

*Combating racially motivated crime and hate crimes through legislation*

Roundtable discussion

Organised by:

Irish Human Rights Commission &  
Amnesty International (Irish Section)

in association with the

National Consultative Committee on Racism and Interculturalism

Dublin Castle - 8 June 2005

“Council of Europe approaches and legal developments under the European  
Convention on Human Rights”

**Tarlach McGonagle**  
Institute for Information Law (IViR),  
University of Amsterdam

E-mail: [T.McGonagle@uva.nl](mailto:T.McGonagle@uva.nl)

## Outline of paper<sup>1</sup>

- Outline of paper
- Definitional divergence and resultant dilemmas
- A multi-pronged approach
- Centrality of the ECHR
  - Values and virtues
  - (Perceived) competition/conflict between rights
  - Freedom of expression
  - Non-discrimination/pro-equality
  - Consideration of the broader picture of international law
- Relevance of other Council of Europe treaties
- The European Commission against Racism and Intolerance (ECRI)
- Role of the Committee of Ministers
- Conclusions

The purpose of this paper is to provide an overview and brief analysis of the Council of Europe's approaches to the struggle against racism, including relevant legal developments under the European Convention on Human Rights. As such, it is intended as a general background piece or reference document for the thematically more specific discussion of "Combating racially motivated crime and hate crimes through legislation".

The paper examines the varying levels of prioritisation attached to the goal of eliminating racism by different branches of the Council of Europe, as well as concrete efforts to translate those senses of prioritisation into practice. It also examines how the Council's anti-racist objectives and strategies relate to objectives and initiatives designed to advance other human rights.

The paper focuses first and foremost on the European Convention on Human Rights and seeks to identify and explore pertinent, developing trends in the jurisprudence of the European Court of Human Rights. Particular attention is also reserved for the relevance of other Council of Europe treaties and the work of both the European Commission against Racism and Intolerance and the Committee of Ministers.

At the very outset, however, it is necessary to give preliminary consideration to the fact that not all anti-racist initiatives share the same point of definitional departure. While there is, in practice, a lot of overlap between the definitions of racism and racial discrimination espoused in various legal and political texts at the international and national levels, it is desirable to ascertain whether any discrepancies between leading definitions are significant, or merely semantic in character.

---

<sup>1</sup> The author is very grateful to Prof. Kevin Boyle, Human Rights Centre, University of Essex, and Donncha O'Connell, Law Faculty, National University of Ireland, Galway, for interesting discussions on relevant topics. However, the views expressed in this paper are personal to the author and any errors or omissions are his responsibility alone.

## Definitional divergence and resultant dilemmas

In this section, it is not the intention to explore variant definitions of racism or racial discrimination in an exhaustive - or even in a comprehensive - manner. Two definitions have been selected to illustrate certain (apparent) divergences of approach in this regard. The first is Article 1 of the International Convention for the Elimination of All forms of Racial Discrimination (ICERD).<sup>2</sup> It reads:

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

The second can be found, *inter alia*, in General Policy Recommendation No. 7 of the European Commission against Racism and Intolerance (ECRI),<sup>3</sup> according to which:

‘racism’ shall mean the belief that a ground such as race, colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or group of persons, or the notion of superiority of a person or group of persons.<sup>4</sup>

The latter definition is based on a broader range of explicitly enumerated grounds than, say, that of ICERD, in order to reflect the full scope of ECRI’s mandate, which is to combat racism, anti-Semitism, xenophobia and intolerance. ECRI explains that it “considers that these concepts, which vary over time, nowadays cover manifestations targeting persons or groups of persons, on grounds such as race, colour, religion, language, nationality and national and ethnic origin”.<sup>5</sup> The definition is deliberately open-ended, “thereby allowing it to evolve with society”.<sup>6</sup>

In a similar vein, the expansive nature of ICERD’s definition of “racial discrimination” should not be overlooked or downplayed either. Its explicitly enumerated grounds may be fewer in number than in the ECRI working definition of racism, but their scope is wide:

Colour tackles discrimination based on physical criteria. ‘Descent’, a term unique to ICERD, has been interpreted to include the notion of caste and denotes social origin, while ‘national or ethnic origin’ refers to prejudice that stems from linguistic, cultural, and historical differences. The definition is thus not limited to objective physical characteristics. It also

---

<sup>2</sup> Adopted by UN General Assembly Resolution 2106 (XX) of 21 December 1965, entry into force: 4 January 1969.

<sup>3</sup> ECRI general policy recommendation No. 7 on national legislation to combat racism and racial discrimination, adopted on 13 December 2002. See further, *infra*.

<sup>4</sup> See also, the Preface to the *Annual report on ECRI’s activities covering the period from 1 January to 31 December 2004*, Doc. CRI (2005) 36, June 2005, p. 5.

<sup>5</sup> Explanatory Memorandum to ECRI general policy recommendation no. 7 on national legislation to combat racism and racial discrimination, para. 6.

<sup>6</sup> *Ibid.*

captures subjective as well as socio-economic variables connected with racism. The definition is capable of addressing past, present, and future expressions of racism [...]<sup>7</sup>

The usefulness of such definitional flexibility is self-evident: it facilitates adaptability of approach and it implicitly recognises racism for the Hydra that it is. It is important to realise that racism is constantly reinventing itself and constantly finding new ways of manifesting itself. This realisation underlies the finding of the UN Human Rights Committee in the case of *Faurisson v. France*,<sup>8</sup> a case which arose from the conviction of Robert Faurisson, an academic, for the contestation of crimes against humanity (i.e., Holocaust denial). The UN Human Rights Committee accepted the French authorities' submission that revisionist theses amounting to the denial of a universally-recognised historical reality constitute the principal [contemporary] vehicle for the dissemination of anti-Semitic views.<sup>9</sup>

The dilemma facing policy- and law-makers, of course, is whether to opt for an etymologically-oriented definition of racism, or a more purposive, expansive one. Morally compelling arguments can certainly be made for treating analogous offences in an identical or at least in a consistent way, particularly if primacy is given to the perspective of the victim in any examination of the harmful effects of such offences.<sup>10</sup> Nevertheless, the legal and political reality is that the same consensus has not been brokered at the global level for countering racist discrimination and intolerance on the one hand, and (for example) religious discrimination and intolerance on the other hand. ICERD is an international convention that binds all States which ratify it; as regards religion, support at global level could only be mustered for a Declaration – the Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief.<sup>11</sup> As such, this is a weaker international instrument which is not legally binding on States. Moreover, its drafting proved to be a very protracted affair.<sup>12</sup>

---

<sup>7</sup> [footnotes omitted] Kevin Boyle & Anneliese Baldaccini, "A Critical Evaluation of International Human Rights Approaches to Racism", in Sandra Fredman, Ed., *Discrimination and Human Rights: The Case of Racism* (Oxford University Press, New York, 2001), pp. 135-191, at 152.

<sup>8</sup> Communication No. 550/1993, Views of the United Nations Human Rights Committee of 8 November 1996.

<sup>9</sup> *Ibid.*, para. 9.7. See further, Tarlach McGonagle, "Wresting (Racial) Equality from Tolerance of Hate Speech", (2001) 23 *Dublin University Law Journal* (ns) 21, pp. 21-54, at 30.

<sup>10</sup> See generally: Mari J. Matsuda, Charles R. Lawrence III, Richard Delgado & Kimberlè Williams Crenshaw, Eds., *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Westview Press, USA, 1993); Richard Delgado & Jean Stefancic, Eds., *Critical Race Theory: the cutting edge* (2<sup>nd</sup> Edition) (Temple University Press, USA, 2000); Richard Delgado & Jean Stefancic, *Understanding Words That Wound* (Westview Press, USA, 2004).

<sup>11</sup> Proclaimed by United Nations General Assembly Resolution 36/55 of 25 November 1981.

<sup>12</sup> See further: Kevin Boyle, "Religious Intolerance and the Incitement of Hatred", in Sandra Coliver, Ed., *Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination* (ARTICLE 19/University of Essex, United Kingdom, 1992), pp. 61-71, at 64; Karl Josef Partsch, "Racial Speech and Human Rights: Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination", in *ibid.*, pp. 21-28; Michael Banton, *International action against racial discrimination* (1996); Michael Banton, *The International Politics of Race* (Polity Press/Blackwell Publishers Ltd., United Kingdom, 2002), pp. 46-66; Natan Lerner, *Group Rights and Discrimination in International Law* (2<sup>nd</sup> Edition) (Kluwer Law International, United Kingdom, 2003), pp. 49-59; Natan Lerner, "The Nature and Minimum Standards of Freedom of Religion and Belief", 2000 B.Y.U.L. Rev. 905.

The apparent anomaly in the current state of affairs under international law arises out of the differential treatment of “interlinked injustices”<sup>13</sup> and has accordingly drawn criticism. As argued by one commentator, “the claim of public international law to condemn racism but not to condemn religious intolerance reflects an incoherent and self-defeating conception of what the evil of racism is”.<sup>14</sup>

The definitional dilemma becomes particularly vexed concerning religions with a “powerful ethnic tinge”.<sup>15</sup> As posited by Conor Gearty, “[i]n such situations, the concept of religious intolerance must stand or fall apart from ethnicity in a way that is not altogether unproblematic”.<sup>16</sup> The Additional Protocol to the Council of Europe’s Cybercrime Convention seeks to circumvent this dilemma by including in its definition of “racist and xenophobic material”, texts, images and other representations [...] “based on race, colour, descent or national or ethnic origin, *as well as religion if used as a pretext for any of these factors*”.<sup>17</sup>

At the national level, the full title of the Irish Prohibition of Incitement to Hatred Act, 1989, is “An Act to prohibit incitement to hatred on account of race, religion, nationality or sexual orientation”. In the ‘Interpretation’ section of the Act, the notion of “hatred” is defined as “hatred against a group of persons in the State or elsewhere on account of their race, colour, nationality, religion, ethnic or national origins, membership of the travelling community or sexual orientation”. Thus, the focus of the Act is broader than its summary title might suggest, and it certainly goes beyond a strictly construed definition of racism.

Despite its summary and incomplete nature, the foregoing discussion can be instructive in the context of the Council of Europe’s anti-racism strategies. The Council does not have its own cast-iron definition of racism, racial discrimination, racial intolerance, or hatred in a broad sense of the term, which applies across the board to all of its activities. As such, it is useful for it to be conscious of the import of various definitional discrepancies between existing international legal and political instruments, even if most of them do by and large cover the “core mischiefs at which the struggle against racism is aimed”.<sup>18</sup>

---

<sup>13</sup> David A.J. Richards, *Free Speech and the Politics of Identity*, *Free Speech and the Politics of Identity* (Oxford University Press, New York, 1999), p. 93. In Richards’ original text, the phrase is used in relation to racism, sexism and homophobia.

<sup>14</sup> *Ibid.*, p. 179.

<sup>15</sup> Conor A. Gearty, “The Internal and External ‘Other’ in the Union Legal Order: Racism, Religious Intolerance and Xenophobia in Europe”, in Philip Alston *et al.*, Eds., *The EU and Human Rights* (Oxford University Press, New York, 1999), pp. 327-358, at 337.

<sup>16</sup> *Ibid.*

<sup>17</sup> Article 2(1) (emphasis added).

<sup>18</sup> Kevin Boyle & Anneliese Baldaccini, “A Critical Evaluation of International Human Rights Approaches to Racism”, *op. cit.*, at 152.

## A multi-pronged approach

The Council to Europe has adopted a multi-pronged approach to combat racism.<sup>19</sup> It is an approach that could perhaps be likened to a collaborative sculpting project, with many different artisans chipping away at the same big lump of unhewn rock. The sculptors tend to demonstrate varying levels of skill, experience, and enthusiasm for the venture, not to mention varying senses of a common purpose or design. No fore(wo)man has been vested with authority to coordinate or oversee the collective efforts of the project.

This approach strives for synergies and one of its foremost achievements has been to fight racism in its manifold manifestations. A more centralised or generalised approach would arguably have been unable to grapple with the specifics of the various causes, forms and manifestations of racism in the way that diversified strategies can.

## Centrality of the ECHR

### *Values and virtues*

The (European) Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR)<sup>20</sup> is the veritable bedrock of human rights protection in Europe. The ECHR espouses a particular conception of democracy, asserting in its Preamble that fundamental freedoms are best maintained *inter alia* by “an effective political democracy”. The entire Convention pivots on the twin values of pluralism and tolerance, as is amply attested to by the jurisprudence of the European Court of Human Rights.

Just as pluralism – and by extension, democracy – presuppose the absence of discrimination and the existence of effective equality, so too are they predicated on the existence of tolerance. Pluralism demands a certain balancing of majority/minority interests,<sup>21</sup> leading to the tolerance and democratic accommodation of minority interests. This has been recognised by the European Court of Human Rights:

Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.<sup>22</sup>

---

<sup>19</sup> For an overview of the Council of Europe’s activities in this domain, see: *Activities of the Council of Europe with Relevance to combating Racism and Intolerance*, European Commission against Racism and Intolerance, Doc. CRI (2004) 7, February 2004.

<sup>20</sup> Adopted on 4 November 1950, ETS No. 5, entry into force: 3 September 1953.

<sup>21</sup> See, for example: *Plattform “Ärzte für das Leben” v. Austria*, Judgment of the European Court of Human Rights of 25 May 1988; *Otto-Preminger-Institut v. Austria*, Judgment of the European Court of Human Rights of 23 August 1994; *Wingrove v. the United Kingdom*, Judgment of the European Court of Human Rights of 22 October 1996.

<sup>22</sup> *Young, James & Webster v. United Kingdom*, Judgment of the European Court of Human Rights of 13 August 1981, Series A No. 44 p. 25, para. 63; *Chassagnou & Others v. France*, Judgment of the European Court of Human Rights of 29 April 1999, para. 112.

However, solutions as to how potentially competing interests ought to be balanced are not always self-evident. Pluralism entails diversity and divergence, which in turn mean that the balancing exercise can often involve a certain amount of antagonism.<sup>23</sup> This is all part of the democratic experiment;<sup>24</sup> the cut and thrust of debate that is free, robust and uninhibited.<sup>25</sup> As stated in the *Handyside* case, information and ideas which “offend, shock or disturb the State or any sector of the population” must be allowed to circulate in order to safeguard the “pluralism, tolerance and broadmindedness” that underpin “democratic society”.<sup>26</sup>

*(Perceived) competition/conflict between rights*

In light of this conception of democracy, it is crucial to examine not only how the struggle against racism relates to the right to freedom of expression, but also its linkage to the non-discrimination/pro-equality agenda. Such contextualisations of the struggle against racism are by no means arbitrary. Indeed, one can even speak of the right to freedom of expression and the right not to be subjected to unjust discrimination as being “structurally connected”.<sup>27</sup>

It is also very important to re-emphasise the universal, indivisible, interdependent and interrelated nature of human rights, as affirmed *inter alia* in the Vienna Declaration of 1993.<sup>28</sup> This is all the more important given that the right to freedom of expression is often pitted against the right not to be subjected to racism. As will be demonstrated *infra*, the relationship between these two rights is not necessarily oppositional: in actual fact, their interplay is much more complex than is usually recognised.<sup>29</sup> This paper will now

---

<sup>23</sup> *Kokkinakis v. Greece*, Judgment of the European Court of Human Rights of 19 April 1993, para. 33; *Metropolitan Church of Bessarabia and others v. Moldova*, Judgment of the European Court of Human Rights of 13 December 2001, para. 123; *Hasan & Chaush v. Bulgaria*, Judgment of the European Court of Human Rights of 26 October 2000, para. 78; *Serif v. Greece*, Judgment of the European Court of Human Rights of 14 December 1999, para. 49; *Agga v. Greece*, Judgment of the European Court of Human Rights of 17 October 2002, paras. 53, 56; *Manoussakis v. Greece*, Judgment of the European Court of Human Rights of 29 August 1996, para. 44; *Supreme Holy Council of the Muslim Community v. Bulgaria*, Judgment of the European Court of Human Rights of 16 December 2004, para. 93.

<sup>24</sup> Paraphrasal of Holmes, J., dissenting, in *Abrams v US*, 250 US 616 (1919), at p. 630, when he described both the US Constitutional enterprise and life itself as being experimental.

<sup>25</sup> Paraphrasal of the United States Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>26</sup> *Handyside v. the United Kingdom*, Judgment of the European Court of Human Rights of 7 December 1976, Series A, No. 24, para. 49.

<sup>27</sup> David A.J. Richards, *Free Speech and the Politics of Identity*, *op. cit.*, p. 211.

<sup>28</sup> World Conference on Human Rights – The Vienna Declaration and Programme of Action (1993). See, in particular, Article 5 of the Declaration, which reads: “All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.”

<sup>29</sup> See further: Tarlach McGonagle, “Wresting (Racial) Equality from Tolerance of Hate Speech”, *op. cit.*; Kevin Boyle, “Overview of a Dilemma: Censorship versus Racism”, in Sandra Coliver, Ed., *Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination*, *op. cit.*, pp. 1-8, esp. at 7.

proceed to give, in turn, an overview of how the European Court of Human Rights has dealt with both of these crucial linkages.

### *Freedom of expression*

Article 10, ECHR, reads as follows:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

In its seminal ruling in *Handyside v. the United Kingdom*, the European Court of Human Rights affirmed that freedom of expression “is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there would be no democratic society.”<sup>30</sup> The question of whether, or to what extent, hate speech should be protected is particularly contentious.

The European Court of Human Rights first examined the interaction between freedom of expression and relevant provisions of ICERD in *Jersild v. Denmark*.<sup>31</sup> In this case, also known as the “Greenjackets” case, the Court found that the conviction of a journalist - for aiding and abetting in the dissemination of racist views in a televised interview he had conducted with members of an extreme right-wing group (“the Greenjackets”) – amounted to a violation of Article 10, ECHR. The Court’s consideration of Article 10, ECHR, in light of ICERD (and in particular Article 4 thereof)<sup>32</sup> was, however, regrettably summary and it failed to grapple with the substantive issues involved. It merely stated that it is not for the Court to interpret the “due regard” clause in Article 4, ICERD, but that “its interpretation of Article 10 of the European Convention in the present case is

---

<sup>30</sup> *Handyside v. the United Kingdom*, *op. cit.*, para. 49.

<sup>31</sup> *Jersild v. Denmark*, Judgment of the European Court of Human Rights of 23 September 1994, Series A, No. 298.

<sup>32</sup> Article 4: “States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with *due regard* to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention [...]” (emphasis added). Note that the rights enumerated in Article 5 include, “[T]he right to freedom of opinion and expression” (Article 5(d)(viii)) and “[T]he right to freedom of peaceful assembly and association” (Article 5(d)(ix)).

compatible with Denmark's obligations under the UN Convention".<sup>33</sup> The Court held that Jersild's conviction was not "necessary in a democratic society" and that it therefore violated his rights under Article 10, ECHR. This was largely due to considerations of context in (news) reporting and the importance of journalistic autonomy for the functioning of democracy. The positive obligations imposed on States Parties to ICERD by Article 4 were not deemed to have been contravened.<sup>34</sup>

In a long line of cases, the Court has very seldom wavered in its refusal to grant racist speech or hate speech, especially when it touches on Holocaust denial, any protection under Article 10 ECHR.<sup>35</sup> Cases involving racist and hate speech are routinely held to be manifestly unfounded under Article 17 ('Prohibition of abuse of rights'), ECHR, and thus declared inadmissible. Article 17 was designed as an in-built safety mechanism to prevent the Convention from being subverted by those whose motivation is contrary to its letter and spirit.<sup>36</sup> It reads:

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

Elements of Nazi ideology or activities inspired by Nazism have figured strongly in the bulk of the aforementioned batch of inadmissibility decisions. The extent to which Nazism is incompatible with the ECHR can be gauged from the oft-quoted pronouncement of the European Commission for Human Rights in *H., W., P. and K. v. Austria*: "National Socialism is a totalitarian doctrine incompatible with democracy and human rights and [that] its adherents undoubtedly pursue aims of the kind referred to in Article 17."<sup>37</sup> The Court took its most trenchant stance against hate speech to date in the *Garaudy v. France* case,<sup>38</sup> which involved a challenge to the French Courts' conviction of the applicant for the denial of crimes against humanity, the publication of racially defamatory statements and incitement to racial hatred. The European Court of Human Rights held that:

[...]There can be no doubt that denying the reality of clearly established historical facts, such as the Holocaust, as the applicant does in his book, does not constitute historical research akin to a quest for the truth. The aim and the result of that approach are completely different, the real purpose being to rehabilitate the National-Socialist regime and, as a consequence, accuse the victims themselves of falsifying history. Denying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incitement to

---

<sup>33</sup> *Jersild v. Denmark*, *op. cit.*, para. 30. See also, paras. 21, 28, 29, 31.

<sup>34</sup> Also of note here is the divisiveness of the judgment: the Court found in favour of a violation of Article 10 by twelve votes to seven.

<sup>35</sup> See further, Tarlach McGonagle, "Wresting (Racial) Equality from Tolerance of Hate Speech", *op. cit.*

<sup>36</sup> See further, Tarlach McGonagle, "Protection of Human Dignity, Distribution of Racist Content (Hate Speech)", in Susanne Nikoltchev, Ed., *Co-Regulation of the Media in Europe*, *IRIS Special* (European Audiovisual Observatory, Strasbourg, 2003), pp. 43-46, at 46.

<sup>37</sup> Inadmissibility decision of the European Commission of Human Rights, Appn. No. 12774/87, 62 DR (1989) 216, at pp. 220/1.

<sup>38</sup> *Garaudy v. France*, Inadmissibility decision of the European Court of Human Rights (Fourth Section) of 24 June 2003, Application No. 65831/01.

hatred of them. The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order. Such acts are incompatible with democracy and human rights because they infringe the rights of others. Its proponents indisputably have designs that fall into the category of aims prohibited by Article 17 of the Convention.

The Court considers that the main content and general tenor of the applicant's book, and thus its aim, are markedly revisionist and therefore run counter to the fundamental values of the Convention, as expressed in its Preamble, namely justice and peace. [...]<sup>39</sup>

A more problematic case, perhaps, as far as the boundaries of freedom of expression are concerned, was *Lehideux and Isorni v. France*.<sup>40</sup> The case concerned an advertisement in a national newspaper, *Le Monde*, as part of a campaign for the rehabilitation of the memory of General Philippe Pétain: the advertisement presented the General's life in a selective and positive manner, with certain dark chapters of the General's life being conspicuous by the absence of any reference thereto. In this case, the European Court again confirmed that protection would be withheld from remarks attacking the core of the Convention's values.<sup>41</sup> However, the impugned advertisement (as it did not amount to Holocaust denial or any other type of expression that would have prevented it from wriggling through the meshes of the Article 17 net) was held to be one of a class of polemical publications entitled to protection under Article 10.<sup>42</sup>

The above-cited judicial pronouncements have, both individually and collectively, usefully helped to clarify the status of performative speech which is offensive, but does not necessarily amount to one of the various forms of advocacy or incitement defined in international human rights treaties.<sup>43</sup> As the relevant corpus of case-law from the European Court of Human Rights continues to grow, so too does the illumination of this rather grey area. *Gündüz v. Turkey*, for instance, was one of the more recent cases to contribute to our understanding of where relevant lines are likely to be drawn by the Court. The case arose out of the participation of the applicant – the leader of an Islamic sect – in a live studio debate on topics such as women's clothing, Islam, secularism and democracy. The applicant was convicted by the Turkish Courts for incitement to hatred and hostility on the basis of a distinction founded on religion. However, the European Court of Human Rights held:

[...] Admittedly, there is no doubt that, like any other remark directed against the Convention's underlying values, expressions that seek to spread, incite or justify hatred based on intolerance, including religious intolerance, do not enjoy the protection afforded by Article 10 of the Convention. However, the Court considers that the mere fact of defending sharia, without calling for violence to establish it, cannot be regarded as "hate speech". Moreover, the applicant's case should be seen in a very particular context. Firstly, as has already been noted [...], the aim of the programme in question was to present the sect of

---

<sup>39</sup> *Ibid.*, p. 23 of the official English translation of excerpts from the decision.

<sup>40</sup> *Lehideux & Isorni v. France*, 23 September 1998, Reports of Judgments and Decisions, 1998-VII.

<sup>41</sup> *Ibid.*, para. 53. See also *Jersild v. Denmark*, *op. cit.*, para. 35.

<sup>42</sup> *Ibid.*, paras. 52, 55.

<sup>43</sup> See, in particular, Article 20 of the International Covenant on Civil and Political Rights, which reads:

"1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

which the applicant was the leader; secondly, the applicant's extremist views were already known and had been discussed in the public arena and, in particular, were counterbalanced by the intervention of the other participants in the programme; and lastly, they were expressed in the course of a pluralistic debate in which the applicant was actively taking part. Accordingly, the Court considers that in the instant case the need for the restriction in issue has not been established convincingly.<sup>44</sup>

### *Non-discrimination/pro-equality*

Like Article 1 (Obligation to respect human rights), ECHR,<sup>45</sup> Article 14 is informed by the principle of equal enjoyment of rights by all. Entitled, 'Prohibition of discrimination', it enumerates a non-exhaustive list of impermissible grounds for discrimination:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

No free-standing right to non-discrimination was provided for in the original text of the European Convention. Article 14 prohibits discrimination merely in relation to "the rights and freedoms set forth" elsewhere in the Convention. Thus, whenever it is invoked, Article 14 must be pleaded in conjunction with other (substantive) rights guaranteed elsewhere in the ECHR. It can only be said to be autonomous to the extent that its application does not presuppose a breach of one or more of the other substantive provisions of the Convention or its Protocols.<sup>46</sup> However, it has been noted that "there seems to be a degree of uncertainty as to when and why the Court actually proceeds to an examination of Article 14 violations".<sup>47</sup> Protocol No. 12 to the Convention was therefore devised in order to address the fact that Article 14, ECHR, is essentially accessory in character.<sup>48</sup> The pith of the Protocol is 'Article 1 – General prohibition of discrimination', which reads:

(1) The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

---

<sup>44</sup> *Gündüz v. Turkey*, Judgment of the European Court of Human Rights (First Section) of 4 December 2003, para. 51.

<sup>45</sup> Article 1, ECHR, reads: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

<sup>46</sup> *Thlimmenos v. Greece*, Judgment of the European Court of Human Rights of 6 April 2000, para. 40. See also, *ibid.*, para. 44, and *Cha'are Ve Tsedek v. France*, Judgment of the European Court of Human Rights of 27 June 2000, para. 86.

<sup>47</sup> Sia Spiliopoulou Akermark, "The Limits of Pluralism – Recent Jurisprudence of the European Court of Human Rights with Regard to Minorities: Does the Prohibition of Discrimination Add Anything?", *Journal on Ethnopolitics and Minority Issues in Europe* (No. 3, 2002), p. 21 of article (note: *JEMIE* is an online journal and the page number cited here refers to the page in the article itself rather than a page number in the journal, as such), available at: <http://www.ecmi.de/jemie/>.

<sup>48</sup> Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 177.

(2) No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

Having obtained the requisite 10 ratifications, Protocol No. 12 entered into force on 1 April 2005.<sup>49</sup> It is still too early to tell what its exact impact will be at the European level and also in the domestic legal orders of Member States,<sup>50</sup> but it is likely to eventually prove portentous.

A purely literal reading of Article 14 suggests that the provision is restrictive in scope. However, some commentators have argued that a more teleological reading of the provision belies its apparently limited character.<sup>51</sup> A key argument in this connection is that following the far-reaching precedent set in *Thlimmenos v. Greece*,<sup>52</sup> Article 14 can be activated when the grounds for acts of (direct or indirect) discrimination – and not merely the actual acts of discrimination – are considered to come “within the ambit” of another ECHR right.<sup>53</sup>

In *Thlimmenos*, the applicant was refused membership of the Greek Institute of Chartered Accountants (thereby in effect barring him from entry into the accounting profession) because of a previous conviction for a serious crime. The serious crime in question was insubordination for having refused to wear the military uniform at a time of general mobilisation. As a Jehovah’s Witness - and therefore a committed pacifist, the applicant had refused to wear the uniform because of his religious beliefs. He was nonetheless convicted and subsequently served a prison sentence. The European Court of Human Rights was of the view that the “set of facts” involved fell “within the ambit” of a Convention provision (Article 9 - Freedom of thought, conscience and religion), thereby rendering Article 14 applicable.<sup>54</sup> It found the imposition of a further sanction on the applicant as a result of his initial conviction to be disproportionate and that “there existed no objective and reasonable justification for not treating the applicant differently from other persons convicted of a serious crime”.<sup>55</sup> The Court concluded that there had been a

---

<sup>49</sup> To date (27 June 2005), it has been ratified by 11 Council of Europe Member States: Albania, Armenia, Bosnia and Herzegovina, Croatia, Cyprus, Finland, Georgia, the former Yugoslav Republic of Macedonia, the Netherlands, San Marino and Serbia and Montenegro. Ireland signed the Protocol on 4 November 2000, but has yet to ratify it.

<sup>50</sup> As regards the Irish situation: Protocol No. 12 is not one of the Protocols to the ECHR listed in the Schedules to the European Convention on Human Rights Act 2003. In consequence, the Irish Act would have to be amended in order to enable further effect to be given to Protocol No. 12 in Ireland. Pending Ireland’s ratification of the Protocol and the relevant amendment of domestic legislation, the Irish courts could – but would not be obliged to - consider the (as yet non-existent) jurisprudence of the European Court of Human Rights dealing specifically with the Protocol.

<sup>51</sup> See, in particular: Robert Wintemute, “‘Within the Ambit’: How Big is the ‘Gap’ in Article 14 European Convention of Human Rights? Part 1”, E.H.R.L.R. 2004, 4, 366-382; Robert Wintemute, “Filling the Article 14 ‘Gap’: Government Ratification and Judicial Control of Protocol No. 12 ECHR: Part 2”, E.H.R.L.R. 2004, 5, 484-499.

<sup>52</sup> *Op. cit.*

<sup>53</sup> See further, Robert Wintemute, “‘Within the Ambit’: How Big is the ‘Gap’ in Article 14 European Convention of Human Rights? Part 1”, *op. cit.*, at 372. Wintemute makes this point in terms of the denial of opportunity (as opposed to discrimination *tout court*, as above).

<sup>54</sup> *Thlimmenos v. Greece*, *op. cit.*, para. 42.

<sup>55</sup> *Ibid.*, para. 47.

violation of the Article 14 *juncto* Article 9, because of the respondent State's failure to introduce legislation with suitable exceptions to the rule preventing persons convicted of serious crimes from entering the profession of chartered accountants.

Some recent trends in case-law from Strasbourg would appear to bear out such a positive evaluation of Article 14's potential scope. Article 14 is increasingly being relied upon by persons belonging to minority groups seeking "[judicial] adjudication and redress"<sup>56</sup> of their complaints, and the resultant case-law has been described as "burgeoning",<sup>57</sup> if "equivocal".<sup>58</sup> There is certainly scope for building on existing precedents of members of minority groups seeking redress for their grievances by invoking the non-discrimination provision(s) of the ECHR. For example, the Court has noted that "[W]here a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group".<sup>59</sup>

Within this "burgeoning" jurisprudence, one can observe a growing tendency on the part of the Court to pay attention to the particular circumstances of specific minority groups, especially the Roma, Gypsies and Travellers.

In its Chamber judgment in *Nachova v. Bulgaria*,<sup>60</sup> in particular, the Court showed its resolve to take a tough stance against racism. It found a violation of Article 14 *juncto* Article 2 (Right to life), ECHR,<sup>61</sup> in its substantive and procedural respects, for the failure of the State Party to adequately investigate inferences of discrimination and racism on the part of its officials: (i) in the death - at their hands - of a member of the Roma community, and (ii) in the subsequent inquiry into his death. The Court referred to "the need to reassert continuously society's condemnation of racism and ethnic hatred and to maintain the confidence of minorities in the ability of the authorities to protect

---

<sup>56</sup> Gaetano Pentassuglia, "Monitoring Minority Rights in Europe: The Implementation Machinery of the Framework Convention for the Protection of National Minorities – With Special Reference to the Role of the Advisory Committee", 6 *International Journal on Minority and Group Rights* (1999), pp. 417-461, at 422.

<sup>57</sup> Geoff Gilbert, "The Burgeoning Minority Rights Jurisprudence of the European Court of Human Rights" 24 *Human Rights Quarterly* (2002) 736-780.

<sup>58</sup> Patrick Thornberry, "Treatment of Minority and Indigenous Issues in the European Convention on Human Rights" in Gudmundur Alfredsson & Maria Stavropoulou, Eds., *Justice Pending: Indigenous Peoples and Other Good Causes* (Martinus Nijhoff Publishers, The Hague, 2002), pp. 137-167, at 167.

<sup>59</sup> *Hugh Jordan v. the United Kingdom*, Judgment of the European Court of Human Rights (Third Section) of 4 May 2001, para. 154.

<sup>60</sup> *Nachova and others v. Bulgaria*, Judgment of the European Court of Human Rights (First Section) of 26 February 2004.

<sup>61</sup> "Article 2 – Right to life

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

a. in defence of any person from unlawful violence;  
b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;  
c. in action lawfully taken for the purpose of quelling a riot or insurrection."

them from the threat of racist violence”.<sup>62</sup> It then continued by trenchantly declaring that to treat “racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of human rights”.<sup>63</sup> The Chamber judgment in *Nachova* represented the culmination of a string of cases with similar facts, but which had less favourable results as regards the consideration of the ethnicity component.<sup>64</sup>

The Grand Chamber of the European Court of Human Rights – to which the case was subsequently referred by the Bulgarian Government – affirmed that “the authorities must use all available means to combat racism and racist violence, thereby reinforcing democracy’s vision of a society in which diversity is not perceived as a threat but as a source of its enrichment”.<sup>65</sup> However, unlike the Chamber, a majority of the Grand Chamber found no violation of Article 14 in conjunction with Article 2 in its substantive respect, i.e., in respect of allegations that the events leading to the fatal shootings under examination constituted an act of racial violence.<sup>66</sup> The Chamber had shifted the burden of proof - to establish “beyond reasonable doubt” whether racism was a causal factor in the shootings - to the respondent Government. The Grand Chamber dealt with this point at length:

The Grand Chamber reiterates that in certain circumstances, where the events lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of death of a person within their control in custody, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation of, in particular, the causes of the detained person's death (see *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII). The Grand Chamber cannot exclude the possibility that in certain cases of alleged discrimination it may require the respondent Government to disprove an arguable allegation of discrimination and – if they fail to do so – find a violation of Article 14 of the Convention on that basis. However, where it is alleged – as here – that a violent act was motivated by racial prejudice, such an approach would amount to requiring the respondent Government to prove the absence of a particular subjective attitude on the part of the person concerned. While in the legal systems of many countries proof of the discriminatory effect of a policy or decision will dispense with the need to prove intent in respect of alleged discrimination in employment or the provision of services, that approach is difficult to transpose to a case where it is alleged that an act of violence was racially motivated. The Grand Chamber, departing from the Chamber's approach, does not consider that the alleged failure of the

---

<sup>62</sup> *Ibid.*, para. 157.

<sup>63</sup> *Ibid.*, para. 158.

<sup>64</sup> In the earlier case of *Velikova v. Bulgaria*, the Court had also considered whether the ethnic origin of the victim's death, coupled with allegations of popular societal prejudice and the prevalence of racially-motivated violence against the Roma community (of which he had been a member), were relevant to the case. On that occasion, the Court held that on the basis of the evidence before it, it was unable “to conclude beyond reasonable doubt that Mr Tsonchev's death and the lack of a meaningful investigation into it were motivated by racial prejudice, as claimed by the applicant.” – para. 94, *Velikova v. Bulgaria*, Judgment of the European Court of Human Rights (Fourth Section) of 18 May 2000. See also: *Anguelova v. Bulgaria*, Judgment of the European Court of Human Rights of 2002-IV. In *Nachova*, the Court again adduced the seriousness of the arguments of racial motivation in the killing of two Roma in police custody in the *Velikova* and *Anguelova* cases: see para. 173.

<sup>65</sup> *Nachova and others v. Bulgaria*, Judgment of the European Court of Human Rights (Grand Chamber) of 6 July 2005, para. 145.

<sup>66</sup> See also in this connection the Joint partly dissenting opinion of Judges Casadevall, Hedigan, Mularoni, Fura-Sandström, Gyulumyan and Spielmann, annexed to *ibid.*

authorities to carry out an effective investigation into the alleged racist motive for the killing should shift the burden of proof to the respondent Government with regard to the alleged violation of Article 14 in conjunction with the substantive aspect of Article 2 of the Convention. [...] <sup>67</sup>

Although it did not find a violation of Article 14 *juncto* Article 2 in its substantive effect, the Grand Chamber did find a violation of its procedural effect. It thus endorsed the Chamber's finding that the State authorities had failed in their duty to "take all possible steps to investigate whether or not discrimination may have played a role in the events". <sup>68</sup>

In another string of cases, the Court has gradually become more sensitive to the plight of Gypsies in the UK. In *Buckley*, the Court held that "[T]he vulnerable position of gypsies as a minority means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases". <sup>69</sup> Building on this statement in *Chapman*, the Court ruled that there is consequently "a positive obligation imposed on the Contracting States by virtue of Article 8 <sup>70</sup> to facilitate the gypsy way of life". <sup>71</sup> Nevertheless, neither of those cases led to the finding of a violation of the Convention. <sup>72</sup> In *Connors*, however, the Court went one step further and - in its application of the same principles to the facts of the case at hand - did find a violation of Article 8, ECHR.

#### *Consideration of the broader picture of international law*

Another laudable development in the jurisprudence of the European Court of Human Rights that deserves special mention is its growing tendency to consider relevant international treaties other than the ECHR, as well as legal and quasi-legal instruments emanating from other Council of Europe bodies, in particular the Committee of Ministers. By routinely examining the approaches of different legal orders to specific matters, the Court has taken an important step towards more informed, outward-looking judicial decision-making.

---

<sup>67</sup> *Nachova and others v. Bulgaria*, Judgment of the European Court of Human Rights (Grand Chamber) of 6 July 2005, para. 157.

<sup>68</sup> *Ibid.*, para. 168.

<sup>69</sup> *Buckley v. United Kingdom*, Judgment of the European Court of Human Rights of 26 August 1996, para. 76, 80, 84. See also, *Connors v. United Kingdom*, Judgment of the European Court of Human Rights of 27 May 2004, para. 84.

<sup>70</sup> [author's footnote] Article 8 (Right to respect for private and family life), ECHR, reads:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.  
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

<sup>71</sup> *Chapman v. United Kingdom*, Judgment of the European Court of Human Rights of 18 January 2001, para. 96. See also, *Connors v. United Kingdom*, *op. cit.*, para. 84.

<sup>72</sup> See, however, the joint dissenting opinion of Judges Pastor Ridruejo, Bonello, Tulkens, Straznicka, Lorenzen, Fischbach and Casadevall in *Chapman*.

In *Jersild*, for example, the Court's reference to the respondent State's obligations under ICERD was a welcome *nouvelle démarche*. However, in the heel of the hunt, the Court merely pronounced that "Denmark's obligations under Article 10 [...] must be interpreted, to the extent possible, so as to be reconcilable with its obligations" under ICERD.<sup>73</sup> The Court was not prepared to interpret the "due regard" clause contained in Article 4, ICERD, and it balked at the opportunity to examine the complex interplay of issues involved in any alternative context. The interpretative guidance offered on that occasion was therefore of very limited value.

In recent years, the case-law of the Court has tended to systematically list relevant international instruments and then proceed to consider them to greater or lesser degrees. The Court is not bound to consult specific extraneous sources of international law, but the normalisation of the practice can be taken as evidence of the Court's heightened awareness of the ongoing evolution of international law and the benefits of comparative legal perspectives. Nowadays, the rubric, 'Relevant international and comparative law', has by and large come to constitute an integral feature of the Court's analysis.

In the *Nachova* judgment, for instance, the Grand Chamber of the Court refers to: the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials; the United Nations Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions; ICERD (including views of the Committee on the Elimination of All Forms of Racial Discrimination – the Convention's designated monitoring body); the Framework Convention for the Protection of National Minorities; the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (including decisions of the United Nations Committee against Torture); European Union Council Directive 2000/43/CE of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Council Directive 2000/78/CE of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; the European Commission Proposal for a Council Framework Decision on Combating Racism and Xenophobia, and a comparative overview of racist violence in 15 EU Member States,<sup>74</sup> published by the European Monitoring Centre on Racism and Xenophobia.<sup>75</sup> In recent years, the Court has patently become much more open to external sources of international law.

---

<sup>73</sup> *Jersild v. Denmark*, *op. cit.*, para. 30.

<sup>74</sup> *Racist Violence in 15 EU Member States: A Comparative Overview of Findings from the RAXEN National Focal Points Reports 2001-2004* (European Monitoring Centre on Racism and Xenophobia, Vienna, April 2005).

<sup>75</sup> See *Nachova and others v. Bulgaria*, Judgment of the European Court of Human Rights (Grand Chamber) of 6 July 2005, Section IV, paras. 71-82.

## Relevance of other Council of Europe treaties

Needless to say, a considerable number of Council of Europe treaties other than its flagship ECHR also contain important provisions designed to counter and prohibit racism. A few of the most relevant treaty provisions will now be considered.

### *Cybercrime Convention and Additional Protocol*

One of the fiercest criticisms of the Council of Europe's Convention on Cybercrime<sup>76</sup> in the latter stages of its drafting and subsequent to its opening for signature in November 2001 concerned its failure to address acts of racism and xenophobia committed through computer systems.<sup>77</sup> This *lacuna* was swiftly filled, however, by the drafting of an Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems.<sup>78</sup> The Additional Protocol concerns "acts", and not just "expression", although the latter is the type of act likely to receive the most attention. The Preamble to the Additional Protocol equates racist and xenophobic acts with "a violation of human rights and a threat to the rule of law and democratic stability". Also of importance for present purposes is the preambular recognition that the Protocol "is not intended to affect established principles relating to freedom of expression in national legal systems".

The goal of the Additional Protocol – to supplement the Convention as regards racist and xenophobic acts committed through computer systems (Article 1) – entails States Parties enacting appropriate legislation and ensuring that it is effectively enforced.<sup>79</sup> Article 2(1) of the Additional Protocol states that:

*"racist and xenophobic material"* means any written material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or violence, against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors.<sup>80</sup>

A major section of the Additional Protocol concerns measures to be taken at the national level. In this regard, States are obliged to "adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the following conduct: distributing, or otherwise making available, racist and xenophobic material to the public through a computer system" (Article 3(1)). Central to this definition is the presence of intent or

---

<sup>76</sup> ETS No. 185, entry into force: 1 July 2004.

<sup>77</sup> See, *inter alia*, Opinion No. 240 of the Parliamentary Assembly of the Council of Europe: "Draft additional protocol to the Convention on Cybercrime concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems", 27 September 2002.

<sup>78</sup> ETS No. 189, opened for signature on 28 January 2003.

<sup>79</sup> See further, Explanatory Report to the Additional Protocol to the Convention on cybercrime, concerning the criminalisation of acts of a racist or xenophobic nature committed through computer systems, adopted on 7 November 2002, para. 9.

<sup>80</sup> See further, *ibid.*, paras. 10-22.

*mens rea*, which is a basic requirement for the establishment of criminal law generally. The corollary of this provision is that Internet Service Providers (ISPs) should not attract criminal liability for the dissemination of impugned material where it has merely acted as conduit, cache or host for such material.<sup>81</sup>

States are, however, given certain leeway not to criminalise relevant acts where the material “advocates, promotes or incites discrimination that is not associated with hatred or violence, *provided that other effective remedies are available*” (Article 3(2): emphasis added). This constitutes an important gesture towards - and endorsement of - the efficacy and value of, for example, self- and co-regulatory complaints and sanctioning mechanisms.

Article 4 requires States Parties to criminalise the following conduct when it is committed “intentionally and without right”: “threatening, through a computer system, with the commission of a serious criminal offence as defined under its domestic law, (i) persons for the reason that they belong to a group, distinguished by race, colour, descent or national or ethnic origin, as well as religion, if used as a pretext for any of these factors, or (ii) a group of persons which is distinguished by any of these characteristics”. This spans both public and private communications, unlike the target of the similarly-worded Article 5 (‘Racist and xenophobic motivated insult’), which is only concerned with public communications. The conduct to be criminalised under Article 5 is: “insulting publicly, through a computer system, (i) persons for the reason that they belong to a group distinguished by race, colour, descent or national or ethnic origin, as well as religion, if used as a pretext for any of these factors; or (ii) a group of persons which is distinguished by any of these characteristics”.

The decision to cast the utterance of insults as a criminal act could potentially grate with the established Article 10 case-law of the European Court of Human Rights. The cause of concern here is that the definitional threshold for “insult” could be deemed to be rather low and thus potentially open to abuse. As discussed, *supra*, according to the seminal principle laid down in the *Handyside* case (and consistently followed by the Court ever since), freedom of expression extends “not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population”.

Article 6 of the Additional Protocol (‘Denial, gross minimisation, approval or justification of genocide or crimes against humanity’) introduces a truly novel focus into international human rights treaty law. For the first time, the scope of the offence has been extended to apply to genocides other than the Holocaust.

Whereas the Convention on Cybercrime entered into force on 1 July 2004, the Additional Protocol will only do so upon ratification by 5 States.<sup>82</sup>

---

<sup>81</sup> *Ibid.*, para. 25. Similarly, pursuant to Article 7 (‘Aiding and abetting’), ISPs are also shielded from liability in the outlined circumstances: *ibid.*, para. 45.

<sup>82</sup> To date (27 June 2005), it has been ratified by four States (Albania, Cyprus, Denmark and Slovenia).

### *European Convention on Transfrontier Television*

Article 7(1) of the European Convention on Transfrontier Television<sup>83</sup> insists that broadcast material must (in its presentation and content) “respect the dignity of the human being and the fundamental rights of others”. It also states that programmes shall not “give undue prominence to violence or be likely to incite to racial hatred”.

### *Framework Convention for the Protection of National Minorities*

The principles of non-discrimination and equality for minorities are enshrined in Article 4 of the Framework Convention for the Protection of National Minorities (FCNM).<sup>84</sup> However, Article 6, FCNM, goes further and requires States parties to actively pursue the objective of fostering a spirit of societal tolerance, thereby seeking to strike at the very roots of racism and racial discrimination. Article 6 reads:

1. The Parties shall encourage a spirit of tolerance and intercultural dialogue and take effective measures to promote mutual respect and understanding and co-operation among all persons living on their territory, irrespective of those persons' ethnic, cultural, linguistic or religious identity, in particular in the fields of education, culture and the media.
2. The Parties undertake to take appropriate measures to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity.

### *European Social Charter*

The (revised) European Social Charter<sup>85</sup> sets forth an extensive range of rights, spanning employment, vocational training, housing, health, social protection/security, dignity and material well-being, and free movement of persons.<sup>86</sup> The enjoyment of all rights enumerated in the Charter “shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status”.<sup>87</sup>

---

<sup>83</sup> ETS No. 132 (entry into force: 1 May 1993), as amended by a Protocol thereto, ETS No. 171, entry into force: 1 March 2002.

<sup>84</sup> ETS No. 157, entry into force: 1 February 1998.

<sup>85</sup> European Social Charter (revised), ETS No. 163, entry into force: 1 July 1999.

<sup>86</sup> See Part I; Part II (Articles 1-31), *ibid.*

<sup>87</sup> Part V, Article E – Non-discrimination, *ibid.*

## **The European Commission against Racism and Intolerance (ECRI)**

The Council of Europe's commitment to the advancement of the struggle against racism is by no means restricted to the ECHR and its other legal conventions.<sup>88</sup> The European Commission against Racism and Intolerance (ECRI), for instance, was established in 1993, and it was under its auspices that the preparations in Europe for the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (2001) were largely coordinated.

ECRI's work has three main focuses: its so-called "country-by-country" approach (which involves the ongoing monitoring of relevant issues in Member States<sup>89</sup>) and work on general themes (which includes the elaboration of general policy recommendations, as well as the collection and promotion of examples of "good practice" in the struggle against racism), and engagement with civil society. More specifically, its objectives have been listed as follows:

- to review member states' legislation, policies and other measures to combat racism, xenophobia, antisemitism and intolerance, and their effectiveness;
- to propose further action at local, national and European level;
- to formulate general policy recommendations to member states;
- to study international legal instruments applicable in the matter with a view to their reinforcement where appropriate.<sup>90</sup>

The following analysis will concentrate on ECRI's work on general themes.<sup>91</sup>

### *ECRI's general policy recommendations (GPRs)*

1. Combating racism, xenophobia, antisemitism and intolerance (1996)
2. Specialised bodies to combat racism, xenophobia, antisemitism and intolerance at national level (1997)
3. Combating racism and intolerance against Roma/Gypsies (1998)
4. National surveys on the experience and perception of discrimination and racism from the point of view of potential victims (1998)
5. Combating intolerance and discrimination against Muslims (2000)
6. Combating the dissemination of racist, xenophobic and antisemitic material [*sic*] via the Internet (2000)
7. On national legislation to combat racism and racial discrimination (2002)
8. On combating racism while fighting terrorism (2004)
9. On the fight against antisemitism (2004)

---

<sup>88</sup> Relevant texts issued by the Committee of Ministers and Parliamentary Assembly of the Council of Europe will be discussed throughout this thesis in appropriate contexts.

<sup>89</sup> This is a report-based system.

<sup>90</sup> Article 1, Appendix to Resolution (2002)8 Statute of the European Commission against Racism and Intolerance (ECRI).

<sup>91</sup> However, given the broader context of this roundtable discussion, careful attention should also be paid to ECRI's Second Report on Ireland, Doc. No. CRI (2002) 3, adopted on 22 June 2001.

(i) The most self-evident *forte* of ECRI's thematic approach is the opportunity it affords to ring-fence particular issues and grapple with their specifics in much more detail and with much more rigour than would be possible in general texts. Its focuses on the Internet and on the fight against terrorism are illustrative of such detailed treatment. However, its handling of these issues is not without flaws.

In GPR No. 6, the credibility of ECRI's single-minded pursuit of the goal of eliminating racist and xenophobic content online is compromised somewhat by its failure at any stage to acknowledge and weigh up relevant freedom of expression interests. In the preambular section, reference is made to GPR No. 1, and a supporting citation is provided, as follows:

Recalling that, in its general policy recommendation No 1, ECRI called on the governments of Council of Europe member States to ensure that national criminal, civil and administrative law expressly and specifically counters racism, xenophobia, antisemitism and intolerance

Stressing that, in the same recommendation, ECRI asked for the aforementioned law to provide in particular that oral, written, audio-visual expressions and other forms of expression, including the electronic media, inciting to hatred, discrimination or violence against racial, ethnic, national or religious groups or against their members on the grounds that they belong to such a group are legally categorised as a criminal offence, which should also cover the production, the distribution and the storage for distribution of the material in question;

This citation of GPR No. 1 in GPR No. 6 is, however, abridged, although no indication is given that this is the case. The omitted section of the full, original text is: "in conformity with the obligations assumed by States under relevant international instruments and in particular with Articles 10 and 11 of the European Convention on Human Rights, [oral, written, audio-visual expressions... are legally categorised as a criminal offence...]". This omission pushes the language employed in GPR No. 6 away from the wording of existing international law standards. And it does so to a significant extent. Articles 10 and 11 (Freedom of assembly and association), ECHR, both contain limiting – or so-called "claw-back" - clauses (which could easily – and are in practice – invoked to counter racist expression and activities); similar limitations govern the exercise of the rights to freedom of expression and association as guaranteed by the International Covenant on Civil and Political Rights; ICERD contains a crucial "due regard" clause, which requires a balancing of anti-racist objectives with other fundamental human rights. It is therefore very remiss of ECRI to fail to consider its own immediate objectives in the context of existing human rights as provided for by international law, especially the right to freedom of opinion, expression and information. This failure to square up to the potential interaction (and incidental friction) between rights is apparent in ECRI's other GPRs too.

While GPR No. 6 does acknowledge the Internet's potential for combating racism, *inter alia*, through self-regulatory measures; the transfrontier sharing of information concerning "human rights issues related to anti-discrimination", and the (further) development of educational and awareness-raising networks, the absence of references to freedom of expression and other pertinent rights conveys the impression of a document that is somewhat skewed in terms of the range of its sources of inspiration.

GPR No. 8,<sup>92</sup> which examines how anti-racism could be integrated into the fight against terrorism, also departs from the tried and trusted formulae of “hard” international law, albeit to a lesser extent. In its Preamble, it stresses that “the response to the threat of terrorism should not itself encroach upon the very values of freedom, democracy, justice, the rule of law, human rights and humanitarian law that it aims to safeguard, nor should it in any way weaken the protection and promotion of these values”. This recognition of relativism is welcome. However, it could also be submitted that this statement would have been all the more forceful if it had been more firmly rooted in international human rights treaties. The verbal phrase, “encroach upon”, is vague and invites subjective interpretation. If the statement had been aligned more closely to the language employed in specific provisions of, for example, the ECHR, or if it had clearly referred to such provisions, the degree of subjectivity would have been reduced. Closer conceptual and linguistic alignment with the ECHR would automatically point to a body of relevant judicial pronouncements, thereby offering authoritative interpretative clarity.

Furthermore, GPR No. 8 refers to “certain visible minorities”, a term which is not used in any (well-known) international (legal or political) instruments. The problems of defining and categorising minorities have proved vexed enough under international law,<sup>93</sup> without muddying the waters further by introducing novel terms of uncertain scope. Indeed, no multi-lateral European-, or global-level, treaty contains a definition of “minority”. For their part, the drafters of the FCNM conceded the impossibility of forging “a definition capable of mustering general support of all Council of Europe member States”.<sup>94</sup>

(ii) A second *forte* of ECRI’s thematic approach is that it enables more generous attention to be given to specific groups, for example those groups which have traditionally suffered - and continue to suffer - from racism and racist discrimination. This is illustrated by the GPRs focusing specifically on the Roma/Gypsies, Muslims and anti-Semitism. These policy recommendations are very important as they address the root causes of racism and not merely its concrete manifestations. As such, they look at situational and systemic discrimination and explore ways of countering and eliminating the same.

The three GPRs were not cast in the same mould: differences in prioritisation and language are easily detectable. Of itself, this is not a problem. Indeed, it is perfectly understandable that different groups could be best served by different emphases and approaches. However, one can also witness here a recurrence of the previously mentioned tendencies to resort to language that is inconsistent with that of codified international law

---

<sup>92</sup> ECRI general policy recommendation no. 8 on combating racism while fighting terrorism, adopted on 17 March 2004.

<sup>93</sup> See generally: Francesco Capotorti, *Study on the rights of persons belonging to ethnic, religious and linguistic minorities* (E/CN.4/Sub.2/384/Rev.1) (New York, United Nations, 1979), esp. p. 96, para. 568; John Packer, “Problems in Defining Minorities”, in Deirdre Fottrell and Bill Bowring, Eds., *Minority and Group Rights in the New Millennium* (The Netherlands, Kluwer Law International, 1999), pp. 223-273; Geoff Gilbert, “The Council of Europe and Minority Rights”, 18 *Human Rights Quarterly* (1996), pp. 160-189.

<sup>94</sup> Explanatory Report to the Framework Convention for the Protection of National Minorities, para. 12.

and the failure to adequately capture the underlying concepts of international law. In particular, insufficient consideration has been given to relevant interlinkage with other rights guaranteed by international law,<sup>95</sup> meaning that a hugely important and hugely relevant source of legal and philosophical inspiration has not been fully tapped into.

Another instance of digression from the beaten track of the terms of conventional international law again involves minorities. In GPR No. 5, which focuses on Muslims, ECRI makes certain recommendations to “the governments of member States, where Muslim communities *are settled and live in a minority situation* in their countries” (emphasis added). Again, “in a minority situation”, is a turn of phrase that is unfamiliar to leading international texts dealing with minority rights. However, the words, “are settled”, are much more problematic. Such a verbal construction would appear to limit the beneficiaries of the recommended measures to non-nomadic Muslim groups, a limitation which is arbitrary, morally indefensible and – it must be hoped – unintended by its drafters.

(iii) The third *forte* of the thematic approach to combating racism is that it has provided ECRI with a very useful means to address policy, institutional and methodological/procedural questions. In terms of policy, GPR Nos. 1 and 7 are the most important. GPR No. 1, entitled “Combating racism, xenophobia, antisemitism and intolerance”,<sup>96</sup> stands out among other GPRs for its ability to see the proverbial bigger picture. It recognises that international law is the backdrop to the struggle against racism and that the obligations imposed on States by international law must remain salient. GPR No. 7 – on national legislation to combat racism and racial discrimination<sup>97</sup> - is somewhat weaker in that regard, but its shortcomings are offset to some extent by its accompanying Explanatory Memorandum. This is the only GPR to have such an appendix, and the explanatory detail it provides on the recommendations concerning constitutional, civil and administrative, and criminal law, is to be welcomed.

As regards institutional questions, GPR No. 2 calls for the establishment of specialised bodies to combat racism at the national level and makes recommendations concerning the functions, responsibilities and working methods of such bodies. Finally, as regards methodological/procedural questions, GPR No. 4 is based on the premise that attitudinal information and experiential information are very important complements to statistical information. It therefore focuses on the need to gather and process information about how (potential) victims experience and perceive racism.

---

<sup>95</sup> GPR No. 3 does not explicitly refer to any specific provisions of the ECHR; GPR No. 5 mentions Articles 9 and 14, ECHR, but not, for example, Article 10; GPR No. 9 mentions Article 14, ECHR, Protocol No. 12 to the ECHR, and Article 10, ECHR (but this reference is not so much an affirmation of the right to freedom of expression as a reiteration of the fact that certain types of expression do not enjoy Article 10 protection).

<sup>96</sup> ECRI general policy recommendation no. 1: Combating racism, xenophobia, antisemitism and intolerance, adopted on 4 October 1996.

<sup>97</sup> ECRI general policy recommendation No. 7 on national legislation to combat racism and racial discrimination, adopted on 13 December 2002.

When assessing ECRI's thematic work at the macro level, two main points should be made. The first is gleaned from, or more accurately, is a summation of, the foregoing critique: the GPRs do not always reflect the letter and spirit of international law provisions. Nor do they always manage to achieve the desirable – and indeed necessary – linkage with other fundamental rights. The second point is that the thematic approach pursued by ECRI very importantly allows it to be responsive to changing agendas of racism and racial discrimination. By setting its own thematic agenda, ECRI has also managed to be pro-active in its decisions to pursue certain topics. This is conducive to fostering dynamic working methods.

(iv) By way of conclusion to this analysis of ECRI's thematic work, two other recent documents should also be briefly discussed: its Declaration on the use of racist, antisemitic and xenophobic elements in political discourse<sup>98</sup> and its Annual Report for 2004.

The Declaration begins by stating that tolerance and pluralism are cornerstones of democracy and that diversity “considerably enriches” democratic societies. Any affirmation of the right to freedom of expression is once again conspicuous by its absence. Given the thematic focus, this omission is regrettable: the counterbalancing and promotional qualities of free expression could usefully have been emphasised in the context of removing racist expression from political discussion.<sup>99</sup>

When stressing that “political parties can play an essential role in combating racism, by shaping and guiding public opinion in a positive fashion”, the Declaration appears to have missed a useful opportunity to pick up on - and thereby consolidate - precedents in ECRI's earlier thematic work. For instance, it could have explicitly referred to “the particular responsibility of political parties, opinion leaders and the media not to resort to racist or racially discriminatory activities or expressions” in contexts where terrorism fans racist flames.<sup>100</sup>

Like the examples documented, *supra*, ECRI's annual report for 2004 also fails to foreground the right to freedom of expression. At a relevant juncture, it states:

Internet continues to be used for the dissemination of racist, xenophobic and anti-Semitic material. ECRI deplors the current extent of differences between States in dealing with this phenomenon. It hopes that the Convention on Cybercrime and its Additional Protocol will rapidly enter into force and that international co-operation will improve, enabling a more effective fight against racism and xenophobia on the Internet.

---

<sup>98</sup> Adopted on 17 March 2005.

<sup>99</sup> See, in particular, Recommendation No. R (97) 21 of the Committee of Ministers to Member States on the media and the promotion of a culture of tolerance (discussed further, *infra*).

<sup>100</sup> For a consideration of the responsibilities of parliamentarians in combating hate speech, see: Summary and Recommendations presented by the Rapporteur of the Seminar, Mr. Emile Guirieoulou, Seminar for Chairpersons and Members of Parliamentary Human Rights Bodies on Freedom of Expression, Parliament and the Promotion of Tolerant Societies, Organized jointly by the Inter-Parliamentary Union and ARTICLE 19, Geneva, 25-27 May 2005.

This statement appears to overlook the fact that the Cybercrime Convention entered into force on 1 July 2004, having secured the requisite five ratifications by States.<sup>101</sup> Aside from this inaccuracy, it also fails to recognise the full extent of the many (and often countervailing) factors at play. While it is, unfortunately, correct that the Internet is being used for racist acts and expression, no indication is given in the same section of the ECRI report that many intergovernmental, governmental, self- and co-regulatory, civil society as well as industry-driven, initiatives are in place which strive to minimise such practices. This is a surprising omission, given that ECRI's *raison d'être* is to *combat* racism. Viewed from such a perspective, one might reasonably have expected initiatives countering online racism to have been detailed, or at least acknowledged. If the nefarious potential of the Internet is to be stressed, so too should its corrective potential.

Furthermore, to “deplore” “the current extent of differences between States in dealing with this phenomenon”, is an unhelpfully sweeping statement that gives the impression of a text that has been drafted without due rigour. This is strong language, after all, and it should be used only when required by the exigencies of the situation and in any case for well-defined, circumscribed targets. It hardly seems appropriate to deplore “differences between States” in how they deal with a particular problem. Surely, it would be much more sensible (and politically more astute) to deplore the fact that the response of certain States to the dissemination of racist material online is not in sync with international human rights law or best international practice? One must caution against over-use or loose use of (morally) condemnatory terms, lest such practices would lead to the inflation and devaluation of the words themselves.

The above criticisms are intended to be constructive. Particularly when dealing with legal issues, ECRI's public statements have, on occasion, been lacking in conceptual depth, balance and consistency, as well as linguistic precision. Such tendencies clearly run the risk of undermining ECRI's credibility. It would be most unfortunate if the Commission's credibility were indeed to be eroded, given all of the important work that it has carried out to date in this very difficult and demanding field. It is submitted here that a more considered and more expansive conceptualisation of ECRI's work would do much to offset any scepticism about the adequacy of its treatment of legal issues. Increased attention to legal contextualisation would be very useful in this regard too. It would also help to refute suggestions that ECRI operates in a kind of echo chamber because of the limited range and self-reinforcing nature of the sources of inspiration referred to in much of its work.

---

<sup>101</sup> Pursuant to Article 36(3) of the Convention, it would only enter into force after it had been ratified by five States, including three Member States of the Council of Europe (as the Convention is open for signature by non-Member States as well – Article 36(1)).

## Role of the Committee of Ministers

The Committee of Ministers, often described as “the decision-making body” of the Council of Europe, has also contributed in no small measure to the organisation’s fight against racism.<sup>102</sup> It has, for instance, adopted a number of Recommendations and Declarations touching on relevant issues. Such statements do not, however, legally bind Member States.

### *Selection of relevant texts*

- Resolution 68 (30) on measures to be taken against incitement to racial, national and religious hatred
- ~~~~~
- Recommendation (92) 19 on video games with a racist content
- Recommendation (97) 20 on “Hate Speech”
- Recommendation (97) 21 on the media and the promotion of a culture of tolerance
- Recommendation (2000) 4 on the education of Roma/Gypsy children in Europe
- Recommendation (2001) 6 on the prevention of racism, xenophobia and racial intolerance in sport
- Recommendation (2001) 8 on self-regulation concerning cyber content
- ~~~~~
- Declaration on a European policy for new information technologies (1999)
- Declaration on freedom of communication on the Internet (2003)
- Declaration on freedom of political debate in the media (2004)
- Declaration on freedom of expression and information in the media in the context of the fight against terrorism (2005)
- Declaration on human rights and the rule of law in the Information Society (2005)

### *Resolution 68 (30)*

The primary aim of Resolution 68 (30), entitled, “Measures to be taken against incitement to racial, national and religious hatred”,<sup>103</sup> is to press Member States of the Council of Europe to sign, ratify and subsequently give domestic legal effect to ICERD.<sup>104</sup> It requests governments to affirm the importance of the schemes of human rights protection offered by both the Universal Declaration of Human Rights and the ECHR when depositing their instruments of ratification of ICERD.<sup>105</sup> It urges States

---

<sup>102</sup> The contribution of the Parliamentary Assembly of the Council of Europe to the Council of Europe’s struggle against racism should also be praised at this juncture, even though constraints of space prevent an in-depth analysis of the same.

<sup>103</sup> Adopted by the Ministers’ Deputies on 31 October 1968.

<sup>104</sup> *Ibid.*, para. A.1.

<sup>105</sup> *Ibid.*, para. A.2.

authorities to bring their influence to bear on the United Nations to push for the successful completion of work on a draft convention for the elimination of all forms of intolerance and of discrimination based on religion or belief.<sup>106</sup> As can be seen from its first three substantive provisions, Resolution 68 (30) was very much a product of its times.<sup>107</sup> Under the Resolution's fourth substantive provision, governments are asked to "review their legislation in order to ensure that it provides for effective measures on the matter of prohibition of racial discrimination as well as on the related question of the elimination of all forms of intolerance and discrimination based on religion or belief".

### *Recommendations*

One of the two main points in Recommendation (92) 19 on video games with a racist content is that States authorities should: "review the scope of their legislation in the fields of racial discrimination and hatred, violence and the protection of young people, in order to ensure that it applies without restriction to the production and distribution of video games with a racist content".<sup>108</sup>

Recommendation (97) 20 on "Hate Speech"<sup>109</sup> deserves special attention for the forthright manner in which it seeks to provide "elements which can help strike a proper balance [between fighting racism and intolerance and protecting freedom of expression], both by the legislature and by the administrative authorities as well as the courts in the member States".<sup>110</sup> The seriousness with which it was prepared is also noteworthy: this involved the instruction - by the Steering Committee on the Mass Media - of a Group of Specialists on media and intolerance "to examine, *inter alia*, the role which the media may play in propagating racism, xenophobia, anti-Semitism and intolerance, as well as the contribution they may make to combating these phenomena".<sup>111</sup> The Group examined existing international legal instruments, the domestic legislation of Member States of the

---

<sup>106</sup> *Ibid.*, para. A.3.

<sup>107</sup> For example, the decision to prioritise the preparation of a UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (adopted in 1981) in effect eventually led to the (indefinite) abandonment of plans to elaborate an international convention on the same themes. See further: Kevin Boyle, "Religious Intolerance and the Incitement of Hatred", *op. cit.*, at 63-64; Natan Lerner, "The Nature and Minimum Standards of Freedom of Religion and Belief", *op. cit.*, at 918.

<sup>108</sup> Recommendation No. R (92) 19 of the Committee of Ministers to Member States on video games with a racist content (adopted by the Committee of Ministers on 19 October 1992, at the 482nd meeting of the Ministers' Deputies), para. a.

<sup>109</sup> Recommendation No. R (97) 20 of the Committee of Ministers to Member States on "Hate Speech" (Adopted by the Committee of Ministers on 30 October 1997, at the 607th meeting of the Minister's Deputies).

<sup>110</sup> Explanatory Memorandum to Recommendation No. R (97) 20 on "Hate Speech", para. 23.

<sup>111</sup> *Ibid.*, para. 8.

Council of Europe and various relevant studies,<sup>112</sup> including a specially-commissioned study on codes of ethics dealing with media and intolerance.<sup>113</sup>

It is clear from the Preamble to the Recommendation that it is anchored in the prevailing standards of international law as regards both freedom of expression and anti-racism. It is not coy about the need to grapple with “all forms of expression which incite to racial hatred, xenophobia, antisemitism and all forms of intolerance, since they undermine democratic security, cultural cohesion and pluralism”. It also recognises and draws attention to a number of the central paradoxes involved, eg. that the dissemination of such forms of expression via the media can lead to their having “a greater and more damaging impact”, but that there is nevertheless a need to “respect fully the editorial independence and autonomy of the media”. These are circles that are not easily squared in the abstract, hence the aim of the Recommendation to provide “elements” of guidance for application in specific cases.

The operative part of the Recommendation calls on national governments to: take appropriate steps to implement the principles annexed to the Recommendation (see further, *infra*); “ensure that such steps form part of a comprehensive approach to the phenomenon, which also targets its social, economic, political, cultural and other root causes”; where States have not already done so, “sign, ratify and effectively implement” ICERD in their domestic legal orders, and “review their domestic legislation and practice in order to ensure that they comply with the principles” appended to the Recommendation.

The principles in question address a wide range of issues. Principle 1 points out that public officials are under a special responsibility to refrain from making statements – particularly to the media – which could be understood as, or have the effect of, hate speech.<sup>114</sup> Furthermore, it calls for such statements to be “prohibited and publicly disavowed whenever they occur”. According to Principle 2, States authorities should “establish or maintain a sound legal framework consisting of civil, criminal and administrative law provisions on hate speech which enable administrative and judicial authorities to reconcile in each case respect for freedom of expression with respect for human dignity and the protection of the reputation or rights of others”. It suggests detailed ways and means of achieving such ends. Principle 3 stresses that States authorities should ensure that within their legal frameworks, “interferences with freedom

---

<sup>112</sup> Special mention is given to the study prepared for ECRI by the Swiss Institute of Comparative Law: *Legal measures to combat racism and intolerance in the member States of the Council of Europe*, Doc. CRI (95) 2 (Strasbourg, 2 March 1995). See further: *ibid.*, para. 9.

<sup>113</sup> Doc. MM-S-IN (95) 21, also published as: Kolehmainen/Pietiläinen, “Comparative Study on Codes of Ethics Dealing with Media and Intolerance” in Kaarle Nordenstreng, Ed., *Reports on Media Ethics in Europe* (University of Tampere, Finland, Series B 41, 1995). See further: *ibid.*, para. 10.

<sup>114</sup> The Appendix to the Recommendation begins by clarifying the scope of “hate speech”: “For the purposes of the application of these principles, the term ‘hate speech’ shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, antisemitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.”

of expression are narrowly circumscribed and applied in a lawful and non-arbitrary manner on the basis of objective criteria”.

Principle 4 affirms that some particularly virulent strains of hate speech might not warrant any protection whatsoever under Article 10, ECHR. This is a reference to the import of Article 17, ECHR, and to existing case-law on the interaction of Articles 10 and 17 (see further, *supra*). Principle 5 highlights the need for a guarantee of proportionality whenever criminal sanctions are imposed on persons convicted of hate speech offences.

Principle 6 harks back to the *Jersild* case, calling for national law and practice to clearly distinguish “between the responsibility of the author of expressions of hate speech on the one hand and any responsibility of the media and media professionals contributing to their dissemination as part of their mission to communicate information and ideas on matters of public interest on the other hand”. The reasoning behind this Principle is that “it would unduly hamper the role of the media if the mere fact that they assisted in the dissemination of the statements engaged their legal responsibility or that of the media professional concerned”.<sup>115</sup> Principle 7 develops this reasoning by stating that national law and practice should be cognisant of the fact that:

- reporting on racism, xenophobia, anti-Semitism or other forms of intolerance is fully protected by Article 10(1), ECHR, and may only be restricted in accordance with Article 10(2);
- when examining the necessity of restrictions on freedom of expression, national authorities must have proper regard for relevant case-law of the European Court of Human Rights, including the consideration afforded therein to “the manner, contents, context and purpose of the reporting”;
- “respect for journalistic freedoms also implies that it is not for the courts or the public authorities to impose their views on the media as to the types of reporting techniques to be adopted by journalists.”

Recommendation (97) 21 on the media and the promotion of a culture of tolerance<sup>116</sup> was conceived of as the logical complement to the Recommendation on “Hate Speech”. It arose out of a conceptual bifurcation in the work of the aforementioned Group of Specialists on media and intolerance. The Group decided to prepare two separate Recommendations, one dealing with the negative role which the media may play in the propagation of hate speech, and the other dealing with the positive contribution which the media can make to countering such speech. The main reasoning behind this decision was explained as follows:

---

<sup>115</sup> Explanatory Memorandum to Recommendation No. R (97) 20, *op. cit.*, para. 38.

<sup>116</sup> Recommendation No. R (97) 21 of the Committee of Ministers to Member States on the media and the promotion of a culture of tolerance (Adopted by the Committee of Ministers on 30 October 1997, at the 607<sup>th</sup> meeting of the Minister's Deputies).

As concerns the propagation of racism and intolerance there is, in principle, scope for imposing legally binding standards without violating freedom of expression and the principle of editorial independence. However, as concerns the promotion of a positive contribution by the media, great care needs to be taken so as not to interfere with these principles. This area calls for measures of encouragement rather than legal measures.<sup>117</sup>

The Recommendation urges governments of Member States to raise awareness of the media practices it promotes in all sections of the media and to remain open to supporting initiatives which would further the objectives of the Recommendation. The list of recommended professional practices is non-exhaustive. It is suggested that initial and further training programmes could do more to sensitise (future) media professionals to issues of multiculturalism, tolerance and intolerance. Reflection on such issues is called for among the general public, but crucially also within media enterprises themselves. It is also pointed out that it would be desirable for representative bodies of media professionals to undertake “action programmes or practical initiatives for the promotion of a culture of tolerance” and that such measures could viably be complemented by codes of conduct.

Broadcasters, especially those with public service mandates, are encouraged to “make adequate provision for programme services, also at popular viewing times, which help promote the integration of all individuals, groups and communities as well as proportionate amounts of airtime for the various ethnic, religious and other communities”. They are also encouraged to promote the values of multiculturalism in their programming, especially in their programme offer targeting children. Finally, the Recommendation mentions the benefits of advertising codes of conduct which prohibit discrimination and negative stereotyping. It equally mentions the usefulness of engaging the media to actively disseminate advertising campaigns for the promotion of tolerance.

The purpose of Recommendation (2000) 4 on the education of Roma/Gypsy children in Europe<sup>118</sup> is to attempt to set right the entrenched disadvantages affecting Roma/Gypsy children in the education sector. The Recommendation therefore addresses structural and content-related matters; recruitment and training of teachers; quality control and review; consultation and coordination.

As its title suggests, Recommendation (2001) 6 on the prevention of racism, xenophobia and racial intolerance in sport,<sup>119</sup> aims to eradicate racism in sporting circles. Its point of departure is a broad definition of racism and it focuses on coordination and the sharing of responsibilities between relevant authorities and other parties. It proposes numerous

---

<sup>117</sup> Explanatory Memorandum to Recommendation No. R (97) 20, *op. cit.*, para. 12.

<sup>118</sup> Recommendation No. R (2000) 4 of the Committee of Ministers to member states on the education of Roma/Gypsy children in Europe (Adopted by the Committee of Ministers on 3 February 2000 at the 696<sup>th</sup> meeting of the Ministers’ Deputies).

<sup>119</sup> Recommendation Rec (2001) 6 of the Committee of Ministers to member states on the prevention of racism, xenophobia and racial intolerance in sport (adopted by the Committee of Ministers on 18 July 2001 at the 761<sup>st</sup> meeting of the Ministers’ Deputies).

legislative measures and pays particular attention to the possible mechanics of their implementation. It also countenances other, non-legislative measures to be taken in sports grounds, as well as at local and institutional levels.

While Recommendation (2001) 8 on self-regulation concerning cyber content<sup>120</sup> does not contain any provisions dealing specifically with racism or racist speech, its Preamble recalls the relevance of such issues to self-regulation of online content. It refers to, *inter alia*, Recommendation (92) 19 on video games with a racist content, Recommendation (97) 20 on “Hate Speech” and Article 4, ICERD.

### *Declarations*

A number of the Committee of Ministers’ (political) Declarations also contain provisions that deal with the perpetration of racist offences via various forms of mass media. For instance, its Declaration on a European policy for new information technologies calls on States:<sup>121</sup>

- to ensure respect for human rights and human dignity, notably freedom of expression, as well as the protection of minors, the protection of privacy and personal data, and the protection of the individual against all forms of racial discrimination in the use and development of new information technologies, through regulation and self-regulation, and through the development of technical standards and systems, codes of conduct and other measures;
- to adopt national and international measures for the effective investigation and punishment of information technology crimes and to combat the existence of safe havens for perpetrators of such crimes;
- [...]
- to enhance this framework of protection, including the development of codes of conduct embodying ethical principles for the use of the new information technologies.

While the Declaration on freedom of communication on the Internet<sup>122</sup> does not zone in specifically on racism, its Preamble does refer to several principles and international instruments which treat relevant issues extensively. As such, it is a document which is of clear – but general – relevance.

---

<sup>120</sup> Recommendation Rec (2001) 8 of the Committee of Ministers to member states on self-regulation concerning cyber content (self-regulation and user protection against illegal or harmful content on new communications and information services) (Adopted by the Committee of Ministers on 5 September 2001 at the 762<sup>nd</sup> meeting of the Ministers’ Deputies).

<sup>121</sup> Declaration on a European policy for new information technologies (1999) (Adopted by the Committee of Ministers on 7 May 1999, at its 104th Session), Section (v), ‘With respect to Protection of rights and freedoms’.

<sup>122</sup> Council of Europe Committee of Ministers Declaration on freedom of communication on the Internet (Adopted by the Committee of Ministers on 28 May 2003 at the 840th meeting of the Ministers’ Deputies).

The Preamble to the Declaration on freedom of political debate in the media<sup>123</sup> recalls the Committee of Ministers' earlier Recommendation on hate speech and emphasises "that freedom of political debate does not include freedom to express racist opinions or opinions which are an incitement to hatred, xenophobia, antisemitism and all forms of intolerance". In the substantive part of the Declaration – under the heading 'Remedies against violations by the media' – it is stated that:

[...] Defamation or insult by the media should not lead to imprisonment, unless the seriousness of the violation of the rights or reputation of others makes it a strictly necessary and proportionate penalty, especially where other fundamental rights have been seriously violated through defamatory or insulting statements in the media, such as hate speech.

The Declaration on freedom of expression and information in the media in the context of the fight against terrorism<sup>124</sup> reminds media professionals *inter alia*:

- to bear in mind the significant role which they can play in preventing "hate speech" and incitement to violence, as well as in promoting mutual understanding;
- to be aware of the risk that the media and journalists can unintentionally serve as a vehicle for the expression of racist or xenophobic feelings or hatred;

The Declaration on human rights and the rule of law in the Information Society, adopted in May,<sup>125</sup> will be submitted as a Council of Europe contribution to the Tunis Phase of the World Summit on the Information Society (WSIS)<sup>126</sup> in November 2005.

The first section of the Declaration is entitled "Human rights in the Information Society". Its treatment of "the right to freedom of expression, information and communication" includes the assertion that existing standards of protection should apply in digital and non-digital environments alike and that any restrictions on the right should not exceed those provided for in Article 10 of the European Convention on Human Rights (ECHR). It calls for the prevention of state and private forms of censorship and for the scope of national measures combating illegal content (eg. racism, racial discrimination and child pornography) to include offences committed using information and communications technologies (ICTs). In this connection, greater compliance with the Additional Protocol to the Cybercrime Convention is also urged.

---

<sup>123</sup> Council of Europe Committee of Ministers Declaration on freedom of political debate in the media (Adopted by the Committee of Ministers on 12 February 2004 at the 872nd meeting of the Ministers' Deputies).

<sup>124</sup> Declaration on freedom of expression and information in the media in the context of the fight against terrorism (Adopted by the Committee of Ministers on 2 March 2005 at the 917th meeting of the Ministers' Deputies).

<sup>125</sup> Declaration of the Committee of Ministers on human rights and the rule of law in the Information Society, 13 May 2005, CM(2005)56 final.

<sup>126</sup> The WSIS is an initiative organised by the International Telecommunication Union (ITU), a UN agency under the auspices of which "governments and the private sector coordinate global telecom networks and services". The Summit is being held in two phases: the first took place in Geneva in 2003 and the second is due to take place in Tunis later in 2005. See further: <http://www.itu.int/wsis/>.

The second section of the Declaration sets out a “multi-stakeholder governance approach for building the information society”. Of most relevance for present purposes is the following prescription:

- With regard to self- and co-regulatory measures which aim to uphold freedom of expression and communication, private sector actors are encouraged to address in a decisive manner the following issues:
- hate speech, racism and xenophobia and incitation to violence in a digital environment such as the Internet;
  - [...]
  - the difference between illegal comment and harmful comment.

### *7<sup>th</sup> European Ministerial Conference on Mass Media Policy*

Finally in this section, the relevance of the 7<sup>th</sup> European Ministerial Conference on Mass Media Policy, which was held in Kyiv (Ukraine) in March 2005, should also be flagged. At the conference, the ministers of participating States undertook, *inter alia*, to: “step up their efforts to combat the use of the new communication services for disseminating content prohibited by the Cybercrime Convention and its additional Protocol concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems.”<sup>127</sup>

## **Conclusions**

Racism will never be driven away by a resolute alliance of prohibitive measures and (threats of) criminal sanctions. Long, hard experience has taught that the only way of effectively combating racism is to address its root causes as well as its various manifestations. What is required is a comprehensive approach, comprising educational, cultural, social, legal, political, economic and other initiatives. The validity and viability of such a multi-faceted approach to countering racism apply equally at international, national and sub-national levels.

Different limbs of the Council of Europe tackle the problem of racism in different ways. Although the relevant strategies are not formally coordinated by any central figure or body, their collective impact in recent years has been commendable, especially in terms of awareness-raising among States authorities and the mainstreaming of the anti-racist agenda in the Council’s own activities. Needless to say, this enhanced attention and support for anti-racist goals at the intergovernmental level consequently reverberates in civil society at the national level too. All of this is to the credit of the Council of Europe, and particularly to ECRI, its specialised anti-racist body.

However, the centripetal tendencies in the Council of Europe’s anti-racism policies and practices do not always yield positive results. What is gained in flexibility of approach is

---

<sup>127</sup> Resolution No. 3, “Human rights and regulation of the media and new communication services in the Information Society”, para. 18.

too often lost in coherence and consistency of result. The main message of this paper is that the Council of Europe's anti-racism activities would be rendered more effective if they were to be better focused and coordinated. Whatever its shortcomings, the ECHR offers a definite conceptual and legal framework within which the democratic imperative of combating racism can be pursued. It is therefore very important to retain the ECHR as a central reference point; for it to continue to be the touchstone for the Council's anti-racist strategies. The body of case-law built up by the Strasbourg court over the years situates the elimination of racism at the heart of the Convention's aspirations, but without allowing it to unquestioningly override other fundamental rights.

The point made in the tail-end of the preceding sentence is crucial. However laudable the zealous pursuit of anti-racist objectives may be, it should not take place in a closed ideological vault. It should remain open to, and be part of, the swirling interplay of other fundamental human rights guaranteed by international law. It follows from the analysis in this paper that a number of the Council of Europe's anti-racist initiatives (especially policy statements) would gain in political credibility if their conceptual and legal underpinnings were to be firmed up. This could be achieved, *inter alia*, by meeting head-on the potential tension generated by interaction with other human rights, rather than shying away from it, and by recognising such potential as creative rather than destructive.

This is perhaps best illustrated by exploring the relationship between the right to freedom of expression and the right not to be subjected to racism or racist discrimination. This relationship is often – erroneously – presumed to be conflictual, because of “excessive focus on the negative, rather than the positive, impact of freedom of expression on racial equality”.<sup>128</sup> Freedom of expression is not only a constitutive right, but an instrumental one. As such, it can serve specific ends, like facilitating the expression of those who oppose racism.<sup>129</sup> The media, in particular, can play a powerful corrective and promotional role against racism.<sup>130</sup>

It is also often assumed that when the right to freedom of expression and the right not to be subjected to racism or racist discrimination are applied to the same factual situation, one of the “competing” sets of objectives will triumph over the other. However, such an assumption over-simplifies matters. The relationship between the right to freedom of expression and the right to be free from racism is not necessarily confrontational and interaction between the two rights/objectives rarely involves one simply triumphing over the other. According to the European Court of Human Rights, protecting freedom of expression on the one hand, and fighting racism and intolerance on the other, are

---

<sup>128</sup> ARTICLE 19 – Global Campaign for Free Expression, Memorandum on Freedom of Expression and Racism for The World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, London, 2001, p. 4.

<sup>129</sup> It can even be argued that given the inherent limitations on the exercise of the right to freedom of expression, and the resultant legal restrictions on racist expression, anti-racists are in a position to enjoy the benefits of the right more consummately than their racist counterparts.

<sup>130</sup> See further: Recommendation (97) 21 on the media and the promotion of a culture of tolerance, *op. cit.*; Joint Statement on Racism and the Media by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 27 February 2001.

reconcilable goals.<sup>131</sup> Moreover, both are imperatives for democratic society, which prompts the conclusion that “it would be unacceptable to give, in a general fashion, precedence to either one at the expense of the other”.<sup>132</sup> Instead of a blanket or general rule preferring one set of objectives to the other, what is required is “highly contextualized analysis”<sup>133</sup> on a case-by-case basis. This would facilitate the search for equitable accommodations of divergent interests and – ultimately – for “those circumstances and conditions in which one right should be preferred over the other”, as well as “coherent justifications for which right is preferred in particular circumstances”.<sup>134</sup>

In conclusion, other branches of the Council of Europe, especially ECRI, would do well to seek to emulate the Court’s tendency to contextualise the fight against racism in the catalogue of rights vouchsafed not only by the ECHR, but also by other relevant instruments of international law, such as ICERD. Proper legal contextualisation would provide a solid basis for optimising the enormous potential of diversified anti-racism strategies.

---

<sup>131</sup> See the discussion of the *Jersild* case, *supra*.

<sup>132</sup> Explanatory Memorandum to Recommendation No. R (97) 20 on “Hate Speech”, *op. cit.*, para. 23.

<sup>133</sup> Mari J. Matsuda, “Public Response to Racist Speech: Considering the Victim’s Story”, in Mari J. Matsuda *et al.*, Eds., *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment*, *op. cit.*, pp. 17-51, at 46.

<sup>134</sup> Kevin Boyle, “Overview of a Dilemma: Censorship versus Racism”, in Sandra Coliver, Ed., *Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination*, *op. cit.*, pp. 1-8, at 1.