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COMMITTEE ON THE ELIMINATION
OF RACIAL DISCRIMINATION
Sixty-eighth session
20 February to 10 March 2006

DECISION

Communication No. 29/2003

Submitted by:	Mr. Dragan Durmic (represented by the European Roma Rights Center and the Humanitarian Law Center)
Alleged victim:	The petitioner
State Party:	Serbia and Montenegro
Date of the communication:	2 April 2003 (initial submission)
Date of the present decision:	6 March 2006

[Annex]

* Made public by decision of the Committee against Torture.

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

– 68th session –

concerning

Communication No. 29/2003

Submitted by:	Mr. Dragan Durmic (represented by the European Roma Rights Center and the Humanitarian Law Center)
Alleged victim:	The petitioner
State Party:	Serbia and Montenegro
Date of the communication:	2 April 2003 (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 2006,

Having concluded its consideration of communication No. 29/2003, submitted to the Committee on the Elimination of Racial Discrimination by Mr. Dragan Durmic 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 author of the communication, his counsel and the State party,

Adopts the following decision:

1. The petitioner is Dragan Durmic, a national of Serbia and Montenegro and of Romani origin. He claims to be a victim of violations of Serbia and Montenegro of article 2, paragraph 1 (d), read together with article 5 (f), as well as articles 3, 4 (c) and 6 of the International Convention on the Elimination of Racial Discrimination. The petitioner is legally represented by the Humanitarian Law Center and the European Roma Rights Center. Serbia and Montenegro made the declaration under article 14 of the Convention on 27 June 2001.

The facts as presented by the petitioners

2.1 In 2000, the Humanitarian Law Center (HLC) carried out a series of "tests" across Serbia, to establish whether members of the Roma minority were being discriminated against while attempting to access public places. It was prompted to such action by numerous complaints alleging that the Roma are denied access to clubs, discotheques, restaurants, cafes and/or swimming pools, on the basis of their ethnic origin.

2.2 On 18 February 2000, two Roma individuals, one of whom the petitioner, and three non-Roma individuals, attempted to gain access to a discotheque in Belgrade. All were neatly dressed, well-behaved and were not under the influence of alcohol. Thus, the only apparent difference between them was the colour of their skin. There was no notice displayed to the effect that a private party was being held and that they could not enter without showing an invitation. The two individuals of Roma origin were denied entry to the club on the basis that it was a private party and they did not have invitations. When the petitioner asked the security guard how he may obtain an invitation there and then, he was told that it was not possible and that the invitations were not for sale. He was unwilling to inform the petitioner how he might obtain an invitation for future events. The three non-Roma individuals were all allowed to enter, despite having no invitations for the so called private party and making this clear to the security personnel at the time.

2.3 On 21 July 2000, on behalf of the petitioner, the HLC filed a criminal complaint with the Public Prosecutor's Office in Belgrade. It was directed against unidentified individuals employed by the discotheque in question on suspicion of having committed a crime under article 60 of the Serbian Criminal Code[1]. The petitioner claimed a violation of his rights as well as the rights of the other Roma individual to equality, human dignity and equal access to places intended for the use of the general public. Among the international provisions invoked, the HLC put special emphases on article 5 (f) of the ICERD. It requested the Public Prosecutor's Office to identify the perpetrators and initiate a formal judicial investigation against them, or file an indictment directly in the competent court.

2.4 After 7 months, in the absence of any response, the HLC sent another letter to the Public Prosecutor stressing that, should the latter dismiss the criminal complaint, and if the perpetrators had been identified by that time, the petitioner and the other alleged victim wished to exercise their legal prerogative to take over the prosecution of the case in the capacity of private/subsidiary prosecutors[2]. The Public Prosecutor responded that he had requested the police

[1] Article 60 provides "Whoever denies or restricts on the grounds of distinctions in nationality, race, religion, political or other affiliation, ethnicity, sex, language, education or social status the rights of citizens embodied in the Constitution, law, or other regulations or ordinances, or a ratified international treaty, or whoever grants citizens benefits or privileges on these grounds, shall be punished with a term of imprisonment of three months to five years."

[2] According to the petitioner, under domestic law, if the Public Prosecutor finds that there is reasonable suspicion that a certain person has committed a criminal offence, he will request the investigating judge to institute a formal judicial investigation. But if not, he must inform the complainant of this decision, who can in turn exercise his prerogative to take over the prosecution of the case on his own behalf.

on two separate occasions in August 2000 to investigate this incident but that they had failed to do so.

2.5 On 22 October 2001, the Public Prosecutor informed the HLC that it had confirmed, through police inquiries, that there had been a private party at the disco on the date in question, allegedly organised by the owner of the establishment. He also stated that the police had ignored the order to identify and question the security personnel on the evening of the incident. No further information was received from the Public Prosecutor. According to the petitioner, under articles 153 and 60 of the Criminal Procedure Code, in circumstances where the Public Prosecutor simply ignores a criminal complaint filed by a complainant regarding a crime, the complainant can only wait for the Prosecutor's decision or, alternatively, informally urge him to take action as provided for by law.

2.6 On 30 January 2002, the petitioner filed a petition in the Federal Constitutional Court stating that, by failing to identify the perpetrators and dismissing the criminal complaint, the Public Prosecutor prevented the petitioner and alleged victim from taking over the prosecution of the case on their own behalf. More than 15 months after submitting the petition to the Federal Constitutional Court, the petitioner has not received any response and thus has obtained no redress for the violations suffered.

The complaint

3.1 On the issue of *ratione temporis*, the petitioner acknowledges that the incident in question predates the State party's declaration under article 14 of the Convention. However, he argues that the Socialist Federal Republic of Yugoslavia (SFRY) ratified the Convention in 1967 and following its dissolution the Convention retained its binding effect with respect to all successor states, including the State party. On 4 February 2003, the Former Republic of Yugoslavia (FRY) renamed itself the State Union of Serbia and Montenegro but remained the same subject under international law. In his view, article 14 is a simple jurisdictional clause and therefore a declaration made in accordance with this article results merely in the recognition by the State concerned of another means by which the Committee can monitor implementation of the Convention. He notes that article 14 contains no express temporal limitation which would prevent the Committee from examining petitions on the basis of facts that had taken place prior to the date of deposit of the declaration. In any event, he argues, it is now more than 21 months following the declaration and the State party has yet to provide the petitioner with any redress. The petitioner refers to the jurisprudence of the European Court of Human Rights and of the Human Rights Committee.

3.2 As to "testing" as a technique used for the collection of evidence on allegations of discrimination, the petitioner submits that since the 1950s US courts have recognised testing as an effective means of proving discrimination. He also refers to the jurisprudence of the CERD which he purports demonstrates that the Committee itself has confirmed the admissibility of such

cases.[3] The petitioner also requests the opportunity to provide further clarification on this issue if the Committee considers it necessary.

3.3 The petitioner alleges that he has exhausted all effective domestic remedies available. As to constitutional remedies, he denies that there is or ever was a constitutional remedy available to individual victims of discrimination. He acknowledges that, on 27 June 2001, the FRY made a declaration under article 14, paragraph 2, of the Convention, designating the country's Federal Constitutional Court as the final domestic judicial instance entrusted with receiving and considering all complaints alleging discrimination – "*providing all other domestic remedies have already been exhausted"*. However, according to the Constitution of the FRY, adopted on 27 April 1992, no such competence was ever granted. In fact, article 128 of the Constitution expressly stated that "the Federal Constitutional Court shall decide on a complaint [alleging various individual human right violations, including discrimination] only when other legal remedies are not available" - i.e. "*when the law provides no other legal remedy for a given kind of violation"*.

3.4 The Federal Constitutional Court explained its competence as follows: "If dissatisfied with the final decision of the Republican Labour Office, the party is entitled to institute administrative litigation before the Serbian Supreme Court ….. The Court has established that the person who filed [this] constitutional complaint had recourse to other means of legal protection, of which he availed himself... For this reason ... the Court has decided to dismiss the constitutional complaint." The petitioner alleges that such legal reasoning led lawyers to conclude that constitutional complaints were indeed "a purely theoretical remedy since the Yugoslav legal system nominally provides protection in almost all cases of human rights violations." The authorities did not amend the Constitution of the FRY, nor the Federal Constitutional Court Act, which would have been necessary to formally provide for an expansion of the Federal Constitutional Court's competence to examine cases of discrimination as the final judicial instance – once an alleged victim has been unsuccessful in obtaining redress from all other/regular remedies.

3.5 On 4 February 2003, the FRY adopted a new constitution and renamed itself the State Union of Serbia and Montenegro. The former Federal Constitutional Court was to be replaced by the Court of Serbia and Montenegro. Pursuant to article 46 of the Charter, this court will also be competent to consider individual complaints alleging human rights violations, including discrimination, but, like the old Court, only "if no other recourse has been provided for". Finally, article 62 (1) of the new Court of Serbia and Montenegro Act, adopted on 19 June 2003, confirmed this understanding of the competence of the Court by providing that an individual complaint can be filed only if "no other avenue of legal redress exists" within either Serbia or Montenegro. Prior to the adoption of the new Constitutional Charter as well as subsequently, domestic legislation contained provisions affording other non-constitutional, means of redress to victims of racial discrimination - including civil and/or criminal remedies. Therefore, the

[3] Lacko v. Slovakia, Case No. 11/1998, Opinion of 9 August 2001, B.J. v. Denmark, Case No. 17/1999, Opinion of 17 March 2000 and M.B. v. Denmark, Case No. 20/2000, Opinion 13 March 2002.

petitioner argues, notwithstanding the article 14 declaration, there is no (and has never been) a constitutional remedy available to victims of discrimination. The petitioner adds that the article 14 declaration itself refers to a currently non-existent court i.e. the Federal Constitutional Court, and not to the Court of Serbia and Montenegro.

3.6 Regardless of the petitioner's view in this regard and to oppose any possible objections from the State party on exhaustion of domestic remedies, the petitioner filed a submission in the Federal Constitutional Court and, in so doing, invoked the article 14 declaration. On exhaustion of domestic remedies, he concludes that the wrong suffered by him is of such a serious nature that only a criminal remedy would provide adequate redress and that he exhausted all domestic criminal remedies, as well as the merely "hypothetically available" constitutional remedy, and still obtained no redress. For the preposition that domestic remedies have been exhausted to the extent that criminal remedies are the only effective remedies to address the kind of violations at issue, the petitioner refers to the cases of *Lacko v. Slovakia* and *M.B. v. Denmark*[4], both found to be admissible by CERD, as well as jurisprudence of the European Court of Human Rights.[5]

3.7 As to the six-months rule, the petitioner submits that although he filed a complaint in the Federal Constitutional Court, this Court never considered the matter. Moreover, as a result of the adoption of the new Constitutional Charter, this Court has since ceased to exist and is yet to be replaced by the new Court of Serbia and Montenegro which, according to the petitioner, will have no competence to consider individual discrimination cases. For the petitioner, the six-month time limit has not even started running, and his communication is therefore both timely and admissible. He invokes the jurisprudence of the European Court of Human Rights, which has accepted cases when there is a continuing situation, act or omission that can be imputed to the authorities.

3.8 The petitioner submits that the allegations of violations ought to be interpreted against a backdrop of systematic discrimination of Roma in the State party, as well as the practical absence of any adequate form of redress. He claims a violation of article 2, paragraph 1 (d), read together with article 5 (f) of the Convention as the discotheque the petitioner was prevented from accessing a "place or service intended for use by the general public," on the basis of his race. The failure of the State party to prosecute the owners of the discotheque for its discriminatory practice, and to ensure that such discrimination does not recur, is said to amount to a violation of article 5 (f), read in conjunction with article 2, paragraph 1 (d).

3.9 The petitioner refers to the Committee's General Recommendation on article 5[6], in which the Committee noted that, although article 5 "does not of itself create civil, political, economic, social or cultural rights, [it] assumes the existence and recognition of these rights. The Convention obliges States to prohibit and eliminate racial discrimination in the enjoyment of such human rights." Thus, the Committee looks to the extent to which States have ensured "the

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[4] Supra.

[5] A v France, Judgment of 23 November 1993, Series A, No. 277-B. See also Yagiz v. Turkey, App. No. 19092/91, 75 D&R 207 as well as Sargin and Yagci v. Turkey, App. No. 14116-7/88, 61 D&R 250.

[6] CERD/48/Misc.6/Rev. 2 (1996), para. 1.

non-discriminatory implementation of each of the rights and freedoms referred to in article 5 of the Convention." Moreover, the Committee indicated that States' responsibility to ensure protection of the "rights and freedoms referred to in article 5 of the Convention" is not dependent on the good will of each government; it is mandatory. The scope of this binding obligation is to ensure the "effective implementation" of the rights contained in article 5. Indeed, CERD has held that the Convention prohibits discrimination by both private parties and public authorities. The petitioner also refers to the Human Rights Committee's interpretation of article 26, the general non-discrimination provision of the International Covenant on Civil and Political Rights on the obligation of States parties to protect against discrimination.

3.10 The petitioner claims a violation of article 3 of the Convention, as he was subjected to a form of racial segregation by being refused entry to the discotheque solely on grounds of race. The State party's failure to provide any remedies in this case constitutes a failure to comply with its obligation under article 3 to "prevent, prohibit and eradicate all practices of this nature....". He claims a violation of article 4 (c) as by failing to prosecute the owners of the discotheque or in any way remedy the alleged discrimination against the petitioner and the other alleged victim, the prosecuting authorities - the police and the Public Prosecutor's Office - have promoted racial discrimination. In its General Recommendation on article 4 of the Convention, the CERD recalled "that the provisions of article 4 are of a mandatory character. To satisfy these obligations, States parties have not only to enact appropriate legislation but also to ensure that it is effectively enforced."

3.11 The petitioner invokes article 6 of the Convention, as the State party has not provided him with a remedy for the discrimination he suffered, nor has it taken measures to punish the perpetrators or ensure that such discrimination does not recur. For the same reasons, the petitioner has to date been denied his right to civil compensation, which he may only claim in criminal proceedings. Due to the State party's failure to provide any remedies in the instant case, and notwithstanding the existing domestic criminal provisions prohibiting discrimination in access to public places, the petitioner has been forced to live with continuing uncertainty as to whether he will be admitted to the discotheque on any given date in the future.

The State party's admissibility submission

4.1 By submission of 12 August 2003, the State party submitted its response on admissibility. As to the facts, it stated that, on 20 August 2000 the Ministry of Internal Affairs was requested to collect the necessary information and to identify the persons working for the discotheque in question. Subsequent requests were made to the Ministry on 3 July and, 22 October 2001, 5 February, 2 October, and 23 December 2002, 25 February 2003 and 14 May 2003. On 4 April 2001, the Ministry submitted a report from which it transpires, based on an interview with the manager of the club, that a private party for specially invited guests was being held on the night in question. The manager could not identify the security personnel on duty that night, given the club's frequent personnel turnover. Consequently, as a result of the problems in establishing their identity the Public Prosecutor had difficulty in building up a case.

4.2 According to the State party, articles 124 and 128 of the Constitution of the Federal Republic of Yugoslavia, in force at the time of the alleged incident, laid down the competence of

the Federal Constitutional Court to consider claims of violations of the rights and freedoms enshrined therein and to consider complaints "when other legal remedies are not available". It is submitted that these provisions are referred to in the article 14 declaration made by the FRY on 27 June 2001, in recognition of the competence of the Committee to receive and consider communications. The State party acknowledges that on 30 January 2002, the petitioner submitted a complaint to the Federal Constitutional Court, as the last instance in the matter, the consideration of which was postponed by the Court on 2 December 2002. The Court has not examined this matter yet for the following reasons: following the adoption of the Constitutional Charter of the State Union of the Serbia and Montenegro on 4 February 2003, the FRY ceased to exist. Under article 12 of the Law on the Implementation of the Constitutional Charter, the Federal Constitutional Court transmitted all undecided cases to the Court of Serbia and Montenegro, the competence of which in this matter is defined in article 46 of the Constitutional Charter. Considering that the judges of the Court have not been elected and that, accordingly, the Court itself has not yet been constituted, the Federal Constitutional Court continues to work, considering matters of vital importance for the functioning of the State only and leaving all other cases for consideration by the Court of Serbia and Montenegro once it is constituted and operational. In view of the fundamental changes that took place in the judicial system of the country, the prolongation of the case, the State party submits, is justifiable.

4.3 The State party contends that in April 2003, the petitioner publicly disclosed the present communication, allegedly in contravention of article 14, paragraph 4, of the Convention.

Petitioner's comments on State party submission

5.1 On 2 October 2003, the petitioner commented on the State party's submission. As to the conduct of the investigation, he notes that the prosecuting authorities have not even identified the security personnel more than three years after the submission of the criminal complaint and that the procedure has been prolonged. The excuse offered by the State party seems to imply that the police are dependent on the good will of the club manager in order to proceed. In addition, there is no information on the thoroughness of the investigation undertaken by the police: whether they looked into the club's internal records to establish the identity of the individuals employed at the time or whether, in the absence of such records, they informed other competent authorities in order to hold the club manager legally accountable for failing to register his employees as required by domestic labor and tax law. The police and Public Prosecutor have failed to date to contact the petitioner and/or other witnesses for the purpose of obtaining a detailed description of the security personnel in question. The petitioner invokes the jurisprudence of the United Nations Committee against Torture in support of his claim that the State party has failed to conduct a comprehensive, prompt, and ultimately effective official investigation into the incident.

5.2 The petitioner reiterates his initial arguments on the issue of exhaustion of domestic remedies. Neither he nor his legal representatives were ever informed about the alleged decision of the former Federal Constitutional Court of 2 December 2002 to postpone consideration of the case. To his knowledge, the Court simply did not respond for more than 12 months - or rather, up to the very moment when it actually ceased to exist. Indeed, he argues, the State party has not provided a copy of the Court's decision referred to and even if it did this would not address in substance any of the above issues. The petitioner submits that a long-term backlog of cases, and

a change in a State's legal framework, coupled with its failure to take remedial measures, cannot be invoked as an excuse for continuing to deny redress to an individual. On the contrary, States are obliged to organize their legal systems so that they comply with the requirements of legal certainty and provide effective remedies to all victims of human rights abuse. However, in the petitioner's view, his argument is purely academic, as the only decision the Federal Constitutional Court could have adopted in this instance, would have been to reject the petitioner's communication on the grounds that there are other, non-constitutional, remedies available.

5.3 As to the claim that he violated article 14 of the Convention, the petitioner submits that the State party misinterpreted the non-disclosure guarantee contained therein. This provision imposes a burden on the State party itself to keep the names and other personal details of all petitioners confidential and relates to "the proceedings before the designated domestic anti-discrimination body only". In a situation where the petitioner himself wishes to publicise his petition submitted to the Committee, this cannot be deemed in violation of article 14, paragraph 4, of the Convention.

Decision on admissibility

6.1 At its sixty-fifth session the Committee examined the admissibility of the communication. As to whether the petitioner had submitted the petition within the time limit set out in rule 91 (f) of the Committee's rules of procedure, the Committee recalled that, communications must be submitted to it, except in the case of duly verified exceptional circumstances, within six months after all available domestic remedies have been exhausted. It observed that the Court of Serbia and Montenegro had not yet considered the matter and therefore the six-month rule had not yet begun to run.

6.2 As to the State party's claim that the petitioner violated article 14, paragraph 4, of the Convention, by publicly disseminating the contents of his petition, the Committee recalled that paragraph 4 provides that,

> "A register of petitions shall be kept by the body established or indicated in accordance with paragraph 2 of this article, and certified copies of the register shall be filed annually through appropriate channels with the Secretary General on the understanding that the contents shall not be publicly disclosed."

6.3 The Committee was of the view that the obligation to refrain from publishing information on individual petitions, prior to examination by the Committee, applies only to the Secretary General of the United Nations, specifically, acting through the Secretariat, and not to the parties to the petition who remain at liberty to publish any information at their disposal relating to a petition.

6.4 As to the question of admissibility *ratione temporis,* the Committee noted that although the incident in front of the discotheque (18/2/2000) took place before the declaration was made under article 14 (27/6/01), what had to be considered from the point of view of the State party's obligations, is not the incident itself, which took place between individuals, but the shortcomings

of the competent authorities in conducting the investigation and the absence of efforts made by the State party to guarantee an effective remedy to the petitioner, in accordance with article 6 of the Convention. As the State party had so far failed to complete its investigations, to refer this case to the new Court of Serbia and Montenegro and to offer other remedies to the petitioner, the alleged violations were ongoing and had continued since the date of the incident itself and after the State party's declaration under article 14. Consequently, the Committee found that this claim was admissible *ratione temporis* under article 14.

6.5 On the question of exhaustion of domestic remedies, the Committee observed that a complaint was made to the Federal Constitutional Court on 30 January 2002 and, at least up to the date of consideration by the Committee, had not been considered either by that Court or by its successor, the new Court of Serbia and Montenegro. While noting the State party's arguments on the ongoing changes within its judicial system, the Committee observed that the petitioner had sought to have his claims of violations of the Convention by the State party adjudicated for over four and a half years, since the incident in February 2000. In this regard, the Committee noted that the State party itself had conceded that the prospect of an early review was unlikely, given that the new Court of Serbia and Montenegro had not even been constituted. The Committee recalled that in article 14, paragraph 7, of the Convention, the requirement to exhaust domestic remedies does not apply if the application of the remedies is unreasonably prolonged. It considered that the application of remedies in this case had been unduly prolonged, and thus found that the requirements of article 14, paragraph 7 (a), had been met. On 5 August 2004, therefore, the Committee declared the case admissible.

The State party's submission on the merits and petitioner's comments thereon

7.1 On 10 June 2005, the State party informed the Committee that officers from Vracar Police Station had again interviewed the witnesses involved in this case but could take no further action, as it was not possible to identify the person/s alleged to have committed the offence. Meanwhile, due to the application of the Statute of Limitations, the lapse of time has barred any further investigation of the case.

7.2 For the State party, even if criminal proceedings had been instituted, the petitioner would have been instructed by the Court to pursue a civil claim, due to the fact that the necessity to call expert evidence to assess the petitioners request for damages would delay the criminal proceedings and increase the costs. In cases in which claims are made for non-material damages in criminal proceedings, the claimant is instructed to pursue his/her claim through civil proceedings. If the petitioner's complaint had reached the criminal court, it would have been dismissed because of the high standard of proof required in criminal proceedings.

7.3 According to the State party, the petitioner could have pursued civil claims for compensation. The Law on Contracts and Torts and the Law on Litigation allows a victim to institute civil proceedings independently from criminal ones. A victim may institute civil proceedings for damages in a situation where the defendant in criminal proceedings has been acquitted. The same law would also have permitted the petitioner to institute civil proceedings against the club itself for which he would not have had to identify the individual allegedly responsible for the damage. It would suffice to establish that the individuals responsible were

employees of the club and that the petitioner had been prevented from gaining access to it because he is a Roma. Provided that the petitioner is successful and is awarded compensation, the Law also provides publication of the decision. The State party argues that, as the petitioner did not file such a civil claim, he has failed to exhaust domestic remedies, the case is thus inadmissible.

7.4 The State party contests the petitioner's position that the Court of Serbia and Montenegro would have taken a decision in accordance with the practice of the former Federal Constitutional Court, as the new court is not bound by the decision of another court, radical changes have taken place in the judicial system since the Constitutional Court took that position and the laws and the practice of the courts are increasingly influenced by international conventions. In any event, the Court of Serbia and Montenegro has not yet considered this matter.

8.1 On 12 October 2005, the petitioner commented on the State party's submission, arguing that the State appears to rely on the inefficiency of the administrative bodes (Vracar Police Station) entrusted with conducting criminal investigations as an excuse for the Public Prosecutor's inability to provide redress to the petitioner. The police limited themselves to recording the statements of the manager of the disco without corroborating them with any other sources. They failed to take basic investigative steps to elucidate the circumstances of the incident, such as looking into the club's internal records to establish the identity of the individuals employed at the time or, informing other competent authorities to hold the club legally accountable for failing to register its employees, as required by law.

8.2 The petitioner submits that the statute of limitations has been invoked as an excuse for the failure to enforce the law when it is the State itself which is responsible for the excessive length of the investigation. The Public Prosecutor has still not issued a decision on the complaint. Under international law, States are obliged to provide effective remedies to all victims of human rights violations and excuses such as a large backlog of cases, a change in the State's legal structure, coupled with its failure to take remedial measures, or other administrative difficulties of the State's own making, are no justification for the continued absence of redress[7].

8.3 As to the State party's argument that if the petitioner's complaint had reached the criminal court, it would have been thrown out because of the high standard of proof required in criminal proceedings, the State are relying on the inefficiency of its investigative bodies to gather sufficient evidence. In the present case, it has not even passed the investigative stage.

8.4 As to the arguments that the State party's criminal courts are ill-equipped to determine damage for non-pecuniary harm, and that conducting forensic expertise to determine the size of non-pecuniary damage is time-consuming, the petitioner submits that the State party's courts appear to be guided by considerations of expediency rather than the desire for justice for victims of crime.

[7] The petitioner refers to the judgements of the European Court of Human Rights: Pelissier and Sassi v. France, 25 March 1999, Application no. 25444/94; Zimmerman and Steiner v. Switzerland, 13 July 1983, Application no. 8737/79 and Guincho v. Portugal, 10 July 1984, Application no. 8990/80...

8.5 It remains unclear for the author why the State party argues that criminal remedies are inadequate remedies when a crime that caused non-pecuniary harm has been committed. A criminal court must be able to provide non-pecuniary damage to the aggrieved party, in addition to the identification and the punishment of those responsible.

8.6 As to the alternative remedies proposed by the State party, the petitioner submits that the wrong he suffered is so serious and so clearly in violation of the Convention that only a criminal remedy could have provided redress. Consequently, civil and administrative remedies alone are not sufficiently effective. He invokes the Committee's decision in of Lacko v Slovakia.[8]

8.7 On the possibility of introducing an alternative civil action for damages under articles 154 and 200 of the Law of Obligations, the petitioner argues that even if he had chosen to seek redress in a civil court, he would have been barred from doing so, as it is the practice to suspend civil proceedings for damages arising from criminal offences, until the relevant criminal proceedings have been completed. In any event, he would have been obliged to identify the respondent. As to taking a civil action against the club itself, he submits that this would not have been a substitute for a criminal action and that the individuals responsible would escape responsibility. In addition, any such legal action would be destined to fail, given the potential evidentiary difficulties that the petitioner would face.

Consideration of the merits

9.1 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 petitioner and the State party.

9.2 In relation to the State party's request that the Committee should reconsider its decision on admissibility on the grounds that the petitioner has not exhausted domestic remedies by failing to institute civil proceedings against the discotheque in question, the Committee recalls its jurisprudence established in the case of Lacko v. Slovak Republic[9], that objectives pursued through a criminal investigation could not be achieved by means of civil or administrative remedies of the kind proposed by the State party. Therefore, the Committee sees no reason to review its decision on admissibility of 5 August 2004.

9.3 As to the merits, the Committee considers it unreasonable that the State party, including the Public Prosecutor, appear to have accepted the claim that it was impossible to identify the personnel involved in the incident in question by reason of a high turn over of staff without further investigation or enquiry on why such information would not be readily available.

9.4 The Committee does not share the State party's opinion that due to the Statute of Limitations it is now too late to initiate proceedings against those considered responsible, as the delays in the investigation appear to have been wholly attributable to the State party itself. This point supports the petitioner's argument that the investigation was neither conducted promptly

[8] Supra
[9] Supra

nor effectively, as nearly 6 years after the incident (and apparently after the expiry of the time limit under the Statute of Limitations) no investigation, let alone a thorough one has been carried out. In this regard, the Committee notes that the Court of Serbia and Montenegro has still not considered the case and it is noteworthy that the State party has provided no likely date for its consideration.

9.5 The State party has equally failed to establish whether the petitioner had been refused access to a public place, on grounds of his national or ethnic origin, in violation of article 5 (f), of the Convention. Owing to the police's failure to carry out any thorough investigation into the matter, the failure of the public prosecutor to reach any conclusion, and the failure of the Court of Serbia and Montenegro even to set a date for the consideration of the case, some six years after the incident, the petitioner has been denied any opportunity to establish whether is rights under the Convention had been violated.

9.6 The Committee notes that in previous jurisprudence it has found violations of article 6 of the Convention without finding violations of any of the substantive articles[10]. The State party's response to the claims of racial discrimination was so ineffective that it had failed to ensure appropriate protection and remedies pursuant to this provision. According to article 6, "States parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention." Although on a literal reading of the provision it would appear that an act of racial discrimination would have to be established before a petitioner would be entitled to protection and a remedy, the Committee notes that the State party must provide for the determination of this right through the national tribunals and other institutions, a guarantee which would be void were it unavailable in circumstances where a violation had not yet been established. While a State party cannot be reasonably required to provide for the determination of rights under the Convention no matter how unmeritorious such claims may be, article 6, provides protection to alleged victims if their claims are arguable under the Convention. In the current case, the petitioner presented such an arguable case but the State party's failure to investigate and adjudicate the case effectively prevented the determination of whether a substantive violation had occurred.

10. The Committee concludes that the State party failed to examine the petitioner's arguable claim of a violation of article 5 (f). In particular, it failed to investigate his claim promptly, thoroughly and effectively. Consequently, article 6 of the Convention has been violated.

11. The Committee recommends that the State party provide the petitioner with just and adequate compensation commensurate with the moral damage he has suffered. It also recommends that the State party take measures to ensure that the police, public prosecutors and the Court of Serbia and Montenegro properly investigate accusations and complaints related to acts of racial discrimination, which should be punishable by law according to article 4 of the Convention.

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[10] Habassi v. Denmark, Opinion No. 10/1997, adopted on 17 March 1999 and Kashif Ahmad v. Denmark, Opinion No. 16/1999, adopted on 13 March 2000.

12. The Committee wishes to receive, within six months, information from the State party about the measures taken in light of the Committee's Opinion. The State party is requested to give wide publicity to the Committee's Opinion

[Done 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.]
