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COMMITTEE ON THE ELIMINATION
OF RACIAL DISCRIMINATION
Seventy-second session
18 February – 7 March 2008

OPINION

Communication No. 38/2006

Submitted by:	Zentralrat Deutscher Sinti und Roma et al. (represented by counsel)
Alleged victim:	The petitioners
State party:	Germany
Date of communication:	29 August 2006 (initial submission)
Date of present decision:	22 February 2008

[ANNEX]

* Made public by decision of the Committee on the Elimination of Racial Discrimination.

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

Seventy-Second session

concerning

Communication No. 38/2006

Submitted by:	Zentralrat Deutscher Sinti und Roma et al. (represented by counsel)
Alleged victim:	The petitioners
State party:	Germany
Date of communication:	29 August 2006 (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 22 February 2008

Having concluded its consideration of communication No. 38/2006, submitted to the Committee on the Elimination of Racial Discrimination by the Zentralrat Deutscher Sinti und Roma et al. 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, their counsel and the State party,

Adopts the following:

OPINION

1.1 The petitioners are the association *Zentralrat Deutscher Sinti und Roma*, acting on its own behalf and on behalf of G. W.; the association *Verband Deutscher Sinti und Roma – Landesverband Bayern*; R. R.; and F. R. They claim to be victims of a violation by Germany[1] of articles 4 (a) and (c); and 6 of the Convention on the Elimination of All Forms of Racial Discrimination. They are represented by counsel.

[1] The Convention was ratified by Germany on 16 May 1969, and the declaration under article 14 was made on 30 August 2001.

1.2 In conformity with article 14, paragraph 6 (a), of the Convention, the Committee transmitted the communication to the State party on 14 September 2006.

Factual background

2.1 Detective Superintendent G. W., a member of the Sinti and Roma minority, wrote an article entitled "Sinti and Roma – Since 600 years in Germany", which was published in the July/August 2005 issue of the journal of the Association of German Detective Police Officers (BDK), "The Criminalist". In the October 2005 issue of the journal, a letter to the editor written by P. L., vice-chairman of the Bavarian section of the BDK and Detective Superintendent of the Criminal Inspection of the city of Fürth, was published as a reply to Weiss' article. The authors indicated that "The Criminalist" was a journal distributed to more than 20,000 members of one of the biggest police associations in Germany. The text of the letter by P. L. reads as follows:

> *"With interest I read the article by colleague W., himself also a Sinti, but I cannot leave this non-contradicted. Even at a time where minority protection is put above everything else and the sins of the Nazi-era still affect ensuing generations, one need not accept everything that is so one-sided.*
>
> *As an officer handling offences against property I have dealt repeatedly with the culture, the separate and partly conspirative way of living as well as the criminality of the Sinti and Roma. We infiltrated the life of criminal gypsies through working groups and also with the help of under-cover agents ("Aussteiger"). We were told by Sinti that one feels like a "maggot in bacon" ("Made im Speck") in the welfare system of the Federal Republic of Germany. One should use the rationalisation for theft, fraud and social parasitism without any bad conscience because of the persecution during the Third Reich. The references to the atrocities against the Jews, homosexuals, Christians and dissidents who did not become criminal, were considered not relevant.*
>
> *As W. states there are no statistics about the share of criminal Sinti and Roma in Germany. If they existed, he could not have written such an article. But it is sure that this group of people, even if only about 100,000, occupies the authorities disproportionately by comparison.*
>
> *Who for example commits nationwide thefts largely to the disadvantage of old people? Who pretends to be a police officer to steal the scarce savings of pensioners which were hidden for the funeral in the kitchen cupboard or in the laundry locker? Who shows disabled and blind persons tablecloths and opens the door to accomplices? What about the trick with the glass of water and the paper trick?*
>
> *Is it really a prejudice when citizens complain about the fact that Sinti drive up with a Mercedes in front of the social welfare office? Is it not true that hardly any Roma works regularly and pays social insurance? Why does this group separate itself in such a way and for example inter-marries without the registry*

office? Why are fathers of Sinti children not named to the youth welfare office? (...)

Whoever does not want to integrate but lives from the benefits of and outside this society cannot claim a sense of community. My lines do not only reflect my opinion as I learned by talking to many colleagues. They are not only a record of prejudices, generalisations ("Pauschalisierungen") or accusations but a daily reality of criminal activity.

It is totally incomprehensible for me that a police officer who knows about this situation is so partial in his argumentation. His origins excuse him partly and his career deserves praise, but he should stick to the truth."

2.2 The authors claimed that P. L.'s letter contained numerous discriminatory statements against Sinti and Roma. They argue that P. L. used racist and degrading stereotypes, going as far as stating that criminality was a key characteristic of Sinti and Roma. In particular, they noted that the terms "maggot" and "parasitism" were used in the Nazi propaganda against Jews and Sinti and Roma. The authors claim that such a publication fuels hatred against the Sinti and Roma community, increases the danger of hostile attitude by police officers, and reinforces the minority's social exclusion.

2.3 In November 2005, after a public protest organized by the *Zentralrat Deutscher Sinti und Roma*, the Bavarian Ministry of the Interior suspended P. L. from his function in the police commissariat of Fürth, stating that generally negative statements about identifiable groups of the population, like the Sinti and Roma in the present case, were not acceptable.

2.4 On 24 November 2005, the *Zentralrat Deutscher Sinti und Roma* and R. R. lodged a complaint with the District Attorney of Heidelberg, and on 1 December 2005, the *Verband Deutscher Sinti und Roma – Landesverband Bayern* and F. R. filed a complaint before the District Attorney of Nürnberg-Fürth. Both complaints were then transferred to the competent authority: the District Attorney of Neuruppin in Brandenburg. The District Attorney of Neuruppin dismissed the first complaint on 4 January 2006 and the second one on 12 January 2006 with the same reasoning, namely that the elements constitutive of the offence under article 130 of the German Criminal Code were missing, refusing to charge P. L. with an offence under the German Criminal Code (GCC).

2.5 On 12 January 2006, the authors lodged an appeal with the General Procurator (*Generalstaatsanwaltschaft*) of the Land of Brandenburg against the two decisions of the District Attorney of Neuruppin. This was dismissed on 20 February 2006.

2.6 On 20 March 2006, the authors appealed to the Supreme Court of Brandenburg. Their appeal was rejected on 15 May 2006. As regards the individuals, the Court found the claim to be without merits. As regards the *Zentralrat Deutscher Sinti und Roma* and *Verband Deutscher Sinti und Roma – Landesverband Bayern*, the Supreme Court found the claim inadmissible on the grounds that, as associations, their rights could only have been affected indirectly.

2.7 The authors argue that, since the judicial authorities refused to initiate criminal proceedings, German Sinti and Roma were left unprotected against racial discrimination. By

so doing, the State party would be tolerating a repetition of such discriminatory practices. The authors highlight a similar case involving discriminatory public statements against Jews, in which the Supreme Court of the Land of Hessen had stated that, in the past, the terms "parasite" and "social parasitism" had been used maliciously and in a defamatory way against Jews, and held that such public statements denied members of a minority the right to be considered as equals in the community.

The complaint

3. The authors claim that Germany violated their rights as individuals and groups of individuals under articles 4 (a) and (c); and 6 of the Convention on the Elimination of All Forms of Racial Discrimination, as the State party does not afford the protection under its Criminal Code against publications which contain insults directed against Sinti and Roma.

State party's observations on the admissibility and merits of the communication

4.1 On 26 January 2007, the State party commented on the admissibility and merits of the communication. On admissibility, it submits that the *Zentralrat Deutscher Sinti und Roma* and *Verband Deutscher Sinti und Roma – Landesverband Bayern* have no standing to submit a communication under article 14 (1) of the Convention. It submits that only individuals or groups of individuals who assert that they are victims of a violation of a right set forth in the Convention can submit communications to the Committee. Neither of these two associations claims to be a victim of State action or lack thereof, and that they cannot be accorded personal dignity. In addition, the present communication distinguishes itself from a previous decision adopted by the Committee[2], inasmuch as the complainants here do not claim impairment of their work and do not claim to be victims as organisations.

4.2 The State party submits that all complainants have failed to substantiate their claims under article 4 (a) and (c) of the Convention, and that none of them has exhausted domestic remedies as required by article 14(2) of the Convention. It adds that the domestic remedies include an appeal to the Federal Constitutional Court and that none of the complainants made use of this option. It would not have been clear from the outset that a constitutional complaint would fail for lack of prospect of success. The State party submits that the Brandenburg Supreme Court, in its decision of 15 May 2006, only rejected the application by the two first complainants as inadmissible because of lack of victim status. It submits that, at least in respect of the complainants that are natural persons, the Federal Constitutional Court could have examined the assessment made by the Brandenburg Supreme Court with respect to the right of freedom of expression, protected by article 5 of the German Basic Law. As regards W., the State party notes that he did not file a criminal action although this option was open to him. For that reason alone, he did not exhaust domestic remedies that were both available and potentially effective.

[2] See Communication No. 30/2003, *The Jewish Community of Oslo et al v. Norway*, opinion of 15 August 2005.

4.3 On the merits, the State party denies that there was a violation of articles 4, paragraph (a) and (c) and 6 of the Convention. As regards article 4(a), it maintains that all categories of misconduct under that provision are subject to criminal sanctions under German criminal law, particularly through the offence of incitement to racial or ethnic hatred ("*Volksverhetzung*") in article 130 of the GCC[3]. In addition, the GCC contains other provisions that criminalise racist and xenophobic offences, e.g. in article. 86 (dissemination of propaganda by unconstitutional organisations) and article 86(a) (use of symbols by unconstitutional organisations). The obligations arising from article 4 paragraph (a) of the Convention have thus been completely fulfilled by art. 130 of the GCC; there is no protection gap in this respect. That some discriminatory acts are not covered by the provision is not contrary to the Convention. The list in article 4 paragraph (a) of the Convention does not enumerate all conceivable discriminatory acts, but rather acts in which violence is used or where racist propaganda is the goal.

4.4 The State party adds that in accordance with General Recommendation No. XV, para. 2, article 130 of the GCC is effectively enforced. Under German criminal law, the principle of mandatory prosecution applies, by which prosecutorial authorities must investigate a suspect *ex officio* and bring public charges when necessary. In the present case, the State party submits that prosecutorial authorities reacted immediately, and that the situation was investigated thoroughly until the proceedings were terminated by the District Attorney of Neuruppin.

4.5 Regarding the interpretation and application of article 130 of the GCC, the State party notes that the District Attorney of Neuruppin, the Brandenburg General Prosecutor and the Brandenburg Supreme Court did not find that the elements constitutive of the offences under art. 130 or art. 185 GCC were met. These decisions show that not every discriminatory statement fulfils the elements of the offence of incitement to racial or ethnic hatred, but that there must be a certain targeting element for incitement of racial hatred. The State party recalls that all the above decisions referred to the wording of the letter as "inappropriate", "tasteless" and "outrageous and impudent". The State party points out that the central question is whether the courts correctly interpreted the relevant provisions of the GCC. It recalls that States parties have some discretion in the implementation of the obligations arising from the Convention and particularly as regards the interpretation of their national legal standards. With respect to the consequences suffered by P. L., it indicates that disciplinary measures were indeed taken against him.

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[3] Article 130. Incitement to racial or ethnic hatred. (1) Whoever, in a manner that is capable of disturbing the public peace: 1. incites hatred against segments of the population or calls for violent or arbitrary measures against them; or 2. assaults the human dignity of others by insulting, maliciously maligning, or defaming segments of the population, shall be punished with imprisonment from three months to five years. (2) Whoever: 1. with respect to writings (article 11, para. 3), which incite hatred against segments of the population or a national, racial or religious group, or one characterized by its folk customs, which call for violent or arbitrary measures against them, or which assault the human dignity of others by insulting, maliciously maligning or defaming segments of the population or a previously indicated group: (a) disseminates them; (…)

4.6 On article 4 (c) of the Convention, the State party denies that it violated this provision. It points to the fact that "The Criminalist" is not published by a public authority or institution, but by a professional association. The author of the letter published it as a private person, and not in his official capacity. The absence of public charges and of a conviction by public prosecutorial authorities cannot be considered to be a violation of this provision, as promotion or incitement requires significantly more than merely refraining from further criminal prosecution.

4.7 Finally, with respect to article 6 of the Convention, the State party maintains that in the present case the criminal prosecution authorities acted quickly and fully discharged their obligation of effective protection through the prompt initiation of an investigation against P. L. After an in-depth examination the authorities concluded that the offence of incitement to racial or ethnic hatred could not be established and closed the proceedings.

Petitioner's comments

5.1 On 7 March 2007 the authors commented on the State party's submission. They note that the German authorities did not investigate the matter *ex officio,* but that they were prompted to act by a complaint from one of the complainants (*Zentralrat Deutscher Sinti und Roma*). They add that, to the present day, the police union has not disassociated itself in any way from the article of P. L.

5.2 The authors claim state that, although the organizations which co-authored the complaint have not been attacked by name in P. L.'s article, their own rights are harmed by such a sweeping criminalization of the entire Sinti and Roma minority. They claim that the derogation of the social reputation of the minority has consequences for the reputation and the possibility of the organisations to exert political influence, especially since they act publicly as advocates of the minority and are funded by the State party to do so.

5.3 On exhaustion of domestic remedies, the authors claim that a complaint to the Federal Constitutional Court would not only be declared inadmissible but would have no prospect of success, based on that Court's established jurisprudence. They state that they know of no case in which the Federal Constitutional Court accepted a complaint against a decision concerning a legal enforcement procedure.

5.4 As regards the provisions of the GCC, the authors doubt that articles 130 and 185, with their strict requirements, are sufficient to combat racist propaganda effectively. They doubt that the intent of the responsible party "to incite hatred against segments of the population" (as required by art. 130) is absent in the present case, given that P. L. is a police officer.

5.5 The authors reiterate that characterizations made in the article represent an attack on the human dignity of members of the Sinti and Roma communities, and that they cannot be considered to be a "permissible statement of opinion", nor the "subjective feelings and impressions of a police officer". Had those characterizations been made against Jews, massive judicial intervention would have resulted. The authors add that the State party approves of its police officers globally criminalizing an entire population group. The approval of such public statements carries the danger that other police officers adopt a similar attitude against Sinti and Roma.

Additional comments by the parties

6. By submissions dated 31 May 2007 and 16 November 2007, the State party generally reiterated the points made in the initial submission. In particular, it states that article 130 of the GCC has been successfully used in the past to act against instances of extreme right-wing extremist propaganda. By submission of 27 June 2007, the complainants replied to the State party's comments, restating the arguments previously offered.

Issues and proceedings before the Committee

7.1 Before considering any claims contained in a petition, the Committee on the Elimination of Racial Discrimination must, in accordance with rule 91 of its rules of procedure, decide whether or not it is admissible under the Convention.

7.2 The Committee notes that two legal entities are among the authors of the complaint: the *Zentralrat Deutscher Sinti und Roma* and the *Verband Deutscher Sinti und Roma – Landesverband Bayern.* The Committee takes note of the State party's objection that, a legal person as opposed to an individual or a group of individuals is not entitled to submit a communication or to claim victim status under article 14, paragraph 1. It equally notes the authors' argument that the organizations submit the complaint on behalf of their members, as "groups of individuals" of the German Sinti and Roma community, and that their own rights are harmed by the statements in the impugned article. The Committee does not consider the fact that two of the authors are organisations to be an obstacle to admissibility. Article 14 of the Convention refers specifically to the Committee's competence to receive complaints from "groups of individuals", and the Committee considers that, bearing in mind the nature of the organisations' activities and the groups of individuals they represent, they do satisfy the "victim" requirement within the meaning of article 14(1).[4]

7.3 On the issue of exhaustion of domestic remedies, the Committee notes that the State party argues that the complainants failed to lodge an appeal with the Federal Constitutional Court. The authors in turn maintain that such an appeal would have no prospect of success and refer to the established jurisprudence of the Court. They argue, and the State party concedes, that individuals have no right under German law to face the State to initiate criminal prosecution. The Committee has previously held that a petitioner is only required to exhaust remedies that are effective in the circumstances of the particular case.[5] It follows that, with the exception of W., the petitioners have fulfilled the requirements of art. 14(7)(a).

[4] See Communication No. 30/2003, *The Jewish community of Oslo et al v. Norway*, opinion of 15 August 2005, para. 7.4.
[5] See Communication No. 11/1998, *Miroslav Lacko v. Slovak Republic*, opinion of 9 August 2001, para. 6.2; Communication No. 13/1998, *Anna Koptova v Slovak Republic*, opinion of 8 August 2000, para. 6.4.

7.4 As regards W., the Committee notes that he did not file criminal charges nor was a party to the proceedings before the Brandenburg Supreme Court. Thus, the complaint is inadmissible with respect to W. because of non-exhaustion of domestic remedies.[6]

7.5 As regards article 4(c) of the Convention, the Committee accepts the State party's contention that the BDK is a professional union and not a State organ, and that P. L. wrote the impugned letter in his private capacity. The Committee thus finds this claim inadmissible.

7.6 In light of the above, the Committee declares the case admissible inasmuch as it relates to articles 4(a) and 6 of the Convention and proceeds to examine the merits.

7.7 On the merits, the main issue before the Committee is whether the provisions in the GCC provide effective protection against acts of racial discrimination. The petitioners argue that the existing legal framework and its application leave Sinti and Roma without effective protection. The Committee had noted the State party's contention that the provisions of its Criminal Code are sufficient to provide effective legal sanctions to combat incitement to racial discrimination, in accordance with article 4 of the Convention. It considers that it is not the Committee's task to decide in abstract whether or not national legislation is compatible with the Convention but to consider whether there has been a violation in the particular case.[7] The material before the Committee does not reveal that the decisions of the District Attorney and General Prosecutor, as well as that of the Brandenburg Supreme Court, were manifestly arbitrary or amounted to denial of justice. In addition, the Committee notes that the article in "The Criminalist" has carried consequences for its author, as disciplinary measures were taken against him.[8]

8. The Committee on the Elimination of Racial Discrimination, acting under article 14, paragraph 7, of the Convention on the Elimination of All Forms of Racial Discrimination, is of the view that the facts before it do not disclose a violation of articles 4(a) and 6 of the Convention.

9. Notwithstanding, the Committee recalls that P. L.'s article was perceived as insulting and offensive not only by the petitioners, but also by the prosecutorial and judicial authorities who dealt with the case. The Committee wishes to call the State party's attention to (i) the discriminatory, insulting and defamatory nature of the comments made by P. L. in his reply published by "The Criminalist" and of the particular weight of such comments if made by a police officer, whose duty is to serve and protect individuals; and (ii) General Recommendation 27, adopted at its fifty-seventh session, on discrimination against Roma.

[Adopted in English, French, Spanish and Russian, 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.]

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[6] See Communication No. 22/2002, *POEM and FASM v. Denmark*, decision of 17 March 2003, para. 6.3.
[7] See Communication No. 40/2007, *Er v. Denmark*, decision of 8 August 2007, para. 7.2.
[8] See para. 2.3.