



**International Convention on
the Elimination
of all Forms of
Racial Discrimination**

Distr.
RESTRICTED*

CERD/C/67/D/30/2003
22 August 2005

Original: ENGLISH

COMMITTEE ON THE ELIMINATION
OF RACIAL DISCRIMINATION
Sixty-seventh session
2 to 19 August 2005

OPINION

Communication No. 30/2003

Submitted by: The Jewish community of Oslo; the Jewish community of Trondheim; Rolf Kirchner; Julius Paltiel; the Norwegian Antiracist Centre; and Nadeem Butt. (represented by counsel, Mr. Frode Elgesem)

Alleged victim(s): The petitioners

State party: Norway

Date of communication: 17 June 2003

Date of the present decision: 15 August 2005

[Annex]

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
– 67th session –
concerning**

Communication No. 30/2003

Submitted by: The Jewish community of Oslo; the Jewish community of Trondheim; Rolf Kirchner; Julius Paltiel; the Norwegian Antiracist Centre; and Nadeem Butt. (represented by counsel, Mr. Frode Elgesem)

Alleged victim(s): The petitioners

State party: Norway

Date of communication: 17 June 2003

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 15 August 2005

Adopts the following:

Opinion

1. The authors of the communication, dated 17 June 2003, are Mr. Rolf Kirchner, born on 12 July 1946, leader of the Jewish community in Oslo, Mr. Julius Paltiel, born on 4 July 1924, leader of the Jewish community in Trondheim, and Nadeem Butt, born on 16 June 1969, leader of the Norwegian Antiracist Centre (NAC). They claim

to be victims of violations by Norway¹ of articles 4 and 6 of the Convention. They are represented by counsel.

The facts as presented:

2.1 On 19 August 2000, a group known as the 'Bootboys' organized and participated in a march in commemoration of the Nazi leader Rudolf Hess in Askim, near Oslo. Some 38 people took place in the march, which was routed over 500 meters through the centre of Askim, and lasted 5 minutes. The participants wore 'semi-military' uniforms, and a significant number allegedly had criminal convictions. Many of the participants had their faces covered. The march was headed by Mr. Terje Sjolie. Upon reaching the town square, Mr. Sjolie made a speech, in which he stated:

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

*Our dear Führer Adolf Hitler and Rudolf Hess sat in prison for what they believed in, we shall not depart from their principles and heroic efforts, on the contrary we shall follow in their footsteps and fight for what we believe in, namely a Norway built on National Socialism ...'*²

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

¹ Norway recognized the competence of the Committee to receive and consider communications under article 14 by declaration of 23 March 1976.

² The speech was recorded on video by the magazine 'Monitor'. It was later used in the criminal proceedings against Mr. Sjolie.

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

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

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

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

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

penalizing approval of Nazism would involve prohibiting Nazi organizations, which it considered would go too far and be incompatible with the right to freedom of speech.³ The majority also considered that the statements in the speech were simply Nazi rhetoric, and did nothing more than express support for National Socialist ideology. It did not amount to approval of the persecution and mass extermination of the Jews during the Second World War. It held that there was nothing that particularly linked Rudolph Hess to the extermination of the Jews; noted that many Nazis denied that the holocaust had happened; and that it was not known what Mr. Sjolie's views on this particular subject were. The majority held that the speech contained derogatory and offensive remarks, but that no actual threats were made, nor any instructions to carry out any particular actions. The authors note that the majority of the Court considered article 4 of the Convention not to entail an obligation to prohibit the dissemination of ideas of racial superiority, contrary to the Committee's position as set out in General Recommendation 15.

2.8 The authors claim that the decision "will serve as a precedent in cases involving s135a of the Penal Code, and that it will henceforth not be possible to prosecute Nazi propaganda and behavior such as that which occurred during the march of 19 August 2000. Following the Supreme Court decision, the Director of Public Prosecution expressed the view that, in light of the Supreme Court's decision, Norway would be a safe have for Nazi marches, due to the prohibition on such marches in neighboring countries.

The complaint:

3.1 The author's contend that they are victims of violations by the State party of articles 4 and 6 of the Convention. They allege that, as a result of the Supreme Court's judgment of 17 December 2002, they were not afforded protection against the dissemination of ideas of racial discrimination and hatred, as well as incitement to such acts, during the march of 19 August 2000; and that they were not afforded a remedy against this conduct, as required by the Convention.

Status as victims

3.2 The authors argue that they are victims of the above violations because of the general inability of Norwegian law to protect them adequately against the

³ Section 100 of the Norwegian Constitution guarantees the right to freedom of speech.

dissemination of anti-Semitic and racist propaganda, and incitement to racial discrimination, hatred and violence. They concede that the Committee has not previously had the opportunity to consider the concept of 'victim' in this context, but submit that the Committee should adopt the approach of both the UN Human Rights Committee and the European Court of Human Rights. They state that the 'victim' requirement in the three Conventions is framed in equivalent terms, and submit that the Human Rights Committee and the European Court have recognized that, by the mere existence of particular domestic laws, a person's rights may be directly affected in a way which results in them being a victim of violations. Reference is made to the decisions of the Human Rights Committee in *Toonen v Australia*⁴ and *Ballantyne et al v Canada*,⁵ and the decision of the European Court of Human Rights in *Dudgeon v United Kingdom*.⁶ In the *Toonen* case, the Human Rights Committee held that the author could claim to be a victim of a violation of his right to privacy because of the existence of a provincial law which criminalized sexual relations between consenting male adults, even though the author had not been prosecuted. An analogous result was reached by the European Court in the *Dudgeon* case. Similarly, in *Ballantyne*, a case involving the prohibition in Quebec of the use of the English language in public outdoor advertising, the Human Rights Committee found that the author could claim to be a victim, although he had not been prosecuted under the relevant legislation. The authors claim that these cases demonstrate that the 'victim' requirement may be satisfied by all members of a particular group, as the mere existence of a particular legal regime may directly affect the rights of the individual victims within the group. In this instance, the authors contend that they, together with any other Jew, immigrant or others facing an imminent risk of suffering racial discrimination, hatred or violence, can claim to be victims of violations of articles 4 and 6 of the Convention.

3.3 The authors submit that they are victims notwithstanding the absence of any direct confrontation with the participants in the march. In this regard, it must be recalled that the Convention is concerned not only with the dissemination of racist ideas as such, but also the effects of this (article 1, paragraph 1). Further, it will rarely be the case that racist views are imparted directly to persons of the race concerned – it

⁴ Communication No 488/1992, Views adopted 31 March 1994.

⁵ Communication No 359 and 385/1989, Views adopted 31 March 1993.

⁶ Judgment of 23 September 1981, series A-45.

will usually be the case that the views are disseminated to likeminded people. If article 4 were not to be read in this context, it would be rendered ineffective.

3.4 The authors also refer to decisions of the European Court of Human Rights, which recognize the right of a potential victim to bring a claim against alleged human rights violation. In *Campbell and Cosans v United Kingdom*,⁷ the Court held that a schoolboy could claim to be a victim of a violation of article 3 of the Convention due to the existence of corporal punishment as a disciplinary measure at the school he attended, even though he himself had never been subjected to it. The general threat of being subjected to such treatment was sufficient to substantiate his claim of being a 'victim'. The authors contend that the existence of violent Nazi groups in Norway, together with the state of Norwegian law after the Supreme Court judgment in the *Sjolie* case, entail a real and imminent risk of being exposed to the effects of dissemination of ideas of racial superiority and incitement to racial hatred and violence, without them being protected, or provided with a remedy, as required by articles 4 and 6 of the Convention.

3.5 The authors further state that, in any event, they have already been personally affected by the alleged violations. The march and speech referred to had a serious adverse effect on Mr. Paltiel, who survived a concentration camp during the war, and who has previously had threats made on his life because of his educational work. The same considerations apply to Mr. Kirchner, whose family was also deeply affected by the persecution of Jews during the war. In addition, the petitioners which are organizations are directly affected, as it is said they will no longer be able to rely on the protection of the law in conducting their work. They argue that the Supreme Court's decision hands over the task of protecting against the effects of racist advocacy to private organizations, and creates new responsibilities for those who are the targets of the racial discrimination.

Exhaustion of domestic remedies

3.6 The authors submit that there are no available domestic remedies to be exhausted. The decision of the Supreme Court is final and there is no possibility of appeal.

On the merits

⁷ Applications No 7511/76 and 7743/76.

3.7 In relation to the merits of the claim, the authors refer to the Committee's General Recommendation No 15, paragraph 3, which requires States parties to penalize four categories of misconduct: dissemination of ideas based on racial superiority or hatred; incitement to racial hatred; acts of violence against any race, and incitement to such acts. They consider that the decision of the Supreme Court is incompatible with the Committee's General Recommendation in relation to article 4 in this regard.

3.8 The authors note that, in the Committee's recent concluding observations on Norway's 15th periodic report, it noted that the prohibition on dissemination of racial hatred is compatible with the right to freedom of speech; article 20 of the International Covenant on Civil and Political Rights stipulates the same. The authors invoke paragraph 6 of General Recommendation No 15, which states that organizations which promote and incite racial discrimination shall be prohibited, and submit that the State party's alleged failure to meet these requirements has been noted with concern by the Committee on previous occasions.⁸ The authors submit that it is fully acceptable for a State party to protect democratic society against anti-democratic propaganda. In particular, they state that there is no basis for the Supreme Court's conclusion that article 4 of the Convention does not require States parties to penalize the dissemination of ideas of racial superiority, given the Committee's clear position on this issue.

3.9 The authors contend that the Supreme Court underestimated the danger of what it termed 'Nazi rhetoric', and that the object of article 4 is to combat racism at its roots. As the Supreme Court minority pointed out, Mr. Sjolie's speech accepted and encouraged violent attacks on Jews, and paid homage to their mass extermination during World War II. In particular, the declaration that the group would follow in the Nazi's footsteps and fight for what they believed in had to be understood as an acceptance of and incitement to violent acts against Jews. The use of the Nazi salute made clear that the gathering was not peaceful, and, given the Bootboys' record of violence, the commemoration march was frightening and the incitement to violence evident.

⁸ The author refers to the 12th to 14th Period Reports (1996/1997), Concluding Observations adopted by CERD at its 1242nd meeting (51st Session) on 21 August 1997, paragraph 13; and 15th Periodic Report (1999), Concluding Observations by CERD adopted at its 1434th meeting (57th Session) held on 23 August 2000, paragraph 14.

3.10 The authors state that, in light of the Supreme Court's decision, section 135a of the Penal Code is unacceptable as a standard for protection against racism. They therefore argue that the State party violated article 4 of the Convention, and consequently violated article 6, as the legal regime laid down by the Supreme Court necessarily implies that no remedies, such as compensation, can be sought.

Observations by the State party

4.1 By note dated 3 October 2003, the State party challenges the admissibility of the communication, and requests that the Committee address the question of admissibility separately from the merits.

4.2 It submits that the authors' communication amounts to an *actio popularis*, the aim of which is to have the Committee assess and evaluate the relationship between section 135a of the Penal Code, as applied by the Supreme Court, and article 4 of the Convention. The State party considers that issues of such a general nature are best dealt with by the Committee under the reporting procedure. It notes that the Committee recently addressed this very issue when considering the 16th report of the State party; the Committee had noted with concern that the strict interpretation of section 135a may not cover all aspects of article 4(a) of the Convention and invited the State party to review this provision and provide information to the Committee in its next periodic report.⁹ The State party submits that it is currently preparing a white paper on proposed amendments to section 100 of the Constitution, which guarantees freedom of speech, and the scope of s135a of the Penal Code. The State party assures the Committee that its Concluding Observations will be a weighty consideration in considering relevant amendments to these provisions.

4.3 The State party submits that neither the Jewish Communities of Oslo and Trondheim, nor the Antiracist Centre, can be considered 'groups of individuals' for the purposes of article 14, paragraph 1. The Jewish Communities are religious congregations comprising numerous members. The Antiracist Centre is a non-governmental organization which seeks to promote human rights and equal opportunity, and conducts research on racism and racial discrimination. The State party submits that, whilst the jurisprudence of the Committee is silent on this issue, a 'group of individuals' should be understood as meaning a group of which every

⁹ Paragraph 12, Concluding Observations dated 22 August 2003.

individual member could claim to be a victim of the alleged violation. What is significant is not the group *per se*, but those individuals who comprise it. It is the individuals, rather than the groups, which have standing.

4.4 In relation to the individual authors, Mr. Kirchner, Mr. Paltiel and Mr. Butt, the State party contends that they have not exhausted domestic remedies. It refers to the decision of the Committee in the case of *POEM and FASM v Denmark*, where it noted that the petitioners had not been plaintiffs in any domestic proceedings, and considered that it was a 'basic requirement of admissibility' that domestic remedies be exhausted 'by the petitioners themselves'.¹⁰ The State party notes that none of the individual petitioners in the present case was a party to the domestic proceedings leading to the Supreme Court's judgment, and that the only complaint about the incident to the police was made by a local politician in the town of Askim. It states that the petitioners have not filed any complaints with the domestic authorities or made any requests for protection.

4.5 The State party contends that the authors are not 'victims' for the purpose of article 14, paragraph 1. There have only been two instances in which the Committee has appeared to find that article 4 gives rise to an individual right, capable of being invoked in the context of a communication under article 14 of the Convention. In both of those cases, the racist expressions had been directed specifically at the petitioners in question, and had involved adverse effects on their substantive rights under article 5. By contrast, none of the petitioners in this case was present when the remarks were made during the commemoration march. They were not personally targeted by the remarks, nor have they specified how, if at all, their substantive rights under article 5 were affected by the comments of Mr. Sjolie. Accordingly, the State party contends that the authors are not victims for the purpose of article 14, paragraph 1.

Comments by the petitioners

5.1 In comments on the State party's submissions of 2 December 2003, the authors contend that the communication is truly individual in nature. They state that, in any event, the issue of inadequate protection against racist speech under article 4 had been an issue in the Committee's dialogue with the State party for some time, and

¹⁰ Communication 22 of 2002, decision of 19 March 2003; paragraph 6.3.

that the concerns expressed by the Committee in its Concluding Observations have had little impact on the State party.

5.2 The authors reiterate that the Jewish Communities and the Antiracist Centre should be considered 'groups of individuals' for the purpose of article 14 of the Convention, and that they have standing to submit communications to the Committee. They note that there is nothing in the wording of article 14 which supports the interpretation that all members of the group must be able to claim victim status on their own. If such a strict reading were applied, the words 'groups of individuals' would be deprived of any independent meaning. They contrast the wording of article 14, paragraph 1, with the corresponding provision in the Optional Protocol to the International Covenant on Civil and Political Rights,¹¹ which provides that only individuals may submit complaints for consideration by the Human Rights Committee. They contend that the expression 'groups of individuals', whatever its outer limits may be, clearly covers entities that organize individuals for a specific, common purpose, such as congregations and membership organizations.

5.3 As to the requirement of exhaustion of domestic remedies, the authors claim that, in light of the judgment of the Supreme Court, any legal proceedings taken by them in Norway would have no prospect of success. They invoke a decision of the European Court of Human Rights to the effect that the obligation to exhaust domestic remedies did not apply in circumstances where, due to an authoritative interpretation of the law by domestic judicial authorities, any legal action by the petitioners would be pointless.¹² They argue that the same approach should be adopted by the Committee in relation to article 14 of the Convention. Thus, even if the authors had not exhausted domestic remedies, the Supreme Court dispensed with this requirement by handing down a final and authoritative interpretation of the relevant law.

5.4 On the State party's submission that they are not 'victims' for the purpose of article 14, the petitioners reiterate that article 4 guarantees to individuals and groups of individuals a *right* to be protected against hate speech. Failure to afford adequate protection against hate speech is of itself a violation of the individual rights of those who are directly affected by the State's failure to fulfill its obligations. They reiterate that, just as a person's status as a potential victim may arise when people are formally

¹¹ Article 1.

¹² Case of *Open Door and Dublin Well Women v Ireland*, judgment of 23 September 1992.

required to breach the law in order to enjoy their rights, so too may it arise where the domestic law or a Court's decision impedes the individual's future enjoyment of Convention rights. They further state that, in the present case, the individual authors are public figures and leaders of their respective Jewish communities, and therefore potential victims of violations of the Convention. Mr. Paltiel has received death threats by Neo-Nazi groups in the past. However, the intent of article 4 is to fight racism at its roots; there is a causal link between hate speech of the type made by Mr. Sjolie, and serious violent racist acts. Persons like Mr. Paltiel are seriously affected by the lack of protection against hate speech. It is submitted that all the authors belong to groups of obvious potential victims of hate speech, against which Norwegian law affords no protection. They claim that there is a high degree of possibility that they will be adversely affected by the violation of article 4 of the Convention.

5.5 In a further submission dated 20 February 2004, the petitioners draw the Committee's attention to the Third Report of the European Commission against Racism and Intolerance (ECRI) on Norway, dated 27 June 2003. In this report, the ECRI stated that Norwegian legislation did not provide individuals with adequate protection against racist expression, particularly in light of the Supreme Court's judgment in the *Sjolie* case. The ECRI recommended that Norway strengthen protection against racist expression through relevant amendments to its Constitution and criminal law.

Committee's request for clarification from the State Party

6.1 At its 64th session, the Committee instructed the Secretariat to seek clarification from the State party as to whether, under Norwegian law, any of the petitioners could have requested to become a party to the criminal proceedings instituted after the remarks made by Mr. Sjolie on the occasion of the march of the 'Bootboys'; and, in the affirmative, to clarify whether intervention by the petitioners as third parties would have had any prospect of success. The request for clarification was sent to the State party on 3 March 2004; it was also transmitted for information to the petitioners.

6.2 By letter of 19 June 2004, the petitioners submitted that they had no possibility of participating in the criminal proceedings that had been instigated in relation to the

'Bootboys' march; they also added that they had not suffered any pecuniary loss which could form the basis of a civil claim.

6.3 In its submission dated 19 August 2004, the State party advised that the petitioners were not at liberty to institute private criminal proceedings or to join the public prosecution against Mr. Sjolie for alleged breaches of s135a. However, it submits that the lack of such a possibility has no bearing on the question of whether the petitioners had exhausted domestic remedies, and states that the present case is indistinguishable from the Committee's decision in POEM and FASM v Denmark, referred to in paragraph 4.3 above, where the Committee had found the communication in question to be inadmissible, as none of the petitioners had been plaintiffs in the domestic proceedings. The State party submits that there is no significant difference between Norwegian and Danish criminal procedure law as regards the possibility of instituting private criminal proceedings or joining a public prosecution of racist expression. In the Danish case, as in the instant case, the communication was admissible because the petitioners did not take any procedural steps to secure the conviction of the alleged perpetrator. In the Danish case, as in the present case, the petitioners had not filed complaints with the police. None of the petitioners took any steps to address the statements of Mr. Sjolie before presenting their communication to the Committee, some three years after the comments were made. The State party submits that there is no basis to distinguish the present case from the Committee's earlier decision in the Danish case.

6.4 The State party further submits that the individual petitioners, and most likely the Jewish Communities, could have filed proceedings against Mr. Sjolie for criminal defamation, which is open to persons who feel targeted by denigrating or defamatory speech under articles 246 and 247 of the Criminal Code. Had they done this, the petitioners could have joined their action for criminal defamation to the criminal proceedings already underway against Mr. Sjolie. The petitioners could thereby have had an impact on the proceedings. While sections 246 and 247 are not directed specifically against discrimination, they are applicable also to racist statements. In its decision in *Sadic v Denmark*,¹³ the Committee noted that the notion of an 'effective remedy' for the purposes of article 6 of the Convention is '*not limited to criminal prosecutions based on provisions which specifically, expressly and exclusively*

¹³ Communication 25/2002, 21 March 2002, paragraph 6.3.

penalize acts of racial discrimination.' It extends to '*general provisions criminalizing defamatory statements, which is applicable to racist statements*'. The Committee stated in the same decision that '*mere doubts about the effectiveness of available civil remedies do not absolve a petitioner from pursuing*.'

6.5 Finally, the State party submits that, should the Committee declare the communication admissible and consider it on the merits, it should bear in mind that the government is proposing significant enhancements of the protection offered by s135a, and that a White Paper has been presented to Parliament on possible amendments to s100 of the Norwegian Constitution. It is too early to inform about the outcome of the legislative process, and the State party will elaborate further upon this in the course of its next periodic report to the Committee.

6.6 In their reply dated 22 August 2004, the petitioners state that the Danish case referred to by the State party is distinguishable from their own case, as the criminal proceedings in that case had been discontinued by the police, without any action being taken by the authors to press civil or criminal proceedings against the alleged perpetrator. In the present case, Mr. Sjolie's comments were held by the Supreme Court to be protected by the constitutional right to freedom of speech, and consequently any action by the authors would be futile. They further submit that the applicability of defamation law to racist speech is an unresolved issue in Norwegian law, and for this reason defamation laws are not invoked in cases dealing with racist speech. They state that it would have been untenable for the authors to seek to consolidate defamation proceedings to the criminal proceedings instituted by the authorities; they are not aware of this ever having happened before.

Decision on admissibility

7.1 At its 65th and 66th sessions, the Committee considered the admissibility of the communication.

7.2 The Committee noted the State party's submission that the authors had not exhausted domestic remedies because none of them complained to the authorities about Mr. Sjolie's conduct; reference was made to the Committee's decision in the *POEM and FASM* case. However, as the authors pointed out, the *POEM* and *FASM* case involved criminal proceedings which were discontinued by the police, without

any action being taken on the part of the authors to have the proceedings re-instigated. The present case involved an authoritative decision by the highest Norwegian Court to acquit a person accused of racist statements. In the former case, the authors could have taken the initiative to protest the decision by the police to discontinue the criminal proceedings, but did not. In the present case, the authors had no possibility of altering the course of the criminal proceedings. Further, Mr. Sjolie had now been acquitted and cannot be retried. The Committee further noted that, in answer to the question asked of it by the Committee during its 64th session, the State party confirmed that the authors could not have requested to become a party to the criminal proceedings against Mr. Sjolie. The State party submitted that the authors could have taken defamation action against Mr. Sjolie. However, the authors contended that the application of defamation laws to racist speech was an unresolved issue in Norwegian law, and the Committee was not in a position to conclude that such proceedings constituted a useful and effective domestic remedy. In the circumstances, the Committee considered that there were no effective domestic remedies to be exhausted, and that according no barrier to admissibility arose in this regard.

7.3 The authors claimed that they were ‘victims’ of alleged violations of articles 4 and 6 of the Convention because of the general inability of Norwegian law to protect them against the dissemination of anti-Semitic and racist propaganda. They also claimed that they were ‘victims’ because of their membership of a particular group of potential victims; the authors, together with any other Jews or immigrants, faced an imminent risk of suffering racial discrimination, hatred or violence. They referred in particular to the jurisprudence of other international human rights bodies to support their argument. They invoked the decision of the Human Rights Committee in the case of *Toonen v Australia*, where the very existence of a particular legal regime was considered to have directly affected the author’s rights in such a way as to give rise to a violation of the International Covenant on Civil and Political Rights. They also referred to the decision of the European Court of Human Rights in *Open Door and Dublin Well Women v Ireland*, in which the Court found certain authors to be ‘victims’ because they belonged to a class of persons which might in the future be adversely affected by the acts complained of.¹⁴ Similarly, in the present case the authors stated that, following the decision of the Supreme Court, they are at risk of

¹⁴ See footnote 17 below, paragraph 44.

being exposed to the effects of the dissemination of ideas of racial superiority and incitement to racial hatred, without being afforded adequate protection. They also submitted that the decision contributed to an atmosphere in which acts of racism, including acts of violence, are more likely to occur, and in this regard they referred to specific incidents of violence and other 'Nazi' activities. The Committee agreed with the authors' submissions; it saw no reason why it should not adopt a similar approach to the concept of 'victim' status as was adopted in the decisions referred to above. It considered that, in the circumstances, the authors had established that they belong to a category of potential victims.

7.4 The Committee did not consider the fact that three of the authors are organizations posed any problem to admissibility. As has been noted, article 14 of the Convention refers specifically to the Committee's competence to receive complaints from 'groups of individuals'. The Committee considered that to interpret this provision in the way suggested by the State party, namely to require that each individual within the group be an individual victim of an alleged violation, would be to render meaningless the reference to 'groups of individuals'. The Committee had not hitherto adopted such a strict approach to these words. The Committee considered that, bearing in mind the nature of the organisations' activities and the classes of person they represent, they too satisfied the 'victim' requirement in article 14.

7.5 On 9 March 2005, the Committee therefore declared the communication admissible.

State party's submissions on the merits

8.1 By noted of 9 June 2005, the State party submits that there has been no violation of articles 4 or 6 of the Convention. It states that, consistent with the provisions of the Convention, article 135a of the Norwegian Penal Code must be interpreted with due regard to the right to freedom of expression. The State party's obligation to criminalize certain expressions and statements must be balanced against the right to freedom of expression, as protected by other international human rights instruments.¹⁵ In the present case, the Norwegian Supreme Court carefully assessed the case following a full hearing, including arguments on the requirements of the

¹⁵ Reference is made to article 10 of the ECHR and article 19 of the ICCPR.

relevant international instruments. It concluded that the proper balance of these rights resulted in there being no violation of article 135a in the present case, a conclusion which the Court considered to be consistent with the State party's obligations under the convention, taking account of the 'due regard' clause in article 4 of the Convention.

8.2 For the State party, States must enjoy a margin of appreciation in balancing rights at the national level, and that this margin has not been overstepped in the present case. The majority of the Supreme Court found that s135a applied to remarks of a distinctly offensive character, including remarks that incite or support violations of integrity and those which entail a gross disparagement of a group's human dignity. The majority considered that the remarks had to be interpreted in the light of the context in which they were made and the likely perception of the remarks by an ordinary member of the audience.¹⁶ The State party submits that the Committee should give due respect to the Supreme Court's interpretation of these remarks, since it had thoroughly examined the entire case.

8.3 The State party submits that the Committee's General Recommendation 15 should be interpreted as recognizing that the application of article 4 requires a balancing of the right to freedom of expression against the right to protection from racial discrimination.

8.4 The State party notes the Committee's decision that the authors belong to a 'category of potential victims'; to the extent that the authors are 'potential victims', the State party draws attention to recent changes in Norwegian law which strengthen legal protection against the dissemination of racist ideas. It argues that, following the adoption of recent changes to s100 of the Constitution and s135a of the Penal Code, the authors can no longer be considered 'potential victims' of racial discrimination contrary to the Convention; any possible violation could only relate to the period preceding the adoption of these amendments.

¹⁶ The State party draws the Committee's attention to the reasoning of the majority set out on pages 11 and 12 of the English version of the judgment, however the Court's conclusions in this regard are not summarized in the submission. In the judgment, the majority concludes that various remarks in question are 'absurd' 'defy rational interpretation', and 'cliché', that they expressed no more than general support for Nazi ideology, which according to the majority did not imply support for the extermination, or other systematic and serious acts of violence against Jews. Hess, in whose memory the march was held, was not particularly associated with Holocaust. The majority also notes that the group of Sjolie's supporters was small, and those opposing the speech were in the majority and able to voice their disapproval.

8.5 A completely revised version of section 100 of the Constitution entered into force on 30 September 2004, affording the Parliament greater scope to pass laws against racist speech, in conformity with its obligations under international conventions. Parliament has since used this new power to amend s135a of the Penal Code, to provide that racist remarks may be subject to prosecution even if they are not disseminated among the public. Racist statements made negligently are now also proscribed – intent need not be proved. The maximum punishment has been raised from 2 to 3 years imprisonment. The balance between s135a and freedom of speech, however, must be weighed by the courts in each case. According to the State party, these recent amendments contradict the authors' assertion that the verdict in the *Sjolie* case would serve as a precedent, and that it will be more difficult to prosecute dissemination of ideas of racist discrimination and hatred. The State party further refers to the adoption of a new Discrimination Act, which incorporates the Convention, and provides criminal sanctions for serious cases of incitement to or participation in discrimination, thus supplementing the new provisions of s135a. The government is also developing a new Anti-Discrimination Ombudsman with a mandate to monitor and enforce these new provisions.

8.6 The State party submits that, in light of the above changes in the State party's laws, and their effect on the authors as 'potential victims', the Committee should reconsider its decision on admissibility, pursuant to Rule 94, paragraph 6, of its Rules of Procedure, at least as far as the communication raises questions regarding the general legal effects of the Supreme Court's judgment.¹⁷

8.7 Finally, the State party notes that the authors have not identified how the remarks of Mr. Sjolie have had adverse effects on their enjoyment of any substantive rights protected by article 5 of the Convention.

Authors' comments on State party's submissions on the merits

9.1 In their comments on the State party's submissions dated 4 July 2005, the authors invoke their earlier submissions, in which issues relating to the merits were addressed. They emphasize that it remains undisputed that, under Norwegian law as it

¹⁷ The submission then reads: 'The government however trusts the Committee to undertake any required assessments at this point'.

presently stands, only three of the four relevant categories of racial discrimination referred to in article 4 of the Convention are penalized; contrary to article 4 and Recommendation 15, dissemination of ideas based on racial superiority or hatred may go unpunished.

9.2 In relation to the State party's request for the Committee to reopen the question of admissibility of the complaint, the authors state that the Committee must review and assess the communication on the basis of the facts at the material time, and not on the basis of legislation adopted subsequently. In any event, the new legislation has not addressed the authors' main concern, namely the failure of the law to proscribe all relevant categories of misconduct under the Convention; thus the authors remain potential victims.

9.3 In respect of the 'due regard' clause in article 4, the authors maintain that penalizing all four categories of misconduct is clearly compatible with any international principle of freedom of speech. For them, the Committee must undertake its own interpretation of the impugned statements, rather than defer to the interpretation adopted by the Norwegian Supreme Court.¹⁸ In characterizing the speech, the authors note that Hess was well known as Hitler's Deputy and confidant, instrumental in the development of the Nuremberg laws. They maintain that, as the minority of the Supreme Court found, anyone with a basic knowledge of Hitler and National Socialism would have understood Mr. Sjolie's speech as an acceptance and approval of mass violence against Jews in the Nazi era.

9.4 The authors refer to jurisprudence of the ECHR and the Human Rights Committee, both of which have accorded racist and hate speech little protection under the freedom of speech provisions of their respective conventions.¹⁹ According to the authors, the role of the due regard clause is to protect the role of the media in imparting information about issues of public importance, provided the objective is not advocacy of racial hatred. It is submitted that the State party offers a much broader level of protection to hate speech than standards established in international case law. The authors further state that the Supreme Court decision in the *Sjolie* case is already

¹⁸ References are made to decisions of the ECHR: *Lehideux and Isorni v France*, 23.09.1998, app 24662/94, para 50-53; and *Jersild v Denmark*, 23.09.1994, app 15890/89, para 35.

¹⁹ Particular mention is made of *Jersild v Denmark*, concerning racist comments by the 'Greenjackets' against Africans and foreigners, held not to be protected by freedom of speech; and *J.R.T and W.G. v Canada*. Communication No 104/1981, Views adopted 6 April 1983..

having a significant effect as a precedent, despite the entry into force of the new legislation. They provide a decision by the Oslo police dated 31 May 2005 not to prosecute the leader of a Neo Nazi organization, in relation to statements made to the effect that Jews had killed millions of 'his people', that Jews should be 'cleansed', and were 'not human beings' but 'parasites'. The police dropped the case with explicit reference to the *Sjolie* case.

9.5 The authors further submit that invoking freedom of speech for racist and discriminating purposes amounts to an abuse of the right of submission. They reiterate that the balance between freedom of speech and protection from hate speech following the *Sjolie* decision is such that persons are afforded protection only against the most distinctive and offensive remarks, entailing severe violations of a group's dignity.

9.6 Finally, the authors note that Norway does not prohibit racist organizations and that the Supreme Court in the *Sjolie* case built on the view that such a ban would be unacceptable, contrary to the Committee's General Recommendation 15, paragraph 6.

Consideration of the merits

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

10.2 In relation to the State party's request that the Committee should reconsider its decision on admissibility pursuant to Rule 94, paragraph 6, of its Rules of Procedure in the light of recent legislative changes, the Committee considers that it must review and assess the communication on the basis of the facts as they transpired at the material time, irrespective of subsequent changes in the law. Further, the authors have referred to at least one incident following the recent amendments to the relevant legislation where the judgment in the *Sjolie* case was apparently interpreted as a bar to the prosecution of hate speech.

10.3 The Committee has noted the State party's submission that it should give due respect to the consideration of the *Sjolie* case by the Supreme Court, which conducted

a thorough and exhaustive analysis; and that States should be afforded a margin of appreciation in balancing their obligations under the Convention with the duty to protect the right to freedom of speech. The Committee notes that it has indeed fully taken account of the Supreme Court's decision and is mindful of the analysis contained therein. However, the Committee considers that it has the responsibility to ensure the coherence of the interpretation of the provisions of article 4 of the Convention as reflected in its general recommendation No.15.

10.4 At issue in the present case is whether the statements made by Mr. Sjolie, properly characterized, fall within any of the categories of impugned speech set out in article 4, and if so, whether those statements are protected by the 'due regard' provision as it relates to freedom of speech. In relation to the characterization of the speech, the Committee does not share the analysis of the majority of the members of the Supreme Court. Whilst the contents of the speech are objectively absurd, the lack of logic of particular remarks is not relevant to the assessment of whether or not they violate article 4. In the course of the speech, Mr. Sjolie stated that his 'people and country are being plundered and destroyed by Jews, who suck our country empty of wealth and replace it with immoral and un-Norwegian thoughts'. He then refers not only to Rudolf Hess, in whose commemoration the speech was made, but also to Adolf Hitler and *their* principles; he states that his group will 'follow in their footsteps and fight for what (we) believe in'. The Committee considers these statements to contain ideas based on racial superiority or hatred; the deference to Hitler and his principles and 'footsteps' must in the Committee's view be taken as incitement at least to racial discrimination, if not to violence.

10.5 As to whether these statements are protected by the 'due regard' clause contained in article 4, the Committee notes that the principle of freedom of speech has been afforded a lower level of protection in cases of racist and hate speech dealt with by other international bodies, and that the Committee's own General recommendation No 15 clearly states that the prohibition of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression.²⁰ The Committee notes that the 'due regard' clause relates generally to all principles embodied in the Universal Declaration of Human Rights, not only freedom of speech.

²⁰ See paragraph 4.

Thus, to give the right to freedom of speech a more limited role in the context of article 4 does not deprive the due regard clause of significant meaning, all the more so since all international instruments that guarantee freedom of expression provide for the possibility, under certain circumstances, of limiting the exercise of this right.. The Committee concludes that the statements of Mr. Sjolie, given that they were of exceptionally/manifestly offensive character, are not protected by the due regard clause, and that accordingly his acquittal by the Supreme Court of Norway gave rise to a violation of article 4, and consequently article 6, of the Convention.

10.6 Finally, in relation to the State party's submission that the authors have failed to establish how the remarks of Mr. Sjolie adversely affected their enjoyment of any substantive rights protected under article 5 of the Convention, the Committee considers that its competence to receive and consider communications under article 14 is not limited to complaints alleging a violation of one or more of the rights contained in article 5. Rather, article 14 states that the Committee may receive complaints relating to 'any of the rights set forth in this Convention'. The broad wording suggests that the relevant rights are to be found in more than just one provision of the Convention. Further, the fact that article 4 is couched in terms of States parties' obligations, rather than inherent rights of individuals, does not imply that they are matters to be left to the internal jurisdiction of States parties, and as such immune from review under article 14. If such were the case, the protection regime established by the Convention would be weakened significantly. The Committee's conclusion is reinforced by the wording of article 6 of the Convention, by which States parties pledge to assure to all individuals within their jurisdiction effective protection and a right of recourse against any acts of racial discrimination which violate their 'human rights' under the Convention. In the Committee's opinion, this wording confirms that the Convention's 'rights' are not confined to article 5. Finally, the Committee recalls that it has previously examined communications under article 14 in which no violation of article 5 has been alleged.²¹

²¹ See for example: Communication No 10/1997, *Ziad Ben Ahmed Habassi v Denmark*, Opinion adopted on 17 March 1999, paragraphs 9.3 and 10, where the Committee found a violation of articles 2 and 6; Communication No 16/1999, *Kashif Ahmed v Denmark*, Opinion adopted 13 March 2000, paragraphs 6.2 - 9, where the Committee found a violation of article 6; and Communication No 27/2002, *Kamal Qureshi v Denmark*, Opinion adopted 19 August 2003, paragraphs 7.1 - 9.

11. The Committee on the Elimination of Racial Discrimination, acting under article 14, paragraph 7, of the Convention on the Elimination of All Forms of Racial Discrimination, is of the view that the facts before it disclose violations of articles 4 and 6 of the Convention.

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

13. The Committee wishes to receive, within six months, information from the State party about the measures taken in the light of the Committee's Opinion. The State party is requested also 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.]
