



# International Convention on the Elimination of All Forms of Racial Discrimination

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## Committee on the Elimination of Racial Discrimination

### Opinion adopted by the Committee under article 14 of the Convention, concerning communication No. 57/2015\*, \*\*

<i>Submitted by:</i>	Salifou Belemvire (represented by counsel, Marcel Moraru)
<i>Alleged victim:</i>	The petitioner
<i>State party:</i>	Republic of Moldova
<i>Date of the communication:</i>	21 April 2015 (initial submission)
<i>Date of the present opinion:</i>	24 November 2017
<i>Subject matter:</i>	Effective protection from and remedy for any act of racial discrimination; and obligation of the State party to act against racial discrimination
<i>Substantive issue:</i>	Discrimination on the grounds of national or ethnic origin
<i>Procedural issue:</i>	Failure to exhaust domestic remedies
<i>Articles of the Convention:</i>	5 (a) and (b), 6 and 7

1. The petitioner is Salifou Belemvire, a national of Burkina Faso who now resides in the Republic of Moldova. Mr. Belemvire claims to be a victim of a violation by the Republic of Moldova of articles 5 (a) and (b), 6 and 7 of the Convention. He is represented by counsel.

#### The facts as submitted by the petitioner

2.1 The petitioner states that on 14 November 2013, at around 8 p.m., he was taking a public minibus. While on this minibus, he made a phone call to one of his friends and spoke in a foreign language. Someone later identified as S.I. started insulting the petitioner, calling him derogatory words, such as “gypsy”, “monkey”, “Indian” and “nigger”.

2.2 S.I. then proceeded to physically assault the petitioner, delivering a number of blows to his face and body. Mr. Belemvire himself did not act violently. As a result of the beating, he was left with a number of bruises, and his face swelled up. S.I. was apprehended

\* Adopted by the Committee at its ninety-fourth session (20 November–8 December 2017).

\*\* The following members of the Committee participated in the examination of the communication: Nourredine Amir, Alexei Avtonomov, Marc Bossuyt, José Francisco Calí Tzay, Anastasia Crickley, Anwar Kemal, Melhem Khalaf, Gun Kut, José Lindgren Alves, Yanduan Li, Nicolás Marugán, Yemhelhe Mint Mohamed, Pastor Elías Murillo Martínez and Yeung Kam John Yeung Sik Yuen.



immediately at the crime scene thanks to help from bystanders who, having witnessed the insults and the assault itself, called the police.

2.3 On 15 November 2013, the petitioner filed a complaint with the Buiucani<sup>1</sup> police inspectorate, which launched a criminal investigation into the assault. The complaint included information regarding the use by S.I. of racial slurs, which, according to the petitioner, were intended to degrade him. On the same day, Mr. Belemvire went for a forensic examination.

2.4 On 18 November 2013, the petitioner was given formal status as a victim and interviewed as part of the criminal investigation. On 19 November 2013, formal charges of hooliganism under article 287 (1) of Criminal Code of the Republic of Moldova were filed against S.I. According to the petitioner, hooliganism is defined as action or actions undertaken without any form of animus or motivation. Mr. Belemvire therefore raised the need to recognize the racially discriminatory nature of the assault, making reference to the Convention and article 4 of the Moldovan Constitution. The petitioner made it clear that he considered that simple hooliganism charges did not constitute the remedy for acts of racial discrimination required by the Convention.

2.5 On 21 November 2013, the police interviewed two witnesses, B.O. and S.P. On 29 November 2013, the prosecutor's office forwarded the criminal case to the court for further consideration. The charges again failed to state that degrading racial slurs had been used in the attack. The racial element was not mentioned during the preliminary hearing held on 26 December 2013, either. On 6 February 2014, the petitioner, through counsel, asked the prosecutor's office to include a potential remedy for acts of racial discrimination against him. On 20 February 2014, the prosecutor's office informed the petitioner that hooliganism charges alone would be pursued and that the attack committed against him by S.I. had not been found racially motivated.

2.6 On 24 February 2014, the Buiucani Court held the second hearing in the case. The prosecutor's office asked the Court to treat the case under the simplified procedure provided for in article 364 (1) of the Code of Criminal Procedure of the Republic of Moldova. The Court issued a decision granting the request for expedited processing of the case. The petitioner objected to that decision and requested additional judicial investigation to consider charges of racial discrimination. The petitioner also indicated to the Court that the prosecution's evidence was incomplete, as it did not include the facts regarding racial discrimination. The petitioner insisted that such information should have been included, in accordance with article 293 (1) of the Code of Criminal Procedure.

2.7 On 4 March 2014, the Buiucani Court convicted the offender, S.I., on charges of hooliganism alone and sentenced him to 18 months of imprisonment in a closed penitentiary facility. The Court chose to follow the simplified procedure, considering only information provided by the prosecutor's office. Counsel for the petitioner once again requested the Court, to no avail, to consider racial discrimination as part of the charges. The provisions of article 77 (d) of the Criminal Code that cover the commission of a crime due to social, national, racial or religious hatred were not applied.

2.8 On 18 March 2014, counsel for the petitioner filed an appeal against the verdict of the lower court, which was rejected on 20 May 2014 by the Chisinau Court of Appeal, leaving the lower court's decision unchanged. On 16 July 2016, the petitioner filed an appeal with the Supreme Court of Justice. In the appeal, the Supreme Court was asked to annul the lower court's decision and consider the case anew, taking into account the element of racial discrimination. On 22 October 2014, the Supreme Court rejected the appeal, considering it inadmissible.

2.9 The petitioner therefore claims that he has raised his racial discrimination complaint at all levels but that it was never considered. He thus contends that he has exhausted all domestic remedies.

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<sup>1</sup> One of five districts in Chisinau.

### The complaint

3.1 The petitioner claims that the State party violated his right to equal treatment before the tribunals and other organs administering justice, in violation of article 5 (a) of the Convention. The petitioner also claims that his rights under article 5 (b) were violated, since there is “general impunity” in the Republic of Moldova for racially motivated attacks.

3.2 The petitioner likewise claims that because the courts rejected his allegations of racial discrimination, his rights to an effective remedy and protection under article 6 of the Convention were also violated.

3.3 Finally, the petitioner makes claims concerning what he describes as a “wider pattern of denial of discrimination”, which would require the State party to adopt a range of measures recognized in the Convention, including obligations under article 7.

### State party’s observations on the admissibility and merits

4.1 On 12 October and 3 December 2015, the State party presented its observations on the admissibility and merits of the complaint. It informs the Committee that the Bureau of Inter-Ethnic Relations is the agency responsible for dealing with individual complaints under article 14 of the Convention. To respond to the present communication, the Bureau consulted with the Ministry of Justice, the Ministry of the Interior, the Prosecutor General’s Office and the Office of the Ombudsman.

4.2 The State party notes that on 14 November 2013, Mr. Belemvire did indeed submit a complaint to the police regarding physical violence that was alleged to be racially motivated. The law enforcement authorities conducted an investigation in accordance with the national laws. Those laws do not have a separate provision for the crime of inflicting bodily injury with a motive based on hatred. The Buiucani Court also took all necessary measures to conduct hearings considering all aspects of the present case, and as a result the offender was sentenced to a prison term of 18 months, to be served in a closed facility.

4.3 The State party also confirms that the petitioner, unhappy with the results of the court hearings, appealed to the Chisinau Regional Court and then to the Supreme Court. The petitioner insisted on having the verdict overturned and on a new investigation and trial that would take the racial discrimination factor into consideration. Mr. Belemvire testified as a victim, stating that he was not only assaulted but also called various names, such as “monkey” and “nigger”, as confirmed by the witness B.O. The State party is therefore of the view that the prosecutor’s office should have taken the element of racial discrimination into account. The motive of racial discrimination should have been admitted as an aggravating element, in accordance with article 77 (1) (d) of the Criminal Code.

4.4 The State party acknowledges that under the Convention, States parties have an obligation to assure to everyone effective protection and remedies, through the courts and other government agencies, in cases of racial discrimination. In its general recommendation No. 31 (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system, the Committee recommended that State parties conduct an effective investigation and prosecution into cases of crimes that are based on racial discrimination.

4.5 The Republic of Moldova also recognizes the right to an effective remedy, and in cases of non-compliance, it must bring its national laws into line with articles 5 (a) and (b) and 6 of the Convention. For example, in *Šečić v. Croatia*,<sup>2</sup> the European Court of Human Rights found that the State party was in breach of its obligations for not making significant efforts to find the perpetrators of a crime that was likely to have been “motivated by racial hatred”.

4.6 The Moldovan Criminal Code contains several provisions proscribing actions that are motivated by hatred or crimes that are committed based on prejudice. Unfortunately, these provisions are not always correctly applied, due to a lack of knowledge or an inability to admit that the motives for the commission of some crimes are racial, as in the current

<sup>2</sup> Application No. 40116/02, judgment adopted on 31 May 2007.

case. Article 176 of the Criminal Code provides for criminal punishment for violations of human rights and freedoms based on such criteria as a person's gender, race, skin colour, language, religion, political or other convictions, national or social origins, cast, status as an ethnic minority and ownership of property. Furthermore, as indicated above, article 77 (1) (d) provides for aggravating circumstance in the event that the commission of a crime is motivated by social, ethnic, racial or religious hatred.

4.7 Regarding the admissibility of the complaint, the State party submits that the mechanisms of international settlement clearly presume the exhaustion of domestic remedies first. In the present case, the petitioner filed an appeal with the Supreme Court, which was rejected on 22 October 2014. It should be noted, however, that the petitioner did not attempt to file an extraordinary appeal in accordance with article 452 of the Code of Criminal Procedure. Furthermore, the petitioner failed to file a civil lawsuit or to file a complaint with the Council for the Prevention and Elimination of Discrimination, in accordance with Act No. 121 of 25 May 2012.<sup>3</sup>

4.8 The Council for the Prevention and Elimination of Discrimination conducted its own research into the State party's compliance with its obligations under international human rights treaties. As a result, it was recommended that the authorities "take reasonable measures" to identify whether hatred or prejudice have played a role in the commission of crimes. For example, there have been no prosecutions under article 176 of the Criminal Code, which prohibits discrimination.

4.9 The Office of the Ombudsman of the Republic of Moldova therefore expresses concern that the provisions of the Criminal Code regarding hate-based crimes and prejudice are not "implemented effectively".<sup>4</sup>

4.10 The State party, in conclusion, submits that the law enforcement agencies in the Republic of Moldova conducted an investigation of the incident in question based on national legislation. The Criminal Code does not include a specific article that establishes criminal liability for causing injuries as a result of hate-based attacks. In the investigation, all the steps were taken for an objective examination of the case in the light of article 278 (1) of the Criminal Code, as later confirmed by the Court, which gave the offender a sentence commensurate with his crime. The petitioner, however, failed to exhaust domestic remedies by not filing a complaint with the Supreme Court, for example.

4.11 The State party will take into consideration the Committee's conclusions in the present communication. Its authorities will take all necessary measures to combat discrimination. In general, the State party supports the notion that hate-based violence is a violation of human dignity that requires a strong response from the authorities.

#### **Petitioner's comments on the State party's observations on admissibility and merits**

5.1 On 11 February 2016, the petitioner, responding to the State party's observations on admissibility and merits, reiterates the position he articulated in his initial submission. The State party admits that no remedy exists under national legislation. The State party also claims that articles 176 and 77 of the Criminal Code could have been applied but were not.

5.2 In addition, the petitioner submits that he has fully exhausted all effective domestic remedies. He contends that the investigation itself was deficient, since it did not consider racial hatred as one of the aspects of the crime. The lower court, in turn, also ignored his consistent pleas to consider a racial motivation. The State party itself, in its submission to the Committee, confirms the error made by the authorities in failing to consider whether racial discrimination motivated the attack the petitioner was subjected to. The petitioner strongly disagrees with the State party's statement that the prosecution took all necessary steps to conduct a proper investigation.

5.3 The additional domestic remedies mentioned by the State party, according to the petitioner, are inadequate, inefficient and unlikely to succeed. The petitioner is not obliged

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<sup>3</sup> The State party does not provide any specific details regarding this procedure.

<sup>4</sup> The Office of the Ombudsman appears to have participated in the preparation of the State party's submissions.

to file an appeal that is “manifestly devoid of any chance of success”. In any case, the review would consider only the possibility of reversing the lower court’s verdict on the charge of hooliganism. It would not involve the filing of possible charges related to racial motives and racial discrimination.

5.4 Concerning a potential complaint to the Council for the Prevention and Elimination of Discrimination, the complaint procedure under Act No. 121 is not a mandatory procedure. The Council must send all complaints that contain a criminal offence to a relevant court, an obligation that makes the procedure ineffective.

5.5 Regarding the lack of a civil lawsuit to recover damages, if the petitioner filed such a lawsuit, it would necessarily mean that he agreed with the outcome of the criminal prosecution, which is not the case. The damages he could be awarded would relate only to the charges of hooliganism, not to the racial discrimination that the petitioner has claimed all along he was a victim of.

5.6 In conclusion, the petitioner asserts that the submission of the State party makes it clear that all effective domestic remedies have been exhausted and that the State party is indeed in violation of the provisions of the Convention listed in his initial submission.

### **Issues and proceedings before the Committee**

#### *Consideration of admissibility*

6.1 Before considering any claim contained in a communication, the Committee must decide, pursuant to article 147 (a) of the Convention, whether or not the communication is admissible.

6.2 The Committee first notes the State party’s argument that the petitioner failed to exhaust all available domestic remedies by not submitting his complaint to the Supreme Court of Justice of the Republic of Moldova. The Committee also notes that the petitioner filed an appeal to the Supreme Court, which was rejected on 22 October 2014. The State party refers to an “extraordinary appeal” in accordance with article 452 of the Code of Criminal Procedure but does not explain what this procedure entails or indicate whether it is reasonably likely to lead to an effective remedy in the circumstances of the case. Accordingly, the Committee considers that it is not precluded from examining the case under article 14 (7) (a) of the Convention.

6.3 The Committee observes that the petitioner has failed to substantiate, for the purposes of admissibility, his allegations that the State party violated his right to equal treatment before the tribunals and other organs administering justice and that in the Republic of Moldova there is “general impunity” for racially motivated attacks and a “wider pattern of discrimination”, in violation of articles 5 (a) and (b) and 7 of the Convention. That part of the communication is therefore inadmissible under article 14 (1) of the Convention.

6.4 The Committee finds that for the purposes of admissibility, the petitioner has sufficiently substantiated his claims under article 6 of the Convention and, in the absence of any further objections to the admissibility of the communication, proceeds to its examination of the merits of those claims.

#### *Consideration of the merits*

7.1 Acting under article 14 (7) (a) of the Convention on the Elimination, the Committee has considered the information submitted by the petitioner and the State party.

7.2 The issue before the Committee is whether the State party fulfilled its obligation to provide effective protection and remedies, through the competent national tribunals or other State institutions, against any acts of racial discrimination, as prescribed by article 6 of the Convention. The Committee notes that it is not its role to review the interpretation of facts and national law made by domestic courts, unless the decisions were manifestly arbitrary or

otherwise amounted to a denial of justice.<sup>5</sup> However, the Committee has also previously stated that “when threats of violence are made ... it is incumbent upon the State party to investigate with due diligence and expedition”.<sup>6</sup>

7.3 In the present case, the Committee notes that while the State party’s authorities investigated the incident, they treated it as an act of hooliganism and did not consider the defendant’s discriminatory motive for committing the crime, despite the petitioner’s numerous requests at various levels and to different government agencies, including courts. The State party appears to agree in its submissions that its authorities, especially the prosecutor’s office, should have considered the discriminatory element. The Committee is of the view that the investigation into the crime as conducted by the State party was incomplete without considering the discriminatory motive of the defendant. The State party should have included that aspect of the crime, “since any racially motivated offence undermines social cohesion and society as a whole”<sup>7</sup> and often inflicts greater individual and societal harm. Furthermore, the State party’s refusal to investigate the racial motive also deprived the petitioner of his right to an “effective protection and remedies against the reported act of racial discrimination”.<sup>8</sup>

8. In the circumstances, and on the basis of the information provided by the parties, the Committee concludes that article 6 of the Convention has been violated.

9. The Committee recommends that the State party grant the petitioner adequate compensation for the material and moral injury caused by the above-mentioned violation of the Convention.

10. The Committee also recommends that the State party review its policy and procedures concerning the prosecution of cases of alleged racial discrimination or racially motivated violence, in the light of its obligations under article 4 of the Convention.<sup>9</sup> The State party is also requested to give wide publicity to the present opinion, including among prosecutors and judicial bodies.

11. The Committee wishes to receive, within 90 days, information from the State party about the measures it has taken to give effect to the Committee’s recommendations.

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<sup>5</sup> *Er v. Denmark* (CERD/C/71/D/40/2007), para. 7.2.

<sup>6</sup> *Dawas and Shava v. Denmark* (CERD/C/80/D/46/2009), para. 7.4.

<sup>7</sup> General recommendation No. 31, para. 15.

<sup>8</sup> *Dawas and Shava v. Denmark*, para. 7.5.

<sup>9</sup> Committee on the Elimination of Racial Discrimination, *L.K. v. Netherlands*, communication No. 4/1991, para. 6.8.