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Soft Authority against Hard Cases of Racially Discriminating Speech: Why the CERD Committee Needs a Margin of Appreciation Doctrine

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Abstract

This article argues that the Committee for the Elimination of All Forms of Racial Discrimination (CERD Committee), as it exercises quasi-judicial authority, should consider applying standards of reasoning similar to those of international courts. In particular, with respect to racially discriminating speech, the legitimacy of the CERD Committee's Communications would benefit from a margin of appreciation doctrine that leaves domestic authorities greater leeway in finding their strategy to counter the threat of anti-migrant popular sentiment and gives recognition to alternative approaches beyond criminal persecution. This allows a context sensitive approach that might do justice to both the freedom of expression and the need for a more effective protection against racially discriminating speech.

A. Fighting Racial Discrimination in Times of Migration

In many regions of the world, a great number of migrants and refugees are seeking a better, more secure life in more developed countries. At the same time, many developed countries struggle with growing popular sentiment against migrants and refugees. Much of that sentiment might stem from social and economic stress in the target countries that is entirely home-grown. In particular, centrifugal social and economic developments which threaten the status and perspective of middle and lower middle segments of society provide a fertile ground for such sentiment. Right-wing populist movements eagerly take it up and transform it into sizeable results at the ballot box. Mainstream political forces are uncertain about the best strategy to counter such movements. Reactions range from imitating populist strategies, via benign ignorance, to attempts to resist them publicly and by initiating legal counteraction.

The Turkish Union in Berlin-Brandenburg, a German NGO, opted for the latter strategy when it brought the *Sarrazin* Case before the Committee on the Elimination of All Forms of Racial Discrimination (CERD Committee). Legally, the NGO succeeded. On 26 February 2013, the CERD Committee adopted Communication No. 48 of 2010.[1] It concluded that Germany had violated its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) by not prosecuting Thilo

[1] Committee on the Elimination of All Forms of Racial Discrimination: *TBB – Turkish Union in Berlin-Brandenburg against Germany*, Communication No. 48/2010, UN Doc CERD/C/82/D/48/2010, 4 April 2013.

Sarrazin, a former Senator of Berlin and Executive Director of *Bundesbank*, for disrespectful remarks about immigrants in an interview published in 2009. Politically, however, it might have been a pyrrhic victory. The decision allows Sarrazin and other populists to style themselves as victims of a system of mainstream political correctness which supposedly suppresses diverging views by means of criminal law.

This article argues that this mixed result has to do with a structural deficit in the reasoning of the CERD Committee. The Committee seems insufficiently aware of the fact that its Communications constitute exercises of international public authority. Their effects resemble that of judgments of international courts, even though they do not have the same legal quality. Therefore, the CERD Committee should consider applying standards of reasoning similar to those of international courts. In particular, the legitimacy of its Communications would benefit from a margin of appreciation doctrine that leaves domestic authorities greater leeway in finding their strategy to counter the threat of anti-migrant popular sentiment and gives recognition to alternative approaches beyond criminal persecution. This would also contribute to furthering the Committee's goal of promoting human rights.

Part B. of the article summarizes the *Sarrazin* Case and compares it to similar CERD cases. It turns out that the reasoning of the CERD Committee displays structural deficits. It categorically excludes context-sensitive considerations relating to free speech when determining whether there has been a case of racial discrimination. Nor does the Committee give much credit to reactions of State parties other than criminal sanctions. This appears as a dangerous strategy given the intricate emotional patterns related to racially discriminating statements. It might harm the legitimacy of the CERD Committee. Part C. elaborates on the broader ramifications of this finding for the CERD Committee. It argues that CERD Communications constitute exercises of public authority, whose legitimacy and effectiveness suffers from the discovered deficit. It should therefore adopt legal strategies used by international courts which render their decisions both legitimate and effective. With respect to racially discriminating speech, the Committee would have been well advised to adopt the doctrine of the margin of appreciation developed by the European Court of Human Rights (ECtHR). This allows a context-sensitive approach that might do justice to both the freedom of expression and the need to protect against racially discriminating speech more effectively.

B. CERD Opinions on Racially Discriminating Speech

I. The CERD Committee on the *Sarrazin* Case

The *Sarrazin* Case is illustrative of two problems of Communications of the CERD Committee, namely the lack of criteria for balancing protection against racial discrimination with free speech, and for taking into account reactions of governments other than criminal proceedings that might nonetheless enhance the acceptance of migrants. The case originated in an interview given by Sarrazin, which appeared in the German culture journal *Lettre International* in 2009. The interview bore the title "Class instead of Mass: from the Capital City of Social Services to the Metropolis of the Elite" and outlined challenges and prospects for Berlin.[2] In the interview, Sarrazin set out his views on immigration in Berlin. One of the more drastic statements is the following:

> "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."[3]

Another quote reads as follows:

> "I do not have to accept anyone who lives off the State and rejects this very [S]tate, 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."[4]

Sarrazin further compared the situation of the Turkish population in Berlin with the Kosovar conquest of Kosovo, which he attributed to a higher birth rate of the immigrant population. He added that he would not mind if it were East European Jews because they had a higher intelligence quotient than Turkish people. The statements appear in the context of less controversial positions of a general political nature.

The interview did not only trigger an extensive, sometimes emotional debate about immigration in the German public, in which government officials

[2] F. Berberich & T. Sarrazin, 'Class instead of Mass: From the Capital City of Social Services to the Metropolis of the Elite' 86 *Lettre International* (2009), 197.

[3] CERD, Communication No. 48/2010, *supra* note 1, para. 2.1.

[4] *Ibid.*

and journalists overwhelmingly rejected Sarrazin's views. It also led to a number of juridical proceedings in Germany and abroad. The Turkish Union Berlin-Brandenburg (TBB), an immigrant association, lodged a complaint with the local police submitting that some of the statements in the interview were to be qualified as defamation[5] and incitement of the people.[6] The Prosecutors initiated an investigation, but terminated it without bringing charges. They established that Sarrazin was not criminally liable since the relevant statements were protected by the constitutional right to free speech.[7] The TBB had no legal remedy against this decision under German criminal procedure. Hence, the TBB decided to lodge a complaint with the CERD Committee.

In the proceedings before the CERD Committee, Germany pointed to the significance of free speech. It considered Sarrazin's statements to be a contribution to the political debate that evoked a public discussion on how to promote integration, stressing that important German politicians, among them the German chancellor Angela Merkel, had clearly rejected Sarrazin's views. The German government emphasized that no criminal acts related to the statements had been committed against foreigners. In contrast, the TBB, supported by the German Institute for Human Rights, considered the public reactions as dangerous. It pointed out that in the population in general, Sarrazin's remarks had received a lot of positive resonance. It also claimed that German law concentrated too much on fighting right-wing organizations instead of focusing on individuals making discriminatory statements.

The CERD Committee rendered an Opinion in favor of the TBB. It decided that Germany had violated the Convention by not bringing forth criminal charges against Sarrazin. According to the Committee, Germany interpreted its own criminal law too narrowly. As the Committee had emphasized repeatedly, it was not sufficient for a State party to merely enact legislation criminalizing racial discrimination; it also needed to apply these provisions in the spirit of the Convention. Hence, it concludes that Germany violated the Convention and requests Germany to revise its policy and procedures on the subject matter.

Even if one fully agrees with the Committee's position that governments need to fight effectively against racial discrimination, the Committee's reasoning leaves some questions open. Article 4 CERD provides that the fight against racial discrimination needs to pay "due regard" to the rights guaranteed in the Universal Declaration of Human Rights (UDHR), including the freedom

[5] Sec. 185, German Criminal Code.

[6] Sec. 130 (1) Nr. 1, 2, German Criminal Code.

[7] Article 5(1), ph.1, Var.1, German Basic Law.

of expression stipulated in Article 19 UDHR. However, the Committee restates some of Sarrazin's statements and immediately labels them as racially discriminating without much further explanation.[8] In particular, it does not consider that they might lend themselves to different readings: on the one hand, one might understand them as a polemic, yet legitimate contribution to an ongoing political debate about essential values and interests of society.[9] On the other hand, one might point to the sublime, yet effective stereotypes they convey.[10] The "due regard" clause might have given the Committee a good reason to engage in such differentiations. Instead, once the Committee has established that the statements are racially discriminating, it stresses that racist remarks such as those at hand are categorically excluded from the protection of the freedom of expression.[11] It also does not accept Germany's argument that other reactions below the threshold of criminal proceedings might be sufficient or even more effective in fighting racial discrimination.

II. Previous Case Law of the CERD Committee

The problems spotted in the *Sarrazin* Case are not unique. A look at the CERD Committee's case law reveals a consistent pattern of structural problems in the reasoning of the Committee. It has not yet developed a consistent, context-sensitive approach to the relationship between the fight against racism and the freedom of expression, nor to the intricate question whether criminal proceedings are the only acceptable reaction of a member State faced with racial discrimination. On the whole, this does not seem to do justice to the "due regard" clause of Article 4 CERD.

A first case that is comparable to the *Sarrazin* Case originated in Norway. In 2000, a group of right-wing extremists celebrated the anniversary of Rudolf Hess with a march near Oslo.[12] In that context Terje Sjolie, who headed the march, held a speech in which he glorified Rudolf Hess for his "attempt to

[8] CERD, Communication No. 48/2010, *supra* note 1, para. 12.6.

[9] C. Tomuschat, 'Der 'Fall Sarrazin' vor dem UN-Rassendiskriminierungsausschuss', 40 *Europäische Grundrechte- Zeitschrift* (2013), 262, 263-265.

[10] M. Payandeh, 'Die Entscheidung des UN-Ausschusses gegen Rassendiskriminierung im Fall Sarrazin', 68 *Juristenzeitung* (2013) 980, 982.

[11] *Ibid*., 983; see also Tomuschat, *supra* note 9, 264.

[12] CERD, *The Jewish community of Oslo; the Jewish community of Trondheim; Rolf Kirchner; Julius Paltiel; the Norwegian Antiracist Centre; and Nadeem Butt against Norway*, Communication No. 30/2003, UN Doc CERD/C/67/D/30/2003, 22 August 2015.

save [...] Europe from [. . .] Jewry"[13] and demonized Jews "who suck [Norway] empty of wealth and replace it with immoral and un-Norwegian thoughts".[14] During the subsequent months, many incidents of discrimination and violence against black people occurred in that area. A fifteen-year-old half-Ghanaian boy was even stabbed to death. Norway opened criminal proceedings against Sjolie. At the last stage of appeal, the Supreme Court acquitted the accused, holding the statement to be protected by the freedom of expression. However repugnant and undesirable it may have been, it did not contain threats or incite to violence.[15] The reasoning of the CERD Committee on the merits reminds of the Sarrazin case. When assessing whether the statement is racially discriminating, the Committee restates the relevant passage and immediately qualifies it as racially discriminating. It does not define workable, context-sensitive criteria that would help domestic courts to delineate legally protected free speech from unprotected racist utterances. The CERD Committee further states that free speech has a lower weight than the prohibition of hate speech. This did not deprive the "due regard" clause of Article 4 of any significance since it referred to other fundamental rights as well, not just free speech.[16] One might only speculate whether the outburst of violence following the statement at issue provided sufficient evidence to the CERD Committee that it should have entailed criminal sanctions.

Surprising is the fact that the CERD Committee did not recognize that Norway at the time of the proceedings was in the midst of a legislative reform project. The project included a constitutional amendment that would give parliament greater scope to pass legislation against racist speech. This, as well as the fact that the Supreme Court had decided upon the case after thorough analysis, made Norway call for a margin of appreciation in balancing rights at the national level.[17] The Committee denied the request by pointing out its "responsibility to ensure the coherence of the interpretation of the provision of Article 4 of the Convention."[18]

A second notable case in which the CERD Committee dealt with racist statements and the freedom of expression originated in Denmark.[19] In January

13 *Ibid.*, para. 2.1.
14 *Ibid.*
15 *Ibid.*, para. 2.7.
16 *Ibid.*, para. 10.5.
17 *Ibid.*, para. 8.2.
18 *Ibid.*, para. 10.3.
19 CERD, *Mohammed Hassan Gelle against Denmark*, Communication No. 34/2004, UN Doc CERD/C/68/D/34/2004, 15 March 2006.

2003, right-wing extremist political leader Pia Kjærsgaard authored a letter to the editor of a national newspaper in which she complained about the Danish Minister of Justice. The Minister of Justice had invited different organizations to a hearing on a legislative proposal regarding female circumcision, among them the Danish-Somali Association. Kjærsgaard stated that asking the Danish-Somali Association for its opinion on a crime mainly committed by Somalis was as good as asking pedophiles and rapists for their views on the prohibition of rape or child molestation.[20] A Danish citizen of Somali origin felt offended and discriminated against by this statement because he considered it to equate people from Somalia with pedophiles and rapists. After exhausting domestic remedies, he filed a petition with the CERD Committee.

On the merits, the CERD Committee found that Denmark should have initiated criminal proceedings against Kjærsgaard. It stated the obvious by emphasizing that it was insufficient for compliance with the Convention for a State to merely adopt legislation making acts of racial discrimination punishable on paper without effectively implementing them.[21] But it did not explain the non-obvious, namely why the statements at hand were racially discriminating. It even accepted that, as Danish authorities had found,

> "the statements in question can also be taken to mean that Somalis are only compared with pedophiles and rapists as concerns the reasonableness of allowing them to comment on laws that affect them directly, and not as concerns their criminal conduct,"[22]

However, it did not indicate why it gave preference to the interpretation that the statement was

> "degrading or insulting to an entire group of people on account of their national or ethnic origin and not because of their views, opinions or actions regarding the offending practice of female mutilation."[23]

[20] *Ibid.*, para. 2.1.
[21] *Ibid.*, para. 7.3.
[22] *Ibid.*, para. 2.4.
[23] *Ibid.*, para. 7.4.

Even though the statement occurred in the context of a parliamentary debate,[24] the Committee repeated its familiar position that the need to protect against racial discrimination categorically prevailed over free speech rights.[25] Nonetheless, to the Committee's credit, it seems that Danish authorities had actually failed to carry out an effective investigation in the case at hand. This might justify the outcome, though not the reasoning.

A third case revealing similar problems involves a complaint of the Central Council of German Sinti and Roma against Germany.[26] In October 2005, a magazine for police officers published a letter to the editor written by a Bavarian police officer. The police officer, referring to an article about Sinti and Roma that had appeared in the magazine a few months earlier, rejected the article's moderate views based on his own experiences with Sinti and Roma. He called them "criminal gypsies [...] who feel like a 'maggot in bacon' in the welfare system of the Federal Republic of Germany."[27] He adds a sentence that strongly resembles Sarrazin's statements:

> "Whoever does not want to integrate but lives from the benefits of and outside this society cannot claim a sense of community."[28]

The Central Council of German Sinti and Roma sustained the position that the letter contained multiple discriminatory statements, racist and degrading stereotypes and phrases that could increase social exclusion.[29] Germany denied a violation of the convention and pleaded discretion in the implementation of the obligations arising from the Convention.[30] Perhaps in deference to the State's domestic procedures, the CERD Committee limited its assessment to examining whether the decisions of German authorities were manifestly arbitrary or amounted to denial of justice, which it denied.[31] In the *Sarrazin* Case, the CERD Committee mentioned this precedent, but did not apply it. There is no obvious justification for the difference between the two Committee

24 Tomuschat, *supra* note 9, 262.
25 CERD, Communication No. 34/2004, *supra* note 19, para. 7.5.
26 CERD, *Zentralrat Deutscher Sinti und Roma et al. against Germany*, Communication No. 38/2006, UN Doc CERD/C/72/D/38/2006, 3 March 2008.
27 *Ibid.*, para. 2.1.
28 *Ibid.*
29 *Ibid.*, para. 2.2.
30 CERD, Communication No. 38/2006, *supra* note 26, para. 4.5.
31 *Ibid.*, para. 7.7; See also CERD, *Er against Denmark*, Communication No 40/2007, UN Doc CERD/C/71/D/40/2007, para. 7.2, 8 August 2007.

decisions. Certainly, the reaction of the German authorities was different in the two cases. In the *Sinti and Roma* Case, German authorities took disciplinary measures against the police officer, suspending him from his position.[32] Sarrazin voluntarily quit his job as a member of the Board of Directors of the *Bundesbank* following public pressure. However, the independence of the *Bundesbank*, an important requirement of German constitutional and European law,[33] prevented Germany from taking similar disciplinary measures against Sarrazin. There is thus an important reason why German authorities reacted differently in the two cases.[34] In any event, the CERD Committee seems to lack a clear line regarding the significance it attributes to decisions below the level of criminal sanctions. This leads to unpredictable decisions.

III. Lack of Consideration for Free Speech and Context

The foregoing cases exhibit two deplorable structural shortcomings in the reasoning of the CERD Committee. First, the Committee has not yet developed a consistent approach that takes free speech seriously in the fight against racial discrimination. This problem has a doctrinal and an epistemological dimension. Doctrinally, one might agree with the committee that racially discriminating statements should be categorically exempt from free speech guarantees.[35] However, if the freedom of expression is to play any role at all, then this position should compel the CERD Committee to take it into account when determining whether there has been a case of racial discrimination, especially in cases where the line is difficult to draw because the statement in question is open to contending interpretations. As concepts are relational, the Committee's approach of defining the impermissible without having at least a vague idea of the permissible seems inconclusive. This is all the more the case because a number of States submitted interpretative declarations underlining their free speech guarantees.[36] The reductionist interpretation of the CERD

[32] CERD, Communication No. 38/2006, *supra* note 26, para. 7.7.

[33] Art. 88 German Basic Law, Art. 130 TFEU.

[34] See CERD, *Individual opinion of Committee member Mr. Carlos Manuel Vasquez*, Communication No 48/2010, UN Doc CERD/C/82/3, 4 April 2013, para. 2 [CERD, Individual Opinion of Vasquez]. He also stresses further similarities between CERD, Communication No. 38/2006, *supra* note 26, and Communication No. 48/2010, *supra* note 1.

[35] Cf. CERD, *Organized violence based on ethnic origin*, General Recommendation No. 15, 23 March 1993, para. 4.

[36] See *United Nations 2. International Convention on the Elimination of All Forms of Racial Discrimination: Status as at 05.05.2016*, available at https://treaties.un.org/Pages/

Committee that denies the "due regard" clause any significance for the freedom of expression finds no basis in the text of the Convention. In particular, the text of Art. 4 CERD differs considerably from that of Art. 20(2) of the International Covenant on Civil and Political Rights (ICCPR), which exempts incitement to national, racial or religious discrimination from the freedom of expression.[37] Simple analogies therefore seem inappropriate.

The epistemological dimension of the problem has to do with the emotional side of statements related to race and ethnicity. On the one hand, the law certainly needs to bar the expression of emotions that lead to discrimination.[38] This is the whole point of the prohibition of racially discriminating speech. Albeit evidence suggests that emotions underpin our moral views,[39] not every emotion has moral value. We should only morally endorse a view for which we find rational justification.[40] Racially motivated hatred is clearly unjustifiable. On the other hand, rational discourse is not free from emotions, either. To some extent, they are a legitimate means of communication. Rational discourse requires trust, attention, confidence, and many other intersubjective sentiments which the content of a speech act alone might hardly evoke. It is thus for a law-applier to carve out the extent to which an appeal to emotions should be admissible as a legitimate element of political debate. The CERD Committee has not spent much thought on this issue as of yet.

The second shortcoming is the Committee's failure to explicitly and consistently recognize measures below the level of criminal sanctions on the part of the respondent state in reaction to racially discriminating statements. The decisions of the CERD Committee diverge on that point from one case to the other without sufficient explanation. This does not do justice to the fact that it might often heavily depend not only on the gravity of the discriminating act, but also on the particular historic, social and political context whether criminal sanctions are appropriate. While racially discriminating speech appeals to,

ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en (last visited 29 May 2016).

37 Cf. M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2nd ed. (2005), 'Article 20' para. 16.

38 On the emotional underpinnings of racial discrimination see C. A. Talaska, S. T. Fiske, S. Chaiken, 'Legitimating Racial Discrimination: Emotions, Not Beliefs, Best Predict Discrimination in a Meta-Analysis', 21 *Social Justice Research* (2008), 3, 263-296.

39 Cf. A. Smith, *The Theory of Moral Sentiments*, (1790); See also J. Prinz, 'The Emotional Basis of Moral Judgments', 9 *Philosophical Explorations* (2006), 1, 29-43.

40 M. Sellers, 'Law, Reason, and Emotion' (2014), available at http://ssrn.com/abstract=2448000 (last visited 29 May 2016).

and generates, dangerous emotions, there is no reason to believe that criminal sanctions are a panacea. Emotions are hard to predict.[41] Criminal investigations might give the perpetrator the possibility to present himself or herself as a victim. It therefore seems appropriate to also look at the wider context of a racially discriminating statement, without losing out of sight the need to achieve justice in the particular case. All this militates for a more context-sensitive approach that balances the various pros and cons of criminal punishment in an individual case. Instead, the CERD Committee has mostly been of the view that "one size fits all". At least, its 2013 General Recommendation on combating racist hate speech recognizes that criminal sanctions should be reserved for severe and clear cases and applied proportionately.[42]

On the whole, the CERD Committee shows a remarkable lack of awareness for the significance of free speech, the context in which a case of racially discriminating speech took place, as well as the emotional aspects of both political discourse and criminal sanctions. It remains to be seen whether this might lead to contestations of the legitimacy of Committee decisions – provided that one considers them as exercises of authority. The following makes the case for the latter and argues that a more pluralistic approach which would grant member States a larger margin of appreciation might eventually fight racially discriminating speech more effectively.

C. CERD Communications as Exercises of Public Authority: The Need for a Margin of Appreciation

The lack of context sensitivity in the CERD Committee's decisions revealed above is not to be taken lightly. As this section argues, the decisions are not just harmless expert views, but cause effects which resemble in some respects those of judicial decisions. Therefore, one should consider them as exercises of international public authority, which require, among others, adequate legal reasoning ensuring their legitimacy (I.). One technique of legal reasoning which international courts use for this purpose consists in granting member States a margin of appreciation, especially when confronted with diverging domestic traditions and understandings (II.). A comparative overview reveals that there is considerable disagreement among domestic jurisdictions on the significance

[41] J. A. Blumenthal, 'Law and the Emotions: The Problems of Affective Forecasting', 80 *Indiana Law Journal* (2005), 155.

[42] Cf. CERD, *Combating racist hate speech*, General Recommendation No. 35, UN Doc CERD/C/GC/35, 26 September 2013, para. 19 [CERD, Combating racist hate speech].

of free speech in relation to racial discrimination. Each position results from a specific historic and cultural situation. While a global minimum standard must always be ensured, the CERD Committee would therefore have had reason to grant Germany a wider margin of appreciation in the case at hand (III.).

I. CERD Communications as Exercises of Public Authority

We argue that one should consider the communications of the CERD Committee as exercises of international public authority, even though they have no binding effect for the member States. We understand "authority" very broadly as the law-based capacity to legally or factually limit or otherwise affect other persons' or entities' use of their liberty.[43] This definition of authority takes individual and collective self-determination, the axioms of modernity, as a starting point. Traditionally, governments facilitated, shaped and limited the exercise of self-determination primarily through binding law. This is why authority became equated with binding, enforceable law.[44] However, over time, new ways have emerged which allow governments to influence people more indirectly, but not necessarily less efficiently. They operate by means of soft instruments, such as recommendations, economic and other incentives, information and education.[45] Such instruments are nowadays omnipresent not only on the domestic, but also on the international level. The last few decades experienced a spread of all sorts of soft law and other non-binding governance instruments for the regulation of international affairs.[46] This does not imply that each and every act of an international institution qualifies as "authority". That would render the concept of authority meaningless. Instead, understanding an act, or a certain type of acts, as authority requires demonstrating that it has the

43 Cf. A. v. Bogdandy, P. Dann & M. Goldmann, Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities', 9 *German Law Journal* (2008), 1375, 1381, 1382. This definition has been further developed in A. v. Bogdandy & M. Goldmann, 'Sovereign Debt Restructurings as Exercises of International Public Authority', in C. Esposito, Y. Li & J.P. Bohoslavsky (eds), *Sovereign Financing and International Law* (2013) 39, 47. The definition is consistent with definitions elaborated in A. v. Bogdandy & I. Venzke, *In wessen Namen?* (2014) 29, 30; and in M. Goldmann, *Internationale öffentliche Gewalt* (2015), 319 *et seq.*

44 Seminal: J. Austin, *The Province of Jurisprudence Determined* (1832).

45 Cf. M. Foucault, 'La 'gouvernementalité'', in D. Defert & F. Ewald (eds), *Michel Foucault: Dits et Ecrits*, vol. 2 (1994), 635-657.

46 Cf. D. Shelton, *Commitment and Compliance. The Role of Non-binding Norms in the International Legal System* (2000); R. Wolfrum (ed.), *Developments of International Law in Treaty Making* (2005); J. E. Alvarez, *International Organizations as Law-Makers* (2005).

potential[47] to produce real-life effects for the self-determination of individuals or other entities.[48]

The CERD Committee's communications reach this threshold. First, the Committee's decision potentially affects the State concerned by the communication. Even though it is legally non-binding, it constitutes a form of public "naming and shaming" that might have (positive or negative) effects for the reputation of that State or its government, whether among other States, among its own citizens or among the citizens of other States.[49] Such reputational effects might be particularly severe in case of human rights violations. Other governments as well as the general public seem to consider it as a requirement for any member in good standing of the international community of States to respect core human rights. Their violation might have numerous repercussions for the international relations of that State or even for its economic situation in case they discourage much-needed immigration.

Second, as with the decisions of international courts and tribunals, the CERD Committee's communications have effects which go beyond the particular case at issue.[50] The reasoning of the decision, both the *ratio decidendi* and any *obiter dicta*, provides an authoritative interpretation of the applicable law and further develops the meaning of the CERD. Since there is an expectation that the Committee's interpretation will be fairly consistent across cases and over time, domestic legislators or courts might adapt their understanding of the CERD accordingly when they implement the convention into domestic law, or apply the implementing legislation to new cases.[51]

47 It is important to classify acts in accordance with their potential effect in order to avoid the fallacies of sociological positivism, see M. Goldmann, 'We Need to Cut Off the Head of the King: Past, Present, and Future Approaches to International Soft Law', 25 *Leiden Journal of International Law* (2012), 335.

48 This is implied in the idea of standard forms, cf. A. v. Bogdandy & M. Goldmann, 'Taming and Framing Indicators: A Legal Reconstructon of the OECD's Programme for International Student Assessment (PISA)', in K. E. Davis et al. (eds), *Governance by Indicators. Global Power through Classification and Rankings* (2012), 52.

49 On reputation in international relations see A. T. Guzman, *How International Law Works. A Rational Choice Theory* (2008).

50 A. v. Bogdandy & I. Venzke, 'In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification', 23 *European Journal of International Law* (2012), 7, 18; A. v. Bogdandy & I. Venzke, 'Beyond Dispute: International Judicial Institutions as Lawmakers', 12 *German Law Journal* (2011) 979, 987.

51 Cf. M. Jacob, *Precedents and Case-Based Reasoning in the European Court of Justice: Unfinished Business* (2014).

The decisions of the CERD Committee therefore qualify as authoritative acts. The authority exercised through them is also public and international, since it pursues a common interest of the international community, the fight against racial discrimination.[52] For that reason, the Committee's decisions need to be legitimized *vis-à-vis* the States and citizens in whose name they decide.[53] The procedure and the reasoning need to meet high standards given that the Committee enjoys little democratic legitimacy relative to that of domestic courts - at least in democratic States.[54] By contrast, the Committee's strength is its expertise and independence, which needs to be reflected in high procedural standards and a compelling style of reasoning. The margin of appreciation doctrine might enhance the latter.

II. Towards a Margin of Appreciation Doctrine for the CERD?

The margin of appreciation is a doctrinal tool that allows international courts, but also quasi-judicial institutions like the CERD Committee, to legitimize their exercise of public authority over States. The European Court of Human Rights (ECtHR) developed this doctrine in order to exercise self-restraint when reviewing domestic legislation or court decisions. It grants discretion to the domestic level that depends on the level of consensus; on the significance of the right at stake for society and the individual; and on the particular constellation of the case. The margin is larger to the extent that a Europe-wide consensus is lacking on the issue at stake.[55] The ECtHR's concept of a "living consensus" takes account of the fact that the meaning of human rights provisions changes over time.[56] This process does not occur at the same speed in all jurisdictions. If a Europe-wide consensus emerges on a certain human rights

[52] Cf. A. v. Bogdandy, P. Dann & M. Goldmann, *supra* note 43, 1381, 1382. Such international acts might be binding or non-binding.

[53] On the dual subject of legitimacy see A. v. Bogdandy & I. Venzke, *In wessen Namen?*, *supra* note 43, 41.

[54] On the democratic significance of international court's reasoning, see A. v. Bogdandy & I. Venzke, 'On the Democratic Legitimation of International Judicial Lawmaking', in A. v. Bogdandy & I. Venzke, *International Judicial Lawmaking* (2012), 473, 477.

[55] *Handyside v. UK*, ECtHR Application No. 5493/72, Judgment of 7 December 1976. For earlier case law of the Commission see J. A. Brauch, 'The margin of appreciation and the jurisprudence of the European Court of Human Rights: threat to the rule of law', 11 *Columbia Journal of European Law* (2004) 113, 116-118.

[56] On indeterminacy as a requirement for the margin of appreciation doctrine, see Y. Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?', 16 *European Journal of International Law* (2005) 907, 914.

issue, the margin of appreciation granted to the domestic level will decrease. The ECtHR establishes by means of a comparative review of domestic law whether and how much consensus there is among its member States on a certain issue.[57] By contrast, there is a wider margin where a sensitive ethical issue is concerned, unless an important aspect of an individual's existence is affected.[58] The margin is also wider where domestic courts are required to strike a balance between competing rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) to another.[59]

By now, the margin of appreciation doctrine has become more and more popular among international courts and tribunals.[60] In the view of Yuval Shany, the margin of appreciation doctrine finds a legal basis in the inherent powers of international courts.[61] There are good reasons why other international courts should use this power and also grant the domestic level a margin of appreciation when they apply international legal rules like human rights which genuinely address domestic issues.[62] In such "inward-looking cases",[63] international courts and quasi-judicial bodies located at considerable distance from domestic institutions and connected only by a long chain of legitimacy are charged with reviewing the decisions of domestic institutions with high democratic legitimacy. This constellation calls for the application of a doctrinal principle ensuring that the international court or quasi-judicial body exercises

[57] A. Nußberger, 'Auf der Suche nach einem europäischen Konsens – zur Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte', 2 *Rechtswissenschaft* (2012), 197, 205; further references in J. Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine', 17 *European Law Journal* (2011) 80, 108.

[58] *Christine Goodwin v. the United Kingdom*, ECtHR Application No. 28957/95, Judgment of 11 July 2002, paras 85, 90.

[59] *Odièvre v. France*, ECtHR Application No. 42326/98, Judgment of 13 February 2003, para. 46.

[60] Shany, *supra* note 56, 926 *et seq*.

[61] Shany, *supra* note 56, 911; for the European Court of Justice cf. Gerards, *supra* note 57.

[62] Shany, *supra* note 56; v. Bogdandy & Venzke, *supra* note 43, 274-5; S. Schill, 'Deference in Investment Treaty Arbitration: Re-conceptualizing the Standard of Review', 3 *Journal of International Dispute Settlement* (2012), 577; comparing the margin of appreciation doctrine with alternative standards of review: W. Burke-White & A. von Staden, 'Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations', 35 *Yale Journal of International Law* (2010), 283.

[63] Shany, *supra* note 56, 920; E. Benvenisti, 'Margin of Appreciation, Consensus and Universal Values', 31 *New York University Journal of International Law and Politics* (1999) 843, 846.

its competence with some degree of subsidiarity.[64] The doctrine of the margin of appreciation puts this idea into legal practice and allows domestic policy-making greater leeway, although not without limits.[65] This leeway might refer both to the factual and the normative aspects of a case.[66] The argument in favor of a margin of appreciation applies *a fortiori* where the applicable international law consists in vague, evolving standards, such as human rights.[67] Reading a margin of appreciation doctrine into human rights treaties would correspond to their object and purpose,[68] which is to find a balance between human rights protection and maintaining State sovereignty.[69]

Granting deference to domestic authorities in such a setting does not impede compliance with international law or 'soften' its normativity.[70] That presupposition would require that the international law in question has a fixed, universally accepted meaning. The application of the margin of appreciation doctrine rests on the insight that this is not the case.[71] Further, the margin of appreciation doctrine might allow States to reconcile their various international obligations in situations of constitutional pluralism, which would enhance overall compliance.[72] In any event, the core of each international legal rule applied with a margin of appreciation granted to States should remain untouched. In case of human rights, this means that the minimal protection necessary for the protection of human dignity must always be respected.[73]

By contrast, the margin of appreciation should not be applied in cases where domestic institutions cannot *per se* claim to have greater legitimacy. Thus, where cross-border externalities are at stake, the margin of appreciation

64 M. Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis', 15 *European Journal of International Law* (2004) 5, 907; M. Delmas-Marty, *Ordering Pluralism: A Conceptual Framework for Understanding the Transnational Legal World* (2009), 44; A. Legg, *The Margin of Appreciation in International Human Rights Law. Deference and Proportionality* (2012), 61.

65 Survey on case law in Legg, *supra* note 64, 75 *et seq*.

66 Shany, *supra* note 56, 917; Gerards, *supra* note 57, 110; M. Ambrus, 'The European Court of Human Rights and Standards of Proof: An Evidentiary Approach towards the Margin of Appreciation', in L. Gruszczynski & W. Werner (eds), *Deference in International Courts and Tribunals* (2014), 235.

67 Shany, *supra* note 56, 914.

68 Cf. Art. 31(1) VCLT.

69 Legg, *supra* note 64, 58 *et seq*.

70 See, however, Benvenisti, *supra* note 63, 844.

71 Shany, *supra* note 56, 913.

72 Gerards, *supra* note 57, 102, 103.

73 See Gerards, *supra* note 57, 113; Nußberger, *supra* note 57.

doctrine does not seem to be warranted. Domestic actors do not possess particular legitimacy to make decisions affecting persons or entities outside their jurisdiction. Only the idea of the separation of powers between the judiciary and other branches of government supports the case for executive discretion in such settings.[74] By contrast, democratic legitimacy requires a margin of appreciation where international tribunals scrutinize domestic measures which affect non-citizens within the jurisdiction of the respective State just as much as its own citizens. This explains the trend towards the margin of appreciation in investment arbitration,[75] although the lack of a single, hierarchical court structure at times produces inconsistent standards of review.[76] Some also argue that the application of the margin of appreciation would be inappropriate in cases involving minority issues. The requirement of a Europe-wide consensus for the exercise of full judicial review would impede the protection of minorities, since the consensus of the majority might not necessarily reflect the interests of minorities.[77] It should, however, be kept in mind that the ECtHR has always used the idea of a Europe-wide consensus as a means of enhancing its scrutiny of domestic decisions and fostering human rights, not in order to give majority positions prevalence over minority interests.

In the light of these considerations, it seems that the CERD would have reason to apply the margin of appreciation doctrine in cases confronting free speech with the need to protect against racial discrimination. First, like human rights courts, the CERD Committee engages in domestic policy review and therefore has to meet the challenge of assessing domestic judicial decisions from considerable distance.[78] In this respect, a margin of appreciation would reduce, second, the risk of fragmentation in international human rights law.[79] Third, both the prohibition of racial discrimination and the guarantee of free speech include a relatively high degree of vagueness and interpretative leeway, for which the *Sarrazin* Case as well as previous case law of the CERD Committee on the issue provide ample evidence.[80] Fourth, whether certain limits to political discourse are acceptable depends on many contextual factors such as a country's particular

74 Shany, *supra* note 56, 925; Schill, *supra* note 62, 592.

75 Schill, *supra* note 62, 592 *et seq*.

76 J. Arato, 'The Margin of Appreciation in International Investment Law', 54 *Virginia Journal of International Law* (2014) 545-579.

77 Benvenisti, *supra* note 63, 850-853; Shany, *supra* note 57, 920.

78 Tomuschat, *supra* note 9, 262.

79 M. Payandeh, 'Fragmentation within International Human Rights Law', in M. Andenas & E. Bjorge, *A Farewell to Fragmentation* (2015), 297.

80 See above part B., see also Vasquez, *supra* note 34, para. 10.

history. This calls for a high level of democratic legitimacy for the determination of the limits of free speech. Fifth, even if one follows those who advocate that the margin of appreciation should not apply in cases concerning minorities,[81] the CERD Committee would still have reason to use it in cases like the ones under consideration, where one human right stands against another. Those invoking free speech for their controversial views – hopefully – also represent just a minority of society. In spite of this, the CERD Committee has never recognized the margin of appreciation despite party submissions to that effect, deeming the definition of racial discrimination to be clear and any argument relating to free speech inacceptable.[82] Only recently the Committee came as far as stating that it should not review the interpretation of facts or domestic law by domestic courts unless they were manifestly absurd or unreasonable.[83] But this is not the same as recognizing that the concretization of international human rights might give member States some leeway and allow for a certain plurality of views.

III. Comparative Perspective on Racially Discriminating Speech

The precondition for applying a margin of appreciation is the absence of a common line among States, both in respect of the scope given to free speech and the measures taken in case of racially discriminating statements. This is examined here for a number of jurisdictions. A look at how legislators and courts in other legal orders balance the freedom of expression with the fight against racial discrimination shows considerable differences.[84] The overview starts with the most permissive jurisdiction.

In the eyes of many observers, this is clearly the United States. In the United States, there is no prohibition of racially discriminating hate speech, unless it amounts to an incitement to illegal acts.[85] This rule applies to all kinds of discriminating speech. The Supreme Court does not want to give different

81 Benvenisti, *supra* note 63, 847.

82 CERD, *Summary record of the 1323rd meeting*, UN Doc CERD/C/SR.1323, 19 March 1999, para. 60.

83 CERD, *Combating racist hate speech*, *supra* note 42, para. 17.

84 Overview of older case law in S. Coliver (ed.), *Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination* (1992).

85 O. Bakircioglu, 'Freedom of Expression and Hate Speech', 16 *Tulsa Journal of Comparative and International Law* (2008) 1, 1, 13 *et seq.* with further references on the earlier "clear and present danger test"; A. v. Ungern-Sternberg, 'Öffentliche Auseinandersetzung um Religion zwischen Freiheit und Sicherheit' in F. Arndt et al. (eds), *Freiheit – Sicherheit – Öffentlichkeit* (2009), 61, 73.

treatment to some forms of discriminating speech as opposed to others.[86] This follows its general rule to not only protect a plurality of views on a particular issue ("viewpoint neutrality"), but also to comprehensively protect free speech regardless of the issue ("content neutrality").[87] For this reason, the United States has submitted a reservation to CERD.[88]

Most other countries adopt more restrictive approaches.[89] The solutions adopted depend to some degree on the national context, both the political situation and legal tradition.[90] In many countries, free speech does not allow statements which might lead to violence.[91] But the precise contours of such exceptions might vary. For example, in Latin America, some countries prohibit incitement to violence, while Argentina draws the exception more narrowly and requires discriminating acts.[92] In Great Britain, statements involving race or religion can only be prohibited when they become "threatening, abusive or insulting." It is not enough that they have an outrageous or offensive character.[93]

More restrictive is Germany. German criminal law prohibits incitement of the people to hatred against ethnic, racial, religious and other groups of the population.[94] This prohibition is not only intended to protect public security, but also human dignity. This illustrates a much-noted decision of the Federal Constitutional Court (FCC) of 2010.[95] The case originated in the city of Augsburg, where a right-wing association mounted a campaign advocating the "Repatriation of Foreigners" under the motto "For a livable German Augsburg". Several courts found the members of the association guilty of incitement of the

86 *R.A.V. v. St. Paul*, (1992) 505 U.S. 377.

87 M. Hong, 'Hassrede und extremistische Meinungsäußerungen in der Rechtsprechung des EGMR und nach dem Wunsiedel-Beschluss des BVerfG', 70 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2010), 73, 117.

88 *United Nations 2. International Convention on the Elimination of All Forms of Racial Discrimination*, *supra* note 36.

89 K. Boyle, 'Overview of a Dilemma: Censorship versus Racism', in S. Coliver (eds), *Striking a Balance* (1992), 1, 4.

90 *Ibid.*, 5.

91 A. v. Ungern-Sternberg, *supra* note 85, 66; Payandeh, *supra* note 10, 985.

92 P. Martins, 'Freedom of expression and Equality: The Prohibition of Incitement to Hatred in Latin America', Study prepared for the regional expert meeting on article 20, organized by the OHCHR (2011) 6-8; S. J. Roth, 'Laws against Racial and Religious Hatred in Latin America: Focus on Argentina and Uruguay', in S. Colliver (ed.), *Striking a Balance* (1992), 197, 198.

93 *Brutus v. Cozens*, [1973] AC 854.

94 Sec. 130(1) lit. 2 German Criminal Code.

95 *Meinungsfreiheit bei Volksverhetzung*, (2010) 1 BvR 369/04. (German only).

people, holding that the motto violated the human dignity of foreigners living in Augsburg. However, the FCC decided otherwise. While it agreed with the previous courts that the motto expressed skepticism towards migrants, it held that this did not suffice for a conviction. One could also understand it as stating that the city was not livable because of wrong immigration policies, making it a legitimate contribution to a political debate.[96] The similarity with the *Sarrazin* Case is evident. While being aware of the need to protect human dignity, the FCC granted the accused the benefit of the doubt. By contrast, German courts apply much stricter standards in cases against holocaust deniers. Not only human dignity, but also Germany's particular history justify such a stance.[97]

A similar case arose in Brazil, yet with a very different conclusion. In the *Ellwanger* Case, a habitual holocaust denier and author of books spreading his crude ideas faced criminal prosecution. In a heavily debated decision, the Supreme Court upheld Ellwanger's conviction by 8 votes to 3.[98] In their opinions, Judges disagreed on the proportionality of criminal prosecutions. Some observers like Celso Lafer support the decision, arguing with the context: Brazil as a multi-ethnic State needs to ensure that there is trust among the various communities.[99]

Broadly in line with the Brazilian case, and in difference to German law, French law defines the freedom of expression more narrowly. Accordingly, strong, emotional statements against migrants entail criminal charges. In one case, a person was convicted who spoke about immigrants in French suburbs as "the idle people looking with hatred at the rare intruders with a white skin", even though she did not incite to violence.[100] In another case, the authors of a book entitled *La Colonization de l'Europe. Discours vrai sur l'immigration et l'islam* were convicted by a domestic court.[101] The book dealt with the alleged incompatibility of European and Muslim societies and defended the right of

[96] *Ibid.*, paras 32 & 33.

[97] *Wunsiedel*, (2009) 1 BvR 2150/08.

[98] *Ellwanger*, (2004) Supremo Tribunal Federal, HC 82.424-2-RS. DJU.

[99] M. N. Machado, 'Liberdade de expressão e restrições de conteúdo análise do caso Ellwanger em diálogo com o pensamento de Celso Lafer', 931 *Revista dos Tribunais* (2013), 159.

[100] Paris Court of Appeals, 17 June 1974, cited after R. Errera, 'In Defence of Civility: Racial Incitement and Group Libel in French Law', in S. Coliver (ed), *Striking a Balance* (1992), 144, 151.

[101] See U. Belavusau, 'A *Dernier Cri* from Strasbourg: An Ever Formidable Challenge of Hate Speech (Soulas & Others v. France, Leroy v. France, Balsyte-lideikiene v. Lithuania)', 16 *European Public Law* (2010), 373, 375.

European citizens to preserve their identity. The case went up to the ECtHR. In its *Soulas* Judgment, the Court recognized that integration is a long and politically contested process which puts domestic courts in a better position to designate the limits of free speech. It therefore applied a wide margin of appreciation when deciding on the limits to free speech necessary in a democratic society. The Court considered it as its task to verify whether France had made reasonable use of its margin.[102] In doing so, the Court took note of the social and political measures France had taken in order to integrate its large number of immigrants.[103] In light of that, it took no issue with a conviction for statements which accused young muslims of "ritual rapes of European women".[104]

The ECtHR has in fact left States considerable leeway in the application of the freedom of expression guaranteed in Art. 10 of the ECHR. Its case law emphasizes that States need to grant free speech to the extent "necessary in a democratic society".[105] This includes the spread of offending, scandalizing or disturbing ideas.[106] However, Art. 17 ECHR prohibits the abuse of convention rights. Although the ECtHR does not always refer to this provision, its case law establishes criteria allowing States to impose relatively far-reaching restrictions upon the freedom of expression.[107] In the *Jerslid* Case, the ECtHR recognized the significance of CERD for determining the limits of free speech.[108] But in contrast to CERD, its decisions show much sensitivity for the particular historic, social and political context of the statement in question as well as for the manner in which it was made.[109] Thus, while the ECtHR accepted the conviction by French courts in the *Soulas* Judgment,[110] it held in the case of *Perincek* that Switzerland enjoyed only a limited margin of appreciation given that the controversial statement had relevance for a debate of public interest. It

102 *Soulas et al. v. France*, ECtHR Application No. 15948/03, Judgment of 10 July 2008, paras 32 & 33 (French only).

103 *Ibid.*, para. 37.

104 *Ibid.*, para. 43.

105 J. Frowein, 'Art. 10 EMRK', in J. Frowein & W. Peukert (eds), *Europäische Menschenrechtskonvention Kommentar*, 3rd ed. (2009), para. 31.

106 *Ibid.*, para. 27. Accordingly, Frowein argues that only statements could be prohibited which do not contribute to the political debate. *Ibid.*, para. 33.

107 Overview: Hong, *supra* note 87; R. Grote & N. Wenzel, *Konkordanz-Kommentar* (2006), Ch. 18, No. 106 *et seq*.

108 *Jersild v. Denmark*, ECtHR Application No., Judgment of 23 September 1994, para. 30.

109 Instructive overview on the ECtHR's jurisprudence in *Perincek v. Switzerland*, ECtHR Application No. 27510/08, Grand Chamber, Judgment of 15 October 2015, paras 205-207.

110 ECtHR, *Soulas et al. v. France*, supra note 102.

decided that Switzerland had not shown a pressing social need for a conviction.[111] From the viewpoint of someone who considers uniform standards as desirable, the ECtHR might appear as applying inconsistent criteria.[112] But from a more pluralistic angle, its decisions appear as context-sensitive uses of the margin of appreciation.

In contrast to the ECtHR, the UN Human Rights Committee, the body responsible for the implementation of the ICCPR, does not grant its States parties any kind of margin of appreciation as regards exceptions to free speech.[113] Notable textual differences between Arts. 19 and 20 ICCPR and Art. 10 ECHR might justify the different approach. The ICCPR defines the range of possible exceptions to the freedom of speech much more narrowly,[114] broadly reflecting the legal situation in the United States.

All in all, this short comparative overview shows that the legal reaction to allegations of racially discriminating speech depends to a considerable extent on the historic, social and political situation of the country concerned. From the viewpoint of an international court or tribunal, it is difficult to generalize about the limits of free speech that might be necessary and reasonable for a particular society. Criminal sanctions, including convictions for crimes against humanity,[115] appear as more appropriate in some contexts than in others, depending on how they might augment or reduce the risk of emotional counter-reactions on the part of the perpetrator and his or her sympathizers. The ECtHR has taken account of this by applying the margin of appreciation doctrine in its decisions on hate speech. At the same time, its case law shows that a margin of appreciation does not necessarily amount to lower overall standards. All this militates in favor of a margin of appreciation for the application of CERD.

D. Conclusion: Strengthening the CERD Committee Through a Margin of Appreciation Doctrine

Let us summarize: the CERD Committee's neglect for free speech as well as for the context of the particular case in its reasoning on the merits led us to

[111] ECtHR, *Perincek v. Switzerland*, Application No. 27510/08, Second Chamber, Judgment of 17 December 2013, paras 112, 129. This was confirmed by the Grand Chamber in its judgment of 15 October 2015, para. 241.

[112] Hong, *supra* note 87, 108.

[113] UN Human Rights Committee, *General Comment no. 34 concerning Article 19 of the Covenant*, UN Doc CCPR/C/GC/34, 21 July 2011, para. 9.

[114] See above Nowak, *CCPR Commentary*, *supra* note 37 and accompanying text.

[115] Cf. *Prosecutor v. Ruggiu*, Judgment, ICTR-97-32-I, 1 June 2000, paras 20-24.

question the legitimacy of its decisions. Given that they constitute exercises of international public authority similar to the judgments of international courts or tribunals, one can argue that they should respect similar standards which ensure their legitimacy. One such standard is the margin of appreciation doctrine, which the ECtHR applies in cases where there is no consent among its member States about restrictions of human rights. As the survey of domestic and international law shows, the relationship between racially discriminating statements and free speech is such a case. The CERD Committee would therefore be well advised to grant States a margin of appreciation: first, with respect to the role they assign to free speech in the identification of racially discriminating speech; second, with respect to the consequences they attach to such acts.

The legitimacy that a margin of appreciation doctrine might provide to the CERD Committee is not an end in itself. A wave of migrants and refugees and a corresponding wave of xenophobic sentiment in quickly pluralizing societies make a strong CERD Committee more necessary than ever. At the same time, the margin of appreciation might provide the CERD Committee with a tool commensurate to the difficulty of its task. The population of States struck by increasing xenophobia, whether caused by rising numbers of migrants and refugees or not, might not necessarily welcome decisions of international institutions which try to teach them a lesson without taking their particular context into account, including the reactions of its government to public statements that might be racially discriminating. This calls for a more pluralistic approach as suggested by the margin of appreciation doctrine.

Regarding the *Sarrazin* Case, the Committee might have acted politically and legally imprudent by narrowly advising Germany to review its criminal sanctions. If one considers the purpose of the Convention, criminal law is and can be only one means of fighting against racial discrimination. Certainly, the CERD is quite explicit in requiring States to adopt legislation criminalizing racial discrimination. And the CERD Committee is correct in emphasizing that the Convention requires member States to also enforce those laws. But there is nothing in the text preventing States parties from handling the application of criminal sanctions with care with a view to their potentially counterproductive consequences, and of course within the limits set by their constitutions. Instead of replacing the assessment of the State party and its competent authorities with its own, the CERD Committee should take a step back and focus on the reaction of the State party.[116]

[116] Cf. CERD, *Individual Opinion of Vasquez*, *supra* note 34, para. 12; A. Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (2009), 173.

This does not mean that the CERD Committee should have acquitted Germany in the *Sarrazin* Case. One might very well argue that Germany failed in identifying Sarrazin as one of the 'intellectual arsonists' responsible for the current backlash in some parts of German society against migrants, refugees and everything that looks foreign. But this would have required a different line of argument on the part of the CERD Committee. It would have had to assess whether the German authorities were sufficiently aware of such risks, and whether their assessment of such risks appeared flawed under the given circumstances. The margin of appreciation does not give States parties leeway to hide and do nothing. It only leaves them a choice of the appropriate means for fighting racial discrimination effectively.