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# International Convention on the Elimination of All Forms of Racial Discrimination

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**Committee on the Elimination of Racial Discrimination**

## Communication No. 46/2009

### Opinion adopted by the Committee at its eightieth session, 13 February to 9 March 2012

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| *Submitted by:* | Mahali Dawas and Yousef Shava (represented by counsel) |
| *Alleged victims:* | The petitioners |
| *State party:* | Denmark |
| *Date of communication:* | 16 June 2009 (initial submission) |
| *Date of the present decision:* | 6 March 2012 |

# Annex

## Opinion of the Committee on the Elimination of Racial Discrimination under article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination (eightieth session)

concerning

### Communication No. 46/2009

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| *Submitted by:* | Mahali Dawas and Yousef Shava (represented by counsel) |
| *Alleged victims:* | The petitioners |
| *State party:* | Denmark |
| *Date of the communication:* | 16 June 2009 (initial submission) |

*The Committee on the Elimination of Racial Discrimination*, established under article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination,

*Meeting on* 6 March 2012,

*Having concluded* its consideration of communication No. 46/2009, submitted to the Committee on the Elimination of Racial Discrimination by Mahali Dawas and Yousef Shava under article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination,

*Having taken into account* all information made available to it by the petitioners of the communication, their counsel and the State party,

*Adopts* the following:

## Opinion

1.1 The petitioners are Mahali Dawas and Yousef Shava, Iraqi citizens recognized as refugees in Denmark, born in 1959 and 1985, respectively. Mr. Dawas has eight children, including the co-petitioner, Mr. Shava. The petitioners claim to be victims of violations by Denmark of article 2, paragraph 1 (d), article 3, article 4 and article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination. They are represented by counsel, Niels Erik Hansen.

1.2 In conformity with article 14, paragraph 6 (a), of the Convention, the Committee transmitted the communication to the State party on 21 December 2009.

#### The facts as submitted by the petitioners

2.1 On the evening of 21 June 2004, a group of 15 to 20 youths attacked the petitioners' house in the town of Sorø. Windows were broken, and the front door damaged. One of the

trespassers managed to break into the house, and both petitioners were subjected to violence, including beatings. Other attackers outside the house shouted "go home!",[1] as well as other slogans of an offensive nature. After this attack, the family, including all eight children, had to flee the house and seek permanent alternative accommodation from the municipality.

2.2 A police investigation was carried out and resulted in a criminal trial before the District Court of Sorø. On 26 January 2005, the Court convicted four perpetrators on counts of violence, vandalism, and illegal possession of weapons. However, only light suspended jail sentences were ordered, no compensation was granted to the victims, and the possible racist element of the attack was not addressed.

2.3 The petitioners thereafter initiated a civil action for torts resulting in moral damage, and included the racist motive as an aggravating factor. Among other elements, the petitioners stressed the fact that a sign saying "no blacks allowed" had been placed near their house shortly before the incident. The petitioners also testified that one of the perpetrators had called another offender by phone prior to the incident, asking him to join him because he "had problems with some *perkere*".[2]

2.4 On 11 September 2007, the District Court of Naestved delivered its judgement, in which it found that there was no evidence establishing the racist character of the attacks against the petitioners. The Court further found that the level of violence and harm suffered was not of such degree to establish a violation of the Danish Act on Torts.

2.5 On 3 October 2008, the High Court of Eastern Denmark upheld the judgment of the District Court of Naestved, and the petitioners were ordered to pay legal costs amounting to 20,000 Danish kroner (DKr).[3] On 12 December 2008, the petitioners were denied leave to appeal to the Danish Supreme Court. Consequently, they claim to have exhausted domestic remedies.

**The complaint**

3.1 The petitioners claim that by failing to investigate the racist character of the attack they suffered and to offer them an effective legal remedy for the violations suffered, the State party deprived them of their right to redress for the pain and humiliation suffered, in breach of article 6, read in conjunction with article 2, paragraph 1 (d).[4]

3.2 They further contend that the violent attack and vandalism suffered, as well as the related racist motive and intent to have the family leave and take up residence in another municipality are tantamount to a breach by the State party of article 3 and article 4 of the Convention.

**State party's observations on the admissibility and merits**

4.1 On 22 March 2010, the State party submitted observations on the admissibility and merits of the communication. It argues that the petitioners have failed to establish a prima facie case for the purposes of admissibility. Subsidiarily, it contends that the petitioners' allegations are ill-founded, and should be rejected on the merits.

[1] The petitioners specify that this meant "Go back to Iraq", as they were already inside the house.

[2] Danish pejorative slang for "foreigners".

[3] Approximately 2,700 euros.

[4] The petitioners also refer to the Committee's general recommendation No. 26 (2000) on article 6. See *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 18* (A/55/18), annex V, sect. B.

4.2 Regarding the facts, the State party recalls that the police was called to the petitioners' place of residence on 21 June 2004, after the latter reported the incident, whereby a group of youths had gathered in front of their house, acting aggressively. When the police reached the petitioner's residence, the group of offenders had already left.[5] The police undertook a preliminary investigation, and commenced a full-scale investigation the following day. The police met with Mr. Shava at his residence on 22 June 2004, and on that occasion, they could see broken windows in the front of the house and in the front door. The police interviewed witnesses and the victims, including Mr. Shava, who reported that a group of young Danes had forced their way into the entrance hall, that a full plant pot had been thrown at his father's leg, and that he himself had received a punch to his face, and had also been struck with a bat-like instrument on his right arm. The group of offenders had alleged that the petitioners' family had stolen a necklace from them, and that the youngest members of the family had damaged a motorcycle helmet belonging to a member of the group. According to the petitioners, all the allegations were false.

4.3 The police interviewed a number of witnesses, including O.R., who testified on 23 June 2004 that he was a friend of the petitioners, who called him for help during the incident since he spoke Danish and could assist them. O.R. was told by one of the youths that the petitioners had stolen his necklace and damaged his motorcycle helmet. O.R. asked the group to wait until the police arrived, but they refused, arguing that they wanted to solve the problem on their own, and expressed the wish to beat the family. O.R. then asked the family to call the police. According to O.R., when the police was called the first time, the call was disconnected, as the police did not want to speak to Mr. Shava. When O.R. himself called the second time, he had the feeling that the police was not interested in the case. While O.R. was speaking to the police, the group of youths were trying to force their way into the petitioners' house. O.R. asked the police to send a patrol. After he ended the call, he was told by the offenders that they intended to seize items from the petitioners' house as compensation for the loss of their belongings, and that alternatively the family could give money as compensation. The group also declared that the family was staying in the house free of charge and was receiving assistance without providing anything in return.

4.4 Mr. Dawas repeated on 25 June 2004 that his family had been living at the place of the incident for more than one year, and had had several problems with two young Danish neighbours, including R.L., who lived at the other end of the building.[6] The family never confronted these individuals, but sought the help of the Municipality of Sorø, which contacted the neighbours. Although the situation improved for a few days after, the incidents resumed.[7] Mr. Shava, also interviewed by the police, mentioned that in response to the family's complaint to the local authorities, a sign was placed on the two neighbours' doors, which read "No blacks allowed". The State party also specifies that suspect K.B, upon interrogation by the police, affirmed that on the day of the offence he had been in contact with R.L., who had told him that he had "problems with some perkere". R.L. then asked if he could meet him and proceeded towards the petitioners' residence, along with one of his friends. An individual approached the victims, saying that they should either return the stolen items, or give the youths money. R.L.'s friend said that they were Danes,

[5] The State party does not specify the timeline for the events and police intervention.

[6] Such as noise-related nuisances, fireworks thrown close to the family's windows, pebbles thrown at the family's children, etc.

[7] No dates are specified. Two of the family's children were stopped in the street and accused of damaging a motorcycle helmet, which the children denied, claiming they had seen their neighbour R.L. and his friends damaging the helmet on the lawn in front of R.L.'s house. Shortly after, two men came to the family's residence and raised the same issue. More people joined, and the incident described above started.

and the ones in charge, that the victims had nothing to say, and that they had been "thrown out" of their country of origin.

4.5 According to the State party, the violent behaviour of the group reached a peak when the youths discovered that Mr. Shava's sister had recorded a video of the incident from a roof window. More people joined the group, which at one point exceeded 35 individuals. The group demanded the videotape, and managed to force their way into the entrance hall. R.L. took a flower bowl from the stairs and threw it at Mr. Dawas. Another man hit Mr. Shava on the face and the chest with his fist, and subsequently struck his right arm with a bat that he had been carrying. The offenders then left the house, leaving Mr. Dawas lying on the floor, almost unconscious. The group remained in front of the house, screaming, and smashed a double-pane window on the front door, as well as three other double-pane windows. The group finally left the premises, leaving the family in a state of shock and fear. The police arrived approximately 20 minutes later, and interrogated a number of witnesses, as well as the victims.

4.6 The State party reports that, as regards objective findings, a forensic medical certificate issued for Mr. Shava revealed that he had an almond-size haematoma on the outer edge of his left eyebrow, and slight swelling above the fifth metacarpal bone, combined with indirect soreness in connection with the medical examination. A medical certificate issued for Mr. Dawas indicated that he was found to be very anxious and in a state of shock. His left ankle was sore and slightly swollen, with two abrasions. Mr. Dawas also suffered from stomach acidity, for which he had previously been treated, although the incident may have aggravated his condition.

4.7 On 30 July 2004, a request for a Court hearing against four suspects[8] was submitted to the District Court of Sorø, on charges of joint violence under section 245 (1) of the Criminal Code,[9] and for having gained unauthorized access to another person's house, under section 264 (1)(i) of the Criminal Code.[10] Defendants K.B. and R.H. were also charged with a violation of section 291 (1) of the Criminal Code, for having allegedly smashed windows in the petitioners' dwelling.[11]

4.8 On 20 August 2004, the Documentation and Advisory Centre on Racial Discrimination (DRC)[12] wrote to the Ringsted Police on behalf of the petitioners, requesting them to consider a potentially racist motive of the offenders. The DRC also asked the police whether the Danish Security and Intelligence Service had been notified of the incident.[13] On 25 August 2004, the Prosecution Service replied to the DRC that the police had investigated the incident based on statements collected, and that the Court would have the opportunity to take section 81 (1)(vi) of the Criminal Code into account during the

[8] R.L. (17 years old), M.N. (15 years old), R.H. (16 years old), and K.B. (16 years old).

[9] Section 245 (1) of the Criminal Code provides: "Any person who commits an assault of a particularly heinous or brutal or dangerous nature, or is guilty of cruelty, is liable to imprisonment for a term not exceeding six years. If any such assault has significantly injured another person or his or her health, it shall be considered a particularly aggravating circumstance".

[10] Section 264 (1) of the Criminal Code provides: "Any person who (i) gains unauthorized access to another person's house or any other place not open to the public, or (ii) wrongfully fails to leave another person's land, having been requested to do so, is liable to a fine or imprisonment for a term not exceeding six months".

[11] Section 291 (1) provides that "any person who destroys, damages or removes items belonging to another person is liable to a fine or imprisonment for a term not exceeding one year and six months".

[12] The petitioners' counsel in this case.

[13] The State party makes a reference to the Memorandum of the Security and Intelligence Service on notification of potentially racially or religiously motivated criminal incidents.

proceedings,[14] should the facts reveal that the offenders' acts were racially motivated. The Prosecution also informed the DRC that the incident would be reported to the Security and Intelligence Service. A supplementary request for a court hearing was submitted on 15 September 2004, in which defendant K.B. was also charged with a violation of the Executive Order on Weapons and Ammunition for possessing a wooden bat.

4.9 On 21 September 2004, a first court hearing was held, during which the video recording of the incident was played, and statements were delivered by suspects along the same line as those they had initially given to the police. On 1 November 2004, the Prosecution asked Counsel whether the case could be processed as summary proceedings. On 2 November 2004, the prosecution requested the Court to fix a new hearing date, for the case to be prosecuted as summary proceedings based on the defendants' guilty pleas, and with revised charges, from a violation of section 245 (1) to a violation of section 244 of the Criminal Code.[15] By judgement of 26 January 2005, the District Court of Sorø found the four defendants guilty, based on their guilty pleas.[16] All defendants were sentenced to 50 days' imprisonment. Considering their young age and personal circumstances,[17] the Court found it appropriate to suspend the sentences on the condition that they did not violate any law for a period of one year, and accepted their supervision by the local authorities, as far as K.B., R.H. and M.N. were concerned, and by the Prison and Probation Service for R.L.

4.10 On 26 January 2005, the petitioners claimed 57,000 DKr in damages from the defendants,[18] corresponding to the amount of a loan contracted by the family for moving expenses in order to change municipality following the incident of June 2004. The petitioners also claimed payment of 15,000 DKr from two of the defendants on behalf of Mr. Dawas, and 15,000 DKr on behalf of Mr. Shava from one of the defendants. According to the State party, the court records fail to establish whether the claim for damages was adjudicated, and the judgement makes no reference to payment of damages to petitioners, which must accordingly be deemed to have been referred to civil proceedings by the Court.

4.11 The State party further informs the Committee that in applications received by the Criminal Injuries Compensation Board on 21 February 2005, the petitioners requested compensation for pain and suffering resulting from the incident of 21 June 2004. In a letter of 2 February 2006 to their lawyer, the Compensation Board requested medical evidence supporting the petitioners' claim, based on section 3 of the Liability for Damages Act, which sets out that an injured person is only eligible for compensation if she or he has been medically ill. According to the State party, the lawyer did not respond to the Compensation Board's request.

4.12 On 23 May 2006, the petitioners instituted civil proceedings, requesting before the District Court of Naestved that the four defendants in the case be ordered to pay 30,000

[14] Section 81 (1)(vi) provides that "in determining the sentence, it is generally an aggravating circumstance that (…) the offence was based on the ethnic origin, faith, sexual orientation or the like of others".

[15] Section 244 provides: "Any person who commits violence against another or otherwise attacks another person is liable to a fine or imprisonment for a term not exceeding three years". Charges were also changed to refer only to each act of violence respectively committed by defendants: R.H. was charged with violence under section 244 of the Criminal Code for having allegedly hit Mr. Sawas in the face with his fist; M.N. was charged with a violation of section 244 for having allegedly hit Mr. Shava with a fist; and K.B. was charged with complicity in violence pursuant to section 244, acting in a threatening manner with a bat, and inciting members of the group to violence. R.H. and K.B. were further charged with a violation of the weapons legislation (for possession of a wooden bat).

[16] The State party does not specify if the defendants were present at trial.

[17] The State party does not specify which personal circumstances.

[18] The State party does not indicate before which jurisdiction the proceedings took place.

DKr to each of the petitioners as compensation for non-pecuniary damages. In support of their claim, the petitioners argued that they suffered from physical and mental injuries pursuant to the attack of 21 June 2004. Mr. Dawas, who was already traumatized from past political persecution in Iraq, saw his condition further deteriorate since the assault. His spouse also had a nervous breakdown since the incident. Although the local authorities of Sorø allowed them to move to another municipality, the family had to bear all related costs. According to the State party, in their civil action for damages, the petitioners relied on the Liability for Damages Act,[19] read in the light of articles 4 and 6 of the Convention, given the racist nature of the acts, which they found highly offensive and detrimental to their reputation. The evidence provided by the defendants corresponded to the statements they had earlier provided to the police and at trial. The petitioners reiterated that a racist sign had been posted on two offenders' doors; that one of the offenders mentioned that they should not come to Denmark and "take jobs"; and that members of the group spoke of them in a derogatory manner and referred to them as "Pakis", in a way detrimental to their public reputation, in addition to the physical assault inflicted.

4.13 On 11 September 2007, the District Court of Naestved rejected the petitioners' application, on the ground that they had failed to substantiate that the assault committed was racially motivated, or otherwise undertaken on the specific ground of the petitioners' race, nationality or ethnic origin. The Court further considered that although the acts resulted in serious insecurity and anxiety, there was no wrongful violation of their rights such as to give rise to a basis for compensation for non-pecuniary damages under the Liability for Damages Act. Considered on appeal by the High Court of Eastern Denmark, the decision was confirmed on 3 October 2008. On 16 December 2008, the Appeals Permission Board denied the petitioners permission to appeal the decision for a third-instance review.

4.14 Turning to the petitioners' complaint before the Committee, the State party submits that the communication should be declared inadmissible because the latter failed to establish a prima facie case for the purpose of admissibility under article 14 of the Convention.[20] To fall within the scope of the Convention, the assault of 21 June 2004 should be an act of racial discrimination vis-à-vis the petitioners. According to the State party, which was also the opinion formed by domestic courts, there is no evidence that the assault was racially motivated, and it is not the role of the Committee to review the interpretation and use of Danish law by independent and competent judicial bodies.[21] The State party adds that in all witness statements given to the police and in court, including the petitioners' statements, no reference was made to the petitioners' ethnic origin as the reason for the assault, and the courts found that it had not been proven that the neighbour was the person who posted the sign saying "no blacks allowed". Mr. Shava's statement to the police, for example, reveals that he presumed that the reason for the offenders' conduct was the family's complaint to the local authorities for their noisy behaviour. It also appears from

[19] Section 26 (1) provides that "a person liable for wrongful violation of another's liberty, peace, character or person shall pay compensation to the victim for non-pecuniary damage". Section 26 (3) further states that "even if no non-pecuniary damage has been suffered, the person liable for wrongful violation of another person's rights shall pay compensation to the victim if the violation was committed by means of an offence involving a particularly aggravated assault on another person or liberty". The State party specifies that non-pecuniary damages must be understood as an injury to the self-esteem and defamation of character, i.e. a person's perception of his or her own worth and reputation.

[20] The State party refers to communication No. 5/1994, *C.P. and M.P. v. Denmark*, inadmissibility decision adopted on 15 March 1995, paras. 6.2 and 6.3.

[21] The State party refers to communication No. 3/1991, *Narrainen v. Norway*, Views adopted on 15 August 1994, paras. 9.4 and 9.5.

almost all statements that the offenders blamed the family for having stolen a necklace and damaged a motorcycle helmet. The offenders became more aggressive upon realizing that a member of the petitioners' family was video recording the incident. The State party also mentions that although the case was referred by the police to the Security and Intelligence Service, as required by the Memorandum on notification of potentially racially or religiously motivated criminal incidents, this does not constitute evidence that the assault was racially motivated, as the Memorandum only requires notification of any potentially racially/religiously motivated criminal acts. It was thus not considered at trial that conditions were met for section 81 (1)(vi) of the Criminal Code to be taken into account in the determination of the sentence. It is the State party's contention that there is no reason to contest this finding, which was subsequently confirmed in the civil proceedings instituted by the petitioners. For these reasons, the State party reiterates that the communication should be declared inadmissible under article 14 of the Convention and rule 91 of the Committee's rules of procedure, as the petitioners failed to establish a prima facie case.

4.15 The State party rejects the petitioners' contention that the assault should be considered as falling under article 3 of the Convention, as "racial segregation and apartheid". The petitioners' allegation that the assault was undertaken so as to have them leave the area has not in any way been substantiated by the facts. The State party also claims that the petitioners have failed to invoke this argument under article 3 of the Convention before national courts, and have thus failed to exhaust domestic remedies on this count.

4.16 The State party also rejects the petitioners' claim under article 4 of the Convention as inadmissible for lack of substantiation, as nothing supports their claim in this regard.

4.17 Subsidiarily, on the merits, the State party considers that no violation of the Convention has taken place, as the petitioners had access to an effective remedy in accordance with article 6 of the Convention. Both the police and judicial instances diligently and effectively pursued the offence of violent assault against the petitioners. The fact that the petitioners' civil action did not reach the outcome they desired, i.e. compensation, is immaterial, as the Convention does not guarantee a specific outcome in cases of alleged racial discrimination. Immediately after the petitioners reported the incident on 21 June 2004, the police commenced its investigation and interviewed witnesses, to find that there was no possible inference to be made that the assault was racially motivated. The offenders were prosecuted and sentenced to 50 days of suspended imprisonment each. Consequently, the State party reaffirms that the way in which public authorities, both police and courts, handled the case meets the requirements of article 2, paragraph 1 (d), and article 6 of the Convention.

**Petitioners' comments on the State party's submission**

5.1 On 31 May 2010, the petitioners contested the State party's claim that the assault did not have a racist motive. They reiterate that a sign saying "no blacks allowed" had been posted in the vicinity of their house, that the group had shouted "go home" and that one of their neighbours had affirmed, in a phone conversation with another offender prior to the assault, that he had "problems with some perkere". According to the petitioners, the police clearly understood the racist implications of the attack from their interviews of witnesses and the letters received from the petitioners' counsel.[22] Accordingly, the police reported the

[22] The petitioners refer to two letters, annexed to the complaint, dated 16 August 2004 and 20 August 2004, in which Counsel for the petitioners, inter alia, informed the police that a sign saying "blacks not allowed" had been posted next to the petitioners' house before the assault, and asked the Sorø police to be informed about their investigation of the crime as a racially motivated crime.

incident to the Security and Intelligence Service as a possible racially motivated crime. The petitioners also reject the State party's argument that the threshold for such reporting is as low as "any potentially racially/religiously motivated criminal acts",[23] referring to a homicide case in 2008 involving an attack by young Danes against a foreign victim,[24] following which the Chief Inspector of Homicide of Copenhagen Police explicitly rejected that the manslaughter was motivated by racism and religion, and thus refused to report the incident to the Security and Intelligence Service. Consequently, the petitioners contend that in this case there is no doubt that the police realized the racist nature of the crime at stake, but nevertheless failed to investigate it properly as a hate crime, in breach of articles 2, 3, 4 and 6 of the Convention.

5.2 Regarding the State party's contention that the petitioners failed to exhaust domestic remedies as they did not invoke article 3 of the Convention before domestic courts, the petitioners affirm that they did not have the possibility to invoke the Convention during the criminal proceedings.

5.3. According to the petitioners, the public authorities wished to reach a speedy conclusion of the proceedings in the case, and thus opted for a fast judicial track based on the defendants' "full confession". The police arrived late at the scene of the offence, only after the attack had ceased, and thus failed to protect the family. Only four suspects, out of 35 offenders, were interviewed and charged for their participation in the racist attack. The offenders were not asked by the Prosecutor to confess the racist element in the crime, and were requested only to admit violence, vandalism, and possession of illegal weapons.

5.4 The petitioners also stress that the criminal proceedings took place in their absence, and that they were thus denied the opportunity to testify before the District Court of Sorø. The civil proceedings subsequently litigated before the District Court of Naestved failed to give them satisfaction. Furthermore, a number of witnesses and defendants, such as defendant K.B., did not appear at the hearing before the District Court of Naestved, nor on appeal before the High Court of Eastern Denmark. It was thus not possible to interrogate him on the phone conversations he had prior to the assault.[25] The petitioners therefore challenge the State party's assertion that the evidence provided in court by the defendants coincided with the statements they had given to the police,[26] as one of the defendants was not present at trial. According to the petitioners, in such circumstances, the District Court of Naestved should have ruled in their favour.

5.5 Regarding the State party's argument that the petitioners failed to properly pursue their application before the Criminal Injuries Compensation Board,[27] the petitioners submit that this procedure was superfluous, as they would have needed a favourable criminal or civil court decision as a basis for a valid claim for damages. As their claims were rejected in both the criminal and civil proceedings, the Compensation Board could not offer redress to the petitioners.

5.6 In conclusion, the petitioners reaffirm that the State party breached article 6 in their regard, in relation to article 2, paragraph 1 (d), as well as article 3 and article 4 of the

[23] See para 4.14 above.

[24] According to the petitioners, the attacker in that case was carrying a baseball bat and reportedly shouted at the victim "what are you looking at *perker svine*?" (Danish pejorative slang for "foreigner").

[25] See paras. 2.3, 4.4 and 5.1 above.

[26] See para. 4.9 above.

[27] See para. 4.11 above.

Convention.[28] They reiterate that they were denied an effective remedy for the acts of racist violence suffered, including their right to adequate reparation and satisfaction for the damage caused by the discrimination suffered, in addition to the punishment of perpetrators.[29]

**Issues and proceedings before the Committee**

*Consideration of admissibility*

6.1 Before considering any claim contained in a communication, the Committee on the Elimination of Racial Discrimination must decide, pursuant to article 14, paragraph 7 (a), of the Convention, whether or not the communication is admissible.

6.2 The Committee first observes that the petitioners have failed to substantiate, for the purposes of admissibility, their allegation that the offenders' intent to have them leave the municipality qualified as an act of racial segregation or apartheid, within the meaning of article 3 of the Convention. This part of the communication is therefore inadmissible under article 14, paragraph 1 of the Convention. Having reached this conclusion, the Committee need not examine the State party's contention that the petitioners failed to exhaust domestic remedies on this count, on the ground that they did not invoke article 3 of the Convention before domestic courts.

6.3 The Committee has taken note of the State party's argument that the petitioners failed to establish a prima facie case for the purposes of admissibility, as the assault does not qualify as an act of racial discrimination under the Convention. The Committee however considers that the question of whether such assault constituted or resulted in discrimination vis-à-vis the petitioners on the basis of their national origin or ethnicity, and if so, whether they were offered an effective remedy in this regard, relates to the substance of the communication and, for this reason, should be considered on the merits. Accordingly, the Committee finds that the petitioners have sufficiently substantiated their claims under article 2, paragraph 1 (d), article 4 and article 6 of the Convention, for the purposes of admissibility, and proceeds to their examination on the merits, in the absence of any further objections to the admissibility of the communication.

*Consideration of the merits*

7.1 Acting under article 14, paragraph 7 (a), of the International Convention on the Elimination of All Forms of Racial Discrimination, the Committee has considered the information submitted by the petitioners and the State party.

7.2 The issue before the Committee is whether the State party fulfilled its positive obligation to properly investigate and prosecute the assault suffered by the petitioners on 21 June 2004, having regard to its duty, under article 2 of the Convention, to take effective action against reported incidents of racial discrimination. The Committee recalls that it is not its role to review the interpretation of facts and national law made by domestic courts, unless the decisions were manifestly arbitrary, or otherwise amounted to a denial of justice.[30] In the present case, the Committee observes that further to the investigation of the offence by the police, the Prosecution requested that criminal proceedings against four suspects be undertaken as summary proceedings based on the defendants' guilty pleas, and decided to revise charges from a violation of section 245 (1), which criminalizes specific

[28] Article 4 is claimed for the violent attack and vandalism; article 3 for the intention to have the family leave the place; and article 6 for the lack of effective remedies.

[29] The petitioners refer to the Committee's general recommendation No. 26.

[30] See communication No. 40/2007, *Er. v. Denmark*, Opinion adopted on 8 August 2007, para. 7.2.

acts of a particularly heinous, brutal or dangerous nature, and which incurs a maximum penalty of six years' imprisonment, to a violation of section 244 of the Criminal Code, which criminalizes general acts of violence and incurs a lighter penalty of maximum three years. The defendants were finally sentenced to 50 days' imprisonment (suspended). The Committee observes that because of the summary proceedings and revised charges, the possibly racist nature of the offence was already set aside at the level of the criminal investigation, and was not adjudicated at trial. The Committee further observes that on 11 September 2007, the District Court of Naestved rejected the petitioners' application for moral damages, on the ground that they had failed to provide sufficient evidence that the assault committed was racially motivated, or otherwise undertaken on the specific ground of the petitioners' race, nationality or ethnic origin.

7.3 The Committee observes that it is undisputed that 35 offenders attacked the petitioners' house on 21 June 2004, and that the petitioners were on several occasions exposed to offensive language of a racist nature both within and outside the context of their assault. Nor is it contested that the police reported the incident to the Security and Intelligence Service, pursuant to the Memorandum on notification of potentially racially or religiously motivated criminal incidents. The Committee notes that the State party failed to submit any information on the outcome of this notification, in particular whether any investigation was undertaken to ascertain whether the attack qualified as incitement to, or an act of racial discrimination.

7.4 The Committee is of the view that in circumstances as serious as those in this case, where the petitioners were subjected, in their own house, to a violent assault by 35 offenders, some of them armed, enough elements warranted a thorough investigation by public authorities into the possible racist nature of the attack against the family. Instead, this possibility was set aside at the level of the criminal investigation, thereby preventing the issue from even being adjudicated at the criminal trial. The Committee considers that the onus was on the State party to initiate an effective criminal investigation, instead of giving the petitioners the burden of proof in civil proceedings. The Committee recalls its jurisprudence, according to which when threats of violence are made, and especially when they are made in public and by a group, it is incumbent upon the State party to investigate with due diligence and expedition.[31] This obligation is a fortiori applicable in the circumstances of the present case, where 35 individuals actually participated in an assault on the family.

7.5 Although, on the basis of information before it, and given that facts are contested between parties, the Committee is not able to find an independent violation of article 4 (a) of the Convention, it is of the view that the investigation into the events was incomplete. In the light of such failure to effectively protect the petitioners from an alleged act of racial discrimination, and to carry out an effective investigation, which consequently deprived the petitioners from their right to effective protection and remedies against the reported act of racial discrimination, the Committee concludes that article 6 and article 2, paragraph 1 (d), have been violated.

8. In the circumstances, and with reference to its general recommendation No. 31 (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system,[32] the Committee on the Elimination of Racial Discrimination, acting under article 14, paragraph 7 (a), of the International Convention on the Elimination of All Forms of Racial Discrimination, is of the opinion that the facts as submitted disclose a violation of article 2, paragraph 1 (d), and article 6 of the Convention by the State party.

[31] Communication No. 4/1991, *L.K. v. Netherlands*, Opinion adopted on 16 March 1993, para. 6.6.

[32] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 18* (A/60/18), chap. IX.

9. The Committee on the Elimination of Racial Discrimination recommends that the State party grant the petitioners adequate compensation for the material and moral injury caused by the above-mentioned violations of the Convention.

10. The Committee further recommends that the State party review its policy and procedures concerning the prosecution in cases of alleged racial discrimination or racially motivated violence, in the light of its obligations under article 4 of the Convention.[33] The State party is also requested to give wide publicity to the Committee's Opinion, including among prosecutors and judicial bodies.

11. The Committee wishes to receive, within 90 days, information from the State party about the measures taken to give effect to the Committee's Opinion.

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

[33] See *L.K. v. the Netherlands* (note 31 above), para. 6.8.