

THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION & FREEDOM OF EXPRESSION¹

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1. Introduction

In this contribution I examine the approach taken by the Committee on the Elimination of Racial Discrimination (“CERD”) in dealing with possible tensions between the right to freedom of expression and the prohibition of (racial) discrimination.

The interface between the right to be free from discrimination and the right to freedom of expression forms an urgent topic in contemporary society. In Dutch society, for example, the public debate on this question flared up around a decision in which the Amsterdam Court of Appeal ordered the public prosecutor to criminally charge politician Geert Wilders with incitement to hatred and discrimination for remarks in several media outlets and for offending Muslims by comparing Islam with Nazism.² The arrest of cartoonist Gregorius Nekschot in 2008 formed a reason for debate on the limits of the freedom of expression³ and in 2009 Mr. Mark Rutte (parliamentarian and leader of the liberal party VVD) announced to be in favour of draft legislation in which the possible limits on the freedom of expression will be substantially narrowed.⁴ Similarly, in Denmark and other countries, debate (and sometimes violent protests) has been spurred by the “Danish Cartoon controversy”.⁵ In Canada, for example, controversy broke out after The Western Standard published some of the cartoons⁶ and (violent) protests broke out in several states, including Pakistan and Nigeria.⁷ In response to this public debate

² Gerechtshof Amsterdam, LJN: BH0496

³ ANP, ‘OM: 8 cartoons Nekschot strafbaar’, *Volkskrant*, (Amsterdam, 16 May 2008) http://www.volkskrant.nl/binnenland/article537525.ece/OM_8_cartoons_Nekschot_strafbaar accessed 8 June 2009

⁴ H. van Soest, ‘Rutte: Holocaust ontkennen moet kunnen’, *Algemeen Dagblad*, (Rotterdam, 26 May 2009) http://www.ad.nl/binnenland/3246952/Rutte_Holocaust_ontkennen_moet_kunnen.html accessed 8 June 2009

⁵ P. Cohen, ‘Danish Cartoon Controversy’, *New York Times* (New York, 12 August 2009) http://topics.nytimes.com/topics/reference/timestopics/subjects/d/danish_cartoon_controversy/index.html accessed at 15 January 2009

⁶ J. Brean, ‘Magazine publisher Levant wins Danish Cartoon Dispute’, *National Post Canada*, (Canada, 6 August 2008) <http://www.investigativeproject.org/748/magazine-publisher-levant-wins-danish-cartoon-dispute> accessed 15 January 2010

⁷ S. Masood, ‘2 die as Pakistan cartoon rage turns violent’, *New York Times*, (New York, 15 February 2006) <http://www.nytimes.com/2006/02/15/international/middleeast/15cartoons.html> accessed 15 January 2010; L Polgreen, ‘Nigeria Counts 100 Deaths over Danish Caricatures’, *New York Times* (New

and especially when discussing and creating new legislation (in the Dutch as well as possible other contexts), it is important to take into account the international legal perspective by looking, among others, at the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD) and its development.

Researching the normative developments of the ICERD through the approach taken by the CERD is furthermore relevant because of the possible development of a new Human Rights Committee (HRC) General Comment on Article 19 of the International Covenant on Civil and Political Rights (ICCPR) on the right to freedom of expression (and its limits). The CERD and the HRC, the Committee that monitors the implementation of the ICCPR, can both hear individual petitions and issue general recommendations (or general comments). In these legally non-binding general recommendations or comments the Committees publish their interpretation on the normative content and State obligations of human rights provisions in their respective treaties. The committees both clarify international law on the limits of the freedom of expression in situations of racial discrimination. The CERD perspective could therefore be seen as highly relevant for the drafting of a new general comment by the HRC.

Below, in section 2 I first shortly describe the ICERD as a whole. Secondly, I examine the normative content and interpretation of article 4 of the Convention, in accordance with the interpretation principles established by articles 31 and 32 of the Vienna Convention on the Law of Treaties. I examine the Convention's text, object and purpose and supplementary sources, including the *travaux préparatoires* in which the discussions on freedom of expression led to the adoption of the wording of article 4. Finally I look into the reservations made by several States party to the Convention on the issue of the freedom of expression.

In section 3 I analyse the CERD's subsequent interpretation of Article 4 in relation to freedom of expression. First, I look at its general recommendations. Second, I consider its jurisprudence and concluding observations on State reports. Especially

York, 24 February 2006) <http://www.nytimes.com/2006/02/24/international/africa/24nigeria.html>
accessed 15 January 2010

in its Concluding Observations on State reports the CERD has put emphasis on three matters, with regard to article 4: 1) the enumeration and implementation of legal provisions by States parties in order to meet the requirements enumerated in article 4; 2) the dissemination of racist ideas in the media; and 3) discriminatory expression by politicians or political parties.

In section 4 I summarize my findings and answer, based thereon, the central question of how the CERD has struck a balance between the right to freedom of expression and the prohibition of racial discrimination.

2. The Convention on the Elimination of All Forms of Racial Discrimination – normative content and State obligations of article 4

In this section I shortly describe the Convention, after which I examine article 4 of the Convention, its normative content and interpretation, the “with due regard”-clause, and reservations and declarations made to it concerning the right to freedom of expression and the right to freedom of association.

2.1 The Convention on the Elimination of All Forms of Racial Discrimination.

The Convention on the Elimination of All Forms of Racial Discrimination (ICERD) was adopted by the United Nations General Assembly on the 21st December 1965. It entered into force on the 4th January 1969. As of January 2010, it had 85 signatories and 173 parties. As stated in the preamble, the aim of the Convention is to speedily eliminate racial discrimination in all its forms and manifestations, and to prevent and combat racist doctrines and practices in order to promote understanding between races and to build an international community free from all forms of racial segregation and racial discrimination. A Committee on the Elimination of All Forms of Racial Discrimination (CERD) consisting of 18 independent experts has been established under article 8 of the Convention.⁸

⁸ For an in depth analysis on the adoption of the Convention on the Elimination of All Forms of Racial Discrimination and the Convention in general, see N. Lerner, *The U.N. Convention on the Elimination of All Forms of Racial Discrimination*, (2nd edn). Sijthoff & Noordhoff, Alphen aan den Rijn 1980)

2.2 Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination

Article 4 of the Convention reads:

“States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, 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, inter alia:

(a) Shall declare an offence 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, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.”

Article 4 “raised many difficulties in all stages of its drafting”,⁹ since it enumerates several obligations on States that considerably interfere with both the right to freedom of expression and the right to freedom of association. Specifically the obligation to make dissemination of certain ideas a punishable offence led to

⁹ *Lerner* (n 1) 47

heated discussion and remarks. The representative for Colombia for example said, inter alia, “certain articles of the Convention still embody extremist clauses which are unacceptable because they are at variance with the political constitutions of particular countries [...]. To penalize ideas, whatever their nature, is to pave the way for tyranny, for the abuse of power. [...] Moreover, we believe that penal law can never presume to impose penalties for subjective offences. This barbarous practice is merely the expression of fanaticism such as is found among uncivilized people and is hence proscribed by universal law.”¹⁰

2.2.1 Normative content and interpretation of Article 4

In general, treaties are interpreted in accordance with the Vienna Convention on the Law of Treaties articles 31 and 32. First, a treaty “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose” and any subsequent practice or agreement. Second, “in order to confirm the meaning resulting from the application of article 31, or to determine” the meaning when this interpretation “leaves the meaning ambiguous or obscure or leads to” a manifestly absurd or unreasonable result, supplementary means may be used, including the *travaux préparatoires*.

The introduction to Article 4 starts off with a condemnation by the States parties of all propaganda and all organizations that 1) are based on ideas or theories of superiority of one race or group of persons of one color or ethnic origin or 2) attempt to justify and promote racial hatred and discrimination in any form. It then continues by placing the obligation on States to “undertake to adopt immediate and positive measures”, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth its article 5. These include the obligation to declare a number of acts (mentioned under paragraph a) offences punishable by law, being: 1) all dissemination of ideas based on racial superiority or racial hatred, 2) incitement to racial discrimination, 3) all acts of violence or incitement thereto against any race or group of persons of another color

¹⁰ UNGA, Official Records (21 December 1965) UN Doc A/PV.1406, at paras. 67-72

or ethnic origin and 4) the provision of any assistance to racist activities, including the financing thereof. Paragraph 4(b) requires States to 1) declare as illegal organizations and propaganda activities (both organized and not) which promote and incite racial discrimination, 2) prohibit all such organizations and activities and 3) recognize participation in these organizations or activities as an offence punishable by law. Paragraph c of Article 4 establishes that States Parties “shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.” This paragraph does not create major difficulties, since it simply establishes that public authorities or public institutions should not be allowed behavior that would be classed an offence if committed by an individual or organization. The text of article 4, read in good faith in accordance with the ordinary meaning of the text, poses clear obligations on the States to act in certain ways. The provisions are not self-executing, but are written in a mandatory way and are seen by the CERD as such.¹¹ It leaves uncertainty, however on the meaning of the “with due regard”-clause.

Questions surrounding the balance to be struck between the obligations in article 4 and the rights to freedom of expression and association have mostly evolved around the first two requirements of article 4(a), the requirements of article 4(b) and the interpretation of the “with due regard”-clause.¹² The “with due regard”-clause states that States, when taking immediate and positive measures designed to eradicate all incitement to, or acts of racial discrimination should do so “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. This includes the right to freedom of expression and the right to freedom of association.

The general reference to the Universal Declaration of Human Rights (UDHR) however, implicitly includes not only article 19 (freedom of opinion and

¹¹ T. Meron, ‘The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination’ (1985) 79 ‘2’ AJIL 283, 297; J.D. Inglés, ‘Positive Measures Designed to Eradicate All Incitement to, or Acts of, Racial Discrimination: Study on the Implementation of Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination’ (1983) UN Doc A/CONF.119/10

¹² D.Mahalic; J.G. Mahalic, ‘The Limitation Provisions of the International Convention on the Elimination of All Forms of Racial Discrimination’ (1987) 9 ‘1’ Human Rights Quarterly 74, 94: This is the case since “all countries have laws penalizing violence in general and the incitement to violent acts” and most of them have laws penalizing those “who aid the commission of an offense”.

expression) and article 20 (freedom of assembly and association) but also article 29 (limitations on the exercise of rights and freedoms). Article 29 creates the possibility for limitations on the exercise of the substantive rights mentioned in the UDHR, including the rights put forward in article 19 and 20, as long as they do not aim at the destruction of any rights and freedoms set forth in the UDHR (article 30). Article 29 UDHR reads:[...] (2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. (3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations. This, as one scholar suggested, makes the reference to the UDHR “somewhat circular”.¹³ The fact that article 29(2) permits limitations on the exercise of the right to freedom of expression and the right to freedom of association leaves open the possibility of interpreting the provisions in such a way that in cases of conflict between the right to freedom of expression and the right to be free from racial discrimination the latter one prevails.¹⁴

The text of article 4 and its’ “with due regard”-clause do not clearly establish where the balance between the obligations for the elimination of all racial discrimination and the rights to freedom of expression and association lies. Examining the text of the UDHR does not clarify this to a level of certainty, because of the fact that the rights enumerated in its articles 19 and 20 are not absolute and can be limited if the requirements of article 29 are met. When reading the text of article 4 of the Convention in the light of its object and purpose, the elimination of all forms of racial discrimination and the eradication of all incitement to and acts of this kind of discrimination, it seems that this purpose, together with the State obligations

¹³ E. Schwelb, ‘The International Convention on the Elimination of All Forms of Racial Discrimination’ (1966) 15 ‘4’ *The International and Comparative Law Quarterly* 996, 1024

¹⁴ In fact, some have even argued that “to have due regard for the UDHR is to have due regard for the very principles upon which Article 4(a) and 4(b) are premised”, because of the many references to the right to be free from (racial) discrimination in the UDHR. *See* for example Mahalic (n 18) 90, who argues that references to the principle of non-discrimination and the right to be free from discrimination, on which article 4 of the Convention on the Elimination of All Forms of Racial Discrimination is based, can be found in articles 1, 2, 5, 7, 8 and 28 of the UDHR.

designed to serve it, should generally be given preference over the rights to freedom of expression and association of those inciting racial discrimination.

The previously quoted comment of the representative of Colombia, however, shows that at least a number of States might not agree with this interpretation and might even find it manifestly unreasonable. Considering that the meaning of the clause is not unambiguous, recourse may be taken to supplementary means of interpretation, including the *travaux préparatoires*. These show that the obligations enumerated in article 4(a) and (b) were very controversial.

The comments of Lady Gaitskell, the United Kingdom representative in the 3rd Committee during the drafting process exemplify this. Commenting on the requirements of article 4(a), she said that "Article IV went to the very heart of the draft Convention, since it involved what her delegation considered to be the fundamental human right - freedom of speech. [...] Speech should be free, but incitement to violence should be repressed."¹⁵ Commenting on the requirements of article 4(b), Lady Gaitskell stated that "Her country [...] defended the right of all organizations, even fascist and communist ones, to exist and to make their views known, even though those organizations held views which the majority of the people utterly repudiated. [...] No matter how odious the ideas of any group or organization were, her country could not agree to the banning of it."¹⁶ Representatives from a number of other (mostly Western) States made similar statements. Contrary to this, representatives from (mostly Eastern communist States) argued that the right to be free from discrimination should receive preference over the rights to free expression and free association, expressly referring to article 29(2) of the UDHR.¹⁷

During the drafting process, wide-spread agreement existed on the need for safeguarding people's rights to be free from discrimination. However, as Mr. Jernstrom, the representative of Finland in the 3rd Committee, stated: "that

¹⁵ UNGA, Official Records (22 October 1965) UN Doc A/D.3/SR.1315, paras. 1-2

¹⁶ UNGA, Official Records (22 October 1965) UN Doc A/D.3/SR.1315, paras. 1-2

¹⁷ See for examples statements made by Mrs. Sakanikova, representative of (then) Czechoslovakia, Mr. Bech, the Hungarian representative, Mr. Resich, the Polish representative and Mrs Dabcevic-Kucar, the Yugoslavian representative, in UNGA, Official Records (22 October 1965) UN Doc A/D.3/SR.1315, paras. 4-17, 20.

objective should not be achieved at the expense of other equally fundamental rights”.¹⁸ He was the representative who introduced the so-called “five-power amendment”,¹⁹ which as submitted inserted the sentence “with due regard to the rights expressly set forth in article 5.”²⁰ The representative of France suggested orally to amend this by adding “within the framework of the principles set forth in articles 19 and 20 of the Universal Declaration of Human Rights.”²¹ The “with due regard”-clause adopted and discussed above followed a proposal by the representative of Nigeria to not specifically mention articles 19 and 20, but refer to the Universal Declaration of Human Rights in general.²² This, however, did not eliminate the controversy on the scope and weight given to the rights to freedom of expression and freedom of association. Even though the text, especially when read in light of the object and purpose of the Convention, seems to suggest the generally overriding importance of the right to be free from discrimination, the remarks made by some representatives suggest interpretations that, in case of conflict between the right to be free from discrimination and the rights to freedom of expression and freedom of association, would give preference to the latter, leaving the right to freedom of expression and association unimpeded.

As Miss Willis, the United States representative in the General Assembly, stated when explaining the United States vote in favor of the Convention: “I wish to state that the United States understands article 4 of the Convention as imposing no obligation on any party to take measures which are not fully consistent with its constitutional guarantees of freedom, including freedom of speech and association. This interpretation is entirely consistent with the opening paragraph of article 4 of the Convention itself, which provides that, in carrying out certain obligations of the Convention, States Parties shall have due regard to the principles embodied in

¹⁸ UNGA, Official Records (22 October 1965) UN Doc A/D.3/SR.1315, para. 18

¹⁹ UNGA, Official Records (22 October 1965) UN Doc A/C.3/L.1245

²⁰ Article 5 CERD reads: In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: [...] d(viii) The right to freedom of opinion and expression; (ix) The right to freedom of peaceful assembly and association;

²¹ UNGA, Official Records (22 October 1965) UN Doc A/D.3/SR.1315, para. 19; in which he stated that he did so because “the reference to the rights set forth in article V was somewhat ambiguous, since those rights were enumerated in that article in a rather different context.”

²² UNGA, Official Records (22 October 1965) UN Doc A/D.3/SR.1315, para. 26

the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention”.²³

The inclusion of the “with due regard”-clause leaves room for discussion on where the balance between the right to be free from discrimination and the rights to freedom of expression and freedom of association should be struck, within the framework of article 4 of the Convention. An examination of the article’s text in light of its object and purpose seems to suggest that the right to be free from discrimination must be given preference under this provision. This interpretation finds further support in article 29(2) UDHR. Support for this as well as for the opposite view can be found in the *travaux préparatoires*. After examining reservations made by certain States on this issue, I examine the approach taken by the Committee on the Elimination of All forms of Racial Discrimination.

2.2.2 Reservations and declarations made regarding article 4

During its preparation of the Convention, the 3rd Committee decided not to include an article or clause on reservations in its draft of the Convention. The present article 20, which allows for States to make certain reservations, was added during the General Assembly plenary meeting by means of an amendment.²⁴ Article 20 of the Convention reads:

1. The Secretary-General of the United Nations shall receive and circulate to all States which are or may become Parties to this Convention reservations made by States at the time of ratification or accession. Any State which objects to the reservation shall [. . .] notify the Secretary-General that it does not accept it.

2. A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention be allowed. A

²³ UNGA, Official Records (21 December 1965) UN Doc. A/PV.1406, para. 99

²⁴ UNGA, Official Records (21 December 1965) UN Doc. A/PV.1406, para. 7-41, in which the representative of Ghana introduces A/L.479, which was submitted by 33 States.

reservation shall be considered incompatible or inhibitive if at least two thirds of the States Parties to this Convention object to it. [. . .].”

The controversial nature of article 4 can be shown by the fact that 20 States²⁵ made reservations or interpretative statements that specifically mention article 4. Almost all²⁶ of these States stress the importance of the “with due regard”-clause, the right to freedom of expression and the right to freedom of association. France, for example, made the following declaration: “With regard to article 4, France wishes to make it clear that it interprets the reference made therein to the principles of the Universal Declaration of Human Rights and to the rights set forth in article 5 of the Convention as releasing the State Parties from the obligation to enact anti-discrimination legislation which is incompatible with the freedoms of opinion and expression and of peaceful assembly and association guaranteed by those texts.”²⁷ No objections were made by other States to these parts of the reservations or declarations.

Some States, having stressed the importance of the “with due regard”-clause, the right to freedom of expression and the right to freedom of association during the preparation stages, refrained from entering reservations or interpretative declarations upon ratification or accession.²⁸ This demonstrates that not only the States that made reservations or declarations, but also several other States, put a lot of weight on the “with due regard”-clause, the right to freedom of expression and the right to freedom of association.

²⁵ Antigua and Barbuda, Australia, Austria, the Bahamas, Barbados, Belgium, Fiji, France, Ireland, Italy, Japan, Malta, Monaco, Nepal, Papua New Guinea, Switzerland, Thailand, Tonga, United Kingdom and the United States.

²⁶ All except for Antigua and Barbuda, Barbados and Thailand, who stress that they read article 4 in such a way that measures only need to be enacted, when the need for them arises.

²⁷ United Nations Treaty Collection, ‘Status of ratification, reservations and declarations: International Convention on the Elimination of All Forms of Racial Discrimination’, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en accessed 17 January 2010

²⁸ See for example UNGA, Official Records (25 October 1965) UN Doc. A/D.3/SR.1318, para. 47 for the remarks made by Mr. Mommersteeg (representative of the Netherlands in the 3rd Committee); UNGA, Official Records (25 October 1965) UN Doc. A/D.3/SR.1318, para 60 for the remarks of Miss Hard (representative of New Zealand in the 3rd Committee); UNGA, Official Records (21 December 1965) UN Doc. A/PV.1406, paras. 67-74 for remarks by Mr. Ospina (representative of Colombia in the GA) A/PV.1406.

3. Subsequent interpretation by the CERD of article 4 in relation to the freedom of expression.

Article 8 of the Convention calls for the establishment of a Committee on the Elimination of Racial Discrimination (CERD). Article 8-16 of the Convention deal with this Committee and its competences. Article 9 provides that States parties are required to submit State reports on “the legislative, judicial, administrative or other measures which they have adopted and which give effect to the provisions of the Convention.”²⁹ It also provides the CERD with the competence to issue “suggestions and general recommendations to the General Assembly, based on their examination of the reports and information received from the States party.”³⁰ These general recommendations are not binding on the parties, but are authoritative statements in which the CERD explains its interpretation of the Convention. Article 11-13 sets up a dispute settlement mechanism for inter-State complaints. To date this mechanism has never been used.³¹ The CERD has since 1993 started using early-warning measures and urgent procedures in order to prevent or more effectively respond to violations of the Convention, even though the Convention does not explicitly refers to such a competence.³²

If a State has declared that it recognizes the competence of the CERD to “receive and consider communications from individuals or groups of individuals within its

²⁹ CERD Article 9 (1) reads:

States Parties undertake to submit to the Secretary-General of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other measures which they have adopted and which give effect to the provisions of this Convention [...]

³⁰ CERD Article 9 (2) reads:

The Committee shall report annually, through the Secretary General, to the General Assembly of the United Nations on its activities and may make suggestions and general recommendations based on the examination of the reports and information received from the States Parties. Such suggestions and general recommendations shall be reported to the General Assembly together with comments, if any, from States Parties.

³¹ Office of the United Nations High Commissioner on Human Rights, ‘Human Rights Bodies: Complaint Procedures’, <<http://www2.ohchr.org/english/bodies/petitions/index.htm>> accessed 26 June 2009

³² Office of the United Nations High Commission on Human Rights, ‘Committee on the elimination of racial discrimination: Early Warning Measures and Urgent Procedures’ <http://www2.ohchr.org/english/bodies/cerd/early-warning.htm#about> Accessed 26 June 2009

jurisdiction” who complain that they are victims of a violation by the State of their rights under the Convention, the CERD may also hear these complaints.³³

To date 53 States³⁴ have made an “article 14”-declaration recognizing the competence of the Committee for the purpose of individual or group communications. The CERD case law, taken together with its general recommendations and State reports show how the CERD interprets the Convention.

3.1 General Recommendations

The CERD has stressed the importance of the State obligations under article 4 over the years. It has done so especially since quite a few States have not adopted national legislation to match their obligations under this provision. Already in its first General Recommendation, the CERD noted that “the legislation of a number of States parties did not include the provisions envisaged in article 4 (a) and (b) of the Convention, the implementation of which (with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of the Convention) is obligatory under the Convention for all States parties.”³⁵ The Committee recommended these States to bring their national legislation in conformity with the requirements of article 4.

In 1985, in General Recommendation VII the Committee noted that, even though some States parties had provided information on the implementation of article 4, other States parties had not enacted the legislation necessary for the

³³ Article 14 CERD reads:

A State Party may at any time declare that it recognizes the competence of the Committee to 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. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.

³⁴ Algeria, Andorra, Argentina, Australia, Austria, Azerbaijan, Belgium, Bolivia, Brazil, Bulgaria, Chile, Costa Rica, Cyprus, Czech Republic, Denmark, Ecuador, Finland, France, Georgia, Germany, Hungary, Iceland, Ireland, Italy, Kazakhstan, Liechtenstein, Luxembourg, Malta, Mexico, Monaco, Montenegro, Morocco, Netherlands, Norway, Peru, Poland, Portugal, Republic of Korea, Romania, Russian Federation, San Marino, Senegal, Serbia, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Ukraine, Uruguay, Venezuela

³⁵ CERD ‘General Recommendation 1 on States Parties’ obligations (art.4), (25 February 1972), <<http://www2.ohchr.org/english/bodies/cerd/comments.htm>> accessed 26 June 2009

implementation of article 4. Furthermore, many States parties had not yet carried out all the requirements enumerated in this provision.³⁶ The Committee reiterated the mandatory nature of the requirements in article 4 and recommended the States parties to take the necessary steps to satisfy these. It also requested States parties to “inform the Committee more fully in their periodic reports of the manner and extent to which the provisions of article 4(a) and (b) are effectively implemented”.³⁷ The Committee put emphasis on the effectiveness of the implementation by not only asking to be informed on the exact text of the national legislation adopted, but also on “decisions taken by the competent national tribunals and other State institutions regarding acts of racial discrimination and in particular those offences dealt with in article 4 (a) and (b)”.

In its General Recommendation XV on organized violence based on ethnic origin, the CERD once again stressed the importance of effective implementation of the measures listed in article 4. While referring to organized violence based on ethnicity and political exploitation of ethnic differences, the Committee called the implementation of article 4 of increased importance. It stated that State parties are not only under an obligation to enact appropriate legislation, but also to effectively enforce this legislation. It stated that threats and acts of racial violence specifically require immediate intervention.³⁸

In this General Recommendation the Committee also took a very clear stance in the discussion whether the prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with the right to freedom of expression. Referring to article 19 and 29(2) of the UDHR and article 20(2) ICCPR³⁹ it stated that this prohibition is compatible with the right to freedom of expression and opinion, based on the fact that “the citizen’s exercise of this right carries special

³⁶ CERD, ‘General Recommendation 7 on Implementation of article 4: Legislation to Eradicate Racial Discrimination’, (23 August 1985) < <http://www2.ohchr.org/english/bodies/cerd/comments.htm> > Accessed 26 June 2009

³⁷ *General Recommendation 7* (n 47)

³⁸ CERD, ‘General Recommendation 15 on Article 4’, (23 March 1993), <http://www2.ohchr.org/english/bodies/cerd/comments.htm> accessed 26 June 2009

³⁹ Article 20(2) ICCPR reads: Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

duties and responsibilities,[...] among which the obligation not to disseminate racist ideas is of particular importance.”⁴⁰

With regard to article 4(b) and State parties’ concerns on the right to freedom of association, the Committee stated that article 4(b) places a greater burden on States that maintain that it is for them inappropriate to prohibit an organization before its members have promoted or incited racial discrimination. This greater burden consists of the duty “to be vigilant in proceeding against such organizations at the earliest moment.”⁴¹

In its two latest General Recommendations the CERD has also referred to the matter of discrimination in speech. In its General Recommendation XXX on “Discrimination Against Non-Citizens”⁴², it recommended States parties to “take steps to address xenophobic attitudes and behavior towards non-citizens, in particular hate speech and racial violence, and to [...] take resolute action to counter any tendency to target, stigmatize, stereotype or profile, on the basis of race, colour, descent, and national or ethnic origin, members of “non-citizen” population groups, especially by politicians, officials, educators and the media, on the Internet and other electronic communications networks and in society at large”.⁴³

In General Recommendation XXXI on the “Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System”⁴⁴ it named gaps in domestic legislation on racial discrimination an indication of potential causes of racial discrimination urging States parties to fully comply with the requirements of article 4. Furthermore, the CERD encouraged States parties to “incorporate a

⁴⁰ *General Recommendation 15* (n 49)

⁴¹ *General Recommendation 15* (n 49)

⁴² CERD ‘General Recommendation 30 on Non-Citizens’, (1 October 2009), <http://www2.ohchr.org/english/bodies/cerd/comments.htm> Accessed 26 June 2009

⁴³ *General Recommendation 30* (n 53), at para. 11-12

⁴⁴ CERD, ‘General Recommendation 31 on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System’ in UN Doc A/60/18, (2005) <<http://www2.ohchr.org/english/bodies/cerd/comments.htm>> Accessed 26 June 2009

provision in their criminal legislation to the effect that committing offences for racial reasons generally constitutes an aggravating circumstance”.⁴⁵

When comparing these General Recommendations it is clear that the Committee has, over time, taken a stronger stance on the duty of States to fulfill their obligations and has become more specific in its interpretation, its demands for information and its focus on the effective implementation of the mandatory provisions of article 4. It has taken a clear position in the debate on the question whether the prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with the right to freedom of expression by stating they are not incompatible. Because of the duty of every citizen not to discriminate on the basis of race, the right to freedom of expression is limited if, and as far as, it is in conflict with this prohibition. Since this provision limits the right to freedom of expression most broadly, it is likely that the Committee would analogously not find any other provisions of article 4 incompatible with the rights to freedom of expression and association.

3.2 Jurisprudence and Concluding Observations

In its jurisprudence and concluding observations on State reports the CERD applies the Convention, as explained and interpreted in the General Recommendations, to the specific situation in States parties and to individual communications. A number of priority issues can be discerned. First of all, the CERD has focused much of its attention in Concluding Observations on State reports on the question whether the legal provisions enacted by States meet the requirements and normative content of article 4.⁴⁶ Secondly, the CERD has given consideration to questions of racial discrimination in the media and other communication technologies.⁴⁷ And thirdly, often connected to the media, the CERD has dealt with a number of cases involving politicians making discriminatory statements.⁴⁸ I will discuss the CERD’s case law and concluding observations in the order of article 4, dealing

⁴⁵ *CERD General Recommendation 31* (n 55)

⁴⁶ See sections 3.2.1 and 3.2.2 below, under Enactment and implementation of legal provisions

⁴⁷ See sections 3.2.1 and 3.2.2 below, under Media

⁴⁸ See sections 3.2.1 and 3.2.2 below, under Politicians and Political parties/organizations respectively

with the realization of the normative content, the role of the media and politicians under article 4(a) and consecutively under article 4(b).

3.2.1 Article 4(a)

Enactment and implementation of legal provisions.

As already indicated in the section on General Recommendations, the CERD has repeatedly emphasized the mandatory nature of the requirements enumerated in article 4. Since this provision is not self-executing, implementation by the States parties is needed. In its concluding observations the CERD has expressed concerns on the implementation of these requirements by several States. The concerns can be divided in three categories: 1) concerns relating to States parties where no legislation is enacted⁴⁹, 2) concerns relating to States parties that have enacted provisions that do not fully meet the standards of article 4(a)⁵⁰ and 3) concerns relating to States parties where provisions that have been enacted are not effectively implemented or enforced⁵¹.

The 2nd category, States that have enacted provisions that do not fully meet the article 4(a) requirements, includes a number of States that have enacted provisions for most of the requirements, but have not (or only partly) prohibited or penalized the dissemination of ideas based on racial superiority or hatred. The USA and Switzerland, for example, both made and maintain reservations to article 4 and this specific provision. Both States maintain a very wide interpretation of the right to freedom of expression. The CERD has requested them to withdraw or narrow the scope of these reservations.⁵² This category also includes States parties that have added certain conditions to the requirements of article 4(a). Several States parties

⁴⁹ For example, see on Sudan, UNGA, 'Official Records 49th Session, supplement No. 18', A/49/18 (1994) 68 at para. 474; On Argentina, UNGA, 'Official Records 52th Session, supplement No. 18', A/52/18 (1997) 65 at para. 505; On the Republic of Korea, UNGA, 'Official Records 54th Session, supplement No. 18', A/54/18 (1999) 14 at para. 54;

⁵⁰ See for example on Norway, UNGA, 'Official Records 49th Session, supplement No. 18', A/49/18 (1994) 37 at para. 261

⁵¹ See for example on Bulgaria, UNGA, 'Official Records 52th Session, supplement No. 18', A/52/18 (1997) 39 at para 283

⁵² See for example on the United States of America, CERD/C/USA/CO/6, (8 may 2008), para. 18; On Switzerland CERD/CHE/CO/6 (23 September 2008), para. 15

have taken the view that the right to freedom of expression requires that the dissemination of ideas can only be penalized if further conditions, such as the causation of harm and intent, are met.⁵³ These types of conditions can also be found in several other international treaties.⁵⁴ The CERD has stated that the States parties are under an obligation to enact national legislation in accordance with article 4 without additional conditions or qualifications⁵⁵ and has, for example, noted its concern on the fact that in Austria the “condemnation of racist propaganda and incitement to racial hostility is qualified by a reference to public peace.”⁵⁶

Another emphasis in the Concluding Observations on State reports has been on the effective implementation of provisions enacted; the 3rd category.⁵⁷ The Committee, after comparing reports of incidents with the judicial record, has urged several States to ensure effective implementation of their provisions, stating for example in Concluding Observations on a State report on Croatia that “as a matter of urgency, the State party should comply with article 4 of the Convention and prohibit and prosecute all incitement to ethnic hatred in the media and elsewhere”⁵⁸. This emphasis on implementation and enforcement does not mean

⁵³ *Mahalic* (n 18) 96-97; see also K.J. Partsch, ‘Racial Speech and Human Rights: article 4 of the Convention on the Elimination of All Forms of Racial Discrimination’ in S. Coliver (ed.), *Striking a balance: Hate Speech, Freedom of Expression and Non-Discrimination*, (Article 19, London 1992) 26-27

⁵⁴ See T.E. McGonagle, ‘Minority Rights and Freedom of Expression: a Dynamic Interface: Academisch Proefschrift (2008) 281 (mentioning not only the ICCPR, but also European treaties and other instruments that condition penalizing the dissemination of racist ideas on either intent or causation or both, including the Additional Protocol to the Convention on cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems article 3.1.

⁵⁵ *Inglés* (n 17) para. 83;

⁵⁶ See for example on Austria, UNGA, ‘Official Records 54th Session, supplement No. 18’, A/54/18 (1999) 13 at para. 33. Another example is formed by article 161 of the Ukrainian Criminal Code, which “only applies to cases where intent [of racial discrimination] can be proven and only if the victim of such discrimination is a citizen”

⁵⁷ Examples include Bosnia and Herzegovina CERD/C/BIH/CO/6, (11 April 2006), para. 16 “The Committee notes with concern reports about the lack of effective implementation of criminal law provisions [...] punishing acts of racial discrimination. The Committee urges that the State party ensure the effective implementation of all legal provisions aimed at elimination racial discrimination, and that it provide in its next report updated information concerning the application by courts within Bosnia and Herzegovina of criminal law provisions punishing acts of racial discrimination.” See also Latvia, UNGA, ‘Official Records 54th Session, supplement No. 18’, A/54/18 (1999) 37 at para. 394; Denmark CERD/C/DEN/CO/17 (19 October 2006), para. 11; South Africa CERD/C/ZAF/CO/3, (19 October 2006), at para. 14

⁵⁸ On Croatia: UNGA, ‘Official Records 50th Session, supplement No. 18’, A/50/18 (1995) 36 at para. 178

the State has to always prosecute in cases of alleged racial discrimination. In *A. YilmazDogan v the Netherlands* the CERD noted that “the Convention cannot be interpreted as challenging the *raison d’être* of the expediency principle” although “it should be applied in each case of racial discrimination, in the light of the guarantees laid down in the Convention”.⁵⁹

Media and other communication mechanisms

One of the important forums in which ideas are disseminated and expressed is the media. The CERD has expressed concerns on the lack of response by several States towards the dissemination of ideas that should be (and often are) prohibited in order to meet the requirements of article 4(a).⁶⁰ It has also opined that if States parties have a very tight control over the media, “propagation of hatred [by the media] may be attributed to the State.”⁶¹

In terms of other communication mechanisms, the CERD has stated that article 4 of the Convention is “applicable to the phenomenon of racism on the internet”⁶² and has encouraged States parties to find ways and means, both nationally and internationally, to stop usage of the internet for racist purposes.⁶³

⁵⁹ Communication No. 1/1984, U.N. Doc CERD/C/36/D/1/1984 (1988); In this case the employment of a female plaintiff, YilmazDogan, was terminated, after the employer’s request for termination of the contract had been agreed to by the Cantonal Court. The employer, in his request for termination, stated that, contrary to Dutch women, foreign female workers kept working after they had a child, using the Sickness Act to disappear on sick leave under the slightest fallback, repeating this endlessly. Petitioner brought an article 12 complaint procedure, which provided her with the possibility to submit a request to the Court of Appeal for criminal prosecution because of the employers remarks in his request for termination of contract. The Court considered that “the institution of criminal proceedings was not in the public interest or in the interest of the petitioner”. Petitioner alleged that the Netherlands, by not ordering the prosecutor to proceed against the employer on the basis of national legislation incorporated in light of article 4 of the Convention, violated this article.

⁶⁰ See for examples on Croatia, UNGA, ‘Official Records 53th Session, supplement No. 18’, A/53/18 (1998) 59 at para. 314; Estonia, CERD/C/EST/CO/7, 19 October 2006 at para. 12; The Former Yugoslav Republic of Macedonia CERD/C/MKD/CO/7, 13 June 2007 at para.9; Lithuania CERD/C/LTU/CO/3 21 march 2006, at para. 12;

⁶¹ On Yugoslavia (Serbia and Montenegro) UNGA, ‘Official Records 50th Session, supplement No. 18’, A/50/18 (1995) 48 at para. 239; the role of the communication media in promoting ethnic and religious hatred was stressed by Committee members, while there was “very tight State control over the media”.

⁶² On Finland, UNGA, ‘Official Records 58th Session, supplement No. 18’, A/58/18 (2003) 69 at para. 407. See also Federal Republic of Germany CERD/C/DEU/CO/18 (22 September 2008), at para. 16

⁶³ Finland, CERD/C/FIN/CO/19 (13 March 2009), in which the Committee requested Finland to ratify the Additional Protocol to the European Convention on Cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems. See also Russian

Politicians

The CERD has expressed concern on the racially discriminatory remarks stated by several politicians in its Concluding Observations on State reports⁶⁴ and has dealt with several individual communications concerning discriminatory speech by politicians. In a line of cases concerning remarks made by Danish politicians⁶⁵ two principles became clear.

First, the fact that the CERD does not afford extra leeway or an exception for statements that are made in the context of political debate, stating for example that “the Committee considers that the fact that [...] statements were made in the context of a political debate does not absolve the State party from its obligation to investigate whether or not her statements amounted to racial discrimination[...] The exercise of the right to freedom of expression carries special duties and responsibilities, in particular the obligation not to disseminate racist ideas.”⁶⁶

Federation CERD/C/RUS/CO/19 (22 September 2008), para. 16, in which the Committee recommended the Russian Federation to “effectively cooperate with Third States from where Russian-speaking internet sites operate”

⁶⁴ See for example on Sweden, UNGA, ‘Official Records 49th Session, supplement No. 18’, A/49/18 (1994) 30 at para. 197; On Turkmenistan, UNGA, ‘Official Records 60th Session, supplement No. 18’, A/60/18 (2005) 61 at para.317; Lithuania CERD/C/LTU/CO/3 (21 March 2006), at para. 12; Denmark CERD/C/DEN/CO/17, (19 October 2006), at para. 11; Israel CERD/C/ISR/CO/13, (14 June 2007), at para. 29; Democratic Republic of the Kongo CERD/C/COD/CO/15 (17 August 2007), at para. 13; Italy CERD/C/ITA/CO/15 (16 May 2008), at para. 15; Republic of Austria, CERD/C/AUT/CO/17, (22 September 2008) at para. 16

⁶⁵ Kamal Quereshi v. Denmark, Communication No.33/2003, U.N.Doc. CERD/C/66/D/33/2003 (2005), concerns the question whether Denmark had a duty to prosecute Ms Andersen, for very discriminatory remarks made in speeches at the Progressive Party’s annual meeting, of which she was an executive board member. The remarks were not made by her. The CERD held that “the complaint did not make out a case that Ms Andersen, as opposed to the speakers themselves, had engaged in an act of racial discrimination” Therefore the decision not to prosecute did not violate the Convention; Mohammed Hassan Gelle v. Denmark, Communication No.34/2004, U.N.Doc. CERD/C.68/D.34/2004 (2006) concerned the question whether the State, by failing to carry out an effective investigation to determine whether or not an act of racial discrimination had taken place, had violated the Convention. The Committee held that a violation had occurred and that an effective investigation into discriminatory remarks in a published letter to the editor of the *Kriseligt Dagblad*, written by the leader of the Danish People’s Party, should have been carried out; P.S.N. v. Denmark, Communication No. 36/2006, U.N. Doc. CERD/C/71/D/36/2006 (2007); A.W.R.A.P. v. Denmark, Communication No. 37/2006, U.N. Doc CERD/C/71/D/37/2006 (2007)

⁶⁶ *Gelle v Denmark* (n 74) The Committee continued by saying “It reiterates that the exercise of the right to freedom of expression carries special duties and responsibilities, in particular the obligation not to disseminate racist ideas, and recalls that General Recommendation 30 recommends that States parties take resolute action to counter any tendency to target, stigmatize, stereotype or profile, on the basis of race, colour, descent, and national or ethnic origin, members of ‘non-citizen’ population groups, especially by politicians”. This wording could be seen to suggest that action should be even more resolute, when politicians are involved.

Secondly, that the CERD considers communications regarding discrimination directed at persons or a group who are not of a particular “race, colour, descent, or national or ethnic origin”⁶⁷ outside of the scope of the Convention and therefore inadmissible *ratione materiae*.⁶⁸

3.2.2 Article 4(b)

Enactment and implementation of legal provisions

As with comments on the enactment and implementation of provisions meeting the requirements of article 4(a), the CERD has repeatedly expressed its concern regarding the enactment and implementation of legal provisions meeting the requirements of article 4(b) in a number of States parties.⁶⁹ In fact, the same 3 categories can be distilled: 1) concerns relating to States parties where no legislation is enacted⁷⁰, 2) concerns relating to States parties that have enacted provisions that do not fully meet the standards of article 4(b)⁷¹ and 3) concerns

⁶⁷ See the definition of racial discrimination in article 1(1) of the CERD, which reads:

In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

⁶⁸ See for example *Quereshi v Denmark* (n 74), in which the Committee stated “The Committee recalls that Mr. Andreassen made offensive statements about “foreigners” at the party conference. The Committee notes that, about regardless of what may have been the position in the State party on the past, a general reference to “foreigners” does not at present single out a group of persons, contrary to article 1 of the Convention”. See also the communications of *P.S.N. v Denmark* (n 74) and *A.N.W.A.R. v Denmark* (n 74) which were communications concerning discriminatory remarks made by Danish politicians against Muslims and Islam, regarding which the CERD held that “the Convention does not cover discrimination based on religion alone, and that Islam is not a religion practiced solely by a particular group, which could otherwise be identified by its race, colour, descent or national or ethnic origin.”

⁶⁹ See for example on Sweden, UNGA, ‘Official Records 49th Session, supplement No. 18’, A/49/18 (1994) 30 at para. 199; On the Russian Federation, UNGA, ‘Official Records 51st Session, supplement No. 18’, A/51/18 (1996) 25 at para.150; On Finland, UNGA, ‘Official Records 51st Session, supplement No. 18’, A/51/18 (1996) 29 at para. 175; On Poland, UNGA, ‘Official Records 52th Session, supplement No. 18’, A/52/18 (1997) 62 at para.476; also on Sweden UNGA, ‘Official Records 52th Session, supplement No. 18’, A/52/18 (1997) 65 at para. 505

⁷⁰ See for example Mongolia, CERD/C/MNG/CO/18, (19 October 2006) at para. 16; Norway CERD/C/NOR/CO/18, (19 October 2006), at para. 16; Oman CERD/C/OMN/CO/1, (19 October 2006), at para. 15; Republic of Fiji Islands, CERD/C/FJI/CO/17, (16 May 2008), at para 20; Belgium CERD/C/BEL/CO/15, (11 April 2008) at para.12

⁷¹ See for example on the Czech Republic, UNGA, ‘Official Records 58th Session, supplement No. 18’, A/58/18 (2003) 65 at para.382; On Luxembourg UNGA, ‘Official Records 60th Session, supplement

relating to States parties where provisions that have been enacted are not effectively implemented or enforced.⁷² The CERD has consistently held that States parties are obliged to meet the requirements of 4(b), which are mandatory, without adding extra conditions or qualifications for their applicability and to effectively enforce these provisions.⁷³

Media

The CERD, in Concluding Observations on State Reports, has expressed concerns about the implementation of the prohibition of all organizations that promote or incite racial discrimination through the media. In relation to Denmark, it expressed concern over a licensed and partly State-funded radio-station named Radio Oasen, owned by a neo-Nazi association, which promoted racial hatred and discrimination on the radio.⁷⁴

Political parties/organizations

In several countries political parties that promote and incite racial discrimination are present. The CERD has stated its concerns on this issue in relation to several States. For example, in its 1998 concluding observations on the Czech Republic State Report, it stated that it noted with concern that “a political party represented in Parliament promotes racial discrimination and disseminates a magazine which promotes racist propaganda and ideas of racial superiority”⁷⁵. The Committee has consistently held that organizations that promote or incite racial discrimination,

No. 18’, A/60/18 (2005) 40 at para. 197; on Sweden, UNGA, ‘Official Records 59th Session, supplement No. 18’, A/59/18 (2004) 41 at para.220

⁷² See for example Moldova, CERD/C/MDA/CO/7 (16 May 2008), at para. 13

⁷³ See for example Sweden CERD/C/SWE/CO/18, (23 September 2008), at paras. 14-15

⁷⁴ Denmark UNGA, ‘Official Records 55th Session, supplement No. 18’, A/55/18 (2000) 22 at para.64. See also Norway, UNGA, ‘Official Records 52th Session, supplement No. 18’, A/52/18 (1997) 77 at para. 607, in which the CERD stated: “Concern is expressed over the publications of anti-immigrant racist organizations and over the fact that a radio station is systematically disseminating ideas of racial superiority”.

⁷⁵ Czech Republic, UNGA, ‘Official Records 53rd Session, supplement No. 18’, A/53/18 (1998) 35 at para.121; See also on The Netherlands, UNGA, ‘Official Records 53rd Session, supplement No. 18’, A/53/18 (1998) 33 at para. 102; Again on the Czech Republic, UNGA, ‘Official Records 55th Session, supplement No. 18’, A/55/18 (2000) 50 at para. 281; On Belgium, UNGA, ‘Official Records 57th Session, supplement No. 18’, A/57/18 (2002) 17 at para. 51; On Portugal, UNGA, ‘Official Records 59th Session, supplement No. 18’, A/59/18 (2004) 66 at para. 166

whether they are political organizations or not, have to be prohibited and declared illegal.

4. Conclusion

In researching the question of “how has the CERD struck a balance between the right to freedom of expression and the prohibition of racial discrimination?” I have first looked at the development and the normative content and interpretation of article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination. Secondly, I have examined the subsequent interpretation of the Convention by the CERD in relation to article 4, by looking at its General Recommendations, Concluding Observations on State reports and views on individual complaints.

When researching these sources, one cannot fail to notice that the CERD has struck a balance between the right to freedom of expression and the right to be free from (racial) discrimination, which leans considerably toward the latter right. Both in terms of article 4 itself as in its interpretation, the CERD allows for a broad limitation on the right to freedom of expression in cases of racial discrimination. States parties are under the obligation to declare a number of acts offences punishable by law. These acts include all dissemination of ideas based on racial superiority or racial hatred, as well as incitement to racial discrimination. These obligations are qualified by the “with due regard”-clause. This clause, however, does not substantially limit the scope of these obligations in practice.

In fact, the CERD has repeatedly stated that the mandatory measures enumerated in article 4 are not incompatible with the right to freedom of expression, since this right is not unlimited. The CERD, pointing out the importance of not only article 19 and 20, but also of article 29(2) of the Universal Declaration of Human Rights, stated that the citizen’s exercise of the right to freedom of expression carries with it special duties and responsibilities, among which it considered the obligation not to disseminate racist ideas of particular importance. Therefore the “with due regard”-clause, as interpreted by the CERD, does not really limit the obligation on States to

implement the provisions of article 4 effectively, even if these provisions impede on the exercise of the right to freedom of expression.

When one of the acts that should be prohibited and declared punishable by law under article 4 CERD is at stake, the CERD has generally struck the balance in favor of the right to be free from racial discrimination.

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