Committee considers that the memory of a distinguished sportsperson may be honoured in ways other than by maintaining and displaying a public sign considered to be racially offensive. The Committee recommends that the State party take the necessary measures to secure the removal of the offending term from the sign in question, and to inform the Committee of such action it takes in this respect.

- *Sadic v. Denmark* (25/2002), CERD, A/58/18 (21 March 2003) 132 (CERD/C/62/D/25/2002) at paras. 2.1, 6.2-6.4 and 6.7.

...

2.1 On 25 July 2000, the petitioner was working on a construction site in a public housing

area in Randers, Denmark, for the company "Assentoft Painters and Decorators" owned by Jesper Christensen. When the petitioner approached Mr. Christensen to claim overdue payments, their conversation developed into an argument during which Mr. Christensen reportedly made the following comments to the petitioner: "Push off home, you Arab pig", "Immigrant pig", "Both you and all Arabs smell", "Disappear from here, God damned idiots and psychopaths." The argument between the complainant and Mr. Christensen was overheard by at least two other workers, Mr. Carsten Thomassen and Mr. Frank Lasse Hendriksen.

...

6.2 The Committee notes that the petitioner brought a complaint under section 266 (b) of the Criminal Code before the police and the Regional Public Prosecutor and that these authorities, after having interviewed two witnesses and the petitioner's former employer, decided to discontinue criminal proceedings under section 266 (b), as they considered that the requirements of this provision were not satisfied. It has taken note of the State party's argument that, despite the discontinuation of proceedings under section 266 (b) of the Criminal Code, the petitioner could have requested the institution of criminal proceedings against his former employer under the general provision on defamatory statements (section 267 of the Criminal Code). The petitioner does not deny the availability of this remedy, but questions its effectiveness in relation to incidents of racial discrimination.

6.3 The Committee observes that the notion of "effective remedy", within the meaning of article 6 of the Convention, is not limited to criminal proceedings based on provisions which specifically, expressly and exclusively penalize acts of racial discrimination. In particular, the Committee does not consider it contrary to articles 2, paragraph 1(d), and 6 of the Convention if, as in the State party's case, the provisions of criminal law specifically adopted to outlaw acts of racial discrimination are supplemented by a general provision criminalizing defamatory statements which is applicable to racist statements even if they are not covered by specific legislation.

6.4 As to the petitioner's argument that criminal proceedings against his former employer under section 267 would have been without prospect because the authorities had already rejected his complaint under section 266 (b) of the Criminal Code, the Committee notes, on the basis of the material before it, that the requirements for prosecution under section 266 (b) are not identical to those for prosecution under section 267 of the Criminal Code. It therefore does not appear that the Danish authorities' decision to discontinue proceedings under section 266 (b) on the ground of lack of evidence as to whether the employer's statements were made publicly or with the intention of wider dissemination have prejudiced a request by the petitioner to institute criminal proceedings under section 267 (together with section 275) of the Criminal Code. The Committee therefore considers that the institution of such proceedings can be regarded as an effective remedy which the petitioner failed to exhaust.

...

6.7 The Committee on the Elimination of Racial Discrimination therefore decides:

(a) That the communication is inadmissible...

- *Kamal Quereshi v. Denmark* (27/2002), CERD, A/58/18 (19 August 2003) 149 (CERD/C/63/D/27/2002) at paras. 2.1-2.7, 7.2-7.5, 8 and 9.

...

2.1 On 26 April 2001, Pia Andersen, a member of the Executive Board of the Progressive Party, faxed a party press release to media, with the headline "No to more Mohammedan rapes!". It included the following statements:

> "Cultural enrichments taking place in the shape of negative expressions and rapes against us Danish women, to which we are exposed every day. … Now it's too much, we will not accept more violations from our foreign citizens, can the Mohammedans not show some respect for us Danish women, and behave like the guests they are in our country, then the politicians in the parliament have to change course and expel all of them."

2.2 On 15 May 2001, Ms. Andersen faxed another press release, in relation to neighbourhood disturbances in Odense, which included the following:

> "Engage the military against the Mohammedan terror! ...Dear fellow citizen, it is that war-like culture these foreigners enrich our country with...Disrespect for this country's laws, mass-rapes, violence, abuse of Danish women by shouting things like 'horse', 'Danish pigs', etc. And now this civil war-like situation."

2.3 For these two actions, the Odense police charged Ms. Andersen with a violation of section 266 (b) of the Danish Criminal Code.a/ She was later convicted... On 5 September 2001, the Progressive Party placed in the newspaper an invitation to a lecture by the former party leader, Mogens Glistrup, which read that: "The Bible of the Muhamedans requires: the infidel shall be killed and slaughtered, until all infidelity has been removed."

2.4 From 20 to 22 October 2001, the Progressive Party held its annual meeting. This meeting, of a party running for Parliament, was required by law to be broadcast on public television. A number of speakers presented the following views:

> Margit Guul (member of the party): "I'm glad to be a racist. We shall free Denmark of Mohammedans", "the Black breed like rats", "they shall have a hand cut off if they steal".

> Bo Warming (member of the party): "The only difference between Mohammedans and rats is that the rats do not receive social benefits."
>
> Mogens Glistrup (former party leader): "Mohammedans are going to exterminate the populations in those countries they have forced themselves into."
> Peter Rindal (member of the party): "Regarding Muslim graveyards, that is a brilliant idea, and preferably of such size that they all fit in them, and preferably at once."
>
> Erik Hammer Sørensen (member of the party): "Fifth columnists are walking around among us. The ones we have received commit violence, murder and rape."
>
> Vagn Andersen (member of the party): "The State has given these foreigners/strangers jobs. They work in our slaughterhouses, where they without problems can poison our food, and endanger our agricultural export. Another form of terrorism is to break into our water supply facilities and poison the water."

2.5 After witnessing this meeting, the petitioner requested the Documentation and Advisory Centre on Racial Discrimination (DRC) to file a criminal complaint against the Progressive Party for a violation of section 266 (b). The DRC filed a complaint with the Chief Constable of the Thisted police, the city of residence of the Progressive Party leader. On 31 October 2001, the complaint was rejected on the basis that section 266 (b) did not apply to legal persons such as a political party. On 3 December 2001, the Aalborg Regional Public Prosecutor upheld this decision.

2.6 Thereupon, the petitioner requested the DRC to file a criminal complaint against each member of the executive board of the Progressive Party, for violation of sections 23 and 266 (b) of the Criminal Code. On 11 December 2001, the DRC complained that Ms. Andersen, as a member of the party's executive board, had participated in a violation of section 266 (b), as a result of the press releases, newspaper invitation and comments made at the annual meeting, all described above. The DRC considered it relevant that the Progressive Party had allegedly set up courses allegedly teaching members how to avoid violations of section 266 (b), by avoiding the use of certain phrases.

2.7 On 7 January 2002, the Chief Constable of the Odense police rejected the petitioner's complaint, considering that there was no reasonable evidence to support the allegation that an unlawful act had been committed.b/ The Chief Constable considered that membership of a political party's executive does not of itself create a basis for criminal participation in relation to possible criminal statements made during the party's annual meeting by other persons.

...

EQUALITY AND DISCRIMINATION - RACIAL DISCRIMINATION

7.2 The Committee notes that the present case involves two different sets of acts by different actors: on the one hand, Ms. Andersen herself transmitted press releases by facsimile, in respect of which she was subsequently convicted; on the other hand, speakers at the party conference (of which Ms. Andersen was not one) made the series of racist statements, contrary to article 4 (b) of the Convention, described in paragraph 2.4, concerning which criminal complaints were lodged

7.3 Against this background, the Committee considers that given the complaint against Ms. Andersen in connection with the party conference was not accompanied by any evidence suggesting that she was an accomplice soliciting, directing, or otherwise procuring the speakers at the party meeting to engage in the impugned conduct, it is reasonable to conclude, as did the State party's authorities, that the complaint did not make out a case that Ms. Andersen, as opposed to the speakers themselves, had engaged in any act of racial discrimination; indeed, as a matter of criminal law, liability of a member of a party's executive board could not attach, without additional evidence, in respect of statements made by third parties.

7.4 In the Committee's view, this case may accordingly be distinguished from previous cases where, on the facts, the Committee has on occasion considered that an investigation into the alleged acts of racial discrimination that had taken place was insufficient for the purposes of article 6.d/ In each of those cases, in fact, the investigation was in respect of the individual(s) directly committing the alleged act of racial discrimination, rather than a third party, with the result that *no* person was held criminally responsible for the acts in question; in the present case, on the other hand, criminal complaints *were* lodged against those directly responsible. It cannot therefore be considered that there was no effective action taken in response to the acts in question.

7.5 As to the review of the decisions not to prosecute in the present case, the Committee refers to its jurisprudence that "the terms of article 6 do not impose upon States parties the duty to institute a mechanism of sequential remedies" in cases of alleged racial discrimination.e/ Accordingly, even if article 6 might be interpreted to require the possibility of judicial review of a decision not to bring a criminal prosecution in a particular case alleging racial discrimination, the Committee refers to the State party's statement that it is open, under national law, judicially to challenge a prosecutor's decision.

8. The Committee on the Elimination of Racial Discrimination...is of the opinion that the facts before it do not disclose a violation of the Convention insofar as the State party's action with respect to Ms. Anderson is concerned.

9. In the light of the State party's obligation under article 4 (b) of the Convention, however, the Committee would wish to remain apprised as to the results of the criminal complaints

lodged against the speakers at the party political conference in view of the racist nature of their remarks, contrary to article 4 (b) of the Convention. The Committee draws the attention of the State party to the need to balance freedom of expression with the requirements of the Convention to prevent and eliminate all acts of racial discrimination, particularly in the context of statements made by members of political parties.

Notes:

a/ Section 266 (b) of the Criminal Code provides as follows:

> "(1) Any person who, publicly or with the intention of wider dissemination, makes a statement or imparts other information by which a group of people are threatened, insulted or degraded on account of their race, colour, national or ethnic origin, religion, or sexual inclination shall be liable to a fine or to imprisonment for any term not exceeding two years.
>
> (2) When the sentence is meted out, the fact that the offence is in the nature of propaganda activities shall be considered an aggravating circumstance."

B/ The relevant sections of the Administration of Justice Act regulating the investigation of criminal complaints provide as follows:

> 742 (2): "The police shall institute investigations upon a [criminal] report lodged or on its own initiative, when it may reasonably be presumed that a criminal offence subject to prosecution has been committed."
>
> 743: "The purpose of the investigation is to clarify whether the conditions for imposing criminal liability or other legal consequences under criminal law are fulfilled, and to provide information for use in the determination of the case and prepare the conduct of the case before the court."

...

d/ See for example, Case No. 16/1999, *Ahmad v. Denmark,* Opinion adopted on 13 March 2000 and *Habassi* [Case No. 10/1997, Opinion adopted on 17 March 1999].

e/ Case No. 1/1984, *Dogan v. The Netherlands,* Opinion adopted on 10 August 1988, paragraph 9.4 (finding no violation of article 6).

- *L. R. et al. v. Slovakia* (31/2003), CERD, A/60/18 (7 March 2005) 119 at paras. 2.1-2.4, 10.2-10.10, 11 and 12.

EQUALITY AND DISCRIMINATION - RACIAL DISCRIMINATION

...

2.1 On 20 March 2002, the councillors of the Dobšiná municipality adopted resolution No. 251-20/III-2002-MsZ, whereby they approved what the petitioners describe as a plan to construct low-cost housing for the Roma inhabitants of the town.a/ About 1,800 Roma live in the town in what are described as "appalling" conditions, with most dwellings comprising thatched huts or houses made of cardboard and without drinking water, toilets, or drainage or sewage systems. The councillors instructed the local mayor to prepare a project aimed at securing finance from a government fund set up expressly to alleviate Roma housing problems in the State party.

2.2 Thereupon, certain inhabitants of Dobšiná and surrounding villages established a five-member "petition committee", led by the Dobšiná chairman of the Real Slovak National Party. The committee drafted a petition with the following text:

> "I do not agree with the building of low-cost houses for people of Gypsy origin on the territory of Dobšiná, as it will lead to an influx of inadaptable citizens of Gypsy origin from the surrounding villages, even from other districts and regions."b/

The petition was signed by some 2,700 inhabitants of Dobšiná and deposited with the municipal council on 30 July 2002. On 5 August 2002, the council considered the petition and unanimously voted, "having considered the factual circumstances", to cancel the earlier resolution by means of a second resolution which included an explicit reference to the petition.c/

2.3 On 16 September 2002, in the light of the relevant law,d/ the petitioners' counsel requested the Rožňava District Prosecutor to investigate and prosecute the authors of the discriminatory petition, and to reverse the council's second resolution as it was based on a discriminatory petition. On 7 November 2002, the District Prosecutor rejected the request on the basis of purported absence of jurisdiction over the matter. The Prosecutor found that "...the resolution in question was passed by the Dobšiná Town Council exercising its self-governing powers; it does not constitute an administrative act performed by public administration and, as a result, the prosecution office does not have the competence to review the legality of this act or to take prosecutorial supervision measures in non-penal area".

2.4 On 18 September 2002, the petitioners' counsel applied to the Constitutional Court for an order determining that articles 12 and 33 of the Constitution, the Act on the Right of Petition and the Framework Convention for the Protection of National Minorities (Council of Europe) had been violated, cancelling the second resolution of the council and examining the legality of the petition. Further information was provided on two occasions at the request of the Court. On 5 February 2003, the Court, in closed session, held that the petitioners had provided no evidence that any fundamental rights had been violated by the petition or by the

council's second decision. It stated that as neither the petition nor the second resolution constituted legal acts, they were permissible under domestic law. It further stated that citizens have a right to petition regardless of its content.

...

10.2 The Committee observes, at the outset, that it must determine whether an act of racial discrimination, as defined in article 1 of the Convention, has occurred before it can decide which, if any, substantive obligations in the Convention to prevent, protect against and remedy such acts have been breached by the State party.

10.3 The Committee recalls that, subject to certain limitations not applicable in the present case, article 1 of the Convention defines racial discrimination as follows: "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".

10.4 The State party argues firstly that the challenged resolutions of the municipal council make no reference to Roma, and must thus be distinguished from the resolutions at issue in, for example, the *Koptova* v/ case that were racially discriminatory on their face. The Committee recalls that the definition of racial discrimination in article 1 expressly extends beyond measures which are explicitly discriminatory to encompass measures that are not discriminatory at face value but are discriminatory in fact and effect, that is, if they amount to indirect discrimination. In assessing such indirect discrimination, the Committee must take full account of the particular context and circumstances of the petition, as by definition indirect discrimination can only be demonstrated circumstantially.

10.5 In the present case, the circumstances surrounding the adoption of the two resolutions by the municipal council of Dobšiná and the intervening petition presented to the council following its first resolution make abundantly clear that the petition was advanced by its proponents on the basis of ethnicity and was understood as such by the council as the primary, if not the exclusive basis for revoking its first resolution. As a result, the Committee considers that the petitioners have established a distinction, exclusion or restriction based on ethnicity, and dismisses this element of the State party's objection.

10.6 The State party argues, in the second instance, that the municipal council's resolution did not confer a direct and/or enforceable right to housing, but rather amounted to but one step in a complex process of policy development in the field of housing. The implication is that the second resolution of the council, even if motivated by ethnic grounds, thus did not amount to a measure "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", within the meaning of article 1, paragraph 1 *in fine*. The

Committee observes that in complex contemporary societies the practical realization of, in particular, many economic, social and cultural rights, including those related to housing, will initially depend on and indeed require a series of administrative and policymaking steps by the State party's competent relevant authorities. In the present case, the council resolution clearly adopted a positive development policy for housing and tasked the mayor with pursuing subsequent measures by way of implementation.

10.7 In the Committee's view, it would be inconsistent with the purpose of the Convention, and elevate formalism over substance, to consider that the final step in the actual implementation of a particular human right or fundamental freedom must occur in a non-discriminatory manner, while the necessary preliminary decision-making elements directly connected to that implementation were to be severed and be free from scrutiny. As a result, the Committee considers that the council resolutions in question, taking initially an important policy and practical step towards realization of the right to housing, followed by its revocation and replacement with a weaker measure, taken together, do indeed amount to the impairment of the recognition or exercise on an equal basis of the human right to housing, protected by article 5, paragraph (e) (iii), of the Convention and further in article 11 of the International Covenant on Economic, Social and Cultural Rights. The Committee thus dismisses the State party's objection on this point.

10.8 In light of this finding that an act of racial discrimination has occurred, the Committee recalls its jurisprudence [n/]...to the effect that acts of municipal councils, including the adoption of public resolutions of legal character such as in the present case, amount to acts of public authorities within the meaning of Convention provisions. It follows that the racial discrimination in question is attributable to the State party.

10.9 Accordingly, the Committee finds that the State party is in breach of its obligation under article 2, paragraph 1 (a), of the Convention to engage in no act of racial discrimination and to ensure that all public authorities act in conformity with this obligation. The Committee also finds that the State party is in breach of its obligation to guarantee the right of everyone to equality before the law in the enjoyment of the right to housing, contrary to article 5, paragraph (e) (iii), of the Convention.

10.10 With respect to the claim under article 6, the Committee observes that, at a minimum, this obligation requires the State party's legal system to afford a remedy in cases where an act of racial discrimination within the meaning of the Convention has been made out, whether before the national courts or, in this case, the Committee. The Committee having established the existence of an act of racial discrimination, it must follow that the failure of the State party's courts to provide an effective remedy discloses a consequential violation of article 6 of the Convention.

...

EQUALITY AND DISCRIMINATION - RACIAL DISCRIMINATION

11. The Committee on the Elimination of Racial Discrimination...is of the view that the facts before it disclose violations of article 2, paragraph 1 (a), article 5, paragraph (e) (iii), and article 6 of the Convention.

12. In accordance with article 6 of the Convention, the State party is under an obligation to provide the petitioners with an effective remedy. In particular, the State party should take measures to ensure that the petitioners are placed in the same position that they were in upon adoption of the first resolution by the municipal council. The State party is also under an obligation to ensure that similar violations do not occur in the future.

Notes

a/ The State party provides, with its submissions on the merits of the petition, the following full text of the resolution:

> "On its 25th extraordinary session held on 20 March 2002 the Town Council of the town of Dobšiná adopted the following resolution from discussed reports and points:
>
> RESOLUTION 251-20/III-2002-MsZ
>
> After discussing the proposal by Lord Mayor Ing. Ján Vozár concerning the building of low-cost housing the Town Council of Dobšiná
>
> Approves
>
> the low-cost housing - family houses or apartment houses - development policy and
>
> Recommends
>
> the Lord Mayor to deal with the preparation of project documentation and acquisition of funds for this development from State subsidies."

b/ Petitioners' translation, which reflects exactly the text of the petition set out in the translated judgement of the Constitutional Court provided by the State party annexed to its submissions on the merits. The State party suggests in its submissions on the merits that a more appropriate translation would be: "I do not agree with the construction of flats for the citizens of Gypsy nationality (ethnicity) within the territory of the town of Dobšiná, as there is a danger of influx of citizens of Gypsy nationality from surrounding area [sic] and even from other districts and regions."

c/ The State party provides, with its submissions on the merits of the petition, the following

full text of the resolution:

"RESOLUTION 288/5/VIII-2002-MsZ

I. After discussing the petition of 30 July 2002 and after determining the facts, the Town Council of Dobšiná, through the Resolution of the Town Council is in compliance with the law, on the basis of the citizens' petition

Cancels

Resolution 251-20/III-2002-MsZ approving the low-cost housing - family houses or apartment houses - development policy.

II. Tasks

The Town Council commissions with elaborating a proposal for solving the existence of inadaptable citizens in the town of Dobšiná and then to discuss it in the bodies of the town and at a public meeting of the citizens.

Deadline: November 2002
Responsible: Chairpersons of commissions."

d/ The petitioners refer to:

(i) Article 1 of the Act on the Right of Petition, which provides:
"A petition cannot call for a violation of the Constitution of the Slovak Republic and its laws, nor deny or restrict individual rights";

(ii) Article 12 of the Constitution, which provides:
(1) All human beings are free and equal in dignity and in rights. Their fundamental rights and freedoms are sanctioned; inalienable, imprescriptible and irreversible.
(2) Fundamental rights shall be guaranteed in the Slovak Republic to everyone regardless of sex, race, colour, language, belief and religion, political affiliation or other conviction, national or social origin, nationality or ethnic origin, property, descent or any other status. No one shall be aggrieved, discriminated against or favoured on any of these grounds.
(3) Everyone has the right to decide freely which national group he or she is a member of. Any influence and all manners of pressure that may affect or lead to a denial of a person's original nationality shall be prohibited.
(4) No injury may be inflicted on anyone, because of exercising his or her fundamental rights and freedoms;

(iii) Article 33 of the Constitution, which provides:

"Membership in any national minority or ethnic group may not be used to the detriment of any individual"; and

(iv) The Act on the Public Prosecution Office, which provides that the Prosecutor has a duty to oversee compliance by public administration bodies with laws and regulations, and to review the legality of binding regulations issued by public administration bodies.

...

n/ [See *Koptova v. Slovak Republic*, case No. 13/1998, Opinion of 8 August 2000], at para. 6.6.

...

y/ [*Koptova v. Slovak Republic*, case No. 13/1998, Opinion of 8 August 2000].

- *Sefic v. Denmark* (32/2003), CERD, A/60/18 (7 March 2005) 134 at paras. 2.1-2.7, 7.2 and 8.

...

2.1 On 22 July 2002, the petitioner contacted Fair Insurance A/S to purchase insurance covering loss of and damage to his car, as well as third-party liability insurance. He was told that they could not offer him insurance, as he did not speak Danish. The conversation took place in English and the sales agent fully understood his request.

2.2 In late July 2002, the petitioner contacted DRC [Documentation and Advisory Centre on Racial Discrimination], which requested confirmation of the petitioner's allegations from Fair Insurance A/S. In the meantime, the petitioner contacted the company again and was rejected on the same grounds. By letter dated 23 September 2002, Fair Insurance A/S confirmed that the language requirement was necessary to obtain any insurance offered by the company for the following reasons:

> "...[to] ensure that we cover the need of the customer to the extent that we can ensure that both the coverage of the insurance and the prices are as correct as possible. "...ensure that the customer understands the conditions and rights connected to every insurance...ensure that the customer in connection with a damage claim, particularly when it is critical (accident, fire, etc.), can explain what has happened in order that he/she can be given the right treatment and compensation.
>
> "To fulfil these demands it is...of the utmost importance that the dialogue with the customers is carried out in a language that both the customer and we are familiar with and that for the time being we can only fulfil this requirement and offer service to our

> customers in Danish. The reason being that we as a young (3½ years) and relatively small company have limited resources to employ persons in our customer services department with knowledge of insurance issues in languages other than Danish or develop or maintain material on insurances in languages other than Danish."

2.3 On 8 October 2002, DRC filed a complaint with the Danish Financial Supervisory Authority, which monitors financial companies. By letter of 25 November 2002, the Supervisory Authority replied that the complaint should be made to the Board of Appeal of Insurances ("the Board"). However, the Supervisory Authority would consider whether a general policy of rejection on the basis of language was in accordance with Danish law. It pointed out that, under section 1 (1) of the Instruction on Third-Party Liability Insurances for Motor Vehicles (No. 585, 9 July 2002), the company was legally obliged to offer any customer public liability insurance.

2.4 On 12 December 2002, DRC filed a complaint with the Board and specifically asked whether the language requirement was compatible with the Act against Discrimination. On 31 January 2003, the Board informed DRC that it was highly unlikely that it would consider the legality of the requirement in regard to any legislation other than the Act on Insurance Agreements. However, the case was being given due consideration. The letter also contained a response, dated 29 January 2003, from Fair Insurance A/S to the Board, which stated as follows:

> "Regarding the Act on Insurance Agreements...we are clearly aware of the fact that anybody accepting our conditions of insurance can demand to be offered third-party liability insurance. We regret that Emir Sefic was not offered [the] third-party liability insurance that he could have claimed. On this basis, we have explained in more detail to our employees the legal rules in regard to the liability insurance."

2.5 On 10 January 2003, the Supervisory Authority informed DRC that in its determination on whether Fair Insurance A/S had complied with "upright business activity and good practice", its assessment would be based on section 3 of the Act on Financial Business. On 11 March 2003, it informed DRC that it was of the view that the requirement did not violate section 3. The Supervisory Authority did not consider whether the language requirement violated any other legislation, in particular the Act against Discrimination.

2.6 On 12 December 2002, DRC filed a complaint with the Commissioner of Police of Copenhagen ("the Commissioner"). On 24 April 2003, the Commissioner informed DRC that "it appears from the material received that the possible discrimination only consists of a requirement that the customers can speak Danish in order for the company to arrange the work routines in the firm. Any discrimination based on this explanation and being objectively motivated is not covered by the prohibition in section 1 (1) of the Act against

Discrimination".

2.7 On 21 May 2003, DRC filed an appeal with the Regional Public Prosecutor of Copenhagen ("the Prosecutor"). On 13 June 2003, the Prosecutor rejected the complaint under section 749 (1) of the Administration of Justice Act. He explained that the language requirement "was not based on the customer's race, ethnic origin or the like, but in the wish to be able to communicate with the customers in Danish, as the company has no employees who in regard to insurances in other languages than Danish have skills. Discrimination based on such a clear linguistic basis combined with the information given by the company is not in my opinion covered by the Act on the prohibition of differential treatment based on race, etc. Moreover, it is my view that Fair Insurance A/S's acknowledgement of the fact that the company was obliged to offer a third-party liability insurance to Emir Sefic, in accordance with the Act on Insurance Agreements, is of no relevance in regard to...the Act on the prohibition of differential treatment based on race, etc. ...I have based this on the information provided by Fair Insurance A/S that it was due to a mistake that no third-party liability insurance was offered to Emir Sefic".

...

7.2 The issue before the Committee is whether the State party fulfilled its positive obligation to take effective action against reported incidents of racial discrimination, with regard to the extent to which it investigated the petitioner's claim in this case.g/ The petitioner claims that the requirement to speak Danish as a prerequisite for the receipt of car insurance is not an objective requirement and that further investigation would have been necessary to find out the real reasons behind this policy. The Committee notes that it is not contested that he does not speak Danish. It observes that his claim together with all the evidence provided by him and the information about the reasons behind Fair Insurance A/S's policy were considered by both the police department and by the Public Prosecutor. The latter considered that the language requirement "was not based on the customer's race, ethnic origin or the like", but for the purposes of communicating with its customers. The Committee finds that the reasons provided by Fair Insurance A/S for the language requirement, including the ability to communicate with the customer, the lack of resources for a small company to employ persons speaking different languages, and the fact that it is a company operating primarily through telephone contact were reasonable and objective grounds for the requirement and would not have warranted further investigation.

8. In the circumstances, the Committee on the Elimination of Racial Discrimination...is of the opinion that the facts as submitted do not disclose a violation of the Convention by the State party.

Notes

...

g/ *L.K. v. The Netherlands* [Case No. 4/1991, decision adopted on 16 March 1993] and

EQUALITY AND DISCRIMINATION - RACIAL DISCRIMINATION

Habassi v. Denmark, [Case No. 10/1997, decision adopted on 17 March 1999].

- *Quereshi v. Denmark* (33/2003), CERD, A/60/18 (9 March 2005) 142 at paras. 2.5, 2.6, 2.8, 2.11, 2.13, 7.3, 8 and 9.

...

2.5 Speeches made at the Progressive Party's annual meeting, held on 20 and 21 October 2001, were broadcast on the State party's public television system, which has a duty to broadcast from annual meetings of political parties seeking election. The petitioner contends that the following statements were made at the meeting from the podium:b/

> Vagn Andreasen (party member): "The State has given the foreigners work. They work in our slaughterhouses where they can easily poison our food and endanger the agricultural exports. Another form of terrorism is to break into our waterworks and poison the water."
>
> Mogens Glistrup (former leader of the party): "The Mohammedans will exterminate the populations of the countries to which they have advanced." On 22 October, an article in the *Dagbladet Politiken* daily quoted this statement as: "Their holiest duty is, in the name of Allah, to exterminate the populations in the countries to which they have advanced."
>
> Erik Hammer Sørensen (party member, commenting on immigration to the State party): "There are fifth columnists about. Those that we have got in commit violence, murder and rape."
>
> Margit Petersen (party member, referring to her earlier conviction under section 266 (b) in the State party's courts): "I'm glad to be a racist. We want a Mohammedan-free Denmark"; "the Blacks breed like rats".
>
> Peter Rindal (party member): "Concerning Mohammedan burial grounds in Denmark, of course we should have such ones. And they should preferably be so large that there is room for all of them, and hopefully in one go."
>
> Bo Warming (party member): "The only difference between Mohammedans and rats is that rats don't draw social benefits." He allegedly distributed a drawing of a rat with the Koran under its arm to journalists present at the conference.

2.6 Upon viewing the meeting, the petitioner requested the Documentation and Advisory

Centre on Racial Discrimination (DRC) to file complaints against the above individuals, as well as the members of the executive board of the Progressive Party for its approval of the statements made.

...

2.8 On 25 October 2001, DRC filed a complaint with the Varde police, alleging that the statement made by Mr. Andreasen violated section 266 (b) (1) and (2) on the basis that it insulted and degraded a group of people on account of their religious origin. DRC added that the statement postulated that immigrants and refugees were potential terrorists, thereby generally and unobjectively equating a group of people of an ethnic origin other than Danish with crime. The same day, DRC filed a complaint with the Varde police, alleging that the statement made by Mr. Rindal violated section 266 (b) (1) and (2) on the basis that it threatened a group of people on account of their race and ethnic origin.

...

2.11 On 28 March 2003, the Varde Police Chief Constable forwarded the six cases to the Sønderborg Regional Public Prosecutor with the following recommendations:

...

- The charges against Mr. Andreasen and Mr. Sørensen should be withdrawn under sections 721 (1) (ii) of the Administration of Justice Act.

...

2.13 After receipt of further information, the Regional Public Prosecutor, on 18 June 2003, made the following recommendations to the Director of Public Prosecutions (DPP), in relation to prosecution of the above; DPP accepted them on 6 August 2003:

...

- The charges against Mr. Andreasen should be withdrawn on the basis that that further prosecution could not be expected to lead to conviction and sentence. DPP observed that the *actus reus* of section 266 (b) (1) required a statement to be directed at a group of persons on account of, *inter alia*, race, colour, national or ethnic origin and religion. In the view of DPP, this requirement had not been met as the concept of "foreigners" employed by Mr. Andreasen was "so diffuse that it does not signify a group within the meaning of the law".

...

7.3 The Committee recalls that Mr. Andreasen made offensive statements about "foreigners" at the party conference. The Committee notes that, regardless of what may have been the position in the State party in the past, a general reference to foreigners does not at present single out a group of persons, contrary to article 1 of the Convention, on the basis of a specific race, ethnicity, colour, descent, or national or ethnic origin. The Committee is thus unable to conclude that the State party's authorities reached an inappropriate conclusion in determining that Mr. Andreasen's statement, in contrast to the more specific statements of the other speakers at the conference, did not amount to an act of racial discrimination contrary to section 266 (b) of the Danish Criminal Code. It also follows that the petitioner was not deprived of the right to an effective remedy for an act of racial discrimination in

respect of Mr. Andreasen's statement.

8. Nevertheless, the Committee considers itself obliged to call the State party's attention (i) to the hateful nature of the comments concerning foreigners made by Mr. Andreasen and of the particular seriousness of such speech when made by political figures and, in this context, (ii) to its general recommendation XXX, adopted at its sixty-fourth session, on discrimination against non-citizens.

9. The Committee on the Elimination of Racial Discrimination...is of the opinion that the facts before it do not disclose a violation of the Convention.

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Notes

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b/ The form of the statements is as reported in the criminal complaints to the police lodged by the Documentation and Advisory Centre on Racial Discrimination.

_____

- *The Jewish Community of Oslo et al. v. Norway* (30/2003), CERD, A/60/18 (15 August 2005) 154 at paras. 2.1-2.8, 10.3-10.6, 11 and 12.

...

2.1 On 19 August 2000, a group known as the "Bootboys" organized and participated in a march in commemoration of the Nazi leader Rudolf Hess in Askim, near Oslo. Some 38 people took part in the march, which was routed over 500 m through the centre of Askim, and lasted five minutes. The participants wore "semi-military" uniforms, and a significant number allegedly had criminal convictions. Many of the participants had their faces covered. The march was headed by Mr. Terje Sjolie. Upon reaching the town square, Mr. Sjolie made a speech, in which he stated:

> "We are gathered here to honor our great hero, Rudolf Hess, for his brave attempt to save Germany and Europe from Bolshevism and Jewry during the Second World War. While we stand here, over 15,000 Communists and Jew-lovers are gathered at Youngsroget in a demonstration against freedom of speech and the white race. Every day immigrants rob, rape and kill Norwegians, every day our people and country are being plundered and destroyed by the Jews, who suck our country empty of wealth and replace it with immoral and un-Norwegian thoughts. We were prohibited from marching in Oslo three times, whilst the Communists did not even need to ask. Is this freedom of speech? Is this democracy?...
>
> "Our dear Führer Adolf Hitler and Rudolf Hess sat in prison for what they believed

in, we shall not depart from their principles and heroic efforts, on the contrary we shall follow in their footsteps and fight for what we believe in, namely a Norway built on National Socialism..." a/

2.2 After the speech, Mr. Sjolie asked for a minute's silence in honour of Rudolf Hess. The crowd, led by Mr. Sjolie, then repeatedly made the Nazi salute and shouted "Sieg Heil". They then left.

2.3 The authors claim that the immediate effect of the march appeared to be the founding of a Bootboys branch in nearby Kristiansand, and that for the next 12 months the city was "plagued" by what the authors describe as incidents of violence directed against Blacks and political opponents. They further state that, in the Oslo area, the march appears to have given the Bootboys confidence, and that there was an increase in "Nazi" activity. Several violent incidents took place, including the murder by stabbing on 26 January 2001 of a 15-year-old boy, Benjamin Hermansen, who was the son of a Ghanaian man and a Norwegian woman. Three members of the Bootboys were later charged and convicted in connection with his death; one was convicted of murder with aggravating circumstances, because of the racist motive of the attack. The authors state that he and one of the other persons convicted in this case had participated in the march on 19 August 2000.

2.4 The authors state that the Bootboys have a reputation in Norway for their propensity to use violence, and cite 21 particular instances of both threats and the use of violence by the Bootboys between February 1998 and February 2002. Mr. Sjolie himself is currently serving a term of imprisonment for attempted murder in relation to an incident in which he shot another gang member.

2.5 Some of those who witnessed the commemorative march filed a complaint with the police. On 23 February 2001, the District Attorney of Oslo charged Mr. Sjolie with a violation of section 135a of the Norwegian Penal Code, which prohibits a person from threatening, insulting, or subjecting to hatred, persecution or contempt any person or group of persons because of their creed, race, colour, or national or ethnic origin. The offence carries a penalty of a fine or a term of imprisonment of up to two years.

2.6 On 16 March 2001, Mr. Sjolie was acquitted by the Halden City Court. The prosecutor appealed to the Borgarting Court of Appeal, where Mr. Sjolie was convicted of a violation of section 135a because of the references in his speech to Jews. The Court of Appeal found that, at the least, the speech had to be understood as accepting the mass extermination of the Jews, and that this constituted a violation of section 135a.

2.7 Mr. Sjolie appealed to the Supreme Court. On 17 December 2002, the Supreme Court, by a majority of 11 to 6, overturned the conviction. It found that penalizing approval of

Nazism would involve prohibiting Nazi organizations, which it considered would be incompatible with the right to freedom of speech. b/ The majority also considered that the statements in the speech were simply Nazi rhetoric, and did nothing more than express support for National Socialist ideology. It did not amount to approval of the persecution and mass extermination of the Jews during the Second World War. It held that there was nothing that particularly linked Rudolph Hess to the extermination of the Jews; noted that many Nazis denied that the Holocaust had taken place; and that it was not known what Mr. Sjolie's views on this particular subject were. The majority held that the speech contained derogatory and offensive remarks, but that no actual threats were made, nor any instructions to carry out any particular actions. The authors note that the majority of the Court considered article 4 of the Convention not to entail an obligation to prohibit the dissemination of ideas of racial superiority, contrary to the Committee's position as set out in general recommendation XV.

2.8 The authors claim that the decision will serve as a precedent in cases involving section 135a of the Penal Code, and that it will henceforth not be possible to prosecute Nazi propaganda and behaviour such as occurred during the march of 19 August 2000. Following the Supreme Court decision, the Director of Public Prosecutions expressed the view that, in light of the Supreme Court's decision, Norway would be a safe haven for Nazi marches, due to the prohibition on such marches in neighbouring countries.

...

10.3 The Committee has noted the State party's submission that it should give due respect to the consideration of the *Sjolie* case by the Supreme Court, which conducted a thorough and exhaustive analysis, and that States should be afforded a margin of appreciation in balancing their obligations under the Convention with the duty to protect the right to freedom of speech. The Committee notes that it has indeed fully taken account of the Supreme Court's decision and is mindful of the analysis contained therein. However, the Committee considers that it has the responsibility to ensure the coherence of the interpretation of the provisions of article 4 of the Convention as reflected in its general recommendation XV.

10.4 At issue in the present case is whether the statements made by Mr. Sjolie, properly characterized, fall within any of the categories of impugned speech set out in article 4, and if so, whether those statements are protected by the "due regard" provision as it relates to freedom of speech. In relation to the characterization of the speech, the Committee does not share the analysis of the majority of the members of the Supreme Court. While the content of the speech is objectively absurd, the lack of logic of particular remarks is not relevant to the assessment of whether or not they violate article 4. In the course of the speech, Mr. Sjolie stated that his "people and country are being plundered and destroyed by Jews, who suck our country empty of wealth and replace it with immoral and un-Norwegian thoughts". He then refers not only to Rudolf Hess, in commemoration of whom the speech was made, but also to Adolf Hitler and *their* principles, stating that his group will "follow in their footsteps and fight for what (we) believe in". The Committee considers these statements to

contain ideas based on racial superiority or hatred; the deference to Hitler and his principles and "footsteps" must, in the Committee's view, be taken as incitement at least to racial discrimination, if not to violence.

10.5 As to whether these statements are protected by the "due regard" clause contained in article 4, the Committee notes that the principle of freedom of speech has been afforded a lower level of protection in cases of racist and hate speech dealt with by other international bodies, and that the Committee's own general recommendation XV clearly states (para. 4) that the prohibition of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression. The Committee notes that the "due regard" clause relates generally to all principles embodied in the Universal Declaration of Human Rights, not only freedom of speech. Thus, to give the right to freedom of speech a more limited role in the context of article 4 does not deprive the "due regard" clause of significant meaning, all the more so since all international instruments that guarantee freedom of expression provide for the possibility, under certain circumstances, of limiting the exercise of this right. The Committee concludes that the statements of Mr. Sjolie, given that they were of an exceptionally/manifestly offensive character, are not protected by the "due regard" clause and that accordingly, his acquittal by the Supreme Court of Norway gave rise to a violation of article 4, and consequently article 6, of the Convention.

10.6 Finally, in relation to the State party's submission that the authors have failed to establish how the remarks of Mr. Sjolie adversely affected their enjoyment of any substantive rights protected under article 5 of the Convention, the Committee considers that its competence to receive and consider communications under article 14 is not limited to complaints alleging a violation of one or more of the rights contained in article 5. Rather, article 14 states that the Committee may receive complaints relating to "any of the rights set forth in this Convention". The broad wording suggests that the relevant rights are to be found in more than just one provision of the Convention. Further, the fact that article 4 is couched in terms of States parties' obligations, rather than inherent rights of individuals, does not imply that they are matters to be left to the internal jurisdiction of States parties, and as such immune from review under article 14. If such were the case, the protection regime established by the Convention would be weakened significantly. The Committee's conclusion is reinforced by the wording of article 6 of the Convention, by which States parties pledge to assure to all individuals within their jurisdiction effective protection and a right of recourse against any acts of racial discrimination which violate their "human rights" under the Convention. In the Committee's opinion, this wording confirms that the Convention's "rights" are not confined to article 5. Finally, the Committee recalls that it has previously examined communications under article 14 in which no violation of article 5 has been alleged.r/

11. The Committee on the Elimination of Racial Discrimination...is of the view that the facts

before it disclose violations of articles 4 and 6 of the Convention.

12. The Committee recommends that the State party take measures to ensure that statements such as those made by Mr. Sjolie in the course of his speech are not protected by the right to freedom of speech under Norwegian law.

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Notes

a/ The speech was recorded on video by the magazine *Monitor*. It was later used in the criminal proceedings against Mr. Sjolie.

b/ Section 100 of the Norwegian Constitution guarantees the right to freedom of speech.

...

r/ See for example: *Ziad Ben Ahmed Habassi v. Denmark*, communication No. 10/1997, Opinion adopted on 17 March 1999, paras. 9.3 and 10, where the Committee found a violation of arts. 2 and 6; *Kashif Ahmed v. Denmark*, communication No. 16/1999, Opinion adopted on 13 March 2000, paras. 6.2-9, where the Committee found a violation of art. 6; and *Kamal Qureshi v. Denmark*, communication No. 27/2002, Opinion adopted on 19 August 2003, paras. 7.1-9.

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ICCPR

- *Gueye et al. v. France* (196/1985), ICCPR, A/44/40 (3 April 1989) 189 at para. 9.4.

...

9.4 The Committee has noted the authors' claim that they have been discriminated against on racial grounds, that is, one of the grounds specifically enumerated in article 26. It finds that there is no evidence to support the allegation that the state party has engaged in racially discriminating practices *vis-a-vis* the authors. It remains, however, to be determined whether the situation encountered by the encountered by the authors falls within the purview of article 26. The Committee recalls that the authors are not generally within French jurisdiction, except that they rely on French legislation in relation to the amount of their pension rights. It notes that nationality does not figure among the prohibited grounds of discrimination listed in article 26, and that the Covenant does not protect the right to a pension, as such. Under article 26, discrimination in the equal protection of the law is prohibited on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. There has been a differentiation by reference to nationality acquired upon independence. In the Committee's opinion, this falls within the reference to "other status" in the second sentence of article 26.

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The Committee takes into account, as it did in communication No. 182/1984, that "the right to equality before the law and to equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26.

- *Gillot v. France* (932/2000), ICCPR, A/57/40 vol. II (15 July 2002) 270 (CCPR/C/75/D/932/2000) at paras. 2.1-2.7, 11.2, 12.1, 12.2, 13.1-13.8, 14.1-14.7 and 15.

...

2.1 On 5 May 1998, two political organizations in New Caledonia, the *Front de Libération Nationale Kanak Socialiste* (FLNKS) and the *Rassemblement pour la Calédonie dans la République* (RPCR), together with the Government of France, signed the so-called Noumea Accord. The Accord, which forms part of a process of self-determination, established the framework for the institutional development of New Caledonia ... over the next 20 years.

2.2 Implementation of the Noumea Accord led to a constitutional amendment in that it involved derogations from certain constitutional principles, such as the principle of equality of political rights (restricted electorate in local ballots). Thus, by a joint vote of the French Parliament and Senate, and approval of a draft constitutional amendment by the Congress, the Constitution Act of New Caledonia (No. 98-610) of 20 July 1998 inserted a title XIII reading "Transitional provisions concerning New Caledonia" in the Constitution. The title comprises the following articles 76 and 77:

Article 76 of the Constitution provides that:

> "The people of New Caledonia shall, before 13 December 1998, express their views on the provisions of the accord signed at Noumea on 5 May 1998 and published on 27 May 1998 in the *Journal Officiel* of the French Republic. Those persons fulfilling the requirements established in article 2 of Act No. 88-1028 of 9 November 1988 shall be eligible to vote. The measures required for the conduct of the voting shall be taken by decree of the Council of State, after consideration by the Council of Ministers."

Article 77 provides that:

> "Following approval of the Accord in the referendum provided for in article 76, the Organic Law, adopted following consultation with the deliberative assembly of New Caledonia, shall establish, to ensure the development of New Caledonia with due respect for the guidelines provided for in the Accord and in accordance with the

> procedures necessary for its implementation: [...] - regulations on citizenship, the electoral system [...] - the conditions and time frame for a decision by the people concerned in New Caledonia on accession to full sovereignty."

2.3 An initial referendum was held on 8 November 1998. The Noumea Accord was approved by 72 per cent of those voting, and it was established that one or more referendums would be held thereafter. The authors were not eligible to participate in that ballot.

2.4 The authors contest the way in which the electorates for these various referendums, as established under the Noumea Accord and implemented by the French Government, were determined.

2.5 For the first referendum on 8 November 1998, Decree No. 98-733 of 20 August 1998 on organization of a referendum of the people of New Caledonia, as provided for by article 76 of the Constitution, determined the electorate with reference to article 2 of Act No. 88-1028 of 9 November 1988 (also determined in article 6.3 of the Noumea Accord), namely: "Persons registered on the electoral rolls for the territory on that date and resident in New Caledonia since 6 November 1988 shall be eligible to vote."

2.6 For future referendums, the electorate was determined by the French Parliament in article 218 of the Organic Law of New Caledonia (No. 99-209) of 19 March 1999 (reflecting article 2.2 of the Noumea Accord)2/, pursuant to which:

> "Persons registered on the electoral roll on the date of the referendum and fulfilling one of the following conditions shall be eligible to vote:
>
> (a) They must have been eligible to participate in the referendum of 8 November 1998;
>
> (b) They were not registered on the electoral roll for the referendum of 8 November 1998, but fulfilled the residence requirement for that referendum;
>
> (c) They were not registered on the electoral roll for the 8 November 1998 referendum owing to non-fulfilment of the residence requirement, but must be able to prove that their absence was due to family, professional or medical reasons;
>
> (d) They must enjoy customary civil status or, having been born in New Caledonia, they must have their main moral and material interests in the territory;
>
> (e) Having one parent born in New Caledonia, they must have their main moral and material interests in the territory;

(f) They must be able to prove 20 years continuous residence in New Caledonia on the date of the referendum or by 31 December 2014 at the latest;

(g) Having been born before 1 January 1989, they must have been resident in New Caledonia from 1988 to 1998;

(h) Having been born on or after 1 January 1989, they must have reached voting age on the date of the referendum and have one parent who fulfilled the conditions for participation in the referendum of 8 November 1998.

Periods spent outside New Caledonia for the performance of national service, for study or training, or for family, professional or medical reasons shall, in the case of persons previously domiciled in the territory, be included in the periods taken into consideration in order to determine domicile."

2.7 The authors, who did not fulfil the above criteria, state that they were excluded from the referendum of 8 November 1998 and that they will also be excluded from referendums planned from 2014 onwards.

...

11.2 The Committee has to determine whether the restrictions imposed on the electorate for the purposes of the local referendums of 8 November 1998 and in 2014 or thereafter constitute a violation of articles 25 and 26 of the Covenant, as the authors maintain.

12.1 The authors maintain, first, that they have an absolute, acquired and indivisible right to vote in all political ballots organized in their place of residence.

12.2 On this point the Committee recalls its decisions in relation to article 25 of the Covenant, namely that the right to vote is not an absolute right and that restrictions may be imposed on it provided they are not discriminatory or unreasonable.22/

13.1 The authors maintain, secondly, that the criteria used to determine the electorates in local ballots represent a departure from French rules on electoral matters (the right to vote can be made dependent only on the criterion of inclusion on an electoral roll, either of the commune of domicile, irrespective of the period of residence, or of the commune of actual residence for at least 6 months) and thereby impose on them discriminatory restrictions which are contrary to the International Covenant on Civil and Political Rights.

13.2 In order to determine the discriminatory or non-discriminatory character of the criteria in dispute, in conformity with its above-mentioned decisions, the Committee considers that the evaluation of any restrictions must be effected on a case-by-case basis, having regard in particular to the purpose of such restrictions and the principle of proportionality.

13.3 In the present case, the Committee has taken note of the fact that the local ballots were conducted in the context of a process of self-determination of the population of New Caledonia. In this connection, it has taken into consideration the State party's argument that these referendums - for which the procedures were fixed by the Noumea Accord and established according to the type of ballot by a vote of Congress 23/ or Parliament 24/ - must, by virtue of their purpose, provide means of determining the opinion of, not the whole of the national population, but the persons "concerned" by the future of New Caledonia.

13.4 Although the Committee does not have the competence under the Optional Protocol to consider a communication alleging violation of the right to self-determination protected in article 1 of the Covenant, it may interpret article 1, when this is relevant, in determining whether rights protected in parts II and III of the Covenant have been violated. The Committee is of the view, therefore, that, in this case, it may take article 1 into account in interpretation of article 25 of the Covenant.

13.5 In relation to the authors' complaints, the Committee observes, as the State party indeed confirms, that the criteria governing the right to vote in the referendums have the effect of establishing a restricted electorate and hence a differentiation between (a) persons deprived of the right to vote, including the author(s) in the ballot in question, and (b) persons permitted to exercise this right, owing to their sufficiently strong links with the territory whose institutional development is at issue. The question which the Committee must decide, therefore, is whether this differentiation is compatible with article 25 of the Covenant. The Committee recalls that not all differentiation constitutes discrimination if it is based on objective and reasonable criteria and the purpose sought is legitimate under the Covenant.

13.6 The Committee has, first of all, to consider whether the criteria used to determine the restricted electorates are objective.

13.7 The Committee observes that, in conformity with the issue in each ballot, apart from the requirement of inclusion on the electoral rolls, the criteria used are: (a) for the 1998 referendum relating to the continuation or non-continuation of the process of self-determination, the condition of length of residence in New Caledonia; and (b) for the purpose of future referendums directly relating to the option of independence, additional conditions relating to possession of customary civil status, the presence in the territory of moral and material interests, combined with birth of the person concerned or his parents in the territory. It accordingly follows, as the date for a decision on self-determination approaches, that the criteria are more numerous and take into account the specific factors attesting to the strength of the links to the territory. To the length of residence condition (as opposed to the cut-off points for length of residence) for determining a general link with the territory are added more specific links.

13.8 The Committee considers that the above-mentioned criteria are based on objective elements for differentiating between residents as regards their relationship with New Caledonia, namely the different forms of ties to the territory, whether specific or general - in conformity with the purpose and nature of each ballot. The question of the discriminatory or non-discriminatory effects of these criteria nevertheless arises.

...

14.1 Lastly, the authors argue that the cut-off points set for the length of residence requirement, 10 and 20 years respectively for the referendums in question, are excessive and affect their right to vote.

14.2 The Committee considers that it is not in a position to determine the length of residence requirements. It may, however, express its view on whether or not these requirements are excessive. In the present case, the Committee has to decide whether the requirements have the purpose or effect of restricting in a disproportionate manner, given the nature and purpose of the referendums in question, the participation of the "concerned" population of New Caledonia.

14.3 In addition to the State party's position that the criteria used for the determination of the electorates favour long-term residents over recent arrivals owing to actual differences in concern with regard to New Caledonia, the Committee notes, in particular, that the cut-off points for length of residence are designed, according to the State party, to ensure that the referendums reflect the will of the population "concerned" and that their results cannot be undermined by a massive vote by people who have recently arrived in the territory and have no proven, strong ties to it.

14.4 The Committee notes that the 21 authors were excluded from the 1998 referendum because they did not meet the 10 years' continuous residence requirement. It also notes that one author will not be able to participate in the next referendum because of the 20 years' continuous residence requirement, whereas the other 20 authors do, as things stand, have the right to vote in that referendum - 18 authors on the basis of the residence criterion and 2 others on the strength of having been born in New Caledonia, their ethnic origin and national extraction being of no consequence in this respect.

14.5 The Committee considers, first, that the cut-off points adopted do not have a disproportionate effect, given the nature and purpose of the referendums in question, on the authors' situation, particularly since their non-participation in the first referendum manifestly has no consequences for nearly all of them as regards the final referendum.

14.6 The Committee further considers that each cut-off point should provide a means of evaluating the strength of the link to the territory, in order that those residents able to prove a sufficiently strong tie are able to participate in each referendum. The Committee considers

that, in the present case, the difference in the cut-off points for each ballot is linked to the issue being decided in each vote: the 20-year cut-off point - rather than 10 years as for the first ballot - is justified by the time frame for self-determination, it being made clear that other ties are also taken into account for the final referendum.

14.7 Noting that the length of residence criterion is not discriminatory, the Committee considers that, in the present case, the cut-off points set for the referendum of 1998 and referendums from 2014 onwards are not excessive inasmuch as they are in keeping with the nature and purpose of these ballots, namely a self-determination process involving the participation of persons able to prove sufficiently strong ties to the territory whose future is being decided. This being the case, these cut-off points do not appear to be disproportionate with respect to a decolonization process involving the participation of residents who, over and above their ethnic origin or political affiliation, have helped, and continue to help, build New Caledonia through their sufficiently strong ties to the territory.

15. The Human Rights Committee...is of the view that the facts before it do not disclose a violation of any article of the Covenant.

Notes

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2/ Article 2.2 of the Noumea Accord: "The electorate for the referendums on the political organization of New Caledonia to be held once the period of application of this Accord has ended (sect. 5) shall consist only of: voters registered on the electoral rolls on the dates of the referendums provided for under section 5 who were eligible to participate in the referendum provided for in article 2 of the Referendum Act, or who fulfilled the conditions for participating in that referendum; those who are able to prove that any interruptions in their continuous residence in New Caledonia were attributable to professional or family reasons; those who have customary status or were born in New Caledonia and whose property and personal ties are mainly in New Caledonia; and those who, although they were not born in New Caledonia, have one parent born there and whose property and personal ties are mainly in New Caledonia. Young people who have reached voting age and are registered on the electoral rolls and who, if they were born before 1988, resided in New Caledonia from 1988 to 1998, or, if they were born after 1988, have one parent who fulfilled or could have fulfilled the conditions for voting in the referendum held at the end of 1998, shall also be eligible to vote in these referendums. Persons who, in 2013, are able to prove that they have resided continuously in New Caledonia for 20 years may also vote in these referendums."

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22/ Communications No. 500/1992, *J. Debreczeny v. Netherlands*; No. 44/1979, Alba Pietraroia on behalf of *Rosario Pietraroia Zapala v. Uruguay*; General Comment No. 18 relating to article 25 (fifty-seventh session, 1996), paras. 4, 10, 11 and 14.

23/ Constitutional Act (No. 98-610) of 20 July 1998, whose article 76 determined conditions for participation in the 1998 ballot. Congress is constituted by the meeting of the National Assembly and the Senate for the purposes of amending the Constitution, in accordance with article 89 of the Constitution of 4 October 1958.

24/ Organic Law (No. 99-209) of 19 March 1999, whose article 218 determines conditions for participation in ballots as from 2014.

- *Rajan v. New Zealand* (820/1998), ICCPR, A/58/40 vol. II (6 August 2003) 410 (CCPR/C/78/D/820/1998) at paras. 2.1-2.4 and 7.4.

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2.1 Mr. Rajan emigrated to Australia in 1988, where he was granted a residence permit on 19 February 1990, on the basis of his *de facto* relationship with an Australian woman. Subsequently, in 1994, the woman was convicted in Australia of making a false statement in Mr. Rajan's application for residence. In 1990, Mr. Rajan married Sashi Kantra Rajan in Fiji, who followed him to Australia in 1991, where she obtained a residence permit on her husband's residency status. In 1991, Australian authorities became aware that the claimed *de facto* relationship was fraudulent and started taking action against Mr. and Mrs. Rajan, as well as against Mr. Rajan's brother (Bal) and sister who were believed to have obtained Australian residency under similarly false pretences. On 2 February 1992, son Vicky was born in Australia. On 22 April 1992, Mr. Rajan's brother (Bal) was arrested on ground of false immigration, and Mr. Rajan was advised of a pending interview by authorities.

2.2 The following day, Mr. and Mrs. Rajan migrated to New Zealand. They did not disclose events transpiring in Australia, and were granted New Zealand residence permits on the basis of their Australian permits. On 24 April 1992, Mr. Rajan's brother (Bal) also left Australia for New Zealand. On 30 April 1992, the Australian authorities cancelled Mr. and Mrs. Rajan's Australian permits. On 5 June 1992, the New Zealand authorities were informed that Mr. and Mrs. Rajan were deemed to have absconded from Australia and were prohibited from re-entering Australia. On 3 July 1992, Mr. Rajan admitted to New Zealand authorities that his original *de facto* relationship in Australia was not genuine. Following investigations by the authorities, including interviews with Mr. and Mrs. Rajan, the Minister of Immigration, on 21 June 1994 revoked Mr. and Mrs. Rajan's residence permits on the basis that Mr. Rajan had failed to disclose that the Australian documentation (upon which the New Zealand permits were founded) was dishonestly obtained.

2.3 Mrs. Rajan, not having disclosed these facts in an application for citizenship to the Ministry of Internal Affairs, was granted citizenship on 26 October 1994, whereby, under s.8

of the Citizenship Act 1977, her Fijian citizenship was automatically annulled. In early 1995, her son Vicky was also granted New Zealand citizenship. On 19 April 1995, the Minister of Internal Affairs issued notice of intention to revoke citizenship on the grounds that it was procured by fraud, false representation, wilful concealment of relevant information or by mistake.

2.4 On 31 July 1995, the High Court dismissed an appeal against the revocation of residence permits and an application for judicial review of the Minister's decision to revoke, finding that they had been procured by fraud and false and misleading representation. The Court considered there was no threat to the family unit, as the child could live with the parents in Fiji and, if he so wished, return to New Zealand in his own right. The Court of Appeal dismissed their appeal. In March 1996, a second child, Ashnita, was born and automatically acquired New Zealand citizenship by birth.

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7.4 The Committee notes the authors' contention that they and their children are victims of racial discrimination as they are not Anglo-Saxon and their contention that they have been treated differently and, therefore, unequally to others in similar cases, including the cases of Mr. Rajan's sister and brother. The Committee recalls that equality in enjoyment of rights and freedoms does not mean identical treatment in every instance and that differences in treatment do not constitute discrimination, when they are based on objective and reasonable criteria. The Committee observes that the national courts can only examine cases on the facts presented, and such facts differ from case to case. The authors have not presented the facts of any comparable cases either to the Committee or to the domestic courts; the Committee therefore considers that the arguments advanced by the authors do not substantiate, for the purposes of admissibility, the authors' claim that they are victims of discrimination or unequal treatment. Consequently, the Committee finds that this claim is inadmissible under article 2 of the Optional Protocol.

CAT

- *Hajrizi Dzemajl et al. v. Serbia and Montenegro* (161/2000), CAT, A/58/44 (21 November 2002) 85 (CAT/C/29/D/161/2000) at paras. 2.1-2.24, 9.2-9.6, 10, 11 and Individual Opinion by Mr. Fernando Mariño and Mr. Alejandro González Poblete (concurring), 97.

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2.1 On 14 April 1995 at around 10 p.m., the Danilovgrad Police Department received a report indicating that two Romani minors had raped S.B., a minor ethnic Montenegrin girl. In response to this report, around midnight, the police entered and searched a number of houses in the Bozova Glavica Roma settlement and brought into custody all of the young male Romani men present in the settlement (all of them presently among the complainants

to this Committee).

2.2 The same day, around midnight, two hundred ethnic Montenegrins, led by relatives and neighbours of the raped girl, assembled in front of the police station and publicly demanded that the Municipal Assembly adopt a decision expelling all Roma from Danilovgrad. The crowd shouted slogans addressed to the Roma, threatening to "exterminate" them and "burn down" their houses.

2.3 Later, two Romani minors confessed under duress. On 15 April, between 4 and 5 a.m., all of the detainees except those who confessed were released from police custody. Before their release, they were warned by the police to leave Danilovgrad immediately with their families because they would be at risk of being lynched by their non-Roma neighbours.

2.4 At the same time, police officer Ljubo Radovic came to the Bozova Glavica Roma settlement and told the Romani residents of the settlement that they must evacuate the settlement immediately. The officer's announcement caused panic. Most residents fled towards a nearby highway, where they could take buses for Podgorica. Only a few men and women remained in the settlement to safeguard their homes and livestock. At approximately 5 a.m., police officer Ljubo Radovic returned to the settlement, accompanied by police inspector Branko Micanovic. The officers told the remaining Roma still in their homes (including some of the complainants) to leave Danilovgrad immediately, as no one could guarantee their safety or provide them with protection.

2.5 At around 8 a.m. the same day, a group of non-Roma residents of Danilovgrad entered the Bozova Glavica Roma settlement, hurling stones and breaking windows of houses owned by the complainants. Those Roma who had still not left the settlement (all of them presently among the complainants) hid in the cellar of one of the houses from which they eventually managed to flee through the fields and woods towards Podgorica.

2.6 In the course of the morning of 15 April, a police car repeatedly patrolled the deserted Bozova Glavica settlement. Groups of non-Roma residents of Danilovgrad gathered in different locations in the town and in the surrounding villages. Around 2 p.m. the non-Roma crowd arrived in the Bozova Glavica settlement - in cars and on foot. Soon a crowd of at least several hundred non-Roma (according to different sources, between 400 and 3,000 persons were present) assembled in the then deserted Roma settlement.

2.7 ...Shortly after 3 p.m., the demolition of the settlement began. The mob, with stones and other objects, first broke windows of cars and houses belonging to Roma and then set them on fire. The crowd also destroyed and set fire to the haystacks, farming and other machines, animal feed sheds, stables, as well as all other objects belonging to the Roma. They hurled explosive devices and "Molotov" cocktails that they had prepared beforehand, and threw

burning cloths and foam rubbers into houses through the broken windows. Shots and explosions could be heard amid the sounds of destruction. At the same time, valuables were looted and cattle slaughtered. The devastation endured unhindered for hours.

2.8 Throughout the course of this destruction, the police officers present failed to act in accordance with their legal obligations. Shortly after the attack began, rather than intervening to halt the violence, these officers simply moved their police car to a safe distance and reported to their superior officer. As the violence and destruction unfolded, police officers did no more than feebly seek to persuade some of the attackers to calm down pending a final decision of the Municipal Assembly with respect to a popular request to evict Roma from the Bozova Glavica settlement.

2.9 The outcome of the anti-Roma rage was the levelling of the entire settlement and the burning or complete destruction of all properties belonging to its Roma residents. Although the police did nothing to halt the destruction of the Roma settlement, they did ensure that the fire did not spread to any of the surrounding buildings, which belonged to the non-Roma.

2.10 The police and the investigating magistrate of the Basic Court in Danilovgrad subsequently drew up an on-site investigation report regarding the damage caused by those who took part in the attack.

2.11 Official police documents, as well as statements given by a number of police officers and other witnesses, both before the court and in the initial stage of the investigation, indicate that the following non-Roma residents of Danilovgrad were among those who took part in the destruction of the Bozova Glavica Roma settlement: Veselin Popovic, Dragisa Makocevic, Gojko Popovic, Bosko Mitrovic, Joksim Bobicic, Darko Janjusevic, Vlatko Cacic, Radojica Makocevic.

2.12 Moreover, there is evidence that police officers Miladin Dragas, Rajko Radulovic, Dragan Buric, Djordjije Stankovic and Vuk Radovic were all present as the violence unfolded and did nothing or not enough to protect the Roma residents of Bozova Glavica or their property.

2.13 Several days following the incident, the debris of the Roma settlement was completely cleared away by heavy construction machines of the Public Utility Company. All traces of the existence of the Roma in Danilovgrad were obliterated.

2.14 Following the attack, and pursuant to the relevant domestic legislation, on 17 April 1995, the Podgorica Police Department filed a criminal complaint with the Basic Public Prosecutor's Office in Podgorica. The complaint alleged that a number of unknown perpetrators had committed the criminal offence of causing public danger under article 164

of the Montenegrin Criminal Code and, *inter alia*, explicitly stated that there are "reasonable grounds to believe that, in an organized manner and by using open flames … they caused a fire to break out ... on 15 April 1995 … which completely consumed dwellings … and other propert[ies] belonging to persons who used to reside in … [the Bozova Glavica] settlement".

2.15 On 17 April 1995 the police brought in 20 individuals for questioning. On 18 April 1995, a memorandum was drawn up by the Podgorica Police Department which quoted the statement of Veselin Popovic as follows: "... I noticed flames in a hut which led me to conclude that the crowd had started setting fire to huts so I found several pieces of foam rubber which I lit with a lighter I had on me and threw them, alight, into two huts, one of which caught fire."

2.16 On the basis of this testimony and the official police memorandum, the Podgorica Police Department ordered, on 18 April 1995, that Veselin Popovic be remanded into custody, on the grounds that there were reasons to believe that he had committed the criminal offence of causing public danger in the sense of article 164 of the Montenegrin Criminal Code.

2.17 On 25 April 1995, and with respect to the incident at the origin of the present complaint, the Public Prosecutor instituted proceedings against one person only - Veselin Popovic.

2.18 Veselin Popovic was charged under article 164 of the Montenegrin Criminal Code. The same indictment charged Dragisa Makocevic with illegally obtaining firearms in 1993 - an offence unrelated to the incident at issue notwithstanding the evidence implicating him in the destruction of the Roma Bozova Glavica settlement.

2.19 Throughout the investigation, the investigating magistrate of the Basic Court of Danilovgrad heard a number of witnesses all of whom stated that they had been present as the violence unfolded but were not able to identify a single perpetrator. On 22 June 1995, the investigating magistrate of the Basic Court of Danilovgrad heard officer Miladin Dragas. Contrary to the official memorandum he had personally drawn up on 16 April 1995, officer Dragas now stated that he had not seen anyone throwing an inflammable device, nor could he identify any of the individuals involved.

2.20 On 25 October 1995, the Basic Public Prosecutor in Podgorica requested that the investigating magistrate of the Basic Court of Danilovgrad undertake additional investigation into the facts of the case. Specifically, the prosecutor proposed that new witnesses be heard, including officers from the Danilovgrad Police Department who had been entrusted with protecting the Bozova Glavica Roma settlement. The investigating magistrate of the Basic Court of Danilovgrad then heard the additional witnesses, all of whom stated that they had seen none of the individuals who had caused the fire. The investigating magistrate took no

further action.

2.21 Due to the "lack of evidence", the Basic Public Prosecutor in Podgorica dropped all charges against Veselin Popovic on 23 January 1996. On 8 February 1996, the investigating magistrate of the Basic Court of Danilovgrad issued a decision to discontinue the investigation. From February 1996 up to and including the date of filing of the present complaint, the authorities took no further steps to identify and/or punish those individuals responsible for the incident at issue - "civilians" and police officers alike.

2.22 In violation of domestic legislation, the complainants were not served with the court decision of 8 February 1996 to discontinue the investigation. They were thus prevented from assuming the prosecution of the case themselves, as was their legal right.

2.23 Even prior to the closing of the proceedings, on 18 and 21 September 1995, the investigating magistrate, while hearing witnesses (among them a number of the complainants), failed to advise them of their right to assume the prosecution of the case in the event that the Public Prosecutor should decide to drop the charges. This contravened domestic legislation which explicitly provides that the Court is under an obligation to advise ignorant parties of avenues of legal redress available for the protection of their interests.

2.24 On 6 September 1996, all 71 complainants filed a civil claim for damages, pecuniary and non-pecuniary, with the first instance court in Podgorica - each plaintiff claiming approximately US$ 100,000. The pecuniary damages claim was based on the complete destruction of all properties belonging to the plaintiffs, while the non-pecuniary damages claim was based on the pain and suffering of the plaintiffs associated with the fear they were subjected to, and the violation of their honour, reputation, freedom of movement and the right to choose their own place of residence. The plaintiffs addressed these claims against the Republic of Montenegro and cited articles 154, 180 (1), 200, and 203 of the Federal Law on Obligations. More than five years after the submission of their claim, the civil proceedings for damages are still pending.

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9.2 As to the legal qualification of the facts that have occurred on 15 April 1995, as they were described by the complainants, the Committee first considers that the burning and destruction of houses constitute, in the circumstances, acts of cruel, inhuman or degrading treatment or punishment. The nature of these acts is further aggravated by the fact that some of the complainants were still hidden in the settlement when the houses were burnt and destroyed, the particular vulnerability of the alleged victims and the fact that the acts were committed with a significant level of racial motivation. Moreover, the Committee considers that the complainants have sufficiently demonstrated that the police (public officials), although they had been informed of the immediate risk that the complainants were facing and had been present at the scene of the events, did not take any appropriate steps in order to

protect the complainants, thus implying "acquiescence" in the sense of article 16 of the Convention. In this respect, the Committee has reiterated on many instances its concerns about "inaction by police and law-enforcement officials who fail to provide adequate protection against racially motivated attacks when such groups have been threatened" ... Although the acts referred to by the complainants were not committed by public officials themselves, the Committee considers that they were committed with their acquiescence and constitute therefore a violation of article 16, paragraph 1, of the Convention by the State party.

9.3 Having considered that the facts described by the complainants constitute acts within the meaning of article 16, paragraph 1 of the Convention, the Committee will analyse other alleged violations in the light of that finding.

9.4 Concerning the alleged violation of article 12 of the Convention, the Committee, as it has underlined in previous cases (see *inter alia Encarnacion Blanco Abad v. Spain*, Case No. 59/1996, decided on 14 May 1998), is of the opinion that a criminal investigation must seek both to determine the nature and circumstances of the alleged acts and to establish the identity of any person who might have been involved therein. In the present case, the Committee notes that, despite the participation of at least several hundred non-Roma in the events of 15 April 1995 and the presence of a number of police officers both at the time and at the scene of those events, no person nor any member of the police forces has been tried by the courts of the State party. In these circumstances, the Committee is of the view that the investigation conducted by the authorities of the State party did not satisfy the requirements of article 12 of the Convention.

9.5 Concerning the alleged violation of article 13 of the Convention, the Committee considers that the absence of an investigation as described in the previous paragraph also constitutes a violation of article 13 of the Convention. Moreover, the Committee is of the view that the State party's failure to inform the complainants of the results of the investigation by, *inter alia*, not serving on them the decision to discontinue the investigation, effectively prevented them from assuming "private prosecution" of their case. In the circumstances, the Committee finds that this constitutes a further violation of article 13 of the Convention.

9.6 Concerning the alleged violation of article 14 of the Convention, the Committee notes that the scope of application of the said provision only refers to torture in the sense of article 1 of the Convention and does not cover other forms of ill-treatment. Moreover, article 16, paragraph 1, of the Convention while specifically referring to articles 10, 11, 12, and 13, does not mention article 14 of the Convention. Nevertheless, article 14 of the Convention does not mean that the State party is not obliged to grant redress and fair and adequate compensation to the victim of an act in breach of article 16 of the Convention. The positive obligations that

flow from the first sentence of article 16 of the Convention include an obligation to grant redress and compensate the victims of an act in breach of that provision. The Committee is therefore of the view that the State party has failed to observe its obligations under article 16 of the Convention by failing to enable the complainants to obtain redress and to provide them with fair and adequate compensation.

10. The Committee...is of the view that the facts before it disclose a violation of articles 16, paragraph 1, 12 and 13 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

11. In pursuance of rule 111, paragraph 5, of its rules of procedure, the Committee urges the State party to conduct a proper investigation into the facts that occurred on 15 April 1995, prosecute and punish the persons responsible for those acts and provide the complainants with redress, including fair and adequate compensation and to inform it, within 90 days from the date of the transmittal of this decision, of the steps it has taken in response to the views expressed above.

Individual Opinion by Mr. Fernando Mariño and Mr. Alejandro González Poblete

We are issuing this opinion to emphasize that, in our judgement, the illegal incidents for which the Yugoslav State is responsible constitute "torture" within the meaning of article 1, paragraph 1, of the Convention, not merely "cruel, inhuman or degrading treatment" as covered by article 16. The failure of the State authorities to react to violent evictions, forced displacement and the destruction of homes and property by individuals amounts to unlawful acquiescence which, in our judgement, violates article 1, paragraph 1, particularly when read in conjunction with article 2, paragraph 1, of the Convention.

We believe that, in fact, the suffering visited upon the victims was severe enough to qualify as "torture", because:

(a) The inhabitants of the Bozova Glavica settlement were forced to abandon their homes in haste given the risk of severe personal and material harm;

(b) Their settlement and homes were completely destroyed. Basic necessities were also destroyed;

(c) Not only did the resulting forced displacement prevent them from returning to their original settlement, but many members of the group were forced to live poorly, without jobs or fixed places of abode;

(d) Thus displaced and wronged, these Yugoslav nationals have still not received any

compensation, seven years after the fact, although they have approached the domestic authorities;

(e) All the inhabitants who were violently displaced belong to the Romani ethnic group, which is known to be especially vulnerable in many parts of Europe. In view of this, States must afford them greater protection;

The above amounts to a presumption of "severe suffering", certainly "mental" but also inescapably "physical" in nature even if the victims were not subjected to direct physical aggression.

We thus consider that the incidents at issue should have been categorized as "torture".