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International Covenant on Civil and Political Rights

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Human Rights Committee

Decision adopted by the Committee under the Optional Protocol, concerning communication No. 2039/2011**, ***

Communication submitted by:	A.N. (represented by counsel, Niels-Erik Hansen)
Alleged victim:	The author
State party:	Denmark
Date of communication:	31 December 2009
Document references:	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 12 April 2011 (not issued in document form)
Date of adoption of decision:	30 March 2016
Subject matter:	Hate speech against Muslim community
Procedural issues:	Non-substantiation of claims; victim status; non-exhaustion of domestic remedies
Substantive issues:	Prohibition of advocacy of religious hatred; rights of religious minorities; right to an effective remedy
Articles of the Covenant:	2, 20 (2) and 27
Articles of the Optional Protocol:	1, 2 and 5 (2) (b)

* Reissued for technical reasons on 31 January 2017.

** Adopted by the Committee at its 116th session (7-31 March 2016).

*** The following members of the Committee participated in the examination of the communication: Yadh Ben Achour, Lazhari Bouzid, Sarah Cleveland, Ahmed Amin Fathalla, Olivier de Frouville, Yuji Iwasawa, Ivana Jelić, Duncan Laki Muhumuza, Photini Pazartzis, Sir Nigel Rodley, Víctor Manuel Rodríguez-Rescia, Fabián Omar Salvioli, Dheerujlall Seetulsingh, Anja Seibert-Fohr, Yuval Shany, Konstantine Vardzelashvili and Margo Waterval.

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1. The author of the communication is A.N., a Muslim residing in Denmark. He claims to be victim of a violation by Denmark of articles 2, 20 (2) and 27 of the Covenant. He is represented by counsel. The Optional Protocol entered into force for the State party on 23 March 1976.

Factual background

2.1 In September 2005, a Member of Parliament for the Danish People's Party, Louise Frevert, published on her website a set of articles under the headline "Articles no one dares to publish". The articles to which she referred contained statements accusing Muslims of believing that that they have a right "to rape Danish girls and knock down Danish citizens" and proposals for "deporting young immigrants to Russian prisons", with additional remarks that "even this solution is a short-term one, because when they return, they will be even more determined to kill Danes". The articles also compared Islam with cancer. The publication received considerable media attention and, as a result, the webmaster of Ms. Frevert's site, E.T., was interviewed in a news broadcast on 1 October 2005. During the interview, he stated that he was responsible for having uploaded the articles to the site.

2.2 On 30 September 2005, the Documentation and Advisory Centre on Racial Discrimination, a non-governmental organization acting on behalf of the author, filed a complaint against Ms. Frevert with the Copenhagen police, alleging a violation of section 266b of the Criminal Code of Denmark, which prohibits hate speech.[1] On 4 and 10 October 2005, the Copenhagen police interviewed E.T. and charged him with a violation of section 266b. When interviewed, he stated that he had accidentally uploaded the disputed articles onto Ms. Frevert's website as he was uploading other material. On 11 October 2005, the Copenhagen police interviewed Ms. Frevert under caution. At the interview, she explained that the disputed articles had neither been edited nor approved by her, that they had been uploaded onto her website without her consent, and that she learned about them only when she started to receive phone calls from several reporters while she was in the United Kingdom of Great Britain and Northern Ireland.

2.3 In a letter dated 13 October 2005, the Commissioner of the Copenhagen police notified the Documentation and Advisory Centre on Racial Discrimination that investigations against Ms. Frevert had been discontinued since it could not be found with the certainty required for conviction that Ms. Frevert had intended to disseminate the quotations in question, as both she and her webmaster had stated that she was unaware of the content of the articles. The Regional Public Prosecutor upheld the decision on appeal on 13 December 2005, with no further appeal being allowed.

2.4 The Copenhagen police forwarded the case file concerning E.T., attached to a letter dated 30 December 2005, to the Helsingor police for further investigation. On 19 January 2006, the Helsingor police recommended that the Regional Public Prosecutor withdraw charges against E.T. on the basis that it could not be proved, in light of the latter's statements, that the articles had been published intentionally. On 8 February 2006, the Regional Public Prosecutor requested the Chief Constable of Helsingor to pursue further investigations, including digital forensic examinations.

[1] Section 266b of the Criminal Code provides the following:

> (1) Any person who, publicly or with the intention of wider dissemination, makes a statement or imparts other information by which a group of people are threatened, insulted or degraded on account of their race, colour, national or ethnic origin, religion, or sexual orientation shall be liable to a fine or imprisonment for a term not exceeding two years.
>
> (2) In determining the sentence, it is considered an aggravating circumstance if the conduct can be characterized as propaganda activities.

2.5 On 10 February 2006, the Documentation and Advisory Centre on Racial Discrimination submitted a communication to the Committee on the Elimination of Racial Discrimination on behalf of the author. In its decision of 8 August 2007, that Committee declared the communication inadmissible for falling outside the scope of the International Convention on the Elimination of All Forms of Racial Discrimination.[2]

2.6 On 4 January 2007, the Documentation and Advisory Centre on Racial Discrimination filed a complaint against E.T. with the Copenhagen police.

2.7 On 3 February 2009, the North Zealand police submitted the outcome of the additional investigations on E.T., which were based on further interviews and digital forensic examinations of the server administrator logs, and maintained the recommendation to withdraw charges. On 18 March 2009, the regional prosecutor submitted the case to the Director of Public Prosecutions, also recommending the withdrawal of the charges. On 5 May 2009, the Director of Public Prosecutions decided to withdraw the charges against E.T. on the basis of insufficient evidence proving that he had intended to publish the articles. On 4 June 2009, the Documentation and Advisory Centre on Racial Discrimination appealed this decision to the Ministry of Justice. On 2 July 2009, the Ministry rejected the appeal, considering that the author was not entitled to complain because the statements made about Muslims in the articles were of a general nature and affected a large and indefinite number of persons, and that the author had failed to justify any particular interest in the outcome of the case other than a personal, moral and emotional one. The decision was final. The author notes that domestic remedies have been exhausted, given that the public prosecuting authority has the exclusive competence to bring to court cases based on section 266b of the Criminal Code.

The complaint

3.1 The author claims to be the victim of violations by the State party of articles 2, 20 (2) and 27 of the Covenant. He contends that the State party has failed to take effective measures against yet another incident of hate speech against Muslims in Denmark by Members of Parliament belonging to the Danish People's Party, despite the existence of a specific provision (article 266b) in the Criminal Code prohibiting such acts. The statements in the disputed articles, which are part of a Danish People's Party campaign to build up hatred against Danish Muslims, are a personal insult to him and constitute discrimination against him. The statements create a hostile islamophobic environment and put him at risk of assault, for example, when working in the street, by people who are influenced by the statements. A study published by the Danish Board for Ethnic Equality in 1999 indicated that people from Lebanon, Somalia and Turkey (most of them Muslims) living in Denmark had suffered from racist attacks in the street. The Board was dismantled in 2002 and no further studies have been carried out since then. The State is responsible for the lack of updated figures on racist attacks.

3.2 The author claims that, through the denial of his right to appeal the decision of the Director of Public Prosecutions to discontinue the investigations, his right to an effective remedy against the attacks suffered has been violated. He has an interest in the case because the defamatory statements negatively affect his daily life in Denmark. Being a Muslim, it hurts his feelings and offends him to be repeatedly accused by Danish People's Party

[2] The Committee on the Elimination of Racial Discrimination recalled that the Convention did not cover discrimination based on religion alone, and that Islam was not a religion practised solely by a particular group, which could otherwise be identified by its race, colour, descent, or national or ethnic origin. See the Committee's communication No. 36/2006, *P.S.N. v. Denmark*, opinion adopted on 8 August 2007, para. 6.3.

members of having committed crimes; it prevents him from being able to integrate into Danish society, puts him in danger of racist attacks and reduces his chances of being admitted into the Danish labour market or finding housing. He is a victim of those statements as a member of a group or class of persons, namely, Muslims living in Denmark, negatively affected by a decision. Furthermore, although some lower-ranking Danish People's Party members have been convicted for violations of section 266b of the Criminal Code, none of the leading members have been prosecuted. Such cases never reach the courts as they can only be brought by public prosecutors.

State party's observations on admissibility and the merits

4.1 In a communication dated 12 October 2011, the State party notes that article 20 of the Covenant establishes an obligation to enact legislation prohibiting the advocacy of national, racial or religious hatred and, therefore, that provision cannot be invoked under the Optional Protocol as it cannot be interpreted as providing for direct protection for individuals. The State party adds that the Committee still has not made a determination on the applicability of article 20 to individual cases.[3]

4.2 The State party contends that the author failed to sufficiently substantiate his claim under article 20 for the purposes of admissibility. Legislation has been put in place specifically criminalizing hate speech and making it an aggravating circumstance when the conduct is considered as propaganda. Additionally, a reporting scheme has been established by the Danish Prosecution Service to ensure uniform charging practices nationally and to supervise the processing of cases regarding alleged violations of section 266b of the Criminal Code. In this regard, special updated guidelines have been adopted by the Director of Public Prosecutions in instruction No. 2/2011.[4] In the present case, police and public prosecutors took effective action against the incidents of alleged hate speech reported by the author and investigated the matter properly and thoroughly, including through various interviews and digital forensic investigations of the server data. In order to convict a person of hate speech, it is necessary to prove intent to show hatred, which could not be proven in the present case. There have been several prosecutions for violations of section 266b of the Criminal Code in cases of statements by politicians relating to Muslims and/or Islam, including propaganda activities.[5]

4.3 Concerning the author's claim under article 27 of the Covenant, the State party contends that the author failed to explain in which manner that article was relevant to the present case. The decision not to prosecute on the basis of Ms. Frevert's website did not deprive Muslims of their right to enjoy their own culture or to profess and practise their own religion.

4.4 With regard to the author's claim under article 2 of the Covenant, the State party argues that such provision does not provide for an independent protection but must be invoked together with other substantive provisions of the Covenant. Given that the author failed to substantiate his claims under articles 20 and 27, his claim under article 2 should also be declared inadmissible as unsubstantiated. Furthermore, article 2 does not grant the author or his representative a right to appeal an administrative decision as it is usually only

[3] The State party cites, in that regard, communication No. 1570/2007, *Vassilari et al. v. Greece*, Views adopted on 19 March 2009.

[4] Instruction No. 2/2011 of 14 September 2011 of the Director of Public Prosecutions on processing cases of violation of section 266b of the Criminal Code and the Act on prohibition of differential treatment based on race and cases in which section 81 (1) (vi) of the Criminal Code might apply.

[5] The State party cites the example of a member of the Danish People's Party who was convicted on 3 December 2010 by the District Court of Randers for a breach of article 266b, namely, for making racially offensive comments in the course of a political debate.

the "victims" who are entitled to appeal a decision regarding criminal prosecution to a higher-level administrative body. Pursuant to section 721 of the Danish Administration of Justice Act, criminal charges may be withdrawn where it is considered that conviction cannot be expected or where the proceedings will entail difficulties, costs or trial periods that are not commensurate with the sanction. If the Director of Public Prosecutions decides not to press charges, those who are presumed to be the victims or to have a special interest in the case are notified of that decision in order to allow them to appeal against it. In the present case, both the public prosecutor and the Ministry of Justice found that the author was not a victim within the meaning of section 266b of the Criminal Code and did not have an essential, direct, individual and legal interest in the outcome of the case such that he could be considered as entitled to appeal.

4.5 The State party contends that the communication is also inadmissible on the ground of non-exhaustion of domestic remedies because the author could have filed a criminal complaint against Ms. Frevert and E.T. for the allegedly defamatory statements under section 267 of the Criminal Code, which prohibits defamatory statements, including racist statements. The offenses under section 267 are subject to private prosecution, as established in section 275 of the Criminal Code.[6] The State party invokes the Committee's decision of inadmissibility in *Ahmad and Abdol-Hamid v. Denmark*[7] to support that, in cases such as the present one, authors are required to institute proceedings under sections 267 and 275 (1) of the Criminal Code in order to exhaust domestic remedies.

Authors' comments on the State party's observations

5.1 In a communication dated 28 November 2011, the author submitted his comments on the State party's observations on admissibility and the merits. The author challenges the State party's statement that article 20 (2) does not provide for individual protection. In the case invoked by the State party (*Vassilari et al. v. Greece*), the Committee did not make a determination in that regard. It would weaken the protection of minority groups if victims could not invoke violations of their rights under articles 20 and 27 before the Human Rights Committee.

5.2 The statements contained in the disputed articles were aimed to create among the Danish population fear of the religious minority group of Muslims. The statements also constituted incitement to adopt a policy of deportation of Muslim criminals to serve their prison sentences in Russian prisons. Whether the articles mentioned ethnicity or only religion was irrelevant since the police and prosecution authorities could investigate and press charges under the Criminal Code either way. Members of religious minorities should be protected not only in the law but also in the effective application of the law through the provision of protection against hate crimes. The author notes that article 20 (2) constitutes a limitation on freedom of speech as established by the Committee in its general comment No. 34 (2011) on the freedoms of opinion and expression.

[6] Section 267 (1) of the Criminal Code provides the following: "Any person who violates the personal honour of another by offensive words or conduct or by making or spreading allegations of an act likely to disparage him in the esteem of his fellow citizens shall be liable to a fine or to imprisonment for a term not exceeding four months."
Section 275 of the Criminal Code establishes the following: "The offences set out in this Part shall be subject to private prosecution, except for the offences referred to in sections … and 266b."

[7] See communication No. 1487/2006, *Ahmad and Abdol-Hamid v. Denmark*, decision of inadmissibility adopted on 1 April 2008, para. 6.2.

5.3 The author contends that the propaganda published by E.T. to the effect that Muslims who have committed crimes should be deported and separated from the rest of the Muslim community in Denmark amounted to a violation of articles 20 and 27 of the Covenant.

5.4 The State party failed to ensure the author's right to redress owing to political, rather than legal, reasons. The author argues that the Government of Denmark was able to stay in power only due to the support of the Danish People's Party. The police dealt with the complaints filed against Ms. Frevert and E.T. in different ways. In the case against E.T., who is not a member of the Danish People's Party, the Regional Public Prosecutor asked for advice from the Director of Public Prosecutions, whereas in the case against Ms. Frevert, the Regional Public Prosecutor made the final decision. The author adds that instruction No. 2/2011, which the author claims was likely enacted as a response to the present case, allows the police to take an initial decision on whether to press charges; in the event of a positive decision, the case is forwarded to the Regional Prosecutors Office and, if the decision to press charges is maintained, the case would have to be examined by the Director of Public Prosecutions before it can be brought to court. In contrast, local police and/or prosecution authorities can adopt a final decision not to press charges under article 266b without such decision being confirmed by the highest prosecution authority.

5.5 Concerning the State party's claim regarding non-exhaustion of domestic remedies, the author notes that he could not be expected to file criminal complaints under section 267 of the Criminal Code since those would also have been declared inadmissible on the ground that he was considered to have a lack of direct interest in the case.

Additional submissions by the parties

6.1 In a communication dated 25 January 2012, the State party challenges the author's statement that instruction No. 2/2011 was enacted a result of the present case. Guidelines for submission and reporting of cases under section 266b of the Criminal Code were issued in 1995 by the Director of Public Prosecutions, under instruction No. 4/1995, and later amended in 2006 and 2011.

6.2 With regard to the author's statement that prosecution procedures for Ms. Frevert and E.T. differed, the State party notes that such differentiation was owing to the fact that no charges were pressed against Ms. Frevert and, therefore, the Director of Public Prosecutions did not take any decision in that regard. Charges were, however, pressed against E.T., thus the Director of Public Prosecutions had to take a decision on that case. Proceedings were therefore carried out in accordance with the applicable guidelines referenced above.

6.3 Finally, the State party reiterates that politicians, including members of the Danish People's Party, have been convicted of violations of section 266b of the Criminal Code in several cases, the most recent case being the one referenced in the State party's previous submissions (see footnote 5 above).

6.4 In a communication dated 7 September 2012, the author insists on the lack of a uniform prosecution practice regarding section 266b of the Criminal Code. According to the author, if the Government of Denmark wants to ensure a uniform practice, all incidents of possible violations of section 266b should be submitted to the Director of Public Prosecutions in order for that office to decide on whether to prosecute those cases. Instead, local police and prosecution authorities can decide to discontinue investigations. However, if they decide to press charges, they must submit the case first to the regional prosecutor and then to the Director of Public Prosecutions, thereby making it more difficult to initiate criminal proceedings. Therein lay the problem with the case: local police and/or prosecution authorities were able to decide not to prosecute Ms. Frevert and were able to

make a final decision in that regard. On the contrary, in order to charge E.T., local authorities had to "ask for permission" from the regional prosecution office, which, in turn, had to ask the office of the Director of Public Prosecutions to make a decision that would eventually allow the case to go to court.

6.5 In a communication dated 19 October 2012, the State party challenges the author's statements regarding the procedure for cases of violation of section 266b of the Criminal Code. It notes that, according to the procedure established in instruction No. 2/2011, all cases of alleged violation of section 266b must be submitted to the Director of Public Prosecutions through the Regional Public Prosecutor. This applies whether or not the Commissioner of Police and/or the Regional Public Prosecutor finds that a prosecution should be instituted. This means that cases in which it is recommended to withdraw charges must also be submitted to the Director of Public Prosecutions. Contrary to the author's allegation, the Commissioner of Police cannot decide not to launch an investigation. Such a decision may be taken only by the Regional Public Prosecutor and appealed to the Director of Public Prosecutions. A copy of decisions taken by the Regional Public Prosecutor must be sent to the Director of Public Prosecutions in all cases to allow the Director to monitor the regional practice in this field, pursuant to section 2.4.2 of the above-mentioned instruction.[8]

Issues and proceedings before the Committee

7.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether the claim is admissible under the Optional Protocol.

7.2 The Committee notes that a communication submitted on behalf of the author to the Committee on the Elimination of Racial Discrimination was declared inadmissible for falling outside the scope of the International Convention on the Elimination of All Forms of Racial Discrimination. The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

7.3 The Committee takes note of the State party's argument that domestic remedies have not been exhausted because the author did not file a complaint under section 267 of the Criminal Code, which prohibits defamatory statements, including racist statements. The Committee also takes note of the author's claim that criminal complaints under section 267 of the Criminal Code would also have been declared inadmissible. The Committee notes that according to the author his appeal against the withdrawal of charges against E.T. under section 266b had been rejected because the statements made about Muslims had been of a general nature affecting an indefinite number of persons and because the author had failed

[8] Section 2.4.1 of instruction No. 2/2011 establishes that all cases of violation of section 266b of the Criminal Code in which a charge has been preferred must be submitted to the Director of Public Prosecutions through the Regional Public Prosecutor together with a recommendation on the question of prosecution.
Section 2.4.2 of instruction No. 2/2011 establishes that cases where the Commissioner of Police finds that a report of an alleged violation of section 266b should be dismissed or where no basis is found for continuing the investigation must be submitted to the Regional Public Prosecutor together with a recommendation stating why the report should be dismissed or the investigation discontinued. If the Regional Public Prosecutor endorses the recommendation, the Commissioner of Police must notify the persons presumed to have a reasonable interest therein of the decision as soon as possible and provide guidelines on the right of appeal. It must appear that the decision can be appealed to the Director of Public Prosecutions. The Director of Public Prosecutions must be notified of all cases in which a report lodged with the police is dismissed.

to justify any particular interest in the outcome of the case. The Committee concludes that in these circumstances it would be unreasonable to expect the author to initiate separate proceedings under section 267 after having unsuccessfully invoked section 266b of the Criminal Code. Accordingly, the Committee concludes that domestic remedies have been exhausted pursuant to article 5 (2) (b) of the Optional Protocol.

7.4 The Committee notes the author's claims under articles 20 (2) and 27 of the Covenant that the State party failed to take effective measures against hate speech statements directed against the Muslim community living in Denmark. The Committee recalls its jurisprudence that no person may, in theoretical terms and by *actio popularis*, object to a law or practice that he or she holds to be at variance with the Covenant and that any person claiming to be a victim of a violation of a right protected by the Covenant must demonstrate either that the exercise of their rights has already been impaired by a State act or omission or that such impairment is imminent, basing his or her argument, for example, on legislation in force or on a judicial or administrative decision or practice.[9] In the present case, the Committee notes the author's argument that the defamatory statements in the disputed articles affect his daily life in a negative way, preventing him from integrating into Danish society and accessing social rights and putting him at risk of attacks by persons who may be influenced by such statements. However, the Committee considers that, without prejudice to the State party's obligations deriving from article 20 (2), the author has failed to demonstrate that his rights under the Covenant were effectively impaired by the State party, or that such impairment would be imminent as a result of the decision to withdraw charges under section 266b of the Criminal Code for the lack of intent to publish the disputed quotations. The author has therefore failed to establish that he was personally affected by the State party's decision not to prosecute Ms. Frevert or E.T. for the publication of the articles. In the light of the above, the Committee concludes that the author has failed to demonstrate that he was a victim of a violation by the State party of a right protected under the Covenant and declares this part of the communication inadmissible under article 1 of the Optional Protocol.

7.5 The Committee points out that article 2 may be invoked by individuals only in relation to other provisions of the Covenant. A State party cannot reasonably be required, on the basis of article 2 (3) (b), to make such procedures available in respect of complaints that are insufficiently founded and where the author has not been able to prove that he was a victim of such violations. Since the author has failed to demonstrate that he was a victim of a violation for purposes of admissibility in relation to articles 20 (2) and 27 of the Covenant, his allegation of a violation of article 2 of the Covenant is inadmissible, for lack of substantiation, under article 2 of the Optional Protocol.

8. The Committee therefore decides:

(a) That the communication is inadmissible pursuant to articles 1 and 2 of the Optional Protocol;

(b) That the decision shall be transmitted to the author and to the State party.

[9] See communications No. 318/1988, *E.P. et al. v. Colombia*, decision of inadmissibility adopted on 25 July 1990, para. 8.2; No. 1453/2006, *Brun v. France*, decision of inadmissibility adopted on 18 October 2006, para. 6.3; No. 1868/2009, *Andersen v. Denmark*, decision of inadmissibility adopted on 26 July 2010, para. 6.4; and No. 1879/2009, *A.W.P. v. Denmark*, decision of inadmissibility adopted on 1 November 2013, para. 6.4.