Written Comments on the Case of *Nachova v. Bulgaria*

A Submission from the Open Society Justice Initiative to the European Court of Human Rights

November 2004

OPEN SOCIETY
JUSTICE INITIATIVE

IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application Nos. 43577/98 and 43579/98

Nachova and others
v.
Bulgaria

WRITTEN COMMENTS OF THE OPEN SOCIETY JUSTICE INITIATIVE

I. Introduction

1. The Open Society Justice Initiative ("Justice Initiative") respectfully submits written comments by permission of the President of the Grand Chamber of the European Court of Human Rights (the "Court")[1] pursuant to Article 36 (2) of the European Convention on Human Rights and Rule 44(2) of the Rules of Court.[2]

2. The Justice Initiative pursues law reform activities grounded in the protection of human rights, and contributes to the development of legal capacity for open societies. It has offices in Budapest (Hungary), New York (United States) and Abuja (Nigeria). Among its activities, the Justice Initiative prepares legal submissions for national and international courts and tribunals on questions of law where its expertise may be of assistance. As an organization that promotes humane and effective criminal justice policies, and combats racial violence and discrimination, the Justice Initiative has a particular interest in the questions raised by this matter.[3]

3. This case presents issues of great significance for the development and application of legal norms concerning racial discrimination and racially-motivated violence. In recent years, this Court has developed an extensive body of jurisprudence concerning the obligations of states to investigate and prosecute those responsible for acts of violence. However, the Court has had more limited occasion to examine state duties with respect to acts motivated by racial animus. Awareness of the dangers posed by discrimination and racial hatred informed the creation of the Council of Europe and the drafting of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). They remain painfully relevant today. This case thus offers the Court's Grand Chamber an opportunity to make clear what protection is afforded by the prohibition of discrimination under Article 14 in cases of violence where racial bias is suspected.

[1] Pursuant to letter dated 5 October 2004 by the Registrar, Paul Mahoney.
[2] The Justice Initiative is grateful for the research assistance of the law firm of Sherman & Sterling, as well as Yale Law School students Andrea Armstrong and Sue Paik, in preparing these written comments.
[3] Throughout this submission, the term "racial", as in "racial violence", "racial discrimination," "racial animus," or "racial motivation or bias," is used, as in Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination, to encompass actions "based on race, colour, descent or national or ethnic origin."

4. These comments draw on relevant international and comparative jurisprudence from within Europe and beyond concerning the obligation of states to investigate and prosecute racial discrimination and violence. The first section describes the international and comparative legal foundation for this Court's recognition of a procedural obligation under Article 14 in respect of certain Convention rights, particularly those encompassed by Articles 2 and 3. The discussion then addresses, in turn, the timing and scope of such an obligation. Throughout, these comments are intended to aid in fashioning an approach to Article 14 consistent with the Court's mandate that the Convention's guarantees be "practical and effective."[4]

II. Discussion

A. The evolving jurisprudence of the Court, as well as international and comparative legislation and case law, supports the existence of a procedural obligation to investigate and prosecute racially motivated violence, in breach of Article 14 taken together with Articles 2 and/or 3.

5. Over the past two decades, this Court has made clear that, when read in conjunction with the state's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in the Convention," certain substantive Convention rights – most particularly, to life[5] and to protection against torture and inhuman and degrading treatment or punishment[6] – impose procedural obligations on states parties to carry out effective investigations to determine the facts and bring the perpetrators to justice.[7] Thus, a state's failure to undertake an effective investigation may result in a finding of violation of the right concerned. The Court's rationale in these cases has been clear: absent such a procedural requirement, the right at issue "would be ineffective in practice and it would be possible in some cases for agents of the State to [commit violations] with virtual impunity."[8] In addition, with respect to alleged violations by public officials, "[i]t must often be the case … that the factual circumstances and the motivation for the [act at issue] lie largely, if not wholly, within the knowledge of the state authorities…."[9]

6. This same logic applies with equal force to the protection against discrimination under Article 14. Thus, in investigating the violation of any substantive Convention right, and in particular acts of violence, state authorities should, in conformity with Article 14, take all reasonable steps to examine whether racial prejudice may have played a role. As with respect to other Articles of the Convention, "[t]he essential purpose of such an investigation is to secure the

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[4] *Artico v. Italy*, 1980, 3 EHRR 1, para. 33. These comments are limited to the existence and extent of a procedural obligation under Article 14; they do not address any additional remedial obligations which may arise under Article 13. Compare *Ergi v. Turkey*, 33 EHRR 2 (2001), para. 98 ("the requirements of Article 13 are broader than a Contracting State's procedural obligation under Article 2 to conduct an effective investigation").

[5] See, e.g., *Yasa v. Turkey* (1999), 28 EHRR 408; *Kaya v. Turkey* (1998), 28 EHRR 1; *McCann v. UK* (1996), 21 EHRR 97.

[6] See, e.g., *Assenov v. Bulgaria* (1998), 28 EHRR 652; *Labita v. Italy*, Judgment of 6 April 2000; *Krastanov v. Bulgaria*, Judgment of 30 September, 2004.

[7] Compare *X and Y v. Netherlands* (1985), 8 EHRR 235 (Article 8 requires criminal prosecution, not merely civil proceedings, to deter sexual abuse).

[8] *Assenov v. Bulgaria*, *supra*, para. 102. See also *McCann v UK*, *supra*, para. 161 ("a general legal prohibition of arbitrary killing by the agents of the state would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by state authorities").

[9] *McCann v. UK*, *supra*, paras. 191-93 (quoting decision of European Commission of Human Rights).

effective implementation of the domestic laws which protect the right [at issue] and, in those cases involving State agents or bodies, to ensure their accountability for [violations] occurring under their responsibility."[10] Indeed, it would be incongruous if the Convention mandated official investigations in cases of suspected violence, but did not similarly require the authorities to probe any underlying racial animus where warranted. This is so for several reasons.

7. First, discrimination on grounds of race or ethnicity is one of the most serious harms against which the Convention was designed to protect.[11] Article 14's prohibition against discrimination is of "fundamental importance."[12] The constitutions of virtually all Council of Europe member states ban discrimination on the grounds of race and/or ethnic origin. Legal efforts to sanction and eradicate racial prejudice and discrimination are manifested in numerous binding international legal instruments[13] which today give the general prohibition against racial discrimination the status of *jus cogens*, a peremptory rule of international law.[14] In view of the particularly invidious nature of racial discrimination and violence, the right to be free from these violations is a fundamental right requiring a high level of protection.

8. Second, it is precisely because discrimination is often particularly difficult to prove that a number of jurisdictions have made adjustments in their legislation to account for the unequal position of perpetrator and victim.[15] An obligation to investigate and prosecute racial discrimination is another, complementary means to help make Article 14 a genuinely useful instrument.

9. Third, crimes motivated by racial bias are more likely to provoke retaliatory crimes, inflict distinct emotional harm on victims, and incite community unrest.[16] States thus have a legitimate interest in targeting racial violence and discrimination as particular evils warranting heightened scrutiny.

10. Finally, the obligation to investigate and punish acts of racial violence and discrimination is well recognized by a variety of international monitoring bodies. The United Nations

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[10] *Anguelova v. Bulgaria*, Judgment of 13 June 2002, para. 137.

[11] See *East African Asians. v. UK*, 3 EHRR 76 (1973), para. 207 (a "special importance should be attached to discrimination based on race," and "differential treatment of a group of persons on the basis of race might therefore be capable of constituting degrading treatment when different treatment on some other ground would raise no such question"); *Cyprus v. Turkey*, Judgment of 10 May 2001, paras. 308-10 (discrimination against members of the Karpas Greek-Cypriot community amounted to degrading treatment in breach of Article 3).

[12] *Assenov v. Bulgaria*, *supra*, para. 102.

[13] See Universal Declaration of Human Rights (1948), Art. 7; International Labour Organisation Convention No. 111 (1958); Convention Against Discrimination in Education (1960); Declaration on the Elimination of All Forms of Racial Discrimination (1965); Convention on the Elimination of All Forms of Racial Discrimination (1965); International Covenant on Civil and Political Rights (1966), Arts. 2, 26; International Covenant on Social, Economic and Cultural Rights (1966), Art. 2; International Convention on the Suppression and Punishment of the Crime of Apartheid (1973).

[14] See, e.g., Dissenting Opinion of Judge Tanaka in the *South West Africa Cases* (Second Phase), ICJ Reports (1966), p. 298.

[15] See, e.g., European Union Race Equality Directive, Article 8 (once plaintiff establishes "facts from which it may be presumed that there has been direct or indirect discrimination," burden of proof shifts to respondent to prove there has been no breach of equal treatment principle).

[16] See *Wisconsin v. Mitchell*, 508 U.S. 476, 488 (1993).

Committee on the Elimination of All Forms of Racial Discrimination (CERD) has observed, "When threats of racial violence are made … it is incumbent upon the State to investigate with due diligence and expedition."[17] "[F]irm action" should be "taken to punish racially motivated violence and ensure the access of victims to effective legal remedies and the right to seek just and adequate reparation for any damage suffered as a result of such actions."[18]

11. In a number of its individual country reports, the European Commission against Racism and Intolerance (ECRI) of the Council of Europe has expressly affirmed the importance of investigating and prosecuting acts of racial discrimination and violence.[19] Similarly, in 2000 the European Conference against Racism urged governments to ensure that "criminal prosecution of offenses of a racist or xenophobic nature is given a high priority," and that "racist and xenophobic acts are stringently punished, by allowing the racist or xenophobic motives of the offender to be specifically taken into account."[20]

12. ECRI further recommends that Council of Europe member states define criminal acts "with racist or xenophobic nature as specific offenses," and ensure that racial motivation is "specifically taken into account."[21] For all crimes which do not include racial motivation as an element, "[t]he law should provide that … racist motivation constitutes an aggravating circumstance."[22] Many Council of Europe member states, and several other states, specifically include in their domestic legislation provisions which criminally sanction racially discriminatory conduct.

13. In some states, racial animus is the subject of mandatory investigation because it is an element of a distinct offense. In Belgium, Article 4 of the Law of 30 July 1981 on the Punishment of Certain Acts Motivated by Racism or Xenophobia imposes a penalty of between two months' and two years' imprisonment for racial discrimination committed in the exercise of duties by a public official.[23] In Hungary, bodily assault motivated by racial or ethnic hatred against the victim constitutes a distinct crime under Article 174/B of the

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[17] *L.K. v. The Netherlands*, UN CERD Views of 16 March 1993, Communication No. 4/1991, para. 6.6.
[18] *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America*, U.N. Doc. CERD/C/59/Misc.17/Rev.3 (2001).
[19] See ECRI, *Third Report on Hungary (2003)*, para. 20 (underscoring importance of "ensuring that the investigation and prosecution of racist crimes are carried out in a thorough and systematic fashion"); ECRI, Third Report on the Czech Republic (2003), para. 19 (recommending that the government "undertake special efforts to improve the manner that complaints of racially motivated crimes are recorded, classified, investigated and prosecuted"); ECRI, *Second Report on the Netherlands (2000)*, para. 8 (encouraging authorities to publish reasons for not prosecuting a case of racial discrimination).
[20] *General Conclusions of the European Conference against Racism* (adopted on 16 October 2000 in Strasbourg) para. 10. At the European Conference against Racism, Council of Europe Member States expressly committed themselves to, inter alia, "assure all victims of racism, racial discrimination, xenophobia and related intolerance adequate … national legal, administrative and judicial remedies." *Political Declaration adopted by Ministers of Council of Europe member States on Friday 13 October 2000 at the concluding session of the European Conference against Racism.*
[21] ECRI, *General Policy Recommendation No. 1 on Combating Racism, Xenophobia, Anti-Semitism and Intolerance* (1996).
[22] ECRI, *General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination* (2002).
[23] European Union Monitoring Centre, *Anti-Discrimination Legislation in EU Member States (A comparison of national anti-discrimination legislation on the grounds of racial or ethnic origin, religion or belief with the Council Directives) (hereafter "EUMC Study"): Belgium* (2002), p. 13.

Criminal Code.[24] In the United Kingdom, the Crime and Disorder Act 1998 gave rise to new offenses of racially aggravated violence and harassment.[25] In France, Article 225 of the Penal Code criminalizes discrimination on grounds of, *inter alia*, membership of an ethnic group, nation, race or religion.[26]

14. In a number of states, racial motivation constitutes an aggravating factor which may warrant a sentencing enhancement. This is the case in Austria,[27] Belgium,[28] the Czech Republic,[29] France,[30] Italy,[31] Norway,[32] Portugal,[33] Spain,[34] Sweden,[35] and the United Kingdom.[36]

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[24] *EUMC Study: Hungary* (2003), p. 29.

[25] ECRI, *Second Report on the United Kingdom* (2001) (available at: http://www.coe.int/T/E/human%5Frights/Ecri/1%2DECRI/2%2DCountry%2Dby%2Dcountry%5Fapproach/United%5FKingdom/United_Kingdom_CBC_2.asp#P100_10505). Section 82 of the Act is designed to give statutory expression to the case of *R v. Ribbans, Duggan and Ridley* (1995), 16 Cr App R(S) 698, which makes clear that where there is evidence of a racist element in the commission of a crime, the sentencing judge should consider this as an aggravating factor meriting an increased sentence. See http://www.homeoffice.gov.uk/docs/racagoff.html.

[26] *EUMC Study: France* (2002), p. 12.

[27] Section 33(5) of the Austrian Criminal Code cites racist or xenophobic motivation as a particular aggravating circumstance of any crime. See ECRI, *Second Report on Austria* (2000), para. 4 (available at: http://www.coe.int/T/E/human_rights/Ecri/1-ECRI/2-Country-by-country_approach/Austria/PDF_CBC2%20Austria.pdf).

[28] Under the Act of 25 February 2003, racial animus is an aggravating circumstance of a number of criminal offenses, including indecent assault and rape; murder, battery and assault; arson; and destruction of movable property. See ECRI, *Third Report on Belgium* (2003), para. 10 (Available at: http://www.coe.int/T/E/human%5Frights/Ecri/1%2DECRI/2%2DCountry%2Dby%2Dcountry%5Fapproach/Belgium/third%20report%20Belgium%20-%20cri04-1.pdf).

[29] Racial motivation constitutes an aggravating circumstance warranting a sentencing enhancement for a number of crimes, including murder, bodily harm, extortion, and damage to property. *EUMC Study: Czech Republic* (2003), p.10.

[30] Article 132-76 of the French Penal Code incriminates as aggravating factors any motives relating to racial or ethnic origin, religion or belief. *EUMC Study: France* (2002).p. 12.

[31] In Italy, Section 3 of Law No. 205/1993 treats racial motivation as an aggravating circumstance for all offenses. The Law further provides that any racially-motivated offense be prosecuted ex officio. ECRI, *Second Report on Italy* (2001), para. 11 (available at: http://www.coe.int/T/E/human%5Frights/Ecri/1%2DECRI/2%2DCountry%2Dby%2Dcountry%5Fapproach/Italy/CBC2-Italy.asp#P118_13613).

[32] The Norwegian Criminal Code classifies racist motivation as a specific aggravating circumstance of the offenses of bodily harm and vandalism and of some felonies against personal liberty. Courts have also enhanced sentences where racial motivation has played a role in other offenses. ECRI, *Third Report on Norway* (2003), para. 8 (available at: http://www.coe.int/T/E/human%5Frights/Ecri/1%2DECRI/2%2DCountry%2Dby%2Dcountry%5Fapproach/Norway/Norway_CBC_3.asp#P116_10169).

[33] In Portugal, homicide perpetrated for motives of racial or religious hatred is punishable as aggravated homicide, resulting in a heavier penalty. Such aggravating circumstances may also apply in cases of assault causing bodily harm. Internal guidelines provide that, where appropriate, the public prosecution must highlight the racist motivation underlying an offense in its argument to the court, and take it into account when recommending sentence. ECRI, *Second Report on Portugal* (2002), para. 11: (available at: http://www.coe.int/T/E/human%5Frights/Ecri/1%2DECRI/2%2DCountry%2Dby%2Dcountry%5Fapproach/Portugal/Portugal_CBC_2en.asp#P111_11031).

15. In Germany, although the criminal code does not specifically single out racial motivation for attention, in practice sentencing enhancements have been imposed in cases of offenses motivated by racial animus. And the Federal Supreme Court regards racism as an aggravating circumstance warranting a sentencing enhancement for murder.[37]

16. In the Netherlands, supervisory guidelines instruct law enforcement officials to "improve preliminary investigation in discrimination cases and to deal more effectively with allegations of racial discrimination."[38] In Australia, the Racial Discrimination Act of 1975 authorizes criminal penalties for racially discriminatory conduct.[39] In the United States, a variety of federal and state criminal civil rights statutes make racial animus an element of an offense or an aggravating factor in sentencing.[40]

17. However it is accomplished, many European and other states require their law enforcement authorities to investigate the existence of racial discrimination and/or racial motivation as a distinct component above and beyond the general duty to investigate all relevant circumstances of a criminal offense. Accordingly, an affirmation by this Court that Article 14 contains a procedural obligation in cases of racially-motivated violence would be consistent with prevailing European and international practice.

B. International and comparative jurisprudence, including prior judgments of this Court, suggest that a state's obligation to investigate and prosecute racial violence is *ex officio*,

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[34] Article 22.4 of the Criminal Code in Spain makes racial motivation an aggravating circumstance of a criminal offense. *EUMC Study: Spain* (2002), p. 14.

[35] Chapter 29 Section 2 (7) of the Swedish Penal Code provides for the racist motives of offenders to be taken into account as an aggravating circumstance when sentencing in cases of criminal acts such as assault, unlawful threat, molestation and inflicting damage. ECRI, *Second Report on Sweden* (2002), para. 20 (available at: http://www.coe.int/T/E/human%5Frights/Ecri/1%2DECRI/2%2DCountry%2Dby%2Dcountry%5Fapproach/Sweden/Sweden_CBC_en.asp#P164_20697).

[36] The Crime and Disorder Act 1998 gives statutory force to caselaw requiring judges to consider evidence of racist motivation for any offense as an aggravating factor in sentencing. Under the Act, an offense is "racially aggravated" if a) at the relevant time, the offender demonstrates towards the victim hostility based on the victim's race, or b) the offense is wholly or partly motivated by hostility toward members of a racial group based on membership in the group. ECRI, *Second Report on the United Kingdom* (2001), para. 8 (available at: http://www.coe.int/T/E/human%5Frights/Ecri/1%2DECRI/2%2DCountry%2Dby%2Dcountry%5Fapproach/United%5FKingdom/United_Kingdom_CBC_2.asp#P100_10505).

[37] ECRI, *Third Report on Germany* (2003), para. 10 (available at: http://www.coe.int/T/E/human%5Frights/Ecri/1%2DECRI/2%2DCountry%2Dby%2Dcountry%5Fapproach/Germany/Germany_CBC_3.asp#P121_15434).

[38] ECRI, *Second Report on the Netherlands* (2000), para. 6 (available at: http://www.coe.int/T/E/human%5Frights/Ecri/1%2DECRI/2%2DCountry%2Dby%2Dcountry%5Fapproach/Netherlands/Netherlands_CBC_2.asp#P96_8034).

[39] See Race Discrimination Act 1975 (Commonwealth), sections 9 and 17.

[40] See, e.g., 18 U.S.C. section 245 (making it a crime to willfully injure, intimidate or interfere with any person by force or threat of force, because of that person's race, color, religion or national origin); 28 U.S.C. section 534 (requiring the U.S. Department of Justice to gather from law enforcement agencies nationwide information on crimes which manifest prejudice based on race, religion, sexual orientation or ethnicity); 28 U.S.C. 994 (providing for sentence enhancement for crime against person or property motivated by "race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation").

and exists when there is reasonable suspicion that a racially-motivated crime has occurred.

18. This Court has held that the obligation to investigate and prosecute acts of violence arises when there exists a "reasonable suspicion" that a violation of a relevant Convention article has taken place. In *Assenov v. Bulgaria*, a case involving a Roma victim of physical abuse, the Court found that several factors "together raise[d] a reasonable suspicion" that injuries were caused by the police. This "require[d] by implication that there should be an effective official investigation."[41]

19. This reasoning is in accord with United Nations standards in cases of alleged torture and ill-treatment. Article 12 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment requires a "prompt and impartial investigation wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction." Caselaw of the United Nations Committee against Torture has adopted this standard.[42]

20. Moreover, it is well settled that this investigative obligation exists *ex officio*; it "does not depend on the filing of a formal complaint.[43] Rather, "the mere fact that authorities [have been] informed of [a] killing … g[i]ve[s] rise *ipso facto* to an obligation under Article 2 of the Convention to carry out an effective investigation into the circumstances surrounding the death."[44] "[T]he authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures."[45] On this issue as well, other international jurisdictions apply similar rules.[46]

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[41] *Assenov v. Bulgaria, supra*, paras.101-102. Compare *Elci v. Turkey*, Judgment of 13 November 2003, para. 648 (investigation required where there is "credible assertion" of Article 3 mistreatment); *Labita v. Italy, supra*, para. 131 (same). In the case of Article 2, "there should be some form of effective official investigation when individuals have been killed as a result of the use of force." *Anguelova v. Bulgaria, supra*, para. 136; *Velikova v. Bulgaria*, Judgment of 18 May 2000, para. 80 (same).

[42] See *Encarnación Blanco Abad v. Spain*, UNCAT Views of 14 May 1998, Communication Number 059/1996, para 8.2 ("the authorities have the obligation to proceed to an investigation … wherever there are reasonable grounds to believe that acts of torture or ill-treatment have been committed and whatever the origin of the suspicion"). Compare *Aksoy v. Turkey*, 23 EHRR 553 (1996), para. 98 (although text of European Convention of Human Rights does not, as Article 12 of UN Convention against Torture does, mandate an investigation ''whenever there is reasonable ground to believe that an act of torture has been committed,… such a requirement is implicit in the notion of an 'effective remedy' under Article 13'').

[43] *Ergi v. Turkey, supra*, para. 82; *Salman v. Turkey*, 34 EHRR 17 (2000), para. 105.

[44] *Ulku Ekinci v. Turkey*, Judgment of 16 July 2002, para. 144 (not "decisive whether members of the deceased's family or others have lodged a formal complaint about the killing with the competent investigation authority"); *Ergi v. Turkey, supra*, para. 82 (same).

[45] *Jordan v, United Kingdom*, Judgment of 4 August 2001, para. 105.

[46] See *Encarnación Blanco Abad v. Spain, supra*, para. 8.2 ("the authorities have the obligation to proceed to an investigation ex officio"); *United Nations Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Recommended by General Assembly resolution 55/89 of 4 December 2000), para. 2 ("States shall ensure that complaints and reports of torture or ill-treatment are promptly and effectively investigated. Even in the absence of an express complaint, an investigation shall be undertaken if there are other indications that torture or ill-treatment might have occurred"); *Inter-American Commission on Human Rights - Amparo Tordecilla Trujillo v. Colombia*, Case 10.337, Report No. 7/00, OEA/Ser.L/V/II.106 Doc. 3 rev. at 423 (1999)., February 24, 2000, para 48 ("The case law of the Commission indicates that whenever a crime is committed that can be prosecuted on the initiative of the State, the State has the obligation to promote and

21. As with the existence of an obligation to investigate and prosecute acts of violence, so these well-settled standards concerning the timing of the obligation should apply equally to crimes motivated by racial animus. In fact, ECRI has expressly called on governments to ensure "that criminal offenses of a racist and xenophobic nature can be prosecuted *ex officio*."[47] Recognition of an *ex officio* obligation to investigate reflects the reality that states have an interest independent and apart from that of the victim in punishing and deterring racial violence.

C. The scope and contours of the obligation to investigate and prosecute violations of Article 14 should be no narrower than of the procedural obligations this Court has already recognized for other Articles of the Convention

22. This Court has established that the procedural obligations attached to Articles 2 and 3 of the Convention require, at a minimum, "an effective official investigation." The investigation must be "capable of leading to the identification and punishment of those responsible"[48] and "to a determination of whether the force used in such cases was or was not justified in the circumstances."[49] The investigation must be impartial and careful.[50] It must be thorough.[51] It must be carried out by persons independent from those implicated in the events.[52] It must enable effective involvement of next of kin, and, if initiated on the basis of a criminal complaint, the complainant.[53] Furthermore, the investigation must be prompt[54] and subject to "a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory."[55]

23. This Court has taken care not to apply these requirements inflexibly. Rather it has affirmed "that the nature and degree of scrutiny which satisfies the minimum threshold of the investigation's effectiveness depends on the circumstances of the particular case. It must be assessed on the basis of all relevant facts and with regard to the practical realities of

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give impetus to the criminal proceedings, to their ultimate consequences. In those cases, one cannot demand that the victim or his or her family propel the investigation, since it is up to the State to investigate the facts and punish the persons responsible as part of its obligation to preserve public order. The obligation to investigate, try, and punish the persons responsible for human rights violations is a duty that the State is not in a position to delegate").

[47] ECRI, General Policy Recommendation No. 1 (1996). And too, in the United States, the Federal Bureau of Investigation is required to initiate a civil rights investigation "whenever information is received from any source not known to be unreliable." See *Investigative Programs: Civil Rights*, at http://www.fbi.gov/hq/cid/civilrights/civilrts.htm.

[48] *Assenov*, *supra*, para. 101; *McCann v. UK*, *supra*, para. 161; *Kaya v. Turkey*, *supra*, para. 86; *Yasa v. Turkey*, *supra*, para. 98.

[49] *Jordan v. UK*, *supra*, para. 107; Kaya v. Turkey, *supra*, para. 87.

[50] *McCann v. UK*, *supra*, paras. 161-163; *Kaya v. Turkey*, *supra*, para. 105; *Jordan v. UK*, Judgment of 4 August 2001, para. 103.

[51] *Assenov*, *supra*, para. 106 ("in view of the lack of a thorough and effective investigation," Court found violation of Article 3).

[52] *Gulec v. Turkey*, Judgment of 27 July 1998, paras. 81-82.

[53] *Jordan v. UK*, *supra*, para. 109.

[54] *Id*., para. 108; *Yasa v. Turkey*, *supra*, paras. 102-104.

[55] *Jordan v. UK*, *supra*, para. 109.

investigation work. It is not possible to reduce the variety of situations which might occur to a bare check-list of acts of investigation or other simplified criteria."[56]

24. Underlying these requirements is a fundamental concern that the law must not only be enforced impartially and effectively, but also that it should be seen to be so. Thus, an effective investigation is "essential in maintaining public confidence in [the authorities'] adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts."[57] This concern takes on particular importance in the context of violence against racial minorities. As this Court has observed, there is "an emerging international consensus amongst the Contracting States of the Council of Europe recognizing the special needs of minorities and an obligation to protect their security, identity and lifestyle."[58]

25. Indeed, some of the same considerations which militate in favor of the existence of a procedural element of Article 14 are relevant to considering the scope of the obligation. Thus, precisely because investigation of racial motivation is particularly challenging, and often requires exploration of hard-to-measure factors such as state of mind, the duty to investigate should be at least as thorough in cases where racial discrimination is at issue. If any evidence of racist motive by the perpetrators of a violent act comes to light – such as verbal abuse of members of a racial minority group – a searching inquiry should be pursued.

26. Furthermore, the grave danger which unchecked racial violence poses to social peace and stability mandates that the official investigation not be hampered by unnecessary delay. As a British government analysis notes, "It is critical to the application of [racist] offenses that evidence of racial aggravation is gathered at the earliest possible stage. This is necessary to ensure that the appropriate offense is charged, and that the Crown Prosecution Service and the Courts can make correct decisions upon a full knowledge of the circumstances of the offense."[59]

27. Thus, where racial bias is suspected, particular care may be required to ensure that an investigation satisfies the standards of effectiveness, impartiality and thoroughness. This reflects the findings of the UN CERD, which has underscored that an investigation into allegations of racial discrimination must be careful and comprehensive. The authorities must not simply defer to the explanations offered by the alleged perpetrator of discrimination; rather, they must "initiate a proper investigation into the real reasons" underlying a potentially discriminatory act "in order to ascertain whether or not criteria involving racial discrimination … are being applied." In line with this reasoning, the Committee will not necessarily accept at face value a decision not to prosecute.[60]

28. Finally, the obligation to investigate racial motivation should extend to acts committed by private parties as well as public officials. This is consistent with this Court's jurisprudence

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[56] *Velikova v. Bulgaria*, *supra*, para. 80; *Kaya v. Turkey*, *supra*, paras. 89-91; Güleç v. Turkey, Judgment of 27 July 1998, paras. 79-81.
[57] *Jordan v. UK*, *supra*, para. 108.
[58] *Chapman v. UK*, Judgment of 18 January 2001, para. 93.
[59] Home Office Research Study 244, *Racist Offences – How is the Law Working?: The implementation of the legislation on racially aggravated offences in the Crime and Disorder Act 1998* (2002), available at http://www.homeoffice.gov.uk/rds/pdfs2/hors244.pdf. .
[60] *Ziad Ben Ahmed Habassi v. Denmark*, CERD Views of 17 March 1999, Communication 010/1997, paras. 9.3, 9.4.

with respect to procedural obligations under other Articles of the Convention,[61] as well as with the principles of other international organs.[62] It also reflects the reality that some of the most heinous acts of racial violence are committed by private parties.

III. Conclusion

29. It is respectfully submitted that this Court should make clear that Article 14 of the Convention, taken together with Articles 2 and 3, contains a procedural obligation to investigate and prosecute the perpetrators of racially-motivated violence. This obligation is fully consistent with this Court's prior caselaw, international jurisprudence more generally, and the law and practice in numerous Council of Europe member states and beyond. The obligation should be exercised *ex officio* when there is reasonable suspicion that a racially-motivated crime has occurred. The scope and contours of the obligation should be no narrower than for the procedural obligations this Court has already recognised under other Articles of the Convention. Given this Court's recognition of the importance of maintaining the public confidence of minorities in the rule of law, where racial bias is suspected, particular care may be required to ensure that an investigation satisfies the standards of effectiveness, impartiality and thoroughness.

Respectfully submitted,

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[61] See *Ergi v. Turkey* (2001), *supra*, para. 82 ("the obligation to investigate a killing is not confined to cases where it has been established that the killing was caused by an agent of the state"); *X and Y v. Netherlands*, *supra* (state obligation to adopt criminal penalties to secure respect for private life may extend to relations between private individuals").

[62] See United Nations Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (2004), CCPR/C/21/Rev.1/Add.13 (para. 8) ("positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities"); United Nations Human Rights Committee, General Comment No. 28 (2000), para. 31 ("The right to equality before the law and freedom from discrimination protected by Article 26 requires states to act against discrimination by private, as well as public agents in all fields"); International Convention against All Forms of Racial Discrimination, Art. 2(1)(d) (state must prohibit and prevent racial discrimination "by any person, group or organisation"); *Miroslav Lacko v. Slovakia*, UN CERD Views of 9 August 2001, Communication 011/1998, para. 10 (imposition of criminal sanction upon private restaurant owner who engaged in racial discrimination "constitutes sanctions compatible with the obligations of the State Party"); *Velasquez Rodriguez Case*, Judgment of 26 June 1987, Inter-Am. Ct. H.R. (Ser. C) No. 1 (1987), para. 177 ("Where the acts of private parties that violate the [Inter-American] Convention [of Human Rights] are not seriously investigated, those parties are aided in a sense by the Government, thereby making the State responsible on the international plane").

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