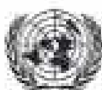
NATIONS UNIES
DROITS DE L'HOMME
HAUT-COMMISSARIAT



UNITED NATIONS
HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER

HAUT-COMMISSARIAT AUX DROITS DE L'HOMME • OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS
PALAIS DES NATIONS • 1211 GENEVA 10, SWITZERLAND
www.ohchr.org • TEL: +41 22 917 9341 • FAX: +41 22 917 9022• E-MAIL: petitions@ohchr.org

REFERENCE: G/SO 237/211 DEU (2)
CE/MEF/JI 48/2010

Kopie an Mdt.: Stellungn. | WV:
EINGEGANGEN
11. APR. 2013
Anwaltsbüro
M·J·H·M·V
zdA

5 April 2013

Dear Ms. Hermanns,

I have the honour to transmit to you herewith, the (advance unedited) text of the Opinion, adopted by the Committee on the Elimination of Racial Discrimination, concerning complaint No. 48/2010 which you submitted to the Committee under article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination, on behalf of the Turkish Union in Berlin / Brandenburg (TBB).

The text of an individual opinion by a Committee member is appended to the present Opinion.

In accordance with the Committee's established practice, the Opinion will be made public.

Yours sincerely,

Ibrahim Salama
Director,
Human Rights Treaties Division

Ms. Jutta Hermanns
Tempelhofer Ufer 22
10963 Berlin
Germany

United Nations

CERD/C/82/D/48/2010

International Convention on the Elimination of All Forms of Racial Discrimination

Distr.: General
4 April 2013

Original: English

Advance unedited version

Committee on the Elimination of Racial Discrimination

Communication No. 48/2010

Opinion adopted by the Committee at its eighty second (11 February to 8 March 2013)

Submitted by:	TBB-Turkish Union in Berlin/Brandenburg (represented by counsel, Ms. Jutta Hermanns)
Alleged victim:	The petitioner
State Party:	Germany
Date of the communication:	12 July 2010 (initial submission)
Date of the present decision	26 February 2013

Please recycle

Annex

Opinion of the Committee on the Elimination of Racial Discrimination under article 14 of the international Convention on the Elimination of All Forms of Racial Discrimination (Eighty second session)

concerning

Communication No. 48/2010*

Submitted by:	TBB-Turkish Union in Berlin/Brandenburg (represented by counsel, Ms. Jutta Hermanns)
Alleged victim:	The petitioner
State Party:	Germany
Date of the communication:	12 July 2010 (initial submission)

The Committee on the Elimination of Racial Discrimination, established under article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination,

Meeting on 26 February 2013,

Having concluded its consideration of communication No. 48/2010, submitted to the Committee on the Elimination of Racial Discrimination by the TBB-Turkish Union in Berlin/Brandenburg under article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination,

Having taken into account all information made available to it by the petitioner of the communication, its counsel and the State party,

Adopts the following:

Opinion

1. The petitioner of the communication, dated 11 May and 13 July 2010, is an association, the TBB Turkish Union in Berlin/Brandenburg, represented according to paragraph 9 of its by-laws by the spokesperson of the Board of Directors and an additional member of the Executive Board of Directors.[1] According to paragraph 3 of its by-laws, the

* The following members of the Committee participated in the examination of the present communication: Mr. Nourredine Amir; Mr. Alexei S. Avtonomov; Mr. Jose Francisco Cali Tzay; Ms. Anastacia Crickley; Ms. Fatimata-Binta Victoire Dah; Mr. Régis de Gouttes; Mr. Ion Diaconu; Mr. Kokou Mawuena Ika Kana (Dieudonné) Ewomsan; Mr. Yong'an Huang; Ms. Patricia Nozipho January-Bardill; Mr. Anwar Kemal; Mr. Dilip Lahiri; Mr. Jose A. Lindgren Alves; Mr. Pastor Elias Murillo Martinez; Mr. Waliakoye Saidou; Mr. Carlos Manuel Vazquez. According to rule 90 of the Committee's Rules of Procedure, Mr. Gun Kut did not participate in the examination of the present communication.
The text of an individual opinion by Mr. Carlos Manuel Vazquez is appended to the present Opinion as a separate document (CERD/C/82/3).

[1] The power of attorney is signed by the spokeswoman of the Board of Directors and by the spokesperson of the Executive Board of Directors.

aim of the association is threefold: (1) to contribute to a peaceful and solidary cohabitation of all persons in Berlin and Brandenburg and to understanding among the peoples; (2) the furtherance of equal and non-discriminatory cohabitation and cooperation between Germans and Non-Germans, in particular persons of Turkish heritage in Berlin and Brandenburg; (3) education and counselling on issues of consumer protection in connection with protection against discrimination. The petitioner's pursues its aims with the following measures: conduct of events, conferences, forums, working groups on different topics, counselling of institutions and authorities on the topic of integration policy, dissemination about issues of concern to persons of Turkish heritage, support to persons of Berlin and Brandenburg in legal and social questions through counselling, courses, seminars, as well as holding of cultural events, discussions etc. and counselling in and out of court against discrimination. The petitioner claims that its members and the association itself are victims of a violation by Germany[2] of article 2, paragraph 1(d), article 4, paragraph (a) and article 6 of the Convention on the Elimination of All Forms of Racial Discrimination. It is represented by counsel, Ms. Jutta Hermanns.

The facts as submitted by the petitioner

2.1 The German cultural journal *Lettre International* (2009 fall edition, number 86)[3] published an interview with Mr. Thilo Sarrazin, the former Finance Senator of the Berlin Senate (from 2002 to April 2009, Social Democratic Party) and member of the Board of Directors of the German Central Bank (from May 2009), entitled "Class instead of Mass: from the Capital City of Social Services to the Metropolis of the Elite". In this interview, Mr. Sarrazin expressed himself in a derogatory and discriminatory way about social "lower classes", which are "not productive" and would have to " disappear over time" in order to create a city of the "elite". In this context, he stated, *inter alia*:

"[…] The city has a productive circulation of people, who work and who are needed, be they part of the administration or of the ministries. Beside them, there is a number of people, about 20% of the population, who are economically not needed. They live off social welfare (Hartz IV) and transfer income; on a federal level this segment is only 8-10%. This part of the population needs to disappear over time. A large number of Arabs and Turks in this city, whose numbers have grown through erroneous policies, have no productive function, except for the fruit and vegetable trade, and other perspectives will probably not develop either […].

[…] One must stop talking about "the" migrant. We must look at the different migrant groups. […]

With the core group of people from Yugoslavia, however, one sees a more "Turkish" problem, the Turkish group and the Arabs slope dramatically [in terms of success]. Even in the third generation, a lot of them lack any reasonable knowledge of German. Many of them don't even finish school and an even smaller part makes it to the college entrance exam […].

[…] There is another problem: the lower the class, the higher the birth rate. The birth rates of the Arabs and Turks are two to three times higher than what corresponds to their overall part in the population. Large segments are neither willing nor able to integrate. The solution to this problem can only be to stop letting people in and whoever wants to get married, should do it abroad. Brides are constantly being supplied: the Turkish girl here is married to

[2] The Convention was ratified by Germany on 16 May 1969, and the declaration under article 14 was made on 30 August 2001.

[3] A German cultural magazine, with 23,000 issues printed. For the issue in question 33,000 issues were printed.

someone from Anatolia; the young Turkish man gets a bride from an Anatolian village. It's even worse with the Arabs. My idea would be to generally prohibit influx, except for highly qualified individuals and not provide social welfare for immigrants anymore.

[…] It is a scandal when Turkish boys don't listen to female teachers because of their culture. Integration is an accomplishment of those who integrate. I don't have to accept anyone who doesn't do anything. I don't have to accept anyone who lives off the state and rejects this very state, who doesn't make an effort to reasonably educate their children and constantly produces new little headscarf girls. That is true for 70% of the Turkish and for 90% of the Arab population in Berlin. Many of them don't want any integration, they want to live according to their own rules. Furthermore, they encourage a collective mentality that is aggressive and ancestral […].

[…] The Turks are conquering Germany just like the Kosovars conquered Kosovo: through a higher birth rate. I wouldn't mind if they were East European Jews with about a 15% higher IQ than the one of Germans.

[…] If the Turks would integrate themselves so that they would have comparable success in the school system like other groups, the topic would become moot. […] However, it does not happen like that. Berliners always say that they have a particularly high number of foreigners. This is wrong. The percentage of foreigners in Munich, Stuttgart, Cologne or Hamburg is much higher, but the foreigners there have a smaller percentage of Turks and Arabs and they are of more diverse origin.

[…] We have to completely restructure family policies: away with payments, above all to the lower class. I remember a report in the newspaper "Die Zeit" that stated that every Monday morning, the city cleaning services clean 20 tons of left over lamb from Turkish grill parties in the Tiergarten - this is not a satire. The Neukölln Mayor Buschkowsky spoke about an Arab woman who was having her sixth child to be able to get a bigger apartment through the social welfare law (Hartz IV). We have to say farewell to these structures. One has to assume that human ability is to some extent socially contingent and to some extent hereditary. The road we are following leads to a continuous decrease of the number of intelligent high performers due to demographic reasons. One can't build a sustainable society that way...

[…] If 1.3 million Chinese are just as intelligent as Germans, but more industrious and in the foreseeable future better educated while we Germans take on ever more of a Turkish mentality, we'll have a bigger problem […]

2.2 On 23 October 2009, the petitioner, "as the interest group of the Turkish citizens and citizens with Turkish heritage of Berlin and Brandenburg" filed a complaint of criminal offence against Mr. Sarrazin to the Office of Public Prosecution. It claimed, *inter alia*, that Mr. Sarrazin's statements constituted incitement of the people (Volksverhetzung), pursuant to article 130 of the Criminal Code[4], in particular because "Turks and Arabs were presented as inferior and denied a right to existence in our society".

[4] Paragraph 130 of the Criminal Code: (1) Whoever, in a manner that is capable of disturbing the public peace: 1. incites hatred against segments of the population or calls for violent or arbitrary measures against them; or 2. assaults the human dignity of others by insulting, maliciously maligning, or defaming segments of the population, shall be punished with imprisonment from three months to five years.

2.3 Mr. Sarrazin's statements were reviewed with respect to article 130 (incitement to hatred) and article 185 (insult)[5] of the German Criminal Code. On 16 November 2009, the Office of Public Prosecution established that there was no criminal liability for Mr. Sarrazin's statements and terminated the proceedings on the basis of article 170 (2) of the German Code of Criminal Procedure[6]. The Office of Public Prosecution based its decision on article 5 of the Basic Law (freedom of expression)[7] and concluded that incitement to hatred against a segment of the population vs an individual, was not recognized and that Mr. Sarrazin's statements are considered as a "contribution to the intellectual debate in a question that [was] very significant for the public […]."

2.4 On 21 December 2009, the petitioner submitted a written complaint, challenging the decision of the Office of Public Prosecution. On 24 February 2010, the General Prosecutor informed the petitioner that it was not entitled to file a formal complaint against the decision of the Office of Public Prosecution, because it was not the "injured party" within the meaning of article 172 (1), sentence 1, of the Code of Criminal Procedure[8]. The General Prosecutor, however, reviewed the facts of the case in his supervisory role and decided that the Office of Public Prosecution in Berlin has correctly terminated the proceedings. He established that Mr. Sarrazin's comments were made in the context of a critical discussion about; *inter alia*, structural problems of economic and social nature in Berlin.

2.5 In addition to the petitioner, two individual members of the petitioner, Ms. C.B. and Mr. S. Y. filed a complaint against Mr. Sarrazin to the Office of Public Prosecution. These proceedings were also terminated. The complaints against the termination of investigative proceedings against Mr. Sarrazin were rejected in an identical way by the General Prosecutor. Due to personal reasons, these individuals have not taken any further legal action.

2.6 Domestic remedies have been exhausted with the termination of the investigative proceedings on the basis of article 170 (2) of the Code of Criminal Procedure. Further legal action is not available and the six-month deadline for the submission of an individual communication to the Committee should be counted from 16 November 2009, despite the review of the complaint by the General Prosecutor in his supervisory role.

---

[5] Paragraph 185: Insult shall be punished with imprisonment for not more than one year or a fine and, if the insult is committed by means of violence, with imprisonment for not more than two years or a fine.

[6] Article 170, of the German Criminal Procedure Code : (1) If the investigations offer sufficient reason for preferring public charges, the public prosecution office shall prefer them by submitting a bill of indictment to the competent court. (2) In all other cases the public prosecution office shall terminate the proceedings. The public prosecutor shall notify the accused thereof if he was examined as such or a warrant of arrest was issued against him; the same shall apply if he requested such notice or if there is a particular interest in the notification.

[7] Article 5 of the Basic Law : (1) Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures, and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship. (2) These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honour.(3) Arts and sciences, research and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the constitution.

[8] Article 172(1), of the German Criminal Procedure Code: Where the applicant is also the aggrieved person, he shall be entitled to lodge a complaint against the notification made pursuant to Section 171 to the official superior of the public prosecution office within two weeks after receipt of such notification. On the filing of the complaint with the public prosecution office the time limit shall be deemed to have been observed. Time shall not start to run if no instruction was given pursuant to Section 171, second sentence.

2.7 According to article 172 of the Code of Criminal Procedure, proceedings aimed at forcing the public prosecution to initiate criminal charges are not available to the petitioner as a union or association. For the same reason, it cannot file a constitutional complaint to the Federal Constitutional Court. According to the decision of the Federal Constitutional Court of 22 June 2006 (the umbrella organisation of the Sinti und Roma case), only individual members of a group, but not the association itself, can be affected in their human dignity within the meaning of article 130 of the Criminal Code. An institution cannot initiate legal proceedings to obtain criminal prosecution, since only natural persons can invoke human dignity.[9]

2.8 With regard to the victim status pursuant to article 14, paragraph 1 of the Convention, the petitioner argues that the association's aim is the conduct of events, conferences, forums, working groups on different topics, counselling of institutions and authorities on the topic of integration policy, dissemination about issues of concern to persons of Turkish heritage, support to persons of Berlin and Brandenburg in legal and social questions through counselling, courses, seminars, as well as holding of cultural events, discussions etc. and counselling in and out of court against discrimination (see 1.1). The association represents persons of Turkish heritage and works towards equality and non-discrimination in society, in particular for persons of Turkish heritage. In line with the Committee's jurisprudence in communications No. 28/2003, Documentation and Advisory Centre on Racial Discrimination v. Denmark[10], No. 30/2003, The Jewish community of Oslo v. Norway[11] and No. 38/2006, Central Council of German Sinti und Roma et al. v. Germany[12], the TBB, as a legal entity representing the interests of the Turkish citizens and citizens of Turkish heritage of Berlin and Brandenburg, is a victim within the meaning of article 14, paragraph 1, of the Convention. Through the negative value judgments, its integrity as a union of migrants with Turkish background, as well as its work are affected. There is a danger that the petitioner itself and its members could become victims of criminal acts due to the climate of negative value judgments and blanket statements expressed by Mr. Sarrazin. In this context, the organization received two emails on 9 and 10 October 2009, expressing support to Mr. Sarrazin's statements and to the fact that statements about immigrants and foreigners should be protected by freedom of expression. The larger right-wing extremist parties, such as the German National Democratic Party (National Demokratische Partei Deutschlands, NPD), German People's Union (Deutsche Volksunion, DVU) and the Republicans, have all sided with Mr. Sarrazin. The petitioner notes that even though Mr. Sarrazin cannot be directly held responsible for the fact that the right-wing extremist parties sided with him, his statements are on a level that abetted the goals of these parties. The rights of its members, as well as of the association representing these individuals and groups of individuals, have been violated by the decision of the Office of Public Prosecution in Berlin, confirmed by the General Prosecutor, to terminate the proceedings against Mr. Sarrazin due to the fact that his statements were not liable to criminal prosecution.

---

[9] See Federal Constitutional Court, B.v. 22 June 2006 – 2 BvR 1421/05.

[10] See communication No. 28/2003, *Documentation and Advisory Centre on Racial Discrimination v. Denmark*, Opinion of 22 August 2003, para. 6.4.

[11] See communication No. 30/2003, *Jewish Community of Oslo et al. v. Norway*, Opinion of 15 August 2005, para. 7.4.

[12] See communication No. 38/2006, *Central Council of German Sinti and Roma et al. v. Germany*, Opinion of 22 February 2008, para. 7.2.

The complaint

3.1 The petitioner claims to be a victim of a violation by Germany of article 2, paragraph 1(d), article 4, paragraph (a) and article 6 of the Convention on the Elimination of All Forms of Racial Discrimination, as the State party failed to provide protection under its Criminal Code against Mr. Sarrazin's racially discriminatory and insulting statements directed against the petitioner as a group of individuals of Turkish heritage and as the representative of this group.

3.2 The petitioner recalls the Committee's concluding observations[13], in which it recommended that the State party consider adopting a clear and comprehensive definition of racial discrimination in its national legislation. The Committee also recommended that the State party broaden its approach to combatting racial discrimination with a view to countering such discrimination in all its forms, including expressions of racist prejudices and attitudes. It submits that the degrading and discriminatory statements made by Mr. Sarrazin are connected to distinct features of the Turkish population. The Turkish population was presented as a group of individuals who live at the expense of the state and due to their ascribed negative characteristics and ways of behaving, they do not have the right to be in Germany.

3.3 The petitioner argues that since Mr. Sarrazin is the former Finance Senator of the Berlin Senate and member of the Board of Directors of the German Central Bank, his authority leads to the perception that his statements are based on proven facts and, therefore, "the truth". It adds that the effects of Mr. Sarrazin's statements enhance prejudices of the majority towards the Turkish population and individuals of Turkish heritage, including their children. The petitioner submits that such racially discriminatory statements are not covered by the right to freedom of expression because the concerned group has a right to live without prejudices and general intolerance, and the freedom to exercise their rights should be respected. The statements made by Mr. Sarrazin should be assessed in the framework of the special social context of Germany, adding to the general pattern of incitement to racial hatred against the Turkish population, which in the circumstances can be even more dangerous than openly flaunted racism, which is easier to combat. With the termination of the investigation against Mr. Sarrazin, the petitioner claims that it was arbitrarily denied protection against racially discriminatory statements directed against it as a group of individuals of Turkish heritage and as the representative of this group and the propagation thereof represents a violation of articles 2 (1 (d), 4, (a) and 6.

3.4 With regard to article 4 (a), of the Convention, the petitioner notes that an effective criminal prosecution has not taken place when the Public Prosecution refused to introduce criminal proceedings against Mr. Sarrazin and the State party implicitly tolerates a repetition of similar statements. Therefore, in violation of article 6 of the Convention, effective protection has been denied.

State party's observations on admissibility and merits

4.1 On 23 December 2010, the State party submits its observations on admissibility and merits. The State party recalls the facts and adds that, at the time of the interview, Mr. Sarrazin was working on his book "Germany is self-destructing", which was published in August 2010. In his book, Mr. Sarrazin gave an opinion on the situation of Germany. He predicted future developments concerning poverty and inequality, the job market, motivation to work, equality in education, the demographic development, immigration and integration. In all these areas, he made direct and controversial statements.

[13] ICERD/C/SR.1998, Federal Republic of Germany, 13 August 2008, para. 15.

4.2 The State party notes that it does not in any way share or condone Mr. Sarrazin's views expressed in his interview with the *Lettre international*, however it submits that this does not mean that it was under an obligation to prosecute Mr. Sarrazin for uttering them. The State party submits that the Committee should find the communication inadmissible, as the petitioner lacks standing to submit a communication, pursuant to article 14 1 of the Convention in conjunction with article 91 (b) of the Committee's Rules of Procedure. Being a legal entity, the petitioner is not in a position to claim that it is the victim of a violation of any of the rights set in forth in the Convention. The Turkish Union in Berlin-Brandenburg is not directly affected in its own rights by the statements of Mr. Sarrazin. The integrity of the complainant as a legal entity is not a right that can be violated. The petitioner does not mention any concrete influence of the statements in its work. It notes that in this respect, the case differs from the facts in communication No. 30/2003 (The Jewish Community of Oslo et al v. Norway)[14]. In that case, on a march in commemoration of the Nazi leader Rudolf Hess, a racially discriminating speech was made. As a result of this, there was increased "Nazi" activity, and a marked increase of violence against blacks and political opponents. This understandably instilled fear and had a serious influence on the Jewish Community and its work. In the present communication, no effects of the interview can be seen that would make the petitioner a "victim" and the e-mails the petitioner received after the interview do not amount to such serious adverse effect.

4.3 The State party acknowledges the possibility that an association can act on behalf of a member or a group of its members, provided it is authorized to act on their behalf.[15] However, the State party submits that even if all or some members of the petitioner could be victims, the petitioner itself is not authorized to submit an individual communication and the bylaws of the petitioner do not provide any basis for such authorization. Furthermore, the petitioner does not provide any justification why it is acting on behalf of its members without due authorization. Although the Turkish Union supports equitable co-existence in society without discrimination, it only gives legal support against discrimination and the members don't join the organization to be legally represented.[16]

4.4 With regard to the merits, the State party submits that the goal of German policy is to create a climate where racist statements and crimes are proscribed and, thus, deterred. Racially motivated crimes are prosecuted and punished with determination. On the other hand, freedom of speech is even applicable to information or ideas that offend, shock or disturb the state or any sector of the population. With regard to the petitioner's claim of a violation of article 4 (a) of the Convention, the State party notes that the focus of this provision is on legislative action and that the provisions of the German Criminal Code (GCC) are sufficient to provide effective legal sanctions to combat incitement to racial discrimination. The four categories of misconduct mentioned in article 4(a) of the Convention are penalized: (1) dissemination of ideas based upon racial superiority or hatred; (2) incitement to racial hatred; (3) acts of violence against any race or group of persons of another colour or ethnic origin; and (4) incitement to such acts. It explains that in order to find someone guilty of a crime under § 130 GCC, the existence of each required element of the crime must be established beyond reasonable doubt. By finding that, in this case, the prerequisites of § 130 GCC were not fulfilled, the State party did not violate the

[14] See communication No. 30/2003, *The Jewish Community of Oslo et al v. Norway*, Opinion of 15 August 2005.

[15] Communication No. 28/2003, *Documentation and Advisory Centre on Racial Discrimination v. Denmark*, Opinion of 22 August 2003, para. 6.4

[16] A contrario communication No. 30/2003, *Jewish Community of Oslo et al. v. Norway*, Opinion of 15 August 2005, para.7.4; communication No. 38/2006, *Central Council of German Sinti and Roma et al. v. Germany*, Opinion of 22 February 2008, para. 7.2.

Convention. It notes that the order of termination of 16 November 2009 by the Office of Public Prosecution held that the statements did not reach the threshold of intensity which would amount to incitement. The interview – although polemic - did not call for particular actions like violence or arbitrary measures. The Office of Public Prosecution clearly stated that the language used in the interview was inappropriate, however, it did not brand segments of population as "inferior" and the right to exist as equally worthy persons was not contested. Moreover, the statements did not qualify as an insult (§ 185 GCC), considering the context and the freedom of speech. The General Prosecutor shared this point of view in his decision of 22 February 2010. He added that the statements were made in the context of a critical discussion of economic and social problems in Berlin. There were no indications that Mr. Sarrazin intended to foment hostility against the described groups.

4.5 The State party further maintains that the decisions by the criminal prosecution authorities were in conformity with article 4 (a) of the Convention. They were neither manifestly arbitrary nor did they amount to a denial of justice. As a consequence of the interview, there were several complaints from organizations and individuals of different nationalities; however the authorities concluded that considering the context, purpose and content of the statements, an offence of incitement to racial or ethnic hatred could not be established. It further notes that the context of the interview shows that Mr. Sarrazin expressed his personal views rather than giving any official or semi-official view. There was no indication that Mr. Sarrazin intended to incite hatred against certain segments of the population. His statement was neither objectively suitable nor subjectively determined to engender and strengthen an emotionally increased hostile attitude against people of Turkish and Arab origin, nor did it include any indication that violent or arbitrary measures should be used against the mentioned groups. Hatred based on intolerance was not incited, promoted or justified. There were a lot of critical reactions to Mr. Sarrazin's statements and many people living in Germany stated in public that they did not share his point of view. In August 2010, Mr. Sarrazin published his book "Germany is self-destructing", which included similar statements. Many important personalities took public positions against the views put forward in the book. Chancellor Angela Merkel called Mr. Sarrazin's statements "stupid" and the Social democratic Party, to which Mr. Sarrazin belongs, initiated a procedure for exclusion from the Party. This discussion showed that a majority of the German population did not share the opinion of Mr. Sarrazin and it is not true that a main part of the society was encouraged and confirmed in their latent racism because of the interview and the decisions to terminate the criminal investigations. The State party submits that there was no increased risk for the petitioner or its members to become victims of future criminal acts. Rather, as a consequence of the interview, the discussion on how to improve the situation of immigrants and how to promote their integration has gained welcome prominence.

4.6 With regard to the alleged violation of article 6 of the Convention, the State party notes that effective criminal prosecution of racist acts is generally ensured by the principle of mandatory prosecution. Although the petitioner was not allowed to lodge a complaint and was not entitled to appeal because it was not a directly aggrieved party, the General Prosecutor in his supervisory role scrutinized the decision of the Office of Public Prosecution.

4.7 With regard to the alleged violation of article 2(1(d) of the Convention, the State party notes that any dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination as well as all acts of violence or incitement to such acts against any race or group of persons of another ethnic origin constitute an offense punishable by law. In the instant case, the prosecution could not establish that Mr. Sarrazin intended to cause any disadvantages for the segments of the population mentioned in the interview. This being so,

the importance of freedom of speech precluded the authorities from bringing criminal charges against him.

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

5.1 On 7 March 2011, the petitioner submits its comments on the State party's observations and notes that in German, the terms such as "supply a bride" or "produce headscarf girls" have deeply degrading and contemptuous meanings. The petitioner notes, as the State party demonstrated, that the statements were subsequently repeated in Mr. Sarrazin's book published in August 2010, and they are an expansion of the statements found in the present complaint. In the debates following the book's publication, contrary to the State party's observation, it emerged that a majority of the German population agreed with Mr. Sarrazin's racist statements, as a consequence verbal and physical attacks against immigrants increased.[17] According to studies, Islam phobic attitudes during the Sarrazin debate were measured at 55% of the population and social scientists who publically criticized Mr. Sarrazin received death threats and hundreds of hate emails. The petitioner disagrees with the State party and notes that Mr. Sarrazin's statements in the interview led to public vilification and debasement of "Turks", "Arabs" and Muslims and it became socially acceptable to have these types of opinions.

5.2 With regard to the admissibility, the petitioner recalls the Committee's jurisprudence[18] and notes that it represents the Turkish community and as a consequence of Mr. Sarrazin's statements, all "Turks" have been vilified through insulting and racist statements. The petitioner therefore notes that all members of the ethnic group "Turks" are victims or potential victims in the sense of article 14 of the Convention. It notes that the increase of racial hatred in the society has a direct consequence on the mandate of the petitioner whose work is to promote a climate of mutual respect and of freedom from discrimination. Furthermore, a physical attack is not needed to become a victim under the Convention. Referring to the Committee's jurisprudence[19], the petitioner submits that according to its by-laws it supports its members against discrimination in court and outside of it and the by-laws of the association can be interpreted in the sense that the petitioner should take any necessary action on behalf of its members to fight against discrimination and to support them when they are victims of discrimination. Its two members, who are listed by name, decided not to continue proceedings out of fear of verbal attacks, abuses or threats in public, as even well-known persons and academics were victims of such abuses

5.3. With regard to the merits, the petitioner recalls that Mr. Sarrazin, as a former finance senator of Berlin and thereafter Board member of the German Central Bank should be considered as a State party official. Even if he did not make the statements in his official capacity, the State party should be obliged to prohibit such statements. As a consequence of the publication of his book, Mr. Sarrazin voluntarily resigned from the Board of the German Central Bank, however only after receiving an increase in his pension. The petitioner reiterates that it considers articles 2, 4 and 6 violated, as the authorities narrowly interpreted the domestic legislation, contrary to other cases concerning similar statements

---

[17] See statement of 400 well-known persons and organizations expressing their concern about the public order and racist statements, tageszeitung.taz, a daily newspaper, 1 October 2010 and German Institute for Human Rights of 2 September 2010.

[18] See communication No. 28/2003, *Documentation and Advisory Centre on Racial Discrimination v. Denmark*, Opinion of 22 August 2003, para. 6.4; communication No. 30/2003, *Jewish Community of Oslo et al. v. Norway*, Opinion of 15 August 2005, para. 7.4; communication No. 38/2006, *Central Council of German Sinti and Roma et al. v. Germany*, Opinion of 22 February 2008, para. 7.2.

[19] See communications No. 28/2003, opcit, para. 6.4; No. 38/2006, para. 7.2; No. 30/2003, para. 7.4.

made by right-wing extremists against Jews. This amounts to unequal treatment. [20] It also notes the statement of the right-wing extremist National Democratic Party (NPD), who stated that after the dismissal of the investigative process against Mr. Sarrazin, it will be difficult to sentence members of the NPD on grounds of incitement to ethnic hatred. [21] Lastly, no other domestic remedies were available to the petitioner.

Further observations by the State party on admissibility and merits

6.1 On 1 June 2011, the State party submits further observations on admissibility and merits and compares the present communication to communication No. 38/2006. The State party reiterates that the petitioner does not become a victim pursuant to article 14, paragraph 1 because of its nature or activities.[22] It notes that there are important differences between the petitioner and the petitioner in communication No. 38/2006, as the Central Council of German Sinti and Roma is the biggest and most important organization representing Sinti and Roma in Germany and there are regional groups all over the country. It exerts permanent influence in all political questions regarding Sinti and Roma and therefore has the authority to speak for the group it represents. In contrast, the petitioner criticized Mr. Sarrazin's statements about "Turks" and "Arabs" without authorisation to speak for these groups in general. The petitioner's activity is restricted to the region of Berlin-Brandenburg and it represents only 26 Turkish organizations and many other Turkish and Arab organizations in the communities of Berlin and Brandenburg don"t have any connection with the petitioner. Moreover, pursuant to rule 91 (b), of the Committee's rules of procedure, the submission on behalf of the alleged victim(s) without authorization is only allowed in exceptional cases and the only reason why Ms. C.B. and Mr. S.Y. did not submit their communication to the Committee is because they failed to exhaust domestic remedies. It submits that their fear of hostilities and attacks appears to be exaggerated, as their criminal complaint did not have such consequences and there was no reason to assume that the continuation of the proceedings would change that.

6.2 On the merits, the State party reiterates that it has noted Mr. Sarrazin's statements with great concern and that it disapproves of his opinion and it welcomes the protests lodged against the statements from all sectors of society.[23] Nevertheless, the State party reiterates that Mr. Sarrazin's statements are protected by the freedom of speech and expression, which is guaranteed under German Basic Law. As his statements cannot be classified as hate speech, they are not punishable under criminal law. It notes that Mr. Sarrazin talked about his personal views and did not advocate for particular actions like violence or arbitrary measures against certain segments of the population, such as "Turks" and "Arabs" and although he said negative things about them, he did not express racial hatred. [24] Referring to the jurisprudence of the European Court of Human Rights, the State party submits that the domestic authorities have the advantage of evaluating the facts and assessing Mr. Sarrazin's statements, and therefore, their decisions should be scrutinized only in so far as they may have infringed rights and freedoms of the European Convention on Human Rights. During the procedure for exclusion from the Social Democratic Party, to which Mr. Sarrazin belongs, he issued a declaration on 21 April 2011 clarifying that he did

[20] See Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Githu Muigai, 22 February 2010, A/HRC/14/43/Add. 2, para. 67.

[21] See Südwestrundfunk, SWR, TV station, 30 August 2010.

[22] See communication No. 38/2006, *Central Council of German Sinti and Roma et al. v. Germany*, Opinion of 22 February 2008, para. 7.2.

[23] See for example, the statement of 400 well-known persons in the « tageszeitung.taz », daily newspaper, 1 October 2010.

[24] See article 20, paragraph 2 of the International Covenant on Civil and Political Rights; ECHR, Gündüz v. Turkey, No. 35071/97, judgement of 4 December 2003, para. 40.

not want to discriminate any groups but he wanted to underline the necessity of integration of immigrants.

6.3 The State party further submits that the punishment for the expression of a personal opinion is one of the greatest encroachments in the freedom of expression and criminal law should be used as a last resort. Mr. Sarrazin did not express any form of hatred against Turks and Arabs, nor did he express that he regards them as inferior. His statement is not hostile and does not advocate for hostility or violence. With regard to the consequences of Mr. Sarrazin's statement, the State party notes that the petitioner's description is exaggerated and partial. It notes that even if true, it is not a consequence of Mr. Sarrazin's statement or book. The State party argues that there is no indication that the number of attacks against immigrants increased after Mr. Sarrazin's statement. The State party observes that the different figures the petitioner brings forward are not comparable; there may have been an increase of negative attitudes against Muslims but not all of them are tantamount to racial discrimination and there is no indication that they increased after Mr. Sarrazin's statements. With regard to the attacks against immigrants, death threats and hate mails against social scientists, the State party assures that every offence is criminally prosecuted and that there is no need to punish Mr. Sarrazin, as he did not cause or advocate for these offences.

Petitioner's further comments

7.1 On 8 January 2012, the petitioner submits that it is not a quantifiable number that determines the victim status of the petitioner but the way the acts were committed. The petitioner is an umbrella organization of persons of Turkish descent and represents a number of individuals and 27 member organizations. With regard to issues of migration and integration, the petitioner is the most visible and attentively heard voice in public and it supports an independent project against all forms of discrimination. On these grounds it is entitled to represent the demographic group that has become a victim of a violation of the Convention. With regard to Ms. C.B and Mr. S.Y.'s fear, the petitioner notes that it is not hypothetical, as Social Democratic City Council member, Mr. D. received a number of death threats since 17 May 2011 because he demanded that statements such as Mr. Sarrazin's be categorized as incitement to ethnic hatred. It further observes that the police notified the petitioner on 21 November 2011 that it is on the list of the National Socialist Underground (NSU), as supposed enemies of Germany. The NSU is responsible for at least eight murders of individuals originally from Turkey. Therefore, the public considers that the petitioner represents persons from Turkey living in Germany.

7.2 On the merits the petitioner reiterates its previous submissions and reiterates that in light of the domestic jurisprudence, Mr. Sarrazin's statements would have been treated differently if he had denigrated the population group of "Jews". Mr. Sarrazin's explanatory statement in the exclusion proceedings from the Social Democratic Party was demanded of him in order to prevent his exclusion and that criminal liability of racist incitement should not depend on a claim a person makes two years after the initial statement. In domestic criminal proceedings, the motivation to incitement of ethnic hatred is an inner attitude and measured objectively by actions and not by statements of the perpetrator.

8.1 On 20 January 2012, the petitioner submits an *amicus curiae* brief by the German Institute for Human Rights (GIHR). The GIHR notes that the term "racism" is often used in the context of organized right-wing extremism only. This perception has been criticized by the Committee[25] and other international bodies[26]. It notes that some prominent public

[25] See ICERD/C/DEU/CO/18, 22 September 2008, para. 15.

figures supported Mr. Sarrazin and he and the Social Democratic Party received a great number of approving letters and emails. Right-wing extremists espoused Mr. Sarrazin's positions. In the internal sanction procedure by the Social Democratic Party, of which Mr. Sarrazin is a member, a scientific opinion was produced which qualified his statements in the interview as racist. [27] The fact that the party procedure did not lead to his exclusion was equally met with criticism and approval. After the publication of Mr. Sarrazin's book, he was presented as a political realist who breaks taboos in integration and immigration policy. In a number of magazines, newspapers and TV shows, the alleged intellectual, social and character deficits of the Muslim population were discussed in a generalized fashion. The labels "Turks" or "Arabs" are applied as synonyms for Muslims. Occasionally, even office-holders took up Mr. Sarrazin's positions and thereby contributed to the stigmatization and stereotyping of Muslims in Germany. The debates considerably affected the climate in Germany, this included that persons who publicly criticized Mr. Sarrazin received hate mails, death threats and were ridiculed on internet blogs. The GIHR also refers to an open letter to the President of prominent German Muslims, in which they expressed their concern at the current atmosphere and note that in their daily lives, they are confronted with hostilities.[28]

8.2 The GIHR observes that freedom of expression is a pivotal human right and that high thresholds must be put on restrictions of freedom of expression. It observes that one of the main functions of freedom of expression stems from the need to protect the criticism of power. However, this does not require that it be interpreted in a way which would protect racist statements against minorities. It notes that article 4 (a) of the Convention stipulates that the dissemination of racist ideas be made a punishable offence, which is implemented in article 130 (1) (2) of the German Criminal Code (GCC). The GIHR notes the domestic case law, according to which the Federal Constitutional Court stressed repeatedly that when determining the application of article 130 of the GCC, the right to freedom of expression must be weighed on a case-by-case basis against the legally protected interest that is affected by the expression of the respective opinion of the other[29]. However, the Court has also established that in the case of an assault on human dignity, freedom of expression must yield to human dignity[30]. The notion of human dignity prohibits making a person the mere object of the State or to subject the person to a treatment which fundamentally questions his/her quality as a human being. Assaults on human dignity include, for instance, degradation, stigmatization or social exclusion[31] and other forms of conduct that deny the affected person's right to respect as a human being[32].

8.3 The GIHR notes that Mr. Sarrazin's statements in the relevant parts of the interview meet all the criteria of racist ideas and an assault on human dignity. Racist ideas are

---

[26] See ECRI Report on Germany, 26 May 2009, p. 8; Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Githu Muigai, Mission to Germany, A/HRC/14/43/Add. 2, 22 February 2010, para. 77 (a).

[27] Gideon Botsch, Gutachten im Auftrag des SPD-Kreisverbandes Spandau und der SPD-Abteilung Alt-Pankow zur Frage « Sind die Äusserungen von Dr. Thilo Sarrazin im Interview in der Zeitschrift Lettre International (deutsche Ausgabe, Heft 86) als rassistisch zu bewerten? 22 December 2009.

[28] See Open letter of German Muslims to the President Christian Wulff, Offener Brief deutscher Muliminnen und Muslime an den Bundespräsident Christian Wulff, 13 September 2009.

[29] Federal Constitutional Court, decision of 12 November 2002, 1 BvR 232/97, para. 17 and 21.

[30] Federal Constitutional Court, decision of 4 February 2010, 1 BvR 369/04, 1 BvR 370/04, 1 BvR 371/04, para. 26.

[31] Federal Constitutional Court, decision of 4 February 2010, 1 BvR 369/04, 1 BvR 370/04, 1 BvR 371/04, para. 28.

[32] Federal Constitutional Court, decision of 4 February 2010, 1 BvR 369/04, 1 BvR 370/04, 1 BvR 371/04, para. 28.

characterized by their calling into question the individuality of human beings and thus also their human dignity. It notes that on the basis of their content, linguistic style and terminology, Mr. Sarrazin's statements display parallels to the racial biology literature of the 19th and early 20th century. Mr. Sarrazin separates the population into "us" and "them", in which he includes "Turks" and "Arabs" to whom he attributes negative characteristics and conduct. He misuses the term "Turkish" and applies it as a synonym for an established expression with a negative meaning ("with respect to the core group of Yugoslavs, you can see "Turkish" problems"). Mr. Sarrazin's statements ridicule and degrade people ("no productive function except for the vegetable trade") and simultaneously, in a belligerent tone, they fan fear ("the Turks conquer Germany in the same way as the Kosovars conquered the Kosovo: by way of higher birth rates"). He talks about them, as if they were mass-produced goods ("permanently brides are supplied, "Arabs" and "Turks" constantly produce little headscarf girls"). The GIHR notes that this rhetoric denies the affected persons the right to respect as human beings, including children.

8.4 The GIHR notes that the identity of the person who made the statements and in what type of magazine it is published are irrelevant for considerations under article 130 of the GCC. Furthermore, according to the Committee's jurisprudence, the context of a political debate is irrelevant for the racist nature of specific statements. [33] The GIHR observes that the Public Prosecutor's Office's considerations situating Mr. Sarrazin's statements in the context of the development of Berlin 20 years after the fall of the wall and basing them on his political work in Berlin, have the consequence that public figures enjoy special and arbitrary protection when expressing racist views. Moreover, the judiciary legitimizes such statements and not only promotes the establishment and acceptance of racism in society but also contributes to the development of racism. The facts complained of therefore reveal a violation of the Convention.

9. On 10 February 2012, the petitioner refers to the jurisprudence of the German Constitutional Court cited by the position paper of the GIHR (see para. 8.3), which states that if statements depict foreigners as inferior, for example, through the generalized attribution of socially unacceptable behaviour or characteristics, freedom of expression cannot prevail over human dignity. [34] Mr. Sarrazin's statements contain exactly the kind of generalizing attributions of the supposed unacceptable behaviour and characteristics, among others referring to "Turks" and "Arabs" which have characteristics attributed to them solely on the basis of their origin.

Further observations by the State party

10.1 On 9 February 2012, the State party, in response to the *amicus curiae* brief submitted by the German Institute of Human Rights, notes that the point at issue is not whether the State party's judiciary shares or supports Mr. Sarrazin's statements. The State party reiterates that it rejects these opinions and regards them as wrong and deplorable and dissociates itself from them, including its judiciary. The GIHR's brief conveys a fundamental misconception of the relationship between freedom of expression and the Convention. According to article 4 (a) of the Convention, the need for respecting freedom of expression cannot be disregarded when States parties combat racism. It reiterates that German law conforms to article 4 (a) of the Convention and section 130 of the GCC provides for severe punishments in all cases of incitement to hatred, if the relevant act is

---

[33] See communication No. 34/2004, *Mohammed Hassan Gelle v. Denmark*, Opinion of 6 March 2006, para. 7.5; communication No. 43/2008, *Saada Mohamad Adan v. Denmark*, Opinion of 13 August 2010, para. 7.6.

[34] See Federal Constitutional Court, Decision of 4 February 2010, 1 BvR 369/04, 1 BvR 370/04, 1 BvR 371/04.

capable of disturbing public peace. The question whether the relevant act is capable of disturbing public peace has to be carefully assessed, in particular when freedom of expression is to be balanced against the necessity to combat racism.

10.2 A statement which the petitioner perceives as racist does not automatically constitute an assault on human dignity within the meaning of section 130 of the GCC. The GIHR appears to imply that the criterion of "capable of disturbing the public peace" is not relevant in this case, although it is a requirement in the GCC. It was legally necessary for the Prosecutor General to consider the position of author of the incriminated statements, the weight of his opinion, his known political opinions and the role and distribution of the journal which published the interview when deciding whether the statements were likely to disturb the public peace. The debate generated by Mr. Sarrazin's statements does not constitute a disturbance of the public peace. The State party firmly rejects the assertion by the GIHR that the judiciary or any other State authority promotes the establishment and acceptance of racism in society.

Issues and proceedings before the Committee

Consideration of admissibility

11.1 Before considering any claim contained in a communication, the Committee on the Elimination of Racial Discrimination must decide, pursuant to article 14, paragraph 7 (a), of the Convention, whether or not the communication is admissible.

11.2 The Committee notes that the petitioner is a legal entity. is an umbrella association with individual members and 27 legal entities as members. The Committee takes note of the State party's argument that the communication should be declared inadmissible, for lack of victim standing in accordance with article 14, paragraph 1, as the petitioner is not directly affected by the statements of Mr. Sarrazin. It also notes the State party's claim that the present communication cannot be compared to communication No. 38/2008[35], because in the present case, the petitioner does not have the authority to speak for the group it represents and it has not provided any arguments why it is acting on behalf of its members without due authorization. It also takes note of the petitioner's argument that it represents the interests of citizens of Turkish heritage in Berlin and that its work of promoting equality and a climate of non-discrimination was directly affected by the statements of Mr. Sarrazin.

11.3 The Committee reiterates that article 14, paragraph 1 directly refers to the Committee's competence to receive communications from "groups of individuals". It considers that on the one hand the nature of the petitioner's activities and its aims, which are, according to paragraph 3 of its by-laws, the promotion of peaceful and solidary cohabitation in Berlin and Brandenburg and the furtherance of equality and non-discrimination implemented, inter alia, by counselling and support both in and out of court against discrimination, and on the other hand the group of individuals it represents, namely persons of Turkish heritage in Berlin and Brandenburg satisfies the victim requirement within the meaning of article 14, paragraph 1, of the Convention. [36] It further considers that for purposes of admissibility, the petitioner has sufficiently substantiated that it was directly affected by Mr. Sarrazin's statements, as it received several emails in which individuals expressed their agreement with Mr. Sarrazin, stating that citizens of Turkish heritage and

[35] See communication No. 38/2006, *Central Council of German Sinti and Roma et al. v. Germany*, Opinion of 22 February 2008.

[36] See communication No. 38/2006, *Central Council of German Sinti and Roma et al. v. Germany*, Opinion of 22 February 2008, para. 7.2; communication No. 30/2003, *Jewish Community of Oslo et al. v. Norway*, Opinion of 15 August 2005, para. 7.4.

Muslim do not integrate and, that the petitioner should accept the supremacy of freedom of expression. It also received a notification from the police that it was on the list of the National Socialist Underground as an enemy of Germany.

11.4 The Committee[37] therefore considers that the fact that the petitioner is a legal entity is not an obstacle to admissibility. Accordingly, the Committee declares the communication admissible and proceeds with its examination on the merits in regard of the claims under articles 2, paragraph 1 (d), 4, paragraph (a) and 6, of the Convention.

Consideration of the merits

12.1 In accordance with article 14, paragraph 7 (a), of the International Convention on the Elimination of All Forms of Racial Discrimination, the Committee has considered the present communication in light of all the information submitted by the petitioner and the State party.

12.2 The issue before the Committee is whether the State party fulfilled its positive obligation to take effective action against reported statements of racial discrimination, having regard to the extent to which it investigated the petitioner's complaint under paragraphs 130 and 185 of the Criminal Code. Paragraph 130 of the Criminal Code criminalizes any manner of expression that is capable of disturbing the public peace by incitement to hatred against segments of the population or calling for violent or arbitrary measures against them; or by assaulting the human dignity of others by insulting, maliciously maligning, or defaming segments of the population. It also criminalizes incitement of hatred against segments of the population or a national, racial or religious group, or one characterized by its folk customs, calls for violent or arbitrary measures against them, or assaults the human dignity of others by insulting, maliciously maligning or defaming segments of the population or a previously indicated group. Paragraph 185 of the Criminal Code criminalizes insult.

12.3 The Committee recalls its earlier jurisprudence[38] according to which it does not suffice, for the purposes of article 4 of the Convention, merely to declare acts of racial discrimination punishable on paper. Rather, criminal laws and other legal provisions prohibiting racial discrimination must also be effectively implemented by the competent national tribunals and other State institutions. This obligation is implicit in article 4 of the Convention, under which States parties undertake to adopt immediate and positive measures to eradicate all incitement to, or acts of, racial discrimination. It is also reflected in other provisions of the Convention, such as article 2, paragraph 1 (d), which requires States to prohibit and bring to an end, by all appropriate means, racial discrimination, and article 6, which guarantees to everyone effective protection and remedies against any acts of racial discrimination.

12.4 The Committee notes the petitioner's claim that Mr. Sarrazin's statements in the magazine "Lettre international", 2009, Number 86 discriminated against it and its members, who are all of Turkish heritage, as the Turkish population was presented as a segment of the population who live at the expense of the State and who should not have the right to live on the territory of the State party and that the State party failed to provide protection against such discrimination. It also notes the petitioner's argument that Mr. Sarrazin's statements led to public vilification and debasement of Turks and Muslims in general. It further notes the petitioner's claims that the absence of criminal prosecution of Mr. Sarrazin amounts to a

[37] Mr. Carlos Manuel Vazquez noted that he did not agree that the communication be declared admissible.

[38] See communication No. 34/2004, *Gelle v. Denmark*, Opinion adopted on 6 March 2006, paras. 7.2 and 7.3.

violation by the State party of articles 2, paragraph 1(d); 4, paragraph (a) and 6, of the Convention, , as the domestic legislation was narrowly interpreted. The Committee notes that the State party disapproves of Mr. Sarrazin's opinion, however argues that the provisions of its Criminal Code sufficiently translate its obligations to provide effective legal sanctions to combat incitement to racial discrimination and that the State party's authorities correctly assessed that Mr. Sarrazin's statements are protected by the right to freedom of expression and do not amount to incitement nor do they qualify segments of the population as inferior. The Committee further notes the State party's argument that the decisions by its criminal prosecution authorities were neither manifestly arbitrary nor did they amount to a denial of justice and that there was no indication of an increased risk for the petitioner or its members to become victims of future criminal acts.

12.5 The Committee recalls that it is not its role to review the interpretation of facts and national law made by domestic authorities, unless the decisions were manifestly arbitrary or otherwise amounted to a denial of justice.[39] Nevertheless, the Committee has to examine whether the statements made by Mr. Sarrazin fall within any of the categories of impugned speech set out in article 4, of the Convention, and if so, whether those statements are protected by the "due regard" provision as it relates to freedom of speech, as well as to whether the decision not to prosecute Mr. Sarrazin was manifestly arbitrary or amounted to a denial of justice.

12.6 The Committee has taken note of the content of Mr. Sarrazin's statements regarding the Turkish population of Berlin and in particular notes that he states that a large proportion of the Turkish population does not have any productive function except for the fruit and vegetable trade, that they are neither able nor willing to integrate into German society and encourage a collective mentality that is aggressive and ancestral. Mr. Sarrazin uses attributes such as productivity, intelligence and integration to characterise the Turkish population and other immigrant groups. While he uses these attributes in a positive manner for some immigrant groups, for example the East European Jews, he uses them in a negative sense for the Turkish population. He states that the Turks are conquering Germany just like the Kosovars conquered Kosovo: through a higher birth rate and that he would not mind if they were East European Jews with about a 15% higher IQ than the one of Germans. Mr. Sarrazin states that he does not have to accept anybody who lives off the state and rejects this very state, who doesn't make any effort to reasonably educate their children and constantly produces new little headscarf girls, and claims that this is true for 70% of the Turkish population in Berlin. Mr. Sarrazin also creates an adjective to express his ideas of inferiority of the Turkish population and states that in other segments of the population, including Germans "one can see a "Turkish" problem". He also states that he would generally prohibit influx of migrants, except for highly qualified individuals and stop providing social welfare for immigrants. The Committee considers that the above statements contain ideas of racial superiority, denying respect as human beings and depicting generalized negative characteristics of the Turkish population, as well as incitement to racial discrimination in order to deny them access to social welfare and speaking about a general prohibition of immigration influx except for highly qualified individuals, within the meaning of article 4 of the Convention.

12.7 Having qualified Mr. Sarrazin's statements as impugned speech under article 4, of the Convention, the Committee needs to examine if the State party properly assessed that these statements are protected by the "due regard" provision relating to freedom of speech. The Committee recalls its jurisprudence and reiterates that the exercise of the right to freedom of expression carries special duties and responsibilities, in particular the obligation

[39] See communication No. 40/2007, *Er. v. Denmark*, Opinion adopted on 8 August 2007, para. 7.2.

not to disseminate racist ideas. [40] It also observes that article 4 of the Convention codifies the State party's responsibility to protect the population against incitement to racial hatred but also acts of racial discrimination by dissemination of ideas based upon racial superiority or hatred.[41]

12.8 While acknowledging the importance of freedom of expression, the Committee considers that Mr. Sarrazin's statements amounted to dissemination of ideas based upon racial superiority or hatred and contained elements of incitement to racial discrimination in accordance with article 4, paragraph (a) of the Convention. By concentrating on the fact that Mr. Sarrazin's statements did not amount to incitement of racial hatred and were not capable of disturbing public peace, the State party failed its duty to carry out an effective investigation whether or not Mr. Sarrazin's statements amounted to dissemination of ideas based upon racial superiority or hatred. The Committee further considers that the criterion of disturbance of public peace, which is taken into consideration in the evaluation if statements reach the threshold of dissemination of ideas based upon racial superiority or hatred, does not adequately translate into domestic legislation the State party's obligation under article 2, paragraph 1 (d), in particular as neither article 2, paragraph 1 (d), nor article 4 contain such a criterion.

12.9 The Committee therefore concludes that the absence of an effective investigation into the statements by Mr. Sarrazin by the State party amounted to a violation of articles 2, paragraph 1 (d), 4 and 6 of the Convention.

13. In the circumstances, and with reference to its general recommendation No. 31 (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system[42] and its general recommendation No. 15 (1993) on organized violence based on ethnic origin[43], the Committee on the Elimination of Racial Discrimination, acting under article 14, paragraph 7 (a), of the International Convention on the Elimination of All Forms of Racial Discrimination, is of the opinion that the facts as submitted disclose a violation of article 2, paragraph 1 (d), 4 and article 6 of the Convention by the State party.

14. The Committee recommends that the State party review its policy and procedures concerning the prosecution in cases of alleged racial discrimination consisting of dissemination of ideas of superiority over other ethnic groups based on article 4 (a) of the Convention and of incitement to discrimination on such grounds, in the light of its obligations under article 4 of the Convention.[44] The State party is also requested to give wide publicity to the Committee's Opinion, including among prosecutors and judicial bodies.

15. The Committee wishes to receive, within 90 days, information from the State party about the measures taken to give effect to the Committee's Opinion.

[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.]

---

[40] See General Recommendation XV: Organized violence based on ethnic origin (article 4), para. 4; communication No. 43/2008, *Saada Mohamad Adan v. Denmark*, Opinion adopted on 13 August 2010, para. 7.6.

[41] See General Recommendation XV: Organized violence based on ethnic origin (article 4), para. 3.

[42] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 18* (A/60/18), chap. IX.

[43] See General Recommendation XV: Organized violence based on ethnic origin (article 4).

[44] See communication No. 4/1991, *L.K. v. the Netherlands*, Opinion adopted on 16 March 1993, para. 6.8.

International Convention on the Elimination of All Forms of Racial Discrimination

Distr.: General
4 April 2013

Original: English

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."[1] 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."[2] 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.

1 Human Rights Committee, General Comment 34

2 General Recommendation 15

Please recycle

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[3].

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.[4] 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.[5] 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

---

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." [6] 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."[7] 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.

---

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."[8] 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."[9] 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." [10]

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

---

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

9 Id ¶9.4.

10 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.[11] 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.[12] 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.[13]

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

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."[14] 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.]

---

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