

**Written Contribution**  
**by the**  
**German Institute for Human Rights**  
**to the Thematic Discussion of the Committee on the Elimination of Racial Discrimination on**  
**Racist Hate Speech (August 28<sup>th</sup>, 2012)**

The German Institute for Human Rights, the A-status National Human Rights Institution of Germany, commends the Committee on the Elimination of Racial Discrimination on its decision to hold a thematic discussion on racist hate speech, and submits the following contribution. It focuses on the “dissemination of ideas based on racial superiority or hatred” that is to be criminally sanctioned under Article 4 (a) ICERD.

### **I. General Observations**

As the Committee emphasized, Article 4 constitutes a cornerstone of the International Convention on the Elimination of Racial Discrimination (ICERD; “the Convention”), whose importance has even increased since the adoption of the Convention.<sup>1</sup> Contemporary forms of racism differ considerably from those that motivated the UN Member States to draft the Convention. Moreover, new forms of communication, particularly new media, have been developed, increasing the ways in which racist ideas as well as incitement to racist hatred and to racist violence can be spread and reinforced.

Article 4 is exceptional for a human rights treaty in that it obliges States Parties to penalize certain acts, including certain types of speech. This provision, which is partly echoed in Article 20 of the International Covenant on Civil and Political Rights (ICCPR), is an emanation of the States’ obligation to protect. It concretizes this obligation and thus limits the States’ freedom of choosing the appropriate means of protecting their population against racism by private individuals. However, in light of the fundamental role of freedom of expression in a democratic society that is respectful of human rights, States have found it difficult to enact laws that meet the requirements of Article 4, or they have proved reluctant to approach the issue at all. Conversely, there is a danger of States misusing Article 4 (a) so as to censor communication or to impose sanctions on media and journalists.

By clarifying the object and purpose of Article 4, the concepts employed, and the relationship between this provision and freedom of expression, the Committee would help ensure the effective implementation of ICERD by States Parties and prevent undue encroachments

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<sup>1</sup> CERD General Recommendation XV on article 4 of the Convention (1993), para. 1.

upon freedom of expression by States. Therefore, the German Institute for Human Rights would welcome a decision of the Committee to draft a General Recommendation on Racist Hate Speech.

## **II. Scope of Article 4 (a) with Respect to Racist Hate Speech**

Among the conduct that Article 4 (a) requires States Parties to penalize there are three categories of misconduct referring to speech:

- (i) Dissemination of ideas based upon racial superiority or hatred;
- (ii) Incitement to racial discrimination;
- (iii) Incitement to acts of violence against any race or group of persons of another colour or ethnic origin.

These three categories comprise the Convention's concept of "racist hate speech".<sup>2</sup> Beyond racist hate speech, there are the two other categories of misconduct whose penalization Article 4 (a) requires, *viz.* "the provision of any assistance to racist activities, including the financing thereof." These categories need not necessarily be dealt with in a General Recommendation on Racist Hate Speech.

All three categories of racist hate speech in Article 4 (a) presuppose racist concepts on the part of the speaker - either that s/he spreads (i) ideas based upon racial superiority or hatred, or (ii) incites to racist discrimination or (iii) that s/he incites to violence against a "race". Only the latter two forms of racist hate speech cover statements that are intended to cause the addressees to perform racist act and thus violate the human rights of others. In contrast, the first category - dissemination of ideas based upon racial superiority or hatred - focuses on the acts that increase the existence of racist ideas in a society. It thus is a provision that focuses on the dangerousness of ideas. In a democratic society based on the respect for human rights, such restrictions to freedom of expression must be closely scrutinized because, in principle, ideas should not be banned but should be put to public debate where they can be countered and their dangerousness exposed. For this reason, "dissemination of ideas based on racial superiority or hatred" needs to be interpreted in a way that ensures its compatibility with freedom of expression. Hence, the present contribution will focus on this category of hate speech covered by Article 4(a).

## **III. Racist Ideas within the Scope of Article 4 (a)**

As research has shown and as the Committee and other UN human rights bodies as well as the UN Member States have recognized, "race" is not a biological fact, but a social construction.<sup>3</sup> Thus, what Article 4 (a) refers to when it uses the term "racial" is not a (perceived) affiliation to a pre-existing "race", but to the construction of a group based on racist concepts. However, as the work of the Committee proves, many States have not fully taken up this understanding in their legislation or through their courts. For example, law

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<sup>2</sup> There is no globally accepted concept of "hate speech". The Council of Ministers of the Council of Europe, for example, applies a possibly more restrictive understanding in its Recommendation 97(20) on hate speech as "covering all forms of expression which spread, incite, promote, or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based intolerance, including intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin".

<sup>3</sup> See also: Declaration of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (Durban Declaration), of 8 September 2001, 31<sup>st</sup> preamble paragraph; and paragraph 7.

enforcement authorities and criminal courts in Germany tend to base their assessment of the racist motive on the perpetrator's affiliation with a right-wing extremist association,<sup>4</sup> because of their close connection with "race"-based national-socialist ideology. Thus, they fail to take into account that contemporary forms of racism do not use the concept of "race" ("racism without race"). Through a clarification of the concept of racist ideas falling within the scope of Article 4 (a), a General Recommendation on Racist Hate Speech would help States fully implement their obligations under this provision.

A narrow understanding of racism adopted by some States has been criticized by the Committee as well as the UN Special Rapporteur on Racism and the European Commission on Racism and Intolerance of the Council of Europe (ECRI).<sup>5</sup> According to them, racist ideas in the 21st century do not have to be based on biological theories on descent and heredity. It is even less necessary that they terminologically segregate persons according to "race". Contemporary racist lines of argumentation are typically based on attributions according to different "cultures", "nations", "ethnicities" or religious affiliation. Again these attributions are constructions because the persons thus targeted are alleged to constitute a homogenous group whose individual members are attributed certain characteristics in a blanket or generalized way. Racist ideas are thus characterized by their calling into question the individuality of human beings and thus also their individual dignity.

Such categorizations of persons reach the threshold of racist hate speech under Article 4 (a) when they are associated with the hierarchization and abasement of particular groups constructed in the way described above. They negate that all persons are equal in dignity and rights (Article 1 UDHR), and deny them the respect as an autonomous individual that forms the basis for human interaction. This constitutes an assault on the very foundation of human rights, and is thus of particular severity. It excludes human beings from society and from societal interaction.

A clear outline of racism in a General Recommendation on Racist Hate Speech would also reduce the risk of States' misusing Article 4 (a) to impose disproportionate limitations on the freedom of expression, inter alia preventing States from including blasphemy laws or criticism of religious or other group leaders into the prohibition of racist hate speech. Such prohibitions must be justified under Article 19 (3) ICCPR ("respect of the reputation of others") or Article

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<sup>4</sup> European Commission on Racism and Intolerance of the Council of Europe (ECRI), ECRI Report on Germany (fourth monitoring cycle), published 26 May 2009, paras. 79 et seq., especially para. 91; Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Githu Muigai, Mission to Germany AHRC/14/43/Add.2 of 22 February 2010, paras. 32-36; Human Rights Watch, Die Reaktion des Staates auf „Hasskriminalität“ in Deutschland, published 9 December 2011, [http://www.hrw.org/sites/default/files/related\\_material/2011%2012%2007%20HateCrimesPaper\\_German.pdf](http://www.hrw.org/sites/default/files/related_material/2011%2012%2007%20HateCrimesPaper_German.pdf).

<sup>5</sup> See, e.g., CERD, Concluding observations of the Committee on the Elimination of Racial Discrimination, Germany, CERD/C/DEU/CO/18 of 22 September 2008, para. 15, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/441/50/PDF/G0844150.pdf?OpenElement>; Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Githu Muigai, Mission to Germany AHRC/14/43/Add.2 of 22 February 2010, para.77(a), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/116/24/PDF/G1011624.pdf?OpenElement>. ECRI, General Policy Recommendation No 7 on national legislation to combat racism and racial discrimination, Strasbourg, 13 December 2002, [http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation\\_N7/ecri03-8%20recommendation%20nr%207.pdf](http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N7/ecri03-8%20recommendation%20nr%207.pdf); ECRI, ECRI Report on Germany (fourth monitoring cycle), published 26 May 2009, for example Summary, p. 8 and nos 79 et seq., [http://hudoc.ecri.coe.int/XMLEcri/ENGLISH/Cycle\\_04/04\\_CbC\\_eng/DEU-CbC-IV-2009-019-ENG.pdf](http://hudoc.ecri.coe.int/XMLEcri/ENGLISH/Cycle_04/04_CbC_eng/DEU-CbC-IV-2009-019-ENG.pdf).

20 (2) ICCPR (“advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence”).<sup>6</sup>

Such clarification of the concept of racist ideas and racist hate speech in Article 4 (a) should not preclude employing a broader understanding of racism in the scope of the Convention as a whole. Social research has shown that a full understanding of racism in state and society should not concentrate on individual ideas and attitudes and forms of intentional discrimination only. It must take into account that racism is a process, in which power and dominance play a crucial role and that consists not only of individual attitudes and discriminatory behaviour, but is deeply embedded in socio-legal structures.

#### **IV. Racist Hate Speech and Freedom of Expression**

As Article 4 (a) obliges States to restrict freedom of expression in cases of racist hate speech, it is particularly necessary to explain the relationship between the prohibition against racism and freedom of speech. Explaining the rationale of Article 4 (a) is not only necessary to give States a clear guideline as to whether a penal norm that limits freedom of expression is impermissible or is required. It also helps law enforcement authorities, judges, human rights activists, civil society, and the media identify overbroad laws or judgments in violation of Article 19 ICCPR, and it also helps them understand and defend limitations of speech pursuant to Article 4 (a). As can be witnessed in many States, criticism of racist hate speech is frequently discounted in the public debate as mere “political correctness” or as stifling a “robust debate”. Such characterizations often are based on the erroneous view that freedom of expression cannot be restricted or should, under no circumstance, be restricted.

On a theoretical level, the relationship between freedom of expression and the prohibition of racist hate speech pursuant to Article 4 (a) can be conceptualized in two ways: Either racist hate speech does not fall within the scope of application of the freedom of expression, or Article 4 (a) codifies a specific justification for restricting freedom of opinion. In view of the importance of free speech, the German Institute for Human Rights suggest adopting the second approach because it permits a more nuanced understanding and is in line with the approach of other human bodies on the international and the regional levels.<sup>7</sup> Moreover, Article 4 itself refers to freedom of expression when it calls for “due regard to the (...) rights set forth in Article 5 of this Convention.”

##### **1. Freedom of expression**

Freedom of expression is a pivotal human right; it is the prerequisite for the free development of the individual, the foundation of a free and democratic society, and it ensures the promotion and protection of all human rights. This has been stressed by the UN Human Rights Committee,<sup>8</sup> the UN Human Rights Council,<sup>9</sup> the UN Special Rapporteur on freedom

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<sup>6</sup> Human Rights Committee, General Comment No 34 (Article 19: Freedom of opinion and expression) of 21 July 2011, UN Doc CCPR/C/GC/34, para. 48.

<sup>7</sup> Human Rights Committee, General Comment No 34 (Article 19: Freedom of opinion and expression) of 21 July 2011, UN Doc CCPR/C/GC/34, para. 11. For an in-depth study of the case law of the ECtHR see Anne Weber, *Manual on Hate Speech*, 2009.

<sup>8</sup> Human Rights Committee, General Comment No 34 (Article 19: Freedom of opinion and expression) of 21 July 2011, UN Doc CCPR/C/GC/34, para. 2.

<sup>9</sup> Resolution 16/4 (Freedom of opinion and expression: mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression) of 8 April 2011, 2<sup>nd</sup> preamble paragraph.

of opinion and expression,<sup>10</sup> and the European Court of Human Rights (ECtHR)<sup>11</sup>. Consequently, the scope of application of the freedom of expression, in principle, must be interpreted broadly; high requirements must be put on restrictions of the freedom of expression and on the application of the principle of proportionality.

The Human Rights Committee as well as the European Court of Human Rights emphasized that freedom of expression extends to opinions irrespective of their well-foundedness, their value or validity.<sup>12</sup> This applies to “deeply disturbing” opinions or, according to the famous words of the European Court of Human Rights, to opinions that “offend, shock or disturb”.<sup>13</sup> They are covered by the freedom of expression because this is required by “pluralism, tolerance and broadmindedness without which there is no ‘democratic society’”.<sup>14</sup>

Any limitation of freedom of expression must be justified by a legitimate aim and must be proportionate.<sup>15</sup> Penal sanctions warrant particularly scrutiny because of their chilling effect. Article 4(a) ICERD already contains an important element of the proportionality test for a restriction of the right to freedom of expression: Criminalization is necessary for the protection against the racist statements that are comprised by this norm. Therefore, and despite its possible chilling effect, it constitutes a proportionate restriction of the right to freedom of expression. What remains to be determined is whether the particular sanctions provided for by a State’s criminal code are proportionate.

Similarly, the European Court of Human Rights has held consistently that tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralist society and that sanctioning all forms of expression which spread, incite, promote or justify hatred based on intolerance is not a violation of freedom of expression, provided that any ‘formalities’, ‘conditions’, ‘restrictions’ or ‘penalties’ imposed are proportionate to the legitimate aim pursued.<sup>16</sup>

Protecting freedom of expression is particularly important when a statement was made within the context of a political debate, especially when the author is a politician and speaks during an election campaign.<sup>17</sup> This reflects the importance of free debate within a democratic society. However, this does not mean that politicians are free to spread racist ideas.<sup>18</sup> On the contrary, the special responsibilities that politicians have in the fight against racism have

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<sup>10</sup> Promotion and protection of the right to freedom of opinion and expression, Report of the Special Rapporteur, Mr. Abid Hussain, pursuant to Commission on Human Rights resolution 1993/45, UN Doc E/CN.4/1995/32, para. 14.

<sup>11</sup> European Court of Human Rights, judgment of 26 November 1991, *Observer and Guardian v. The United Kingdom*, application no. 13585/88, para. 59.

<sup>12</sup> Human Rights Committee, General Comment No 34 (Article 19: Freedom of opinion and expression) of 21 July 2011, UN Doc CCPR/C/GC/34, para. 11, with reference to CCPR, *Ross v. Canada*, Communication No 736/97, View of 18 October 2000, CCPR/C/70/D/736/1997; European Court of Human Rights, judgment of 7 December 1976, *Handyside v. The United Kingdom*, application no. 5493/72, para. 49.

<sup>13</sup> Judgment of 7 December 1976, *Handyside v. The United Kingdom*, application no. 5493/72, para. 49.

<sup>14</sup> *Ibid.*

<sup>15</sup> Human Rights Committee, General Comment No 34 (Article 19: Freedom of opinion and expression) of 21 July 2011, UN Doc CCPR/C/GC/34, para. 11.

<sup>16</sup> European Court of Human Rights, judgment of 4 December 2003, *Gündüz v. Turkey*, application no 35071/97, para. 40.

<sup>17</sup> European Court of Human Rights, *Erbakan v. Turkey*, judgment of 6 July 2006, application no 59495/00, para. 55.

<sup>18</sup> *Id.*, para. 64.

been emphasized by the European Court of Human Rights<sup>19</sup> and the European Commission against Racism and Intolerance (ECRI).<sup>20</sup>

Article 4 (a) ICERD not only justifies, but requires restrictions of the dissemination of “ideas based on racial superiority or hatred”, provided the sanctions are proportionate and the other criteria of Article 19 (3) ICCPR are met. In order to provide States with clear guidance, a General Recommendation should explain the rationale behind each category of racist hate speech under Article 4 (a); this includes clarifying the term “dissemination of racist ideas”.

## **2. Racist Hate Speech through the Dissemination of Racist Ideas - Article 4 (a) (i)**

### **a) General**

Article 4(a) (i) requires penalizing the “dissemination of all ideas based upon racial superiority or hatred.” CERD considers this prohibition compatible with freedom of expression because the exercise of this right carries with it special duties and responsibilities, as specified in Article 29 (2) UDHR. It argues that the “obligation not to disseminate racist ideas is of particular importance” among these duties and responsibilities.<sup>21</sup> In a General Recommendation, this explanation could be made more precise so as to prevent governments from extending the understanding of the “special duties and responsibilities” in a way to stifle free expression. Moreover, a more detailed explanation would counter any argument that the Committee’s reasoning is circular.

The restriction of freedom of expression with respect to racist statements is based on the important premise of human rights protection, which is codified in the ICCPR (Article 5(1): the prohibition of abusing human rights. This understanding was explicitly resorted to with respect to penalizing racist statements within the framework of the European Convention on Human Rights.<sup>22</sup> “Ideas based upon racial superiority or hatred” fundamentally deny the equality of all human beings by depriving those affected of the right to live as equals within the State community. Thereby, these racist ideas reject the very foundation of human rights as already expressed in Article 1 UDHR: the equality of all human beings in dignity and rights, which can be guaranteed only if all treat each other as equals. ICERD refers to the Universal Declaration of Human Rights already at the beginning of its preamble. Thus, anyone who spreads racist ideas as defined in Article 4(a) (i) ICERD aims at the abolishment of the foundation of internationally guaranteed human rights while abusing his or her right to freedom of expression.

Providing criminal sanctions for statements that disseminate racist ideas based on racial superiority or hatred further takes into account the effects and consequences of such assaults on members of groups marginalized in society. Racist verbal attacks are part and consequence of societal processes in which power plays a crucial role. They are a manifestation of dominance, they aim at segregating society by way of discrimination and

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<sup>19</sup> *Id.*, para. 64.

<sup>20</sup> ECRI Declaration of 17 March 2005 on the use of racist, antisemitic and xenophobic elements in political discourse, [http://www.coe.int/t/dghl/monitoring/ecri/activities/14-Public\\_Presentation\\_Paris\\_2005/Presentation2005\\_Paris\\_Declaration\\_en.asp#TopOfPage](http://www.coe.int/t/dghl/monitoring/ecri/activities/14-Public_Presentation_Paris_2005/Presentation2005_Paris_Declaration_en.asp#TopOfPage).

<sup>21</sup> CERD General Recommendation XV on article 4 of the Convention (1993), para. 4.

<sup>22</sup> European Commission on Human Rights, *Glimmerveen and Hagenbeek v. The Netherlands*, applications nos. 8348/78 and 8406/78, Decisions and Reports (DR) 18, p. 187; and *Künen v. Germany*, application no. 12194/86, Decisions and Reports (DR) 56, p. 205; European Court of Human Rights, judgment of 23 September 1994, *Jersild v. Denmark*, application no. 15890/89, para. 35.

exclusion of marginalized groups, and they seek to (further) exclude these groups from political and social participation by denying their equality in dignity and rights.

The experience with racism, on which ICERD is based as well, has shown that a racist discourse in a society can dangerously spread and undermine a polity which is based on human rights and which is committed to human rights protection, if States do not effectively counter it. This is the reason why Article 4 (a) (i) ICERD requires States to enact and enforce penal laws directed against the first stage of this process: the distribution of ideas based upon racial superiority or hatred.

It is before this background, that the term “ideas based upon racial superiority or hatred” should be interpreted: They do not cover every statement pertaining to alleged racial groups. What they do cover are statements endorsing racist ideas in a way that they prepare the ground for ostracizing and excluding the persons targeted. For this reason, the Camden Principles rightly consider that the “promotion, by different communities, of a positive sense of group identity does not constitute hate speech.”<sup>23</sup>

A further important safeguard to prevent an overbroad interpretation of a law that penalizes the dissemination of racist ideas is that the criminal court must determine beyond reasonable doubt that a statement is based on the idea of racial superiority or hatred. In doing so, the court must satisfy itself that the statement permits no other interpretation. The high importance of freedom of expression requires abstaining from prosecution of statements that leave room for a different interpretation than that its author embraces these racist ideas.

#### **b) Penalizing the Denial of the Shoah (Holocaust) as Racist Hate Speech**

A particular category of laws against racist hate speech are laws that penalize the denial of the existence of the Shoah. Their justification is not and cannot be the protection of a historical truth because, as the Human Rights Committee stated,

“[I]aws that penalize the expression of opinions about historical facts are incompatible with the obligations that the Covenant imposes on States parties in relation to the respect for freedom of opinion and expression. The Covenant does not permit general prohibition of expressions of an erroneous opinion or an incorrect interpretation of past events.”<sup>24</sup>

Read out of context, this statement in General Comment No. 34 can be misunderstood or misconstrued as expressing an absolute bar to laws penalizing the denial of the Shoah. In fact, persons denying the Shoah have started in Germany to make this argument. For this reason, it would be advisable for CERD to clarify the issue in a General Recommendation on racist hate speech.

Such laws are compatible with human rights if they are justified under Article 19 (3) or Article 20 ICCPR. This is why the Committee, in its General Comment No. 34 cited above, continues by stating that “[r]estrictions on the right of freedom of opinion should (...) not go beyond what

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<sup>23</sup> The Camden Principles on Freedom of Expression and Equality, launched at the Durban Review Conference on 23, April 2009, <http://www.article19.org/data/files/medialibrary/1214/Camden-Principles-ENGLISH-web.pdf>, Principle 12.1 (iv).

<sup>24</sup> Human Rights Committee, General Comment No 34 (Article 19: Freedom of opinion and expression) of 21 July 2011, UN Doc CCPR/C/GC/34, para. 11, with reference to *Faurisson v. France*, Communication No. 550/93, View of 8 November 1996, CCPR/C/58/D/550/199, and to concluding observations on Hungary (CCPR/C/HUN/CO/5) para. 19.

is permitted in paragraph 3 or required under article 20.”<sup>25</sup> Applying this standard in a case concerning a law penalizing the denial of the Shoah, the Human Rights Committee held that

“[s]ince the statements made by the author, read in their full context, were of a nature as to raise or strengthen anti-semitic feelings, the restriction served the respect of the Jewish community to live free from fear of an atmosphere of anti-semitism. The Committee therefore concludes that the restriction of the author’s freedom of expression was permissible under article 19, paragraph 3 (a), of the Covenant.”<sup>26</sup>

The Human Rights Committee considered the law in question necessary because it had been enacted to combat racism and anti-semitism and because the Committee found no reason to contest the characterization of “the denial of the existence of the Holocaust as the principal vehicle for anti-semitism.”<sup>27</sup> Thus, the central justification of the law is the protection of the rights of individuals to be free from a type of racism, viz. anti-semitism, as an ideology that instills profound fear in the members of the group targeted.

Consequently, penalizing the denial of a genocide can only be justified if the State shows that this denial transmits a racist ideology and hence constitutes hate speech under Article 4 (a) or a restriction of freedom of opinion under Article 19 (3) ICCPR. Similarly, the Camden Principles suggest that “States should prohibit the condoning or denying of crimes of genocide, crimes against humanity and war crimes, but only where such statements constitute hate speech as defined by Principle 12.1.”

### **3. Racist Hate Speech and the Role of Media**

The media play a particularly important role in respect to hate speech. CERD, the UN Special Rapporteur on Racism and other international bodies have emphasized the positive role of the media in building a society built upon the mutual respect of all human beings as equal in dignity and rights. Through critical reporting, they contribute to exposing racist ideas or incitement to racist hatred or racist violence and thus to point public attention to areas or problems where political action and societal reactions become urgent.

However, in fulfilling their role of “public watchdog”<sup>28</sup> and reporting on racist statements, policies, or events, the media may risk to be considered as themselves inciting to violence or to racist hatred or as distributing ideas based on racial superiority or hatred that fall under Article 4 (a) CERD. The threat of criminal prosecution thus may have a chilling effect on journalists and may prevent them from fulfilling their important societal task. Therefore, they must, in principle, remain free to report on such events as they deem appropriate.<sup>29</sup> Criminal prosecution only comes into play when a journalist merely serves as a multiplier for racist statements. The determining question is whether the statement appears “from an objective point of view to have as its purpose the propagation of racist views or ideas.”<sup>30</sup> To avoid this

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<sup>25</sup> *Id.*

<sup>26</sup> Human Rights Committee, Communication No. 550/199, *Faurisson v. France*, view of 8 November 1996, CCPR/C/58/D/550/199, para. 9.6.

<sup>27</sup> *Id.*, at para. 9.7.

<sup>28</sup> European Court of Human Rights, judgment of 26 November 1991, *The Observer and Guardian v. The United Kingdom*, application no. 13585/88, para. 59.

<sup>29</sup> European Court of Human Rights, judgment of 23 September 1994, *Jersild v. Denmark*, application no. 15890/89, para. 31, with reference to *Oberschlick v. Austria*, judgment of 23 May 1991, application no. 11662/85, para. 57.

<sup>30</sup> European Court of Human Rights, judgment of 23 September 1994, *Jersild v. Denmark*, application no. 15890/89, para. 31.

result, a journalist can contextualize the statement, s/he can comments upon it and expose the racist contents as such.<sup>31</sup>

#### V. Making Article 4 (a) Effective

As the UN Special Rapporteur on Racism pointed out in his most recent report,

“measures taken to sanction racism, racial discrimination, xenophobia and related intolerance (...) cannot be effective unless other equally robust preventive measures and mechanisms are developed and implemented.”<sup>32</sup>

It is for this reason, that the chapeau of Article 4 contains the undertaking of States Parties “to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such [sc. racist] discrimination” (emphasis added). A General Recommendation on Article 4 (a) ICERD should, therefore, also emphasize the intrinsic link between this provision and Article 6 ICERD, as well as the need for human rights education for law enforcement authorities, including judges, and on the important role of the media in preventing racism.

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<sup>31</sup> European Court of Human Rights, *Jersild v. Denmark*, judgment of 23 September 1994, application no. 15890/89, para. 34.

<sup>32</sup> Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mutuma Ruteere, of 15 May 2012, A/HRC/20/33, para. 40.