



## International Covenant on Civil and Political Rights

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### Human Rights Committee

#### Communication No. 1879/2009

#### Decision adopted by the Committee at its 109th session (14 October – 1 November 2013)

<i>Submitted by:</i>	A.W.P. (represented by Niels-Erik Hansen of the Documentation and Advisory Centre on Racial Discrimination (DACoRD))
<i>Alleged victim:</i>	The author
<i>State party:</i>	Denmark
<i>Date of communication:</i>	26 March 2009 (initial submission)
<i>Document reference:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 15 May 2009 (not issued in document form)
<i>Date of adoption of decision:</i>	1 November 2013
<i>Subject matter:</i>	Hate speech against the Muslim community in Denmark
<i>Substantive issues:</i>	Hate speech; discrimination based on religious belief and minority rights; right to an effective remedy
<i>Procedural issues:</i>	Non-substantiation; non-exhaustion of domestic remedies; victim status
<i>Articles of the Covenant:</i>	2, paragraph 3; 20, paragraph 2; and 27
<i>Articles of the Optional Protocol:</i>	1; 2; and 5, paragraph 2 (b)

## Annex

### **Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights (109<sup>th</sup> session)**

concerning

#### **Communication No. 1879/2009\***

*Submitted by:* A.W.P. (represented by Niels-Erik Hansen of the Documentation and Advisory Centre on Racial Discrimination (DACHRD))

*Alleged victim:* The author

*State party:* Denmark

*Date of communication:* 26 March 2009 (initial submission)

*The Human Rights Committee*, established under article 28 of the International Covenant on Civil and Political Rights,

*Meeting on* 1 November 2013,

*Adopts the following:*

#### **Decision on Admissibility**

1. The author of the communication is Mr. A.W.P., a Danish citizen. He claims to be a victim of violations by Denmark of his rights under article 2; article 20, paragraph 2; and article 27 of the International Covenant on Civil and Political Rights. The author is represented by counsel.<sup>1</sup>

#### **Facts as presented by the author**

2.1 On 18 April 2007, Member of Parliament (MP) Søren Krarup, member of the Danish Popular Party (DPP) expressed his views in an article from the newspaper “Morgenavisen Jyllands-Posten”, about allowing a female parliamentary candidate to speak in Parliament wearing her Muslim scarf. Mr. Krarup stated that “just like the Nazis believed that everyone from another race should be eliminated it is the belief in Islam that everyone of another faith must be converted and if not eliminated”. On 20 April 2007, MP Morten Messerschmidt from the DPP stated in an article from Nyhedsavisen that “Muslim societies

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\* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kaelin, Ms. Zonke Zanele Majodina, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabian Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval. The text of an individual opinion by Committee members Mr. Yuval Shany, Mr. Fabian Omar Salvioli and Mr. Victor Manuel Rodríguez-Resia is appended to the present views.

<sup>1</sup> The Optional Protocol entered into force for the State party on 6 April 1972.

are per definition losers. Muslims cannot think critically [...] and this produces losers [...]" On the same date, Member of the European Parliament (MEP) Mogens Camre from the same political party stated in the same newspaper article that "the idea that a fundamentalist with headscarf should become member of the Danish Parliament is sick. She (the candidate for Parliament) needs mental treatment [...]".

2.2 The author is a Muslim. In his opinion, the statement comparing Islam with Nazism is a personal insult to him. Furthermore, it creates a hostile environment and concrete discrimination against him.

2.3 The author filed a complaint before Copenhagen Metropolitan police. On 20 September 2007, the police informed the author by letter that the Regional Prosecutor had decided not to prosecute the three above-mentioned members of the DPP. The letter also advised the author about the possibility to appeal this decision to the Public Prosecutor General.

2.4 On 16 October 2007, the author appealed the decision to the Public Prosecutor General who, on 28 August 2008, upheld the decision of the Regional Prosecutor stating that neither the author nor his counsel could be considered legitimate complainants in the case. Statements covered by section 266 (b) of the Criminal Code<sup>2</sup> are usually of such a general nature that there generally would be no individuals who are legitimate complainants. He added that there was no information proving that the author could be regarded as an injured person according to the Act on the Administration of Justice section 749 (3). He could not be said to have such a substantial, direct, personal and legal interest in the outcome of the case to be considered as a legitimate complainant.

2.5 Under section 99, paragraph 3, subsection 2, of the Administration of Justice Act, this decision is final and cannot be appealed to. There are no other administrative remedies available and the public prosecuting authority has a monopoly to bring cases to courts in relation to section 266 (b) of the Criminal Code.

### **The complaint**

3.1 The author claims that, by not fulfilling its positive obligation to take effective action against the reported incident of hate speech against Muslims in Denmark, the State party has violated the author's rights under article 2; article 20, paragraph 2; and article 27, of the Covenant.

3.2 According to the author, the comparison made in the incriminating statements between Islam and Nazism is just one example of the ongoing campaign by members of the DPP to stir up hatred against Danish Muslims. Some people who are influenced by such statements take action in the form of hate crimes against Muslims living in Denmark. A study published by the Danish Board for Ethnic Equality in 1999 indicated that people from Turkey, Lebanon and Somalia (all of them mainly Muslims) living in Denmark suffer from racist attacks in the street. The Board was dismantled by the Danish Government in 2002 and no further studies have been carried out since then. The State party fails to

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<sup>2</sup> The provision of the Criminal Code on racially discriminating statements is worded as follows:  
Section 266 (b).

(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 inclination shall be liable to a fine or to imprisonment for any term not exceeding two years.  
(2) When the sentence is meted out, the fact that the offence is in the nature of propaganda activities shall be considered an aggravating circumstance.

acknowledge the need to protect Muslims against hate speech in order to prevent future hate crimes against members of religious groups. The author notes that a statement made as part of a systematic racist propaganda, such as the one led by the DPP, is an aggravating factor under section 266 (b) subsection 2 of the Danish Criminal Code.

3.3 With regard to his status as a victim, the author refers to the Opinion of the Committee on the Elimination of Racial Discrimination (CERD) regarding communication No. 30/2003,<sup>3</sup> where CERD adopted an approach to the concept of “victim” status similar to that of the Human Rights Committee in the case of *Toonen v Australia* and the European Court of Human Rights in *Case of Open Door and Dublin Well Women v. Ireland*.<sup>4</sup> In particular, the Court found certain authors to be “victims” because they belonged to a class/group of persons which might in the future be adversely affected by the acts complained of. The author argues, therefore, that as a member of such a group, he is also a victim.

#### **The State party’s observations on admissibility and merits**

4.1 By note verbale of 14 July 2009, the State party submitted its observations on the admissibility and merits of the communication. It notes that the Copenhagen Police processed counsel’s complaint and interviewed Mr. Messerschmidt on 22 August 2007. The latter confirmed his statements and explained that, at the time they were made, there was a debate in Denmark because a Muslim parliamentary candidate had stated that she would be wearing her scarf in the hall of the Parliament if she were elected. The purpose of his statement was to support Mr. Krarup. He had not intended to insult Muslims but simply express his view that Islamism was problematic because its adherents prized God’s will above ordinary common sense and turned religion into a political ideology.

4.2 On 4 September 2007, the Copenhagen Police submitted the case to the Regional Prosecutor for Copenhagen and Bornholm, who decided on 7 September 2007 that the investigation should be discontinued pursuant to section 749(2) of the Danish Administration of Justice Act. On 20 September 2007, the Commissioner of the Copenhagen Police notified the author’s counsel of the Regional Public Prosecutor’s decision, stating that a particular extensive freedom of expression is enjoyed by politicians in respect of controversial social issues and the Regional Public Prosecutor found that the said persons had not transgressed the borderline into criminality. It is particularly during a political debate that statements that may appear as offending to some occur, but in such situations importance should be attached to the fact that they occur during a debate in which, by tradition, there are quite wide limits to the use of simplified allegations.

4.3 On 28 August 2008, the Director of Public Prosecutions decided that neither the author nor his counsel were entitled to appeal in this case because they did not show a reasonable interest pursuant to section 749(3) of the Administration of Justice Act (persons considered to be parties in the case).

4.4 The State party contests the admissibility of the communication on the ground that article 2 can be invoked only in conjunction with other articles of the Covenant. Furthermore, article 2, paragraph 3 (b), obliges State parties to ensure determination of the right to such remedy “by a competent judicial, administrative or legislative authority”, but a State Party cannot reasonably be required, on the basis of that article, to make such

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<sup>3</sup> CERD communication No. 30/2003, *The Jewish community of Oslo et al. v. Norway*, Opinion adopted on 15 August 2005, para. 7.4.

<sup>4</sup> Communication No. 488/1992, *Toonen v. Australia*, Views adopted on 31 March 1994, para. 5.1; and the Judgement of the ECtHR, *Case of Open Door and Dublin Well Women v. Ireland*, Application No. 14234/88; 14235/88, Judgment of 29 October 1992.

procedures available no matter how unmeritorious the claims may be. Article 2, paragraph 3, only provides protection to alleged victims if their claims are sufficiently well-founded to be arguable under the Covenant.

4.5 The State party further submits that the incriminating statements cannot be considered as falling within the scope of application of article 20, paragraph 2, of the Covenant. For statements to be comprised by article 20, paragraph 2, the wording of the provision requires them to imply advocacy of national, racial or religious hatred. In addition, such advocacy must constitute incitement to discrimination, hostility or violence. Advocacy of national, racial or religious hatred is not sufficient. The State party rejects that the relevant statements by some members of the DPP in any way advocated religious hatred. All the statements had their background in a public debate on how members of Parliament should appear when speaking from the rostrum of Parliament. All three statements were made as part of this intense public debate, which took place both in the press and in the Parliament. The State party insists that, during the debate, a large majority of Parliament sharply rejected those statements.

4.6 Although the statements may be seen as offensive, there is no basis for asserting that those statements were made with the purpose of inciting religious hatred. One of those statements was not directed at all Muslims but at this particular candidate for Parliament. The statements in question therefore fall outside the scope of article 20, paragraph 2 of the Covenant and the claims before the Committee should be considered as insufficiently substantiated pursuant to article 2 of the Optional Protocol.

4.7 The State party further claims that the author has not exhausted all domestic remedies. The State party opposes section 266 (b) of the Criminal Code on racially discriminating statements, which is subject to public prosecution and for which only persons with a personal interest can appeal the Prosecutor's decision to discontinue the investigation, to sections 267 and 268 on defamatory statements which are applicable to racist statements.<sup>5</sup> Contrary to section 266 (b), section 267 allows for private prosecution. Hence, the author could have instituted criminal proceedings against Mr. Krarup, Mr. Messerschmidt and Mr. Camre. By choosing not to do so, he has failed to exhaust all available domestic remedies. The State party refers to the Committee's jurisprudence concerning the publication of "The Face of Muhammad" where it declared a communication inadmissible as the authors who had filed a criminal complaint for defamation under section 267 had submitted the communication to the Committee before the High Court had issued its final decision on the matter<sup>6</sup>. In the State party's opinion, such jurisprudence implies that criminal proceedings under section 267 are required to exhaust domestic remedies in issues related to allegations of incitement to religious hatred. It cannot be considered to be contrary to the Covenant to require the author to exhaust the

<sup>5</sup> The provision of the Criminal Code on defamatory statement is worded as follows:

Section 267.

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 any term not exceeding four months.

This provision is furthermore supplemented by section 268, which provides:

Section 268.

If an allegation has been made or disseminated in bad faith, or if the author has had no reasonable ground to regard it as true, he shall be guilty of defamation, and the punishment mentioned in section 267 may then be increased to imprisonment for two years.

<sup>6</sup> Communication No. 1487/2008, *Kasem Said Ahmad and Asmaa Abdol-Hamid v. Denmark*, 18 April 2008.

remedy according to section 267, even after the public prosecutors have refused to institute proceedings under section 266 (b), as the requirements for prosecution under the former provision are not identical to those for prosecution under the latter one.

4.8 On the merits, the State party contends that the requirement of access to an effective remedy has been fully complied with in the present case, as the Danish authorities, i.e. the Prosecution Service, handled the author's complaint of alleged racial discrimination in a prompt, thorough and effective manner, fully consistent with the requirements of the Covenant. Article 2, paragraph 3 (a) and (b), of the Covenant, does not require access to the courts if a victim has had access to a competent administrative authority. Otherwise, the courts would be overburdened with cases where persons allege that something is a violation of the Covenant and must be determined by the courts regardless of how thoroughly the competent administrative authority investigated their allegations.

4.9 The fact that the author's criminal complaint did not lead to the result desired by the author, namely prosecution of Mr. Krarup, Mr. Messerschmidt and Mr. Camre, is irrelevant, as State parties are under no obligation to bring charges against a person when no violations of Covenant rights have been revealed. In this connection, it should be emphasized that the issue in the present case was solely whether there was a basis for presuming that the statements of Mr. Krarup, Mr. Messerschmidt and Mr. Camre would fall within the scope of application of section 266 (b) of the Criminal Code. The assessment to be made by the Prosecution Service was therefore a strictly legal test. In that connection, on 22 August 2007, the Copenhagen Police did interview one of the said persons, Mr. Messerschmidt, about the background for his statements. It was undisputed that those persons had made such statements in the newspapers and there was no doubt as to the context in which they were made. There was also no need to interview the author as his views were detailed in his complaint to the police and no other investigative measures were relevant in this case.

4.10 According to the *travaux préparatoires* of section 266 (b) of the Criminal Code, it was never intended to lay down narrow limits on the topics that can become the subject of political debate, nor details on the way in which the topics are discussed. The right to freedom of expression is especially important for an elected representative of the people. Interferences with the freedom of expression of an opposition member of Parliament call for the closest scrutiny. In the present case, the State party considers that the national authorities' handling of the author's complaint fully satisfied the requirements that can be inferred from article 2, paragraph 3 (a) and (b), of the Covenant.

4.11 Concerning the possibility of appealing the decision, the Covenant does not imply a right for the author or his counsel to appeal the decisions of administrative authorities to a higher administrative body. Nor does the Covenant govern the question of when a citizen or lobby organization should be able to appeal a decision to a superior administrative body. Any person who considers himself the victim of a criminal offence can appeal. Others can appeal only if they have a special interest in the outcome of the case other than having a sentence imposed on the offender. Therefore, there was no indication of circumstances showing that the author or his legal representative was entitled to appeal. The State party finds that the decision of the Director of Public Prosecutions, which was well reasoned and in accordance with the Danish rules, cannot be considered contrary to the Covenant.

4.12 The State party adds that the Commissioners of Police must notify the Director of Public Prosecutions of all cases in which a report concerning a violation of section 266 (b) is dismissed. This reporting scheme builds on the ability of the Director of Public Prosecutions, as part of his general power of supervision, to take a matter up for reconsideration to ensure proper and uniform enforcement of section 266 (b). In that connection, reference is made to the case concerning publication of the article "The Face of Muhammad" and the accompanying 12 drawings of Muhammad, in which the Director of

Public Prosecutions decided, due to the public interest about the matter, to consider the appeal without determining whether the organizations and persons who had appealed the decision of the Regional Public Prosecutor could be considered entitled to appeal.<sup>7</sup> In the present case, however, the Director of Public Prosecutions found no basis for exceptionally disregarding the fact that neither the author nor his counsel was entitled to appeal the decision.

4.13 The author's evidence proving the risk of attacks consists solely of a reference to a study from 1999 from which it appeared that people from Turkey, Lebanon and Somalia living in Denmark suffered from racist attacks in the streets. In the State party's view, such a study cannot be considered sufficient evidence to prove that the author, who is a native Dane, has a real reason to fear attacks or assaults, and in fact he has not stated anything about any actual attacks – whether verbal or physical – to which he has been subjected due to the statements made by Mr. Krarup, Mr. Messerschmidt and Mr. Camre.

4.14 The State party therefore requests the Committee to declare the communication inadmissible for failing to establish a *prima facie* case under article 20, paragraph 2, of the Covenant and for failing to exhaust domestic remedies. Should the Committee declare the communication admissible, it is requested to conclude that no violation of the Covenant has occurred.

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

5.1 On 24 August 2009, the author provided his comments. He notes that, in the response of the State party, no reference has been made to article 27 of the Covenant. He therefore presumes that it must be taken for granted that the author has not been protected in his right to the peaceful enjoyment of his culture and religion and its symbols. According to article 27, members of minority groups have a right to their identity, and should not be forced to "disappear" or to submit to forced assimilation. This right should be absolute. As to the State party's observations that the incriminating statements fall outside article 20, paragraph 2, of the Covenant, the State party has not addressed the question of whether limits on statements fall within the positive duty of State parties under article 27 of the Covenant to protect the right of minorities in their enjoyment of their culture and its symbols, and the right to profess and practice their religion.

5.2 The author contests that a thorough investigation was made in this case. It is very difficult to understand how the Danish police were able to finalize the investigation without interviewing the three persons concerned (only Mr. Messerschmidt was interviewed by police). Given the repeated pattern of degrading and offensive statements from the political party of Mr. Krarup, Mr. Messerschmidt and Mr. Camre, it would have been appropriate to examine whether the statements met the definition of propaganda which has been deemed an aggravating circumstance under section 266 (b) paragraph 2. In the author's view, the incriminating statements fall outside the functional area of Parliamentary immunity and are not in accordance with an equal application of the ordinary strict legal test.

5.3 The author refers to the *travaux préparatoires* of section 266 (b) of the Criminal Code as well as to the *Glistrup* case<sup>8</sup> to affirm that there has been an intention to include acts of politicians or political statements in the scope of section 266 (b). A legislative amendment of 1996 inserted paragraph 2 of section 266 (b) to counteract propaganda activities. The background of the bill was to be seen in the ever more prominent tendencies towards intolerance, xenophobia and racism both in Denmark and abroad. Propaganda acts,

<sup>7</sup> *Ibid.*

<sup>8</sup> *Glistrup* case, Judgement of Danish Supreme Court, 23 August 2000, *Danish Weekly Law Reports*, UfR 000. 2234.

understood as a systematic dissemination of discriminatory statements with a view to influencing public opinion, were seen as an aggravating circumstance, allowing only for a penalty of imprisonment and not a simple fine. The explanatory report further contained a directive for the prosecution authorities that it should not show the same restraints as in the past in bringing charges if the acts were in the nature of propaganda. In the *Glistrup* case, the Supreme Court found that section 266 (b) was applicable as the defendant, who was a politician, had subjected a population group to hate on account of its creed or origin. The Court further noted that freedom of expression must be exercised with necessary respect for other human rights, including the right to protection against insulting and degrading discrimination on the basis of religious belief.

5.4 On the legal test the Prosecutor should have carried out, the author contends that the balance between all elements at stake was not performed. The incriminating statements did not take place during a debate involving an exchange between contending parties but emanated from a unilateral attack against a vulnerable group with no possibility to defend itself. By not carrying out an investigation, despite the existence of the Supreme Court's jurisprudence, which has recognized limitations to the freedom of expression of politicians, the prosecuting authorities have given no opportunity for the author, and the minority group he belongs to, to have his case adjudicated by a court of law. The author recalls that the Danish Prosecution authorities made a series of similar decisions not to investigate and prosecute complaints regarding statements made by politicians, such as in *Gelle v. Denmark*, where CERD found a violation of article 6 of the Convention on the Elimination of All Forms of Racial Discrimination.<sup>9</sup>

5.5 With regard to the exhaustion of domestic remedies, the author strongly rejects the argument of the State party whereby he should have instituted proceedings under sections 267 and 275 (1) of the Criminal Code for defamation. Section 266 refers to a public or general societal interest and is protective of a group (collective aspect) whereas section 267 derives from a traditional concept of injury to personal honour or reputation and refers to an individual person's moral act or qualities (individual aspect). Contrary to the requirement of section 267, an insulting or degrading statement under section 266 needs not be false to fall within the scope of that provision.

5.6 In *Gelle v. Denmark*,<sup>10</sup> CERD considered it unreasonable to expect the petitioner to initiate separate proceedings under the general provisions of section 267, after having unsuccessfully invoked section 266 (b) of the Criminal Code in respect of circumstances directly implicating the language and object of that provision. As for the inadmissibility decision of the Committee in *Ahmad and Abdol-Hamid v. Denmark*,<sup>11</sup> the author notes that the facts in that case were different from the present one, since it involved two different sets of proceedings, one with the second applicant under section 266 (b) and the other with the first applicant under section 267. Since the communication was submitted jointly and one of the two procedures was still pending at the time of examination by the Committee, the Committee declared the whole communication inadmissible. The State party can therefore not use this example as a reason to reject the admissibility of the present communication on that ground.

5.7 The author maintains that he should be considered a victim of the incriminating statements since he has been directly affected by being singled out as a member of a minority group, distinguished by a cultural and religious symbol. He was exposed to the

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<sup>9</sup> CERD communication No. 34/2004, *Gelle v. Denmark*, Opinion adopted on 6 March 2006, para. 6.5.

<sup>10</sup> *Ibid.*, para. 6.2.

<sup>11</sup> Communication No. 1487/2008, *op.cit.*



effects of the dissemination of ideas encouraging cultural and religious hatred, without being afforded adequate protection.

5.8 The author insists on the balance between the freedom of expression that public persons, including politicians and civil servants, enjoy and the duty of the State to limit this freedom when it contravenes other fundamental rights. With regard to the State party's contention that the statistical data on violence against Muslims is dated 1999, the author replies that it is specifically because the Board for Ethnic Equality was dismantled in 2002 that no updated data can be provided herein. Partial corroboration of the continued validity of these data can however be found in the recent publication by the EU Fundamental Rights Agency issued in May 2009.<sup>12</sup> In this report, the State party is noted for groups that have a high victimization rate but a low police report rate.

## Issues and proceedings before the Committee

### *Consideration of admissibility*

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, as required under article 5, paragraph 2(a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee notes the State party's argument that the author did not exhaust domestic remedies, by failing to institute proceedings for defamatory statements, which are applicable to racist statements (sections 267 and 275(1) of the Criminal Code). The Committee notes that (a) according to the author, section 266 (b) on the one hand (see footnote 2 above) and sections 267 and 268 on the other hand (see footnote 6 above), do not protect the same interests (collective interest vs. private interest); (b) section 266 (b) regards racist statements which the State party has the obligation to prosecute (collective interest) while section 267 regards personal defamation (civil suit) and is therefore directed at specific individuals; and (c) an insulting or degrading statement under section 266 needs not to be false to fall within the scope of that provision. It takes note of the author's argument that private litigation is not by definition a remedy to secure the implementation by the State party of its international obligations. The Committee considers that it would be unreasonable to expect the author to initiate separate proceedings under section 267, after having unsuccessfully invoked section 266 (b) of the Criminal Code in respect of circumstances directly implicating the language and object of that provision. Accordingly, the Committee concludes that domestic remedies have been exhausted pursuant to article 5, paragraph 2 (b) of the Optional Protocol.<sup>13</sup>

6.4 With regard to the author's allegations under articles 20, paragraph 2, and 27 of the Covenant, the Committee observes that no person may, in theoretical terms and by *actio popularis*, object to a law or practice which he holds to be at variance with the Covenant. Any person claiming to be a victim of a violation of a right protected by the Covenant must demonstrate either that a State party has by an act or omission already impaired the exercise of his right or that such impairment is imminent, basing his argument for example on legislation in force or on a judicial or administrative decision or practice. In the Committee's decision regarding *Toonen v. Australia*, the Committee had considered that

<sup>12</sup> EU-MIDIS 02, Data in Focus Report/Muslims.

<sup>13</sup> Communication No. 1868/2009, *Andersen v. Denmark*, Inadmissibility decision of 26 July 2010, para. 6.3.

the author had made reasonable efforts to demonstrate that the threat of enforcement and the pervasive impact of the continued existence of the incriminating facts on administrative practices and public opinion had affected him and continued to affect him personally. In the present case, without prejudice to the State party's obligations under article 20, paragraph 2 with regard to the statements made by Mr. Krarup, Mr. Messerschmidt and Mr. Camre, the Committee considers that the author has failed to establish that those specific statements had specific consequences for him or that the specific consequences of the statements were imminent and would personally affect him.<sup>14</sup> The Committee therefore considers that the author has failed to demonstrate that he was a victim for purposes of the Covenant. This part of the communication is therefore inadmissible under article 1 of the Optional Protocol.

6.5 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, paragraph 3 (b), to make such procedures available in respect of complaints which are insufficiently founded and where the author has not been able to prove that he was a direct victim of such violations.<sup>15</sup> Since the author has failed to demonstrate that he was a victim for purposes of admissibility in relation to articles 20, paragraph 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.

7. The Committee therefore decides that:

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

(b) This decision will be transmitted to the author and, for information, to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

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<sup>14</sup> *Ibid.*, para. 6.4.

<sup>15</sup> *Ibid.*, para. 6.5.

## Appendix

### **Individual opinion by Committee members Mr. Yuval Shany, Mr. Fabian Omar Savlioli and Mr. Victor Manuel Rodríguez-Rescia (concurring)**

1. Although we agree that the author's petition is inadmissible, we are concerned that the language used by the Committee in its Views may be read to limit more than is necessary the right of victims to submit communications. The Optional Protocol only allows for submission of communications by persons claiming to be a victim of a violation of a right protected by the Covenant and does not recognize *actio popularis*. Still, in situations where an act or omission by a State party adversely affects a group of individuals, all members of the group who can demonstrate either that the act or omission already impaired the exercise of their right under the Covenant or that such impairment is imminent, may be considered as victims for the purposes of their right of standing. Indeed, in *Toonen v. Australia*, the Committee took the view that, although the law criminalizing private homosexual conduct was of a general nature and had a pervasive impact on administrative practices and public opinion in Tasmania, the author had demonstrated that the threat of enforcement of the law and the discriminatory social attitudes it sustained had actually affected him and continued to affect him personally.<sup>1</sup>

2. In the present case, the author failed to establish that the decision of the State party not to bring criminal charges in connection with the specific statements delivered by Mr. Krarup, Mr. Messerschmidt and Mr. Camre had actually affected him, or that the specific consequences of the said decision were imminent and would affect him personally. The fact that the author is a member of the Muslim minority in Denmark and that the said statements targeted this minority group is not enough to conclude that the State party *prima facie* failed to adequately protect the author and that such a failure had actually affected the exercise of his rights under the Covenant.

3. As a result, we are of the view that the correct ground for inadmissibility should be the author's failure to substantiate a violation of his rights under articles 20, paragraph 2, and 27 of the Covenant, and not lack of victim status due to the collective nature of the harm allegedly afflicted by the acts or omissions of the State party.

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<sup>1</sup> Communication No. 488/1992, *Toonen v. Australia*, Views adopted on 31 March 1994, para. 8.2.