



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

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## Committee on the Elimination of Racial Discrimination

Seventy-ninth session

8 August to 2 September 2011

### Decision

#### Communication No. 45/2009

Submitted by:

A. S. (represented by counsel, the Anti-Discrimination Centre 'Memorial')

Alleged victim:

The petitioner

State Party:

Russian Federation

Date of the communication:

20 August 2009 (initial submission)

Date of the present decision

26 August 2011

[Annex]

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

## Annex

### **Decision of the Committee on the Elimination of Racial Discrimination under article 14 of the international Convention of all forms of racial discrimination (seventy-ninth session)**

concerning

#### **Communication No. 45/2009**

Submitted by: A. S. (represented by counsel, the Anti-Discrimination Centre ‘Memorial’)

Alleged victim: The petitioner

State Party: Russian Federation

Date of the communication: 20 August 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 26 August 2011,

Aadopts the following:

#### **Decision on admissibility**

1.1 The petitioner is Ms. A. S., a Russian citizen of Roma ethnicity born on 4 September 1961 and currently residing in St. Petersburg, Russian Federation. She claims to be a victim of a violation by the Russian Federation<sup>1</sup> of articles 4, 5 and 6 of the International Convention on the Elimination of All Forms of Racial Discrimination. She is represented by counsel, the Anti-Discrimination Centre “Memorial”.

1.2 In conformity with article 14, paragraph 6 (a), of the Convention, the Committee transmitted the communication to the State party on 27 October 2009.

#### **Factual background**

2.1 The petitioner was born in the Pskov region, where a community of her Roma relatives continues to reside at present. On 16 July 2008, she found a leaflet pinned to an electricity post in a public area of the town of OPOCHKA, Pskov region [exact address is available on file with the Secretariat], bearing the following text:

“White Brothers! Enough we had [of] black bastards in our town! Let us stand together side by side and set their asses up! Stinking gypsies – go away.

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<sup>1</sup> The Convention was ratified by the Russian Federation on 4 February 1969, and the declaration under article 14 was made on 1 October 1991.

We, Mr. I.B. and Mr. I.F., will drive the blacks out of our town. Find us: [contact address].”<sup>2</sup>

2.2 On 18 July 2008, the petitioner submitted an application based on the above-described facts to the Prosecutor’s Office of the Pskov Region, requesting the opening of criminal proceedings under article 282 (incitement to hatred or enmity, as well as abasement of human dignity) and article 280 (public appeals to encourage extremist activity) of the Criminal Code of the Russian Federation (the Criminal Code).

2.3 On 21 July 2008, the authorities found two more leaflets with similar content close to the area where the first leaflet had been found. These two leaflets depicted the Nazi swastika.

*Adoption of decision No. 1 of the Prosecutor’s Office of the Pskov Region*

2.4 On 27 July 2008, the Deputy Head of the Investigation Department of the Prosecutor’s Office of the Pskov Region (Investigation Department of the Prosecutor’s Office) decided not to initiate criminal proceedings under articles 280 and 282 of the Criminal Code for lack of *corpus delicti* (decision No. 1 of the Prosecutor’s Office of the Pskov Region). This decision was adopted on the basis of the investigation which established that the leaflet found by the petitioner on 16 July 2008 had been written by a third person, Ms. Y.L., who was in conflict with the two individuals named in the leaflet. In the beginning of July 2008, she wrote a number of leaflets, in order to take revenge on the individuals named and to stir up violence between the representatives of the Roma community living on the territory of the town of OPOCHKA and the said individuals. Ms. Y.L. gave the leaflets to her cohabitant, Mr. A.K., who, with the same intentions, then pinned one of them to an electricity post, and left the others in the backyard of the nearby house.

2.5 The above-mentioned actions, in the opinion of the Deputy Head of the Investigation of the Prosecutor’s Office, did not amount to incitement to hatred or enmity against the Roma, since there was no direct intent, required by article 282 of the Criminal Code, to incite hatred or enmity between members of the Roma community and members of the titular (Slavic) ethnic group. Rather, Ms. Y.L.’s and Mr. A.K.’s actions were prompted by their intent to cause harm to the two individuals named in the leaflet through the actions of the Roma. Moreover, given that the leaflets were distributed in the area predominantly populated by the Roma, Ms. Y.L.’s and Mr. A.K.’s actions were lacking the element of publicity, also required by article 282 of the Criminal Code, for the members of the titular (Slavic) ethnic group to have ‘necessary and sufficient conditions’ to become acquainted with the content of the leaflets in question.

2.6 According to the decision, Ms. Y.L.’s and Mr. A.K.’s actions equally did not amount to public appeals to encourage extremist activity, proscribed by article 280 of the Criminal Code. As transpires from the text of the leaflets found on 16 and 21 July 2008, its content was in effect addressed to members of the Roma community, and Ms. Y.L. and Mr. A.K. did not pursue the goal of stirring up a conflict between members of different ethnic groups and nationalities residing in the town of OPOCHKA, Pskov Region. The investigation, however, established that there were elements of crimes, proscribed by article 129, part 1 (slander), of the Criminal Code with regard to the two individuals named in the leaflets found on 16 and 21 July 2008, and article 130, part 1 (insult), of the Criminal Code with regard to the representatives of the Roma community in the town of OPOCHKA, Pskov

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<sup>2</sup> A scanned copy of the original text of the leaflet in Russian language, containing full names of the alleged authors of the leaflet and their contact address, as well as English translation thereof are provided by the petitioner.

Region. According to article 20, part 2, of the Criminal Procedure Code, offences proscribed by article 129 and article 130 of the Criminal Code are subject to private prosecution, and criminal proceedings under these articles can be initiated exclusively on the basis of the injured person's application to the justice of the peace.

*Revocation of decision No. 1 of the Prosecutor's Office of the Pskov Region and subsequent adoption of decision No. 2 of the Prosecutor's Office of the Pskov Region*

2.7 On 11 August 2008, decision No. 1 of the Prosecutor's Office of the Pskov Region was revoked *proprio motu* by a superior prosecutor and the case was sent back for additional investigation. On 20 August 2008, the Investigation Department of the Prosecutor's Office again decided not to initiate criminal proceedings under articles 280 and 282 of the Criminal Code for lack of *corpus delicti* in the actions of Ms. Y.L. and Mr. A.K. (decision No. 2 of the Prosecutor's Office of the Pskov Region).

*Revocation of decision No. 2 of the Prosecutor's Office of the Pskov Region and subsequent adoption of decision No. 3 of the Prosecutor's Office of the Pskov Region*

2.8 On 18 September 2008, decision No. 2 of the Prosecutor's Office of the Pskov Region was revoked *proprio motu* by a superior prosecutor and the case was sent back for additional investigation. On 5 October 2008, the Investigation Department of the Prosecutor's Office again decided, for the same reasons, not to initiate criminal proceedings under the articles of the Criminal Code invoked by the petitioner (decision No. 3 of the Prosecutor's Office of the Pskov Region).

*Revocation of decision No. 3 of the Prosecutor's Office of the Pskov Region and subsequent adoption of decision No. 4 of the Prosecutor's Office of the Pskov Region*

2.9 On 8 December 2008, decision No. 3 of the Prosecutor's Office of the Pskov Region was revoked *proprio motu* by a superior prosecutor and the case was sent back for additional investigation. The investigating authorities were requested to legally qualify the impugned actions of Ms. Y.L. and Mr. A.K., taking into account the results of linguistic examination. On 10 December 2008, the Investigation Department of the Prosecutor's Office again decided not to initiate criminal proceedings (decision No. 4 of the Prosecutor's Office of the Pskov Region). This decision contains the same conclusions as decision No. 1 of the Prosecutor's Office of the Pskov Region. In addition, it refers to the expert report No. 478 of 29 September 2008, according to which all three leaflets have been written by Ms. Y.L. It also refers to the results of linguistic examination of 30 October 2008, establishing that the wording used in the first leaflet, namely appeals to violent acts against individuals of Roma ethnicity, could be characterised as 'extremist'.

*Revocation of decision No. 4 of the Prosecutor's Office of the Pskov Region and subsequent adoption of decision No. 5 of the Prosecutor's Office of the Pskov Region*

2.10 On 6 April 2009, decision No. 4 of the Prosecutor's Office of the Pskov Region was revoked *proprio motu* by a superior prosecutor and the case was sent back for additional investigation. This time, the investigating authorities were requested to further question Ms. Y.L. and Mr. A.K. in order to establish who took the lead in writing the leaflets, as well as to identify the whereabouts of the remaining leaflets that have not been found. The investigating authorities were also requested to further question Ms. L.U. of Roma ethnicity who lived in a house where the other two leaflets have been found on 21 July 2008. On 23 April 2009, the Investigation Department of the Prosecutor's Office again decided not to initiate criminal proceedings (decision No. 5 of the Prosecutor's Office of the Pskov Region). This decision contains the same conclusions as decision No. 1 of the Prosecutor's

Office of the Pskov Region. In addition, it refers to the testimonies received as a result of further questioning of Ms. Y.L., Mr. A.K. and Ms. L.U. Namely:

- (a) Ms. Y.L. and Mr. A.K. could not recall who took the lead in writing the leaflets but both of them confirmed that the leaflets were not intended to ‘cause great harm to anyone’. Ms. Y.L. and Mr. A.K. expected that representatives of the Roma community would ‘only intimidate’ the two individuals named in the leaflets.
- (b) Mr. A.K. pinned one leaflet to an electricity post, and left the others close to where the Roma community lived.
- (c) Ms. L.U. spoke about the content of the leaflets only with members of her family and the petitioner. The investigation did not find any other individuals who were aware of the content of the leaflets.

*Revocation of decision No. 5 of the Prosecutor’s Office of the Pskov Region and subsequent adoption of decision No. 6 of the Prosecutor’s Office of the Pskov Region*

2.11 On 10 June 2009, decision No. 5 of the Prosecutor’s Office of the Pskov Region was revoked *proprio motu* by a superior prosecutor and the case was sent back for additional investigation. On 29 June 2009, the Investigation Department of the Prosecutor’s Office again decided not to initiate criminal proceedings (decision No. 6 of the Prosecutor’s Office of the Pskov Region). This decision contains the same conclusions as decision No. 1 of the Prosecutor’s Office of the Pskov Region. In addition, it refers to the questioning of Mr. A.U., the son of Ms. L.U., who acknowledged that he spoke to the two individuals named in the leaflets after the leaflet in question was shown to him by his mother. Mr. A.U. further explained that he ‘did not have any claims in respect to anyone’ after he ‘has ascertained that the two individuals named in the leaflets had nothing to do with their content’.

*Petitioner’s attempt to appeal in court decision No. 1 of the Prosecutor’s Office of the Pskov Region*

2.12 It is unclear at what stage of the proceedings the petitioner became aware of the revocation of decision No. 1 of the Prosecutor’s Office of the Pskov Region and subsequent adoption of decisions Nos. 2 – 6 of the Prosecutor’s Office of the Pskov Region.

2.13 On 18 September 2008, the petitioner appealed decision No. 1 of the Prosecutor’s Office of the Pskov Region to the OPOCHKA District Court on the basis of article 125 of the Criminal Procedure Code. She claimed, *inter alia*, that the disposition of article 130, part 1, of the Criminal Code required that the denigration of the honour and dignity be directed at a specific person or specific persons, whereas the leaflets in question did not refer to any specific persons. The petitioner further argued that by refusing to initiate criminal proceedings and referring her to the procedure of private prosecution, the public official who took a decision on her application did not take into account the degree of public danger posed by the impugned actions of Ms. Y.L. and Mr. A.K. She added that such actions could have resulted in mass riots, threat to the live and health of many people and destabilisation of interethnic relations in OPOCHKA. The petitioner recalled that, given the current situation in the Russian Federation with its ever increasing number of crimes committed on the ethnic grounds, such ‘manifestations of extremism should not remain unpunished’.

2.14 On 23 September 2008, the OPOCHKA District Court declined to accept the petitioner’s appeal on the grounds that (1) the ten-day deadline for appealing that decision had been missed; and (2) in her appeal, the petitioner contested the legal qualification of the impugned actions made by the Deputy Head of the Investigation Department, which in itself could not be a subject of judicial review under article 125 of the Criminal Procedure Code.

2.15 On 20 October 2008, the petitioner appealed the ruling of the OPOCHKA District Court of 23 September 2008 to the Judicial Chamber for Criminal Cases of the Pskov Regional Court (Pskov Regional Court). On 24 December 2008, the Pskov Regional Court upheld the ruling of the OPOCHKA District Court of 23 September 2008 in the part dealing with the scope of judicial review under article 125 of the Criminal Procedure Code. It held that, further to article 125, part 1, of the Criminal Procedure Code, only an action, omission to act or a procedural decision of a public official could be the subject of judicial review. In the present case, however, the petitioner was contesting the legal qualification of the crime. The Pskov Regional Court further ruled that the reference to the ten-day deadline for appealing decision No. 1 of the Prosecutor's Office of the Pskov Region was inapplicable to the present case and should be removed from the ruling of the OPOCHKA District Court of 23 September 2008.

*Petitioner's attempt to appeal in court decision No. 4 of the Prosecutor's Office of the Pskov Region*

2.16 On 11 January 2009, the petitioner appealed decision No. 4 of the Prosecutor's Office of the Pskov Region to the OPOCHKA District Court on the basis of article 125 of the Criminal Procedure Code. On 16 January 2009, the OPOCHKA District Court declined to accept the petitioner's appeal, stating that she contested the legal qualification of the impugned actions made by the Deputy Head of the Investigation Department, which in itself could not be a subject of judicial review under article 125 of the Criminal Procedure Code.

2.17 On 26 January 2009, the petitioner appealed the ruling of the OPOCHKA District Court of 16 January 2009 to the Pskov Regional Court. On 25 February 2009, the Pskov Regional Court referred to paragraph 5 of the Ruling of the Presidium of the Supreme Court No. 1 "On the Practice of Examinations by Court of Complaints on the Basis of Article 125 of the Criminal Procedure Code" dated 10 February 2009 and held that the OPOCHKA District Court should not have accepted the petitioner's case in the first place, since none of her rights have been infringed. The Pskov Regional Court based this conclusion on the fact that the petitioner 'lived and worked in St. Petersburg, was officially registered as residing in Vlesno village of the Krasnogorodsk district of the Pskov region, whereas the leaflets have been distributed in the town of OPOCHKA of the Pskov region'.

*Petitioner's arguments on the admissibility of the communication*

2.18 The petitioner submits that the six-month period for the purposes of article 14, paragraph 5, of the Convention should be counted from the ruling of the Pskov Regional Court of 25 February 2009, which, in her opinion, constitutes a final judgment in the legal proceedings by virtue of which she contested decision No. 4 of the Prosecutor's Office of the Pskov Region not to initiate criminal proceedings under articles 280 and 282 of the Criminal Code for lack of *corpus delicti* in the actions of Ms. Y.L. and Mr. A.K.

2.19 The petitioner argues that it would have been essentially impossible and ineffective for her to contest each of the six decisions of the Prosecutor's Office of the Pskov Region, because (1) all of them have been nearly identical in their conclusions and often content, and (2) the number of decisions and the frequency of their revocation and adoption would have made her engage in as many as six parallel court proceedings. The petitioner adds that she has initiated and followed through two sets of court proceedings, both unsuccessfully. She explains that the reason for contesting the decisions of the Prosecutor's Office of the Pskov Region Nos. 1 and 4 was that, by the time the proceedings on the first decision were completed, those on the fourth decision were just starting.

2.20 The petitioner contends that she has exhausted all available domestic remedies. The petitioner submits that the State party may argue that she could have initiated proceedings

under article 130 of the Criminal Code (insult) and that, by failing to do so, she has also failed to exhaust all available domestic remedies. She recalls that under article 20 of the Criminal Procedure Code, offences proscribed by article 130 of the Criminal Code are subject to private prosecution. The petitioner refers to the Committee's decision in *Sadic v. Denmark*,<sup>3</sup> and argues by analogy that it cannot be regarded as an effective remedy to initiate proceedings under article 130 of the Criminal Code after having unsuccessfully invoked article 282 of the Criminal Code (incitement to hatred or enmity, as well as abasement of human dignity), since the requirements for prosecution under both articles are identical and both require direct intent. Since the disposition of article 130 of the Criminal Code requires that the denigration of the honour and dignity be directed at a specific person or specific persons, it would be difficult for her to initiate proceedings under this article, as she was not mentioned in any of the leaflets. The petitioner concludes that, given the repeated refusal of the Prosecutor's Office of the Pskov Region to initiate criminal proceedings under article 282 of the Criminal Code for lack of direct intent, there was no prospect to have criminal proceedings initiated under article 130 of the Criminal Code with regard to the same factual background.

2.21 The petitioner submits that the State party may also argue that she has failed to avail herself of the opportunity to have her case examined under the supervisory review procedure. According to article 402 of the Criminal Procedure Code, supervisory review constitutes the review of a judgment that has already entered into force. The petitioner argues in great detail that the supervisory review may not be regarded as an effective remedy, because (1) it is a procedure carried out after the final decision of the court of cassation; (2) it is contrary to the principle of legal certainty and, therefore, cannot be deemed as a mandatory remedy for the purposes of the Convention; and (3) it is ineffective due to the imperative of domestic law, as well as the practice of its application and interpretation. The petitioner adds that, under article 403 of the Criminal Procedure Code, supervisory review in a case where the first instance judgment was rendered by a district court is conducted by the same court of cassation which previously examined the case in question. In the present case, it would be the Pskov Regional Court that has already rendered two decisions on cassation in the petitioner's case, both being not in her favour and on nearly identical grounds. She concluded that it is reasonable to expect that the Pskov Regional Court would not change its position regarding her case should it consider it under the supervisory review procedure.

### **The complaint**

3.1 The petitioner submits that the State party failed to criminalise hate speech and all propaganda based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form. She argues that the Prosecutor's Office of the Pskov Region and subsequently the courts have interpreted article 282 of the Criminal Code as not applicable to propaganda that did not aim *directly* at the incitement to hatred or enmity, in disregard of the Committee's General recommendation XV.<sup>4</sup> They repeatedly noted that the leaflets were aimed at inciting hostility of the Roma against the two individuals named in the leaflets. In other words, the State party authorities have not found grounds for prosecuting Ms. Y.L. and Mr. A.K. under article 282 of the Criminal Code for the lack of *direct intent* to incite violence against the Roma. The petitioner submits that article 282 of

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<sup>3</sup> Communication No. 25/2002, *Sadic v. Denmark*, Inadmissibility decision adopted on 19 March 2003, paragraph 6.4.

<sup>4</sup> Committee on the Elimination of Racial Discrimination, General recommendation XV: Article 4 (Organized violence based on ethnic origin), 1993 (HRI/GEN/1/Rev.8), paragraph 3.

the Criminal Code, which applies only to those actions that are accompanied by the direct intent to incite violence and does not cover “all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination”, does not comply with the State party’s obligations under article 4, paragraph (a) of the Convention.

3.2 The petitioner claims that the State party failed to recognise that every individual of Roma origin has standing as a victim in a case of hate speech and propaganda of racial violence (article 282 of the Criminal Code) directed against the Roma as an ethnic group, irrespective of where the specific Roma individual has his or her residence. The petitioner further claims that the State party has previously recognised that the case based on the same crime directed against ethnic Russians in the Baltic countries may be initiated in the interest of the ethnic Russians living in the Russian Federation<sup>5</sup> and, thus, discriminated ethnic Roma against ethnic Russians in the enjoyment of the right to a court and to ethnic identity, in violation of article 5 of the Convention. The petitioner asserts that the rights guaranteed under this article and article 27 of the International Covenant on Civil and Political Rights are collectively referred to as a group and individual right to ethnic identity, which is to be guaranteed without discrimination in accordance with article 5 of the Convention. She submits that her case shows that the Roma as an ethnic group may not be regarded as a victim of hate speech in the Russian Federation, it is rather an individual of Roma origin that either permanently lives or is registered in a specific place that can be regarded as a victim of hate speech in the said place.

3.3 She further submits that the above approach is incompatible with the collective right of the Roma to ethnic identity for the following reasons:

(a) It is not uncommon for the Committee to recognise the victim status of an individual who may be potentially exposed to the racial hatred or humiliation due to his or her national or ethnic origin, as a result of a given hate speech, irrespective of where his or her house is located.<sup>6</sup>

(b) It is within the effective interpretation of the Convention, that hate speech aims at the ethnic group in general rather than at specific individuals. It is within this logic that article 4 of the Convention “categorically condemns group defamation”.<sup>7</sup>

(c) As the Committee stated in its General recommendation XX, “many of the rights and freedoms mentioned in article 5, such as the right to equal treatment before tribunals, are to be enjoyed by all persons living in a given State”,<sup>8</sup> thereby confirming the impossibility to deny protection on the basis of territorial jurisdiction.

(d) The Committee has effectively recognised that the right to legal standing before the courts in cases involving hate speech should be based on self-identification of

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<sup>5</sup> On 27 January 1995, the Assistant to the Prosecutor General of the Russian Federation has initiated criminal proceedings (Case No. 229120) against Ms. Valeriya Novodvorskaya under article 74 of the Criminal Code of the Russian Soviet Federative Social Republic (violation of equality of citizens on the ground of race, ethnicity or beliefs). According to the indictment of 26 April 1996, Ms. Novodvorskaya has repeatedly made intentional offensive statements in mass media that humiliated the Russians in Estonia, Latvia and Lithuania. The criminal proceedings were initiated by an officer of the Prosecutor’s Office in accordance with the powers of the prosecutor to initiate proceedings in the interest of the public.

<sup>6</sup> Communication No. 30/2003, *The Jewish community of Oslo v. Norway*, Opinion adopted on 14 August 2005, paragraph 7.3.

<sup>7</sup> T.D. Jones, Human Rights: Group Defamation, Freedom of Expression and ‘The Law of Nations’, Martinus Nijhoff (1998), at p. 39.

<sup>8</sup> Committee on the Elimination of Racial Discrimination, General recommendation XX: Article 5 (Non-discriminatory implementation of rights and freedoms), 1996 (HRI/GEN/1/Rev.8), paragraph 3.

the individual concerned and, being an aspect of the right to equal treatment before the courts, should be provided to everyone living in a given State (see, General recommendation VIII).<sup>9</sup>

3.4 The petitioner argues that, in breach of article 6 of the Convention, the State party failed to ensure effective judicial review of decisions taken by the administrative bodies, refusing to initiate criminal proceedings in relation to hate speech and propaganda of ethnic violence due to the narrow interpretation of applicable domestic law. As the Committee stated in *L.R. et al. v. Slovak Republic*, a case regarding the right to a remedy allegedly denied to the Roma, “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”.<sup>10</sup> Finally, in the General recommendation XXVII, the Committee recommended the States Parties to provide to “members of Roma communities effective remedies and to ensure that justice is fully and promptly done in cases concerning violations of their fundamental rights and freedoms”.<sup>11</sup>

3.5 In the present case, the Prosecutor’s Office of the Pskov Region repeatedly refused to initiate criminal proceedings to investigate the petitioner’s claims on the grounds that the facts described in her application (see, paragraphs 2.1 and 2.2. above) did not constitute hate speech. The petitioner submits that she was *de facto* denied the right of judicial review of the decisions of the Prosecutor’s Office of the Pskov Region, because the State party’s courts have determined in both court proceedings initiated by her that the legal qualification of the impugned actions could not be a subject of judicial review (see, paragraphs 2.14, 2.15 and 2.16 above). The petitioner also argues that the practice of the State party authorities to effectively discontinue the case by adopting numerous identical decisions substituting each other, *de facto* deprives the victim of an opportunity to seek for judicial review.

### **State party's observations on the admissibility**

4.1 On 25 January 2010, the State party argued that this communication should be declared inadmissible under article 14, paragraph 7, of the Convention for failure to exhaust all available domestic remedies. In particular, the rulings of the Pskov Regional Court of 24 December 2008 (see, paragraph 2.15 above) and 25 February 2009 (see, paragraph 2.17 above) have not been examined under the supervisory review procedure. In accordance with article 403 of the Criminal Procedure Code, the rulings of the Pskov Regional Court could have been examined under the supervisory review procedure by the Presidium of the Pskov Regional Court, then by the Judicial Chamber for Criminal Cases of the Supreme Court and lastly by the Presidium of the Supreme Court. The State party argued that the supervisory review procedure was an effective domestic remedy. The fact that the petitioner was well aware of this possibility and has deliberately not availed herself of it constitutes an abuse of the right of submission of an individual communication to the Committee.

4.2 The State party claimed that the decisions of the Prosecutor’s Office of the Pskov Region Nos. 1 and 4 have been ‘intermediate’ and that the final decision on the petitioner’s application of 18 July 2008 was adopted on 29 June 2009 (decision No. 6 of the

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<sup>9</sup> Committee on the Elimination of Racial Discrimination, General recommendation VIII: Article 1, paragraphs 1 and 4 (Identification with a particular racial or ethnic group), 1990 (HRI/GEN/1/Rev.8).

<sup>10</sup> Communication No. 31/2003, *L.R. et al. v. Slovak Republic*, Opinion adopted on 7 March 2005, paragraph 10.10.

<sup>11</sup> Committee on the Elimination of Racial Discrimination, General recommendation XXVII (Discrimination against Roma), 2000 (HRI/GEN/1/Rev.8), paragraph 7.

Prosecutor's Office of the Pskov Region). The State party referred to the letter of the Chairperson of the Pskov Regional Court of 15 January 2010, confirming that the petitioner has not appealed in court decision No. 6 of the Prosecutor's Office of the Pskov Region, and added that this avenue was still open to the petitioner. The State party refuted the petitioner's claim that court proceedings in her case have been unreasonably delayed and submitted that the petitioner's appeals have been examined by the courts in conformity with time-limits provided for in articles 227 and 374 of the Criminal Procedure Code.

4.3 The State party submitted that the petitioner's allegations about the persecution of the Roma and lack of legal provisions criminalising incitement to racial or ethnic hatred in the domestic law were unfounded and, in any case, they could not be a subject of an individual communication submitted under article 14 of the Convention. The State party specifically referred to articles 63, 280 and 282 of the Criminal Code, the Law "On Mass Media" and the Federal Law "On the Counteraction of Extremist Activity". With reference to its 18<sup>th</sup> and 19<sup>th</sup> periodic reports under the Convention, replies to the list of issues and follow-up information, the State party stated that it actively cooperated with the Committee, *inter alia*, on the situation of the Roma and prevention of ethnically motivated crime.

#### **Petitioner's comments on the State party's observations**

5.1 On 31 March 2010, the petitioner commented on the State party's observations. She reiterated her earlier arguments related to the issue of effectiveness of the supervisory review procedure (see, paragraph 2.21 above) and submitted that the State party has failed to satisfy its burden of proof in demonstrating the effectiveness of such procedure. The petitioner added that a mere statement as to the existence of the remedy and denunciation of the opponent's argument as being subjective was not enough to satisfy the burden of proof. She also submitted that the supervisory review procedure was consistently considered as violating the principle of legal certainty by the European Court of Human Rights (ECHR)<sup>12</sup> and the Human Rights Committee.<sup>13</sup> In this regard, the petitioner argued that the recognition of such procedure as mandatory for the purpose of bringing an international claim would be contrary to the principle of legal certainty and would oblige every potential petitioner in the Russian Federation to exhaust five instances instead of two, thus unnecessarily prolonging the domestic proceedings.

5.2 As to the State party's argument that she did not appeal decision No. 6 of the Prosecutor's Office of the Pskov Region, the petitioner explained that it was obvious to her that the outcome of such an appeal would be negative, in view of the fact that the Prosecutor's Office of the Pskov Region has previously adopted five decisions to the same effect, two of which have been unsuccessfully contested by her in court. The petitioner reiterated her claim that domestic proceedings in her case have been unreasonably delayed (see, paragraph 3.5 above) and added, with reference to the jurisprudence of the Human Rights Committee,<sup>14</sup> that it was unnecessary to appeal the last decision the Prosecutor's Office of the Pskov Region, since it was clear that such an appeal would inevitably be dismissed.

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<sup>12</sup> See, for example, *Sergey Petrov v. Russian Federation* (application No. 1861/05), Judgment of 10 August 2007, paragraphs 28-29; *Anatoliy Kot v. Russian Federation* (application No. 20887/03), Judgment of 18 April 2007, paragraph 29; *Irina Fedotova v. Russian Federation* (application No. 1752/02), Judgment of 19 January 2007, paragraphs 25-28; and *Markovtsi and Selivanov v. Russian Federation* (applications nos. 756/05 and 25761/05), Judgment of 23 October 2009, paragraphs 19-21.

<sup>13</sup> Communication No. 1158/2003, *Blaga v. Romania*, Views adopted on 30 March 2006, paragraph 6.3.

<sup>14</sup> Communication No. 327/1988, *Barzhig v. France*, Views adopted on 11 April 1991, paragraph 5.1.

5.3 On the merits, the petitioner reiterated her initial claim that, contrary to the requirements of article 4, paragraph (a), of the Convention, the State party's domestic law criminalises only those acts of incitement to hatred that were committed with direct intent and drew the Committee's attention to the fact that this claim was not addressed by the State party in its observations. She further submitted that the State party did not have a constitutional framework that would limit its duty to criminalise all racist propaganda and, therefore, could not refer to such constitutional framework as a justification for lack of criminalisation of all racist propaganda, including that committed without direct intent. Moreover, article 29 of the Constitution stated that “[t]he propaganda or campaigning inciting social, racial, national or religious hatred and strife should not be allowed. The propaganda of social, racial, national, religious or language superiority should be banned”. In the petitioner's view, this provision could not be interpreted as limiting the propaganda that should be subject to criminalisation only to the one accompanied by a direct intent.

#### **State party's further observations on the admissibility**

6.1 On 6 December 2010, the State party submitted its further observations on the admissibility and reiterated its position that this communication should be declared inadmissible under article 14, paragraph 7, of the Convention. It stated that the petitioner had a possibility to have the ruling of the Pskov Regional Court of 25 February 2009 reviewed by the Presidium of the Pskov Regional Court under the supervisory review procedure and that her voluntary refusal to avail herself of all available domestic remedies has created legal obstacles for making use of the international procedure for examination of individual communications. The State party rejected the petitioner's argument that the supervisory review procedure was ineffective and submitted that:

(a) The petitioner's reference to the jurisprudence of the ECHR (see, paragraph 5.1 above) was erroneous, since all the judgments cited by her concerned the issue of the supervisory review procedure in civil proceedings and, therefore, were inapplicable in her case. The State party stated that the supervisory review procedure in civil and criminal proceedings had substantial differences and should be dealt with separately. In particular, under article 410, part 1, of the Criminal Procedure Code, a court examining a case under the supervisory review procedure “was not bound by the issues raised in the appeals for a supervisory review and had a right to examine the criminal case in full”.

(b) According to the judgment of the ECHR in *Lenskaya v. Russian Federation*,<sup>15</sup> the principle of legal certainty was not absolute. Higher courts' powers to quash or alter binding and enforceable judicial decisions should be exercised for correction of fundamental defects. That power must be exercised so as to strike, to the maximum extent possible, a fair balance between the interests of an individual and the need to ensure the effectiveness of the system of justice. The ECHR concluded in *Lenskaya v. Russian Federation* that the errors committed by the courts of first and second instances were sufficient in nature and effect to warrant the reopening of the proceedings. Leaving such errors uncorrected would seriously affect the fairness, integrity and public reputation of the judicial proceedings. The ECHR also attributed particular weight to the fact that those judicial errors could not be neutralised or corrected by any other means, save by the quashing of the earlier judgments. In such circumstances, the quashing of the final judgment was a means of indemnifying the convicted person for mistakes in the administration of the criminal law.

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<sup>15</sup> *Lyudmila Lenskaya v. Russian Federation* (application No. 28730/03), Judgment of 29 April 2009, paragraphs 30-32 and 40.

6.2 The State party submitted a copy of the legal opinion of 8 September 2010 approved by the Deputy Prosecutor of the Pskov Region, according to which the Prosecutor's Office did not find any grounds to request the reopening of court proceedings under the supervisory review procedure in relation to the petitioner's application.

6.3 The State party challenged an attempt by the petitioner's counsel to confer the powers of judicial body on the Committee in, *inter alia*, placing a burden of proof on the State party and suggesting that it had to address all of the petitioner's claims. It recalled that the mandate of the Committee, as a non-judicial human rights treaty body, was to examine individual communications alleging human rights violations and to transmit its opinions to the State party concerned and the petitioner.

6.4 The State party submitted that the subject matter of the petitioner's communication to the Committee, that is, alleged incompliance by the State party with its obligations under article 4, paragraph (a), of the Convention and the situation of the Roma, fell outside the scope of the individual communications procedure under article 14 of the Convention and could be dealt with only within the reporting procedure under article 9 of the Convention. The State party added that the situation of ethnic minorities, in particular the Roma, was not a part of the petitioner's claims at the domestic level and, therefore, could not be examined under the Committee's individual communications procedure.

6.5 The State party submitted that the domestic law in force established liability for crimes committed on the grounds of political, ideological, racial, ethnic or religious hatred or enmity, as well as on the grounds of hatred or enmity against a particular social group. In support of its statement, the State party cited relevant provisions of the Constitution, the Federal Law "On the Counteraction of Extremist Activity", Criminal Code, Code of Administrative Offences, etc.<sup>16</sup> The State party specifically referred to articles 63, 280 and 282 of the Criminal Code, the Law "On Mass Media" and the Federal Law "On the Counteraction of Extremist Activity".

6.6 In conclusion, the State party reiterated its position that this communication should be declared inadmissible for (1) failure to exhaust all available domestic remedies; and (2) abuse of the right of submission of an individual communication to the Committee.

6.7 On 2 June 2011, State party submitted its further observations. It reiterated the facts summarised in paragraphs 2.3 – 2.4 and 2.9 above and added that the petitioner, a social worker of the Anti-Discrimination Centre 'Memorial', situated in Saint-Petersburg, was on her business trip in the town of OPOCHKA when she had found the leaflet written by Ms. Y.L. The State party recalled that the leaflet contained an appeal to expel the representatives of the Roma community residing on the territory of the town of OPOCHKA, Pskov Region and listed the names of its presumed authors, Mr. I.B. and Mr. I.F.

6.8 The State party submitted that, at the time of the first investigation in relation to the petitioner's application of 18 July 2008, Ms. Y.L. and Mr. A.K. explained that they perceived their actions as a mean joke with the aim of causing harm to Mr. I.B. and Mr. I.F. through expected actions of the representatives of the Roma community and that they did not intend to incite enmity between the Roma and the Russians. Furthermore, they did not

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<sup>16</sup> Reference is made to articles 13, paragraph 5, and 29, paragraph 2, of the Constitution; articles 1, 13 and 15 of the Federal Law "On the Counteraction of Extremist Activity"; articles 63, 148, 149, 150, 213, 214, 243, 244, 280 282, and 282.1 of the Criminal Code; article 20.29 of the Code of Administrative Offences; and Decree of the Prosecutor General No. 362 of 19 November 2009 "On the Establishment of Supervision by the Prosecutor's Office over the Compliance with Legislation on the Counteraction of Extremist Activity".

participate in any organizations that propagandised violence against the Roma or against any other nationalities and they had friends of Roma ethnicity.

6.9 The State party referred to the linguistic examination report of 30 October 2008, according to which the text of one of the leaflets with the appeals for violence against the Roma contained the expressions which could be characterized as ‘extremist’, since it called for violent acts against the persons of another nationality or ethnic origin. According to this report, there were no semantic features of the same kind in the other leaflets. At the same time, several expressions and phrases in the text of the leaflets contained insults on the grounds of nationality or race.

6.10 The State party reiterated the conclusion of the investigating authorities that there had been no elements of crimes proscribed by article 280, part 1, and article 282, part 1, of the Criminal Code in the actions of Ms. Y.L. and Mr. A.K. It stated that in accordance with article 282 of the Criminal Code, actions amount to incitement to hatred or enmity, as well as to abasement of human dignity if they pursue the aim of attaining the desired outcomes. *Actus reus* of the crime prescribed active influence upon will and mind of people by public actions intended at incitement of hatred or enmity, or at origin of determination and eagerness to act in such a way or furtherance of present intention. *Mens rea* of the crime prescribed only direct intent and, therefore, any incidental emotional manifestation of discontent or pursuit of other aims could not amount to incitement of hatred or enmity, as well as to abasement of human dignity.

6.11 The State party submitted that the analysis of the investigation materials proved that Ms. Y.L. produced and Mr. A.K. distributed the leaflets with the aim of informing the Roma and not the general public about their content. The fact that the leaflets were distributed in the area predominantly populated by the Roma, in particular in the courtyard Ms. L.U.’s house, supported this conclusion. Therefore, the actions did not intend to be addressed to the individuals of other ethnic origin and did not appeal to acts of violence against the Roma.

6.12 The State party explained that its law defined ‘call’ as an active influence upon mind and will of people with the aim of encouraging them to commit violent acts of seizure of power, retention of power or change of the constitutional system, etc. ‘Publicity’ of actions, which was prescribed by article 280 of the Criminal Code, presupposed that the appeals were addressed to the general public. The most typical examples of the ‘publicity’ were speeches and presentations held in meetings, rallies and other public activities, proclaiming extremist slogans during demonstrations, processions, pickets and etc. Moreover, it should be established that the public accepted the appeals.

6.13 The State party reiterated its argument that the content of the leaflets was in fact addressed to representatives of the Roma community. Ms. Y.L. and Mr. A.K. did not pursue the goal of stirring up a conflict between members of different ethnic groups and nationalities residing in the town of OPOCHKA. Furthermore, the fact that the leaflets were distributed in the area predominantly populated by the Roma and, in particular, in the courtyard of Ms. L.U.’s house, did not satisfy the requirement of ‘publicity’ of actions provided for in article 280 of the Criminal Code.

6.14 The State party submitted that the actions of Ms. Y.L. and Mr. A.K. were prompted by their intent to cause harm only to Mr. I.B. and Mr. I.F. through the actions of the Roma. This conclusion, in the State party’s view, was confirmed by the textual content of the leaflets, in which Mr. I.B. and Mr. I.F. were singled out from the titular ethnic group as the representatives of the ‘white brothers’. Therefore, the intentions of Ms. Y.L. and Mr. A.K. to initiate the conflict between the representatives of the Roma community and Mr. I.B. and Mr. I.F. did not imply that their goal was to incite hatred between different ethnic groups on

the ground of nationality, since there was a dominant motivation to take vengeance on the concrete individuals.

6.15 The State party added that two individuals residing in the proximity of the area where the leaflets had been found explained that they did not belong to the Roma community. They were unaware of the distribution of the leaflets threatening the Roma and did not see them. No other individuals with the knowledge of the distribution of the leaflets, except for Ms. L.U., have been identified as a result of the house-to-house tour of the area where the leaflets in question had been found. When questioned, Ms. L.U. explained that when she had found the leaflets in the courtyard of her house, she thought that somebody could do harm to her and brought those leaflets to the militia office. However, she did not receive any threats. Moreover, she was unaware of any facts of discrimination of the Roma in OPOCHKA area. Afterwards she got to know that ‘the leaflets were written by a girl, who wished to cause harm to two guys’. The State party stated that even though Ms. L.U. did not have any complaints in respect to anyone, she was explained her right to apply to the justice of the peace with the request to initiate proceedings under article 130 of the Criminal Code.

### **Issues and proceedings before the Committee**

#### *Consideration of admissibility*

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

7.2 The Committee notes that the Pskov Regional Court found on 25 February 2009 that the petitioner did not have legal standing in the case, as she ‘lived and worked in St. Petersburg, was officially registered as residing in Vlesno village of the Krasnogorodsk district of the Pskov region’, whereas the leaflets at issue in the present communication were only found in the town of OPOCHKA and were clearly intended for a local readership (see, paragraph 2.1 above). The Committee also notes that the Prosecutor’s Office conducted investigations into the petitioner’s complaint on six separate occasions and that each investigation came to the conclusion that the facts of the case revealed that the leaflets were meant to target and expose the two individuals who were named as authors of the leaflets. The Committee recalls its established jurisprudence<sup>17</sup> that in order for an individual to be able to claim to be a victim of a violation of any of the rights guaranteed in the Convention, he or she should be directly and personally affected by the action (or the omission) in question. Any other conclusion would open the door for litigation of a general nature without identifiable victims (*actio popularis*)<sup>18</sup> and, therefore, fall outside the scope of the individual communications procedure established under article 14 of the Convention. With reference to the above, the Committee considers that the petitioner cannot qualify as a victim since the content of the leaflets has not directly and personally affected her. The communication is therefore inadmissible *ratione personae* under article 14, paragraph 1, of the Convention.

7.3 Having come to this conclusion, the Committee does not consider it necessary to address the other issues raised by the parties regarding the admissibility of the communication.

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<sup>17</sup> Communication No. 28/2003, *Documentation and Advisory Centre on Racial Discrimination v. Denmark*, Inadmissibility decision adopted on 19 August 2003, paragraph 6.6.

<sup>18</sup> Ibid.

7.4 Although the Committee considers that it is not within its competence to examine the present communication,<sup>19</sup> it takes note of the racist and xenophobic nature of the actions of the identified author of the leaflets that had been found in the town of OPOCHKA, Ms. Y.L., as well as of her identified accomplice, Mr. A.K., and reminds the State party of its obligations under articles 4 and 6 of the Convention to prosecute *ex officio* all statements and actions which attempt to justify or promote racial hatred and discrimination in any form, regardless of whether or not there was a formal request from the alleged victim(s) to initiate criminal proceedings under article 282 of the Criminal Code. The Committee also takes the opportunity to remind the State party of its Concluding Observations, following consideration of the State party's periodic report in 2008, in which it had commented and made recommendations upon: (a) the alarming increase in the incidence and severity of racially motivated violence against the Roma; (b) the increase of racist and xenophobic attitudes especially among young Russians; and (c) the absence of information on complaints or court decisions in civil or administrative, as well as criminal proceedings, concerning acts of racial discrimination.<sup>20</sup> It, therefore, encourages the State party to follow-up on its recommendations and to provide pertinent information on the above concerns in the context of the Committee's procedure for follow-up to its concluding observations.

8. The Committee on the Elimination of Racial Discrimination therefore decides:

- (a) That the communication is inadmissible *ratione personae* under article 14, paragraph 1, of the Convention.
- (b) That this decision shall be communicated to the State party and to the petitioner.

[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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<sup>19</sup> Communication No. 37/2006, *A.W.R.A.P. v Denmark*, Opinion adopted on 8 August 2007, paragraph 6.5.

<sup>20</sup> CERD/C/RUS/CO/19, 22 September 2008, paragraphs 18, 28 and 29.