Convention on the Elimination of All Forms of Racial Discrimination—Article 4—obligation to take action against statements of racial discrimination—incitement to racial discrimination—ideas of racial superiority—freedom of expression

TBB–TURKISH UNION IN BERLIN/BRANDENBURG v. GERMANY. Communication No. 48/2010. *At* http://www2.ohchr.org/english/bodies/cerd/jurisprudence.htm.
United Nations Committee on the Elimination of Racial Discrimination, February 26, 2013.

In February 2013, the Committee on the Elimination of Racial Discrimination (CERD Committee or the Committee) issued its opinion in *TBB–Turkish Union in Berlin/Brandenburg v. Germany*.[1] The majority of the Committee concluded that Germany had violated its obligations to protect its Turkish and Arab populations from a former state official's allegedly racially discriminatory statements in violation of Articles 2(1)(d), 4(a), and 6 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD or the Convention).[2] The Committee reached significant conclusions regarding the contours of incitement to racial hatred and ideas of racial superiority, the balance between freedom from discrimination and freedom of expression, and state discretion not to prosecute. Consideration of this matter also marks the first time a member of the CERD Committee has filed an individual—or dissenting—opinion.

In the fall of 2009, former finance senator of the Berlin Senate and then-member of the Board of Directors of the German Central Bank Thilo Sarrazin gave an interview to the German cultural journal *Lettre International*, in which he discussed the economic productivity of various segments of Germany's population. In the interview Sarrazin made several allegedly discriminatory statements about Germany's Turkish and Arab populations, observing that these two groups "have no productive function, except for the fruit and vegetable trade, and [that] other perspectives will probably not develop either" (para. 2.1). He claimed that the Arab and Turkish populations of German cities were growing as a result of high birth rates and access to social services. Citing low proficiency in German and poor matriculation rates, Sarrazin noted that "the Turkish group and the Arabs slope dramatically [in terms of success]" and suggested that Germany limit immigration to "highly qualified individuals" and eliminate welfare for immigrants (*id.*).

The former senator attributed Turks' and Arabs' poor economic performance to their alleged unwillingness or inability to integrate into German culture and their reliance on social welfare. Accusing those populations of "encourag[ing] a collective mentality that is aggressive and ancestral," he asserted that "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." He claimed that "[t]he Turks are conquering Germany just

[1] TBB–Turkish Union in Berlin/Brandenburg v. Germany, Communication [Commc'n] No. 48/2010, UN Doc. CERD/C/82/D/48/2010, annex (Apr. 4, 2013).

[2] International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, S. EXEC. DOC. 95-C (1978), 660 UNTS 195 [hereinafter CERD]. Article 2(1)(d) requires states parties to "prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization." Article 4(a) requires states parties to make "punishable by law all 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 colour or ethnic origin." Article 6 requires states parties to provide effective protection and remedies against any acts of racial discrimination.

like the Kosovars conquered Kosovo" and posited that he "wouldn't mind if they were East European Jews with about a 15% higher IQ than the one of Germans" (para. 2.1).

The TBB, describing itself as "the interest group of the Turkish citizens and citizens with Turkish heritage of Berlin and Brandenburg" (para. 2.2), and two of its individual members filed criminal complaints against Sarrazin with the Berlin Office of Public Prosecution (OPP) in October 2009. The complainants alleged that Sarrazin had violated section 130 of the German Criminal Code[3] by inciting hatred against Turkish and Arab people. After reviewing Sarrazin's statements against the incitement and insult provisions of the Criminal Code,[4] the OPP terminated the proceedings for lack of criminal liability. The OPP based its decision in part on Article 5 of Germany's Basic Law, which guarantees freedom of expression.[5] The OPP also reasoned, inter alia, that the former senator's statements were a "contribution to the intellectual debate in a question that [was] very significant for the public" (para. 2.3).

The TBB (though not its individual members) tried to challenge the OPP's decision but was informed by the general prosecutor that it lacked standing to do so given that it was not the "injured party" within the meaning of the Code of Criminal Procedure (para. 2.4).[6] Nonetheless, in his supervisory capacity, the general prosecutor reviewed the matter and affirmed the OPP's decision on the grounds that Sarrazin's statements were made in the context of an important discussion about Berlin's economic and social problems.

The TBB then submitted a communication to the CERD Committee pursuant to Article 14(1) of the Convention, under which Germany has recognized the Committee's competence to consider claims from individuals or groups of individuals within its jurisdiction who allege that Germany has violated their rights under CERD. In its communication, the TBB alleged that by failing to prosecute Sarrazin, Germany had violated the TBB's rights under CERD to be protected against racially discriminatory statements in violation of Articles 2(1)(d), 4(a), and 6 of the Convention. Germany and the TBB then submitted several rounds of written observations to the Committee on the admissibility and merits of the TBB's claims.[7]

As a preliminary matter, Germany urged the Committee to dismiss the TBB's communication as inadmissible for lack of standing under Article 14(1) of the Convention and Rule 91(b) of the Committee's Rules of Procedure.[8] While Article 14(1) permits the submission of communications by "groups of individuals," Germany argued that the TBB lacked the legal

[3] STRAFGESETZBUCH [STGB] [CRIMINAL CODE], Nov. 13, 1998, BGBl. I at 3322, *amended by* Law of Oct. 2, 2009, Art. 3, §130, BGBl. I at 3214. English translations of the German Criminal Code and the German Code of Criminal Procedure are available at http://legislationline.org/documents/section/criminal-codes.

[4] *Id.*, §§130, 185.

[5] GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [BASIC LAW], May 23, 1949, BGBl. I, Art. 5. An English translation of the Grundgesetz is available at http://legislationline.org/documents/section/constitutions/country/28.

[6] STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], BGBl. I at 1074, *amended by* Act of Oct. 31, 2008, Art. 2, §172(1), BGBl. I at 2149.

[7] The Committee generally considers communications on the basis of written submissions. Oral argument is not typically held, although the Committee's Rules of Procedure appear to allow for that possibility. *See* CERD Committee, Rules of Procedure, Rules 85–95, UN Doc. CERD/C/35/Rev.3 (Jan. 1, 1989) [hereinafter Rules] (detailing procedures for handling communications via written submissions). *But see* Rule 94(5) (leaving the Committee the option to invite "the presence of the" petitioner or his representative, and that of the representatives of the state party, to provide additional information or answer questions regarding the merits of the communication).

[8] Article 14(1) of CERD, *supra* note 2 (stating in part that the Committee may "receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that State Party of any of the rights set forth in this Convention"); Rules, *supra* note 7, Rule 91(b) (stating "[t]hat

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authority to represent its members before the Committee, and contended that the two e-mails it had received in support of the statements by Sarrazin and his right to make them were insufficient to render the union a "victim" under Article 14(1).

The Committee disagreed, however, and reasoned that the TBB satisfied the standing requirements of Article 14(1) given its activities and aims, inter alia, of furthering equality and nondiscrimination, as well as its representation of people of Turkish heritage in Berlin and Brandenburg. Moreover, the Committee determined that the two e-mails to the TBB supporting Sarrazin and the designation of the TBB as an "enemy of Germany" by the National Socialist Underground (which was responsible for the murders of at least eight Turkish individuals) were sufficient indicia that the union had been directly affected by Sarrazin's statements (paras. 7.1, 11.3).

On the merits, the Committee concluded that in declining to prosecute Sarrazin for either incitement or insult, Germany had failed to take positive action against reportedly racist statements in violation of its obligations under the Convention to "adopt immediate and positive measures [designed] to eradicate all incitement to, or acts of," racial discrimination (Art. 4), "to bring to an end, by all appropriate means," racial discrimination (Art. 2(1)(d)), and to provide "effective protection and remedies" against acts of racial discrimination (Art. 6) (paras. 12.3, 13).

The Committee concluded that Sarrazin's statements "contain[ed] 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" so as to deny welfare to that population and prohibit its immigration. For these reasons, Sarrazin's statements merited punishment under Article 4 of the Convention (para. 12.6). In the Committee's view, those statements were not protected by the provision of Article 4 that requires state measures to be undertaken with "due regard to the principles embodied in the Universal Declaration of Human Rights [UDHR] and the rights expressly set forth in article 5" of the Convention, both of which safeguard freedom of expression, because that freedom is accompanied by the "obligation not to disseminate racist ideas" (para. 12.7).[9] In the Committee's opinion, Germany's investigation of Sarrazin's statements had focused erroneously on whether they were capable of disturbing the public peace (as required by the incitement provision of the German Criminal Code), rather than (as required under Article 4 of the Convention) whether they amounted to "ideas based on racial superiority or hatred" (para. 12.8).

Committee member Carlos Manuel Vázquez filed an individual opinion dissenting from nearly all of the Committee's core conclusions.[10] In his view, while the statements of the former

the individual claims to be a victim of a violation by the State party concerned of any of the rights set forth in the Convention").

[9] Citing CERD Committee, General Recommendation XV on Article 4 of the Convention, para. 4 (Mar. 17, 1993), *in* CERD Committee, Annual Report, UN GAOR, 48th Sess., Supp. No. 18, at 115, UN Doc. A/48/18 (1994) [hereinafter CERD Committee, Annual Report]; Adan v. Denmark, Commc'n No. 43/2008, para. 7.6, UN Doc. CERD/C/77/D/43/2008 (Aug. 13, 2010).

[10] TBB–Turkish Union in Berlin/Brandenburg v. Germany, Commc'n No. 48/2010, Individual Opinion of Mr. Carlos Manuel Vazquez, UN Doc. CERD/C/82/3 (Apr. 4, 2013) [hereinafter Individual Opinion].

Editors' Note: Carlos Manuel Vázquez is a member of this *Journal*'s Board of Editors and a professor at Georgetown University Law Center but was not consulted or involved in the production of this note, other than to confirm the author's understanding that this is the first dissenting opinion in the Committee's practice to date.

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senator were "bigoted and offensive,"[11] Germany's decision not to prosecute him for such statements was neither arbitrary nor a denial of justice because they did not constitute incitement to racial discrimination. Vázquez reasoned that Sarrazin's proposal that immigration be limited to "highly qualified people" and that immigrants be denied welfare did not amount to discrimination based on "race, colour, descent, or national or ethnic origin," as enumerated in Article 1(1) of the Convention.[12] Additionally, the statements by Sarrazin did not amount to incitement to racial discrimination because his calls to limit immigration and welfare presented no "reasonable possibility that the statement[s] could give rise to the prohibited discrimination" and his advocacy of legislation would make only a "minuscule" contribution to its enactment.[13]

Vázquez further observed that Article 4 of CERD is "unusual" among human rights instruments because it penalizes speech "without an express link to the possibility that such speech will incite hatred or violence or discrimination."[14] According to him, the absence of this link risks placing CERD in conflict with the UDHR, which affirms freedom of thought and expression. He explained that CERD's negotiators had attempted to avoid this conflict by including the "due regard" clause in Article 4.[15] Moreover, "racial superiority" should be read narrowly, since it is "open to question" whether that term as used in Article 4(a) encompasses statements of superiority based on nationality or ethnicity.[16] Vázquez therefore proposed limiting the term to statements of superiority based on "innate or immutable characteristics" to avoid "chilling speech far removed from the central concerns of the Convention."[17]

While Sarrazin had expressed himself at times by way of "denigrating and offensive language,"[18] Vázquez did not view those statements as ideas of racial superiority but, rather, as commentary on certain aspects of Turkish culture that Sarrazin believes inhibit the Turkish population from succeeding economically in Berlin, and more broadly as commentary on the social welfare policies that can impede integration and thus economic success.[19] Vázquez likened Sarrazin's comments on cultural influences to those of the noted Indian economist Amartya Sen, who has also written on cultural determinants of economic success, and concluded that the expression of such ideas is "not outside the scope of reasoned discourse, and it is not prohibited by the Convention."[20]

Similarly, referring to portions of Sarrazin's statements that were not excerpted by the Committee in its opinion, Vázquez asserted that Sarrazin was not singling out Turkish culture as the cause of any economic underperformance but, instead, was blaming Germany's social welfare policies for removing incentives to perform well economically.[21] According to

[11] Individual Opinion, para. 2.
[12] *Id.*, para. 4.
[13] *Id.*
[14] *Id.*, para. 5.
[15] *Id.*
[16] *Id.*, para. 6.
[17] *Id.*
[18] *Id.*, para. 9.
[19] *Id.*, paras. 7, 8.
[20] *Id.*, para. 7.
[21] *Id.*, para. 8.

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Vázquez, Sarrazin was also theorizing that Turks perform much better economically in countries where they receive no welfare benefits.[22] For these reasons, it was not arbitrary for German prosecutors to conclude that Sarrazin's statements did not constitute ideas of racial superiority.[23]

Leaving aside the substance of Sarrazin's statements, Vázquez maintained that Germany retains the discretion under Article 4 to determine when prosecution of allegedly racially discriminatory statements would fulfill its obligations under both CERD and the UDHR.[24] He did not understand the Convention as requiring criminal prosecution of every statement containing ideas of racial superiority, and he pointed to various reasons why a state may elect not to prosecute—to avoid drawing attention to little-publicized statements, to avoid creating a "martyr" of the speaker, to prevent chilling speech that *is* protected by creating a climate of fear of prosecution—all of which preserve the goals of the Convention.[25]

* * * *

The CERD Committee is not a court but a body of independent experts, elected by states parties to the Convention, to monitor implementation of the treaty.[26] While it may consider individual communications under Article 14, the conclusions and recommendations of the Committee are not, strictly speaking, binding,[27] and it is not constrained by the principle of stare decisis. Nonetheless, its opinion in *TBB* is in line with its prior opinions interpreting Article 4. But the first dissent in its history offers a unique window into internal discussion within the Committee about the precise contours of what constitutes racially discriminatory speech, how states parties must balance their competing treaty obligations regarding racial discrimination and free speech, and what the Committee's proper role should be vis-à-vis that of domestic authorities.

The latter question is one with which every treaty-monitoring body must wrestle. How does a treaty-monitoring body fulfill its interpretive role while respecting state sovereignty, particularly where criminal punishment of speech is called for, as it is in Article 4(a)? As noted in the individual opinion, CERD is unusual among human rights instruments because it calls for criminalization of racially discriminatory speech absent an express link to the possibility that such speech will lead to racial hatred or discrimination. By contrast, the Human Rights Committee (HRC)—which monitors adherence to the International Convention on Civil and Political Rights (ICCPR)—has interpreted the ICCPR's limitations on freedom of expression[28] as requiring "a direct and immediate connection between the expression and the threat."[29]

[22] *Id.*

[23] *Id.*, para. 9.

[24] *Id.*, para. 10.

[25] *Id.*, paras. 11, 12.

[26] CERD, *supra* note 2, Arts. 8(1), 9(1), 11(1), 14(1).

[27] *See, e.g.*, *id.*, Art. 14(7)(b) (stating that the Committee may issue "suggestions and recommendations" following its consideration of individual communications).

[28] International Covenant on Civil and Political Rights, Art. 19(3), Dec. 16, 1966, S. EXEC. DOC. NO. 95-E, at 28 (1978), 999 UNTS 171 (freedom of expression may "be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or of public health or morals").

[29] Human Rights Comm., General Comment No. 34, para. 35, UN Doc. CCPR/C/GC/34 (Sept. 12, 2011); *see also id.*, para. 36 ("[A] State party, in any given case, must demonstrate in specific fashion the precise nature of

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As in prior opinions, the Committee properly defined the circumstances in which it will review national authorities' interpretation of facts and national law as instances where those interpretations are "manifestly arbitrary or otherwise amount[ ] to a denial of justice" (para. 12.5).[30] This approach comports with that of the HRC.[31] Neither the CERD Committee nor the HRC has defined "denial of justice" or "arbitrary." Denial of justice has been defined elsewhere as the "denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guaranties which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment."[32] Arbitrariness is understood as "wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety."[33] Viewed through these exacting standards, the Committee in *TBB* appears to have exceeded its commitment to grant some deference to states parties when it concluded that the German prosecutors had violated Article 4 by determining that Sarrazin's statements did not amount to incitement and that they were protected by his right to freedom of expression.

As regards "ideas of racial superiority" and "incitement to racial discrimination," the Committee offered perhaps its most expansive interpretation of both terms to date. In prior opinions, it had concluded that statements calling for support of Nazism,[34] and threats to burn the house and car of a Moroccan citizen,[35] constituted incitement to racial discrimination, but accusations that "foreigners" were poisoning food and water supplies did not amount to racial discrimination.[36] In determining that Sarrazin's statements violated Article 4, the Committee seems to have read the statements—at least those that are excerpted in the opinion—as a whole and understood him to conflate "Turks and Arabs" with "immigrants." For example, the Committee's conclusion that Sarrazin's calls for limiting immigration to "highly qualified individuals" and eliminating welfare for immigrants amounted to incitement to racial discrimination could only be so if, in Sarrazin's mind, all immigrants were of Turkish and Arab origin and no one of Turkish or Arab origin could be highly qualified. His excerpted statements do not necessarily demonstrate these beliefs. Presumably, the Committee reached this conclusion by assuming that Sarrazin had intended these meanings because of his assertions that people of Turkish and Arab descent are not economically productive, have many children, and are not assimilating into German culture. In any event, in reaching these conclusions, the Committee appears not to have reviewed the German prosecutors' interpretations of Sarrazin's statements against the denial of justice or arbitrariness standards but, instead, to have substituted its own

the threat to any of the enumerated grounds listed in paragraph 3 that has caused it to restrict freedom of expression.").

[30] Citing Er v. Denmark, Commc'n No. 40/2007, para. 7.2 (Aug. 8, 2007), UN Doc. CERD/C/71/D/40/2007, annex (2007).

[31] *See, e.g.,* Mulai v. Guyana, Commc'n No. 811/1998, UN Doc. CCPR/C/81/D/811/1998 (Aug. 18, 2004).

[32] Harvard Research in International Law, *The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners*, Art. 9, 23 AJIL 131, 134 (Special Supp. Apr. 1929).

[33] Elettronica Sicula S.p.A. (ELSI) (U.S. v. It.), 1989 ICJ REP. 15, 76, para. 128 (July 20).

[34] Jewish Community of Oslo v. Norway, Commc'n No. 30/2003, UN Doc. CERD/C/67/D/30/2003, annex (Aug. 15, 2005).

[35] L.K. v. Netherlands, Commc'n No. 4/1991 (Mar. 16, 1993), *in* CERD Committee, Annual Report, *supra* note 9, at 131.

[36] Quereshi v. Denmark, Commc'n No. 33/2003 (Mar. 9, 2005), UN Doc. CERD/C/66/D/33/2003, annex (2005).

interpretation of Sarrazin's statements for those of the German prosecutors. While the determination of what constitutes incitement to racial discrimination or ideas of racial superiority certainly falls within the competence of the Committee, in *TBB* it preceded that determination with factual interpretations about Sarrazin's intent without explaining why the German prosecutors' interpretations of that intent were manifestly unjust or surprised a sense of juridical propriety.

Of perhaps greater concern is the Committee's substitution of its judgment for that of domestic prosecutors when considering whether prosecution of Sarrazin would properly strike the balance between Germany's obligation to protect people from racial discrimination and the duty to safeguard freedom of expression. If anything, the facts as presented in the opinion clearly demonstrate that the OPP had evaluated Sarrazin's statements and determined that they did not meet the threshold for either incitement or insult under the German Criminal Code and that they were protected by constitutional guarantees of free speech. Moreover, even though the TBB lacked standing to challenge that decision, the general prosecutor had reviewed it and reached the same conclusion, explaining his reasoning in terms that mirrored those of the OPP.

In its opinion, the Committee does not sufficiently explain why the OPP's decision (and the general prosecutor's affirmance) amounted to a denial of justice or was arbitrary. It comes closest by saying that the prosecutor had erred in focusing on whether Sarrazin's statements threatened the public peace, a preoccupation deemed by the Committee to have inhibited an "effective investigation" into whether those statements amounted to incitement or assertions of racial superiority (para. 12.8). But again, it is difficult to discern from the opinion what other steps—other than initiating prosecution—German authorities could have taken to satisfy the Committee given the circumstances of this case. Indeed, the German prosecutor's actions look remarkably like those of the Danish courts in *Er v. Denmark*. In that matter, where several Danish courts had held that the complainant had failed to sustain his claim of ethnic discrimination, the Committee concluded that there had been no denial of justice or arbitrariness because the "claims were examined in accordance with the law that specifically regulates and penalises acts of racial or ethnic discrimination and . . . the decisions were reasoned and based on that law."[37] The same conclusion could very well have been reached in *TBB.* The OPP (and the general prosecutor) examined the TBB's and its members' claims of incitement and insult against the relevant portions of the German Criminal Code and reached its decision not to prosecute Sarrazin on the basis of that analysis.[38] Such a review hardly seems to rise to the level of gross deficiency or willful disregard of due process of law.

At the conclusion of its opinion, the Committee recommended that Germany "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" (para. 14) but, absent a fuller explanation of why the German prosecutors' review of the facts and law in this case was arbitrary or amounted to a denial of justice, it is unclear how Germany might comply with the opinion in the future short of adopting a mandatory prosecution policy for allegedly racist

[37] Er v. Denmark, *supra* note 30, para. 7.2.

[38] Even though speech must be capable of disturbing the public peace to constitute incitement under German law, the crime of insult does not carry this requirement and the OPP considered and dismissed an insult charge against Sarrazin. *See* Individual Opinion, *supra* note 10, para. 15.

speech.[39] By providing such little support for its conclusions, the Committee risks leaving other states parties unsure of when their decisions will be subject to its second-guessing. One alternative approach might be for the Committee to remain in dialogue with Germany via the periodic reporting process about the need to amend its Criminal Code to comport with Article 4. For example, given that the Committee believed that the OPP had unduly fixated on whether Sarrazin's statements disturbed the public peace, the Committee might ask Germany during its next periodic dialogue if it has amended section 130 of its Penal Code to remove the disturbance element from the offense of incitement. Additionally, the Committee might consider issuing another general recommendation further explaining its views on how states parties should balance freedom from racial discrimination and freedom of expression under Article 4, a balance that is currently addressed in a single paragraph in the Committee's General Recommendation XV.[40]

AMY SENIER
Georgetown University Law Center

[39] Germany informed the Committee that it is evaluating existing law criminalizing racist statements in light of *TBB* but cautioned that this evaluation "will have to take into account the importance of freedom of speech, which is guaranteed by the German Basic Law and by international human rights law." Permanent Mission of the Federal Republic of Germany to the Office of the United Nations and to the Other International Organizations, Geneva, Note Verbale No. 166/2013 (July 1, 2013), *available at* http://mediendienst-integration.de/fileadmin/Dateien/CERD-TBB_Antwort.pdf.

[40] CERD Committee, General Recommendation XV, *supra* note 9, para. 4.

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