



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

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## Committee on the Elimination of Racial Discrimination

### Communication No. 48/2010

#### Individual opinion of Committee member Mr. Carlos Manuel Vazquez (dissenting)

1. This Communication concerns the relation between a State party's obligation under the Convention to combat hate speech and its obligation to protect the freedom of opinion and expression. On the one hand, "[f]reedom of opinion and freedom of expression are indispensable conditions for the full development of the person" and "constitute the foundation stone for every free and democratic society."<sup>1</sup> On the other hand, article 4 of the Convention provides that States parties are to "declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred [and] incitement to racial discrimination." Under this provision, "States parties have not only to enact appropriate legislation but also to ensure that it is effectively enforced."<sup>2</sup> The question before the Committee is whether the State party violated article 4 by failing to prosecute Mr. Sarrazin for certain statements he made in an interview published in the cultural journal *Lettre Internationale*.

2. The interview with Mr. Sarrazin contains statements that are bigoted and offensive. The Convention, however, does not require the criminal prosecution of all bigoted and offensive statements. In *Zentralrat Deutscher Sinti und Roma v. Germany*, for example, the Committee found no violation of the Convention even though the State party had declined to prosecute statements that the Committee found to be "discriminatory, insulting and defamatory." The German government has disavowed and criticized Mr. Sarrazin's statements. Chancellor Merkel has denounced them as "simple blanket judgments" and "stupid." The Berlin Office of Public Prosecution investigated his statements but decided to terminate the investigation upon concluding that the statements did not amount to incitement to racial hatred or qualify as an insult under German criminal law. The General Procurator reviewed the decision of the Berlin Office of Public Prosecution and determined that the investigation had been correctly terminated, noting, inter alia, that Mr. Sarrazin did not characterize members of the Turkish minority as "inferior beings" or "bereave [sic] them of their right to life as an equally worthy person." Both decisions were extensively explained in writing. The Committee, on the other hand, has concluded that the State party violated its obligation under the Convention when it decided not to pursue further the criminal prosecution of Mr. Sarrazin.

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1 Human Rights Committee, General Comment 34.

2 General Recommendation 15.

### **Standard of Review**

3. As the Committee recognizes, to find a violation the Committee must conclude that the State Party acted arbitrarily or denied justice. In the context of speech prohibitions, this deferential standard is particularly appropriate. The pertinent officials of the State party have a far greater mastery of the language involved than do the Members of this Committee., and they are in a far better position to gauge the likely impact of the statements in the social context prevailing in the State party. The State party's decision not to prosecute was neither arbitrary nor a denial of justice<sup>3</sup>.

### **Incitement to Racial Discrimination**

4. In concluding that Mr. Sarrazin's statements "contained elements of incitement to racial discrimination," the Committee is apparently referring to the statements suggesting that immigration be limited to "highly qualified people" and that immigrants be denied social welfare. These statements do not, however, advocate discrimination on the basis of "race, colour, descent, or national or ethnic origin." Moreover, the statements do not constitute "incitement" to discrimination. To constitute "incitement," there must at least be a reasonable possibility that the statement could give rise to the prohibited discrimination.<sup>4</sup> In the statements that the Committee finds to be "incitement to discrimination," Mr. Sarrazin puts forward some ideas for possible legislation. The possibility that an individual's advocacy of legislation will contribute more than trivially to the enactment of legislation is minuscule. Indeed, the concept of incitement to legislation is, to my knowledge, a novel one. Mr. Sarrazin's statements do not constitute incitement to discrimination.

### **Dissemination of Ideas Based on Racial Superiority**

5. The Committee has also concluded that the interview with Mr. Sarrazin "contained ideas of racial superiority." The Convention, which refers in article 4 to the prohibition of the "dissemination of ideas based on racial superiority or hatred," is unusual among human rights instruments in referring to the penalization of speech without an express link to the possibility that such speech will incite hatred or violence or discrimination. Because of the absence of such a link, the dissemination clause poses particular risks of conflict with the right to freedom of thought and expression affirmed in the Universal Declaration of Human Rights. This potential conflict did not go unnoticed in the treaty negotiations.<sup>5</sup> Several states objected to the clause precisely because of its possible conflict with free speech rights. The concerns of these states were addressed through the inclusion of the "due regard" clause in Article 4. This clause specifies that the State parties' obligations under article 4 are to be exercised "with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention." In view of this negotiating history, any construction of the term "racial

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3 The Committee has found the Communication to be admissible insofar as it alleges that the statements in question denigrated members of the Turkish population of Berlin and Brandenburg. Thus, only statements referring to persons of Turkish nationality or ethnicity are relevant to the Communication. Other statements, such as those referring generally to the "lower classes" or comparing the IQ of Eastern European Jews to that of Germans, cannot be the basis for finding a violation, however offensive they might be.

4 See *Erbakan v. Turkey*, 59405/00; Rabat Plan of Action ¶ 22.

5 See Natan Lerner, *The Convention on the Elimination of Racial Discrimination* at 43-53; K J Partsch, "Racial Speech and Human Rights: Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination," at 23-26, in *Striking a Balance* (1992).

superiority” should be heedful of the need to safeguard the free exchange of opinions and ideas on matters of public concern.

6. It is open to question whether the term “racial superiority” in article 4(a) encompasses statements of superiority on the basis of nationality or ethnicity. Expressions of national or ethnic pride abound in popular discourse, and such expressions are often hard to distinguish from boasts of national or ethnic superiority. Criminalizing such statements risks chilling speech far removed from the central concerns of the Convention. To avoid such a serious incursion on free expression, the term “racial superiority” is best understood to cover statements of superiority based on innate or immutable characteristics.

7. In any event, Mr. Sarrazin’s statements did not express the view that Turks as a nationality or ethnic group were inferior to other nationalities or ethnic groups. Some of the statements, considered in isolation, might be understood to assert that some aspects of Turkish culture inhibit Turks in Berlin from succeeding economically. But it is often claimed, including by commentators of unimpeachable integrity and sensitivity to the problem of racial discrimination, that the culture that prevails among particular national or ethnic groups inhibits their economic success. For example, Amartya Sen, has written that “[c]ultural influences can make a major difference to work ethics, responsible conduct, spirited motivation, dynamic management, entrepreneurial initiatives, willingness to take risks, and a variety of other aspects of human behavior which can be critical to economic success.”<sup>6</sup> The dissemination clause should not be construed to prohibit the expression of such views. “The right to freedom of expression implies that it should be possible to scrutinize, openly debate and criticize belief systems, opinions and institutions, including religious ones.”<sup>7</sup> The claim that the culture or belief system that prevails among a national or ethnic group inhibits their chances of achieving a particular goal is not outside the scope of reasoned discourse, and it is not prohibited by the Convention.

8. Moreover, other portions of the interview indicate that Mr. Sarrazin was not asserting that Turkish culture leads inevitably to lack of economic success. Mr. Sarrazin’s main point appears to have been that the provision of social welfare leads to habits and ways of life that inhibit economic success and integration. Thus, he notes that the same immigrant groups that in Germany and Sweden are economically unsuccessful are successful in other countries, such as the United States. The reason for this disparity, he (mistakenly) asserts, is the fact that immigrants in Germany and Sweden receive social welfare, which gives them a disincentive to integrate, whereas the United States does not provide immigrants with social welfare and, as a result, immigrants from these groups do integrate and succeed economically. Elsewhere in the interview, Mr. Sarrazin asserts that, “[i]f the Turks would like to integrate, they would have parallel success with other groups, and it would not be an issue any more.” Thus, Mr. Sarrazin does not appear to have been asserting the inferiority of Turkish culture or Turks as a nationality or ethnic group. Instead, he appears to have been making an argument about the impact of certain economic policies on the incentives of Turkish immigrants to integrate and thus to succeed economically. In any event, the State party was not acting arbitrarily in construing his statements this way.

9. It is true that, in expressing these ideas, Mr. Sarrazin at times employed denigrating and offensive language. But such language does not change the fact that it was not arbitrary for the State party to conclude that the statements were not ideas of racial superiority. The right to freedom of expression extends even to statements framed in sharp and caustic terms.

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6 Quoted in Lan Cao, *Culture Change*, 47:2 *Va. J. Int’l L.*, 350, 389(2007). For additional examples, see *id.* at 378-91.

7 See Rabat Plan of Action, para. 11.

### State Party Discretion Not To Prosecute

10. Even if I agreed that Mr. Sarrazin's statements incited to racial discrimination or contained ideas of racial superiority, I would not agree that the State party violated the Convention by failing to prosecute him. The Convention does not require the criminal prosecution of every expression of ideas of racial superiority or every statement inciting to racial discrimination. Rather, the Convention leaves States parties with discretion to determine when criminal prosecution would best serve the goals of the Convention while safeguarding the principles of the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of the Convention. In past decisions, the Committee has recognized the "principle of expediency," which it has defined as "the freedom to prosecute or not prosecute."<sup>8</sup> The Committee has explained that this principle "is governed by considerations of public policy" and that "the Convention cannot be interpreted as challenging the *raison d'être* of [this] principle."<sup>9</sup> In the light of these decisions, commentators have correctly noted that "[t]he obligation to criminalize should not be understood as an absolute duty to punish." Rather, "[t]he Committee . . . acknowledge[s] a margin of appreciation for prosecuting authorities."<sup>10</sup>

11. In its General Recommendation 15, the Committee has asserted that "the prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression." This is far from saying, however, that the right to freedom of expression is irrelevant to the construction or implementation of article 4. As explained above, in the light of the "due regard" clause, concerns about freedom of opinion and expression are directly relevant to the interpretation of the term "ideas based on racial superiority." Furthermore, even if the "dissemination of ideas based on racial superiority or hatred" is not protected by the right to freedom of opinion and expression, it does not follow that the *criminal prosecution* of such dissemination poses no risks to the freedom of opinion and expression. Criminal punishment is the most severe form of punishment the State can impose. A threat of criminal prosecution has the distinct tendency to cause persons to forgo conduct that the law does not prohibit, particularly if the statutory language is unclear. In the context of laws prohibiting speech, this phenomenon is known as the "chilling" effect of such laws. Thus, even if the types of speech described in article 4 are not protected by freedom of expression, an aggressive approach to enforcement can deter people from exercising their right to engage in speech that *is* protected. For this reason, application of the principle of expediency to the "dissemination of ideas based on racial superiority or hatred" does not contradict General Recommendation 15.

12. A State party might permissibly decline to prosecute on the ground that criminal prosecution in a particular case would impede rather than advance the goals of the Convention. For example, criminally prosecuting statements that are not clearly prohibited could have the perverse effect of making a "freedom of expression" martyr of the speaker, who could claim governmental heavy-handedness and imposition of "political correctness." If the initial statement was not widely disseminated, criminal prosecution could make matters worse by giving undue prominence to a statement that might otherwise have been quickly forgotten. Criminal prosecution might, indeed, magnify the psychic pain experienced by the targeted groups by giving wider publicity to the denigrating statements. Depending on the circumstances, a State party might reasonably conclude that criminal prosecution would unduly dignify a statement that would otherwise be perceived as too ludicrous to be taken seriously. In sum, States parties act properly in determining that a

<sup>8</sup> L.K. v. The Netherlands ¶ 3.3(CERD, 1993); Yilmaz-Dogan v. the Netherlands, ¶8.2 (CERD, 1987).

<sup>9</sup> Id ¶9.4.

<sup>10</sup> Anja Siebert-Fohr, *Prosecuting Serious Human Rights Violations* (2009) p. 173.

criminal prosecution in a particular instance would cause greater harm to the goals of the Convention than would some other form of response to the offending statement.

13. The Convention does not preclude States parties from adopting a policy of prosecuting only the most serious cases. Indeed, such a policy would appear to be required by the principle that any restriction on the right of free expression must conform to the strict tests of necessity and proportionality.<sup>11</sup> The necessity inquiry asks whether the aim of the restriction “could be achieved in other ways that do not restrict freedom of expression,” and the proportionality inquiry asks whether the State party employed “the least intrusive instrument amongst those which might achieve” its legitimate aims.<sup>12</sup> Criminal prosecution of racist statements will often not be the least intrusive instrument for achieving the legitimate aim of eliminating racial discrimination; indeed, criminal prosecution will sometimes be counterproductive. The Committee implicitly recognized this point in *Zentralrat Deutscher Sinti und Roma et al. v. Germany* when it declined to find a violation, even though the State party did not criminally prosecute statements that the Committee found to be “discriminatory, insulting and defamatory,” noting that the offending statements had already carried consequences for its author. Unfortunately, the Committee has overlooked the point in this case.

14. In determining whether criminal prosecution is necessary and proportional, States parties properly take a number of factors into account. As relevant to this Communication, these factors include the form in which the statement was disseminated. A speech before a crowd or on television might properly be deemed of greater concern than an interview published in a cultural journal. States parties should also consider the number of persons reached by the publication. A statement in a newspaper of wide circulation may be deemed of greater concern than a statement in a journal of comparatively low circulation. States parties may also consider whether the offensive statements were addressed directly to the offended group or otherwise disseminated in a way that made it difficult for persons from the offended group to avoid them. Thus, racist statements displayed on a billboard or on the subway, where the targeted groups cannot avoid them, may be deemed of greater concern than offensive statements buried in the middle of a dense, lengthy interview mainly focusing on economic matters. Finally, and most importantly, States parties should take account of the context and the genre of the discussion in which the statements were made – for example, whether the statements were part of a vitriolic ad hominem attack or instead were presented as a contribution, however intemperate, to reasoned debate on a matter of public concern, as the State party found Mr. Sarrazin’s statements to be.<sup>13</sup>

15. The Committee faults the State party for “concentrating on the fact that Mr. Sarrazin’s statements were not capable of disturbing public peace,” noting that Article 4 does not contain such a criterion. However, “it is not the Committee’s task to decide in abstract whether or not national legislation is compatible with the Convention.” The Committee’s task, rather, is “to consider whether there has been a violation in the particular

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11 *Soulas and Others v. France*, 15948/03, ¶¶ 32-37 (2008); Human Rights Committee, General Comment 34, ¶ 22. See also *Rabat Plan of Action* (criminal prosecution should be a last resort).

12 *Id.*, ¶¶ 33, 34.

13 Although the State party follows a policy of mandatory prosecution of felonies, the explanations provided by the Berlin Public Prosecutor and the General Procurator for declining to initiate a prosecution against Mr. Sarrazin show that the State party takes account of case-specific considerations such as those discussed above in determining whether its hate speech laws properly apply to particular cases in the light of the State party’s constitutional provisions protecting freedom of expression.

case.”<sup>14</sup> Moreover, the Public Prosecutor only mentioned this criterion as one among many reasons not to initiate a criminal prosecution, and the General Procurator did not mention the criterion at all. Furthermore, while GCC 130(1) applies only to statements “capable of disturbing the public peace,” this limitation does not appear in GCC 130(2), which criminalizes, *inter alia*, the “dissemination” in writing or through the media of materials “which assault the human dignity of other by insulting, maliciously maligning or defaming [a national, racial or religious group].” Nor is the limitation found in GCC 185, which criminalizes insult. Finally, the Convention need not be read to imply that considerations of public order are irrelevant to the application of the dissemination clause. To the contrary, in balancing the obligation to combat hate speech with the safeguarding of freedom of expression, as they must under the “due regard” clause, States parties, in my view, may permissibly determine that prosecution is warranted only if the speech threatens to disturb the public peace.

16. For the foregoing reasons, I am unable to agree that the State party violated the Convention.

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

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<sup>14</sup> See, e.g., *Zentralrat Deutscher Sinti und Roma et al. v. Germany* (38/2006) ¶7.7; *Murat Er v. Denmark* (40/2007) ¶ 7.2.