UNITED NATIONS

CAT

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Distr.
RESTRICTED*

CAT/C/29/D/161/2000
2 December 2002

ENGLISH
Original: ENGLISH/SPANISH

COMMITTEE AGAINST TORTURE
Twenty-ninth session
11-22 November 2002

DECISION

Complaint No. 161/2000

Submitted by:	Hajrizi Dzemajl et al. (represented by counsel)
Alleged victim:	Hajrizi Dzemajl et al.
State party:	Yugoslavia
Date of complaint:	11 November 1999
Date of present decision:	21 November 2002

[ANNEX]

* Made public by decision of the Committee against Torture.

GE.02-46165 (E) 101202 121202

Annex

DECISION OF THE COMMITTEE AGAINST TORTURE UNDER ARTICLE 22 OF THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Twenty-ninth session

concerning

Complaint No. 161/2000

Submitted by:	Hajrizi Dzemajl et al. (represented by counsel)
Alleged victim:	Hajrizi Dzemajl et al.
State Party:	Yugoslavia
Date of complaint:	11 November 1999
Date of present decision:	21 November 2002

The Committee against Torture, established under Article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Meeting on 21 November 2002,

Having concluded its consideration of complaint No. 161/2000, submitted to the Committee against Torture by Mr. Hajrizi Dzemajl et al. under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Having taken into account all information made available to it by the complainants, their counsel and the State party,

Adopts the following:

Decision under article 22, paragraph 7, of the Convention

1.1 The complainants are 65 persons, all of Romani origin and nationals of the Federal Republic of Yugoslavia. They claim that Yugoslavia has violated articles 1, paragraph 1, 2, paragraph 1, 12, 13, 14 and 16, paragraph 1, of the Convention. They are represented by Mr. Dragan Prelevic, attorney at law, the Humanitarian Law Center, an NGO based in Yugoslavia, and the European Roma Rights Center, an NGO based in Hungary.

1.2 In accordance with article 22, paragraph 3 of the Convention, the Committee transmitted the complaint to the State party on 13 April 2000.

The facts as presented by the complainants

2.1 On 14 April 1995 at around 10 p.m., the Danilovgrad Police Department received a report indicating that two Romani minors had raped S.B., a minor ethnic Montenegrin girl. In response to this report, around midnight, the police entered and searched a number of houses in the Bozova Glavica Roma settlement and brought into custody all of the young male Romani men present in the settlement (all of them presently among the complainants to this Committee).

2.2 The same day, around midnight, two hundred ethnic Montenegrins, led by relatives and neighbours of the raped girl, assembled in front of the police station and publicly demanded that the Municipal Assembly adopt a decision expelling all Roma from Danilovgrad. The crowd shouted slogans addressed to the Roma, threatening to "exterminate" them and "burn down" their houses.

2.3 Later, two Romani minors confessed under duress. On 15 April, between 4 and 5 a.m., all of the detainees except those who confessed were released from police custody. Before their release, they were warned by the police to leave Danilovgrad immediately with their families because they would be at risk of being lynched by their non-Roma neighbours.

2.4 At the same time, police officer Ljubo Radovic came to the Bozova Glavica Roma settlement and told the Romani residents of the settlement that they must evacuate the settlement immediately. The officer's announcement caused panic. Most residents of the settlement fled towards a nearby highway, where they could take buses for Podgorica. Only a few men and women remained in the settlement to safeguard their homes and livestock. At approximately 5 a.m., police officer Ljubo Radovic returned to the settlement, accompanied by police inspector Branko Micanovic. The officers told the remaining Roma still in their homes (including some of the complainants) to leave Danilovgrad immediately, as no one could guarantee their safety or provide them with protection.

2.5 The same day, at around 8 a.m., a group of non-Roma residents of Danilovgrad entered the Bozova Glavica Roma settlement, hurling stones and breaking windows of houses owned by the complainants. Those Roma who had still not left the settlement (all of them presently among the complainants to this Committee) were hidden in the cellar of one of the houses from which they eventually managed to flee through the fields and woods towards Podgorica.

2.6 In the course of the morning of 15 April, a police car repeatedly patrolled the deserted Bozova Glavica settlement. Groups of non-Roma residents of Danilovgrad gathered in different locations in the town and in the surrounding villages. Around 2 p.m. the non-Roma crowd arrived in the Bozova Glavica settlement - in cars and on foot. Soon a crowd of at least several hundred non-Roma (according to different sources, between 400 and 3,000 persons were present) assembled in the then deserted Roma settlement.

2.7 Between 2 and 3 p.m., the crowd continued to grow and some began to shout: "We shall evict them!" "We shall burn down the settlement!" "We shall raze the settlement!" Shortly after 3 p.m., the demolition of the settlement began. The mob, with stones and other objects, first broke windows of cars and houses belonging to Roma and then set them on fire. The crowd also destroyed and set fire to the haystacks, farming and other machines, animal feed sheds, stables,

as well as all other objects belonging to the Roma. They hurled explosive devices and "Molotov" cocktails that they had prepared beforehand, and threw burning cloths and foam rubbers into houses through the broken windows. Shots and explosions could be heard amid the sounds of destruction. At the same time, valuables were looted and cattle slaughtered. The pogrom endured unhindered for hours.

2.8 Throughout the course of this pogrom, police officers present failed to act in accordance with their legal obligations. Shortly after the attack began, rather than intervening to halt the violence, these officers simply moved their police car to a safe distance and reported to their superior officer. As the violence and destruction unfolded, police officers did no more than feebly seek to persuade some of the attackers to calm down pending a final decision of the Municipal Assembly with respect to a popular request to evict Roma from the Bozova Glavica settlement.

2.9 The outcome of the anti-Roma rage was that the whole settlement was levelled and all properties belonging to its Roma residents burnt or completely destroyed. Although the police did nothing to halt the destruction of the Roma settlement, they did ensure that the fire did not spread to any of the surrounding buildings, which belonged to the non-Roma.

2.10 The police and the investigating magistrate of the Basic Court in Danilovgrad subsequently drew up an on-site investigation report regarding the damage caused by those who took part in the pogrom.

2.11 Official police documents, as well as statements given by a number of police officers and other witnesses alike, both before the court and in the initial stage of the investigation, indicate that the following non-Roma residents of Danilovgrad were among those who took part in the destruction of the Bozova Glavica Roma settlement: Veselin Popovic, Dragisa Makocevic, Gojko Popovic, Bosko Mitrovic, Joksim Bobicic, Darko Janjusevic, Vlatko Cacic, Radojica Makocevic.

2.12 Moreover, there is evidence that police officers Miladin Dragas, Rajko Radulovic, Dragan Buric, Djordjije Stankovic and Vuk Radovic were all present as the violence unfolded and did nothing or not enough to protect the Roma residents of Bozova Glavica or their property.

2.13 Several days following the incident, the debris of the Roma settlement was completely cleared away by heavy construction machines of the Public Utility Company. All traces of the existence of the Roma in Danilovgrad were obliterated.

2.14 Following the pogrom, and pursuant to the relevant domestic legislation, on 17 April 1995, the Podgorica Police Department filed a criminal complaint with the Basic Public Prosecutor's Office in Podgorica. The complaint alleged that a number of unknown perpetrators had committed the criminal offence of causing public danger under article 164 of the Montenegrin Criminal Code and, inter alia, explicitly stated that there are "reasonable grounds to believe that, in an organized manner and by using open flames … they caused a fire to break out ... on 15 April 1995 … which completely consumed dwellings … and other propert[ies] belonging to persons who used to reside in … [the Bozova Glavica] settlement".

2.15 On 17 April 1995 the police brought in 20 individuals for questioning. On 18 April 1995, a memorandum was drawn up by the Podgorica Police Department which quoted the statement of Veselin Popovic as follows: "... I noticed flames in a hut which led me to conclude that the crowd had started setting fire to huts so I found several pieces of foam rubber which I lit with a lighter I had on me and threw them, alight, into two huts, one of which caught fire."

2.16 On the basis of this testimony and the official police memorandum, the Podgorica Police Department ordered, on 18 April 1995, that Veselin Popovic be remanded into custody, on the grounds that there were reasons to believe that he had committed the criminal offence of causing public danger in the sense of article 164 of the Montenegrin Criminal Code.

2.17 On 25 April 1995, and with respect to the incident at the origin of this complaint, the Public Prosecutor instituted proceedings against one person only - Veselin Popovic.

2.18 Veselin Popovic was charged under article 164 of the Montenegrin Criminal Code. The same indictment charged Dragisa Makocevic with illegally obtaining firearms in 1993 - an offence unrelated to the incident at issue notwithstanding the evidence implicating him in the destruction of the Roma Bozova Glavica settlement.

2.19 Throughout the investigation, the investigating magistrate of the Basic Court of Danilovgrad heard a number of witnesses all of whom stated that they had been present as the violence unfolded but were not able to identify a single perpetrator. On 22 June 1995, the investigating magistrate of the Basic Court of Danilovgrad heard officer Miladin Dragas. Contrary to the official memorandum he had personally drawn up on 16 April 1995, officer Dragas now stated that he had not seen anyone throwing an inflammable device, nor could he identify any of the individuals involved.

2.20 On 25 October 1995, the Basic Public Prosecutor in Podgorica requested that the investigating magistrate of the Basic Court of Danilovgrad undertake additional investigation into the facts of the case. Specifically, the prosecutor proposed that new witnesses be heard, including officers from the Danilovgrad Police Department who had been entrusted with protecting the Bozova Glavica Roma settlement. The investigating magistrate of the Basic Court of Danilovgrad then heard the additional witnesses, all of whom stated that they had seen none of the individuals who had caused the fire. The investigating magistrate took no further action.

2.21 Due to the "lack of evidence", the Basic Public Prosecutor in Podgorica dropped all charges against Veselin Popovic on 23 January 1996. On 8 February 1996, the investigating magistrate of the Basic Court of Danilovgrad issued a decision to discontinue the investigation. From February 1996 up to and including the date of filing of this complaint, the authorities took no further steps to identify and/or punish those individuals responsible for the incident at issue - "civilians" and police officers alike.

2.22 In violation of domestic legislation, the complainants were not served with the court decision of 8 February 1996 to discontinue the investigation. They were thus prevented from assuming the capacity of a private prosecutor and to continue with the prosecution of the case.

2.23 Even prior to the closing of the proceedings, on 18 and 21 September 1995, the investigating magistrate, while hearing witnesses (among them a number of the complainants), failed to advise them of their right to assume the prosecution of the case in the event that the Public Prosecutor should decide to drop the charges. This contravened domestic legislation which explicitly provides that the Court is under an obligation to advise ignorant parties of avenues of legal redress available for the protection of their interests.

2.24 On 6 September 1996, all 71 complainants filed a civil claim for damages, pecuniary and non-pecuniary, with the first instance court in Podgorica - each plaintiff claiming approximately US$ 100,000. The pecuniary damages claim was based on the complete destruction of all properties belonging to the plaintiffs, while the non-pecuniary damages claim was based on the pain and suffering of the plaintiffs associated with the fear they were subjected to, and the violation of their honour, reputation, freedom of movement and the right to choose their own place of residence. The plaintiffs addressed these claims against the Republic of Montenegro and cited articles 154, 180 (1), 200, and 203 of the Federal Law on Obligations. More than five years after the submission of their claim, the civil proceedings for damages are still pending.

2.25 On 15 August 1996, eight of the Danilovgrad Roma, all of them among the complainants in the instant case, who were dismissed by their employers for failing to report to work, filed a law suit requesting that the court order their return to work. Throughout the proceedings, the plaintiffs argued that their failure to appear at work during the relevant time period was justified by their reasonable fear that their lives would have been endangered had they come to work so soon after the incident. On 26 February 1997, the Podgorica first instance court rendered its decision dismissing the claims of the plaintiffs on the grounds that they had been absent from work for five consecutive days without justification. In doing so the court cited article 75 paragraph 2 of the Federal Labour Code which inter alia provides that "if a person fails to report to work for five consecutive days without proper justification his employment will be terminated". On 11 June 1997, the plaintiffs appealed this decision and almost five months later, on 29 October 1997, the second instance court in Podgorica quashed the first instance ruling and ordered a retrial. The reasoning underlying the second instance decision was based on the fact that the plaintiffs had apparently not been properly served with their employer's decision to terminate their employment.

2.26 In the meantime, the case went again up to the Montenegrin Supreme Court which ordered another retrial before the fist instance court in Podgorica. The case is still pending.

2.27 The complainants, having been driven out of their homes and their property having been completely destroyed, fled to the outskirts of Podgorica, the Montenegrin capital, where during the first few weeks following the incident they hid in parks and abandoned houses. Local Roma from Podgorica supplied them with basic food and told them that groups of angry non-Roma men had been looking for them in the Roma suburbs in Podgorica. From this time on, the banished Danilovgrad Roma have continued to live in Podgorica in abject poverty, makeshift shelters or abandoned houses, and have been forced to work at the Podgorica city dump or to beg for a living.

The Complaint

3.1 The complainants submit that the State party has violated articles 2, paragraph 1 read in conjunction with article 1, 16, paragraph 1, and 12, 13, 14 taken alone or together with article 16, paragraph 1 of the Convention.

3.2 With regard to the admissibility of the complaint, and more particularly the exhaustion of local remedies, the complainants submit that, given the level of wrongs suffered, and alongside the jurisprudence of the European Court of Human Rights,[1] only a criminal remedy would be effective in the instant case. Civil and/or administrative remedies do not provide sufficient redress in this case.

3.3 The complainants note further that the authorities had the obligation to investigate, or at least to continue their investigation if they considered the available evidence insufficient. Moreover, even though they acknowledge that they have never filed a criminal complaint against individuals responsible for the pogrom, they contend that both the police and the prosecuting authorities were sufficiently aware of the facts to initiate and conduct the investigation ex officio. The complainants therefore conclude that there is no effective remedy.

3.4 The complainants also note that since there is no effective remedy in respect of the alleged breach of the Convention, the issue of exhaustion of domestic remedies should be dealt with together with the merits of the case since there is a claim of violation of articles 13 and 14 of the Convention.

3.5 Referring to a number of excerpts from NGO and governmental sources, the complainants first request that the complaint be considered taking into account the situation of the Roma in Yugoslavia as victims of systematic police brutality and dire human rights situation in general.

3.6 The complainants allege that Yugoslav authorities have violated the Convention under either article 2, paragraph 1 read in conjunction with article 1, because, during the events described previously, the police stood by and watched as the events unfolded, or article 16, paragraph 1 for the same reasons. In this regard, the complainants consider that the particularly vulnerable character of the Roma minority has to be taken into account in assessing the level of ill-treatment that has been committed. They suggest that “a given level of physical abuse is more likely to constitute ‘degrading or inhuman treatment or punishment’ when motivated by racial animus”.

3.7 With regard to the fact that the acts have mostly been committed by non-State actors, the complainants rely on a review of international jurisprudence on the principle of “due diligence” and remind the current state of international law with regard to “positive” obligations that are incumbent on States. They submit that the purpose of the provisions of the Convention is not limited to negative obligations for States parties but include positive steps that have to be taken in order to avoid that torture and other related acts are committed by private persons.

3.8 The complainants further contend that the acts of violence occurred with the "consent or acquiescence" of the police whose duty under the law was to secure their safety and afford them protection.

3.9 The complainants then allege a violation of article 12 read alone or, if the acts committed do not amount to torture, taken together with article 16, paragraph 1 because the authorities failed to conduct a prompt, impartial, and comprehensive investigation capable of leading to the identification and punishment of those responsible. Considering the jurisprudence of the Committee against Torture, it is submitted that the State party had the obligation to conduct "not just any investigation" but a proper investigation, even in the absence of the formal submission of a complaint, since they were in possession of abundant evidence.[2] The complainants further suggest that the impartiality of the same investigation depends on the level of independence of the body conducting it. In this case, it is alleged that the level of independence of the investigative magistrate was not sufficient.

3.10 The complainants finally allege a violation of article 13 read alone and/or taken together with article 16, paragraph 1, because "their right to complain and to have [their] case promptly and impartially examined by [the] competent authorities" was violated. They also allege a violation of article 14 read alone and/or taken together with article 16, paragraph 1, because of the absence of redress and of fair and adequate compensation.

State party's observations on admissibility

4. In a submission dated 9 November 1998, the State party contended that the complaint was inadmissible because the case had been conducted according to the Yugoslavian legislation and because all available legal remedies had not been exhausted.

Comments by the complainants

5. In a submission dated 20 September 2000, the complainants reiterated their main arguments with regard to the admissibility of the complaint and underlined that the State party had not explained what domestic remedies would still be available which the complainants should still exhaust. In addition, they consider that since the State party has failed to put forward any other objections in that respect, it has in effect waived its right to contest other admissibility criteria.

Decision on admissibility

6. At its twenty-fifth session, the Committee considered the admissibility of the complaint. The Committee ascertained, as it is required to do under article 22, paragraph 5 (a) of the Convention, that the same matter had not been and was not being examined under another procedure of international investigation or settlement. Regarding the exhaustion of domestic remedies, the Committee took note of the arguments made by the complainants and noted that it had not received any argumentation or information from the State party on this issue. Referring to rule 108, paragraph 7 of its Rules of Procedure, the Committee declared the complaint admissible on 23 November 2000.

State party's observations on the merits

7. Notwithstanding the Committee's call for observations on the merits, transmitted by a note of 5 December 2000, and two reminders of 9 October 2001 and 11 February 2002, the State party has not made any further submission.

Complainants' additional comments on the merits

8.1 By a letter of 6 December 2001, the complainants transmitted to the Committee additional information and comments on the merits of the case. In the same submission, the complainants have transmitted detailed information on different questions that were asked by the Committee, namely, on the presence and behaviour of the police during the events, the actions that have been taken towards the local population, the relations between the different ethnic groups, and their respective titles of property.

8.2 With regard to the presence and behaviour of the police during the events and the actions that have been taken towards the local population, the complainants give a detailed description of the facts referred to in paragraphs 2.1 to 2.29 above.

8.3 With regard to the general situation of the Roma minority in the Federal Republic of Yugoslavia, the complainants contend that the situation has remained largely unchanged after the departure of President Milosevic. Referring to a report that was earlier submitted by the Humanitarian Law Center to the Committee against Torture and to the 2001 Annual Report of Human Rights Watch, the complainants submit that the situation of Roma in the State party is today very preoccupying and emphasize that there have been a number of serious incidents against Roma over the last few years while no significant measures to find or prosecute the perpetrators or to compensate the victims have been taken by the authorities.

8.4 With regard to the property titles, the complainants explain that most were lost or destroyed during the events of 14 and 15 April 1995 and that this was not challenged by the State party's authorities during the civil proceedings.

8.5 The complainants then make a thorough analysis of the scope of application of articles 1, paragraph 1, and 16, paragraph 1, of the Convention. They first submit that the European Court of Human Rights has ascertained in Ireland v. United Kingdom and in the Greek case, that article 3 of the European Convention on Human Rights also covered "the infliction of mental suffering by creating a state of anguish and stress by means other than bodily assault".[3]

8.6 Moreover, the complainants reiterate that the assessment of the level of ill-treatment also depends on the vulnerability of the victim and should thus also take into account the sex, age, state of health or ethnicity of the victim. As a result, the Committee should consider the Romani ethnicity of the victims in their appreciation of the violations committed, particularly in Yugoslavia. In the same line, they reiterate that a given level of physical abuse is more likely to constitute a treatment prohibited by article 16 of the Convention if it is motivated by racial considerations.

8.7 Concerning the devastation of human settlements, the complainants refer to two cases that were decided by the European Court of Human Rights and whose factual circumstances were similar to the one at issue.[4] The European Court considered in both cases that the burning and destruction of homes as well as the eviction of their inhabitants from the village constituted acts that were contrary to article 3 of the European Convention.

8.8 Concerning the perpetrators of the alleged violations of articles 1 and 16 of the Convention, the complainants submit that although only a public official or a person acting in an official capacity could be the perpetrator of an act in the sense of either of the above provisions, both provisions state that the act of torture or of other ill-treatment may also be inflicted with the consent or acquiescence of a public official. Therefore, while they do not dispute that the acts have not been committed by the police officers or that the latter have not instigated them, the complainants consider that they have been committed with their consent and acquiescence. The police were informed of what was going to happen on 15 April 1995 and were present on the scene at the time when the pogrom took place but did not prevent the perpetrators from committing their wrongdoing.

8.9 With regard to the positive obligations of States to prevent and suppress acts of violence committed by private individuals, the complainants refer to General Comment 20 of the Human Rights Committee on article 7 of the International Covenant on Civil and Political Rights according to which this provision covers acts that are committed by private individuals, which implies a duty for States to take appropriate measures to protect everyone against such acts. The complainants also refer to the United Nations Code of Conduct for Law Enforcement Officials, the Basic Principles on the Use of Force and Firearms by law Enforcement Officials and the Council of Europe's Framework Convention for the Protection of National Minorities, which have provisions with a similar purpose.

8.10 On the same issue, the complainants cite a decision of the Inter-American Court of Human Rights in Velasquez Rodriguez v. Honduras according to which

> [a]n illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.[5]

Similarly, the European Court of Human Rights has addressed the issue in Osman v. United Kingdom and stated that

> [a]rticle 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual … [W]here there is an allegation that the authorities have violated their

> positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person … it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk ... [H]aving regard to the nature of the right protected by article 2, a right fundamental in the scheme of the Convention, it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge.[6]

8.11 The complainants further contend that the extent of the obligation to take preventive measures may increase with the immediacy of the risk to life. In support of this argument, they extensively rely on the judgement of the European Court of Human Rights in Mahmut Kaya v. Turkey where the Court laid down the obligations of States as follows: first, States have an obligation to take every reasonable step in order to prevent a real and immediate threat to the life and integrity of a person when the actions could be perpetrated by a person or group of persons with the consent or acquiescence of public authorities; second, States have an obligation to provide an effective remedy, including a proper and effective investigation, with regard to actions committed by non-State actors undertaken with the consent or acquiescence of public authorities.

8.12 The complainants also underline that the obligation of the States under the European Convention on Human Rights goes well beyond mere criminal sanctions for private individuals who have committed acts contrary to article 3 of the said Convention. In Z. v. United Kingdom, the European Commission on Human Rights held that

> the authorities were aware of the serious ill-treatment and neglect suffered by the applicants over a period of years at the hands of their parents and failed, despite the means reasonably available to them, to take any effective steps to bring it to an end ... [The State had therefore] failed in its positive obligation under article 3 of the Convention to provide the applicants with adequate protection against inhuman and degrading treatment.[7]

8.13 In conclusion, the complainants submit that "they were indeed subjected to acts of community violence inflicting on them great physical and mental suffering amounting to torture and/or cruel, inhuman and degrading treatment or punishment". They further state that "this happened for the purpose of punishing them for an act committed by a third person (the rape of S.B.), and that the community violence (or rather the racist pogrom) at issue took place in the presence of, and thus with the 'consent or acquiescence' of, the police whose duty under law was precisely the opposite - to secure their safety and afford them protection".

8.14 Finally, concerning the absence of observations by the State party on the merits, the complainants refer to rule 108 (6) of the Committee's rules of procedure and consider that such

principle should be equally applicable during the phase of the merits. Relying on the jurisprudence of the European Court of Human Rights and of the Human Rights Committee, the complainants further argue that, by not contesting the facts or the legal arguments developed in the complaint and further submissions, the State party has tacitly accepted the claims at issue.

Issues and proceedings before the Committee

9.1 The Committee has considered the complaint in the light of all information made available to it by the parties concerned, in accordance with article 22, paragraph 4, of the Convention. Moreover, in the absence of any submission from the State party following the Committee's decision on admissibility, the Committee relies on the detailed submissions made by the complainants. The Committee recalls in this respect that a State party has an obligation under article 22, paragraph 3, of the Convention to cooperate with the Committee and to submit written explanations or statements clarifying the matter and the remedy, if any, that may have been granted.

9.2 As to the legal qualification of the facts that have occurred on 15 April 1995, as they were described by the complainants, the Committee first considers that the burning and destruction of houses constitute, in the circumstances, acts of cruel, inhuman or degrading treatment or punishment. The nature of these acts is further aggravated by the fact that some of the complainants were still hidden in the settlement when the houses were burnt and destroyed, the particular vulnerability of the alleged victims and the fact that the acts were committed with a significant level of racial motivation. Moreover, the Committee considers that the complainants have sufficiently demonstrated that the police (public officials), although they had been informed of the immediate risk that the complainants were facing and had been present at the scene of the events, did not take any appropriate steps in order to protect the complainants, thus implying "acquiescence" in the sense of article 16 of the Convention. In this respect, the Committee has reiterated on many instances its concerns about "inaction by police and law-enforcement officials who fail to provide adequate protection against racially motivated attacks when such groups have been threatened" (concluding observations on the initial report of Slovakia, CAT A/56/44 (2001), paragraph 104; see also concluding observations on the second periodic report of the Czech Republic, CAT A/56/44 (2001), paragraph 113 and concluding observations on the second periodic report of Georgia, CAT A/56/44 (2001), paragraph 81). Although the acts referred to by the complainants were not committed by public officials themselves, the Committee considers that they were committed with their acquiescence and constitute therefore a violation of article 16, paragraph 1, of the Convention by the State party.

9.3 Having considered that the facts described by the complainants constitute acts within the meaning of article 16, paragraph 1 of the Convention, the Committee will analyse other alleged violations in the light of that finding.

9.4 Concerning the alleged violation of article 12 of the Convention, the Committee, as it has underlined in previous cases (see inter alia Encarnacion Blanco Abad v. Spain, Case No. 59/1996, decided on 14 May 1998), is of the opinion that a criminal investigation must seek both to determine the nature and circumstances of the alleged acts and to establish the identity of

any person who might have been involved therein. In the present case, the Committee notes that, despite the participation of at least several hundred non-Roma in the events of 15 April 1995 and the presence of a number of police officers both at the time and at the scene of those events, no person nor any member of the police forces has been tried by the courts of the State party. In these circumstances, the Committee is of the view that the investigation conducted by the authorities of the State party did not satisfy the requirements of article 12 of the Convention.

9.5 Concerning the alleged violation of article 13 of the Convention, the Committee considers that the absence of an investigation as described in the previous paragraph also constitutes a violation of article 13 of the Convention. Moreover, the Committee is of the view that the State party's failure to inform the complainants of the results of the investigation by, inter alia, not serving on them the decision to discontinue the investigation, effectively prevented them from assuming "private prosecution" of their case. In the circumstances, the Committee finds that this constitutes a further violation of article 13 of the Convention.

9.6 Concerning the alleged violation of article 14 of the Convention, the Committee notes that the scope of application of the said provision only refers to torture in the sense of article 1 of the Convention and does not cover other forms of ill-treatment. Moreover, article 16, paragraph 1, of the Convention while specifically referring to articles 10, 11, 12, and 13, does not mention article 14 of the Convention. Nevertheless, article 14 of the Convention does not mean that the State party is not obliged to grant redress and fair and adequate compensation to the victim of an act in breach of article 16 of the Convention. The positive obligations that flow from the first sentence of article 16 of the Convention include an obligation to grant redress and compensate the victims of an act in breach of that provision. The Committee is therefore of the view that the State party has failed to observe its obligations under article 16 of the Convention by failing to enable the complainants to obtain redress and to provide them with fair and adequate compensation.

10. The Committee, acting under article 22, paragraph 7, of the Convention, is of the view that the facts before it disclose a violation of articles 16, paragraph 1, 12 and 13 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

11. In pursuance of rule 111, paragraph 5, of its rules of procedure, the Committee urges the State party to conduct a proper investigation into the facts that occurred on 15 April 1995, prosecute and punish the persons responsible for those acts and provide the complainants with redress, including fair and adequate compensation and to inform it, within 90 days from the date of the transmittal of this decision, of the steps it has taken in response to the views expressed above.

Notes

[1] See Assenov v. Bulgaria, Judgement of 28 October 1998, paras. 102, 117; Aksoy v. Turkey, Judgement of 18 December 1996; Aydin v. Turkey, Judgement of 29 September 1997; X and Y v. The Netherlands, 8 EHRR 235 (1985), paras. 21-30.

[2] See Encarnación Blanco Abad v. Spain, 14 May 1998, CAT/C/20/D/59/1996, para. 8.2; Henri Unai Parot v. Spain, 2 May 1995, CAT/C/14/D/6/1990.

[3] Report of 5 November 1969, Yearbook XII; the Greek case (1969), p. 461.

[4] Mentes and Others v. Turkey, 58/1996/677/867 and Selcuk and Asker v. Turkey, 12/1997/796/998-999.

[5] Velasquez Rodriguez v. Honduras, judgment of 29 July 1988, p. 291.

[6] Osman v. United Kingdom, paras. 115-116.

[7] Z. v. United Kingdom, para. 98.

Annex

(Case No. 161/1999 - Hajrizi Dzemajl et al. v. Yugoslavia)

Individual opinion by Mr. Fernando Mariño and Mr. Alejandro González Poblete under rule 113 of the Rules of Procedure

We are issuing this opinion to emphasize that, in our judgement, the illegal incidents for which the Yugoslav State is responsible constitute "torture" within the meaning of article 1, paragraph 1, of the Convention, not merely "cruel, inhuman or degrading treatment" as covered by article 16. The failure of the State authorities to react to violent evictions, forced displacement and the destruction of homes and property by individuals amounts to unlawful acquiescence which, in our judgement, violates article 1, paragraph 1, particularly when read in conjunction with article 2, paragraph 1, of the Convention.

We believe that, in fact, the suffering visited upon the victims was severe enough to qualify as "torture", because:

(a) The inhabitants of the Bozova Glavica settlement were forced to abandon their homes in haste given the risk of severe personal and material harm;

(b) Their settlement and homes were completely destroyed. Basic necessities were also destroyed;

(c) Not only did the resulting forced displacement prevent them from returning to their original settlement, but many members of the group were forced to live poorly, without jobs or fixed places of abode;

(d) Thus displaced and wronged, these Yugoslav nationals have still not received any compensation, seven years after the fact, although they have approached the domestic authorities;

(e) All the inhabitants who were violently displaced belong to the Romani ethnic group, which is known to be especially vulnerable in many parts of Europe. In view of this, States must afford them greater protection;

The above amounts to a presumption of "severe suffering", certainly "mental" but also inescapably "physical" in nature even if the victims were not subjected to direct physical aggression.

We thus consider that the incidents at issue should have been categorized as "torture".

(Signed): Fernando Mariño
Alejandro González Poblete
