Copenhagen, July 19, 2010

Submission by the

Documentary and Advisory Centre on Racial Discrimination, Denmark (DACoRD)

to the

Committee on the Elimination of Racial Discrimination

at its 77th session (2 -27 August 2010) on the

consideration of the 18th and 19th periodic reports of DENMARK

GENERAL OBSERVATIONS ON THE STATUS OF THE CONVENTION.

1. Denmark is well known to the Committee as the Member State that has been dealt with most times according to the Convention Article 14 (individual communications). It is also the country where individual complainants have been most success full, since the Committee four times has declared Denmark in violation with the Convention. [1]

2. In the Concluding observations on the 16th. And 17th reports of Denmark in August 2006 the Committee encouraged the Danish government to reconsider its decision not to incorporate the Convention in the domestic legal order, in order to give full effect to the provisions of the Convention (CERD/C/DEN/CO/17 para. 10). The Human Rights Committee agreed in 2008 and found that the "State Party should reconsider its consideration" (CCPR/C/DNK/CO/5 para. 6).

3. The Government in the report restated that the Convention is a relevant source of law and is applied by the courts and other law applying public authorities, and therefore the Government does not consider it legally necessary to incorporate the Convention: "Since it is not considered legally necessary, the Government does not find it politically desirable either." (CERD/C/DEN/18-19 para. 24f).

4. The Government does not offer any insight into why it is not politically desirable to incorporate the Convention. The Government merely reiterates that the method of implementation is immaterial and that unincorporated conventions "can be and are in fact applied by Danish courts and other law-applying authorities, which is also clear from printed case law."

5. DACoRD fails to see a convincing application of the Convention in practice, and notes that there might be some practical differences, however, in the way the question is considered in reporting to international monitoring bodies and in everyday, domestic life. DACoRD notes that is a persistent claim by the Danish authorities that incorporation only is of only pedagogical and psychological effect. The Government may, however, admit – as it did in its 3rd report to CCPR that incorporation would be of informative value to the citizens.

6. The subject is addressed in some detail in the Danish core document, dated 20 April 1995, where it is stated:

> 103. Denmark has a "dualist" system under which international agreements to which Denmark becomes a party are not automatically incorporated into domestic law. When Denmark wishes to adhere to an international agreement it must, therefore, ensure that its domestic law is in conformity with the agreement in question. It is, however, not disputed that international law, including conventions, are a relevant source of law in Denmark. Provisions of human rights conventions are accordingly applicable before the Danish courts and administrative authorities.
> 104. During the late 1970s and the 1980s a debate took place in Denmark about the status of certain human rights conventions in Danish law, including the International Covenant on Civil and Political Rights and the European Convention on Human Rights (ECHR) due to these treaties' special

1 CERD case No. 10/1997; 16/1999; 34/2004; 40/2007.

character as human rights treaties as opposed to other international agreements. The impact of the ECHR in the legislative process and before domestic courts was rather limited for a long period and it was cast into doubt whether the dualist approach hindered effective use and appliance of the ECHR before domestic courts. ...The ECHR is incorporated as an ordinary statute.... thereby generating a high degree of awareness of the human rights principles. The incorporation can be seen as having mainly psychological consequences by opening the eyes of the legal practitioners of the ECHR and the convention organs and improving the possibility of the national judges of having a human rights-updated level of protection in domestic courts decisions.

7. Prior to this Denmark had argued in an individual communication, that the ICCPR might be argued before the courts:[2].

> "4.4. The State party also observes that the courts may directly rule on the alleged violations of Denmark's international obligations under the International Covenant on Civil and Political Rights. It concludes that, as the author failed to submit his complaint to the Danish courts, the communication is inadmissible under articles 2 and 5, paragraph 2(b), of the Optional Protocol."

8. A claim that the Convention can not only be applied by the Danish Court, but must be applied, was is further stressed in mandatory language in the 14th Danish periodical report to the Committee on the Elimination of Racial Discrimination:

> "258. Thus the Danish authorities must apply the provisions of the Convention in connection with the interpretation and the application of Danish Law."

9. In actual practice, however, the situation may be somewhat different. This can be seen both when the Crown counsel argues in Court that the Convention is not incorporated into Danish law, and in the fact that actual court practice applying non-incorporated Conventions is rare – even when parties has made submissions based upon them. DACoRD continues to be of the opinion that the Convention is not being applied by the authorities in the same manner as it would be, if the Convention had been incorporated. The situation is similar to the description by the Government in the core document, para. 103, above, of the rare application by the European Convention on Human Rights before incorporation.

10. Two surveys have been published on the application by human rights conventions in the Danish Courts.

11. In 2001 a committee appointed by the Ministry of Justice recommended the incorporation of several additional Human rights Conventions, including ICERD. In its public report No. 1407/2001 "*On the Incorporation of Human Rights Conventions in Danish Law*" the Committee conducted a survey in Chapter 3 (pp. 31-62, cf. detailed review of the published decision in Annex 1, pp. 336-401) showing how Danish Courts have applied the ECHR after its incorporation in 1992. "The chapter also describes how Danish courts have applied other human rights conventions during the same period. It is pointed out that other human rights conventions

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2 Com. No. 397/1990, P.S. v. Denmark, Decision of 22 July 1992, *Report of the Human Rights Committee,* 47 GAOR Suppl. 40 (A/47/40), p. 395, at 399; inadmissible for lack of exhaustion of domestic remedies.

are not invoked or applied to the same extent as the European Convention on Human Rights. While there were 12 published decisions relating to other human rights conventions, there were 158 decisions concerning the European Convention on Human Rights."(p. 322). The Report further demonstrates a steady growth in the number of cases where the ECHR have been pleaded or applied since its incorporation in 1992: from 3 in 1993 to 43 in 1999 and 34 for 2000. The Annex 1 review further in laconic language detailed that the court in question did not address the "other" convention pleaded. Of the 12 cases reported ICERD had been argued in two cases.

12. An update to the above survey in the Committee report was published by the electronic law journal *Rettid* of the Faculty of Law at the University of Aarhus, in 2005. This survey covered cases published by the Law Weekly (*Ugeskrift for Retsvæsen)* from no. 26/2001 until 15 Aug. 2005. The survey reported cases concerning the European Convention on Human Rights on p. 61-116; while other human rights conventions were reported on p. 116-119. Of the four cases reported under this heading, none – according to the summary – concerned the ICERD, even though one – the Thule case – actually was argued in part on both this Convention and ICCPR.

13. Both the Committee on the Elimination on Racial Discrimination and the Human Rights Committee have expressed their concern in concluding observations since 1996-2008 over actions in the Thule case "a particularly grave example of situations where populations, usually indigenous populations, have been removed from their territory" (CERD/C/SR/1785 para. 50), but where "the Danish courts had not given their arguments the weight they deserved (ibid). In the claims document in this case both the ICERD and the CCPR had been cited as "international sources of law" and the CERD General Recommendation XXXII on Indigenous Populations had been submitted during the hearings in the Supreme Court – and the taking of their traditional lands had been designated as a continuing violation. These references to unincorporated conventions were not, however, reflected by the Supreme Court. Yet following the suggestion by the Crown Counsel, the Court opted to put premium value on a non-binding Danish declaration upon ratification of yet a 3rd unincorporated Convention (ILO 169 art. 1) in order vest all human rights entitlement in the hands of the Home Rule Government, to the effect of preventing the Thule Tribe as a previously recognized entity, of any identity as a separate group capable of vindicating its traditional rights, despite the tribe's own perception to the contrary (CCPR/C/DKN/CO/5 [2008] para. 13). Thus, the Supreme Court managed to put the indigenous Thule Tribe in 'an adverse special status compared to the population at large" (reasons of the plenary of the Norwegian Supreme Court in the *Mandalen Case* (2001) which was also submitted to the Danish Supreme Court in the case to no avail, compare ICERD Art. 5(d)(v).)

14. Apart from the general overview of court practice from 1992-2005 a few concrete examples may add to the understanding of the comparatively weak position of unincorporated human rights conventions in Denmark and of the obstacles encountered when trying to argue these conventions against State policy and law.

15. In two unpublished judgements from the High Court, Western Division, the Crown counsel countered pleadings based on ILO human rights conventions that since the provision of the act

was clear "it is without importance for determining the case, whether the conventions discussed may have been violated, *since the conventions are not incorporated into Danish law.*"[3]

16. The argument is brought a little bit further by the Crown argument in a different case which also draws on CCPR, incl. art. 26: "It is, however, without importance for deciding the case, whether this convention may have been violated. [The Convention....] has not been incorporated in Danish law and thus cannot be applied directly before Danish court. The only legal effect of the Convention is, that in case of doubtful construction, the presumption is, that Danish legislation is in accordance with the convention."[4] This essentially brings the position of the government back to the classic Danish dualist framework and rules of interpretation from before the incorporation of the European Human Rights convention.

17. In a case which reached the Supreme Court the applicant made claim based inter alia on ILO Convention 29, challenging the conditioning of receipt of social benefits on the performance of compulsory labour. The Supreme Court that the 'activation' program did not constitute forced or compulsory labour within the meaning of the European Convention on Human Rights, Art.4 and as for the ILO C.29 the Supreme Court in accordance with the High Court below noted, that the ILO conventions "are not directly applicable in Danish law in the sense, that they could result in setting aside the rules on activation in the active [social policy, our add.] law."[5]

18. As a final example involving a claim under ICERD reference is made to a case pending before the Supreme Court which concerns the starting allowance. The CERD Committee addressed this issue in the substance in its recommendation 18 in its concluding observations in 2006. (We shall return to the substance of the matter below under article 5 (e). In this case the applicant in the rejoinder to the Supreme Court emphasized that the explanatory report to the relevant legislation in Parliament had stressed that Denmark's international obligations under human rights conventions had to be respected, and therefore challenged the distinction made by the counsel for the Crown between incorporated and non-incorporated conventions. In the rejoinder by the Crown counsel of 21 May 2010, the Crown agreed that in the legislative process no distinction is made, whether these international rules are incorporated into Danish law or not. However, in an ambiguous statement the Crown added: "*but there is not necessarily identity between the significance of international rules in connection with the preparation of a bill of law and the application of these rules during a court case*, cf for this *UfR.2006, p. 770H*" (The citation refers to the Supreme Court decision in the preceding paragraph).[6] DACoRD find it difficult, at best to understand this statement; under the Danish Constitution, Section 64, the Courts or the judges are charged alone with the application of the law. However, according to the Crown statement the courts should not apply the law and its preparatory legislative reports,

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3 unpubl. J. of 10 Dec. 1999, in case no. B-0268-99 and B-2144-97, Dansk Magisterforening som mandatar for X, v. Arbejdsmarkedsstyrelsen and Silkeborg Kommune respectively, at p. 2.

4 Counsel for the Crown/Kammeradvokaten, Processkrift A, dated 25 May 2000, to the High Court, Eastern Division in case no. B-0342-98.

5 Supreme Court judgment of 5 Dec 2005 in the *Law Weekly UfR.2006, p. 770H* at For the applicant's submission see p. 777, the reasons of the High Court at p. 780 and S.Ct. at 781.

6 Supreme Court Case no. 159/2009 Rejoinder of the applicant , dated 15 April 2010, p. 8, and rejoinder of the Crown Counsel on behalf of both the Municipality in case, and the Ministry of Integration, dated 21 May 2010 at p. 4. The applicant lost in the High Court eastern Division.

but rather the law as the Government sees fit (?). The Government should be stopped from an argument that does not tie Danish authorities to a loyal and effective application of Denmark's international obligations.

19. A recent Supreme Court judgment of 13 Jan. 2010 suggests a differential application of arguments regarding non-incorporated Conventions. The case concerned a refused family reunion in connection with the requirement of more aggregate ties to Denmark compared to any other country and the exemption from this rule for persons who had been Danish nationals for 28 years. On the question whether this rule is discriminatory to members of ethnic minorities (cf. CERD 2006 Concluding observations no. 15) the Supreme Court split 4 to 3 in favour of the Government.[7] The appellants had argued ECHR Art. 8 in conjunction with art. 14 and one question was whether this prohibition was supplemented by other human rights prohibitions of discrimination of a broader scope. The Crown Counsel rejected ICERD as not incorporated and no comments on this were offered by the courts. Also ICCPR Art. 26 was mentioned, but attention centred on the European Convention on Nationality [ECN, 1997, E.T.S. No. 166], which did not encounter any argument on not being directly applicable as a non-incorporated Convention. The dividing line in the case was the requirement of equal treatment of nationals in Art. 5.2 of the ECN no matter "whether they are nationals by birth or have acquired its nationality subsequently". The majority of the Supreme Court (p. 1060) joined the High Court (at 1052) in finding a narrow (and non-binding) scope of the rule which did not give any better protection than that flowing from ECHR Art. 14. The minority of 3 judges, however, found (at 1061f) that art. 5.2 after its wording as a starting point entails a general rule that differentiation between different groups of own citizens is prohibited, and that the 28 year rule could not be reasonable justified. [In the factual part of the judgment the concern of European Commissioner of Human Rights, Gil-Robles, upon his visit to Denmark in 2004 was noted to the effect that the rule in question did not guarantee the principle of equality before the law".[8] For the present purposes on commentary DACoRD draws attention to the traditional Danish rules of interpretation that Danish law should be applied in harmony with Denmark's international obligations. Even if doubts could be raised as to the binding effect of art. 5.2 of ECN then the legal binding quality of art. 26 of ICCPR, requiring equal treatment and protection before and in the law is binding on Denmark. However, this legal obligation was not discussed neither by the High Court nor the Supreme Court. (For further comments on the substance, see below under Article. 5 (d) (iv) on family reunion)

20. One derived effect of the above discrepancy between incorporated and non-incorporated human rights treaties and their domestic application is that it is difficult for a victim of a violation to obtain an effective remedy in two ways. First, because it is difficult to vindicate your right before the authorities, and secondly because it is difficult to gain access to a remedy. One general principle of the Danish rules on free legal aid before the courts is that the applicant must have a reasonable prospect of winning the case. That decision is made inter alia based on the

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7 Supreme Court judgment of 13 Jan. 2010 upholding the High Court Eastern Division judgement of 25 September 2007, reported in *U.2010.1035H*. For a critical commentary, see senior researcher Eva Ersbøll, Institute for Human Rights, "Det lige statsborgerskab" (On Equal Citizenship) in *Juristen* No. 4, 2010, pp. 121-127.

8 COE doc., Office of the Commissioner for human Rights, CommDH (2004)12, original version, para. 10, p. 7.

practice of the courts. In this light one may understand that judicial tests of non-incorporated human rights conventions are relatively rare and that exhaustion of local remedies meets with extreme difficulties.

Effective implementation of the Convention and of remedies against violations

21. In its 2006 Concluding observations, para. 11, the Committee recommended the State Party to take resolute action to counter any tendency to target, stigmatize, stereotype or profile people on the basis race, colour, decent, and national or ethnic origin, especially by politicians. In her additional report, CERD/C/DEN/CO/17/.Add.1, para. 3f, the Government took note of the concerns but explained the reluctance of the of the police and the prosecuting authorities to effectively investigate and prosecute acts falling under Section 266b of the Danish Criminal Code by a reference to Art. 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and that Section 266b had to be interpreted in accordance with Art. 10 and the case law of the European Court of Human Rights.

22. DACoRD agrees that freedom of expression is indeed a foundation of democratic society, but notes that the right must be exercised with due regard for the protection of the rights and freedoms of others, and cannot be used as a pretext for any act aimed at the destruction of these rights, cf. Art. 17. of the Convention. It is further noted, that Section 266b was enacted in order to implement ICERD in Danish law; yet the Government in the reference above, makes no reference to the obligation under ICERD to criminalize dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination or to violence. In practice, the Government does not cite this obligation as a relevant source of law for the interpretation of Section 266b of the criminal code.

23. DACoRD regrets to find no improvement in the situation since the last examination of Denmark by the Committee, and finds reason to restate its observation of 8 June 2006:

> "DACoRD is of the opinion that the Convention is not being used by the authorities in the same manner as it would be, had it been incorporated. This perception is based on numerous cases of rejection by the prosecuting authority and the State Attorney to raise charges for racist statements made by e.g. members of Parliament or other persons participating in the public debate.
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> The legal provision in the Danish penal Code covering racist statements is section 266 b which reads as follows:
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> > *"(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."*

DACoRD has on several occasions made complaints to the prosecuting authority on behalf of persons who have felt aggrieved by statements covered by the Danish Penal Code section 266b. A number of these complaints have been rejected on the grounds that the prosecuting authority was of the opinion that the statements would not lead to conviction in a court of law. Furthermore, the State Attorney has in a case filed by DACoRD concerning racist statements made by Member of Parliament for the Danish Peoples Party Ms. Louise Frevert stated that:

> "*The section (section 266 b in the Danish Penal Code, ed.) must be interpreted in concurrency with the principles of freedom of expression laid down in the Danish Constitution section 77 and the European Convention on Human Rights article 10, which implies that section 266 b of the penal code must be interpreted narrowly under concern of the freedom of expression*".[9]

Nothing is mentioned of the Convention on the Elimination of All Forms of Racial Discrimination, presumably given the fact that it is not an integrated part of Danish law."

24. Under the Danish Administration of Justice Act, Section 218, the prosecution authority is given the monopoly of bringing criminal cases before the courts, unless there is specific authority allowing private individuals to sue. Under the Criminal Code, Section 275, the public monopoly for the prosecution authorities is expressly reserved in respect of Section 266b. Since the decision by the Director of Public Prosecutions (*Rigsadvokaten*) is final and cannot be appealed, the decision not to prosecute constitutes exhaustion of national remedies.

25. DACoRD observes that the prosecution authorities have for nearly a decade in effect created a barrier against effective investigation of violation of Section 266b by politicians and thereby a presumption against effective remedies for victims of such statements. In expression of the above the Director of Public Prosecution, Henning Fode, said to the newspaper, *Jyllandsposten*, on 8 October 2006: "I have no obligation to follow the views of ECRI or the UN Committee on Racial Discrimination. I need to comply with the working conditions, which Parliament has laid on the table before me, and that is Section 266b with its *travaux préparatoires*, the general rules on freedom of expression and the decisions by the European Court of Human Rights".

26. In a number of decisions regarding alleged violations of Section 266b the Director of Public Prosecutions have exonerated several leading politicians, in particular from the Danish Popular Party (sometimes called the Danish People's Party) from effective investigation and prosecution. The standard reason given by the Director of Public Prosecutions in his decisions not to prosecute politicians has been a statement, that they enjoy a "particularly extensive freedom of expression". The rationale for this reason is given as a reference to the Supreme Court judgement of 23 August 2000, against a politician and then former member of parliament, Mogens Glistrup of the Danish Progress Party, from which the founding leadership of the Danish Popular Party broke-away in 1995. As a matter of fact, the reference by the

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9 Decision from the State Attorney of Copenhagen, Frederiksberg and Tårnby Counties, dated May 19th 2006.

Director of Public prosecution is however not a reference to the *ratio decidendi* of the Supreme Court, which convicted Mr. Glistrup, but to a passing *obiter* in the judgement. In the case Mr. Glistrup was convicted for statements *inter alia* liking 'Mohammedans' to 'world criminals *par excellence'*.

27. In the Glistrup case *The Supreme Court* panel of 5 judges unanimously found Section 266b applicable in the case: "The defendant had subjected a population group to hate on account of its creed or origin." (*UfR* 2000.2234 at 2246). The Court further addressed the relationship between Sec. 266b and freedom of expression:

> "Freedom of expression is fundamental for a democratic society, since tolerance *vis-à-vis* the opinion of others is a necessary precondition for a free debate. Freedom of expression must, however, 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."
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> "The defendant has as a politician taken active part in the political debate as a part in his work for a restrictive policy on aliens turned against Muslims. It cannot in itself be considered criminal in such debate to argue with a reference to Islamic texts or to societal consequences of the program of fundamentalistic Muslims. References of this kind cannot, however, justify insults and degradation as the ones expressed in the defendant's statements. A debate on the political goals of the defendant is not precluded by a criminalization of such statements. The consideration of a particularly extensive freedom of expression[10] for politicians in controversial societal matters *can therefore not give grounds for exemption from punishment for the defendant*."(*ibid.* at 2247).

28. In this context DACoRD briefly observes that its observation is made out of grave concern over the fact that the Prosecution Authorities has in recent years made a series of similar decisions refusing to investigate and prosecute complaints concerning statements from politicians using a similar approach in misrepresenting the Supreme Court judgement in the *Glistrup case.* Some of these have reached the international level, cf. eg. *Gelle v. Denmark*, CERD No. 34/2004 where CERD found a violation of ICERD Art. 6, in regard to statements targeting Somalis in Denmark and set forth by Ms. Kjærsgaard. The statements in that case have subsequently been repeated in 2006 by another member of the Danish Popular Party, Søren Espersen, MP. The investigation of his case was discontinued on the same misrepresentation of the *Glistrup* judgment and a complaint is presently pending before the Committee on the Elimination of Racial Discrimination, CERD No. 43/2008. Another case concerning statements by Ms. Kjærsgaard against Somali is similarly pending before CERD: *Jama v. Denmark*, No. 41/2008. A similar case *Andersen v. Denmark*, HRC Com. No. 1868/2009 is currently pending before the Human Rights Committee, citing Art. 20(2) alone and in conjunction with Art. 27 as well as Art. 2 on effective remedies, is expected to be considered by the Human Rights Committee at its July 2010 Session. Extensive comments by DACoRD were submitted in the latter case on 29 June 2009. A case a against 2 MPs and one MEP for Islamophobic statements by MP Søren Krarup, MP Morten Messerschmidt and MEP Mogens Camre is furthermore pending before the Human Rights Committee, Com. No. 1879/2009, *Abdul Wahid Pedersen v. Denmark.*

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10 A notion suggested by the defence counsel for Mr. Glistrup during oral proceedings.

29. Summing up on these cases DACoRD observes that the law and practice must secure effective remedies against human rights violations. Purely administrative remedies as a complaint to the policies not sufficient, if the State party cannot demonstrate to the Committee, that the investigative steps have been sufficient and effective in practice. In the cases above no precise information has been given. The executive may not be prepared to tolerate and let go unpunished serious human rights violations notwithstanding the official status of the perpetrator. The duty to investigate violations of human rights violations implies also a correlative duty in appropriate cases to prosecute criminally, try and punish those held responsible for such violations. This duty applies *a fortiori* in cases such as mentioned above where the perpetrators of such violations are identified. Adoption of laws or a change in practice under existing law that effectively excludes the possibility of investigation into past, present and future human rights violations prevents States from discharging its responsibility to provide effective remedies to victims, and may contribute to an atmosphere of impunity which may give rise to further grave human rights violations.

30. Failing to prosecute Ms. Kjærsgaard and other members of the Danish People's Party, the Prosecution Service has in fact given *carte blanche* to conduct a systematic islamophobic and racist campaign against Muslims, Somalis, Roma, Jews and other minority groups living in Denmark. In this context, DACoRD refers to the General Comment No. 31 of the Human Rights Committee [80], para 18, according to which "no official status justifies persons who may be accused of responsibility for such violations [of convention rights, our add.] being held immune from legal responsibility" – and further, that "the problem of impunity for these violations, a matter of sustained concern by the Committee, may well be an important contributing element in the recurrence of the violations."[11]

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[11] During the preparation of the present comments to CERD, it was made known through the press that the Director of Public prosecutions had decided to ask Parliament to lift the Parliamentary immunity of Jesper Langballe MP for the Danish Popular Party, in order to bring charges against Mr. Langballe under Section 266b of the Criminal Code for statements in the newspaper *Berlingske Tidende* on 13 Jan. 2010. A decision to that effect was taken by Parliament on 16 June 2010. As representative for the complainant DACoRD was not informed by the Prosecution authority. It is not clear why the Director of Public Prosecution have opted to bring this case, but refused all other cases for nearly a decade, but it may be noted that Mr. Langballe is an outgoing MP, who will not stand for reelection at the next general election. At the time of final court decision Mr. Langballe will be former MP like Mr. Glistrup and of approximately same age. Mr. Langballe voted himself for lifting his immunity, and it can be expected that the defense will try to make the case a show piece in the efforts of the Popular Party to have Section 266 b abolished.

In a related development, On June 29, 2010 The Director of Public Prosecution decided to drop charges against Mr. Søren Krarup, MP for the Danish Popular Party for similar statements equally in support of Lars Hedegaard on generalized statements on sexual abuse of young girls in Muslim families. In a newspaper article Mr. Krarup was quoted for saying that Mr. Hedegaard "was absolutely correct" and that the public indignation was only due to the ignorance of journalists. In a police interview, Mr. Krarup subsequently explained, that he did not know at the time what Mr. Hedegaard had said. The Director for public prosecution decided to stop further prosecution, as the "evidence was not fully sufficient" to prove, that Mr. Krarup had violated Section 266B of the Penal Code. The Director reasoned that it could not be proven, that Mr. Krarup was familiar with the precise content of Mr. Hedegaards statements.

31. In this context DACoRD would respectfully distance itself from the effort by the Government in these cases to justify the ineffectiveness of the investigation to give freedom of expression a special status as one of the core human rights in the Conventions and a necessity in a democracy, stating that it must be considered incompatible with the founding principles if the human rights conventions were to be interpreted as imposing a positive duty of action on the State to intervene in a debate on a current topic. DACoRD objects to this characterization of freedom of expression, however important that right is. Freedom of expression does not have a higher ranking among Convention rights or compared to other human rights. Freedom of expression is not listed as a non-derogable right under Article 4.2 of the ICCPR. – and in the opinion of DACoRD such listing is more of a practical nature, than it is an expression of a higher quality or level of importance of certain human rights. Human rights are not hierarchical, but equal, interdependent and indivisible.[12] If anything, freedom from discrimination and self-determination stands out as special among the Covenant rights as *jus cogens* under international law. The positive duty of States is to implement and give effect to all protected rights.

32. As a third general point, DACoRD refers back to the General Comment No. 31 of the HRC, above, on the problem of impunity as a source of recurrence of violations, and the case of *Gelle v. Denmark*, CERD No. 34/2004, cited above in para 27. In the *Gelle case* the Committee on the Elimination of Racial Discrimination in its decision of 6 March 2006 recommended that the petitioner should be granted compensation for moral injury and that existing legislation is effectively applied so that similar violations do not occur in the future. This did not happen, however. The statements in the case were subsequently repeated and formed the basis for new petitions, and the Government refused to pay compensation in the follow-up procedure.

33. In the Committee's views on case no. 40/2007, *Murat Er v. Denmark*, the Committee similarly held, that the State party should grant the petitioner adequate compensation for the moral injury caused by the violations under art. 2 (1)(d),5(e) and 6 of the ICERD. Again the State party refused. DACoRD had submitted a Note of 14. December 2007 to the Ministry of Justice, Human Rights Entity, containing a statement of claims under three headings (compensation in tort, costs at the High Court level in the domestic proceedings for the opponent according to the judgment and for own costs) totaling a compensation of DKR 115.000. The case was further complicated by the fact that the Complaints Committee for Ethnic Equal Treatment of the Danish Institute of Human Rights– which had originally found a discrimination on ground of ethnicity in the case in a decision of 20 December 2007 on its own motive submitted a recommendation to the Ministry of Justice against compensation in case, without knowing the claim and acting *ultra vires*, as it was outside the competence of the Committee to consider, whether a person, who has been subjected to discriminatory treatment on account of race or ethnic origin, is entitled to damages for economic loss or compensation for non-economic injury. The Government submitted the Statement by the Complaints Committee to the Committee on the Elimination of Racial Discrimination as its first response and subsequently refused to comply with the Views of CERD. This appears in part to be at the strong urging of the Technical School, which was responsible for the original discrimination in the case, which was concerned over ramifications in similar cases, including the pending *Gavrani* case. In DACRD's reply in the follow-up procedure reference was also made to a general survey from

12 Cf. Th. Meron, On a hierarchy of International Human Rights, 80 *Am. J.Int.L* 1 (1986).

the research entity of the *Rockwool Foundation*, that the issue in the *Murat Er case* is part of a much broader and persistent practice. Consequently, DACoRD requests the Committee to remain seized with the *Murat Er case* in the follow-up procedure and to consider the dialoque with the State party as ongoing with a view to implementation. DACoRD is of the view that failure to implement the Views of the Committee is incompatible with the obligation to respect in good faith the procedure of individual communication established by the Convention, cf. General Comment No. 33 of the Human Rights Committee (2008) on the Obligations of the State Parties under the Optional Protocol to the ICCPR, para. 16ff.[13]

34. Far from not cooperating with the Views of Treaty bodies the official Danish posture was stated in February 2007, when Denmark was a candidate for a seat on the Human Rights Council. Denmark assured its respect for human rights and pledged "to ensure effective enjoyment of human rights domestically: …By submitting fully to independent monitoring of human rights protection domestically through cooperation with international and national monitoring bodies as well as by complying with their recommendations."[14]

35. For further information relevant to the status of the Convention, please see the specific observations on Article 6 below.

SPECIFIC OBSERVATIONS ON INDIVICUAL ARTICLES 2 TILL 6 OF THE CONVENTION.

36. Apart from the Committee's Concluding observations nos 10 and 11 discussed above, the Committee expressed substantive concerns regarding specific articles in the observations 12-22. DACoRD regrets to be unable to find improvements in regards to the Committee recommendations nos. 12,13,14,15,17,18,19, 20, 21 and 22. In certain respects the situation may have become graver.

37. In respect of the Committee's concern over unemployment among "immigrants" and "descendants" in recommendation 16 DACoRD would note some improvement in the reporting period. These improvements can generally be ascribed to labour shortage on the labour market which could help previously marginalized persons to gain access to jobs. It is yet too early to say whether this trend will be counteracted by the economic crisis. However, one effect of the crisis and globalization has been a structural development that led to the loss of large numbers of unskilled jobs in Denmark. It is, however, more doubtful whether these structural trends on the labour market will have long-term effects on discrimination in the labour market. It has not been documented that so-called economic incentive legislation such as the starting allowance or the 450 hours rule – both concerning reduced social benefits – has improved equal access to ordinary employment on equal terms. We refer to further comments below under art. 3 and 5.e.i.

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13 DACoRD points to A.K.H.A. v. Norway case, Com. No. 1542/2007 as an effective follow-up procedure and the response of the Norwegian authorities as a model dialogue, see CCPR/C/98/3, p. 11.

14 Note verbale dated 2 February 2007 from the Permanent Mission of Denmark to the United Nations addressed to the President of the General Assembly. UN Doc. A/61/742 Agenda item 105 (2) …election of fourteen members of the Human Rights Council.

38. One reason that little progress has been taking place in relation to the Concluding observations from 2006 may be found in the decisive role of the Danish Popular Party as majority alliance for the Government since the general election in November 2001. On 6 May 2002 two members Søren Krarup and Jesper Langballe of the party had negotiations on the Aliens Act with the then Minister of Integration Bertel Haarder. In an interview with the newspaper *Information* (8 Dec. 2006) Søren Krarup later stated: "If I should be solemn, it was a national question, which had to be resolved. It was of course a matter of getting a handle on the disastrous immigration. That was the pressure upon us. We were *driven by our conscience to straighten the nation*. Jesper and I had to get a handle on the immigration. That was the main objective." …"The Agreement from 2002 on the aliens act besides the 24-years rule and the aggregate ties rule also included the so-called starting allowance for newly arrived refugees. … At the same time it was *decisive to distinguishing between people*. Danes and those 'from foreign countries', said Krarup. "I have always been morally offended that people can come travelling to Denmark from the other side of the World and get the same social assistance as Danish citizens. It was therefore quite decisive, that the starting allowance had the overriding function, that people on the other side of the World should *not just be able to come* travelling to Denmark *and be treated on equal footing with Danish citizens*." An other element discussed in the interview was therefore also the many new and tightened requirements for access to Danish citizenship which had been part of the same policy. (Ital.s added).

39. Much of the Danish 18th and 19th periodical report consist of references to legislative reforms and projects. In disentangling the contents and effects of these initiatives DACoRD would like to encourage attention to three elements: *Firstly,* many rules are put together in a way that at surface may look general in application, but which in fact tend to discriminate on grounds of race, colour, ethnicity, and religion. *Secondly*, many of the measures are tied to the disproportionate use of controls and sanctions that have the purpose of impairing or nullifying the enjoyment of rights on the political, economic, social or cultural field. This could involve loss of economic support in case of unsatisfactory participation in an introductory program, forced choice of residence, loss of access to permanent residence if an introductory program had not been completed for some reason, including change of rules, or forced labour on substandard conditions. *Thirdly*, an aim to assimilate rather than to integrate the individual in a way that may marginalize the individual and restrict the social and cultural identity of persons belonging to national, linguistic or ethnic minorities in a disproportionate manner (cf. CO 2006 nos. 17 & 22. *Fourthly*, many of the legislative reforms and initiatives are in the form of claw back provisions leading to a reduction in rights in the areas of civil, political, social and cultural rights. This often takes place piece by piece over consecutive years. One pertinent example is giver under Art. 5 (c).

40. As a fourth point of concern programs and initiatives mentioned may not be realized or implemented. The Government in para 9f of the Perodic Report, refers to the Action Plan to Promote Equal Treatment and Diversity and Combat Racism of Nov. 2003, and mentions a new action plan to be published ultimo 2009. A revised action plan, however, is not yet available at the time of writing. In the 2003 Action Plan the Government refers, e.g. to two "good initiatives" at p. 9, one to secure documentation of unequal treatment in Denmark both under domestic and international law to be carried out by the Danish Institute for Human Rights and, secondly, to a hotline in the Ministry for Education for ethnic minorities and immigrants, which

was supposed to assist individuals questioning the use by educational institutions of rules that could be useful for the concerns of ethnic minorities. Neither initiative has been realised.

41. According to a pre-press statement published by *Berlingske Tidende* and *Ritzau* press agency on 5 July 2010 the 2009 Action Plan will announce a research program to map the extent of ethnic discrimination in Denmark. According to the telegram the purpose of the project is to end the negative thinking, "where one sees racism and discrimination every where".

42. The two last examples illustrate instances where DACoRD with its advisory and documentary functions comes into play. The Government writes in the Action Plan 2003 that it is necessary to know how and where racism and discrimination occurs, and that the documentation and knowledge in the field have to be updated and expanded. Absent action in the field by the public institutions, DACoRD tries to fill the vacuum, but lack the resources for the job compared to the public institutions. The basic cause for this is the taking of the public appropriation for DACoRD since the 2002 financial year. Public institutions, however, still expects DACoRD to do the job and turns to the organisation for information.

Roma Questions (Art.s 2 & 5)

43. In the 2006 Concluding observations, para. 12, The Committee on the Elimination of Racial Discrimination regretted the paucity of information on the Roma population in Denmark. Prior to that in para 8, the Committee noted with satisfaction that Roma children in Denmark no longer are subject to classes established on the basis of their ethnicity. In the Summary Record 1785, para 222 the Country Rapporteur explained that "the situation had improved in one specific area, namely education, but that in general the Committee required more information about the situation of the Roma population, which it requested in paragraph 12."

44. The Government responds in para. 33ff of the 18th and 19th report along traditional lines giving broad information on time periods for Roma immigrants to Denmark, but stating that the Central Population Register does not allow identification on of the Roma group in Denmark. It is further stated that Roma who took up residence in Denmark prior to 1960s have been complete integrated (assimilated?) and do not emerge as an identifiable group.

45. The same general information was noted by Mr. Gil-Robles as Commissioner for Human Rights on his visit to Denmark 13th-16th Apr. 2004,[15] who added, however, that "Many of the indigenous Roma have, however, lost their mother tongue, but I was informed that there has been a renewed eagerness to maintain and rejuvenate the Roma culture, language and traditions.

46. Mr. Gil-Robles stated that he heard a number of reports of discrimination against Roma regarding access to employment, housing and education, but expressed particular concern about difficulties faced by Roma children in accessing education. He specifically referred to the situation in Elsinore Municipality, "where there are reportedly special Roma classes, which are defined in the municipality's report as classes for 'Roma pupils who cannot be in a normal class

15 CommDH (2004)12, original version, para. 35ff, p.13f.

or in a special class'." The "so-called Romi classes, which, whilst not officially described as classes for special education, offer education that corresponds to that of classes for special education rather than regular classes. The pupils in the classes are not of the same age, but from all class levels in the public school system. Reportedly, practically none of the Roma children ever make it back to normal classes again. No proper pedagogical counselling and assessment takes place prior to a placement of a child to a Romi class. Instead, the decision is taken on the basis of the teacher alone."

47. An individual complaint was considered on the matter by the former Complaints Committee for Ethnic Equal Treatment on 5 Dec. 2005, which found that a pupil had been subjected to direct discrimination on ground of ethnic origin by being placed in a class (called 'F-class') solely composed of pupils of Roma background.

48. The Roma classes were subsequently abolished, which is the background for the CERD satisfaction in para 8 of the Concluding observations above. However, the problem appears not to have gone away.

49. A recent evaluation report from the Pedagogical Development Centre in the Municipality of Elsinore called for competence in Danish as a second language and cultural difference in the visitation of pupils to the special classes. According to the report lack of knowledge caused far to many bilingual students to be wrongfully placed in special classes and they never get away from them again. A school master wrote a summary of the problem:

> "For the moment there is a tendency, that relatively many bilingual pupils are placed in the special classes. This is particularly the case for Romi children. They are often referred to the special classes later in their schooling than Danish children. When the so-called f-classes (absenteeism classes with exclusive Rome children) were abolished, a placement had to be found for these students. Their substantive/linguistic skills were/are at a low level. Many of them have been tested to special class, but their problem is quite different (linguistically, socially, culturally). The preconditions of the special classes – which are children with general learning disabilities – are changed in a way, so that pupils with a bilingual problem takes up relatively much space. By way of example up towards half of the pupils in a special class may have Romi background. At the same time there is no certainty that there are teachers in the special classes, who have qualifications for teaching bilingual students, and there are no dedicated resources to teaching Danish as a second language in those classes, that have many bilinguals. …If one want to maintain the good framework of the special classes for pupils with learning disabilities and to secure that the Romi children also get a decent education, …a different solution for the bilingual pupils should be found than referring them to Special classes."[16]

50. Like Commissioner Gil-Robles, DACoRD has over the years handles a number of complains on the basis of race/ethnic background, and the same is true for the old Complaints Committee for Ethnic Equal Treatment. After the unsuccessful efforts by Roma organizations to gain

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16 *Fokus på lærersamarbejdet i forbindelse med efteruddannelse af lærere, som underviser tosprogede elever i Hlesingør Kommune,* Pædegogisk UdviklingsCenter, Delevaluering 1, maj 2008, p. 31, the quote at p. 32. The evaluation report on in-service training/supplementary training can be found at the home page of the Pedagogical Development Centre in the Municipality of Elsinore http://www.puc.helsingor.dk/upload/puc/dokumenter/ini/microsoft%20word%20-%20delevaluering%201_200608.pdf

recognition by the Government under the European Framework Convention for the Protection of National Minorities, the ability of Roma in Denmark for a concerted effort to gain some recognition and status appears to have been set back – and the Government has lost an opportunity to have a dialogue part. In this sense the Government has been successful in preventing Roma as a non-identifiable group in Denmark.

51. DACoRD would like to add 1) that besides the three groups of Roma identified by the Government a new migration of Roma is taking place in recent years apparently mainly of Eastern European origin and from new EU Member States. Data are scant and information primarily derives from non official sources, and relevant protective measures are therefore not available either.[17] 2) Stereotypes and prejudicial discrimination is reported both at the street and at official level, and ethnic profiling is documented by police issuing warnings to the public. In this context registration appears to take place on racial/ethnic background. "Sigøjner" [Gypsies] rather than Roma appears to be the preferred police terminology. Economic need and social exclusion appears to be prime motivators for the migration, but improvement in life conditions are not reported in Denmark. Aid is limited to private organisations. These organisations vary in their view and observations as to whether the migration patterns are organised.

52. Ethnic targeting and stigmatization by the police of Roma on the basis of race, colour, national or ethnic origin. In a mail of June 16, 2008 the national police (Rigspolitiet) informed DACoRD that it did not have statistical data on new immigration by Roma, noting that no registration takes place on the basis of ethnicity in the section on aliens in the National Police.

53. However, the Police does have information – also of a statistical nature – on Roma in the area of crime. According to a thematic article in the daily newspaper *MetroXpress*, Københavnon June 11, 2008, p. 12f, "Police intensifies the hunt on Romas: Migrant Romas – also called gypsies [sigøjnere] swindles, begs and steals, says an analysis from the police", states the headline.

54. The article reports that the Police in the *District of East Jutland* has examined the phenomenon in depth, and that it shows that incoming Romas use a broad palette of scam and tricks: In the period 2005-2007 163 reports have been made against 315 Romas in the police district, and 87 has been charged. In a special window the article listed the scope of Roma crimes under 6 headings. It further appears, that the East Jutland Police District had shared its analysis with other police districts.

55. DACoRD has requested a copy of the Report from the East Jutland Police, but this was refused. The police analysis has, however, been shared with the newspaper reporter on an oral basis. It is not clear how the numbered persons 163/87 have been identified by the police on ethnic lines – especially if the have not been arrested – only as few as half the number is reported to have been charged.

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17 Cf. Tomas Hammerberg, "Every European state should join together and state loud and clear that they have had enough of prejudice towards Roma.", p. 14 in: *Human Rights in Europe: no ground for complacency, Viewpoints by the Council of Europe Commissioner for Human Rights,*Council of Europe, 2008,

56. The ethnic profiling in the above is also reflected in press releases from the police, public warnings and reports to journalists from the daily activity report:

    One example is a press release of 27 May 2008 from the same police district, and published on the police webside[18] under the heading: "Gypsies tries to stop cars in East Jutland. Gypsies are again on the go in East Jutland. The police requests the public to ignore the 'tricksters'" The text reports that roadside "gypsy types" tries to stop cars asking for money and trying to sell 'gold jewels'. It is stated that the way of operation is known from previous seasons. The police encourages the motorists to ignore the tricksters: *It is not necessary, either, to call the police in order to report on the position of the gypsies. The police know they are there, and use every opportunity to pursue them"*. The police expects that the practice will spread to the entire country.

57. In May 2010 Police warnings against Roma again took the headlines of national news: "Police warns agains Gypsie", read the front page of *Jyllands Posten* on May 30, 2010, and the story continued on a double page at p. 4-5. We see a marked increase in the number of these East Europeans – typically Romas – stated a Police Inspector from the Copenhagen Police.

58. In 2007 an article in the publication *Journalisten,* a professional membership publication from the Danish Journalist Union[19], in December 2007 warned against the stereotyping and poor journalism in reporting on Roma under the headline: "Now I'll come and steal your laundry. The author quotes a few examples of incidents concerning "Gypsies" being turned away from roadside parking lots and picnic-areas and most often based on one source of information, the Police. "I believe, that the media has a large co-responsibility, for our exclusion today of one definite group out of our society, because only negative stories are reported based on poor journalistic leg-work."

59. One source of information on recent Roma migrants is often NGOs, since support is not made available by public sources for undocumented immigrants. One of these organizations is *Project Outside* [projekt UDENFOR][20] a social action project dealing with the problem of homelessness. *Project Outside* has noted tensions between Roma and other users of their programmes, e.g. at their mobile café, delivering free meals to homeless persons in the street. The organization do not register their users, but notes made by their volunteers suggest some animosity and competition between Danish homeless people and Roma, who are not always welcome at the Mobile Café and can meet shouts like "go home". Behaviour and perceptions thus can also lead to discrimination at this level.

60. One traditional area of discrimination in access to services has been camping sites. Prior to the implementation of the ICERD, art. 5 (f) through the 1971 Act prohibiting discrimination on the basis of race refusing admittance or service on equal terms an Annual Directory of Camping Sites in Denmark from the 1969 issue brought bylaws which in § 1 limited access to persons with fixed domicile and identity cards. In practice the rule was aimed to limit access for travelling gypsies. The rule was introduced after a press campaign, and could also be used

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18 http://www.politi.dk/Oestjylland/da/lokalnyt/Nyheder/Sigoejnere_100408.htm. In at least one instance the police report refers not to Eastern European persons, but to Travellers from England.

19 http://www.journalisten.dk/om-journalisten, Article by Kenneth Wöhlisfelt

20 http://www.udenfor.dk/uk/Menu/Front-page

against hosts of camping sites who would allow Roma at their facilities.[21] A few membership organizations had objected to the rule, while the responsible Minister for Culture did not find a discriminatory objective in the general wording of the rule.

61. The problem did not disappear after the 1971 act, and on 30 Nov. 2006 the former Complaints Committee for Ethnic Equal Treatment found that refusal by a camping ´site of a person with Roma background constituted direct discrimination in violation of the law. On 4 May 2010, however, the chairman of the Legal Committee of the Danish Parliament, reacted to a news report that 8 out of 11 owners of camping sites admitted to refuse "Gypsies on the background of bad experiences with this population group". According to the Chairman of the Legal Committee, Mr. Peter Skaarup of the Danish Popular Party, the owners of the camping grounds could decide for themselves what customers they wanted, and denied that it was racial discrimination if Roma are refused access. According to press statements he would now ask the Minister for Justice to address the issue: "Camping ground owners should not be punished for protecting the sites against criminals. I believe, there is a need to make plain that you of course have the possibility to choose your customers."[22]

62. The latest development is the forced expulsion of 22 Roma EU citizens who were caught sleeping "illegally" in tents in public space in Copenhagen. The European Roma Right Centre on July 12, 2010 condemned the Mass arrest and forced deportation of EU-Romani citizens, since they were not charged for any crimes, except for "illegal" camping in a public space.[23] DACoRD is concerned that this is a violation of EU law and discriminatory against Romani.

Segregation in the labour market (recomm 16) (Art 3)

63. The Danish authorities have only been able to identify three cases of relevance during the period under review which is quite a surprise since the Danish authorities at the last session with CERD promised to improve the registration of discrimination cases. It is regrettable that the authorities have no idea of the number of cases since this seems to be crucial for the acknowledgement of the extent of the problem of discrimination in the Danish labour market.

64. By way of example DACoRD has forwarded many discriminatory job advertisements to the Ministry of Labour and asked the Ministry whether it agree that these are violations of the Act on the prohibition against discrimination in the labour market. Further more DACoRD has asked what the Ministry intend to do to stop these discriminatory employers practices. In a letter dated 15 August 2007 the Minister concluded, that since the police did not take action in a concrete case (where the employer asked for Danish manpower) the Ministry would not comment on the issue. Recently the Ministry replied that they acknowledge the great numbers of discriminatory job ads receive from DACoRD, but the only concrete measure the Ministry wanted to invoke was to include them as examples in a future pamphlet describing the law.

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21 A. Enevig 'Sigøjnere' pp. 62, in J. Blum, ed., *Minoritetsproblemer i Danmark,* Gyldendal, 1975,

22 *Ekstra Bladet* 4 May 2010 and other newspapers, based on a news item from the news agency *Ritzaus Bureau*.

23 See homepage: http://www.errc.org/cikk.php?cikk=3603

65. Concerning the three cases that are mentioned by the Minister please be informed that all three of them are of limited interest to CERD. By way of example the "Ramadan" case is about religion and not racial discrimination according to the High Court decision. DACoRD agrees however that "religious" discrimination in Denmark is often also due to ethnic origin (Arabs) but then not only the Ramadan case should be mentioned, but also Court cases on the issue of religious headgear (headscarves, Turban etc.). But maybe more relevant the Government should mention the City Court decision of Copenhagen January, 3, 2006 by which the employer had to pay a fine of D.kr. 3000 for violating the ban on discrimination in the Labour market in a job ad demanding Danish manpower. It seems to be the main problem that the Danish Police will not take action against these discriminatory job ads, but when they do take the cases to Court, the Danish Courts have no problems in sentencing the employers for violating the ban on discrimination in the labour market.[24]

66. DACoRD would like to underline the need for a comprehensive registration of discrimination cases in the labour market and that the Ministry for Labour is taking action when it has received information about discrimination taking place openly in the Danish society.

Racist speech/racist crimes (Art. 4)

67. DACoRD welcomes the data provided by the Danish Government in para. 48 on cases concerning hate speech. Please however be informed about the number of complaints about hate speech during the same period (2004 till 2008), since this has not been reported by the Danish Government. Please observe that the Danish government only reported **24** cases which is a little more than 10% of the cases, since the total numbers of complaints in the same period are **190.**

2004:	27
2005:	54
2006:	66
2007:	26
2008:	17
Total	190 (complaints to the police about hate speech)

68. DACoRD is surprised that these figures are not included in the report and even more surprised that the figures from the Danish Police Intelligence Service (PET) relating to possible racist incidents (violence, vandalism, threats and other hate crimes) are not included either. Please find below figures for the period 1992 until 2008.

Figure 1 (PET records 1992-2008)

Year	Number of Incidents
1992-1998	620
1999	16

[24] Communication no.

2000	28
2001	116
2002	68
2003	52
2004	36
2005	87
2006	227
2007	35
2008	175

69. The rising numbers in 2001 was a direct result of 9.11 since a large number of hate crimes (Violence, Threats, Vandalism etc. with a possible racist motive) were committed against Muslims or people who were considered to be Muslims (Arabs, Somalians and other “foreign” looking people etc.). The rise in 2005 was close connected to the London Bombs and the rise in 2006 can mainly be explained due to the Danish “Cartoon crises”.

70. After 9.11 and again after the London bombs the Danish Prime Minister Anders Fogh Rasmussen (today head of NATO) was invited to do more for the prevention of hatred and reprisals against Muslims following the attacks. By way of example Tony Blair stated that "We were proud of your contribution to Britain before last Thursday. We are still proud of it today. That was his message to the peaceful British Muslims in London in July 2005. "I have not seen a single message from our leading politicians. All they do is to react when the imams do not take enough distance from extremists. We miss a clear message from Fogh, for there are many who listen to what the official Denmark believes it is important that there develops a bad mood, "sad Danish Imam Wahid Pedersen to the Danish Newspaper Berlingske on July 19, 2005. Also Imam Fatih Alev, experienced several examples of harassment, and he asked Mr. Fogh to take the role of a father figure to all. It was not possible however to get a statement from the prime minister, but the Liberal Party integration spokesman Irene Simonsen, believed that the government had taken its share of responsibility. On July 4, 2010 however the Social scientist Magnus Ranstorp stated to the Danish Newspaper Jyllandsposten that the Danish government is lacking behind when it comes to preparing the Danish population to the situation right after a possible terrorist attack. “It is possible to foresee that a terrorist attack will create a conflict between the Muslim part of the population and the rest of the population. That is why the authorities already now ought to establish dialogue between the two groups, so it will be possible to create a joint front against terrorism (in case of an attack).”

71. DACoRD is afraid that the reason why the Danish Liberal/Conservative Government is not taking such steeps is because they are 100 % depending on the support of the Danish Peoples Party in order to stay in power since the DPP has the “swing votes” in the Danish Parliament. Consequently the present Government has agreed in a large number of demands from DPP including the withdrawal of all public funding for DACoRD’s work and changes of the Aliens

Act and a long row of hate statements against Somalians and Muslims. [25] Lately the DPP has demanded the abolishment of the Danish Penal Code section 266 b (hate speech) since one of their members of Parliament has now been accused and taken on trial by the public prosecution for violation of section 266 b.

Police conduct

72. Riots broke out in February 2007. Because of these violent incidents in Copenhagen including several young men of a non-Danish ethnic origin, a Copenhagen police officer had to work during the weekend. Consequently the officer wrote on the internet amongst others:"*Go home you fucking perkere (slang like Paki.) Get out of our town and our country. I hate you*." Several other remarks were also offensive and the City Court sentenced the Police Officer to a fine of 4000 DKK (Euro 600). This decision was appealed, but the Eastern High Court finally sentenced the Police Officer for hate speech on the internet.

73. Two other police officers were using violence against a man of African decent while they were off duty. Consequently they were both sentenced for violence and sacked from the Metropolitan Police Service in Copenhagen. A fourth police officer was sentenced in the City Court but the case is now under appeal in High Court. Such cases contribute to the feeling amongst migrant youth that the police force is biased against them

74. According to para 56-58 the Danish government has no cases to report concerning the Act on the prohibition against racial discrimination. Again DACoRD is surprised about the lack of data, since we provided a report to the Municipality of Copenhagen concerning discrimination cases in 2006-2007.[26] During 2006 the City Court of Copenhagen sentenced 4 doormen (from four different night clubs) for discrimination against young men of a non Danish ethnic origin. Since DACoRD has identified four cases from the city of Copenhagen in just one year the total number of Court decisions must be much higher, and DACoRD is thus surprised that the Danish authorities have not been able to include these figures in the report.

Racist violence (Art 5 b)

75. A few cases have been handled as racist violence according to the criminal code section 244 or 245 with section 81, subsection 6 (racist motive).

76. By way of example two Israeli salesmen were attacked in the town of Odense by gunshots on December 31, 2008, and the 28 year old attacker was sentenced 10 years imprisonment. According to the verdict the sentence was raised from 9 years to 10 years because 9 out of 12 members of the Jury voted for using the criminal code section 81 subsection 6 (racist motive as an aggravating factor). The shooting was taking place in the period of time when Israeli troops

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25 Some examples are know to CERD as cases No. 34/2004, no. 36/2006 and no. 37/2006 and no. 43/2008 (pending).

26 See report on http://www.drcenter.dk/html/publikationer/Diskriminationsrapport07-21.pdf

were fighting inside Gaza (end of 2008, beginning of 2009), and consequently Denmark experienced a number of anti-Semitic attacks. It is thus welcomed that the prosecution has asked the court to consider racism as an aggravating factor and that the majority of votes in court was in favour of this. Consequently the Danish society is sending a strong signal to other perpetrators that racist crimes are not accepted

77. Unfortunately this is, however, far from being the norm in Denmark

78. By way of example in March 2008 Dennis Uzun delivered newspapers in Copenhagen. He was standing on a corner with a friend when a group of three youngsters of Danish origin attacked him. The one in front attacked Dennis Uzun with a baseball bat saying "What are you looking at perker pig" (Perker = paki). The stroke in the head caused the death of Dennis shortly after.

79. On trial the friend of Dennis Uzun (who was standing right behind him) testified that Kenni used that exact wording, by repeating what he had told the police shortly after the murder. Never the less the Chief Inspector of the homicide section in Copenhagen Police, Ove Dahl, stated in public on 28 March 2008: "I totally reject that this manslaughter has anything to do with racism or religion. It is only violence for the sake of violence". This statement was a great surprise to the mother of Dennis – Gülsen Uzun, since she had already learned about the statement: "What are you looking at perker pig". Further more it was now public knowledge that the same attacker was also bing charged for the attack of Sayed Shams Hussain about two weeks before the attack on Dennis Uzun.

80. According to Danish law racist motivated crimes are considered an aggravating factor according to the criminal code section 81, para. 6.

81. During the trial in January 2009 and on appeal in June 2009 the prosecution failed to invoke section 81, para. 6 and consequently the courts were barred from considering the possibility of including the racist element into the case. This is even more surprisingly since it was made public knowledge on 17 March 2009 that the attacker had stated to a guard in the prison that: "We just had to kill a perker". The sentence was 3 years imprisonment – far from the 8 years imprisonment maximum for young offenders under 18.

82. DACoRD is concerned that the police and prosecution is not doing enough to protect victims of racial discrimination, and if racist attacks takes place – not to prosecute according to section 81, subsection 6. See by way of example CERD Communication 46/2009

Political rights – local elections Art. 5(c).

83. It has been a standard area of satisfaction in the dialoque between the Danish Government and the Committee, that resident aliens in Denmark had the right to participate in local and regional elections after 3 years in Denmark. This right to political participation is, however, under revision.

84. On March 15, 2010 the Government and the Danish Popular Party entered into an agreement after a so-called service-check of the policy on aliens and integration. As a new initiative under the agreement, it was agreed to limit the universal and equal suffrage and the right to vote and stand for election in local and regional elections. According to the text of the agreement: "The individual foreigner must make an effort to become integrated and to show citizenship. Resident aliens – not including Nordic citizens and EU Citizens - can therefore first obtain municipal and regional voting rights after 4 years residence. The Danish Popular Party has indicated as its preference that immigrants must have obtained citizenship to gain the right to vote in municipal elections, which to the Party is a logical consequence of being well integrated."

85. Legislative implementation of the decision has not yet taken place. In the view of DACoRD the agreed reduction in rights does not have a rational tie to the poorly stated aim and cannot be considered a legitimate means under the Convention. It is not necessary in a democratic society as many years practice of local voting rights have demonstrated. Good citizenship is hardly developed by limiting the right to participate.

86. As the matter stands recent research has shown a lessened participation in municipal elections by immigrants and their descendants in municipal elections in the two largest cities from the municipal election in 1997 to 2009 (11 percent loss of voters in Copenhagen and 17 percent in Århus). 44 municipalities were examined in the study, covering some 2.4 million votes in the 2009 election. The total participation in the 2009 municipal election was 37 percent for immigrants and 36 for descendants, while ethnic Danes tallied at 68 percent. (*Politiken* 23 June 2010, front page). In a comment to the study an 18 years old high school student, Danish born of Pakistani origin, indicated: " I will not use my right to vote, because it does not lead to anything. And generally I believe many immigrants feel like that." Some further comments ascribed to attitude to the harshness of the debate and disillusionment.

Family reunion and the 28 year rule (Art. 5 (d) (iv), cf. Art. 5 (d) (iii) and Art. 1

87. In the context of restrictive Danish rules on family reunion the Committee in para. 15 of its 2006 Concluding Observations expressed concern that the rule that the aggregate ties with Denmark must be stronger than their ties with any other country unless the spouse living in Denmark has been a Danish national or has been residing in Denmark for more than 28 years may lead to a situation of discrimination in the enjoyment of the right to family life, marriage and choice of spouse for persons belonging to ethnic or national minority groups.

88. In the Danish additional report, requested by the Committee, the Government found that the 28-year rule was not in contradiction with the principle of equality (CERD/C/CO/17/Add.1, para. 49). The Government further described the 28-year rule as an exception waiving the stipulation on aggregate ties of the couple and stated that there are objective reasons for the differential treatment accorded to citizens depending on the length of their citizenship (para. 50, cf. para. 33 "do not amount to unfounded discrimination").

89. DACoRD respectfully disagrees and urge the Committee to review whether 'any distinction, exclusion or restriction… based on national or ethnic origin which has the purpose or effect of

nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms', inter alia the right to nationality. Yet the Government - in para. 50 cited above - states that 'a person who has been a Danish national for 28 years will normally be found to have such ties with Denmark that it is possible to waive the condition of ties and allow family reunion in contradistinction to persons enjoying a Danish citizenship apparently of a lesser quality.[27] The Government provides no reason why the apparent arbitrary figure of 28 years should give reason for such qualitative distinction. In the view of DACoRD there is no rational tie between the measure in the 28 year rule and any objective and proportional reason for the differential treatment, which must therefore be deemed discriminatory.[28]

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91. The question before the Supreme Court concerned the distinction under which persons with Danish citizenship for 28 years are better placed than persons, who have had Danish citizenship for a shorter period than 28 years. (*UfR 2010. 1035H* at 1059).

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Art. 5 (2) or the European Convention on Nationality, the majority then concluded, that the European Convention on Human Rights Art. 14, cf. Art. 8, could not be accorded a broader scope than that which follows from the judgement from 1985.

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"For persons who did not grow up in Denmark and who first at a later time in their life have achieved Danish citizenship the rule means that the attachment tie rule is applied until 28 years has passed from the time when the applicant attained Danish citizenship. By way of example, B [spouse in the instant case, ed. Ann.] who became Danish citizen at 31 years of age, will be subject to the attachment requirement until he becomes 59 years old. The 28 years rule therefore involves, that the substantial limitation in the access to family reunion, which follows from the attachment requirement, far more often and in a more radical interference will effect persons, who only later in their life have attained Danish citizenship, than persons born to Danish citizenship. The 28 year rule, thus involves a clear indirect difference of treatment between the two groups of Danish citizenship.
…while persons, who only at a later point in life have Danish citizenship generally will have a different ethnic origin. The 28 years rule concurrently, therefore, involves a clear indirect discrimination between Danish citizens of Danish origin and Danish citizens with a different ethnic origin in relation to access to family reunion."
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On the basis of remarks in the travaux preparatoires the minority next took it for granted that the differentiation in the 28 years rule involved an intended consequence of the act. The minority next reviewed the European Conventions on Human Rights (ECHR) and on Nationality (ECN) and questioned the interpretation by 3 ministries of Art. 5 (2) of the latter limiting the application to concern only deprivation or forfeiture of citizenship.

It is in our view subject to doubt, whether there is basis for such a restrictive construction, since the norm according to its wording concerns any distinction irrespective of how and when the citizenship has been acquired. …In considering the 28 year-rule in the light of the Human Rights Convention Art. 14, cf. art. 8, it must, however, in our view be taken into account, that the Nationality Convention art. 5 (2), at least according to its wording as a starting point contains a general rule prohibiting differentiation in treatment between different groups of own citizens.
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On this background it is our view that the indirect differentiation, which the 28 year rule involves, cannot be considered serving a reasonable purpose and therefore it is in violation of the Human Rights Convention art. 14 in conjunction with art. 8.

The consequence flowing from this must be, that the authorities in applying the Aliens Act, Section 9 § 7 on Danish citizens must restrict the 28 years rule to be an age criterion only, so that the aggregate attachment tie is not applied in cases, where the here resident spouse is a Danish citizen and has reached 28 years of age." (*Ibid* at p.1062).

94. DACoRD finally wants to inform the Committee on the Elimination of Racial Discrimination that a complaint over the refusal of family reunion in the Supreme Court judgement of 13 January 2010 has been submitted to the European Court of Human Rights within the 6 month rule limit.

Starting allowance Art. 5 (e)

95. In para 18 of its 2006 Concluding observations the Committee recommended that Denmark reviewed its policy on social benefits for persons 'newly' arrived in Denmark. The Committee expressed concern that the State policy mainly affected foreign nationals – even if it formally applied both to citizens and non-citizens.

96. DACoRD had reported in June 2008 under Art. 2 (c) on the amendment in 2002 of the Act on an Active Social Policy[30] and the Act on Integration[31], Under the amendments distinctions were introduced to reduce the ordinary social assistance '*cash benefit allowance* [*kontanthjælp*] for persons who had not resided lawfully in Denmark for at least 7 out of the preceding eight years. Persons who do not meet the residence requirement, but otherwise satisfy the conditions laid down by the regulations, will be entitled to a *starting allowance benefit* [starthjælp] which is a lower cash benefit allowance than the ordinary cash benefit allowance. Families receiving the starting allowance have at their disposal only between 56 and 73 per cent of the amount of money deemed necessary to live on as a discount budget in Denmark.[32]

97. In DACoRD's submission we cited the criticism from both Amnesty International and UNHCR recalled article 23 of the 1951 Convention relating to the Status of Refugees, which provides for the "same treatment with respect to public relief and assistance as is accorded to their nationals".

98. DACoRD further recalled the Conclusions by the European Committee on Social Rights from 2004 where it is noted on page 20 of the report: "*The Committee also notes that section 11 of the Act on an Active Social policy henceforth applies a distinction between "assistance allowance" and "starting allowance". <…> Although the residence requirement in principle applies to Danish nationals and foreign nationals (except, where applicable, EU/EEA*

30 Bill No. 361 of June 6 2002

31 Bill No. 364 of June 6 2002

32 According to budget indexes from the Bureau of Information for Consumers – Forbrugerinformationen. Forbrugerinformationen is an administration under the jurisdiction of Ministry for Family and Consumer matters. www.forbruger.dk

nationals), the Committee considers that the requirement in practice restricts access of foreign nationals to assistance to a much larger extent. It therefore amounts to indirect discrimination, which is not in conformity with the Charter."[33]

99. Responding to the Committees recommendation the Government in its Periodic Report indicates, that it is the intention to uphold the starting allowance. The Government further informs that the High Court, Eastern Division in a judgement of 24 April 2009 had held, that the challenged provision did not violate any international Convention.

100. The Government did not inform the Committee that the High Court judgement was appealed to the Supreme Court on 10 June 2009, where the case is pending. The plaintiff in the case is a refugee. 2 further cases are pending before the High Court.

101. In the pleadings in the case the appellant has shown that 90% of the recipients[34] of the starting allowance are foreigners. This is not contested by the Crown counsel, acting both for the Ministry and the municipality.

102. DACoRD continues to be of the opinion that the legislative amendment was intended to exclude residents in Denmark from equal access to social benefits on the basis of national or ethnic origin, and that it is mainly foreigners who are affected by the rule. Even if the Government in the explanatory remarks to parliament – also cited before the High Court – maintained the formal view, according to which the rule also applied to Danish citizen, the government has recently shown a more favourable inclination to change the rule in relation to Danish citizens.

103. On June 10 2010 Danish news media carried a story the Danish war veterans was being punished.. Veterans who had been on Danish missions abroad and had become ill – typically PTSD syndrome – had been refused ordinary cash allowance because the had hit the 7/8 year ceiling and ended on the starting allowance while their application for early retirement was pending. On the same day the Minister for Employment issued a press release, stating: "I cannot live with the fact that soldiers who has been out to defend Denmark, are not entitled to cash assistance, when they return home. I will therefore change the rules in order that this particular kind of stay abroad counts in a different way than other stays abroad.[35]

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33 9 http://www.coe.int/t/e/human_rights/esc/3_reporting_procedure/2_recent_conclusions/1_by_state/ Denmark_XVII-1.pdf

34 The figure remains stable in tabulation for the years 2003-2006 in a report prepared by Amnesty International, *Starthjælp – når staten diskriminerer* [Starting Allowance – when the State discriminates], Copenhagen, Nov. 2007, p. 10. For the year 2006 recipients counted 249 persons with Danish background (6%) and 3.659 individuals (94%). The relative distribution for all the years remain stable, while the absolute numbers show growth: 2003: 1998 for persons not of Danish background, 2004: 3392, 2005: 3802 and 2006: 3659. Thus, the figures does not support the contention of the Government in para. 125f of the report, that the starting allowance "help". Furthermore, persons of non-Danish background remain longer on the lower starting allowance, than persons of Danish background: 61-62 percent of recipients are foreigners of Western and non-Western country background compared to 39 percent of persons of Danish background (*ibid*, p.11).

35 Beskæftigelsesministeriet, Press release 10 June 2010 *Udsendte soldater skal ikke på starthjælp*.

Mother Tongue teaching and education– Art. 5 (e) (v) and (vi)

104. In para 19 of the 2006 Concluding observations the Committee regretted the repeal in 2002 of the municipalities' obligation to provide economic support for mother tongue teaching to bilingual students – if the students did not come from Europe (the E/EES countries) or from the Faroe Islands or Greenland. The Committee recommended a review by the State party in this area. The Government it its response merely stated that in distinction to the mentioned student groups, "the same reasons for giving mother tongue tuition do not apply to other bilingual children(Report, para. 161). The government did not ask if there was the same substantial reason from the perspective of fundamental human needs in personal and educational development and personal identity formation was the same substantive reason to offer mother tongue instruction. Accordingly, the government did not address the question if the differentiation between the children from the concerned groups therefore was based on objective criteria and accordingly was proportionate to the pursuit of a legitimate aim. DACoRD believes that this is the critical question to be answered, and that the distinction therefore constitutes discrimination. The government further noted, that it did not prevent municipalities and private organizations from funding such instruction. (para. 162)

105. In order to get an overview of the effect of the repeal in 2008 the Documentation and Advisory Centre on Racial Discrimination (DACoRD or DRC) carried out a mapping of the instruction in the mother-tongue in the Danish School System. The survey consisted of a questionnaire directed to the 98 municipalities of the country and interviews with 40 parents to learn their reasons for having their children follow instruction in the mother-tongue.[36] The report notes that from 1975 and until the change in legislation in 2002 instruction in the mother-tongue had been offered on equal terms irrespective of country of origin to all bilingual children for 3-5 hours a week.

106. As a result of the change in legislation in 2008 approximately 62.000 bilingual children of third country origin have lost the right, which they previously had, to develop their mother-tongue as an integral part of the public educational system. Through the legislative change it was left to the individual municipality to decide whether this group of pupils should be offered instruction in their mother-tongue on a par with children from EU/EES countries, the Faroe Islands and Greenland. The negative implications for the largest group of bilingual children did not, however, appear from the revised law.[37] The revised law only specifies which children continues to have the right to government supported instruction in their mother-tongue – a right

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36 Danm*ark har ondt i modersmålet, En kortlægning af kommunernes modersmålsundervisning i skoleåret 2007/08* [***DENMARK: MOTHER-TONGUE INSTRUCTION IS SUFFERING*** *- A survey of the Municipalities' Instruction in the Mother-Tongue in the School Year 2008/09***] –** The report and a summary in 6 languages, incl. English, is available at the DACoRD home page, www.drcenter.dk under the heading "Nyheder/news in Nov. 2008 (The main report) and May 2009 (Summaries).

37 Danish Law Gazette (*Lovtidende*) 2002, No. 618 of 22 July 2002.

which is secured to them through Directive 77/486/EEC along with children from Greenland and the Faroe Islands.[38]

107. The mapping demonstrated among other things that the possibility for bilingual children to receive publicly supported instruction in the mother-tongue varies tremendously depending on which municipality the family lived in.

108. The DACoRD survey shows, however, that by far the largest number of municipalities has chosen to follow the government downgrading of instruction in the mother-tongue. At the national level the result of the mappings reveals:

- 5 of the total 98 municipalities have offered instruction on equal terms to all bilingual pupils during the school year 2007/08. That is the case in the municipalities of Copenhagen[39], *Vordingborg*, *Randers*, *Frederikshavn* and *Vallensbæk*.[40]
- 10 municipalities have to a certain extent offered instruction to all minority students irrespective of language. That means e.g., that the instruction is offered on equal terms up until the 3rd or 5th grade, after which point minority students with a non-European language no longer can receive publicly financed instruction in the mother-tongue or may receive instruction against a fee, whereas children from EU/EES countries are entitled to government funded instruction in the mother-tongue throughout their schooling.
- The remainder of the municipalities has either provided instruction to a smaller number of students from EU/EES countries and from the Faroe Islands and Greenland *or* not provided any instruction at all.

During the school year 2007/08 a total of approximately 5000 minority pupils have taken part in publicly financed instruction in the mother-tongue, amounting to about 7 *per cent* of the pupils having a different mother-tongue than Danish. Out of these about 2.800 were residents in Copenhagen, the largest municipality in the country. I 1997 a survey showed that about 41 *per cent* of the students having a minority language background received instruction in their language.[41] In other words, there is a strong decline in the development of bilingual competences among minority students in Denmark, if we consider the education that takes place within the public education system.

The revised legislation results in quite arbitrary results of which one example may be mentioned:
If a family having Spanish as its mother-tongue moves to *Greve* the opportunity to receive education in the mother tongue depends on whether the child/children speak Spanish, because the parents derives e.g. from Peru or from Spain. If they come from Spain the child/ children will be offered government funded instruction in the mother-tongue throughout the entire schooling period in their own municipality. If the

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38 *Evas Skjulte Børn*, Phd. Thesis, B. Kristjansdöttír, 2006.

39 From the school year 2008/09 the municipality of Copenhagen decided, however, that bilingual pupils could receive instruction in the mother-tongue on equal terms up to and including the 6th grade. After that grade parental payment is charged of students from 3rd Countries, while children of EU/EES citizens continue to be offered publicly financed instruction.

40 The policy of the municipality of *Fanø* also gives equal opportunity to the student group, but had no pupils that year who wished to take part in mother-tongue instruction.

41 *Kommunerne og de tosprogede elever*, Udviklingscentret for undervisning og uddannelse af tosprogede børn og unge, UC2, 1997. At the relevant time there were approx. 39.000 bilingual pupils in Denmark.

parents are from Peru, the child/children will not be given the offer. If the family had moved to Copenhagen on the other hand the child/children would have been offered publicly financed instruction in their mother tongue up until and including 5th grade no matter whether the parents come from Spain or Peru. After 5th grade, however, the parents will have to pay if the family comes from Peru, but not if it comes from Spain.

109. In the survey the 40 interviewed parents state three main reasons for finding that education at a high level in the mother-tongue is important:

- The possibility of the parents for bringing their children up and forming them to citizens in Denmark is closely connected to the children and parents being able to communicate in a language, where the adults can maintain their rôle as parents.
- The children's possibilities for achieving good educational results – becoming good in Danish as well as other subjects are closely connected to their self-esteem and identity as bilingual and bicultural.
- The benefit for society from the actual linguistic and cultural profusion becomes positive, when children and young persons grow competent at a high level to enter into societal institutions and the private labour market with linguistic abilities both in the mother-tongue and in Danish and with the knowledge and cultural heritage, which is connected to the mother-tongue.

110. Those parents who have contributed to the survey conceive their children's bilingualism as a resource, and they refuse to reject their linguistic and cultural heritage as a pre-condition for being Danish.

111. According to the parents the government's downgrading of the mother-tongue instruction has had negative impact on practice in the schools and educational institutions in several ways. The parents have experiences with institutions and schools prohibiting children and young persons to speak their mother-tongue in class or at the school. It means that the children are deprived of those learning strategies that are regularly used by children with several languages whereby they tie new knowledge to the knowledge they possess both in their mother-tongue and in Danish. By such prohibitions schools and institutions in other words impair the possibilities of minority children to acquire new knowledge, even if a prohibition is often justified with the opposite. Beyond that parents recount that it has consequences to their children's sense of identity and self-esteem when the language they speak in their family is criminalized in this way in the school. It makes the children feel embarrassed and to feel contempt for their origin – or in the case of some contempt for the society that debases their family's linguistic and cultural practice. On this basis some of the parents believe that the current problems of reducing drop-outs from youth educations and some of the problems with criminality among young persons with an immigrant background can be tied to the downgrading of the minority mother-tongue in the school. A mother stated e.g.: *"Those 500.000 DKR they have used for mother-tongue instruction [in the municipality, ed.ann.] they are earned, for they have gained some young children, who move on. They are not lost on the ground. When you think of the costs... In 2-3 months you can spend half a million on a young person, for whom things are going badly."*

112. The Governments efforts to address the problem of low performance of bilingual students compared to their ethnic Danish classmates is presented in para. 152ff. Most initiatives of the Ministry of Education the Task Force mentioned in para 156 of the Government Report to aid local authorities and schools in their efforts to help bilingual students benefit more from their schooling is preoccupied with advanced and obligatory linguistic tests from pre-school age 3

and up, and binding goals measuring student performance in national tests. Assimilation is confused with integration. A recent review of the effect of integration efforts in the municipality of Copenhagen shows that average grades of bilingual students in the public schools compared to monolingual Danish classmates have dropped from 92 percent in 2006 to now 86 percent.[42]

Well being in schools

113. A recent study reveals that children of immigrants experience a significant lesser degree of security and well-being in schools and that they have a higher frequency of use of medicine for headaches, sedatives, sleeping medicine and stomach aches compared to ethnic Danes. The study called '*Health and Well-being among Immigrants, Descendants and Ethnic Danes in the 5th, 7th and 9th grade'*[43] was published by the National Institute of Public Health (NIPH) The report is based on responses from more than 6.000 pupils between 11-15 years from randomly selected schools in Denmark.

114. According to the study between 18-25 percent of the children with ethnic minority background rarely or never feel safe in the school, while it is less than 1 out of 10 of the ethnically Danish children. 15-19 percent of the immigrant and descendants group rarely or never feel self-confidence, while the figure for ethnic Danish girls and boys is between 8-12%. 13-14 percent of the immigrants, 9-10 percent of descendants in contrast to 5-6 percent of the ethnically Danish students disagree or completely disagree, that class mates are kind and helpful. 1 out of 10 immigrant boys had received medicine for nervous symptoms within the last month, compared to 1 out of 25 among ethnic Danish boys. For medicine against stomach ache the figures were 15 percent of immigrant boys and 8 percent of ethnic Danes. The same pattern was demonstrated for the girls.

115. In a commentary to the study Anders Bondo Christensen, the chairman of the Danish Association of Teachers, noted than when we have an obligation to receive education in Denmark we must also make a school available where the children will enjoy well-being. He saw a solution in 'greater inter-cultural understanding'. It is not a question of compromising 'Danish values' such as democracy and equality, but we must become better at being open to cultural diversity. We must be better at understanding that the cultural background has importance for our understanding and our experience."[44]

Family reunion and the 28 year rule (Art. 5 (d) (iv), cf. Art. 5 (d) (iii) and Art. 1

116. In the context of restrictive Danish rules on family reunion the Committee in para. 15 of its 2006 Concluding Observations expressed concern that the rule that the aggregate ties with Denmark must be stronger than their ties with any other country unless the spouse living in Denmark has been a Danish national or has been residing in Denmark for more than 28 years

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42 *Politiken*, 19 June 2010, 1 Section p. p.

43 Nordahl Jensen H, Holstein BE. *Sundhed og trivsel blandt indvandrere, efterkommere og etniske danskere i 5., 7. og 9. klasse.* København: Statens Institut for Folkesundhed 2010; 59 pp. http://www.si-folkesundhed.dk/upload/enicitet_rapport_29-6_.pdf.

44 *Kristeligt Dagblad,* 1 July 2010, p. 1 and 3.

may lead to a situation of discrimination in the enjoyment of the right to family life, marriage and choice of spouse for persons belonging to ethnic or national minority groups.

117. In the Danish additional report, requested by the Committee, the Government found that the 28-year rule was not in contradiction with the principle of equality (CERD/C/CO/17/Add.1, para. 49). The Government further described the 28-year rule as an exception waiving the stipulation on aggregate ties of the couple and stated that there are objective reasons for the differential treatment accorded to citizens depending on the length of their citizenship (para. 50, cf. para. 33 "do not amount to unfounded discrimination").

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On this background it is our view that the indirect differentiation, which the 28 year rule involves, cannot be considered serving a reasonable purpose and therefore it is in violation of the Human Rights Convention art. 14 in conjunction with art. 8.

The consequence flowing from this must be, that the authorities in applying the Aliens Act, Section 9 § 7 on Danish citizens must restrict the 28 years rule to be an age criterion only, so that the aggregate attachment tie is not applied in cases, where the here resident spouse is a Danish citizen and has reached 28 years of age." (*Ibid* at p.1062).

123. DACoRD finally wants to inform the Committee on the Elimination of Racial Discrimination that a complaint over the refusal of family reunion in the Supreme Court judgement of 13 January 2010 has been submitted to the European Court of Human Rights within the 6 month rule limit.

Article 6

124. Under Article 6 of ICERD the State parties must assure to *everyone* – individuals and groups, cf. art. 14 – effective protection and remedies through competent national tribunals and other State institutions, against any acts of racial discrimination as well as right to effective reparation or satisfaction.

125. DACoRD regrets that obstacles to the achievement of these rights continue to create structural problems for individuals and organizations trying to vindicate rights under the Convention. DACoRD have over the years submitted a number of individual complaints to the Committee on the Elimination of Racial Discrimination which have involved restrictions on the access to satisfaction. We should like to illustrate by recent examples.

126. On January 10, 2009 a pro-Israeli demonstration took place at the City Hall Square in Copenhagen. A pro-Palestinian counter-demonstration took place and was separated from the first demonstration by the police. A group of the participants in the latter demonstration was

shouting “Death to Jews” and “All Jews must be exterminated all over the World”. They flashed Nazi-Heil salutes. The incident was shown on national television news the same evening. One of the shouting demonstrators was using a megaphone for his shouts, and the news report showed several police officers were standing nearby.

127. On 22 January 2009 DACoRD made a formal report of the incident to the Copenhagen Police stating a violation of The Danish Criminal Code Section 266b, and added a link to a video sequence in evidence. DACoRD also asked if the Police had taken the matter under examination by its own motion since there had been an opportunity for direct intervention. DACoRD further asked for reasons if no such intervention had taken place.

128. The incident gave rise to several reports to DACoRD, and the initial report to the Police was later supplemented by a report by DACoRD on behalf of Mosaisk Troessamfund [The Jewish Community], which added the observation that the threats apparently were made by one of the organizers of the demonstration, and not by a stray demonstrator. The President of the Jewish Community later also complained on his own behalf, since he had been present at the City Hall Square and he was thereby directly affected by the death threats. DACoRD further submitted a separate individual complaint on behalf of an individual from Funen, who had also been present at the square.

129. In the first (collective) complaint the Copenhagen Prosecuting Authority on 18 May 2009 notified DACoRD that the Regional Public Prosecutor on 12 May had decided to close the investigation into the case, The reason stated was that the police had not been able to ascertain to identity of the perpetrator. The only evidence was a video sequence where the perpetrator could be seen and heard, but this had not sufficed for identification. A similar decision was made by the Regional Public Prosecutor on 14 December 2009 in the individual complaint. It was added here that the police was not in possession of personal information on any of the participants in the demonstration, including the demonstration leader.

130. In the individual complaint DACoRD had also specified a complaint over the police omission during the demonstration to take action against the criminal acts, either by arresting the perpetrator or at least securing information on his identity – which is a general power of the police in any situation. This part of the complaint was referred to the Police Director. The deputy director of the Copenhagen Police replied on this part on 22 Dec. 2009 recognizing that there was a clear violation of the Criminal Code Section 266b, but noting on the other hand that the primary task of the police during the demonstration had been to secure law and order. In view of the noisy and aggressive mood of the demonstration and its subsequent [DACoRD clarification] violent character, the Deputy Director, however, did not find reason to criticise the police for insufficient attention to the threats in question. DACoRD appealed the decision on 19 January finding that it would hardly be a compelling reason not to add a single additional arrest – to the other 75 arrests made in later incidents. Furthermore, an arrest had not been necessary, if the person in question had been asked to identify himself. The Regional Public Prosecutor agreed with Director of the Police in a final, non-appealable decision of 24.2.2010.

131. The Director of Public Prosecution gave his final decision on the first complaint on 13 Aug. 2009. The Director in his final and non-appealable decision refused to consider the substance of

the case, since he found that neither the DACoRD nor the Jewish Community was entitled to appeal. In the individual complaint DACoRD had noted that the complainant as a Jew was entitled to complain since there was a threat against "all Jews". The Director of Public Prosecution on 18 Feb. 2010 again refused to right of the individual applicant to appeal. In making that decision he stated that weight should be attached to strength of the complainant's interest in the case and its result. Persons who report a crime or are witnesses are only accorded status as a part in a criminal case, if there is a direct, individual and legal interest in the outcome of the case. In the case in point the Director of Public Prosecution found that the "statements about Jews are of general character and concerns a large and indefinite number of persons" and that there was no information that the complainant "should have a special interest in the outcome of the case compared to other persons of the group targeted by the statements which had been set forth during the demonstration on 10. January 2009."

132. In the first group complaint the reasons given by the Director of Public Prosecution were that he did not find that neither DACoRD as an interest organisation not the Jewish Community as a [publicly recognized] religious community could be considered entitled to complain. Under normal practice interest organisations, associations or persons, which handles or represents the rights of others, groups or general public interests on an ideal or organisational, work-related or similar basis cannot normally be considered parties to a criminal case: "I do not find that there is information on the interest of DACORD or the Jewish Community in the present case, which provides reason to deviate from this point of departure".

133. On 20 April 2010 the prosecution authority of the Copenhagen Police served a 3rd decision regarding the same incident at the demonstration on 10 Jan. 2009 – and it was again stated that the investigation may be reopened if it should later on be possible to identify the persons responsible for the statements. DACoRD subsequently on two occasions asked for further identification of whom the decision referred to and citing the two decisions above. On 21 June the Police replied that it was unable to identify the case in which it had made the decision – because the case file had been mislaid both at the Copenhagen Police and at the Regional Public Prosecutor.

134. A further new development came in a letter of 22 June 2010 from the Parliamentary Ombudsmand [*Folketingets Ombudsmand*]. DACoRD had submitted the two refusals by the Director of Public Prosecutions over the two decisions to discontinue investigations in the case. The Ombudsmand had decided not make any inquiries into the case, since he did not se any likelihood of criticising the Director of Public Prosecutiuons on the basis of administrative law. The *Ombudsmand* subsequently addressed the question of the status and application of international law:

> "In relation to the reference by DACoRD to international rules, there is in my view no coincidence between the concept of a 'party' in administrative law which lies at heart in the right to complain in Section 99 § 3 of the Administration of Justice Act and the right of petition in relation to the Committee on the Elimination of Racial Discrimination which is established according to the UN Convention on Racial Discrimination (CERD).
>
> The fact that the CERD-Committee deems individual persons as entitled to complain in similar situations in relation to the Committees own examination of complaints does not affect whether these persons are considered to have a right to complain in Danish administrative law.

Nor do I believe that the Convention against Racial Discrimination or practice according to it can be construed as implying a right for DACoRD in a case as the instant one to appeal the Decision of the Regional Public Prosecutor not to reopen investigation of the case to the Director of Public Prosecution."[49]

135. DACoRD believes that the remarks by the *Ombudsmand* effectively demonstrates the structural problem for individuals and groups trying to obtain satisfaction under article 6 of the Convention, and problems of the status of the Convention as a non-incorporated Convention. Under the Convention the Government is obligated to secure effective remedies and the right to seek just and adequate reparation and satisfaction and under article 14 an aggrieved party claiming to be a victim under the Convention has a right to petition the Committee. Governments are obliged to cooperate in good faith and not to place hindrances in the way of a complainant. If anything the *Ombudsmand* overlooks the principle of effectiveness in international law, and suggest that Article 6 seen in conjunction with the obligation to criminalize in Article 4 has not been implemented at all in Danish law – which would be contrary to previous assurances from the Danish Government. *Secondly*, on may question if the Ombudsmand is of the opinion that a single report to the Police suffice to exhaust domestic remedies in respect of Section 266b in a case of a decision to cease investigations. The Government is not known to have taken a position on this point. The consequence of such position would also be curious since the special decision procedure established for Section 266b

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[49] Compare in contrast the general position of the Ombudsmand expressed in the public Report on the Revision of the Act on the Ombudsmand (*Bet. Nr. 1272/1994 Ombudsmandsloven),*: "The Ombudsmand ensures in particular that general criteria – including criteria that derives from ideas that underlies the Constitution or *which forms part of the international conventions on human rights*, especially the European Convention on Human Rights – *are included in the assessment, when relevant.*" (p. 122, *ital.s added).*

For the specific case to which DACoRD had referred – as noted by the Ombudsmand in the main text quote – the Ombudsmand had specifically considered the application of ICERD and ILO C.111 Discrimination (Employment and Occupation) Convention in a case, in which DACoRD had complained that the Public Employment Service deferred to employers request for workers with specific racial or ethnic characteristics. The Parliamentary Ombudsmand noted that Denmark had ratified these Conventions, "containing broadly worded norms regarding the participating States' obligations not to discriminate or treat differently on the basis of race etc. The obligations of the Danish State are important for the limits as to which criteria can lawfully be accorded weight in discretionary decision-making. It is presumed that public authorities when they make concrete discretionary decisions do not come in conflict with treaty obligations that the Danish State have taken on. It follows from the socalled rule of instruction that administrative authorities – when exercising discretionary powers - *are obliged to exercise their powers in such a way that a breach of international obligations are avoided.*" – The Ombudsmand subsequently noted, that if the social partners at the labour market no longer were in control of the situation through collective agreements, as claimed by DACoRD, then there was "reason to consider whether the international obligations that Denmark had taken on in the area should be implemented through legislation." (Reports of the Ombudsmand, *FOB 1995. 46, ital.s added).*

For purposes of clarification Section 99 § 3 of the Administration of Justice Act is found in Chapter 10 of the Act on the Prosecution Authority and only lays down the Director of Public Prosecution decides complaints over decisions by the regional prosecutors as the first tier of the hierarchy. Chapter 10 does not regulate the right to complain over administrative, prosecutorial decision, which is based on administrative practice and discretion. Section 749 of the Act on decisions not to investigate a case, provides in § 3, that such decision must be notified to persons with a "reasonable interest in the case", while the decision can be appealed under the rules in chapter 10. Thus the right to complain is not regulated in law.

beginning with the Regional Prosecutor in the first tier was made in order to secure functional coordination in the prosecuting authority in these cases. *Thirdly*, the police procedure in the instant case has been slow and ineffective from the very time of the demonstration and the Danish authorities have failed in their positive duty to conduct effective investigations. *Fourthly*, when it comes to filing of international communications DACoRD is specifically mentioned in the explanatory report for the Act no. 940 on assistance to victims of human rights violations of 20 Dec. 1999 as an example of an organization bringing complaints to international bodies. In cases under Section 266b it is therefore only logic that DACoRD has the requisite capacity to assist victims of transgressions in bringing complaints to the Danish Police on behalf of the affected victims, having received a power of attorney to do so.

136. Furthermore, in the view of DACoRD the object of Section 266b of the Criminal Code is to protect the interests and safety of whole groups, Jews or other minority groups in Denmark. This is in contrast to Section 266 (individualized threats) and it is the very reason for the introduction into the law in 1939 of Section 266b since Section 266 did not cover statements like "We will kill all Jews". The minority groups in question cannot in Denmark initiate proceedings according to 266b in a Danish Court, as this competence is entirely with the Danish Public Prosecution. As long as the prosecution takes the cases to court this is not a problem, because this correspond with the international human rights standards by which the State party is obliged to secure the human rights. It is then up to the Danish Courts to decide whether or not a violation took place or not. The problem is the fact that the Danish prosecution over a longer period of time systematically has barred the Danish Courts from having the possibility to look into the cases and strike the right balance between the freedom of association and expression and the right not to be subjected to hate speech and incitement to violence, simply because of your belonging to a minority group, religion etc. Thus, it is a prerequisite for effective victim status at the international level, that the victim also has an effective legal interest at the domestic level with a right to be informed of the status of the report to the police and a right to complain. It cannot be presumed – as suggested by the Director of Public Prosecution in his 18 Feb. 2010 decision - that an individual member of a minority group or a representative organization should be joined by all other group members to have a special interest in the case in order to complain. The protected interest in Section 266b is an objective, general community interests on which the aggrieved party should be able to rely.

137. Those individuals and individual members of groups of individuals, who are 'victims' are indeed those persons who suffers from the effect of the crime/human rights violation. Consequently, those individuals who are 'victims' under ICERD art. 14 or Article 1 of the First Protocol to ICCPR must also be considered 'victims' according to national law. However according to the prosecution authority the complainants in the two cases above only have a "reasonable interest" to be informed of the decision to discontinue the investigation (Sec. 749 § 3 of the Administration of Justice act), but no "legal interest" in the case and thus she do not qualify to the right to appeal the administrative decision. A proposition that the 'interest' of the complainants should also be 'legal' (not only 'reasonable') is not meaning full at all. Standing as a party with a right to complain in the administrative phase of the decision to investigate or not is determined by the relevance of the interest which the aggrieved person wishes to protect seen in relation to the object and purpose of the legislation in question. In the instant case the object of Section 266 b is to protect racially or ethnically delimited groups against hate speech,

threats, propaganda, incitement and violence. If the consequences of the act in question has a certain weight is surpasses the balance of what should be endured. If there is no right to complain, there is no remedy and accordingly no protected right under Section 266b and ICERD Art. 4. *Ubi jus, ibi remedium*. In other words the right to complain – which is not laid down in express law, but based on practice and discretionary rules – must be interpreted in accordance with the societal interests that Section 266b is intended to protect. If the necessary balance cannot be struck in practice by the prosecuting authority, the aim could be provided for by incorporation or the adoption of a legislative amendment.

138. As a victim of a human right violation the interests of the victims are indeed "legal" since it is based on legal standards in the international Convention, accorded to the individual. In this context DACoRD refers to the reasons adopted by the Committee on the elimination of Racial Discrimination in the case of *The Jewish Community of Oslo et al. v. Norway* in Com. No. 30/2003 of 15 Aug. 2005.

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139. Absent incorporation the preferred Danish method of implementation of international human rights treaties, noting 'harmony of norms' or 'transformation', may give rise to lacunae in the protection. A question that was not perceived of or seen as a problem area at the time of ratification procedure may end up falling outside the scope of the treaty or the limits of its application. A recent example concerned ethnic profiling and left the aggrieved party without a remedy as noted below.

140. A young student participated in a trip with his school CPH West to the Prague in the beginning of April 2008. Before the trip back to Denmark a teacher decided to body search the complainant. The facts around this visitation have been disputed by the parties, however the complainant is of the opinion, that he was specific targeted and thus subject to "ethnic profiling" and that the teacher from CPH West lack any authority to search him.

On the other hand the school teacher explained to the Danish police that they search all students and they did not want to involve the local police, rather do the search themselves.

Furthermore it was stated by the teacher, that the complainant agreed to the visitation.

However, all agreed that nothing illegal was found on the student.

141. The main problem in the case seems to be that victims of discrimination in the form of "ethnic profiling" can not rely on the protection of the Act on the Prohibition against discrimination due to race which was first introduced into Danish law in 1971 in order for Denmark to be able to ratify the ICERD (article 5), today Act no 626 of 29. September 1987 (the 1971 Act was changed in 1987 in order to include sexual orientation, however the content of the legislation stayed the same).

142. The question of discrimination on the basis of race was disputed between the parties, and the Regional Prosecutor in June 2008 decided to close investigations of the file.

143. The Director General of Public Prosecution agreed in the result in his decision of 14 Oct. 2008, but based on different reasons, finding the act in question fell outside the scope of of the Act, both Section 1 § 1 and § 2:

> "*.. it is my opinion that a teacher's visitation of a student during a study trip is outside the scope of the Racial discrimination Act, section 1.1. Nor can the provision in the Racial Discrimination Act section 1.2 be considered violated by searches, since this provision relates to denial of access …. Finally the case details in my view includes no basis for believing that there in the said visitation should have been committed any criminal offence*."

144. In the opinion of DACoRD on behalf of our client it is stressed that this argument by the Director for Public Prosecution will deny all victims of racial discrimination in connection to racial profiling etc. from the effective protection of the Danish law that was passed in order to ratify the International Convention on the Elimination of All Forms of Racial Discrimination. Since the prosecution does not consider such episodes whether carried out by the police or teachers or any others as falling within the scope of the 1971 Act, then the Danish Courts are prevented examining such cases, because only the public prosecution can take such cases to courts.

145. It is however clear that ICERD intends to eliminate **all forms** of racial discrimination including "ethnic profiling" by the police or other actors who undertakes visitation, and thus covers victims of such acts. Consequently, the interpretation by the prosecution of the Danish legislation - that was intended to implement all aspects of ICERD – effectively stops victims from the protection of the Danish Court system in this regard. It is the viewpoint of DACoRD that this interpretation is not correct, however, the Danish Court can not change this practice since they are never asked to look into the matter.[50]

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[50] See on ethnic profiling the decision by the Human Rights Committee in Com. No. 1493/2006 *Williams v. Spain*. See also the Euiropean Court of Human Rights, judgement of 12 Jan. 2010 in the case of *Gillan and Quinton v. United Kingdom*, Appl. No. 4158/05, where the Court warned of the risk of discrimination in the practice of general powers: "In the Court's view, there is a clear risk of arbitrariness in the grant of such a broad discretion to the police officer. While the present cases do not concern black applicants or those of Asian origin, the risks of the discriminatory use of the powers against such persons is a very real consideration" (para. 85)