

**EXPERT SEMINAR:  
COMBATING RACISM WHILE  
RESPECTING FREEDOM OF EXPRESSION**

**ORGANISED BY  
THE EUROPEAN COMMISSION  
AGAINST RACISM AND INTOLERANCE (ECRI)**

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Deeply concerned by the increasingly racist and inflammatory tone of public discourse, and confronted with the need to strike the right balance between the repression of racist discourse and respect for freedom of expression, the European Commission against Racism and Intolerance (ECRI) - the Council of Europe's independent monitoring body on issues related to racism and racial discrimination - organised an expert seminar on "Combating racism while respecting freedom of expression" on 16 -17 November 2006 in Strasbourg.

In today's multicultural context, striking the right balance is becoming increasingly important, but at the same time more difficult. As documented in ECRI's country monitoring reports, there is growing evidence that the hostile tone of public debate on issues such as immigration or the integration of minorities is fostering racism and xenophobia in society, thereby putting victims of racism and the social cohesion of our societies seriously at risk.

Recent world events have also brought this issue to the forefront of public debate and although there seems to be a consensus at both national and European levels that racist expression in all its different forms, including hate speech, has to be combated, there is less agreement on how to go about it. Concerns about limitations to freedom of expression, which is rightfully considered to be one of the main foundations of democratic societies, play a major role here.

The aim of the seminar was therefore to look at how to combat racism while respecting freedom of expression in multicultural societies, and which legal and policy measures, in line with existing human rights standards, are the most appropriate to achieve this aim.

For this purpose the seminar brought together governmental representatives, parliamentarians, journalists and representatives of media self-regulatory bodies, researchers, specialised NGOs, minority representatives and ECRI's inter-agency co-operation partners (EU, OSCE, UN).

Beginning with the identification of the main challenges related to combating racism while respecting freedom of expression, the seminar explored how racist discourse and other forms of racist expression operate and how they can foster and perpetuate ideologies of racism and racial discrimination. Thereafter, a closer examination of the international and national legal framework for combating racist expression in a selected number of Council of Europe member States helped to identify basic principles to be respected in legal proceedings when striking the balance between the right to be free from racism and the right to freedom of expression. Finally, special emphasis was put on exploring possible legal and policy responses for combating racism while respecting freedom of expression to be adopted by governments and other relevant actors in this field. These included the implementation and monitoring of legislative measures against racist and discriminatory speech and expression, the empowerment of minorities, training and awareness-raising and self-regulatory measures.

The rich and knowledgeable contributions of a very diverse group of participants allowed a very deep insight into this topic. ECRI would therefore like to take the opportunity to thank all the participants for their valuable input to this event. It hopes that the publication of the proceedings of this seminar will help further the debate on this very important issue in Europe.



## II – MAIN FINDINGS AND CONCLUSIONS of the Rapporteur, Mr Michael HEAD, member of ECRI

The preparation of the main findings and conclusions of this seminar has been an intellectually challenging task. The reasons are obvious. At the highest level we have been discussing intangibles to which there are no obvious answers - like whether the consequences to society of unrestricted manifestations of racism are greater than any perceived dangers to freedom of expression.

At the more practical level we have had to cope with some considerable complexities, including:-

- Different kinds of legal restrictions - for example, those relating to acts of racism and discrimination, “hate speech” (however that is defined) and expressions of views and opinions deemed to have racist overtones.
- Inconsistencies in national laws, reflecting differing national circumstances.
- Inconsistencies as between relevant international instruments and huge complexities in their case law.
- The variety of communications media, including the role of the internet.
- The impact of external events, particularly since 9/11, and their effect on the climate of discussion and political debate.
- Differences in national approaches - for example, as between those which have traditionally favoured restrictions, reflecting a priority in favour of freedom of expression and those with particular backgrounds justifying a more restrictive approach.

The task of striking a balance between the legitimate demands of these two basic human rights is not therefore an easy one. There is no quick and easy solution that fits every circumstance. But what we can do within this seminar is to examine whether there is any area of agreement, not simply at the theoretical level but at the level of what might be possible in practice. Some useful thoughts emerged from the detailed discussions and presentations in the various sessions. I will summarise what I took to be the main points to emerge from these and offer some perceptions of my own on their implications.

The first session sought to set the framework for the seminar. Some of the major points were as follows:

- Freedom of expression and freedom from racism and racial discrimination are not conflicting, but complementary rights. We should keep in mind that human rights are interdependent and interconnected. This means that (i) there can be no such thing as two conflicting human rights and that (ii) human rights need to be interpreted in light of each other.

- Because there is no conflict, but interdependence, it is not just a question of protecting one right (freedom from racism and racial discrimination) while respecting the other (freedom of expression); it is also a question of protecting one right through the other. One way of doing this is by ensuring a balanced application of the provisions against incitement to racial hatred. In spite of perceptions to the contrary, these provisions are still today predominantly applied against minority groups, not majority.
- Problems in striking the balance between the two rights that have been experienced in Europe recently do not come only from difficulties that are inherent to these rights. They come from external circumstances, too. These are essentially the climate of anxiety and fear created by the modalities of the global fight against terrorism and, as a result of this, the erosion in government and public support to human rights generally.
- In such a context, it is all the more important that good journalism be supported. However, the trend in Europe today is in the opposite direction. There needs to be much more support given to media initiatives geared towards ethical journalism. A media that is ethical in general terms is also capable of using the necessary responsibility in exercising freedom of expression.

So we were already attempting to approach the issue in a way which minimised conflict but emphasised complementarity. At the same time we noted the need to be realistic. There is an inherent - although not inevitable - tension between the two freedoms - and this has to be managed sensitively and creatively.

This led us in the second session to an examination of the various contexts in which destructive racist and discriminatory expressions can occur. The significant debate here was over the differences between the “free market” and the self regulatory approaches to the media - a debate which resurfaced at several points. The main points were:

- Racism is not innate but learnt through discourse and communication. The problem here is not only open and blatant racism as advocated by fringe groups, but mainstream racism that is conveyed by the symbolic elites in society (including writers, professors, journalists, editors, politicians, text book writers, teachers etc.) These symbolic elites contribute to fostering and perpetuating racism and racial discrimination in society and should therefore also be part of the solution when it comes to combating racist discourse.
- At the public level there is much talk about the need to fight racism; however this is often not matched by strong governmental action in this field. Europe - as the cradle of racist ideologies - has a special responsibility in this respect and the increased use of racist and xenophobic arguments in political discourse must therefore not be belittled. It is a worrying development that anti-racist discourse is increasingly seen as outdated political correctness.

Other important *fora* of public discourse that were addressed in this session include the internet and the media.

- Concerns were raised that racist discourse continues to grow on the internet, although at the same time there was a feeling that the internet can also be a valuable tool for combating racism and racial discrimination. The Additional Protocol to the Convention on Cybercrime concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems was mentioned as an important tool for combating racist discourse on the Internet.
- As regards the media in general, there was some controversy about whether the “free market” alone is the best guarantor of good quality journalism and ethical reporting. Here, self-regulatory measures were championed by the majority of participants and preferred to governmental regulation in this field. In this context the important role of public service broadcasting in upholding high ethical standards and promoting diversity was also underlined.

The third session dealt with the legal standards that applied to the exercise of the “two freedoms”. The following is a summary of a very detailed and complex discussion.

- Although the responsible exercise of freedom of expression in a diverse society requires measures that go well beyond legal measures, it is important that the existing legal measures are applied. The case law of the European Court of Human Rights provides invaluable guidance as to what, under European human rights law, is covered by freedom of expression and what is not.
- The elements that must be examined include: (i) the aim pursued by the author of the expression or statement; (ii) its content; and (iii) the context within which the expression or statement took place. In assessing whether a specific expression or statement is covered by freedom of expression, the setting (public or political debate) and the function (journalist, politician, civil servant) bear considerable relevance.
- However, some participants called for caution in this field, as an excessively broad use of “context considerations” may in some cases jeopardize the respect of the principle of legal certainty (i.e. to foresee, to a degree that it is reasonable in the circumstances, the potential penal consequences a given action may entail).
- The case-law of the ECourtHR in the areas of protecting individuals against racist expressions is likely to increase in the near future. A trend towards increased attention being paid (and protection awarded) to questions of racism and racial discrimination has been registered in recent years (*Nachova vs. Bulgaria* and subsequent jurisprudence testify to this). There is an obvious role for civil society organisations that defend the rights of minority groups to play here: these organisations should bring cases and be creative in doing so, using all the possibilities offered by the ECHR in these fields, which are in fact broader than Article 10 (freedom of expression).

The rest of the seminar was largely taken up with policy responses to the dilemma of reconciling freedom of expression with combating racism. This was in recognition of the fact that legal provisions against racism and racial discrimination, including provisions against racist expression, are important but that they are only part of a broader strategy for preventing racist expression and promoting tolerance. As outlined by ECRI's Chair, Professor Eva Smith Asmussen, such a comprehensive strategy includes monitoring the implementation of provisions against racist expression, as well as a certain number of self-regulatory and structural measures to be adopted by different actors of society.

The discussions of the fourth and fifth sessions concerning adequate policy responses in this field could be summarised in the following way:

- An adequate implementation of existing criminal law provisions concerning racist expression is crucial. To this end, there is a need for a national body specialised in the field of combating racism in all member States of the Council of Europe.
  - Such a body could play a role when it comes to monitoring the implementation of criminal law provisions in this field.
  - This body could also provide training for media professionals or members of the criminal justice system.
  - It could assist victims of racist expression in regaining their dignity, for instance by obtaining reparation for the moral damages they suffered.
- There still is a lack of regular and systematic data collection regarding racist expression. We need to find mechanisms enabling better collection of data and information on racist expression. On the basis of the data and information collected, it should then be possible to develop targeted policies which bring practical solutions to the problems identified.
- In session five minority community media were identified as an important means to promote the participation of immigrants and ethnic minority groups in society. Complementing the mainstream media, they can play a mediating role between communities and provide access to minority networks and to alternative sources of information.
- A strong case was also made for increasing the representation of minority groups in the mainstream media, as diversity in content is closely linked with diversity in the profession itself; this does not mean that journalists with minority backgrounds should only report on minority issues, but that they can bring in a special perspective on many issues.
- Reporting diversity is a skill that can be acquired by each and every one of us; we just have to (i) become aware of our prejudices, (ii) manage them and finally (iii) get rid of them, which is indeed a very difficult task. Training and educational measures should therefore start at the earliest possible age and not only target established media professionals, as experienced journalists are often reluctant to undergo training after working for many years.

- Session four also took us further into the area of self-regulation and we had some interesting reflections on self-regulation in the political sphere and on some practical experiences of media regulation. Some of these experiences pointed to ways of working which offered positive signs to a possible way ahead. Others, particularly in the political sphere, where I have had some direct involvement, were more negative.
- We heard that the Charter of European Political Parties for a Non-Racist Society, which is a very commendable initiative, has so far only had a limited impact, as - among many other reasons - it lacks an authoritative supervisory mechanism. There is some evidence that there is a lack of political will within many European political parties to tackle racism within their own ranks. The real problem of racism in politics is therefore not only extreme right-wing parties, but the growing lack of moral leadership in mainstream parties to speak out clearly against racist discourse.
- Finally, the example of the Communications Regulatory Authority in Bosnia and Herzegovina showed the positive role that media self-regulatory bodies can play in helping to rebuild a war-shattered and ethnically divided media landscape. In this context, the keys to success have proved to be joint codes of conduct (print, broadcast etc.), which were agreed within the media community and not imposed externally.

I will end with some reflections on the role of the law in this area and on what we have learnt about non-legal approaches.

There are some commonly accepted criteria for the sort of criteria that ought to apply to the application of the law-particularly the criminal law.

- It should deal with a recognisable set of behaviour that is widely acknowledged as undesirable.
- It should be precise in its application and its definitions.
- Its penalties should be proportionate and there should be adequate safeguards against wrongful conviction.
- It should be enforceable.
- It should command public support.

I think it is generally accepted that if these criteria are not met there is a danger of the law being used-or being perceived to be used- in an arbitrary or oppressive way.

In the area we are talking about, that there are certain actions in respect of which criminal restrictions could be used consistently with these criteria and where there would be a consensus that the potential restrictions on freedom of speech would be a price worth paying. These include, for example, words and expressions used with an intent to stir up racial or religious hatred, racial violence or incitement to racial violence, incitement to racist conduct such as discrimination and racial harassment. A distinguishing feature of these actions is that they involve direct threats and damage to individuals or groups defined in terms of race, religion or ethnic or national origin.

There are more serious problems when we move into areas where the law seeks to deal essentially with the expression of opinion which in certain areas might be used for a racist purpose but where it might be argued that the law should not hinder the expression of views which might have a more legitimate basis. This covers the whole sensitive area of insult, defamation, historical revisionism, satire, criticism of faith and religious practices and even the glorification of terrorism. It is here that the chances of conflict between the two human rights are greatest and where there is a need for particular care.

An example of the sort of steps that might be taken to minimise the chances of conflict is the provision included in the recent UK legislation on religious hatred which embodies specific safeguards designed to protect discussion or criticism of particular religions. There is a feeling that this provision may go too far in that it protects also expressions of insult and ridicule, but it does indicate that it is possible to draft laws in this area which also contain safeguards for free speech and which place the burden of defining what is or is not acceptable on the courts of the country concerned.

There was strong agreement, however, that the fight against racism depends on factors other than the existence of legal restrictions-which by definition tended to polarise the debate. The debate on the contribution of self-regulation in the context of the media and the internet illustrated this. There was a general feeling within the seminar that there was no such thing as the perfect market and that issues of this importance could not safely be left to a system of laissez faire. The examples of how self-regulation operated in practice showed that this was a workable alternative but that it carried its own dangers. To be effective such a system requires a mechanism and a regulator which commands respect and which is manifestly independent.

Above all, the fight against racism requires strong, positive Government action across the whole range of social policy and on law enforcement, raising public awareness and the development of civil society. This calls for political will and takes time, but, without it, other measures are doomed to failure.

Thus, the conclusion emerges that there needs to be a combination of factors if the objective is to be achieved of achieving synergy between these two basic human rights. These include restrictions based on law, but only if they are sensitively applied and with adequate safeguards; and they should be accompanied by appropriate mechanisms of self-regulation backed up by firm Government action in the area of social policy. Above all there needs to be developed a consensus within society supportive of the values espoused in this seminar. It is such a consensus alone that makes possible the sensitive policing of the boundaries between freedom of expression and the measures necessary to fight racism-a fight to which we are all committed.



## **III - WRITTEN AND ORAL CONTRIBUTIONS**



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**MR PHILIPPE BOILLAT,  
DIRECTOR GENERAL OF HUMAN RIGHTS, COUNCIL OF EUROPE**

Madam Chair, Ladies and Gentlemen,

It is a great pleasure for me to welcome you very warmly to this seminar on combating racism while respecting freedom of expression, which I have the honour of opening with this address.

I would like to begin by saying - and this is not just for form's sake - that we are particularly glad to welcome you here to the home of human rights for this key event organised by the Council of Europe's Commission against Racism and Intolerance, to whom, Madam Chair, I offer my congratulations and thanks.

What prompted ECRI to organise this seminar is an issue which has become increasingly pressing:

How can we fight racism effectively while fully respecting freedom of expression? Are these really, as is sometimes claimed, two entirely conflicting goals?

Clearly, the two sides differ in the answers they give. Nevertheless, the questions themselves are based on certain shared assumptions.

I believe I can safely say that all of us in Europe agree that racism is extremely damaging to society and that we cannot therefore allow it the freedom to flourish, if I may put it this way. Combating racism is vital for preserving social cohesion and preventing social unrest. Fighting racism is also a moral obligation. On this point as well there is a high degree of consensus in European countries. Put simply, racism has to be combated!

In addition, we all agree that the right to freedom of expression is not just one of the foundations of democracy but also the very lifeblood of democracy. Without freedom of speech, the heart of democracy stops beating and it ceases to function. In this respect as well, there is broad consensus in our member states. Freedom of expression is essential to the functioning of all genuinely democratic and pluralist societies. The European Court of Human Rights has reminded us of this on numerous occasions.

The challenge is to enable these two fundamental rights - the right to be protected from racism and racial discrimination and the right to freedom of expression - to co-exist.

It has to be said that the harmonious co-existence of these two rights has been somewhat undermined in recent times. We have a duty therefore to consider the issues raised and develop our thinking on the matter.

We do this at the Council of Europe from different angles and in varying sectors of the organisation and I would like to draw your attention to six examples of this, which seem particularly important to me.

Firstly, there is the intergovernmental sector. Some of the questions raised here are discussed by the Steering Committee on the Media and the New Communication Services, which focuses on the necessary conditions for the exercise of freedom of

expression, particularly during conflicts and crises. Another contribution in the context of intergovernmental co-operation is that of the Committee of Experts for the Development of Human Rights, which deals with human rights in a multicultural society and, in particular, the question of hate speech.

As far as independent human rights monitoring mechanisms are concerned, ECRI's activities are of course crucial to discussion and progress in this field. The same can be said of the work of the Council of Europe Commissioner for Human Rights and I would like to take this opportunity to congratulate him on his unceasing efforts to combat discrimination.

The Council of Europe's Youth Campaign for diversity, human rights and participation under the banner "All different, all equal" is very important for raising the awareness of the public. Lastly, the future White Paper on intercultural dialogue, which is currently at the drafting stage, will also be a very useful tool in this area.

The Council of Europe puts human beings at the centre of its activities. The purpose of ECRI's fight against racist expressions is not just to contest the ideas expressed but also to protect human beings, who are, after all, the central focus of human rights protection.

I have no ready-made solutions to offer you. I would, however, like to mention just two specific questions among the many that call for our attention.

Firstly, do we need to recognise that the development of new communication technologies has fundamentally changed the environment in which freedom of expression is exercised? In other words, does the context in which we communicate today - and the fact that it is possible to say anything and make oneself heard in real time - add a new perspective to freedom of expression?

Secondly, Article 10 of the European Convention on Human Rights, which establishes freedom of expression, is the only Convention article which specifically states that the exercise of this freedom carries with it duties and responsibilities. In the new environment which I have just described, do these duties and responsibilities take on a extra dimension? Once again I would point out that these are merely questions and that I, for one, do not yet have any cogent answers to them.

ECRI's aim in holding this seminar is to enrich the discussion by gathering together experts on these questions to analyse them from different angles. We often say that diversity is a source of enrichment. Here also, the diversity of our approaches to these questions should serve to enrich the debate.

I wish you all fruitful discussions and thank you for your attention.

Ms ISIL GACHET,  
EXECUTIVE SECRETARY TO ECRI

ECRI bases its activities on respect for human rights.

It aims to guarantee all persons present in the Council of Europe member states the right not to suffer racism and racial discrimination.

Combating racism, as ECRI understands it, consists in preventing violence, discrimination and prejudice faced by persons or groups of persons on grounds of race, colour, language, religion, nationality or national or ethnic origin.

ECRI's activities cover measures to combat racism and intolerance in all its forms, including antisemitism, xenophobia, Islamophobia and Romaphobia.

The principle of freedom of expression, as enshrined in the European Convention on Human Rights and interpreted by the Court, is fully acknowledged by ECRI and is one of its most important tools.

For example, in its country-by-country monitoring, ECRI stresses, in each member state of the Council of Europe, that the members of minority groups exposed to racism should be able to exercise their freedom of expression (and of assembly and association) in full compliance with the European Convention on Human Rights and without any form of discrimination.

However, as ECRI's task is to fight racism in all its forms, it is also concerned with the other aspect of freedom of expression, namely that of countering the expression of racist opinions.

Here again, the general term "racist expressions" naturally covers all forms of racist opinion, whether antisemitic, xenophobic, Islamophobic or Romaphobic.

What then are the challenges that ECRI faces?

The main one, of course, is to strike the right balance between stamping out racist discourse and respecting the right to freedom of expression.

ECRI can and has met this challenge.

In so doing, it has based itself mainly, and as always, on the European Convention on Human Rights. Freedom of expression is protected by Article 10 of the Convention. It is clear from paragraph 2 of this article that freedom of expression is not absolute and that certain restrictions may be imposed on it.

The Convention therefore sets limits to the exercise of this right. A large body of Court case-law has clearly established that state activities intended to restrict this right are justified under paragraph 2 of Article 10, or sometimes under Article 17, where these ideas and their expression infringe the rights of third parties or the spirit of the Convention.

So despite occasional claims to the contrary, freedom of expression is a conditional right (not an absolute one like, for example, the prohibition of torture).

On the basis of the Convention and the case-law of the Court, ECRI asks member states, in its General Policy Recommendations and its country-specific recommendations, to adopt and enforce criminal law provisions prohibiting racist expressions.

ECRI's general approach is to deal with these questions in an integrated manner, including legal aspects, self-regulation and structural measures. Legislation must be combined with codes of ethics and measures to strengthen the position of the persons concerned.

One important issue which ECRI must address in the course of its work is that of getting its main message across, which is one of inclusion with due regard for diversity and difference.

To achieve this, ECRI uses the law, but not just the law.

Legal instruments alone are not necessarily the best and most effective way of dealing with issues of inclusion and diversity.

And this of course raises the major question of how we can promote co-existence.

This is why - and it is important to stress this - ECRI objects, and will always object, to racist comments and expressions and their authors. It does so even if they are covered by freedom of expression, since not all that is legal is necessarily conducive to co-existence and mutual respect.

This is not a matter of sacrificing freedom of expression or advocating censorship or self-censorship. The aim is simply to raise the question of the effect and the repercussions of racist expressions.

It is surely no coincidence that the only time the word "responsibility" is used in the European Convention on Human Rights is in Article 10-2, which states that the exercise of the right to freedom of expression carries with it "duties and responsibilities". It is not the responsibility of states that is at stake here but that of each and everyone of us. Our discussion today should also focus therefore on what is meant by "exercising freedom of expression responsibly".

Ms JOLIEN SCHUKKING,  
CHAIR OF THE COMMITTEE OF EXPERTS FOR THE DEVELOPMENT OF  
HUMAN RIGHTS OF THE COUNCIL OF EUROPE

Ladies and gentlemen,

It is a privilege for me to contribute to this seminar in my capacity as Chair of the Committee of Experts for the Development of Human Rights of the Council of Europe (DH-DEV) and to share with you information on the work which is currently being done by this committee.

I will begin with a few words about the DH-DEV in general. Then I will inform you about the work the DH-DEV is doing on the topic 'Human rights in a multicultural society'. In this context I will pay attention to the questions:

- 'How do you strike a fair balance between competing rights or interests?'

and

- 'Is it possible to identify factors that distinguish offensive expressions fully protected by the right to freedom of expression from those that are not?'

The DH-DEV is 'the Committee of Experts for the Development of Human Rights' which comes under the Steering Committee for Human Rights (CDDH). DH-DEV is the committee on the contents of human rights norms; it was, for instance, in the past entrusted with the drafting of several additional protocols to the European Convention of Human Rights, like the 12<sup>th</sup> Protocol on the prohibition of discrimination or the 13<sup>th</sup> Protocol banning the death penalty in all circumstances. As nowadays our governments are not in favour of new standard setting in the field of human rights, the DH-DEV concentrates on themes relating to the enforcement of existing human rights. The committee produced, for example, recently a 'Manual on human rights and the environment' in which it describes and explains to the public-at-large the principles emerging from the case-law of the Court in cases concerning the influence of noise, pollution or dangerous industrial activities. Almost all members of the committee have a legal background.

At this moment, the DH-DEV is working on the theme 'Human Rights in a multicultural society'. And that is of course the reason why I was invited to join you today. In May this year, the committee held its first plenary meeting on this issue. At this meeting, a discussion took place on the question what this committee could do within the framework of the Council of Europe on this topic. It shared views with the Human Rights Commissioner of the Council of Europe and also with the Directorate that is in charge of Council of Europe activities on intercultural dialogue. Also ECRI was invited to join.

In this plenary meeting, the DH-DEV:

- decided that its work on this theme should focus on (i) 'Hate speech' and (ii) 'the wearing of religious symbols in public places'; in the context of this seminar I will confine myself to tell you about the results of its work on the topic 'Hate speech';

- emphasized that freedom of expression, freedom of thought, conscience and religion, respect for private life or human dignity, and the prohibition of discrimination are all among the foundations of a “democratic society”;
- noted that, within a democratic society situations could, however, arise in which the rights or interests of one person compete with the rights or interests of another;
- pointed out that in these situations, national authorities have a task in striking a fair balance between the competing rights and interests involved;
- recognized that this is of particular importance in multicultural societies, which are characterised by a diversity of cultures, religions and ways of life.

And here we come to one of the key-questions of this seminar:

**“How do you strike a fair balance between competing interests?”**

Of course, the answer to this question depends heavily on the specific circumstances of the case. It would, however, be helpful if elements or factors could be identified that are taken into account in doing this balancing-exercise.

The DH-DEV therefore created working groups to examine in depth the principles deriving from the case-law of the Court and from other Council of Europe or international instruments. ECRI’s General Policy Recommendations were also taken into account.

Besides that, it prepared a questionnaire, asking member states to provide information on national legislation and regulations prohibiting ‘hate speech’ and on methods or initiatives to prevent ‘hate speech’ and to promote tolerance. The reactions to that questionnaire were overwhelming and led to a nice overview of ‘best practices’.

In its draft report, the working group on ‘Hate speech’ notes that:

- Although the term ‘hate speech’ is frequently used, it is not always clear what is exactly covered by it. There is no universally accepted definition of ‘hate speech’;
- It is of particular importance to distinguish offensive expressions fully protected by the right to freedom of expression from those expressions that may legitimately be the subject of restrictions or are not even protected by the right to freedom of expression (Art. 17 ECHR-exceptions);

The draft report therefore attempts to give an overview of factors used for the identification of expressions of ‘hate speech’ and their distinction from expressions that simply offend, shock or disturb. The aim of that exercise is thus not to set any new standards, but to list merely pointers taken from the case-law of the Court and other international instruments.

This overview contains content-related factors, context-related factors and factors relating to the ‘author’ of the expression. In this introductory speech, I will not go into too much detail but in the course of our discussion I could elaborate on those factors.

To conclude, I would like to express some personal views on the topic.

My first remark concerns freedom of expression.

Freedom of expression is an essential precondition for public debate on issues of public interest. We all agree on that. This means that this right not only protects views which are favourably received, but also views which are received as shocking. But it does not mean that there are no limitations on freedom of expression. While the right to freedom of thought (internal freedom or *forum internum*) is absolute, the right of freedom of expression (external freedom or *forum externum*) is a relative right. The Court has allowed interferences with speech that *'seeks to spread or incite hatred based on intolerance'* and speech that *'calls for violence'*, pointing to the fact that such speech *'undermines the values of a democratic society'*. But not only content is important in this respect, context matters equally. Speech on facts, on history, should be looked at from a different angle than for instance expressions of ideas or theories, or products of art. Artists, including cartoonists, do not pretend to depict reality.

My second remark concerns our pluralistic societies.

I think that, because of its diversity our societies are very rich. However, this 'richness' is only real when the people who make that society understand this diversity and respect it. The question is therefore: "What requires living happy together with differences?"

Member states of the Council of Europe have an obligation to ensure that everyone within its jurisdiction enjoys the rights and freedoms laid down in the Convention. This entails, in my view, that States should create conditions that enable people to exercise their rights. It also entails that they have to find proper solutions for situations in which rights and interest of some seem to compete with rights and interests of others. These solutions should not lead to less freedoms for all, but to fair balanced rights for all.

Thank you for your attention.



**MS AGNES CALLAMARD,  
EXECUTIVE DIRECTOR, ARTICLE 19**

Ladies and Gentlemen, Members of Parliament, Colleagues

It is with great honor that I am addressing you this morning on the occasion of the ECRI expert seminar on “*combating racism “while” respecting freedom of expression*”. I am very grateful to ECRI for this invitation and for giving me the opportunity to present ARTICLE 19 position on an issue of immense importance to human rights.

My task is to set the frame and in the few minutes allocated, I will seek to re-frame the terms of the debate, by moving away from the “while” in the title of the seminar - Combating racism while respecting freedom of expression - and recommending instead that we combat racism through respecting freedom of expression.

I - The terms of our discussion today have already been profoundly shaped, if not determined, by the security agenda defined through the lenses and experiences of terrorism and counter-terrorism. It will be naïve and counter-productive to ignore this fact and deny the continued influence that the politics of security, indeed, the politics of fear, impose on our discussion. These are politics stripped of complexity and nuance, reduced to the bare bones of fear and violence. Legitimate security concerns have resulted in measures that have threatened or undermined human rights, including freedom of expression, and created an atmosphere where differences and diversity have been under attack.

Take for instance the constant debates over Islam and Muslims throughout the Western world, although mass-obsession may be a better qualifier. Take also the call for racial profiling which is becoming increasingly legitimate across the political spectrum and across the world. The general public have been seen to take the matters in their own hands, as two young men of Asian descent recently experienced as they were boarding a plane from Spain to Great Britain.

So the first thing I want to do this morning, when framing the terms of the debate on racism and freedom of expression, is to suggest that we recognize this security context, and that we place it squarely and centrally within the frame of our discussion. And that we then seek to challenge the hegemonic notion of security that has invaded all aspects of public and private life and of the public discourse. The frame I would like to propose instead is that of human security, one that places human rights at the heart of our quest for security and insists for a definition of security predicated on freedom from fear in all its dimensions.

II - Secondly, the framing or re-framing of today’s debate also requires recognizing that developments have not been linear: we have all shared experience of insecurity, even if varied and multi-dimensional, which has resulted in a blurring of what may have been perceived or constructed at some point as the contrasts or oppositions between respecting freedom of expression and protecting the right to be free from racism. For instance, speech restrictions that are meant, directly or not, to protect minorities against hatred, have more often than not resulted in their imprisonment or silencing, or at least in the imprisonment or silencing of the most controversial voices within these communities.

Let me give you a recent example: on November 10, in the UK, a leader of the British National Party (BNP) was cleared of charges of incitement to racial hatred<sup>1</sup>. A day earlier, a young Muslim man, Mizanur Rahman, was convicted for incitement to race hatred at a demonstration in London after a Danish newspaper published cartoons depicting the Prophet Mohammed as a terrorist. He had carried a placard urging 'beheading those who insult Islam' and called for the deaths of British soldiers in Iraq<sup>2</sup>. The two cases were very different, in terms of their context - for instance, private vs. public gatherings - and the nature of the speeches that were being delivered. But it does remain that a well-established powerful institution - a political party - whose main ideology is that of racial superiority was cleared of charges of incitement to racial hatred, while a lone individual, marching in a public demonstration, was found guilty under these same charges. The overwhelming reaction in the aftermath of the BNP verdict was that the law must be changed, on the grounds that it is clearly not strong enough if a right-wing party could be cleared of such charges. No politicians, to the best of my knowledge, question this same law two days earlier, when Mizanur Rahman was found guilty. Restrictions and repression have become the sole policy model, tacitly endorsed by all.

As a freedom of expression organization, ARTICLE 19 recognises that freedom of expression is not absolute and that some speeches are not protected under article 19 of the Universal Declaration of Human Rights (UDHR) and the international Convention on Civil and Political Rights (ICCPR). Indeed, states are under an international obligation to take actions against incitement to racial, and religious hatred, as per article 20 of the ICCPR. Hate speech laws, at least in theory, seek to meet essential human rights objectives: protecting the right to equality, the right to mental and physical integrity, the right to be free from discrimination, and ultimately the right to life, as hate speeches have also been associated with ethnic cleansing, wars, and genocide. From this standpoint, hate speech regulations may constitute a legitimate and potentially necessary restriction to freedom of expression, provided they meet a number of standards highlighted by several court cases<sup>3</sup>.

Yet, as the overwhelming number of cases across the continent all too well illustrates, the relationship between protecting the right to equality and resorting to hate speech laws has become very weak, if not non-existent.

ARTICLE 19 twenty years experience shows that restrictions on freedom of expression, including hate-speech legislations, rarely protect us against abuses, extremism, or racism. In fact, they are usually and effectively used to muzzle opposition and dissenting voices, silence minorities, and reinforce the dominant political, social and moral discourse and ideology. This is especially true in period of high stress level and duress, as currently and globally experienced.

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<sup>1</sup> The case stemmed from speeches at private BNP meetings in West Yorkshire which were secretly filmed by the BBC. Although Mr Griffin was shown denouncing Islam as "a wicked, vicious faith" and Mr Collett repeatedly called asylum seekers "cockroaches", their defence asserted they were not speaking in public but to like-minded partisans. The speeches also contained long passages of relatively uncontentious material. This was the second time Mr. Griffith was acquitted of these charges.

<sup>2</sup> In February, the radical cleric Abu Hamza was jailed for seven years in February after prosecutors argued he had preached "terrorism, homicidal violence and hatred" during sermons he gave at the Finsbury Park mosque, in north London, and elsewhere.

<sup>3</sup> See for instance, ARTICLE 19, *Striking a balance: Hate Speech, Freedom of Expression and Non-Discrimination*, 1992

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In other words, these laws are not, never, the alternative to an actual commitment and policies to protect and fulfill the right to equality. The appropriate answer to hate speech is not just more anti-hate speech regulations and restrictions - but first and foremost policies and actions to tackle the causes of inequality in all its forms and colors and to empower those whose right to equality and to be free from racism is attacked or undermined.

The power of freedom of expression in the fight against racism has still to be unleashed. Instead of exploring those, we have locked ourselves in debates and policies increasingly extreme in tones, and repressive in focus. Indeed, the media itself has a fair share of responsibilities in this evolution.

III - For extremism sells... This is the third frame I would like to raise this morning. Let me illustrate it with a recent experience. Last week, I got a call from a journalist working for one of the best British radio programs. She was looking for some feedback on the BNP court decision I have mentioned earlier - the no guilty verdict on the charges of incitement to racial hatred. This was a judgement that needed a lot of explanation, especially as it occurred two days after a so-called "Muslim Extremist" had been found guilty of the same charges.

Having provided the journalist with an explanation and elaboration on article 20 of the ICCPR and especially incitement to hatred, and how its implementation must and can be balanced with article 19 regarding freedom of expression, she then asked whether I knew of another organisation in the UK, which after further discussion, turned out to be one that could put forward a more "absolutist" position on freedom of expression! I guess this was her understanding of a "balanced" approach to reporting: presenting not simply opposite viewpoints, but also two extremes viewpoints on some sort of imaginary scale. Strident positions and pictures too often steal the headlines. And this is not only the problem of sensationalist press or tabloid.

As I pointed out to the journalist (with little impact), the media can and should make a positive contribution to the fight against racism, discrimination, and xenophobia, to combat intolerance and to ensure open public debate about matters of public concern. The implementation of this principle does not involve putting forward solely extremist or absolutist images or view points, how important these may be nevertheless. Balanced reporting requires also putting forward balanced viewpoints.

There are many instruments at our disposal already to strengthen balanced and sensitive reporting, including codes of ethics, self-regulatory bodies responsible for enforcing these codes, training and capacity building, including on reporting diversity, as our colleague from the Media Diversity Institute (MDI) will well explain tomorrow, assisting minority media in finding a niche and a market for themselves, upholding and strengthening the diversity principle within Public Service Broadcasting, etc.

IV - So the last frame I would like to raise this morning is that of the positive power of free speech to promote equality, tolerance of difference and anti-racism. Let me further illustrate this point by turning to two events that occurred simultaneously on 12 October of this year, both related to violent events that took place in the early part of the twentieth century: the Armenian genocide.

On 12 October, the Nobel Prize for literature was awarded to the Turkish author Orhan Pamuk. On that day, the French National Assembly passed, by a vote of 106-

19, a draft law that would make it an offence to deny the existence of the 1915 Armenian genocide. The proposal, which was put forward by the Socialist Party, is not supported by the government and the vast majority of the 557 legislators in the National Assembly walked out, in protest.

By awarding the Nobel Prize for Literature to Pamuk, the Nobel Committee not only celebrated his literary work and skills, and his explorations of East-West relations and cultures. It also ended up honouring a staunch defender of freedom of expression<sup>4</sup>, and by extension all voices, in Turkey and elsewhere, that are speaking out against government repression, confronting repressive laws, and talking against the predominant public consciousness and hegemonic discourse, including that which may be discriminatory, racist, etc. The 2006 Nobel decision ended up creating a space for safer, more open and transparent debates, by releasing dissent under the global limelight, and thus favoring far greater scrutiny of those that seeks to keep it locked in and invisible.

The opposite outcome was reached by the French Parliament. Where the Nobel Committee opened debates and celebrated dissent, including on controversial and taboo topics, the French draft Bill sought to close and punish. As highlighted earlier, as a human rights organization, ARTICLE 19 believes that States have an international obligation to prohibit hate speech under Article 20 of the *International Covenant on Civil and Political Rights* (ICCPR). However, we also believe that a very careful balance between the right to freedom of expression and protection against hate speech must be sought by limiting the latter to cases of incitement to hatred, discrimination or violence. The French draft bill may only meet these strict criteria in very specific circumstances, such as when speeches denying the Armenian genocide are motivated by, and result, in hatred. Where denials of the Armenian genocide do not actually promote hatred against Armenians, they are protected speech. The French Bill is too broad in its application, and the scope for abuses of protected speeches far too great, to constitute a balanced and legitimate response. It effectively elevates history to dogma, thus preventing and punishing research and debates. It legally muzzles potentially dissenting or controversial research and publications, creates taboos, and creates or reinforces an overall atmosphere that effectively chills controversial research undertaking.

Of the two 12 October approaches, there is no doubt that one celebrated freedom of expression while bringing us closer to debates and possible reconciliations over our past. The other locked us in dogmatic interpretations that tore us further away from appeasement and common understanding.

Freedom of expression must be one of those freedoms most celebrated, especially in the face of hegemonic discourse that are upheld by fear and the threat of violence. For freedom of expression is not about protecting the voices of the powerful, the voices of the hegemonic or the voices of the consensus. Freedom of expression is concerned with protecting and defending diversity - of interpretations, of opinions, of researches. There are already many tools at our disposal - too often ignored or neglected, to uphold these key principles and objectives. We ought to explore and strengthen each ones of them to build a more tolerant society. Let's protect the right to be free from racism through freedom of expression...

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<sup>4</sup> Earlier this year, Mr. Pamuk was on trial for insulting "Turkishness" under article 301 of the Turkish penal code which prohibits a range of criticisms. Although the charges were eventually dropped there are still many writers and journalists facing similar charges in Turkey.

**MR AIDAN WHITE ,  
GENERAL SECRETARY, INTERNATIONAL FEDERATION OF JOURNALISTS**

***“JOURNALISM AND COMBATING INTOLERANCE: FREE EXPRESSION AND QUALITY MEDIA”***

The global firestorm over the publication of cartoons of the Prophet Mohammed revealed a chasm of misunderstanding and ignorance in relations between Muslim and western communities and underlined why journalists need to be more conscious than ever about the dangers of media manipulation by unscrupulous politicians and racists.

In the 1990s conflict in the Balkans and genocide in Rwanda in 1994 provided brutal reminders that human rights law, journalistic codes and international goodwill count for little when unscrupulous politicians, exploiting public ignorance and insecurity, use compliant media to encourage violence and hatred.

In the 2000s a new war in the Middle East, the manufacture of a clash of civilisations between Christianity and Islam, and a resurgence of community conflict in Europe, dramatically exposed by violence in the urban centres of France, the UK, the Netherlands and elsewhere, have all stirred centuries-old resentments about foreigners in our midst.

The rise in influence of extremist right-wing political parties and the re-emergence of anti-Semitism in Europe, widespread religious intolerance and open warfare in parts of Africa, Asia and the Middle East, often buttressed by prejudice and discrimination against national minorities on the basis of language and social status, are all part of the global landscape of daily news reporting.

In this complex news environment journalists can become casual victims of prejudice and political manipulation. Too often, ignorance and a lack of appreciation of different cultures, traditions and beliefs lead to media stereotypes that reinforce racist attitudes and strengthen the appeal of political extremists.

This is all too evident when we look, for instance, at European media stereotypes of the Arab world, which appear to be greater and more dangerous than they have been for decades.

It is indisputable that the emphasis on war, terrorism and fanaticism in the Arab world creates a distorted and dangerous picture of Muslim communities the world over. It has all been made worse, of course, by the war on terrorism launched by the United States after the September 11 attack on New York and Washington.

This movement has become obsessive. It has undermined the confidence of people living in previously settled multi-cultural communities Europe. It has launched a thousand arguments over the wearing of religious symbols and about women covering their faces. It has called into question the role of dozens of organisations working inside minority communities. It has signalled the end of anonymity as our telephone calls, e-mail messages and financial transactions come under official surveillance. It has forced millions of us to accept without a whimper the absurd pantomime of dressing and undressing and presentation of see through-packages of mascara and toothpaste for security checks whenever we want to travel by air.

All of this is done in the name of security, but what are the consequences?

Certainly, they heighten our anxiety, they increase our suspicions of fellow travellers and other communities, particular the young, and they also, I suspect, reinforce the conviction among those responsible for acts of terror that their bullying and intimidation works. Secular, tolerant and confident communities are in retreat, nervous and uncertain.

At some point we must ask for a sense of proportion. We need new policies that do not play up the politics of security, but which mobilise the forces of democracy, including media, into a campaign not based upon fear and ignorance, but which uses dialogues and democratic exchange as a process for confronting extremism wherever it lurks.

The current media obsession with threatening and dark forces from the world of Islam is fed by sensationalist and superficial reporting of conflict in the Middle East and is nurtured by extremist politicians. It contributes to an increasingly fearful climate within previously stable metropolitan communities in Europe.

Today European countries with a history of tolerance are suffering a serious hangover from the toxic cocktail of prejudice and ignorance about Arab culture which is leading to a resurgence of extremist politics not seen for 50 years.

Many tabloid newspapers - driven by commercial imperatives and falling sales - get short term relief with sensational headlines about asylum seekers or illegal migrants or subversive elements within the Muslim community. Television's daily focus on the tragedies of Iraq and Palestine and the lunacies of terrorism too often fail to report these complex stories in context.

All of this contributes to falling confidence in community relations, the abandonment of multi-cultural values and the encouragement of fragmentation within communities already scarred by social dislocation and increasing deprivation.

All of this provides, too, a challenge to journalists and media. Not just about revisiting the initiatives of ten years ago when professional groups sought to establish a dialogue on how best to confront racism, but a new and more positive vision of the role of media in a changing and uncertain world.

Today we need not just to promote tolerance and anti-racism, we need to balance cultural and religious sensitivity with the right to free expression, and we need to do it in an industry that, convulsed by the process of market change driven by new technological forces, appears to have lost sight of its social and cultural mission.

To kick-start this process the International Federation of Journalists earlier this year brought together some leading professional groups, journalists and others, including the European Commission, UNESCO and the Council of Europe, to talk through some of the arguments arising from the cartoons crisis in Brussels in February.

We emerged, predictably, with no magical or simple set of solutions, but at least we were able to agree on a rejection of violence and a call for dialogue, a restatement of democratic values, and, above all, for a return to ethical and professional journalism with media allowed to report freely without interference.

At the end of March in Oslo journalists and experts from the Arab world, Norway and Denmark met to thrash out some more of these arguments. Further meetings were held in North Africa and Vienna.

The conclusions at all these gatherings were much the same - that it is time to set editorial alarm bells ringing, that media need to improve their performance and that journalists need to rebuild confidence in the notion that media speak for everyone, not just for the settled majority.

These initial discussions also reveal that freedom of expression is not some inflexible, one-size-fits-all concept. It differs from country to country. Communities live with their taboos and customs, which vary from culture to culture, but when they are applied with widespread and common consent, they do not compromise principles of free expression set out in Article 10 of the European Human Rights Convention.

But there is much inconsistency. In Europe many countries still have punitive laws on blasphemy. There are places where you can be prosecuted for wearing Nazi insignia. Or where you can go to prison for denying the Holocaust. In others, there are no such limits to free speech. No wonder some Muslims are confused about European ideals of freedom of expression.

However, inconsistency is not a European disease. The violent demonstrations outside western embassies and calls for trade boycotts and reprisals against European media over the Mohammed cartoons, for instance, were incomprehensible given the record of Arab newspapers which for years have carried vicious and grotesque caricatures of Jews and Israelis.

The dozens of meetings on these issues and the rise of racism over the past year have convinced the IFJ and its members in Europe that it is time to engage media in a new and challenging initiative - not just to eliminate stereotypes and discrimination within media, but to raise the quality of debate about discrimination and intolerance. We need to improve and strengthen standards in reporting to ensure people get the information they need, without lashings of bias and prejudice.

But how? As a modest start, the IFJ is proposing in the coming months to launch a new umbrella group within media to co-ordinate actions at national level to bridge the gulf of misunderstanding between cultures; to campaign for more informed and quality journalism; and to create structures for dialogue within the industry and between the media and the communities they serve. This campaign we have called the Ethical Journalism Initiative.

The starting point for this work will be to raise awareness within media about the important and powerful role that media play in dealing with tolerance issues. It will aim to strengthen journalism by putting the focus on ethics and quality.

Ethical codes will not solve all the problems of intolerance in media, but they help journalists to take responsibility and they encourage journalists to act according to their conscience. But in a media business increasingly fixated on bottom-line objectives and with a continuing decline in public service values across the whole of Europe this is easier said than done.

But we want to make a start. And we should do that by clearly marking out the media territory which should be off limits to increasingly intrusive governments.

In particular, we insist that regulating ethics is the collective business of journalists, not principally of the corporations which commission and carry their journalism, and especially not of governments.

Governments have a legitimate role in regulating media structures to try to ensure the diversity necessary for freedom of expression to flourish, but journalists' ethics are a matter of content, and when it comes to what news media write or broadcast, governments have no role to play, beyond the application of general law.

One issue that united journalists in the debates of the last months was the common understanding that extremism and racism will not be eliminated by the introductions of new codes and supranational rules imposed by governments.

Editorial judgement, exercised freely, is what works best. Ethics, therefore, have to be actively supported, and particularly the prohibition of discrimination on the basis of religion, race or nationality which is one of the most general features of professional codes agreed at national and international level.

But like all the other skills of journalism: it takes training, time and effort to become good at applying ethical codes which direct thinking and permit conscious decision-making.

We need a range of objectives for work at national and international level, in particular to campaign vigorously to recruit more people from different ethnic and cultural groups into journalism. Journalism to be effective, must be inclusive, accountable and a reflection of the whole community.

In many countries of Europe, even the most democratic and decent, it is the case that only a handful of journalists from different social, ethnic or cultural backgrounds work in media. Media, editors and journalists need to do something about this. The argument for internal diversity is not about "do-gooder" journalism, it is about making diversity a reality and improving efficiency, professionalism and performance.

I hope that the Council of Europe will join us in this new work. If these initiatives gain support, they will provide lasting benefits. The controversies and crisis of the last year have opened the eyes of many in western media to their own poor performance. To confront all forms of intolerance we need a change of direction, towards a sense of proportion and respect for liberty in the world of politics, and along the way, a revival of well-informed, challenging journalism.

MR TEUN A. VAN DIJK,  
UNIVERSITAT POMPEU FABRA

“*RACISM, THE PRESS AND FREEDOM OF EXPRESSION: A SUMMARY OF TEN THESES*”

1. **Definition of Racism.** Racism is defined here as a social system of ethnically based social domination – in Europe (and elsewhere) of ‘white’ Europeans against Others – reproduced by a system of discriminatory social practices that are sustained and legitimized by a system of racist social cognitions (prejudices, ideologies).
2. **The fundamental role of discourse.** Discourse (language use, communication, etc.) is the crucial interface of the systems of racism: It may itself be a discriminatory social practice, and at the same time it is produced by and reproduces underlying racist cognitions.
3. **Racist public discourse.** This crucial role of discourse in the (re)production of racism is especially problematic for all forms of public discourse, such as that of politics, the mass media, education, scholarship and research, literature, legal discourse, and so on. Because of its wide distribution and authoritative status such discourse may affect the minds of many people, and hence has most potential to form the underlying racist beliefs that sustain the system of racism.
4. **The role of the symbolic elites.** If racism in contemporary society is largely (re)produced by public discourse, those social groups who control public discourse, the *symbolic elites*, are most responsible for the perpetuation of – as well as the struggle against – racism. Research shows that, given their positive self-image, they are also the ones who most consistently and explicitly deny their involvement in racism. For the same reason, anti-racist policies should first of all target the symbolic elites and their institutions.
5. **The role of the press.** The role of the press in the reproduction of (and struggle against) racism should be understood within this theoretical framework: A vast amount of research in many countries has demonstrated, again and again, that – on the whole, and of course with notable variations – the press is rather part of the problem of racism, than part of its solution. This is more explicitly the case for the right-wing popular press (such as *The Sun* in the UK or *Bild Zeitung* in Germany), but also applies to quality newspapers, and not only those of the Right. Many studies show that the major problems of the press that contribute to the reproduction of prejudiced beliefs, and hence indirectly to the reproduction of racism as a system of inequality are among the following:
  - a. **Biased newsgathering:** There is comparatively less attention for or reliance on non-white groups, persons or organizations as credible sources, experts, etc. - even when these are available. This also leads to **biased citation patterns:** Virtually only white elite sources are cited as reliable sources, thereby publicly marginalizing ethnic leaders and experts.



against racism, and they are obliged to prohibit and prosecute all forms of racism. Again, such applies to all their organizations and all citizens, and hence also to the press and journalists. No “Freedom of the Press!” slogans protect against well-founded accusations of racism or biased coverage. Moreover, other symbolic elites – who also may be part of the problem – such as politicians and judges, will hardly want to restrain the freedom of the press when it comes to racism. On the contrary – there is no institution or professional group less prone to be prosecuted because of discrimination, even when thousands or millions may be victims of (e.g. immigration, labor or housing) discrimination based on prejudice formed by racist or even moderately stereotyped reporting. A racist politician may (mostly internationally, rather than locally) be discredited. A (more) racist newspaper only sells more copies, also because of the anti-immigration hysteria it has created itself among the readers.

9. **The fear of the end of ‘white’ hegemony.** Although many of the symbolic elites and their institutions make us believe that immigration, integration or minorities are among the major problems of Europe, the economic and cultural facts tell a different story: Countries with more immigration and cultural diversity are often doing better than others. In other words, the concerns about immigration or integration, also in the press, should be interpreted as a concern about power – namely a fear of the imminent end of the hegemony of white Europeans and their (nearly exclusively white) elites.
10. **The press and the situation in Europe.** So, if immigration and minorities are construed by the elites as a pseudo-problem to conceal domination and fears of losing hegemony, what are the *real* problems of Europe? There are many, and complex ones, not least widespread poverty – equally ignored in the press. However, if for a moment we recall the major moral and political problems of Europe and white Europeans in the past – such as slavery, colonialism, apartheid, segregation, the Holocaust and ‘ethnic cleansing’ in Bosnia, among many others – then we must conclude with W.E.B. Dubois, that indeed the major problem of the 20th century – and before and after, both in the USA and also in Europe – has been the problem of the ‘color line’, that is, of racism. If we then look at Europe today, and see that also in countries that were believed to be solidly democratic, such as Holland, Denmark, and France, racist parties get large and larger number of votes, as is also the case in Italy, Germany and Austria, and if we also see in the Eurobarometer that on average up to two-thirds of the citizens are against (more) immigration – even when we know this will do their countries good and will make them more diverse – then we can only recognize that one of the fundamental problems of the old Europe, namely its historical racism and illusion of ethnic superiority and hegemony, has not only not been resolved, but is only getting worse again. Instead of problematizing immigration and minorities, or Muslims, or Islam, or cultural diversity, it is time that the press pays (much more) attention to some of the real problems of Europe. Contributing with its biased reporting to ethnic conflict, as all research shows the press is now doing, is not only racist and a threat to the everyday lives and welfare of millions of citizens (who already have enough problems due to the difficulties of immigration and integration) but also, even more fundamentally a threat to our democratic Europe. It is for this reason that the press should be much more aware of its power and responsibility in managing the minds of the citizens. A press can only be truly free if it makes sure that *all* citizens are free, and our neighborhoods, cities and countries free of racism.



MR YAMAN AKDENIZ,  
DIRECTOR OF CYBER-RIGHTS AND CYBER-LIBERTIES

“GOVERNING RACIST CONTENT ON THE INTERNET”

Speech that incites or promotes hatred towards individuals, on the basis of their race, gender, religion, sexual preference, and other forms of individual discrimination continues to be widely available on the Internet as in other kinds of traditional media.

During the course of the last 10 years, the growing problem of racist content on the Internet has naturally prompted vigorous responses from a variety of agents, including governments, supranational and international organisations as well as from the private sector. However, “States have yet to reach a political agreement on how to prevent the Internet being used for racist purposes and on how to promote its use to combat the scourge of racism”.<sup>5</sup> Some regard harmonised national legislation and international agreements as the way forward. For example, the European Commission against Racism and Intolerance (“ECRI”) believes, “national legislation against racism and racial discrimination is necessary to combat these phenomena effectively”.<sup>6</sup> Others strenuously oppose this position, citing objections on grounds of freedom of expression. It has been noted, for example, at the Organisation for Security and Co-operation in Europe (“OSCE”) level that “the United States opposes any regulation, on freedom of expression, while the European countries are more in favour of a policy of monitoring and sanctions”.<sup>7</sup> Hence, fundamental “disagreements remain on the most appropriate strategy for preventing dissemination of racist messages on the Internet, including the need to adopt regulatory measures to that end”.<sup>8</sup> This lack of consensus threatens the implementation of legal sanctions in accordance with relevant international human rights legal instruments, in particular the *International Convention on the Elimination of All Forms of Racial Discrimination* (“ICERD”) as recommended by paragraph 147 of the United Nations’ Durban Programme of Action. It is possible that the strengthening and updating of international instruments, most notably, the ICERD, may result in wider agreement. At the same time, the absence of a global consensus on the limits of freedom of expression may remain an obstacle to regulatory harmonisation through ICERD as well as through the Council of Europe’s *Additional Protocol to the CyberCrime Convention concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed through Computer Systems* or any other future international agreement or convention.

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<sup>5</sup> Racism, Racial Discrimination, Xenophobia And All Forms Of Discrimination Report submitted by Mr. Doudou Diène, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, E/CN.4/2005/18, 13 December 2004.

<sup>6</sup> Note within this context the ECRI General Policy Recommendation No 7 on national legislation to combat racism and racial discrimination, CRI (2003) 8, adopted by ECRI on 13 December 2002, at <[http://www.coe.int/T/E/human\\_rights/Ecri/1-ECRI/3-General\\_themes/1-Policy\\_Recommendations/Recommendation\\_N%07/3-Recommendation\\_7.asp](http://www.coe.int/T/E/human_rights/Ecri/1-ECRI/3-General_themes/1-Policy_Recommendations/Recommendation_N%07/3-Recommendation_7.asp)>, para. 1 of the Explanatory Report.

<sup>7</sup> The fight against racism, racial discrimination, xenophobia and related intolerance and the comprehensive implementation of and follow-up to the Durban Declaration and Programme of Action, Note by the Secretary-General, A/59/329, 7 September 2004.

<sup>8</sup> The meeting on the relationship between racist, xenophobic and anti-Semitic propaganda on the Internet and hate crimes held by the Organization for Security and Cooperation in Europe (OSCE) in Paris on 16-17 June 2004.

However, states such as the United Kingdom, Spain, Russia, Norway, Italy, Ireland, and Hungary have not yet signed the CoE Additional Protocol and the success of such a regional instrument depends upon the co-operation of all Member States. Member States of the CoE may be reluctant to sign and/or ratify the Additional Protocol as becoming a party to the Additional Protocol may require substantial changes to national laws. Speech based restrictions may not be allowed by certain state constitutions, and the definition provided for “racist and xenophobic material” could conflict with state laws and constitutions. The offences included within the Additional Protocol, *inter alia*, dissemination of racist and xenophobic material, racist and xenophobic motivated threats, racist and xenophobic motivated insults, and the criminalisation of expressions which deny, grossly minimise, approve or justify acts constituting genocide or crimes against humanity may not be all supported by the non signing and non ratifying Member States. The reservations present in articles 3, 5, and 6 could also result in disparities between the parties to the Additional Protocol and harmonisation may never take place in relation to “racist and xenophobic motivated insults” (article 5), and “denial, gross minimisation, approval or justification of genocide or crimes against humanity” (article 6) as these two articles allow the parties to the Protocol to reserve the right not to apply, in whole or in part the offences provided within these articles.

A draft Framework Decision on combating racism and xenophobia designed to ensure that racism and xenophobia are punishable in all member states by effective, proportionate and dissuasive criminal penalties<sup>9</sup> was proposed at the European Union level in November 2001. However, to date no agreement has been reached on this initiative largely due to different approaches to limitations in the exercise of freedom of expression within the Member States of the EU. Similar drawbacks will be witnessed during the discussions involving the draft Television Without Frontiers Directive<sup>10</sup> which includes non derogatory provisions to make non-linear services and linear services subject to the same minimum requirements in relation to the prohibition of incitement to hatred. Recently announced European Union wide proposal to criminalise Holocaust Denial supported by Germany and based upon a previously similar but unsuccessful initiative by the Luxembourg presidency face similar obstacles based upon different approaches to limitations in the exercise of freedom of expression within the Member States.

Another associated factor to mention is the extent of duplication of efforts at the supranational, and international levels of governance. This duplication has resulted in delays in finalising policies within relevant organisations, and in its subsequent implementation at the national level to address Internet related problems. Governments and international organisations are, however, reacting more positively against the dissemination of racist content through the Internet, and there is more awareness of the nature of the problem including the use of the Internet by terrorist organisations for terrorist propaganda and inciting terrorist violence,<sup>11</sup> as well as the

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<sup>9</sup> Note also the Declaration by the Council and the Representatives of the Governments of the Member States, meeting within the Council on combating racism and xenophobia on the Internet by intensifying work with young people, 9330/01, Brussels, 6 June 2001.

<sup>10</sup> Proposal for a Directive of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (Television without frontiers), COM(2005) 646 final.

<sup>11</sup> Note the UN Resolution 1617 (2005) Adopted by the Security Council at its 5244th meeting, on 29 July 2005. Note also the ADL report, *JIHAD Online: Islamic Terrorists and the Internet*, 2002, at <[http://www.adl.org/internet/jihad\\_online.pdf](http://www.adl.org/internet/jihad_online.pdf)>.

resurrection of Nazi ideology in Europe,<sup>12</sup> and violent radicalisation.<sup>13</sup> For example, the European Union's May 2006 revised *Action Plan on Terrorism*<sup>14</sup> include the development of policies and measures to encounter misuse of the Internet by extremist websites, as well as enhancing co-operation against terrorist use of the Internet. The EU will also consider developing further legal framework to remove illegal content from the Internet.<sup>15</sup>

Unfortunately content of a racist nature will not disappear from the Internet in the short term, and in the fight against racist Internet content no one approach promises to be entirely effective. Looking to the future, one can expect a trend towards "governance" rather than "government", where the role of the nation state is not exclusive and where more varied forms of regulation, many in the private sector, come into play. The governance of the Internet will continue to evolve at the national and international levels<sup>16</sup> "regardless of frontiers", and policy initiatives need to reflect the decentralised nature of the Internet. Although legal regulation will doubtless continue to form an important part of future efforts to tackle the problem of online racism it will only ever form part of the solution. Ultimately, it will prove necessary to rely on additional measures in the form of self and co-regulatory initiatives. The success of these measures will, in turn, depend upon substantial improvement of existing systems including the development of Internet Service Providers codes of conduct, and other mechanisms aimed at combating racist Internet content as recommended by the UN Durban Programme of Action.<sup>17</sup> If successful these measures would potentially be more flexible and could be more effective than prescriptive government legislation. Consistent with recommendation 141 of the Durban Programme of Action, education about racist content on the Internet and how to foster tolerance, is arguably the single most effective way of combating racist content.<sup>18</sup> The importance of education to promote respect and

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<sup>12</sup> Parliamentary Assembly of the Council of Europe, *Combating the resurrection of Nazi ideology*, Report by the Political Affairs Committee (Rapporteur: Mr Mikhail Margelov, Russian Federation, European Democrat Group), Doc. 10766, 19 December 2005, at <<http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc05/EDOC10766.htm>>. Note also Parliamentary Assembly of the Council of Europe, Resolution 1345 (2003) on Racist, xenophobic and intolerant discourse in politics, at <<http://assembly.coe.int/Main.asp?link=http://assembly.coe.int/Documents/AdoptedText/ta03/ERES1345.htm>>. Assembly debate on 29 September 2003 (26th Sitting). See further Doc. 9904, report of the Committee on Legal Affairs and Human Rights, Rapporteur: Mr McNamara at <<http://assembly.coe.int/Main.asp?link=http://assembly.coe.int/Documents/WorkingDocs/doc03/EDOC9904.htm>>. Text adopted by the Assembly on 29 September 2003 (26th Sitting).

<sup>13</sup> Council of the European Union, *The European Union Strategy for Combating Radicalisation and Recruitment to Terrorism*, 14347/05 JAI 414 ENFOPOL 152 COTER 69, Brussels, 25 November, 2005.

<sup>14</sup> Council of the European Union, *Revised Action Plan on Terrorism*, 10043/06, Brussels, 31 May 2006.

<sup>15</sup> In August 2006, Ministers representing the current Finnish EU Presidency, the future EU Presidencies (Germany, Portugal, Slovenia and France), the UK Home Secretary and Vice-President Frattini of the European Commission emphasised "the need to make the Internet a hostile environment for terrorists and those who seek to radicalise young people, spread messages of hate and plan mass murder". See Joint Press Statement issued by Ministers of UK, Finland, Germany, Portugal, Slovenia, France and the Vice-President of the European Commission during the Informal London Meeting on Counter-Terrorism, 16 August, 2006, at <[http://www.eu2006.fi/news\\_and\\_documents/other\\_documents/vko33/en\\_GB/1155736629535/\\_files/75742366748508254/default/joint\\_press\\_statement\\_london.pdf](http://www.eu2006.fi/news_and_documents/other_documents/vko33/en_GB/1155736629535/_files/75742366748508254/default/joint_press_statement_london.pdf)>.

<sup>16</sup> Note the World Summit on the Information Society, Tunis Commitment 2005, Doc. WSIS-05/TUNIS/DOC/7, 18 November 2005.

<sup>17</sup> See paragraph 144 of the Durban Programme of Action.

<sup>18</sup> See review of reports, studies and other documentation for the preparatory committee and the world conference: Report of the High Commissioner for Human Rights on the use of the Internet for purposes of incitement to racial hatred, racist propaganda and xenophobia, and on ways of promoting international cooperation in this area, A/CONF.189/PC.2/12, 27 April 2001.

fight intolerance is highlighted in other broader forums especially following the events of 11 September, 2001 with the rise of Islamophobia as well as Anti-Semitism.<sup>19</sup> It is often argued that the development of good practice initiatives to reduce prejudice and “cultural, academic and educational initiatives, supplemented by a range of inter-religious and intercultural awareness events”<sup>20</sup> is the best way to address such problems. The role the Internet can play as a powerful instrument to combat racism should not be underestimated.

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<sup>19</sup> Note ODIHR (OSCE), *Education on the Holocaust and on Anti-Semitism: An Overview and Analysis of Educational Approaches*, April 2006, at <[http://www.osce.org/publications/odihr/2006/04/18712\\_586\\_en.pdf](http://www.osce.org/publications/odihr/2006/04/18712_586_en.pdf)>.

<sup>20</sup> Allen, C., and Nielsen, J.S., *Summary Report on Islamophobia in the EU after 11 September 2001*, European Monitoring Centre on Racism and Xenophobia (“EUMC”), Vienna, May 2002 at <[http://eumc.europa.eu/eumc/material/pub/anti-islam/Synthesis-report\\_en.pdf](http://eumc.europa.eu/eumc/material/pub/anti-islam/Synthesis-report_en.pdf)>. Note further EUMC, *The fight against Anti-Semitism and Islamophobia - Bringing Communities together*, Vienna/Brussels, Fall 2003, at <<http://eumc.europa.eu/eumc/material/pub/RT3/Report-RT3-en.pdf>>.

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*“INTERNATIONAL AND EUROPEAN LEGAL STANDARDS FOR COMBATING RACIST  
EXPRESSION: SELECTED CURRENT CONUNDRUMS”*

**Introduction<sup>21</sup>**

By way of preliminary remark, I would like to endorse many of the points made by other contributors to this seminar, in particular the emphasis that has been placed on the inter-related character of human rights and the very real danger that hard-won standards of human rights could be/are being sapped of their vitality by invidious practices of politicisation. This trend involves applying the politics of fear and exploiting individual and societal yearning for security. Professor Conor Gearty makes the point both imaginatively and effectively when he describes a “super-virus” that has infected the international human rights movement.<sup>22</sup> The virus works like a standard computer virus - it has entered the system and is wreaking havoc from within. Like many computer viruses, it is known by its acronym: GWOT. This virus “causes the human rights idea to manifest itself in gross human rights violations and egregious human rights abuses which it presents not as incompatible with but as necessitated by human rights”.<sup>23</sup> GWOT, of course, stands for Global War on Terror: the emotive reason routinely given by many States authorities for their dismantling of much human rights architecture in recent times.

An increasing number of human rights bodies and mechanisms are proving alert to the grave dangers posed by the GWOT virus. The general thrust of their warnings is that the events of 11 September 2001 and the subsequent (re-)actions of States - individually and collectively - have occasioned a veritable sea-change in international relations and protection of human rights. The revival and re-legitimation of historical forms of discrimination unleashed by GWOT are identified as particularly troubling.<sup>24</sup> As noted in a recent joint report by the UN Special Rapporteur on freedom of religion or belief and the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance:

Discrimination is practised based on the two main national issues that Governments consider to be threatened by terrorism: security and identity. In this regard, with the proclaimed motivation of preserving national security, Governments have adopted policies gradually curtailing or disregarding civil and

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<sup>21</sup> This text is based on a presentation given by the author at the ECRI Expert Seminar on combating racism while respecting freedom of expression, Council of Europe, Strasbourg, 16-17 November 2006. The author would like to express his thanks to ECRI for the opportunity to speak at its extremely timely seminar. All websites given in the footnotes were last visited on 6 February 2007.

<sup>22</sup> Conor Gearty, “Is the idea of human rights now doing more harm than good?”, Lecture at the Centre for the Study of Human Rights, London School of Economics, London, 12 October 2004. The text of the lecture is available at: <[http://www.lse.ac.uk/Depts/human-rights/Documents/12.10.04\\_CG.pdf](http://www.lse.ac.uk/Depts/human-rights/Documents/12.10.04_CG.pdf)>. For further insights into Gearty’s reflections on related themes, see: Conor Gearty, *Can Human Rights Survive?* (Cambridge, Cambridge University Press, 2006).

<sup>23</sup> *Ibid.*, at p. 7 of the transcript of the lecture.

<sup>24</sup> Implementation of the United Nations General Assembly Resolution 60/251 of 15 March 2006 entitled “Human Rights Council”, Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir, and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diène, further to Human Rights Council decision 1/107 on incitement to racial and religious hatred and the promotion of tolerance, 20 September 2006, A/HRC/2/3, para. 7. See also, in this connection, paras. 5-8.

political rights or selecting those rights more fitting to that goal. In the same spirit, on the grounds of protection of national identity, cultural, social and economic rights, particularly those guaranteeing the rights of national minorities, immigrants and foreigners, are deliberately violated or marginalized. Rights related to culture and religion are particularly targeted. [...] <sup>25</sup>

In a similar vein, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism recently noted that:

[...] the very old trend of States resorting to the notion of “terrorism” to stigmatize political, ethnic, regional or other movements they simply do not like, is also very much a new trend. What is new is that, since September 2001, the international community seems to have become rather indifferent to the abuse of the notion of terrorism. The result is that calls for and support for counter-terrorism measures by the international community may in fact legitimize oppressive regimes and their actions even if they are hostile to human rights. [...] <sup>26</sup>

These considerations of the post-2001 political *Zeitgeist* have considerable bearing on contemporary interpretations of the provisions of international human rights law that are central to freedom of expression and the struggle against racist discrimination.<sup>27</sup> Such considerations also serve to colour relevant controversies, as will be demonstrated below.

As my background paper<sup>28</sup> provides an overview of the main provisions of international law governing the interface between freedom of expression and the struggle against racism, my main aim here will be to further the general discussion by identifying certain gaps, shortcomings, inconsistencies, red herrings or - for want of a better word - problems, that arise within that interface. Such problems are conceptual, definitional and practical in nature.

### Conceptual problems

In discussions about the right to freedom of expression and the right to be free from racial discrimination, there is an instinctive tendency to pit one imperative against the other; to focus on conflictual aspects of their relationship. However, I would like to argue that the discussion should be framed differently, i.e., within the conceptual framework set out by the Vienna Declaration.<sup>29</sup> Article 5 of the Declaration forcefully states that:

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<sup>25</sup> *Ibid.*

<sup>26</sup> “Promotion and protection of human rights”, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, 28 December 2005, E/CN.4/2006/98, para. 56(a).

<sup>27</sup> For an NGO perspective, see: “Global ‘war on terror’ has become a global war on minorities”, Minority Rights Group International Press Release, 8 September 2006, available at: <[http://www.minorityrights.org/media\\_centre/media\\_press/media\\_centre\\_press\\_sept11.htm](http://www.minorityrights.org/media_centre/media_press/media_centre_press_sept11.htm)>. See also the accompanying table detailing how minorities in different countries have been affected by GWOT: <[http://www.minorityrights.org/media\\_centre/media\\_press/sep11table.pdf](http://www.minorityrights.org/media_centre/media_press/sep11table.pdf)>.

<sup>28</sup> Tarlach McGonagle, “The international and European legal standards for combating racist expression”, pp. 77-95 of this publication.

<sup>29</sup> World Conference on Human Rights - The Vienna Declaration and Programme of Action (1993).

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.

To insist on the interdependent and inter-related character of the right to freedom of expression and the right to be free from racial discrimination, is not to deny that in practice, the exercise of both rights in certain situations can generate certain frictions. Rather, it is to insist on the presumptive coherence of rights.<sup>30</sup> Such an integrated conceptualisation of human rights facilitates the exploration of: (i) the implications of freedom of expression/anti-racism for other human rights, and (ii) the impact of contextualising factors.

Central to this conceptualisation of human rights are the values of “pluralism, tolerance and broadmindedness”,<sup>31</sup> which are prerequisites of democratic society (as consistently held by the European Court of Human Rights). These are the kind of values described by Bhikhu Parekh as “operative public values”, i.e., those values “that a society cherishes as part of its collective identity and in terms of which it regulates the relations between its members”, and which “constitute the moral structure of its public life and give it coherence and stability”.<sup>32</sup>

#### *Coherence of rights at international level*

It is rarely disputed that Articles 19 and 20, ICCPR, are closely related. Indeed, during the drafting of the ICCPR, the draft article that ultimately became Article 20 was realigned so that it would immediately follow Article 19, thereby emphasising the contiguity of the two articles. Indeed, one leading commentator has even referred to Article 20 as being “practically a fourth paragraph to Article 19 and has to be read in close connection with the preceding article”.<sup>33</sup> It is also noteworthy that Article 20, unlike other substantive articles in the ICCPR, does not set out a right as such. Instead, it sets out further restrictions on other rights, most notably the right to freedom of expression. As already suggested, it is generally accepted that there is no real contradiction between Articles 19 and 20. This is borne out by the drafting history of the respective articles,<sup>34</sup> the UN Human Rights Committee’s (HRC) General Comment 11<sup>35</sup> and various HRC Opinions.<sup>36</sup> It is logical that this

<sup>30</sup> For a detailed conceptual exploration of this notion, see: Rolf Künnemann, “A Coherent Approach to Human Rights”, 17 Human Rights Quarterly (No. 2, 1995), pp. 323-342.

<sup>31</sup> *Handyside v. United Kingdom*, Judgment of the European Court of Human Rights of 7 December 1976, Series A, No. 24, para. 49.

<sup>32</sup> Bhikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (2nd Edition) (New York, Palgrave Macmillan, 2006), p. 363.

<sup>33</sup> Karl Josef Partsch, “Freedom of Conscience and Expression, and Political Freedoms”, in Louis Henkin, Ed., *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York, Columbia University Press, 1981), pp. 209-245, at p. 227.

<sup>34</sup> See further: Marc Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights* (Dordrecht, Martinus Nijhoff Publishers, 1987), pp. 403-411; Manfred Nowak, *U.N. Covenant on Civil and Political Rights* (2<sup>nd</sup> revised edition) (Germany, N.P. Engel Publisher, 2005), pp. 468-480.

<sup>35</sup> Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20), General Comment 11, United Nations Human Rights Committee, 29 July 1983.

<sup>36</sup> See further, Tarlach McGonagle, “The international and European legal standards for combating racist expression”, pp. 77-95 of this publication.

coherence should exist: different provisions of the same treaty must be interpreted harmoniously.

The same harmony is not replicated between different treaties, however. Thus, it is a moot question whether relevant respective provisions of the ICCPR and ICERD can be considered totally coherent. They are certainly not co-extensive. Article 19(3), ICCPR, provides for restrictions on the right to freedom of expression only when such restrictions are provided by law and necessary: “(a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals”. Article 20(2) requires States to prohibit by law “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”.

The introductory paragraph to Article 4, ICERD, is condemnatory in tone and it contains the all-important “due regard” clause which, in effect, clarifies that the objectives set out in Article 4 must be pursued consistently with a wider range of human rights. Article 4(a), the first of the Article’s three operative paragraphs, enjoins States *inter alia* to declare offences punishable by law:

- all dissemination of ideas based on racial superiority;
- all dissemination of ideas based on racial hatred;
- incitement to racial discrimination;
- all acts of violence against any race or group of persons of another colour or ethnic origin;
- incitement to such acts;
- the provision of any assistance to racist activities, including the financing thereof.

One key difference between the ICCPR and ICERD is that the latter requires the prohibition of ideas based on racial superiority and hatred without further explicit qualification; had the “due regard” clause not been so astutely inserted into Article 4’s opening paragraph, the prohibition would clearly have been incompatible with the right to freedom of expression. By way of contrast, permissible restrictions on the right to freedom of expression under Article 19, ICCPR, are expressly grounded in the protection of the rights of others or the upholding of other pressing public interests.

On the basis of the brief foregoing analysis alone,<sup>37</sup> it seems difficult to speak of a universal approach to “hate speech”.<sup>38</sup> This is not surprising: different treaties and bodies pursue different objectives, within the constraints of different mandates, and employing different strategies in the process. The absence of a *universal* approach is

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<sup>37</sup> Constraints of space prevent a more detailed discussion, but see further: Natan Lerner, *The U.N. Convention on the Elimination of all Forms of Racial Discrimination* (The Netherlands/USA, Sijthoff & Noordhoff, 1980); Drew Mahalic & Joan Gambia Mahalic, “The Limitation Provisions of the International Convention on the Elimination of All Forms of Racial Discrimination”, 9 *Human Rights Quarterly* (No. 1, February 1987), pp. 74-101; Theodor Meron, “The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination”, 79 *The American Journal of International Law* (No. 2, April 1985), pp. 283-318; Karl Josef Partsch, “Racial speech and human rights: Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination”, in Sandra Coliver, Ed., *Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination* (United Kingdom, ARTICLE 19/University of Essex, 1992), pp. 21-28; Egon Schwelb, “The International Convention on the Elimination of All Forms of Racial Discrimination”, 15 *International and Comparative Law Quarterly* (October 1966), pp. 996-1068.

<sup>38</sup> For further probing of this question, see: Toby Mendel, “Does International Law Provide Sensible Rules on Hate Speech?”, in Peter Molnar, Ed., *Hate Speech and its Remedies* (forthcoming, 2007).

not nearly as grave as the absence of *approximate* coherence across treaties would be.

### Definitional problems

The conceptual dimension inevitably merges into the definitional. A second relevant inevitability is that over time, judicial concepts are developed and refined, leading to greater understanding of their essential meaning and predictability of their evolution. The development of key notions such as incitement, advocacy, propaganda, etc., are touched upon in my background paper, but a few additional words concerning incitement are in order here because a certain amount of confusion about the concept continues to persist because: (i) in some legal traditions, the concept is not particularly well-anchored, and (ii) incitement can have different meanings in the context of different treaties.

In his dissenting opinion in *Gitlow v. New York*,<sup>39</sup> Justice Oliver Wendell Holmes famously asserted that “[E]very idea is an incitement”.<sup>40</sup> While he may have overstated the point somewhat, the remark does contain a certain grain of truth. Incitement does depend on the intensity with which one seeks to cause a desired result to be achieved via the agency of a third party. This is clear from Holmes’ subsequent comments in that same Dissent: “[every idea] offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker’s enthusiasm for the result”.<sup>41</sup>

Ordinarily, incitement is considered to be a so-called inchoate offence. This means that one can be guilty of incitement [to a proscribed activity or the creation of a certain feeling/state of mind (eg. hatred)], even if the desired result is not achieved. It is an offence distinct from the offence it promotes.<sup>42</sup> This summary description of the generic characteristics of the offence can be supplemented with considerations of specific types of incitement, as determined by discrete treaty provisions. For instance, the specific nature of incitement is heavily influenced by the nature of what is being incited: discrimination, hostility or violence (Article 20(2), ICCPR); discrimination and acts of violence (Article 4(a), ICERD), or genocide (Article III(c), the Genocide Convention). Furthermore, the nature of the incitement can also be qualified by the use of terms like “direct and public”, as is the case in the Genocide Convention.

Whereas incitement and other recurring notions lend themselves relatively easily to legal definition, some notions, such as hatred,<sup>43</sup> do not. The same goes for the term, “hate speech”, which enjoys widespread and largely uncontested currency nowadays. Intuitively, there can be no objection to Bhikhu Parekh’s condemnation of “hate speech” as “objectionable for both intrinsic and instrumental reasons, for what it is

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<sup>39</sup> Supreme Court of the United States 268 US 652 (1925).

<sup>40</sup> *Ibid.*, at 673.

<sup>41</sup> *Ibid.*

<sup>42</sup> For a lengthier discussion of relevant issues, see: Andrew Ashworth, *Principles of Criminal Law* (Second Edition), (Oxford, Clarendon Press, 1995), pp. 462 *et seq.*

<sup>43</sup> One leading commentator has described hatred as “an active dislike, a feeling of antipathy or enmity connected with a disposition to injure”: Karl Josef Partsch, “Racial speech and human rights: Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination”, *op. cit.*, at p. 26.

and what it does”.<sup>44</sup> However, we should be wary of the disarming and deceptive familiarity of the term, as reflexive calls for the banning of “hate speech” can be a symptom of the dreaded GWOT virus. The shift from moral condemnation to legal regulation (or prohibition) calls for greater definitional refinement than has hitherto been provided by any international, legally-binding treaty or related adjudicative authority. As one commentator has put it:

The multiple forms of anti-egalitarian expression that exist are neither equally harmful nor performative; we must not, therefore, lose sight of the link between the norm that the state is drafting and the broader public policies involved when identifying [sic] the specific forms of anti-egalitarian expressions to discourage.<sup>45</sup>

The *precise* term “hate speech” is not enshrined in any of the leading international legally-binding instruments. It is used by the European Court of Human Rights, but it is not organic to the European Convention on Human Rights. It is an imported product - and a fairly recent import at that. As far as I can determine, the *precise* term was never used by the Court (or the now-defunct European Commission of Human Rights) before 1999.<sup>46</sup> Prior to that, the vocabulary was different, even if the targeted mischiefs were pretty much the same.<sup>47</sup> The Court has not yet defined the term and in some judgments, it sometimes even uses it in inverted commas (scare quotes).<sup>48</sup> One cannot help but wonder whether this indicates a certain unease with the concept?

To continue in “devil’s advocate” mode, I wonder what added value or clarity the introduction of the term has brought to the Court’s jurisprudence relating to Articles 10 and 17, ECHR - at least in the absence of its own definition of the term? Of course, the Court sometimes refers to the Council of Europe’s Committee of Ministers’ Recommendation (97) 20 on “Hate Speech”, which *describes* the term (albeit for the purposes of the application of the principles set out in the Appendix to the Recommendation) 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”.<sup>49</sup>

But perhaps I am being too harsh here. After all, it takes time to develop and consolidate jurisprudence and judgments like *Gündüz v. Turkey* certainly do help to further our understanding of the term, or at least of the Court’s interpretation of the term. The case arose out of the participation of the applicant - the leader of an

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<sup>44</sup> Bhikhu Parekh, “Hate speech: Is there a case for banning?”, 12 *Public Policy Research* (No. 4, December 2005-February 2006), pp. 213-223, at p. 217.

<sup>45</sup> Jean-François Gaudreault-DesBiens, “From Sisyphus’s Dilemma to Sisyphus’s Duty? A Meditation on the Regulation of Hate Propaganda in Relation to Hate Crimes and Genocide”, (2000) 46 *McGill L.J.* 121, at p. 133. See also in this connection, Bhikhu Parekh, “Hate speech: Is there a case for banning?”, *op. cit.*, at p. 222.

<sup>46</sup> It would appear that the term was first used in the cases, *Sürek v. Turkey (No. 1)* and *Sürek & Özdemir v. Turkey*, Judgments of the European Court of Human Rights of 8 July 1999. See: para. 62 and para. 63, respectively.

<sup>47</sup> For details of relevant case-law, see: Anne Weber, “The case-law of the European Court of Human Rights on Article 10 ECHR relevant for combating racism and intolerance”, pp. 97-113 of this publication; Mario Oetheimer, “La Cour européenne des Droits de l’Homme face au discours de haine”, 69 *Rev. trim. dr. h.* (No. 1, 2007), pp. 63-80.

<sup>48</sup> See, for example, *Gündüz v. Turkey*, Judgment of the European Court of Human Rights (First Section) of 4 December 2003, para. 51 (quoted, *infra*).

<sup>49</sup> Appendix to Recommendation No. R (97) 20.

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 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>50</sup>

"Hate speech" has already been described as an imported term. It was initially propelled to international prominence primarily by critical race scholarship originating in the United States. Critical race theory is (to put it very summarily) an approach to racism where the victim and the victim's perspective are given pride of place.<sup>51</sup> It seeks to ensure that law and policy are adequately informed by circumstances and experiences [of victims of racism].

There are some important lessons to be learned from critical race theory. Prompted partly by its central theses, and partly by an integrated conceptualisation of human rights, I would argue for a purposive definitional approach to hate speech and not a restrictive one. The guiding question should be "what harms ought to be prevented?" To paraphrase Kevin Boyle and Anneliese Baldaccini, the focus should be on the "core mischiefs at which the struggle against racism is aimed".<sup>52</sup> Those "core mischiefs" are the various ways in which hate speech interferes with other rights or "operative public" values: dignity, non-discrimination and equality, (effective) participation in public life (including public discourse<sup>53</sup>), expression, association, religion, etc. The prevention of particular harms suffered by victims should also be considered: psychic harm, damage to self-esteem, inhibited self-fulfilment, etc.<sup>54</sup> All in all, the range of harms to be prevented is varied and complex. The challenge is therefore to identify

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<sup>50</sup> *Gündüz v. Turkey*, *op. cit.*, para. 51.

<sup>51</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>52</sup> 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 p. 152.

<sup>53</sup> For a thorough analysis of this topic, see: Robert C. Post, "Racist Speech, Democracy, and the First Amendment", 32 *Wm. & Mary L. Rev.* 267 (1991).

<sup>54</sup> See generally, Mari Matsuda *et al.*, *Words that Wound*, *op. cit.*

“which criteria allow us to distinguish between harms that justify restrictions and those that do not”.<sup>55</sup>

Partly in recognition of the complexity of relevant harms, different treaties and bodies have different approaches (conceptual and practical) to the question of legitimate restrictions on freedom of expression.<sup>56</sup> The right to freedom of expression, as vouchsafed by international law, comprises the right to hold opinions and to receive and impart information. As such, it covers extremely dynamic processes which typically involve not only speakers and listeners, but also, very often, third parties who are not directly targeted by particular instances of expression, but for whom that expression may nonetheless have implications. The importance of the consequences of expression should therefore be stressed, as well as the need to develop suitable methodological tools for the evaluation of such consequences. This prompts questions about negative reporting on and stereotyping of certain group(ing)s in society: what are their cumulative effects on the rest of society? Does their wider dissemination via mainstream media make them more influential of public opinion, more corrosive of societal values or more subliminally effective than full-blown extremism circulated in fringe fora?

Such questions cannot be answered *in abstracto*.<sup>57</sup> As Robert Post has noted, “Audiences always evaluate communication on the basis of their understanding of its social context”.<sup>58</sup> When applying their normative principles to specific factual circumstances, adjudicative bodies should give sufficient weighting to factors such as the intent of the speaker and “contextual variables”.<sup>59</sup> The latter could include the nature and impact of the medium used to convey the expression; audience-related considerations; socio-political factors; the nature and severity of the sanction imposed (when the adjudicative body is acting in a review capacity), etc.

Because so many rights and values are potentially affected by hate speech and because there are divergent legally-based interpretations of the legitimacy of limitations on freedom of expression, it is not enough to concentrate exclusively on *negative* State obligations for countering hate speech. It is not simply a case of drawing a line that would mark the *nec plus ultra* of permissible expression.

A significant emphasis on *positive* State obligations can be detected in international human rights law. The Durban Declaration and Programme of Action and the Framework Convention for the Protection of National Minorities, in particular, adopt root-and-branch approaches to combating hate speech by targeting the hatred and intolerance from which it spawns.<sup>60</sup> Central to their strategies is the promotion of counter-speech, or more accurately, more speech, or even more accurately, expressive opportunities, especially via the media. The role of the media as the Fourth Estate or democratic watchdog is well-documented, but their importance for democracy is by no means limited to their contribution to public debate. Of increasing importance is the role played by the media in providing fora for expression and communication. The promotion of tolerance and of intercultural understanding

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<sup>55</sup> David Kretzmer, “Freedom of Speech and Racism”, 8 Cardozo L. Rev. 445 (1987), at p. 478.

<sup>56</sup> See further, Tarlach McGonagle, “The international and European legal standards for combating racist expression”, pp. 77-95 of this publication.

<sup>57</sup> See further: David Kretzmer, “Freedom of Speech and Racism”, *op. cit.*, at p. 462.

<sup>58</sup> Robert C. Post, “Racist Speech, Democracy, and the First Amendment”, *op. cit.*, at p. 307.

<sup>59</sup> Michel Rosenfeld, “Hate Speech in Constitutional Jurisprudence: A Comparative Analysis”, 24 Cardozo L. Rev. 1523 (2003), at 1565.

<sup>60</sup> See relevant sections of my background paper for further details.

and dialogue is similarly prioritised. Measures advocated include specialised training for journalists on intercultural themes, ensuring access to media for minorities or other groups, funding of various initiatives promoting ethical journalism and programme production, etc.<sup>61</sup>

Crucially, a sense of deference to principles of media autonomy/editorial freedom is consistently advocated in respect of these measures. Encouragement, not prescription, is the strategy to be employed.<sup>62</sup>

The specialised IGO mandates on freedom of expression adopt a strikingly similar approach in their Joint Statement of 2006.<sup>63</sup> They reaffirm that “exercise of freedom of expression and a free and diverse media play a very important role in promoting tolerance, diffusing tensions and providing a forum for the peaceful resolution of differences”, even though “High profile instances of the media and others exacerbating social tensions tend to obscure this fact”. They have also pointed out the positive contribution that can be made to the promotion of tolerance by “self-regulatory mechanisms such as press councils, professional ethical associations and media ombudspersons” and public service broadcasters. They also caution that:

Governments should refrain from introducing legislation which makes it an offence simply to exacerbate social tensions. Although it is legitimate to sanction advocacy that constitutes incitement to hatred, it is not legitimate to prohibit merely offensive speech. Most countries already have excessive or at least sufficient ‘hate speech’ legislation. In many countries, overbroad rules in this area are abused by the powerful to limit non-traditional, dissenting, critical, or minority voices, or discussion about challenging social issues. Furthermore, resolution of tensions based on genuine cultural or religious differences cannot be achieved by suppressing the expression of differences but rather by debating them openly. Free speech is therefore a requirement for, and not an impediment to, tolerance.

### Practical problems

The third and final focus of this paper is on particular flash-points which raise difficult questions for the application of relevant international legal standards and therefore merit further consideration in the context of this seminar’s broader themes.

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<sup>61</sup> See further, Tarlach McGonagle, “The Road Less Travelled: An Analysis of the Strategy against Hate Speech Elaborated under the Framework Convention for the Protection of National Minorities”, in Peter Molnar, Ed., *Hate Speech and its Remedies* (forthcoming, 2007).

<sup>62</sup> See the Council of Europe’s Committee of Ministers’ Recommendation (97) 21 on the media and the promotion of a culture of tolerance.

<sup>63</sup> Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples’ Rights) Special Rapporteur on Freedom of Expression, 19 December 2006, available at: <<http://www.article19.org/pdfs/standards/four-mandates-dec-2006.pdf>>.

Defamation of religions<sup>64</sup>

The campaign against the so-called “defamation of religions” has - in a relatively short space of time - made significant headway within the United Nations, in particular. The largely uncritical political acceptance of the “defamation of religions” is problematic for conceptual and practical reasons. First, defamation is usually associated with individuals - or groups - but not creeds or belief systems. Defamation of an individual involves making false statements about him/her that would lower him/her in the eyes of other right-thinking members of society. The concern is for one’s good name and the avoidance of reputational harm. The protection of one’s good name is generally recognised as grounds for legitimately restricting freedom of expression, provided all the usual legal safeguards are met. One has to travel considerable conceptual distance to stretch defamation to cover religions which, *qua* belief systems, do not have reputations as such.

In their application, defamation laws frequently fall prey to conceptual overstretch, and instances of such practice are rightly criticised. ARTICLE 19’s *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*<sup>65</sup> insist that “defamation laws cannot be justified if their purpose or effect is to”, *inter alia*: “protect the ‘reputation’ of objects, such as State or religious symbols, flags or national insignia”, or “allow individuals to sue on behalf of a group which does not, itself, have status to sue”.<sup>66</sup> In light of these considerations, the concept of “defamation”, would appear to be the wrong mechanism for advancing the underlying aims of the campaign.

If the true purpose of “defamation of religions” is the protection of religious sensitivities, then a different calculus necessarily applies. As stated by the UN Special Rapporteur on freedom of religion or belief and the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance:

The right to freedom of expression can legitimately be restricted for advocacy that incites to acts of violence or discrimination against individuals on the basis of their religion. Defamation of religions may offend people and hurt their religious feelings but it does not necessarily or at least directly result in a violation of their rights, including their right to freedom of religion. Freedom of religion primarily confers a right to act in accordance with one’s religion but does not bestow a right for believers to have their religion protected from all adverse comment.<sup>67</sup>

A second pertinent objection to “defamation of religions” is that its chilling effect on the discussion of religious issues which are of public interest is potentially huge. It is important to be eternally vigilant against attempts to legally enshrine measures that would have the effect of cordoning off religious beliefs and preventing them from

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<sup>64</sup> Caution has been urged not to confuse “a racist statement and an act of defamation of religion”: Report further to Human Rights Council decision 1/107 on incitement to racial and religious hatred and the promotion of tolerance, *op. cit.*, para 49. Nevertheless, the topic of “defamation of religions” is included here because, as a result of the conceptual confusion inherent in “defamation of religions”, it cannot be ruled out that the real concerns involved could - in some cases - reveal examples of intersectional discrimination (i.e., racist and religious).

<sup>65</sup> Available at: <<http://www.article19.org/pdfs/standards/definingdefamation.pdf>>.

<sup>66</sup> Principles 2(b)(ii) and 2(b)(v), *ibid*.

<sup>67</sup> Report further to Human Rights Council decision 1/107 on incitement to racial and religious hatred and the promotion of tolerance, *op. cit.*, para. 37.

being a subject of debate, or of criticism, for that matter. In the absence of any explicit or ulterior racist motives, hatred or incitement, it is perfectly legitimate to criticise religions and religious beliefs - even in virulent terms. Such are the demands of pluralism, tolerance and broadmindedness without which there would be no democratic society.

### *Denial of genocide*

It is a matter of settled case-law of the UN Human Rights Committee and the European Court of Human Rights that Holocaust denial is beyond the pale of protected expression. The Court's decision in *Garaudy v. France* explains the specificities and ramifications of Holocaust denial, which in turn explain why it is not entitled to protection under Article 10, ECHR:

[...]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 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.<sup>68</sup>

Would the Court consider the denial of other genocides or crimes against humanity generally in the same manner? The detailed exposition of the contextual specificities of Holocaust denial suggests that the Court would not necessarily treat other examples of genocide-denial in an identical way. As noted in my background paper, Article 6 of the Additional Protocol to the Cybercrime Convention ('Denial, gross minimisation, approval or justification of genocide or crimes against humanity') introduces a 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. However, this provision is concerned with:

acts constituting genocide or crimes against humanity, as defined by international law and recognised as such by final and binding decisions of the International Military Tribunal, established by the London Agreement of 8 August 1945, or of any other international court established by relevant international instruments and whose jurisdiction is recognised by that Party.

Where would this leave the French Bill on the calling into question of the Armenian Genocide?<sup>69</sup> The French Bill is a topical example of broader, recrudescing questions. For instance, to what extent (if any) is it legitimate for a State to use the coercive

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<sup>68</sup> *Garaudy v. France*, Inadmissibility decision of the European Court of Human Rights (Fourth Section) of 24 June 2003, Application No. 65831/01, p. 23 of the English-language version of the Decision/p. 29 of the French-language version.

<sup>69</sup> A Bill to prohibit the calling into question of the Armenian genocide (Proposition de Loi tendant à réprimer la contestation de l'existence du génocide arménien), 12 October 2006. The Bill was passed at first reading by the French Assemblée Nationale.

force of its laws to mandate particular interpretations of historical events?<sup>70</sup> The same question could be asked in relation to the objective of sustaining particular versions of a population’s collective identity or memory. It is submitted here that States proposing such legislation would have to discharge a very heavy burden of proof to show that the proposed measures would not constitute an illegitimate interference with the exercise of the right to freedom of expression under prevailing international law standards.

### Conclusion

It is important to resist political pressures which would water down or limit existing guarantees of freedom of expression *and* protection from racist/“hate” speech. The theme of this seminar should not be reduced to a consideration of the interface between freedom of expression and protection from hate speech. It is imperative that a genuinely, fully integrated approach to human rights be pursued. Because hate speech adversely affects many other rights and occasions a range of different types of harms, a root-and-branch approach is required to counter its effects. A coherent and systematic approach to contextualising factors is necessary. The imperative of combating hate speech creates both negative and positive obligations for States authorities. The advocated root-and-branch approach should comprise an appropriately equilibrated set of legal and non-legal measures.

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<sup>70</sup> For further discussion, see: Lawrence Douglas, “Policing the Past: Holocaust Denial and the Law”, in Robert C. Post, Ed., *Censorship and Silencing: Practices of Cultural Regulation* (USA, The Getty Institute for the History of Art and the Humanities, 1998), pp. 67-87; Eric Stein, “History Against Free Speech: The New German Law Against The ‘Auschwitz’ - And Other - ‘Lies’”, 85 Mich. L. Rev. 277 (1986).

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“FREEDOM OF EXPRESSION AND RACISM IN THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS\*”

First of all, let me thank you for your invitation to take part in this seminar, thus establishing synergy - essential in my view - between the European Commission against Racism and Intolerance and the European Court of Human Rights. We have concerns and aims in common, which we address in different ways.

The topic that you have asked me to deal with is vast, and I will try to set out the essentials in the quarter of an hour available<sup>71</sup>. In this situation of conflict between the law and freedom of expression and the prohibition of discrimination, which are among the most difficult cases to decide because we are faced with two rights equally guaranteed by the Convention, the Court employs two approaches with regard to racist discourse: the broader approach of *exclusion* from the protection of the Convention provided for by Article 17 and the narrower approach of *restrictions* on protection provided for by Article 10, paragraph 2 of the Convention which is, as we know, a right to relative protection. I will touch on both these approaches in parts II and III, but first I want to define the context in which the case-law of the Court operates in this area (I).

I. Context

I will confine myself to two comments.

Generally speaking, the organs of the Convention have focused in an increasingly meticulous way on the issue of racial discrimination. As early as 1973 the European Commission of Human Rights took the view that legislation founded on racial considerations amounted to degrading treatment within the meaning of Article 3 of the Convention and consequently an affront to human dignity<sup>72</sup>. The view that this constituted degrading treatment would subsequently be confirmed by the Court in the *Cyprus v. Turkey* judgment of 10 May 2001, in particular because of the discrimination to which Greek Cypriots living in the Karpas region were subjected<sup>73</sup>, and in the *Moldovan and others (No. 2) v. Romania* judgment of 12 July 2005. In that case the Court took the view “that the applicants’ living conditions and the racial discrimination to which they have been publicly subjected by the way in which their grievances were dealt with by the various authorities, constitute an interference

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\* The judgments and decisions of the European Court of Human Rights referred to in the text are available on the Court’s Internet site, in the *Hudoc* database, at the following address: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>.

<sup>71</sup> For an analysis in greater depth cf. A. WEBER, “The case-law of the European Court of Human Rights in relation to Article 10 of the European Convention on Human Rights and combating racism and intolerance”, *ECRI Expert Seminar on combating racism while respecting freedom of expression, Strasbourg, 16-17 November 2006*, Reference Document - Session 3: Defending freedom of expression and the right to be free from racism and racial discrimination: legal standards.

<sup>72</sup> ECHR, report on *East African Asians v. United Kingdom* of 14 December 1973, D.R. 78-A, p. 5.

<sup>73</sup> ECHR (GC), *Cyprus v. Turkey*, judgment of 10 May 2001, § 311.

with their human dignity which, in the special circumstances of this case, amounted to “degrading treatment” within the meaning of Article 3”<sup>74</sup>.

In the recent *Nachova and others v. Bulgaria* judgment (6 July 2005) in which the Court for the first time (finally) accepted the linkage in an actual case between the prohibition of discrimination (Article 14, ECHR) and everybody’s right to life (Article 2), which presupposes that a thorough investigation must be carried out whenever there is a presumption that fatal violence has been motivated by racial hatred<sup>75</sup>, it set out the nature of its requirements in a formula of principle: “Racial violence is a particular affront to human dignity and [...] requires from the authorities special vigilance and a vigorous reaction. It is for this reason 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>76</sup>. I can also see another advantage in this judgment - and it is useful to note that its reasoning has been adopted since<sup>77</sup> - that of opening up Article 14 to the positive obligations, long recognised by the Court, which require States to take measures, in particular preventive measures, to ensure that the rights guaranteed by the Convention are upheld, up to and including in relations between private individuals, a frequently occurring situation in racism. There is potential here that could be exploited in combating racism. The application in *Šečić v. Croatia*, which has been declared admissible under the procedural aspect of Article 3 combined with Article 14 and is currently pending before the Court, in point of fact concerns a situation in which the applicant suffered a racist attack in the street from a group of private individuals<sup>78</sup>.

In the *Timishev v. Russia* judgment of 13 December 2005 concerning a provision in the Republic of Kabardino-Balkaria preventing Chechen citizens from obtaining a residence permit, the Court found that Article 2 of Protocol No. 4 on freedom of movement combined with Article 14 had been violated and delivered a strong message. It stated that “no difference in treatment which is based exclusively or to a decisive extent on a person’s ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures”<sup>79</sup>. In this way the Court has in a sense put racial discrimination outside the framework of ordinary evaluation of discrimination cases in which by tradition a difference in treatment between comparable situations can be objectively justified when it involves a proportionate measure serving a legitimate purpose. Rather than a suspect criterion, racial discrimination now becomes an excluded criterion<sup>80</sup>.

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<sup>74</sup> ECHR, *Moldovan and others (No. 2) v. Romania*, judgment of 12 July 2005, § 113.

<sup>75</sup> It is interesting to note that some judges call for the Court to be more severe on racial discrimination, as Judges Spielmann and Vajić made clear by asking that States should be condemned ever more strictly in order to send them signals and to “reinforce” the messages given to respondent governments (ECHR, *Osman v. Bulgaria*, judgment of 16 February 2006, partially dissenting opinion by Ms Vajić and Mr Spielmann, § 10).

<sup>76</sup> ECHR (GC), *Nachova and others v. Bulgaria*, judgment of 6 July 2005, § 145.

<sup>77</sup> ECHR, *Bekos and Koutropoulos v. Greece*, judgment of 13 December 2005; ECHR, *Ognyanova and Choban v. Bulgaria*, judgment of 23 February 2006.

<sup>78</sup> ECHR, *Secic v. Croatia*, judgment of 15 June 2006.

<sup>79</sup> ECHR, *Timishev v. Russia*, judgment of 13 December 2005, § 58.

<sup>80</sup> S. VAN DROOGHENBROECK, *The European Convention on Human Rights. Three years of case-law of the European Court of Human Rights, 2002-2004, Volume 2, Articles 7 to 59 of the Convention. Additional Protocols*, Brussels, Larcier, Les dossiers du Journal des tribunaux, No. 57, 2006, p. 131, No. 483.

In these judgments the Court has established a clear link between combating racism and the promotion of a vision of society based on respect for diversity. Starting from the principle that “racial discrimination is a particularly odious form of discrimination”<sup>81</sup> and that “racial violence is a particular affront to human dignity”<sup>82</sup> it clearly states that in view of its perilous consequences it “requires from the authorities special vigilance and a vigorous reaction”<sup>83</sup>.

This being so - and this is the second comment - to restrict freedom of expression for any reason whatever is to restrict one of the primary rights laid down by the Court as “one of the essential foundations” of a democratic society and “one of the basic conditions for its progress and for the development of every man”<sup>84</sup>. Thus freedom of expression is the essential pre-condition for a true pluralist democracy. This affirmation of the social function of freedom of expression is the basic philosophy in all the Court’s case-law regarding Article 10. The results of this are twofold: on the one hand, freedom of expression is not only a guarantee against interference by the State (a subjective right), it is also an objective fundamental principle for life in a democracy; on the other, freedom of expression is not an end in itself but a means for the establishment of a democratic society.

Moreover, when the European Court of Human Rights is faced with racist statements its approach, though it must be vigorous, must be formulated in the (relative) absence of international points of reference and texts. As regards the former, the United Nations High Commissioner for Human Rights takes the view in a report to the Human Rights Council, after surveying the various regional systems in force, that “like the international instruments, the regional instruments leave many issues unexplained and do not provide much detail on specific interpretations and how to reconcile apparent inconsistencies among their provisions”<sup>85</sup>. As to the latter, it is true that in universal terms only Article 20 of the International Covenant on Civil and Political Rights provides that “any advocacy of national, racial or religious hatred [...] shall be prohibited by law”, whereas in regional terms only Article 13§5 of the American Convention on Human Rights of 22 November 1969 concerning freedom of thought and expression expressly provides for the prohibition of any discourse of hatred<sup>86</sup>.

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<sup>81</sup> *Ibid.*, § 56.

<sup>82</sup> ECHR (GC), *Nachova and others v. Bulgaria*, judgment of 6 July 2005, § 145.

<sup>83</sup> ECHR, *Timishev v. Russia*, judgment of 13 December 2005, § 56; ECHR (GC), *Nachova and others v. Bulgaria*, judgment of 6 July 2005, § 145.

<sup>84</sup> ECHR, *Handyside v. United Kingdom*, judgment of 7 December 1976, § 49; ECHR, *United Communist Party of Turkey and others v. Turkey*, judgment of 30 January 1998, § 45; ECHR, *Ozgur Gundem v. Turkey*, judgment of 16 March 2000, § 57.

<sup>85</sup> UNITED NATIONS GENERAL ASSEMBLY, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 entitled “Human Rights Council”, Incitement to racial and religious hatred and the promotion of tolerance: report of the High Commissioner for Human Rights*, doc. A/HRC/2/6, 20 September 2006, §§ 28-33 in particular.

<sup>86</sup> “Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar illegal action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law” (Art. 13 § 5 of the American Convention on Human Rights of 22 November 1969).

In this context the European Court of Human Rights is called upon to develop “constructive case-law”<sup>87</sup> indexed to the concepts that currently prevail in democratic societies and to the development of European law on discrimination in order to develop the provisions of the Convention capable of combating racism while respecting the foundations of freedom of expression.

## II. Article 17 of the Convention and abuse of rights

Article 17 of the Convention, little used (or misused) a few years ago<sup>88</sup> to the extent that some were even questioning its value<sup>89</sup>, is becoming a real asset. Saint-Just proclaimed “no freedom for the enemies of freedom”, or again, to take up the comment by J. Rawls, “justice does not require that men must stand idly by while others destroy the basis of their existence”<sup>90</sup>. As analysed by M. Oetheimer in an excellent article on “The European Court of Human Rights faced with racism”, soon to be published, this provision is aimed at “withdrawing from those who wish to use the Convention’s guarantees the benefit of those rights because their aim is to challenge the values that the Convention is protecting”<sup>91</sup>. Article 17 of the Convention, like other restrictions on guaranteed rights, sees the State as individual and groups of individuals, “thus showing that human rights can be invoked in both State-individual relations and in relations between individuals”<sup>92</sup>.

After a few Commission decisions which applied Article 17 to prevent freedom of expression from being used to promote national socialism<sup>93</sup> or for incitement to hatred or to racial discrimination by revisionist writings<sup>94</sup>, the Court used Article 17 boldly for the first time in the inadmissibility decision of 24 June 2003 in *Garaudy v. France*<sup>95</sup>. Where the French philosopher (formerly with Marxist leanings) had made revisionist statements the Court took the view that the applicant was using “his right

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<sup>87</sup> Cf. G. COHEN-JONATHAN, “Le droit de l’homme à la non-discrimination raciale”, *Rev. trim. dr. h.*, 2001, p. 679.

<sup>88</sup> In the cold war climate of the 1950s, the European Commission of Human Rights had given Article 17 of the Convention a broad interpretation “emptying freedom of expression of any content and apparently meaning that the ideology of the ECHR was incompatible with the existence of Communist Parties in the countries of Western Europe” (Fr. SUDRE, *Droit européen et international des droits de l’homme*, Paris, PUF, 8<sup>th</sup> edition, 2006, p. 206, No. 148). See ECHR, *German Communist Party v. Federal German Republic*, decision of 20 July 1957.

<sup>89</sup> S. VAN DROOGHENBROECK, “L’article 17 de la Convention est-il indispensable?” *Rev. trim. dr. h.*, 2001, p. 541. See, however, ECHR, *Glimmerveen and Hagenbeek v. Netherlands*, decision of 11 October 1979, D.R. 18, p. 198, in which the Commission refused to examine the banning of a political party in the Netherlands from the viewpoint of Article 10 and of Article 1 of the 3<sup>rd</sup> Protocol on the ground that the latter’s programme included overtly racist propaganda and in fact the applicants were seeking to obtain a platform to disseminate such propaganda. This was the decision in which the European Commission of Human Rights declared *inter alia* that “Article 17 has as its general purpose to prevent totalitarian groups from exploiting in their own interests the principle enunciated in the convention”.

<sup>90</sup> J. RAWLS, *A theory of justice*, Oxford, Oxford University Press, 1971, p. 218.

<sup>91</sup> M. OETHEIMER, “La Cour européenne des droits de l’homme face au discours de haine”, *Rev. trim. dr. h.*, 2007 (to be published). See, for example, with regard to freedom of association, ECHR, *D.H., W.P. and others v. Poland*, decision of 2 September 2004, in which the Court refused to consider the refusal by the Polish authorities to allow the creation of an association with statutes including anti-Semitic statements under Article 11 of the Convention.

<sup>92</sup> Fr. SUDRE, *Droit européen et international des droits de l’homme*, *op. cit.*, p. 206, No. 148.

<sup>93</sup> ECHR, *H., W., P. and K. v. Austria*, decision of 12 October 1989.

<sup>94</sup> ECHR, *Honsik v. Austria*, decision of 18 October 1995; ECHR, *Marais v. France*, decision of 24 June 1996.

<sup>95</sup> *Garaudy v. France*, 24 June 2003, D., 2004, p. 239, note by D. Roets; *Rev. trim. dr. h.*, 2004, p. 653, obs. M. Levinet.

to freedom of expression for ends which are contrary to the text and spirit of the Convention. [...]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”<sup>96</sup>.

This, then, is in substance the radical approach of exclusion, or more precisely of the loss of the right of freedom of expression because of openly racist statements that seek to destroy the rights of the Convention. In the *Norwood v. United Kingdom* decision of 16 November 2004, in which the applicant complained that he had been compelled to remove from his window a poster with the words “Islam out of Britain” on it, the Court would apply Article 17 for the first time in a case of anti-Muslim racism.

Striking developments and increasing severity: these, according to some writers, are the characteristics of the Court’s recent case-law under Article 17 of the Convention<sup>97</sup>.

### III. Article 10 of the Convention and authorised interference

Knowing that freedom of expression - the foundation of democracy - applies not only “to information or ideas favourably received or regarded as inoffensive or not giving rise to concern, but also to those that offend, shock or disturb”, where and how are limits to be devised and recorded? These are provided for in the exceptions to freedom of expression, the cases of authorised interference laid down in Article 10, paragraph 2 of the Convention, the conditions for which must be examined in each case.

Generally speaking, it is important to stress that the Court takes the view that “it may be deemed necessary in democratic societies to penalise or prevent all forms of expression that spread, encourage, promote or justify hatred based on intolerance”. In the same way, there is “no doubt that actual expressions amounting to a discourse of hatred do not enjoy the protection of Article 10 of the Convention”<sup>98</sup>. I think these statements must be taken seriously.

In its reasoning regarding implementation of the interference provided for in Article 10§2 and on the necessity for them in a democratic society, the Court will rely on two **essential criteria** when racist statements are involved.

Firstly, the *intention*. Was it the applicant’s intention to spread racist ideas by a discourse of hatred<sup>99</sup> or was he or she seeking to inform the public on an issue of general interest?<sup>100</sup> This is the first dividing line, the first frontier between statements that come within the ambit of Article 10 and those that are unacceptable

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<sup>96</sup> ECHR, *Garaudy v. France*, decision of 24 June 2003, p. 29. In ECHR, *Lehideux and Isorni v. France*, decision of 23 September 1998, the Court had already referred to a “category of clearly established historical facts - such as the Holocaust - whose negation or revision would be removed from the protection of Article 10 by Article 17” (§ 47).

<sup>97</sup> P. WACHSMANN, “Liberté d’expression et négationnisme”, *Rev. trim. dr. h.*, 2001, p. 592.

<sup>98</sup> ECHR, *Erbakan v. Turkey*, judgment of 6 July 2006, §§ 56 and 57.

<sup>99</sup> ECHR (GC), *Karatas v. Turkey*, judgment of 8 July 1999.

<sup>100</sup> Cf. ECHR, *Jersild v. Denmark*, judgment of 23 September 1994, § 31; ECHR, *Gündüz v. Turkey*, judgment of 4 December 2003, § 44.

in a democratic society<sup>101</sup>. In this context perhaps the *Gündüz v. Turkey* judgment of 4 December 2003 reaches its furthest point, because the Court took the view that the violently critical statements about “infidels” and secularism could not amount to a discourse of hatred in the circumstances of the case - a televised debate on the role of religion in society.

Secondly, the *content of the statements*. This criterion supplements the eminently subjective nature of the first. However, the aim and content of the statements fall within a context in which other variables will come into play.

Generally speaking, when on the one hand the statements are part of a *public or political debate*, in which Article 10 § 2 “leaves hardly any room for restrictions on freedom of expression”<sup>102</sup>, the Court will find it more difficult to accept that interference is necessary, especially when the statements are directed at the government and not at private individuals<sup>103</sup>. These differences, however, become less marked in the case of an expression of hatred, “which in the eyes of the Court is the prime factor to be considered”<sup>104</sup>.

On the other hand the *office or profession* of the applicant will also have a part to play. In the *Jersild v. Denmark* judgment of 23 September 1994 the profession of *journalist* was “a significant feature of the present case [...] the applicant did not make the objectionable statements himself but assisted in their dissemination in his capacity as television journalist responsible for a news programme”<sup>105</sup>. However, the Court does not grant the press absolute freedom, and amongst other things it stressed in the *Sürek (No. 1) v Turkey* judgment of 8 July 1999 that where the press is concerned it was necessary for the editor-in-chief of a journal “to print an editorial line” and not to give exaggerated support that may “stir up violence and hatred”<sup>106</sup>.

Conversely, States’ latitude is reduced when the author of the controversial statements is a *politician*, which requires the Court to exercise the strictest control, even though “stressing that combating any form of intolerance is an integral part of the protection of human rights” it takes the view that “it is of crucial importance for politicians to avoid disseminating statements likely to feed intolerance”<sup>107</sup>. Here I think the Court should draw inspiration more widely from the observations made by ECRI in its *Declaration on the use of racist, anti-Semitic or xenophobic elements in*

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<sup>101</sup> For example, in the *Jersild v. Denmark* case of 23 September 1994, the Court refused to find against the journalist, considering that it had not been his intention to disseminate racist ideas in the reports, but on the contrary to deal with “specific aspects of a matter that already then was of great public concern” (§ 33). Similarly, in the *Lehideux and Isorni v. France* case of 23 September 1998, which gave rise to lively debate in France about the publication of an item in *Le Monde* calling for a review of Marshal Pétain’s trial emphasising some of his actions before the war, the Court also considered that the applicants had not wished to deny the atrocity of Nazi crimes and “were not so much praising a policy as a man” (§ 53).

<sup>102</sup> ECHR, *Erbakan v. Turkey*, judgment of 6 July 2006, § 55.

<sup>103</sup> Although in the *Incal* case this parameter took pride of place and led the Court to find that Article 10 of the Convention had been violated, in the *Sürek* case, on the contrary, other factors got the upper hand: although criticism of the government was also at issue, the particular context of the case (difficulties connected with combating terrorism) led the Court to conclude that interference was necessary and consequently that Article 10 had not been violated.

<sup>104</sup> ECHR, *Alinak and others v. Turkey*, judgment of 4 May 2006, § 35.

<sup>105</sup> ECHR, *Jersild v. Denmark*, judgment of 23 September 1994, § 31.

<sup>106</sup> ECHR (GC), *Sürek v. Turkey (No. 1)*, judgment of 8 July 1999, § 63.

<sup>107</sup> ECHR, *Erbakan v. Turkey*, judgment of 6 July 2006, § 64.

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*political discourse*, which “condemns the use of racist, anti-Semitic and xenophobic elements in political discourse, stresses that such discourse is ethically unacceptable” and recalls “Europe’s history, which shows that political discourse that promotes religious, ethnic or cultural prejudice and hatred considerably threatens social peace and political stability and inevitably leads to suffering for entire populations”<sup>108</sup>.

Lastly, in cases where State agents and civil servants, and particularly teachers, are involved, the Court has been particularly severe, as for example in the *Seurot v. France* decision of 18 May 2004 with regard to racist statements directed against North Africans by a teacher of history. This seems to me to be a particularly interesting decision, both for the principles stated therein and for their application.

The Court emphasises “that it is particularly conscious of the vital importance of combating racial discrimination in all its forms and manifestations”<sup>109</sup> and refers to Resolution (2002)8 of the Committee of Ministers of the Council of Europe on the statute of the European Commission against Racism and Intolerance (ECRI), which seeks to reinforce action by the latter, having regard to the necessity for firm and sustained action at European level to combat the phenomena of racism, xenophobia, anti-Semitism and intolerance. More particularly with regard to teachers, since these are a symbol of authority for their pupils in the field of education, their duties and responsibilities to a certain extent also apply to their activities outside the school and particularly their ancillary activities within the educational establishment in which they teach. Moreover the Court notes that in its Recommendation (2002) 12 on education for democratic citizenship the Committee of Ministers emphasises that such an education throughout life and at each level of education “is fundamental to the Council of Europe’s primary task of promoting a free, tolerant and just society”. In my view this is the primary significance of this decision - “education in democratic citizenship, essential to combating racism and xenophobia, presupposes the active involvement of responsible persons, in particular teachers”<sup>110</sup>.

Returning to this case, the Court found that “the tenor of what the applicant had written was completely unambiguous” and considered that “the article at issue, which is indisputably racist in content, is incompatible with the duties and responsibilities of the applicant. In any event, assuming that the applicant really wanted to produce a humorous document not intended for publication, both his status as a teacher, incidentally a teacher of history, and the real risk that the document might be disseminated within the educational establishment should have prompted him to show caution and discernment”<sup>111</sup>. Under these conditions the Court took the view that there was no doubt that the grounds relied upon by the domestic authorities were both relevant and sufficient and that the measures taken against the person concerned could not be regarded as disproportionate. Such an analysis gives meaning to the requirement that interference is “necessary in a democratic society” within the meaning of Article 10 § 2 of the Convention.

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<sup>108</sup> ECRI Declaration on the use of racist, anti-Semitic or xenophobic elements in political discourse, adopted on 17 March 2005.

<sup>109</sup> ECHR, *Jersild v. Denmark*, judgment of 23 September 1994, § 30.

<sup>110</sup> ECHR, *Seurot v. France*, decision of 18 May 2004, p. 8.

<sup>111</sup> *Ibid.*, p. 9.

**Conclusion**

I have two conclusions. The first is (perhaps) pessimistic. I think that the Court will be confronted with racist statements more and more often in the next few years. However, these will no longer come only from marginal groups, because we can observe movements or parties that confuse patriotism and nationalism and love of their own and hatred of others gaining ground, sometimes even coming to power.

My second conclusion is (perhaps) optimistic. The entry into force, in the case of States which have ratified it and rapid ratification in the case of others, of Protocol No. 12 to the Human Rights Convention embodying a general prohibition of discrimination in any right provided by law and in any action by a public authority might provide a solid foundation for new developments in the case-law of the Court so that, as the Court never is tired of repeating, the rights in the Convention are positive and effective, not theoretical and illusory.

Thank you for your attention.

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**PROFESSOR EVA SMITH ASMUSSEN,  
CHAIR OF ECRI**

*“CONCLUSIONS TO BE DRAWN FROM ECRI’S MONITORING WORK”*

In its country-by-country approach, ECRI closely examines the situation in each of the member States of the Council of Europe. Following this analysis, it draws up suggestions and proposals as to how the problems of racism and intolerance identified in each country might be overcome.

Such an approach is therefore built on a case-by-case basis, allowing for specific recommendations for each country.

However, it is possible to draw general conclusions from this approach as regards today’s discussions.

You will find a set of these conclusions in the Background Paper for Session 3 (a review of the work of the European Commission against Racism and Intolerance)<sup>112</sup>.

I will not enumerate all of them here but I would like to highlight some elements which are of particular importance for our discussions.

***Existence of criminal law provisions to combat racist expression***

As you know, ECRI’s position is that there should be criminal law provisions to combat racist expression in all member States.

This position is not only reflected in ECRI’s monitoring work but also reiterated in its General Policy Recommendation N°7 on national legislation to combat racism and racial discrimination.

I will therefore not elaborate much further on the kind of provisions ECRI asks for.

ECRI’s monitoring shows that this issue is not the most problematic in the member States of the Council of Europe, so I shall not dwell on it.

There is a general consensus in Europe - which was mentioned before - that there should be criminal law provisions to combat racist expression.

An overview of the legislation in place reveals that most of these provisions exist and are drafted in a satisfactory way.

Where this is not the case, you will find recommendations in ECRI’s reports on how to improve the criminal law in this respect.

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<sup>112</sup> See “A review of the work of the European Commission against Racism and Intolerance (ECRI)”, pp. 115-133 of this publication.

### **Implementation of criminal law provisions to combat racist expression**

To be truly efficient, all of these provisions aimed at combating racist expression have to be implemented by the authorities, particularly by the police and the judiciary.

These provisions should not remain unused, as their effect would then be counter-productive.

The main conclusion that can be drawn from ECRI's monitoring work is that there are serious deficiencies in the **implementation of criminal law provisions to combat racist expression**.

Often, the number of cases brought to court is at variance with the number of cases reported to ECRI by human rights and anti-racist NGOs, as well as by civil society in general.

Of course, the degree of deficiency differs from one State to another, but often ECRI invites member States to improve the implementation of criminal law provisions aimed at combating racism and more particularly, racist expression.

In its reports, ECRI analyses the **reasons behind the lack of implementation** of criminal law provision to combat racist expression.

One of the main obstacles faced by the police, prosecutors and judges when they have to deal with a case of racist expression is the difficulties they encounter.

ECRI is aware that it is not an easy task to decide what constitutes or not a racist statement punishable by law. Nor is it straightforward to determine the best punishment to apply when a racist incident occurs.

ECRI's monitoring work highlights that a **case-by-case approach** is indispensable in this field.

The **context** of an expression is essential in deciding whether it is racist and should be punished. There are numerous factors to be taken into account in this respect and it would be impossible to mention all of them here.

In its case law on Article 10 of the Convention, the European Court of Human Rights has given some indications as to which factors are relevant. However, in some cases, it is understandable that the bodies responsible for implementing criminal law provisions hesitate. Indeed, they have to be careful not to interfere unduly with the exercise of freedom of expression.

ECRI is aware that it is difficult to determine whether an expression is racist or not, whether it is punishable and what the appropriate sanction would be.

This is why it systematically recommends that members of the criminal justice system be regularly trained on the problem of racism and on the implementation of the relevant criminal law provisions.

In ECRI's view, training should not only be initial, it should also be on-going.

Racism is a continually evolving phenomenon, so the relevant actors should be able to identify at any time what is racism and what is not.

This means that, to be effective, training should not only be on what is contained in the law. It should also be a way of raising the awareness of the relevant parties of the need to tackle the problem of racism. It should guide them in the implementation of criminal law provisions.

Another obstacle to the implementation of criminal law provisions to combat racist expression is that often, victims do not make a complaint to the police. Many of those who experience racist insults, defamation or threats, for instance, do not report it to the police or prosecutors.

ECRI's monitoring work shows that there are several explanations for this, depending on the State concerned.

To mention but a few, victims may not be sufficiently aware of their rights and of the fact that racist expression is prohibited by law. Some victims have no confidence in the police and in the criminal justice system in general.

In such a case, ECRI generally recommends that measures be taken to raise awareness among society at large, and more particularly among potential victims of racism, of the prohibition of racist expression and of the mechanisms of redress.

Another solution is to give human rights and anti-racist NGOs and other relevant associations the possibility to intervene in procedures before the courts.

The possibility for such organisations to bring a case of racial discrimination without reference to a specific victim is essential for addressing those cases of racist expression where it is difficult to identify such a victim, or cases which affect an indeterminate number of victims.

Finally, ECRI systematically recommends that data on the implementation of anti-racist criminal law provisions, and more particularly on provisions against racist expression, be duly collected. Such data should include information concerning the number of racist offences reported to the police, the number of prosecutions, their outcomes and any reasons for not prosecuting. I trust that this issue will be addressed in detail by the next speaker, therefore I will move to another topic.

### ***Other policy responses***

Another essential conclusion that should be drawn from ECRI's monitoring work is that although criminal law provisions to combat racist expression are necessary, they are not sufficient by themselves.

We also need to strike at the root of the problem and not only to react to racist expression. ECRI's monitoring work shows that, beyond repression, there is a full range of **incentive or self-regulatory measures** which can be taken.

These measures are of particular interest here, as they constitute solutions which are complementary to the criminal law tool and which do not raise the sensitive issue of the respect of freedom of expression. I will address them only briefly as they will be discussed in more depth during next session tomorrow.

The key-word here is responsibility. It is the responsibility of each of us to avoid resorting to racist discourse or generating racist sentiments when we express ourselves in public.

Obviously, this puts a particular burden on the shoulders of those who have a public profession or a status implying that they often express themselves in public. These persons include **journalists and politicians**.

On the one hand, they should avoid perpetuating racist stereotypes and prejudices. On the other hand, they should actively contribute to promoting the appreciation of diversity in society.

ECRI regularly recommends that, in order to achieve these two ambitious aims, **awareness be raised** among the relevant stakeholders.

This could be done for instance through initial and on-going training on diversity for journalists.

As regards politicians, several kinds of measures could be taken to draw their attention to the Charter of European Political Parties for a Non-Racist Society.

In this context, **self-regulation** plays an essential role. It has the advantage of avoiding the interference of the State, an important element when dealing with freedom of expression.

For instance, there should be codes of self-regulation for all media professions.

I would like to finish by insisting, as ECRI does throughout its monitoring and other work, on the essential need for all member States of the Council of Europe to have a **national body specialised in the field of combating racism**. Indeed, such a body could play a role when it comes to monitoring the implementation of criminal law provisions in this field. This body could also provide training for media professionals or members of the criminal justice system and organise general awareness-raising campaigns. It could assist victims of racist expression in regaining their dignity, for instance by obtaining reparation for the moral damages they suffered.

**Conclusion:** It is therefore a comprehensive and somewhat integrated approach that is advocated by ECRI: we need laws, but we must make sure that they are applied and they must also be complemented by self-regulatory and awareness raising measures.

Thank your for your attention

Ms BEATE WINKLER,  
DIRECTOR OF THE EUROPEAN MONITORING CENTRE ON RACISM AND  
XENOPHOBIA (EUMC)

*“THE RECORDING AND MONITORING OF RACIST EXPRESSION: THE CHALLENGES  
AHEAD”*

Dear Chair, Ladies and Gentlemen, Colleagues and Friends,

It is a great pleasure and honour for me to be here today. Let me congratulate ECRI for bringing all of us together. My hope is that this expert meeting will advance the debate on freedom of expression while combating racism. My hope is also to inspire policy makers and key actors in searching for the right balance between adequate policy responses to racism while protecting freedom of expression. We are dealing with the dilemmas and the contradictory issues which are the main challenges in our work.

We are well aware of the destructive power of racist speech and types of discourses that influence people’s believes, emotions and perceptions.

But we are also well aware of the tremendous positive power of public discourse when supporting equality, diversity and the respect of human rights. The media and political leaders, who mainly influence public discourse, are one of the most powerful tools in changing perceptions. And at the same time there is a large degree of uncertainty as to where the line should be drawn between *punishable* racist and *permissible* forms of expression in public discourse. The recent crisis following the publication of the cartoons of Prophet Mohammed or the reaction to the Pope’s statements, remind us how important it is to keep in mind that freedom of expression is part of Europe’s values and tradition. Freedom of speech is not negotiable. On the other hand, freedom of speech has its limits outlined in international law and defined and enforced by the laws and legal system of each Member State. In order to influence public discourse we have to know what is going on, what are the main issues, what are the trends?

But how do we get a clear picture? How can we get adequate information in order to support people and take adequate measures?

This brings me to my first message:

- 1) **We need better collection of information and data on racist expressions in different discourses: mainly in the media and in politics.**

Despite our continuous efforts, there is still a distinct lack of regular and systematic data collection on racist expression. We need to be better informed about the extent and impact of racist expressions in Europe today, in the media, in politics, in public discourse. Data is particularly lacking on a Europe-wide, comparative level. And here we have to make a clear distinction between public and media discourse in order to get a clearer picture.

**a) Public discourse**

There is some data collection at national level. Some countries, such as Denmark, Germany, and to some extent the Czech Republic, Hungary and Slovakia, collect data on hate speech. This data collection is based on a number of annually reported and prosecuted incidents of hate speech. In some countries, like for example in Austria, there is occasional data collection by NGOs on racist speech during electoral campaigns. However, this represents only the tip of the iceberg - only a small number of hate speech is being dealt with.

Monitoring of racist expressions in public discourse raises questions not only related to fundamental rights, but also related to the methodology of monitoring.

Being aware of the different stereotypical views and hate speech patterns expressed in public discourse, we see two possible ways of establishing a monitoring system:

- establishing a comprehensive monitoring system or
- setting up a complaints system (this may be combined with a selective monitoring system)

Comprehensive monitoring of hate speech would mean that all media and policy papers are systematically scanned for instances of hate speech. This would, however, be a huge and costly operation.

A more realistic way of monitoring hate speech would be to install a complaints system, for example through a telephone hotline and a web page, where instances of racist expressions can be reported and systematically registered and verified.

**b) Media discourse**

In 2002, the EUMC published a report on "Racism and Cultural Diversity in the Mass Media", stressing the role of the mass media, and especially the news media, in reproducing social attitudes and realities.

The way the mass media represent, focus on and give voice to different actors and incidents in society could strengthen racist discourse instead of fighting against it. This issues was also constantly addressed by the EUMC in other projects over the years, e.g. during the European media conference "Cultural diversity against racism", and within the framework of the European Media Prize CIVIS.

The EUMC is currently preparing a transnational Media Monitoring Study to look into possible racist expression in the media. Its results will enable EU institutions and the Member States to access an invaluable source of information on discriminatory media content in different countries. It would also allow comparison between countries. Based on this data, policy makers will be able to reconsider strategies against discrimination and to improve cooperation with vulnerable communities.

Qualitative and quantitative research studies can provide us with in-depth knowledge on the extent and nature of discriminatory content in public discourse and in the media. I have to stress that monitoring should not restrict itself to targeting the most blatant forms of discriminatory discourse, namely hate speech.

In many cases, discriminatory practices find their verbal expression in more implicit and subtle rhetorical forms. We, therefore, also need to monitor subtle forms of discrimination and deal with social structures behind and beyond discourse. This brings me to my second message.

**2) We need more targeted policies developed on the basis of a clear picture of reality.**

Once we have more information on the extent of racist expression in Europe, we will be able to move towards using this information to monitor trends and assess impact. By not recording racist expression we underestimate the problem. We know from research that our whole area is under-reported and under-recorded.

It also means that policy makers are not in a position to develop targeted policies and practical responses to the problem. Such responses, for instance, would include encouraging vulnerable communities to report incidents. Media monitoring for possible racist expression is also a useful tool for policy makers in planning and targeting legal measures against discriminatory content and preparing awareness raising measures and training.

**3) We need political commitment to draw a clear line between racist expressions and freedom of speech; we need political leadership.**

What is essential for today's society is that we reinforce Europe's culture of human rights, a culture of recognition and mutual respect. Racist and xenophobic speech is not acceptable in a democratic society and can leave victims feeling emotionally distressed, inferior, restricted in their personal freedom and even stateless. The EUMC co-organised seminars with the Austrian Presidency of the European Council and the European Commission, which touched upon freedom of expression. First, there was the seminar on the "Framework Decision on Racism and Xenophobia" and, second, there was the seminar on "Racism, Xenophobia and the Media - Towards respect and understanding of all religions and cultures". The latter was an EU seminar in the framework of the Euro-Mediterranean Partnership in Vienna. Both events underlined that there is no contradiction between prosecuting racist speech and protecting freedom of expression. Both can be achieved. The Vice-President and Commissioner for Justice, Freedom and Security of the EU, Mr. Franco Frattini in an interview for EUMC magazine Equal Voices (which you can find on EUMC web site), stated [and I quote]:

*"we should dispel a myth: we believe that there is no contradiction in simultaneously protecting people against racist speech and making sure that freedom of expression is and remains one of the key pillars upon which our societies and the EU is founded."*

And for this we need a very clear political will. We need political leadership. We need political actions, e.g. the adoption of the “Framework Decision on Racism and Xenophobia”.

## **Conclusion**

Ladies and Gentlemen, let me highlight several ways in which we can influence public speech:

- We should start by our own and be very careful with our own language use.
- We can influence the language use of others - in our own immediate environment by training and empowerment, through media monitoring of possible racist expression and ensuring that the media assumes its responsibility.
- And last but not least, we should encourage the media to promote diversity and that means: to change its perspective.

In order to combat “racist expression” all of us need to change our perspectives when we are dealing with diversity: “from threat to opportunity”. Often it appears that the visible evidence of the economic and cultural success of ethnically diverse and multicultural countries such as the Netherlands, the United Kingdom and France, is lost in media reporting which seeks to portray ethnic minority citizens in these countries in a negative light.

Thus negative debate becomes an obstacle to our future. Research has identified the most successful societies in economic terms as the ones that have three common indicators, the so-called three T’s: Technology, Talent and Tolerance. And here we need the support and close cooperation of the media for our future.

And thus I wish you and us all the energy and creativity we need for our work, today at this ECRI conference. Together we are working for full respect of Human Rights, for a culture of respect and recognition - for everybody, you and me and for our future.

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**MR ED VAN THIJN,**  
**MEMBER OF THE PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF**  
**EUROPE**

*“POLICY RESPONSES - SELF-REGULATION IN THE POLITICAL SPHERE”*

1. Freedom of expression is one of the core values of democratic societies. A predominant value, but not an absolute one. Hence, there are a few exceptional restrictions, which emerge when other core freedoms are at stake. The strongest example, and maybe the only one, is the right to be free from racism or hate speech. This is not a matter of balance or of dealing and wheeling. Racist intimidation is a serious crime, and we cannot say that it can be tolerated to this or that extent. Rather, I would say zero tolerance for racism, just as insistently as that freedom of speech is under most circumstances the cornerstone of tolerance.

2. The general idea behind the Charter of European political parties for a non-racist society (initiated during Mr Jean Kahn’s Chairmanship of the EUMC and first drafted in February 1998 in Utrecht) was that certain responsibilities lie first and foremost with political parties. Political parties create the general climate of public discourse; play an educating role; recruit the leadership of their countries; set the tone for moral leadership and are the vehicles for basic democratic principles. The problem as we saw it in the 1990s was the emergence of widespread anti-immigration feelings in society and the rise of xenophobic extremist right-wing parties. These parties as such did not pose a serious threat to the democratic framework of European countries. The big threat was (as history has taught us) the growing lack of moral leadership of the mainstream political parties and the lack of courage to speak out, loudly and clearly, against these emerging feelings of hatred and discrimination, to which some of them even paid lip service.

3. There are five core demands contained in the Charter, which was drafted after a number of public hearings, a survey among most of the political parties in Europe, expert meetings and consultations with both the European Parliament and the Council of Europe and a final conference in Utrecht: First, political parties should reject all forms of racial discrimination. Second, they should counter such tendencies in their own constituency. Third, they should deal responsibly and in a balanced way with sensitive issues that concern minorities in their countries, without creating taboos. Fourth, they should not seek any alliance with racist parties and groups. Fifth, they should strive for fair representation of minority groups within their own ranks, including in the highest political functions.

4. The Charter was signed by more than 100 political parties, many of them represented by their leaders. The Charter was also signed by most of the European party alliances. Two years ago it was adopted by both the European Parliament and the Council of Europe at a joint ceremony. A special problem, as far as ratification was concerned, came to light in Austria on the occasion of the formation of a government that included Jörg Haider’s FPÖ. The new governmental agreement included an article which said that all parties concerned promised to sign the Charter. For obvious reasons these signatories were refused. How could we accept ratification by parties which at the same time were violating one of its basic principles, the *cordon sanitaire*?

5. The Austrian case illustrated one of the main obstacles during the process of implementation of the Charter that is the lack of a well-defined, generally accepted definition of racism. This complication became manifest when the EU asked a committee of three wise men (chaired by the former President of Finland, Martti Ahtisaari) to conduct a fact-finding mission to Vienna. Following their visit, they reported that they had found out that Mr Haider was not primarily a racist but only used from time to time xenophobic terms (but what is the difference?) and must just be considered as a populist (and what is wrong with populism?) They called upon the EU member States to end the bilateral boycotts. By redefining racist discourse in Austria, a definition accepted by most of the mainstream parties, they undermined the enforcement of the Charter by the parties that had already ratified it.

6. Has the Charter proved to be successful? I have to say - unfortunately not and this for a number of reasons, which are:

- a. The lack of a common definition of racism (as mentioned above).
- b. A lack of awareness. There is an enormous discontinuity in political parties due to the democratic process. New leaders know nothing about the signatures of their predecessors. Therefore, one of the lessons learned is that such a Charter should be included in party platforms.
- c. Anti-racism is nobody's priority! Everybody is against racism, but for most parties it is a non-issue in the ongoing political process.
- d. As soon as racism appears to be a serious phenomenon, most of the parties prefer to keep a safe distance. It is easier to remain ignorant, also for strategic reasons.
- e. There are also tactical reasons for ignoring (with the exception of Belgium) the *cordon sanitaire*. For most parties this is not a matter of principle but of opportunism. Some argue that if right-wing parties participate in government then their popularity will decline automatically, as we have seen in Austria.

7. Finally, a big problem for making the Charter work appeared to be the lack of an authoritative supervisory mechanism. We started with a steering committee chaired by myself as the initiator. However, on most of the occasions when we were supposed to meet - twice yearly - I was the only one present. Later the EUMC, of which I became a Board member, took over the task to promote the Charter. However, we had no instruments to find out adequately if the Charter was really implemented and respected and, of course, there were no real sanctions. We functioned on the basis of blame and shame, but who cares when nobody is really interested, including the media. The result was a vicious circle. Besides, who has the moral authority today to blame others for not having moral authority? So I am afraid that there is still a long way to go to make the Charter of European political parties for a non-racist society an effective instrument for combating racist discourse in the political sphere.

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*“POLICY RESPONSES - SELF-REGULATION IN THE MEDIA”*

**Policy challenges**

The mass media, and especially the news media, have an unequivocal position in society when it comes to establishing and disseminating common cultural references. The media have an influence on people's attitudes as well as on our common knowledge, but not always in the expected and desired ways. The active democratic role of the media in society can be influenced by a number of factors. The way the media represent, focus and give voice to different actors and incidents in society could have the unintentional result of strengthening racist discourse instead of fighting against it. Media reporting is especially sensitive when it comes to ethnic, cultural and religious relations in our society. Many media organisations take different initiatives to promote cultural, ethnic and religious diversity, such as developing codes of conduct, recruiting broadcasters from migrant and minority communities and training personnel from multiethnic societies. Media research on ethnicity and racism tends to be rather developed in modern democratic societies, but what exists can be characterised as 'establishing the field'. Written and oral communication that includes prejudices about ethnicity and racism lead to the phenomenon of hate speech, intended to degrade, intimidate, or incite violence against a group of people based on their race, ethnicity, national origin, religion, sexual orientation, or disability. In this regard it is important to remind ourselves of the basic principles of freedom of the expression, which implies that all people should have the right to express themselves in writing or in any other way of expressing personal opinion or creativity. Apart from many international documents, the right to freedom of expression is also guaranteed by constitutions and laws in democratic countries, although those documents anticipate certain exceptions where freedom of expression can/must be limited due to possible harmful consequences for the whole society and for other guaranteed rights of every individual. It is clear from these documents that public “hate speech” is subject to legal restrictions on both the national and international level, since it promotes discrimination, endangers human rights and dignity of other people, first of all “endangered groups” (racial, national, religious, gender and other minorities), and often calls for violence and endangers safety and the democratic principles of societies.

However, there is the question of how far we can go with restrictive measures against “hate speech” and not violating freedom of expression as one of the basic human rights. In this situation, the media are of extreme importance, because they are of invaluable significance for the transparent functioning of the state, including their role in revealing such phenomena and introducing the resulting problems into public debate, while on the other hand they can be immediately or even directly involved in spreading “hate speech”.

Freedom of expression is an extremely problematic concept for most non-democratic systems of government since, in the modern age, strict control of access to information is critical to the existence of most non-democratic governments and their associated control systems and security apparatus. Many findings in the media on ethnic representation throughout Europe between 1995 and 2000 paint a uniform picture. Explicit racism was found in letters to editors, in tabloids, and in journalism online. However, news and current affairs sections in daily newspapers, as well as in television, tend not to publish material expressing overtly racist attitudes. Nevertheless, most researchers criticise the media for excluding ethnic minorities in various subtle ways. Ethnic minorities are presented mainly in a negative 'problem' context, and are not used as important sources. Racism and prejudice have grown alongside cultural heterogeneity. Attitudes differ according to ethnic origin. Ethnic minorities are marginalised as sources in texts concerning ethnicity and immigration issues. Moreover, the linguistic choices indicate that the difference between minorities is clearly marked. But, can we really say that everyday reporting has changed a bit over the last decade?

To respond to this question, it is important to note that the media should take initiatives to examine anti-democratic movements. The most important ethical rules for the media are those which emphasise that the role played by the media in society and public confidence in the media call for accurate and comprehensive news coverage and a critical approach by the media to news sources. One rule of particular interest in the present context is that a person's race, sex, nationality, occupation, political affiliation, religion or sexual orientation should not be stated if it is not relevant and is used negatively. However, there is always a danger of oversimplified and stereotyped representations of race and ethnic relations in the media, hence the important role played by news-reporters and journalists in combating prejudice. The media must ensure that its broadcasting activities as a whole are permeated by the fundamental principles of democratic governance and the principle of the equal worth of all people and the freedom and dignity of the individual. The goal of media policy should be to support freedom of expression, diversity and the independence and accessibility of the mass media, and to combat harmful elements in the mass media. Governments, regulators and all relevant bodies must work actively to ensure diversity in the media, which in turn should be able to openly monitor society and thereby combat corruption, injustice and the abuse of power. It is important to have a free press and independent radio and television companies that are able to raise issues concerning undemocratic forces in our society and which can highlight the injustices and divisions that already exist. In this way different groups in society can gain insight into each others' situation, thereby increasing their understanding of the lives of other people.

### **Policy responses**

As it is recognised, the right to freedom of expression has a very special role in democratic processes. Without this right, the public would not be able to form and define its opinion of the Government, elected officials, and other issues of public interest. Here, the media has a particularly important role in offering information to the public, emphasising corruption and inspiring political debates.

The way rights and freedoms of expression are exercised depends on both the regulatory framework of the media and media professionals, especially journalists. In order for the media to fulfill its important "watchdog" role, a good regulatory structure must be in place and it is imperative that reporters are able to access information from a variety of sources in order to root out malpractice. Journalist

should be free to publish stories in the public interest, without fear of censorship, recrimination or being sued. On the other hand, journalists themselves have the responsibility to maintain and protect the culture of objectivity and to report accurately, fairly and in good faith at all times, but they must be free to do that. However, we do not always appreciate the importance of these freedoms until they are tampered with through state interference and control. Without the expression of ideas and opinions and the publication and distribution thereof in the media no society can develop effectively. Politicians should therefore refrain from undue attacks on the media in an attempt to hide their own incompetence and corruption. Such attacks undermine the effectiveness of the media to inform and educate our citizens. At the same time, faced with social and political conflicts, and even threats to national security such as terrorism, states are tempted to curb liberties in order to safeguard security and a misguided notion of public order. As citizens we should protect our freedom of speech and the freedom of the media to ensure that all other human rights are protected. Maintaining and encouraging media independence to promote responsible journalism and support self-regulatory principles according to which the media define and voluntarily obey professional and ethical standards is the key issue in maintaining the balance between freedom of expression and the violation of this freedom. Increasing the overall quality of journalism, rather than regulation alone will uphold the responsibility of journalists towards the public.

#### **BiH case**

Electronic and print media in Bosnia and Herzegovina are still divided along ethnic lines and report on different issues and events, or on the same issues and events, in a strikingly different fashion. This encourages the authorities of Bosnia and Herzegovina to support initiatives aimed at reaching all communities simultaneously, such as newspapers presenting the same articles in different languages, and television broadcasts of interest to all communities and made accessible to all residents of the country. The situation as concerns the dissemination of ethnically inflammatory material and the presence of stigmatising or insulting reporting on certain ethnic or religious groups has largely improved in the broadcast media in recent years, due to the presence of regulation, co regulation and self-regulation. In this regard, relevant legal instruments are being applied. For electronic media, there is a Broadcasting Code of Practice, binding for all radio and TV stations, that is intended to conform with the right to freedom of expression as envisaged by the European Convention on Human Rights and other instruments incorporated in the Constitution of Bosnia and Herzegovina, while respecting generally accepted standards of decency, non-discrimination, fairness and accuracy. Broadcasters are responsible for the content of all material transmitted by them, whatever its source, and for the professional activities of persons employed by them. In their programming, broadcasters are to meet generally accepted community standards of civility and respect for the ethnic, cultural and religious diversity of Bosnia and Herzegovina, refraining from any material which by its content or tone could carry a clear and immediate risk of inciting ethnic or religious hatred among the communities of Bosnia and Herzegovina.

The Press Code contains self-regulatory provisions against incitement to, *inter alia*, racial, ethnic or religious hatred and provisions against the use of references to a person's racial, ethnic or religious background that are stigmatising or insulting or simply irrelevant to the event being reported. Both electronic and especially print media should be encouraged, without encroaching on their editorial independence, to ensure that reporting does not contribute to creating an atmosphere of hostility

and rejection towards members of any ethnic and religious group and to play a proactive role in countering such an atmosphere.

The key issue here is a combination of proper regulation and self-regulation. By definition, self-regulation means that the state refrains from interfering with a process assuming that social processes alone will lead to a result which will achieve the objectives of regulation. In terms of media, self-regulation or media accountability means that journalists and publishers come together to draw up rules of conduct for journalism and to make sure these rules are obeyed. This is all done with the voluntary agreement of media professionals. It means that journalists and publishers or broadcasting organisations take responsibility for ensuring that their media adhere to good journalistic standards. Adherence to the principles of good journalism are directed toward bringing the highest quality of news reporting to the public, thus fulfilling the mission of timely distribution of information in service of the public interest. To a large degree, the codes and canons evolved via observation of and response to past ethical lapses by journalists and publishers. Today, it is common for terms of employment to mandate adherence to such codes equally applicable to both staff and freelance journalists; journalists may face dismissal for ethical failures. Upholding professional standards also enhances the reputation of and trust in a news organisation, which boosts the size of the audience it serves. Journalistic codes of ethics are designed as guides through numerous difficulties and challenges, to assist journalists in dealing with ethical dilemmas. The codes provide journalists with a framework for self-monitoring and self-correction as they pursue professional assignments. Self-regulatory mechanisms in print median such as press councils, are generally highly encouraged. The press councils offer a means of alternative dispute resolution, though perhaps with less protection for rights than the protection offered by the law. Provided that there is adequate protection for the rights of complainants and transparency, the code and the mechanism for its implementation may have the effect of making the media more accountable to its audience. However, it is believed that media self-regulation can only prosper alongside a legal framework which provides strong guarantees for the fundamental right to freedom of expression and freedom of information.

As far as electronic media are concerned, the situation before the establishment of the Independent Media Commission in 1998, later the Communications Regulatory Agency, as a unique regulatory body in BiH, shows a complex media scene, where broadcasters in many cases did not even apply for any licence. Strong hate speech has been wide-spread, with many broadcasters being under full political control. Many broadcasters were firmly rooted in political units within their own entity and issues concerning their own ethnicity. The language of public communication was generally at a very low level, discriminatory towards political opponents, differences of opinion and indeed everything what is different and based on intolerance and stereotypes that were built in to the media in the pre-war and war years. Although there is no doubt that the media played a key role in the conflicts in the region of the former Yugoslavia, they were only an instrument of politics, under its greater or lesser control. In any case an instrument, not an autonomous creator of conflict. There is no doubt that politics hold prime responsibility here. However, the role of the media in the war and preparation for war, including in the postwar period, has not even remotely been explained and illuminated. On the contrary, there is a tendency to give serious, although somewhat superficial and simplified evaluations, which either underline the media as the cause of the war or reduce its function solely to spreading negative propaganda and lies. This tendency neglects many other aspects of the very complex media activity with long-term negative consequences, even after the end of the conflict. In this situation, regulation had to be firm and all-

encompassing. As a result as the time passed, broadcasters gradually started not only to accept the Agency's authority and rules, but also became motivated to take editorial responsibility and adopt the standards of professional journalism. We are especially proud that hate speech today is almost rooted out as far as electronic media is concerned, which we consider as one of our greatest achievements. Though a regulator which has many times proven its firm dedication to applying regulatory principles in line with best European practice, the Agency firmly believes that regulation alone cannot impose full journalistic responsibility. Therefore self-regulatory principles and voluntary adherence to professional and ethical standards should be strongly encouraged. The lack of professionalism, ethics and education of journalists is the cause of frequent examples of violation of human rights. In search of sensational stories, and sometimes also out of revenge or ignorance, journalists publish information about suspects, arrested people or others, thus directly violating human rights. Media transition, like the transition of society in general, is slow, but it is moving in a positive direction, primarily thanks to the international community's engagement, as well as the passage of time since the war, which enables a more rational approach to problems to be taken.





## **IV - BACKGROUND PAPERS**



“THE INTERNATIONAL AND EUROPEAN LEGAL STANDARDS FOR  
COMBATING RACIST EXPRESSION”

PAPER PREPARED BY MR TARLACH MCGONAGLE, INSTITUTE FOR INFORMATION  
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**Introduction**

The purpose of this background paper is to give an overview of international and European legal standards for combating racist expression.<sup>113</sup> It aims, therefore, to set out the main provisions of international law that frame the struggle against racist speech. It will briefly consider the implementation or development of a number of those provisions. Relevant non-legal standards will be considered only to the extent that they complete the broader normative picture. As such, this paper will be necessarily summary and descriptive. The oral presentation based on this paper<sup>114</sup> will analyse in greater detail the actual interplay between relevant provisions of international law.

**United Nations**

A number of United Nations’ treaties home in on various aspects of the right to freedom of expression and the imperative of combating racism. A selection of relevant provisions from those treaties will now be examined.

*Genocide Convention*

Article II of the Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention), 1948, defines “genocide”. Article III then lists the following five acts as being “punishable” under the Convention: “(a) genocide [as defined in Article II]; (b) conspiracy to commit genocide; (c) direct and public incitement to commit genocide; (d) attempt to commit genocide; (e) complicity in genocide”. Of the punishable acts, “direct and public incitement to commit genocide” is clearly the most relevant to freedom of expression. As noted by the International Criminal Tribunal for Rwanda (ICTR) in its *Akayesu* judgment, “Perhaps the most famous conviction for incitement to commit crimes of international dimension was that of Julius Streicher by the Nuremberg Tribunal for the virulently anti-Semitic articles which he had published in his weekly newspaper *Der Stürmer*”.<sup>115</sup>

More recently, the ICTR has made important contributions to contemporary interpretations of “direct and public incitement to commit genocide”. For instance, the Tribunal has endorsed the International Law Commission’s characterisation of “public” incitement as “communicating the call for criminal action to a number of individuals in a public place or to members of the general public at large”, by

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<sup>113</sup> See also: Sandra Coliver, Ed., *Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination* (United Kingdom, ARTICLE 19/University of Essex, 1992); Stephanie Farrior, “Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech”, 14 Berkeley J. Int’l L. 1; Tarlach McGonagle, “Wresting (Racial) Equality from Tolerance of Hate Speech”, (2001) 23 *Dublin University Law Journal* (ns) 21, pp. 21-54.

<sup>114</sup> Tarlach McGonagle, “International and European standards for combating racist expression: selected current conundrums”, pp. 39-50 of this publication.

<sup>115</sup> *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, ICTR (Chamber I) Judgment of 2 September 1998, para. 550.

technical means of mass communication, such as by radio or television.<sup>116</sup> As for the definitional criterion of directness, it again followed the International Law Commission, stating that “The ‘direct’ element of incitement implies that the incitement assume a direct form and specifically provoke another to engage in a criminal act, and that more than mere vague or indirect suggestion goes to constitute direct incitement”.<sup>117</sup> The relevant *mens rea* required for the crime was held by the Tribunal to involve: “the intent to directly prompt or provoke another to commit genocide. It implies a desire on the part of the perpetrator to create by his actions a particular state of mind necessary to commit such a crime in the minds of the person(s) he is so engaging. That is to say that the person who is inciting to commit genocide must have himself the specific intent to commit genocide [...]”.<sup>118</sup>

Another issue with implications for freedom of speech concerns the status of genocide-denial. Under the Genocide Convention, this putative offence is not included among the enumerated “punishable” acts. Given that Holocaust denial is recognised as a legitimate restriction on freedom of expression, as guaranteed under international law, it is certainly a question deserving further exploration whether the scope of the Genocide Convention could or should be extended to include a more generic offence genocide-denial. This question is highly topical, both at international and national levels.<sup>119</sup> As will be seen below, only one international, legally-binding treaty countenances the criminalisation of the denial of genocides other than/as well as the Holocaust.<sup>120</sup>

#### *Universal Declaration of Human Rights and ICCPR*

The Universal Declaration of Human Rights, 1948, as well as being imbued with the importance of human dignity and non-discrimination, contains a specific Article devoted to the right to freedom of expression, Article 19: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”. This right was subsequently enshrined - and indeed fleshed out - in Article 19 of the International Covenant on Civil and Political Rights (ICCPR), which reads:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain

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<sup>116</sup> *Ibid.*, fn. 126; *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza & Hassan Ngeze* (the Media case), Case No. ICTR-99-52-T, ICTR (Trial Chamber I) Judgment of 3 December 2003, para. 1011. This case is currently on appeal.

<sup>117</sup> The *Akayesu* case, *op. cit.*, para. 557; the Media case, *op. cit.*, para. 1011.

<sup>118</sup> The *Akayesu* case, *op. cit.*, para. 560; the Media case, *op. cit.*, para. 1012.

<sup>119</sup> This is evidenced by the controversy generated by the passing at first reading by the French Assemblée Nationale of a Bill to prohibit the calling into question of the Armenian genocide (Proposition de Loi tendant à réprimer la contestation de l’existence du génocide arménien), 12 October 2006.

<sup>120</sup> Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems: see, in particular, Article 6.

restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (ordre public), or of public health or morals.

The only restrictions on the right countenanced by this article are those which are “provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals”. Nevertheless, Article 19 must be read in conjunction with Article 20, which further trammels the scope of the right. It provides for the prohibition by law of “Any propaganda for war” (Article 20(1)), and - of crucial importance for present purposes - “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence” (Article 20(2)).

The UN Human Rights Committee (HRC) has attempted to elucidate the relationship between Articles 19 and 20 by declaring the required prohibitions enumerated in the latter to be “fully compatible” with the right to freedom of expression and indicating that such prohibitions are subsumed into the “special duties and responsibilities” upon which the exercise of the right (as *per* Article 19) is contingent.<sup>121</sup> It has also stated that “For article 20 to become fully effective there ought to be a law making it clear that propaganda and advocacy as described therein are contrary to public policy and providing for an appropriate sanction in case of violation”.<sup>122</sup> The jurisprudence of the HRC only provides limited illumination of the relationship between Articles 19 and 20. The case of *Faurisson v. France*<sup>123</sup> is one example of where it could have grasped the definitional nettle more firmly, but failed to do so.

The case arose from the conviction of Robert Faurisson, an academic, for the contestation of crimes against humanity (i.e., Holocaust denial). Crucial to the HRC’s finding that Faurisson’s conviction was not a violation of Article 19 were submissions by the French authorities 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. The restriction on Faurisson’s freedom of expression was grounded in the deference pledged to the “respect of the rights or reputations of others” in Article 19(3) and was specifically intended to serve “the respect of the Jewish community to live free from fear of an atmosphere of anti-semitism.”<sup>124</sup>

In *Ross v. Canada*,<sup>125</sup> the HRC held that the restrictions imposed on a school-teacher’s freedom of expression did not violate Article 19, as they had the purpose of protecting the “rights or reputations” of persons of Jewish faith, in particular in the educational sphere. The teacher had been publishing anti-Semitic tracts outside of the classroom and was disciplined by being transferred to an administrative post. The HRC noted that “the rights or reputations of others for the protection of which

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<sup>121</sup> Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20), General Comment 11, United Nations Human Rights Committee, 29 July 1983, para. 2.

<sup>122</sup> *Ibid.*

<sup>123</sup> Communication No. 550/1993, HRC Decision of 8 November 1996.

<sup>124</sup> *Ibid.*, para. 9.6.

<sup>125</sup> Communication No. 736/1997, HRC Decision of 18 October 2000.

restrictions may be permitted under article 19, may relate to other persons or to a community as a whole”.<sup>126</sup> Citing its *Faurisson* decision, the HRC stated that “restrictions may be permitted on statements which are of a nature as to raise or strengthen anti-semitic feeling, in order to uphold the Jewish communities’ right to be protected from religious hatred”, and that such restrictions “also derive support from the principles reflected in article 20(2) of the Covenant”.<sup>127</sup> The actual necessity of the restrictions was justified for the protection of “the right and freedom of Jewish children to have a school system free from bias, prejudice and intolerance”.<sup>128</sup>

There was no apparent need to consider the nexus between Articles 19 and 20 in another case treating colourably similar issues. In *J.R.T. and the W.G. Party v. Canada*,<sup>129</sup> the dissemination of anti-Semitic messages by telephonic means was adjudged by the HRC to “clearly constitute the advocacy of racial or religious hatred” under Article 20(2).<sup>130</sup>

### ICERD

Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) is also a crucial reference point for any examination of the interaction between freedom of expression and the elimination of racism. It reads as follows:

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

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

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

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<sup>126</sup> *Ibid.*, para. 11.5.

<sup>127</sup> *Ibid.*, para. 11.5.

<sup>128</sup> *Ibid.*, para. 11.6.

<sup>129</sup> Communication No. 104/1981, Decision of 6 April 1983.

<sup>130</sup> *Ibid.*, para. 8(b).

The provisions of Article 4 are mandatory in character.<sup>131</sup> The Committee on the Elimination of Racial Discrimination has stated that in order to satisfy these obligations, “States parties have not only to enact appropriate legislation but also to ensure that it is effectively enforced”.<sup>132</sup> It reasons: “Because threats and acts of racial violence easily lead to other such acts and generate an atmosphere of hostility, only immediate intervention can meet the obligations of effective response”.<sup>133</sup>

Article 4, ICERD, clearly includes restrictions on the right to freedom of expression that are additional to - and more far-reaching than - those set out in Articles 19 and 20, ICCPR. This is particularly true of the requirement that States “declare an offence punishable by law all dissemination of ideas based on racial superiority”. The Committee on the Elimination of Racial Discrimination is of the opinion that that requirement “is compatible with the right to freedom of opinion and expression”.<sup>134</sup> It seeks to ground its opinion in references to Article 29(2) of the Universal Declaration of Human Rights and Article 20, ICCPR. The reference to the former provision draws attention to the “duties and responsibilities” that right-holders must observe while exercising their rights and freedoms.<sup>135</sup> It is surprising, however, that no reference is made to Article 19(3), which contains an equivalent provision that is more specific to the rights to freedom of opinion and expression. The reference to Article 20, ICCPR, is specifically to the obligation on States to prohibit by law “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”. Regardless of how the Committee seeks to square this circle, the fact remains that Article 4, ICERD, is more restrictive of the right to freedom of opinion and expression than analogous provisions in the ICCPR.

According to one leading commentator, the rationale behind the “strongly preventive or pro-active mode” of Article 4 “may be understood by reflecting on such phenomena as the discourses of dehumanisation that are characteristic elements of genocidal processes, or, less dramatically, on the climate of oppression that may flourish if unchecked against vulnerable minorities”.<sup>136</sup>

Notwithstanding the foregoing, it is crucially important to stress that the fulfilment by States Parties of their obligations under Article 4 must be achieved while having “due regard” to the principles embodied in the Universal Declaration of Human

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<sup>131</sup> See, for example: Legislation to eradicate racial discrimination (Art. 4), General Recommendation VII, Committee on the Elimination of Racial Discrimination, 23 August 2005, para. 1; Organized violence based on ethnic origin (Art. 4), General Recommendation XV, Committee on the Elimination of Racial Discrimination, 23 March 1993, para. 2.

<sup>132</sup> CERD General Recommendation XV, *op. cit.*, para. 2.

<sup>133</sup> *Ibid.*

<sup>134</sup> CERD General Recommendation XV, *op. cit.*, para. 4.

<sup>135</sup> Article 29(2) of the Universal Declaration of Human Rights reads: “In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”

<sup>136</sup> Patrick Thornberry, “Confronting Racial Discrimination: A CERD Perspective”, 5 *Human Rights Law Review* (No. 2, 2005), pp. 239-269, at p. 253. He develops the point further: “Vulnerable groups well appreciate that the lines between thought, public discourse and oppressive action can be very thin”, *ibid.*

Rights and the rights explicitly set out in Article 5, ICERD.<sup>137</sup> “The right to freedom of opinion and expression” is among those rights specifically enumerated at Article 5.<sup>138</sup>

The Opinion of the Committee on the Elimination of Racial Discrimination in a recent case, *The Jewish Community of Oslo & others v. Norway*,<sup>139</sup> is highly revelatory of the Committee’s current thinking on the relationship between Articles 4 and 5, ICERD. The factual background to the case involved a march and speech in Askim (near Oslo) to commemorate Rudolf Hess. It was organised by a group known as the “Bootboys”. The applicants pointed to a number of instances of racist intolerance and racially-motivated attacks in the months subsequent to the march, which they attributed to the fact that the march had taken place at all. The conviction of the leader of the march (Mr. Sjolie) for violation of the Norwegian Penal Code (in particular the provision dealing with offences that may be summarised as “hate speech”) was eventually overturned by the Norwegian Supreme Court. The applicants then turned to the Committee on the Elimination of Racial Discrimination, claiming that as a result of the acquittal, “they were not afforded protection against the dissemination of ideas of racial discrimination and hatred, as well as incitement to such acts”<sup>140</sup> during the march and that they were not afforded a remedy against this conduct, as required by ICERD.

It fell to the Committee to decide whether the impugned statements by Mr. Sjolie would be protected by the “due regard” clause in Article 4. The Committee noted that “the principle of freedom of speech has been afforded a lower level of protection in cases of racist and hate speech dealt with by other international bodies, and that the Committee’s own General recommendation No 15 clearly states that the prohibition of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression”.<sup>141</sup> It further notes that:

the ‘due regard’ clause relates generally to all principles embodied in the Universal Declaration of Human Rights, not only freedom of speech. Thus, to give the right to freedom of speech a more limited role in the context of article 4 does not deprive the due regard clause of significant meaning, all the more so since all international instruments that guarantee freedom of expression provide for the possibility, under certain circumstances, of limiting the exercise of this right.<sup>142</sup>

The Committee concluded that, given the “exceptionally/manifestly offensive character” of the impugned statements, they are not entitled to protection by the due regard clause and therefore Mr. Sjolie’s acquittal by the Norwegian Supreme Court had given rise to a violation of Article 4, ICERD.

In its General Recommendation XXX, “Discrimination Against Non Citizens”,<sup>143</sup> the Committee on the Elimination of Racial Discrimination sets out a number of general principles, on the basis of which it recommends that States Parties to ICERD, “as appropriate to their specific circumstances”, adopt various measures, including:

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<sup>137</sup> Article 4. The list of rights set out in Article 5 is non-exhaustive: Non-discriminatory implementation of rights and freedoms (Art. 5), General Recommendation XX, CERD, 15 March 1996, para. 1.

<sup>138</sup> Article 5(d)(viii).

<sup>139</sup> Communication No. 30/2003, CERD Opinion of 22 August 2005.

<sup>140</sup> *Ibid.*, para. 3.1.

<sup>141</sup> *Ibid.*, para. 10.5. It does not, however, refer to any specific examples.

<sup>142</sup> *Ibid.*

<sup>143</sup> Discrimination Against Non Citizens, General Recommendation XXX, CERD, 1 October 2004.

III. Protection against hate speech and racial violence

11. Take steps to address xenophobic attitudes and behaviour towards non-citizens, in particular hate speech and racial violence, and to promote a better understanding of the principle of non-discrimination in respect of the situation of non-citizens;

12. Take resolute action to counter any tendency to target, stigmatize, stereotype or profile, on the basis of race, colour, descent, and national or ethnic origin, members of “non-citizen” population groups, especially by politicians, officials, educators and the media, on the Internet and other electronic communications networks and in society at large;

*UNESCO*

While not legally-binding on States, a number of international instruments adopted by UNESCO merit consideration, because of their general relevance to the freedom of expression/anti-racism interface and also their specific relevance to the role of the media in this area. For instance, Article 5.3 of the UNESCO Declaration on Race and Racial Prejudice (1978) reads:

The mass media and those who control or serve them, as well as all organised groups within national communities, are urged - with due regard to the principles embodied in the Universal Declaration of Human Rights, particularly the principle of freedom of expression - to promote understanding, tolerance and friendship among individuals and groups and to contribute to the eradication of racism, racial discrimination and racial prejudice, in particular by refraining from presenting a stereotyped, partial, unilateral or tendentious picture of individuals and of various human groups. Communication between racial and ethnic groups must be a reciprocal process, enabling them to express themselves and to be fully heard without let or hindrance. The mass media should therefore be freely receptive to ideas of individuals and groups which facilitate such communication.<sup>144</sup>

Another example is provided by Article 3.2 of UNESCO’s Declaration of Principles on Tolerance (1995), which reads:

[...] The communication media are in a position to play a constructive role in facilitating free and open dialogue and discussion, disseminating the values of tolerance, and highlighting the dangers of indifference towards the rise in intolerant groups and ideologies.

*World Conference against Racism*

The World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance was held in Durban, South Africa, from 31 August to 8 September 2001. The focus of the Declaration and Programme of Action of the World Conference<sup>145</sup> is broad and it reflects a diversity of thematic and regional priorities. The evident zeal of the language used in these documents augurs well for their effective implementation. While the stigmatisation and negative stereotyping of vulnerable individuals or groups of individuals are criticised in the Declaration (para. 89), it is simultaneously stressed that a possible antidote to such trends could lie in the robust

<sup>144</sup> This provision is further bolstered, in particular, by Article 6.2 and Article 7.

<sup>145</sup> See: Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, 31 August - 8 September 2001, Doc. No. A/CONF.189/12.

exercise of the corrective powers of the media (para. 90). The promotion of multiculturalism by the media is a crucial ingredient of such an antidote (para. 88). These anxieties about the use and misuse of the media are equally applicable, if not moreso, to new technologies and in particular, the Internet (paras. 90-92). This is also borne out in the Declaration.<sup>146</sup>

The Programme of Action, for its part, revisits these themes, but in a manner that is mindful of their practical application. To this end, it calls for the promotion of voluntary ethical codes of conduct, self-regulatory mechanisms and policies and practices by all sectors and levels of the media in order to forward the struggle against racism (para. 144). It also advocates, within the parameters of international and regional standards on freedom of expression, greater (and where applicable, concerted) State action to counter racism in the media (para. 145). The dissemination of racist speech and the perpetration of similar racist acts over the Internet and via other forms of new information and communications technologies should merit particular attention (para. 147).<sup>147</sup> A list of suggested practical approaches to relevant problems is then enumerated.<sup>148</sup>

### *Work of UN Special Rapporteurs*

Mention should also be made in passing to the relevance and value of the normative work being carried out by various Special Rapporteurs within the United Nations system to the issues under discussion in this paper. The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance spring instantly to mind, but it would be remiss to disregard the work of the Special Rapporteur on freedom of religion and belief, and that of other specialised mandates, on the grounds of perceived irrelevance. Having said that, the scope of this paper does not allow for a detailed exposition of their various contributions.

### **Council of Europe**<sup>149</sup>

The European Convention on Human Rights is the veritable centrepiece of human rights protection in Europe. However, as the relevant jurisprudence of the European Court of Human Rights and the (now-defunct) European Commission of Human Rights is the focus of another background paper,<sup>150</sup> it will not be explored further here. The

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<sup>146</sup> These issues are dealt with most extensively in paras. 86-94 of the Declaration.

<sup>147</sup> See further in this connection and in the context of follow-up activities to the Durban Declaration and Programme of Action: Yaman Akdeniz, "Stocktaking on efforts to combat racism on the Internet", Background Paper to High Level Seminar, UN Commission on Human Rights - Intergovernmental Working Group on the Effective Implementation of the Durban Declaration and Programme of Action, January 2006.

<sup>148</sup> All of these issues are dealt with primarily in paras. 140-147 of the Programme of Action. See further, Tarlach McGonagle, "World Anti-Racism Conference: Focus on Media", *IRIS - Legal Observations of the European Audiovisual Observatory*, 2002-2: 3.

<sup>149</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>150</sup> Background paper on the case law of the European Court of Human Rights on Article 10 ECHR relevant for combating racism and intolerance, prepared by Ms Anne WEBER, Dr. iur., Institut de recherche Carré de Malberg, Université Robert Schuman, pp. 97-113 of this publication.

work of the European Commission against Racism and Intolerance (ECRI) will be the subject of another separate background paper.<sup>151</sup>

### 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 its Additional Protocol*

One of the fiercest criticisms of the Council of Europe's Convention on Cybercrime<sup>152</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>153</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>154</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>155</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>156</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

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<sup>151</sup> Background paper on ECRI's jurisprudence in the field of combating racism while respecting freedom of expression, pp. 115-133 of this publication.

<sup>152</sup> ETS No. 185, entry into force: 1 July 2004.

<sup>153</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>154</sup> ETS No. 189, entry into force: 1 March 2006.

<sup>155</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>156</sup> See further, *ibid.*, paras. 10-22.

presence of intent or *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>157</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. 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”.<sup>158</sup>

Article 6 of the Additional Protocol (‘Denial, gross minimisation, approval or justification of genocide or crimes against humanity’) introduces a 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. Article 6 reads:

1 Each Party shall adopt such legislative measures as may be necessary to establish the following conduct as criminal offences under its domestic law, when committed intentionally and without right:

distributing or otherwise making available, through a computer system to the public, material which denies, grossly minimises, approves or justifies acts constituting genocide or crimes against humanity, as defined by international law

<sup>157</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>158</sup> *Handyside v. the United Kingdom*, Judgment of the European Court of Human Rights of 7 December 1976, Series A, No. 24.

and recognised as such by final and binding decisions of the International Military Tribunal, established by the London Agreement of 8 August 1945, or of any other international court established by relevant international instruments and whose jurisdiction is recognised by that Party.

2 A Party may either

a require that the denial or the gross minimisation referred to in paragraph 1 of this article is committed with the intent to incite 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, or otherwise

b reserve the right not to apply, in whole or in part, paragraph 1 of this article.

### *European Convention on Transfrontier Television*

Article 7(1) of the European Convention on Transfrontier Television<sup>159</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*

Despite its failure to specifically mention the term “hate speech”, the Framework Convention for the Protection of National Minorities (FCNM)<sup>160</sup> has nevertheless elaborated a comprehensive strategy for tackling intolerance, hatred and (other) various contributory causes of hate speech.<sup>161</sup> The strategy focuses on the twin goals of facilitating and creating expressive opportunities for minorities and of promoting intercultural dialogue, understanding and tolerance. The strategy derives from the interplay between Articles 6 and 9, FCNM. 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.

For its part, Article 9 reads:

1 The Parties undertake to recognise that the right to freedom of expression of every person belonging to a national minority includes freedom to hold opinions and to receive and impart information and ideas in the minority language, without interference by public authorities and regardless of frontiers. The Parties

<sup>159</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>160</sup> ETS No. 157, entry into force: 1 February 1998.

<sup>161</sup> See further, Tarlach McGonagle, “The Road Less Travelled: An Analysis of the Strategy against Hate Speech Elaborated under the Framework Convention for the Protection of National Minorities”, in Peter Molnar, Ed., *Hate Speech and its Remedies* (forthcoming, 2006).

shall ensure, within the framework of their legal systems, that persons belonging to a national minority are not discriminated against in their access to the media.

2 Paragraph 1 shall not prevent Parties from requiring the licensing, without discrimination and based on objective criteria, of sound radio and television broadcasting, or cinema enterprises.

3 The Parties shall not hinder the creation and the use of printed media by persons belonging to national minorities. In the legal framework of sound radio and television broadcasting, they shall ensure, as far as possible, and taking into account the provisions of paragraph 1, that persons belonging to national minorities are granted the possibility of creating and using their own media.

4 In the framework of their legal systems, the Parties shall adopt adequate measures in order to facilitate access to the media for persons belonging to national minorities and in order to promote tolerance and permit cultural pluralism.

#### *Intergovernmental initiatives under the auspices of the Council of Europe*

The Third Summit of Heads of State and Government of the Member States of the Council of Europe was held in Warsaw on 16-17 May 2005. The Action Plan adopted at the Summit reaffirms States' resolution to "intensify the fight against racism, discrimination and every form of intolerance, as well as attempts to vindicate Nazism". The Action Plan goes on to pledge its support to ECRI in the continuation of its work with national authorities and institutions as well as civil society. It also commends ECRI's role in identifying good practices and its general policy recommendations. It points out the desirability of coordination of activities with equivalent or comparable EU, OSCE and other international bodies. At the same time, it reiterates the States leaders' "commitment to guarantee and promote freedom of expression and information and freedom of the media as a core element of our democracies". It gave its backing to Council of Europe activities in this area and also to the Declaration and Action Plan adopted at the 7<sup>th</sup> European Ministerial Conference on Mass Media Policy (Kiev, 10-11 March 2005). Also of relevance for present purposes was the attention paid to improving cooperation in respect of the protection of national minorities; combating cybercrime and strengthening human rights in the Information Society; protecting and promoting cultural diversity, and fostering intercultural dialogue.

The central theme at the aforementioned the 7<sup>th</sup> European Ministerial Conference on Mass Media Policy was "Integration and diversity: the new frontiers of European media and communications policy". It led to the adoption of a Political Declaration, three Resolutions on the Conference's main themes,<sup>162</sup> an Action Plan and a Resolution on the media in Ukraine. One of the principal goals of Resolution No. 2, "Cultural diversity and media pluralism in times of globalisation", is to promote cultural and linguistic diversity in the media as an end in itself, but also to foster intercultural dialogue and tolerance. By adopting Resolution No. 3, "Human rights and regulation of the media and new communication services in the Information Society", participating Ministers undertook, *inter alia*, to:

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<sup>162</sup> Resolution No. 1 - "Freedom of expression and information in times of crisis"; Resolution No. 2 - "Cultural diversity and media pluralism in times of globalisation"; Resolution No. 3 - "Human rights and regulation of the media and new communications services in the Information Society". See further: Tarlach McGonagle, "Ministerial Conference on Mass Media Policy", *IRIS - Legal Observations of the European Audiovisual Observatory*, 2005-7: 2.

- ensure that regulatory measures governing media and new communication services respect pluralism, diversity, human rights and non-discriminatory access;
- make greater efforts to combat the use of 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

### *Non-treaty-based standard-setting*

The Council of Europe actively engages in a wide range of standard-setting activities which are not based on specific treaties. The work of the European Commission against Racism and Intolerance (ECRI), the Committee of Ministers and the Parliamentary Assembly all deserve special mention in this connection. However, to keep within the parameters of this paper (and thereby focus on legally-binding standards) and to avoid potential overlap with other contributions, only two standard-setting texts will be examined in detail.<sup>163</sup> They are the Committee of Ministers' self-complementing Recommendations on "Hate Speech" and on the media and the promotion of a culture of tolerance. These Recommendations have been selected for further scrutiny because of their conceptual centrality to, and indeed typification of, Council of Europe strategies to reconcile the objectives of safeguarding freedom of expression and combating racism.

### *Recommendation on "Hate Speech"*

Recommendation (97) 20 on "Hate Speech"<sup>164</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>165</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>166</sup> The Group examined existing international legal instruments, the domestic legislation of Member States of the Council of Europe and various relevant studies,<sup>167</sup> including a specially-commissioned study on codes of ethics dealing with media and intolerance.<sup>168</sup>

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<sup>163</sup> For a more comprehensive overview, see: Tarlach McGonagle, *The nexus between freedom of expression and minority rights: challenges for Europe* (doctoral thesis, forthcoming).

<sup>164</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>165</sup> Explanatory Memorandum to Recommendation No. R (97) 20 on "Hate Speech", para. 23.

<sup>166</sup> *Ibid.*, para. 8.

<sup>167</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>168</sup> Doc. MM-S-IN (95) 21, also published as: Kolehmainen/Pietilainen, "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.

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.

Crucially, the Appendix to the Recommendation states that “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”.

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>169</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 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

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<sup>169</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.”

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>170</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 on the media and the promotion of a culture of tolerance*

Whereas combating hate speech may be considered a defensive or reactionary battle, the promotion of tolerance - an objective to which it is intimately linked - is more pro-active.<sup>171</sup> Recommendation (97) 21 on the media and the promotion of a culture of tolerance<sup>172</sup> was conceived of as the logical complement to the Recommendation on “Hate Speech”. It was 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:

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>173</sup>

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<sup>170</sup> Explanatory Memorandum to Recommendation No. R (97) 20, *op. cit.*, para. 38.

<sup>171</sup> It should also be mentioned that the European Commission against Racism and Intolerance frequently refers to the need to assure minority groups effective access to the media, *inter alia*, in order to counter negative stereotypes of their cultures and lifestyles, and more generally to promote inter-community understanding and tolerance.

<sup>172</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).

<sup>173</sup> Explanatory Memorandum to Recommendation No. R (97) 20, *op. cit.*, para. 12.

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.

## European Union

The struggle against racism is informing public and judicial policy to an unprecedented extent in a European Union (EU) whose erstwhile goals were primarily economic cooperation and the consolidation of peace through trade. However, as consistently held by the Court of Justice of the European Communities<sup>174</sup> and as laid down explicitly in the Treaty of Amsterdam, 1997, the EU is bound by the fundamental rights regime of the ECHR.<sup>175</sup> This growing commitment to the upholding of human rights was further consolidated by the proclamation of the Charter of Fundamental Rights of the European Union at the Nice European Council on 7 December 2000.<sup>176</sup> Since then, the Draft Constitution for the European Union has incorporated the Charter of Fundamental Rights of the European Union as its Part II.

That the Charter should begin by stressing the inviolability of human dignity (Article 1) is not merely of symbolic importance; it also lays down one of the document’s main ideological cornerstones.<sup>177</sup> It has been argued that Article 1 constitutes not

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<sup>174</sup> See, for example, Case 4/73, *Nold v. Commission* [1974], Judgment of 14 May 1974, ECR 491, para. 13; Case C-260/89, *Elliniki Radiophonia Tileorasi* [1991], Judgment of 18 June 1991, ECR I-2925, para. 41; Case C-353/89, *Commission v. The Netherlands* [1991], Judgment of 25 July 1991, ECR I-4069, para. 30.

<sup>175</sup> Article 6.2 (ex Article F.2) of the EU Treaty now reads: “The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.” Article 29 (ex. Article K1) provides, *inter alia*, a specific legal basis for preventing and combating racism and xenophobia.

<sup>176</sup> Charter of Fundamental Rights of the European Union, Nice, 7 December 2000, as published in the *Official Journal of the European Communities* of 18 December 2000, C 364/1.

<sup>177</sup> See also the Charter’s preambular reference to human dignity (Recital 2).

only a fundamental right in itself, but the “real basis” of other fundamental rights.<sup>178</sup> Following this line of argumentation, Article 1 necessarily informs other rights enshrined in the Charter, such as Article 11 (Freedom of expression and information), which 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.
2. The freedom and pluralism of the media shall be respected.

In terms of interpretative clarity, it is important to note that Article 11 of the Charter has deliberately been very closely aligned with Article 10, ECHR. The upshot of this alignment is that:

[...] the limitations which may be imposed on it, shall not exceed those provided for in Article 10(2) of the Convention, without any prejudice to any restrictions which Community law may impose on Member States’ rights, for instance on the right to introduce the licensing arrangements referred to in Article 10(1) of the ECHR.<sup>179</sup>

Article 1 also informs Article 20 (Equality before the law), which is reinforced by Article 21 (Non-discrimination). It is also easy to detect its relevance to the Charter’s in-built safety mechanism, i.e., its prohibition of abuse of rights clause (Article 54).

In 1996, a Joint Action concerning action to combat racism and xenophobia was adopted on the basis of Article K.3 of the Treaty on the European Union.<sup>180</sup> The Joint Action sought to ensure effective legal cooperation between Member States in combating racism and xenophobia. It aimed for Member States to make certain listed types of racist and xenophobic behaviour punishable as criminal offences, or to derogate from the principle of double criminality in respect of such behaviour. Following the first assessment of the Joint Action in 1998, the European Commission proceeded in 2001 to put forward a Proposal for a Council Framework Decision on combating racism and xenophobia.<sup>181</sup> The Proposal has yet to be adopted.

According to its draft first article, the purpose of the Framework Decision will be to lay down “provisions for approximation of laws and regulations of the Member States and for closer co-operation between judicial and other authorities of the Member States regarding offences involving racism and xenophobia”. It goes on to define the terms “racism and xenophobia” in draft Article 3: “the belief in race, colour, descent, religion or belief, national or ethnic origin as a factor determining aversion to individuals or groups”. The key article of the Framework Decision, however, will

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<sup>178</sup> Wolfgang Heyde, “Article 1 - Human Dignity”, in *The Commentary of the Charter of Fundamental Rights of the European Union*, June 2006, at p. 25. See also: Note from the Praesidium, *Draft Charter of Fundamental Rights of the European Union*, Doc. No. CHARTE 4473/00, Brussels, 11 October 2000, p. 3.

<sup>179</sup> Gabor Halmai, “Article 11 - Freedom of expression and information”, in *The Commentary of the Charter of Fundamental Rights of the European Union*, op. cit., at p. 122.

<sup>180</sup> Joint Action of 15 July 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning action to combat racism and xenophobia (96/443/JHA), OJ L 185 of 24 July 1996.

<sup>181</sup> COM (2001) 664 final, Brussels, 28 November 2001. However, see also in this connection: Council of the European Union Interinstitutional File: 2001/0270 (CNS), Brussels, 27 May 2005.

be Article 4 - Offences concerning racism and xenophobia. In its original draft form, it reads:

Member States shall ensure that the following intentional conduct committed by any means is punishable as criminal offence:

- (a) public incitement to violence or hatred for a racist or xenophobic purpose or to any other racist or xenophobic behaviour which may cause substantial damage to individuals or groups concerned;
- (b) public insults or threats towards individuals or groups for a racist or xenophobic purpose;
- (c) public condoning for a racist or xenophobic purpose of crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court;
- (d) public denial or trivialisation of the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 April 1945 in a manner liable to disturb the public peace;
- (e) public dissemination or distribution of tracts, pictures or other material containing expressions of racism and xenophobia;
- (f) directing, supporting of or participating in the activities of a racist or xenophobic group, with the intention of contributing to the organisation's criminal activities.

Draft Article 5 enjoins Member States to ensure that “instigating, aiding, abetting or attempting to commit an offence referred to in Article 4 is punishable”. Also of note is that draft Article 7 provides for aggravated sentencing when the perpetrator is acting in the exercise of a professional activity and the victim is dependent on that activity. Draft Article 8, then, stipulates that racist and xenophobic motivation may be regarded as an aggravating circumstance for the determination of penalties for offences.

The Proposal is comprehensive in scope and if adopted, it is sure to prove the mainstay of future anti-racism action within the EU. Nevertheless, concerns over its implications for freedom of expression continue to be a stumbling block among Member States,<sup>182</sup> despite its preambular assurance that “[T]his Framework Decision respects the fundamental rights and observes the principles recognised in particular by the European Convention on Human Rights, in particular Articles 10 and 11 thereof, and by the Charter of Fundamental Rights of the European Union, and notably Chapters II and VI thereof”. The present impasse prompted the European Commission to request the EU Network of Independent Experts on Fundamental Rights “to submit an opinion on existing legislation on racism and xenophobia and in

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<sup>182</sup> “No agreement on the framework decision on combating racism and xenophobia at the Justice and Home Affairs Council”, Press release of the Luxembourg Presidency of the Council of the European Union, 2 June 2005. See also, in this connection: the EU Annual Report on Human Rights - 2005, Doc. No. 12416/05, 28 September 2005, at p. 108; “The Need for a Unified Stance in Combating Racism and Xenophobia”, Speech by Vice-President of the European Commission Frattini, Vienna, 22 June 2006.

particular, on the issues surrounding the borderline between freedom of expression and the repression of racism and xenophobia”.<sup>183</sup>

### **Organization for Security and Co-operation in Europe**

The Organization for Security and Co-operation in Europe (OSCE) also boasts a range of politically-binding commitments dealing with human rights generally and the promotion of tolerance and non-discrimination in particular. The bulk of these commitments have emerged from the so-called “human dimension” of the OSCE’s work.<sup>184</sup> They have been developed at successive Summits of Heads of State or Government, beginning with the Helsinki Final Act (1975), through the Charter of Paris for a New Europe (1990), “The Challenges of Change” - Helsinki (1992), “Towards a Genuine Partnership in a New Era” - Budapest (1994), the Lisbon Document (1996) and the various documents of the Istanbul Summit (1999). Relevant declarations and documents have also resulted from other meetings.

Specialised institutions within the OSCE apparatus deserve particular mention, including: the Office for Democratic Institutions and Human Rights (ODIHR), the Office of the Representative on Freedom of the Media (RFOM), the Office of the High Commissioner on National Minorities (HCNM). Each of these offices have been responsible for important normative work concerning the interface between freedom of expression and anti-racism. In 2003, ODIHR was asked by the OSCE Ministerial Council to act as a collection point for information related to tolerance and non-discrimination on the basis of information received from Participating States, civil society and intergovernmental organisations.

Particular themes addressed in the context of the OSCE’s work on tolerance and non-discrimination include: anti-Semitism, freedom of religion or belief, gender-based discrimination, hate crime, hate on the Internet, homophobia, intolerance against Muslims, racism and xenophobia, Roma, Sinti and Travellers.<sup>185</sup> Ample references to the importance of protecting and promoting the right to freedom of expression, as such, are also to be found throughout OSCE documents pertaining to human rights and democracy.

### **Conclusion**

As mentioned at the outset, the purpose of this background paper is one of scene-setting. The oral presentation based on this paper will examine in detail a variety of tensions, both creative and conflictual, that characterise the interplay between: (i) different standards espoused by international legal instruments; (ii) international instruments that are legally-binding and other standard-setting measures that are not. Current controversies will also be highlighted.

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<sup>183</sup> Combating Racism and Xenophobia through Criminal Legislation: the Situation in the EU Member States, Opinion No. 5-2005, EU Network of Independent Experts on Fundamental Rights, 28 November 2005, p. 5.

<sup>184</sup> There are three main “dimensions” to the OSCE’s work: the politico-military dimension, the economic and environmental dimension and the human dimension.

<sup>185</sup> See further, the OSCE/ODIHR Tolerance and Non-discrimination Information System: <<http://tnd.odihr.pl/>>.



“THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS ON  
ARTICLE 10 ECHR RELEVANT FOR COMBATING RACISM AND  
INTOLERANCE “

PAPER PREPARED BY Ms ANNE WEBER, DR. IUR., INSTITUT DE RECHERCHE CARRÉ  
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The current debate on the confrontation between the protection against racism and intolerance and freedom of expression brings to light the difficulties of reconciling several values which all seem to be “fundamental in a democratic society”, namely freedom of expression, the prohibition of discrimination and freedom of religion. The European Court of Human Rights (hereinafter the Court, or ECourHR) has recognised in particular that freedom of expression “constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man”<sup>186</sup>.

The question therefore is how to fight racism and intolerance while protecting freedom of expression. What are the limits to the latter? It thus seems interesting to study the European Court’s case-law on the subject, in order to clarify and possibly learn from the answers given by the Court. Confronted with States that limit freedom of expression in the name of the fight against racism and intolerance in general, and in the name of the protection of religious beliefs in particular, how has the Court struck a balance between these different values?

When dealing with cases brought by applicants who have been convicted on account of certain remarks they have made and who allege a violation of Article 10 of the European Convention on Human Rights (hereinafter ECHR), which safeguards freedom of expression, the Court first has to check that the remarks in question are covered by Article 10, and then has to verify four successive aspects: the existence of an interference by public authority, which must be prescribed by law, must pursue one or more of the legitimate aims set out in Article 10 § 2 and must be necessary in a democratic society to achieve those aims. While the first three requirements do not normally pose a problem, the assessment of “necessity in a democratic society” calls for more detailed consideration: according to European case-law, it amounts to determining whether the reasons adduced by the national authorities to justify the interference appear “relevant and sufficient”, or in other words whether it corresponds to a “pressing social need”, and whether the means used were proportionate to the legitimate aim pursued. In so doing, the Court grants the national authorities a “margin of appreciation” which fluctuates from one case to another. However, this margin is not unrestricted and “goes hand in hand with a European supervision”<sup>187</sup>.

The identification of the elements that serve to determine the extent of this margin of appreciation and therefore the intensity of European supervision may pose a problem when it comes to issues which involve delicate decisions, as is the case in this area. To gain a clearer understanding of the Court’s approach, a distinction should be drawn between incitement to hatred and attacks on religious convictions.

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<sup>186</sup> ECourHR, *Handyside v. United Kingdom*, 7 December 1976, Series A No.24, § 49.

<sup>187</sup> *Ibid.*

## 1. Incitement to hatred

The European Court of Human Rights has had in the past the occasion to rule on variety of oral and written remarks that may be grouped under the term “hate speech”. This term is also found in European case-law although the Court has never given a precise definition of it. The Court simply refers in some of its judgments to “all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance)”<sup>188</sup>. It is important to note that this is an “autonomous” concept, as the Court does not consider itself bound by the domestic courts’ classification of the remark under examination. As a result, it sometimes rebuts classifications adopted by national courts<sup>189</sup>, or classifies certain statements as hate speech when domestic courts ruled out this classification<sup>190</sup>.

The cases brought before the Court or the former European Commission of Human Rights (ECommHR) cover several situations: firstly, incitement to racial hatred or in other words hatred directed at persons or groups of persons on the grounds of belonging to a race<sup>191</sup>; secondly, incitement to hatred on religious grounds<sup>192</sup>, with which incitement to hatred on the basis of a distinction between believers and non-believers may be equated<sup>193</sup>; and lastly, to use the wording of the Recommendation of the Committee of Ministers of the Council of Europe on hate speech<sup>194</sup>, incitement to other forms of hatred based on intolerance, “expressed by aggressive nationalism and ethnocentrism”<sup>195</sup>. Negationism<sup>196</sup> is a specific category of racist expression, because it constitutes both a denial of crimes against humanity, in this case the Nazi Holocaust, and incitement to hatred against the Jewish community<sup>197</sup>. The common denominator in these cases is that they concern remarks which incite to hatred against human beings, because of their - sometimes perceived - belonging to a religion, a race or an ethnic group: these remarks directly target human beings, not their opinions as such.

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<sup>188</sup> ECourtHR, *Gündüz v. Turkey*, 4 December 2003, § 40; ECourtHR, *Erbakan v. Turkey*, 6 July 2006, § 56.

<sup>189</sup> See for example the *Gündüz v. Turkey* judgment of 4 December 2003: unlike the domestic courts, which classified the applicant’s statements as hate speech, the Court holds that the statements made cannot be regarded as hate speech (§ 43 of the judgment).

<sup>190</sup> See to that effect the *Sürek v. Turkey* judgment of 8 July 1999: the Court found that there had been hate speech, whereas the applicant had not been convicted of incitement to hatred but of separatist propaganda, since the domestic courts had held that there were no grounds for convicting him of incitement to hatred. It would seem, therefore, that in this case the Court went “significantly further than the national courts” (partly dissenting opinion of Judge Palm).

<sup>191</sup> ECommHR, *Glimmerveen and Hagenbeek v. Netherlands*, dec. 11 October 1979, D&R No.18, p.198; ECourtHR, *Jersild v. Denmark* [GC], 23 September 1994, Series A No.298; ECourtHR, *Seurot v. France* (dec.) 18 May 2004.

<sup>192</sup> ECourtHR, *Norwood v. United Kingdom* (dec.), 16 November 2004.

<sup>193</sup> ECourtHR, *Gündüz v. Turkey*, 4 December 2003, ECHR 2003-XI; ECourtHR, *Erbakan v. Turkey*, 6 July 2006 (non-final judgment).

<sup>194</sup> Recommendation No.R(97)20E, adopted on 30 October 1997.

<sup>195</sup> Among the many judgments concerning remarks on the situation in south-east Turkey and the fate of the population of Kurdish origin: ECourtHR, *Incal v. Turkey* [GC], 9 June 1998, Rec.1998-IV; ECourtHR, *Karataş v. Turkey* [GC], *Sürek v. Turkey (No.1)*[GC] and *Sürek and Özdemir v. Turkey* [GC], 8 July 1999, ECHR 1999-IV.

<sup>196</sup> See in particular ECourtHR, *Lehideux and Isorni v. France* [GC], 23 September 1998, Rec.1998-VII; ECourtHR, *Garaudy v. France* (dec.), 24 June 2003.

<sup>197</sup> As the Court itself observes, “denying crimes against humanity is one of the most serious forms of racial defamation of Jews and of incitement to hatred of them” (ECourtHR, *Garaudy v. France* (dec.), cited above).

When dealing now with these situations, how does the Court resolve the apparent conflict between freedom of expression and protection against discrimination?

The starting point of the European Court is clear and unambiguous: it emphasises right at the outset that it “is particularly conscious of the vital importance of combating racial discrimination in all its forms and manifestations”<sup>198</sup>.

Article 17 of the ECHR is one of the means to do this. The purpose of this article is to prevent the principles enshrined in the ECHR from being abused by applicants whose actions are in fact aimed at destroying these same principles. In other words, the purpose of this provision is to avoid the abuse of a right. First and foremost, the Court will therefore check if the remarks in question fall under Article 17, in which case they would be excluded from the protection of Article 10. In case of doubt, the Court will consider the case under Article 10.

### 1.1. Remarks not covered by Article 10

In its *Seurot v. France* decision, the Court points out that there is no doubt that any remarks directed against the values underlying the Convention would be removed from the protection of Article 10 by Article 17. Even at the stage of the admissibility of an application, both the European Commission of Human Rights and the European Court have raised Article 17 against applicants who have made clearly racist or negationist remarks constituting hate speech.

In its *Glimmerveen and Hagenbeek v. Netherlands* decision, the Commission found for example that applicants pursuing a policy that visibly included elements of racial discrimination could not rely on Article 10. In this case, the applicants had been convicted of being in possession of leaflets addressed to “white Dutch people”, which advocated that everyone who was not white should leave the Netherlands. In the *Norwood v. United Kingdom* case, the European Court had to deal with the applicant’s conviction for displaying a large poster on his window distributed by the BNP (British National Party) displaying a photo of the Twin Towers in flames, with the words “Islam out of Britain - Protect the British People” and the symbol of a crescent and star in a prohibition sign. The Court found that “such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination”. These two applications were consequently declared inadmissible because they were incompatible *ratione materiae* with the provisions of the Convention.

The Court has used the opportunity in a number of judgments on the merits to firmly reiterate its position on the subject. In the *Jersild* judgment, concerning remarks made by a group of “Greenjackets”, the Court found that there could be no doubt that “the remarks in respect of which the Greenjackets were convicted (...) were more than insulting to members of the targeted groups and did not enjoy the protection of Article 10”<sup>199</sup>. Likewise, in the *Lehideux and Isorni* judgment, the

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<sup>198</sup> ECourHR, *Jersild v. Denmark*, cited above, § 30. To underscore this statement, the Court refers in its *Seurot v. France* decision of 18 May 2004, to the statute of ECRI and more specifically to the text of Committee of Ministers Resolution Res(2002)8 on the statute of the European Commission against Racism and Intolerance (ECRI), the purpose of the resolution being to reinforce ECRI’s action in view of the “need to take firm and sustained action at European level to combat the phenomena of racism, xenophobia, antisemitism and intolerance”.

<sup>199</sup> ECourHR, *Jersild v. Denmark*, cited above, § 35. Using more general terms in the *Gündüz* judgment, the Court states that “concrete expressions constituting hate speech (...), which may be insulting to

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Court adds that “like any other remark directed against the Convention’s underlying values (...), the justification of a pro-Nazi policy could not be allowed to enjoy the protection afforded by Article 10”<sup>200</sup>. Thus, there is a “category of clearly established historical facts - such as the Holocaust - whose negation or revision would be removed from the protection of Article 10 by Article 17”<sup>201</sup>. The Court applies these principles also in the decision of inadmissibility in respect of *Garaudy v. France*, in which it sanctions the applicant by refusing to afford him the benefit of the protection of Article 10, on which he was relying to challenge the lawfulness of criminal convictions for denial of crimes against humanity. The Court held 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”.

Direct recourse to Article 17 nevertheless remains a rarity, since the Court sometimes prefers to use this provision indirectly as a “principle of interpretation” in order to assess whether restrictions on freedom of expression are necessary, in the case of remarks which are open to doubt. In such cases the Court will begin to examine compliance with Article 10, “whose requirements it will however assess in the light of Article 17”<sup>202</sup>.

## 1.2. Article 10§ 2 and assessment of whether the interference is “necessary in a democratic society”

The Court has sometimes emphasised in its judgments that “tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance), provided that any ‘formalities’, ‘conditions’, ‘restrictions’ or ‘penalties’ imposed are proportionate to the legitimate aim pursued”<sup>203</sup>.

This affirmation suggests that States have a wide margin of appreciation in this area. Yet as a whole, the Court’s case-law gives the impression of very strict supervision: as soon as remarks inciting to hatred seem to be at issue, the States’ margin of appreciation is narrowing. However, it is difficult to identify stable elements that would serve to establish the real scope of this margin of appreciation.

It would seem that in these cases the Court places the emphasis on the aim pursued by the applicant. The decisive question is therefore whether or not the aim pursued by the applicant was the propagation of racist views or incitement to hatred. To answer that question, the Court assesses the circumstances of the case, for the purpose of which it take into account several factors.

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particular individuals or groups, are not protected by Article 10 of the Convention”, ECourHR, *Gündüz v. Turkey*, cited above, § 41).

<sup>200</sup> ECourHR, *Lehideux and Isorni v. France*, cited above, § 53.

<sup>201</sup> *Ibid.*, § 47.

<sup>202</sup> *Ibid.*, § 38.

<sup>203</sup> ECourHR, *Gündüz v. Turkey*, cited above, § 40 and ECourHR, *Erbakan v. Turkey*, cited above, § 56.

### 1.2.1. The aim pursued by the applicant

In the *Jersild* judgment, the Court considered that “an important factor in its evaluation [would] be whether the item in question, when considered as a whole, appeared from an objective point of view to have had as its purpose the propagation of racist views and ideas” (§ 31). The answer to that question should make it possible to draw the line between forms of expression which, although shocking or offensive, enjoy the protection of Article 10 and those which cannot be tolerated in a democratic society.

Thus, in the *Jersild* judgment, the Court justifies the finding of a violation of Article 10 by the fact that, unlike the “Greenjackets” who had been interviewed by the applicant and had made overtly racist remarks, the applicant, who was convicted of aiding and abetting the broadcasting of racist remarks, sought to deal with “specific aspects of a matter that already then was of great public concern”<sup>204</sup>. It thus considers that “taken as a whole, the feature could not objectively have appeared to have as its purpose the propagation of racist views and ideas”<sup>205</sup>. According to the Court, the applicant was therefore not pursuing a racist aim in producing the feature in question. Consequently, his conviction did not appear “necessary in a democratic society”.

Likewise, in the *Lehideux and Isorni* judgment, the Court finds that France violated Article 10 of the Convention in convicting the applicants of publicly defending crimes of collaboration with the enemy; it emphasises that “it does not appear that the applicants attempted to deny or revise what they themselves referred to in their publication as ‘Nazi atrocities and persecutions’ or ‘German omnipotence and barbarism’”<sup>206</sup>. According to the Court, the applicants were thus “not so much praising a policy as a man, and doing so for a purpose - namely securing revision of Philippe Pétain’s conviction - whose pertinence and legitimacy, at least, if not the means employed to achieve it, were recognised by the Court of Appeal”<sup>207</sup>.

Conversely, in the *Garaudy v. France* decision, the Court, considering the conviction of the applicants for racial defamation and incitement to hatred, under Article 10 § 2, points to the “proven racist aim” of the applicant’s statements, which according to the Court are not confined to criticism of the State of Israel; and the Court finds that the application is inadmissible. As regards the conviction for denying crimes against humanity, the Court points out that “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”.

In each case the Court therefore attempts to identify the applicant’s intention: was he or she seeking to inform the public about a matter of general interest<sup>208</sup>? If so, the Court generally finds that the impugned interference was not necessary. On the other hand, where the remarks in question are designed to incite to the use of

<sup>204</sup> ECourHR, *Jersild v. Denmark*, cited above, § 33.

<sup>205</sup> *Ibid.*

<sup>206</sup> ECourHR, *Lehideux and Isorni v. France*, cited above, § 47.

<sup>207</sup> *Ibid.*, § 53.

<sup>208</sup> See to that effect ECourHR, *Gündüz v. Turkey*, cited above, § 44.

violence and to hatred, “the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression”<sup>209</sup>.

The criterion of the aim pursued nevertheless seems tricky to use, because it is so difficult to determine the individual’s inner state of mind. This explains why the Court refers to the circumstances of the case, often in detail, in order to shed light on the aim pursued.

### 1.2.2. The circumstances of the case

The Court states in its judgments that it will consider the impugned interference “in the light of the case as a whole”, including the content of the impugned remarks and the context in which they were disseminated. In practice, several elements will be taken into account, and it is not always possible to distinguish between what relates to the content and what relates to the context, since assessments of the two are often closely linked. Various factors can nevertheless be studied, including the content of the remarks, the position of the applicant, the dissemination and potential impact of the remarks and the nature and severity of the penalties imposed, which are examined by the Court in connection with the proportionality of the interference.

#### 1.2.2.1. The content of the remarks

When considering the content of impugned remarks, the Court attaches particular importance to political discourse and public debate on questions of public interest. In this area “there is little scope under Article 10 § 2 for restrictions on freedom of expression”<sup>210</sup>. Thus, if the remarks can be classified among those, which are subject to public debate, the Court will be less inclined to accept that the interference was necessary.

The Court “attaches the highest importance to freedom of expression in the context of political debate and considers that very strong reasons are required to justify restrictions on political speech”<sup>211</sup>. In the *Erbakan* case, for example, the Court found that the sanction imposed on the applicant on account of a public speech made during the campaign for the local elections was in breach of Article 10 § 2 of the Convention.

Likewise, when the remarks consist of criticism of the government, supervision by the Court is intended to be stricter. According to the Court, “the limits of permissible criticism are wider with regard to the government than in relation to a private citizen or even a politician”<sup>212</sup>. In the *Incal* case the application of this criterion leads the Court to find that there was a violation of Article 10 of the Convention, whereas in the *Sürek* case other criteria prevail. Although also in this case criticism of government is at issue, the particular context of the case (difficulties linked with the fight against terrorism) leads the Court to find that the interference was necessary and therefore that there was no violation of Article 10.

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<sup>209</sup> ECourHR, *Sürek v. Turkey*, cited above, § 61. Conversely, see for example the *Incal v. Turkey* judgment, cited above, in which the Court holds that the appeals to the Kurdish population “cannot, if read in context, be taken as incitement to the use of violence, hostility or hatred between citizens” (§ 50).

<sup>210</sup> See among others ECourHR, *Erbakan v. Turkey*, cited above, § 55.

<sup>211</sup> *Ibid.*

<sup>212</sup> ECourHR, *Incal v. Turkey*, cited above, § 54, and ECourHR, *Sürek v. Turkey*, cited above, § 61.

Religious expression holds a special place here as the Court traditionally grants States a wide margin of appreciation in this area<sup>213</sup>. The European Court thus points out that “in the context of religious opinions and beliefs an obligation may legitimately be included to avoid as far as possible expressions that are gratuitously offensive to others”. Such expressions infringe the rights of others and “do not contribute to any form of public debate capable of furthering progress in human affairs”<sup>214</sup>.

Lastly, the Court takes also into account the truthfulness of the remarks in question. In this context it distinguishes between matters which are part of “an ongoing debate among historians” and “clearly established historical facts”<sup>215</sup>. Whereas the Court exercises strict supervision in respect of the former, denying the truthfulness of clearly established historical facts is in principle not protected by Article 10, since such denial pursues aims prohibited by Article 17 of the Convention. In the *Garaudy* decision, the Court points out 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”; consequently, the applicant cannot claim to rely on Article 10. In contrast, in the *Incal* judgment, the Court emphasises that the impugned leaflet informed about “actual events which were of some interest” to public opinion<sup>216</sup>, namely the administrative and municipal measures taken by the authorities, in particular against street traders in the city of Izmir. In this case the Court found a violation of Article 10 of the Convention.

#### 1.2.2.2. The position of the applicant

The applicant is not always the actual author of the impugned remarks. Applicants sometimes have been convicted because of the position they hold and their link with the dissemination of the remarks concerned, as a journalist, publisher, editor or owner of a newspaper. In the *Jersild* judgment, the Court thus drew a clear distinction between the remarks made by the “Greenjackets” and the role of the journalist, who was the author of the report on them. In the Court’s view, “a significant feature of the present case is that the applicant did not make the objectionable statements himself but assisted in their dissemination in his capacity of television journalist responsible for a news programme” (§ 31). On the basis of the applicant’s position as a journalist, the Court applied the principles governing freedom of the press, conferring a limited margin of appreciation on the national authorities.

However, the Court does not attach the same weight to this distinction in the *Sürek* case, in which the applicant was convicted as the owner of a review that had published two readers’ letters vehemently condemning the military actions of the authorities in south-east Turkey. In this judgment the Court holds that “while it is true that the applicant did not personally associate himself with the views contained in the letters, he nevertheless provided their writers with an outlet for stirring up violence and hatred”. According to the Court, the applicant - as the owner of the review - had “the power to shape the editorial direction of the review” and was therefore “vicariously subject to the ‘duties and responsibilities’ which the review’s editorial and journalistic staff undertake in the collection and dissemination of

<sup>213</sup> See below.

<sup>214</sup> ECtHR, *Gündüz v. Turkey*, cited above, § 37; also ECtHR, *Erbakan v. Turkey*, cited above, § 55.

<sup>215</sup> ECtHR, *Lehideux and Isorni v. France*, cited above, § 47.

<sup>216</sup> ECtHR, *Incal v. Turkey*, cited above, § 50.

information to the public and which assume an even greater importance in situations of conflict and tension”<sup>217</sup>.

The States’ margin of appreciation is also narrower when the applicant, this time as the actual author of the impugned remarks, is a politician. This is because of the aforementioned fundamental importance of free political debate in a democratic society. In the *Incal* judgment, which concerns the criminal conviction of a member of the executive committee of the People’s Labour Party because of his contribution to the preparation of leaflets which were seized on the grounds of separatist propaganda, the Court thus repeats that freedom of expression, “precious to all”, is “particularly important for political parties and their active members (...). They represent their electorate, draw attention to their preoccupations and defend their interests. Accordingly, interferences with the freedom of expression of a politician who is a member of an opposition party, like the applicant, call for the closest scrutiny on the Court’s part” (§ 46). However, this freedom is not absolute: the Court stresses that “it is crucially important that in their speeches politicians should avoid making comments likely to foster intolerance”<sup>218</sup>.

In contrast, the Court grants States a substantial margin of appreciation when restrictions on the freedom of expression of public officials, or persons equated with them, are at issue. In the *Seurot* case, it thus paid special attention to the fact that the applicant, who was the author of an article insulting to North Africans that was published in his school’s newsletter, held the status of teacher - “and in fact a history teacher”. On this occasion the Court drew attention to the “special duties and responsibilities” incumbent on teachers, since they “are figures of authority to their pupils” in the educational field.

### 1.2.2.3. The dissemination and potential impact of the remarks

To measure the potential impact of a statement, the Court first takes account of the medium used for dissemination. In this respect, the safeguards granted to the press are of particular importance: it is incumbent on the press to “impart information and ideas on matters of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of ‘public watchdog’”<sup>219</sup>.

Although the principles governing freedom of the press were formulated primarily with regard to the printed media, “these principles doubtless apply also to the audiovisual media”<sup>220</sup>. The particular importance attached to the role of the press therefore increases still further where the audiovisual media are concerned.

In particular, the Court points out in the *Jersild* judgment that “the audiovisual media often have a much more immediate and powerful effect than the print media (...). The audiovisual media have means of conveying through images meanings which the print media are not able to impart” (§ 31). When the audiovisual media are at

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<sup>217</sup> ECourHR, *Sürek v. Turkey*, cited above, § 63. In her partly dissenting opinion, Judge Palm considers on the contrary that the applicant was not directly responsible for the publication of readers’ letters: she emphasises that he “was only the major shareholder in the review and not the author of the impugned letters nor even the editor of the review responsible for selecting the material in question”.

<sup>218</sup> ECourHR, *Erbakan v. Turkey*, cited above, § 64.

<sup>219</sup> ECourHR, *Observer and Guardian v. United Kingdom*, 26 November 1991, Series A No.216, § 59.

<sup>220</sup> ECourHR, *Jersild v. Denmark*, cited above, § 31.

issue, the Court will therefore consider the type of programme in which the impugned remarks were broadcast, in order to assess the probable impact of the subject of the programme on the audience. The Court thus notes that in the *Jersild* case, the item “was broadcast as part of a serious Danish news programme and was intended for a well-informed audience” (§ 34); and that it was preceded by an introduction by the programme presenter, referring to the recent public debate and press comments on racism in Denmark. The Court infers from this that “both the TV presenter’s introduction and the applicant’s conduct during the interviews clearly dissociated him from the persons interviewed” (§ 34). However, the minority judges did not consider these precautions sufficient and criticised the fact that there had been no “clear statement of disapproval”<sup>221</sup> of the racist remarks made by the persons interviewed.

In the *Gündüz* judgment, the Court emphasises that the applicant was taking an active part in a “lively public discussion”: his statements were counterbalanced by the intervention of the other participants in the programme and his views were expressed as part of a pluralist debate. To justify a number of remarks made by the applicant which could be regarded as insulting, the Court notes that “the applicant’s statements were made orally during a live television broadcast, so that he had no possibility of reformulating, refining or retracting them before they were made public” (§ 49).

The Court also considers the form of expression: in the *Karataş* judgment, which concerns poems, the Court observes that the medium used was poetry, “a form of artistic expression that appeals to only a minority of readers”<sup>222</sup>. This “limited their potential impact on ‘national security’, ‘[public] order’ and ‘territorial integrity’ to a substantial degree”<sup>223</sup>.

Lastly, the particular situation of the region, and the place where the remarks were made or broadcast, are also of importance. The Court has repeatedly referred to the “problems linked to the prevention of terrorism” in order to confer a wider margin of appreciation on the State involved in combating terrorism, in this instance Turkey. In addition, in the *Seurot* case, the known risk that the impugned text would be disseminated within a school called for closer scrutiny by the Court.

However, the Court does not always draw the consequences of its findings. Thus, in the *Lehideux and Isorni* judgment, after pointing to the unilateral character of the impugned publication and stressing that the authors did not distance themselves from or criticise certain events and that they put nothing in the text about certain aspects of history, the Court nevertheless takes no account of the probable effect of the one-page advertisement on readers. It concludes that “although it is morally reprehensible, however, the fact that the text made no mention of [these events] must be assessed in the light of a number of other circumstances of the case” (§ 54).

#### 1.2.2.4. The nature and seriousness of the interference

According to the Court, the nature and severity of the penalties imposed are also factors to be taken into account in assessing whether the interference was proportionate to the aim pursued or not. However, it turns out that this criteria is not always decisive, but rather secondary, since the Court sometimes considers it

<sup>221</sup> Joint dissenting opinion of Judges Rysdøl, Bernhardt, Spielmann and Loizou, § 3.

<sup>222</sup> ECtHR, *Karataş v. Turkey*, cited above, § 49.

<sup>223</sup> *Ibid.*, § 52.

unnecessary to examine it, or mentions it only briefly and partially, finding that there has been a violation on the basis of another aspects of the case. In the *Gündüz* judgment, for example, the Court holds that the finding it has just made, namely that the interference with the applicant's freedom of expression was not based on sufficient reasons for the purposes of Article 10, makes it unnecessary for the Court "to pursue its examination in order to determine whether the two-year prison sentence imposed on the applicant - an extremely harsh penalty even taking account of the possibility of parole afforded by Turkish law - was proportionate to the aim pursued"<sup>224</sup>. In the *Jersild* judgment, the limited nature of the fine imposed on the applicant is irrelevant: to the Court, "what matters is that the journalist was convicted" (§ 35).

Conversely, this factor sometimes appears to be decisive in the conclusion reached by the Court. In the *Incal* judgment in particular, the fact that the applicant was sentenced to various penalties, including being excluded from the civil service and from certain activities in political organisations, associations and trade unions, when he was a member of the executive committee of an opposition party, is found to be disproportionate to the aim pursued and therefore not necessary in a democratic society. Likewise, in the *Erbakan* judgment, the Court notes that besides being ordered to pay a fine, the applicant was sentenced to one year's imprisonment and banned from exercising several civil and political rights. The Court considers that these were undoubtedly very severe penalties for a well-known politician<sup>225</sup>, and adds that it should in particular be noted that by its very nature, a penalty of this kind inevitably has a dissuasive effect, a conclusion which is not altered by the fact that the applicant did not serve his sentence<sup>226</sup>. In the *Karataş* judgment, the Court is "struck by the severity of the penalty imposed on the applicant - particularly the fact that he was sentenced to more than 13 months' imprisonment - and the persistence of the prosecution's efforts to secure his conviction"<sup>227</sup>, insofar as the fine imposed on the applicant was more than doubled after a new law came into force. On the other hand, having regard to the other circumstances of the case, the Court did not consider that the termination of the contract of a teacher in a private secondary school was disproportionate, in spite of its seriousness<sup>228</sup>.

In order to assess whether the sanction is proportionate, the Court can take account of the existence of other means which would interfere to a lesser extent with freedom of expression. In the *Lehideux and Isorni* judgment, the Court, stressing "the seriousness of a criminal conviction for publicly defending the crimes of collaboration", refers to "the existence of other means of intervention and rebuttal, particularly through civil remedies"<sup>229</sup>; it then finds that the criminal conviction of the applicants was disproportionate in view of the aims pursued. In a similar vein, the Court holds in the *Incal* judgment that since a request for authorisation was submitted to the provincial governor's office prior to distribution of the impugned

<sup>224</sup> ECourHR, *Gündüz v. Turkey*, cited above, § 54.

<sup>225</sup> ECourHR, *Erbakan v. Turkey*, cited above, § 69.

<sup>226</sup> *Ibid.*

<sup>227</sup> ECourHR, *Karataş v. Turkey*, cited above, § 53.

<sup>228</sup> ECourHR, *Seurot v. France*, cited above.

<sup>229</sup> ECourHR, *Lehideux and Isorni v. France*, cited above, § 57. G. Cohen-Jonathan regards this statement as a way of trivialising the public defence of the crime of collaboration, as if it were a dispute between private individuals (COHEN-JONATHAN G., "L'apologie de Pétain devant la Cour européenne des droits de l'homme", *Revue universelle des droits de l'homme*, 1999, pp. 366-382, p. 380). In their joint dissenting opinion, Judges Foighel, Loizou and Sir John Freeland note on the question of proportionality that the penalty was limited to the requirement of a symbolic payment of one franc to the civil parties and the ordering of publication of excerpts from the conviction in *Le Monde* (§ 7).

leaflet, the authorities could have required changes to the leaflet before having recourse to a criminal penalty. Failing this, the Court notes the radical nature of the impugned interference and points out that “its preventive aspect by itself raises problems under Article 10”<sup>230</sup>.

The last aspect that should be mentioned in this context is the need for consistency in the States’ attitudes. The national authorities cannot sanction remarks or activities that they have previously authorised or at least tolerated. In the *Erbakan* case, the Court does therefore not consider it acceptable that a prosecution was brought four years and five months after the dissemination of the impugned remarks: in this case criminal prosecution is not a means that is reasonably proportionate to the legitimate aims pursued. The Court thus appears to impose on the Contracting States a certain duty to proceed expeditiously in bringing prosecutions. Its line of reasoning in the *Lehideux and Isorni* judgment seems to follow the same idea, when it refers to the fact that the publication in question corresponded directly to the objective and the aim of the associations headed by the applicants; their associations had been legally constituted and no proceedings had ever been instigated against them for pursuing their objective<sup>231</sup>.

To conclude, cases on incitement to hatred result either in a decision of inadmissibility, under Article 17 of the Convention, where the impugned remarks are found to interfere with the values underlying the Convention, or, with few exceptions, in the finding of a violation of Article 10, because of the narrow margin of appreciation left to the national authorities. Exercising strict supervision in these cases, the Court examines several criteria to determine the aim pursued by the applicant, without letting one single aspect of the case determine the outcome.

The conflict of rights<sup>232</sup>, mentioned in the introduction, between freedom of expression and protection against discrimination, is therefore resolved either by denial - by depriving the applicant of the right to rely on Article 10, under Article 17 of the Convention - or by conciliation, in which case the Court weighs up the interests involved. In this case the scales generally tip in favour of freedom of expression.

However, there has been some criticism of this case-law. The Court seems to place too much emphasis on considerations of expediency and does not always attach enough importance to the context of the case. It has thus been criticised for forgetting the circumstances specific to France in the *Lehideux and Isorni* case, and for attaching too much weight to the form of words used and paying insufficient attention to the general context in which the words were used as well as their likely impact<sup>233</sup>.

While it might have been expected that the Court grants States a wide margin of appreciation when it comes to combating racism and incitement to hatred - which involves delicate decisions - this is by no means the case. On the contrary, the importance of the values at stake, which constitute the foundations of democracy,

<sup>230</sup> ECourHR, *Incal v. Turkey*, cited above, § 56.

<sup>231</sup> ECourHR, *Lehideux and Isorni v. France*, cited above, § 56.

<sup>232</sup> DE GOUTTES R., “À propos du conflit entre le droit à la liberté d’expression et le droit à la protection contre le racisme”, *Mélanges en hommage à Louis Edmond Pettiti*, Bruylant, Brussels, 1998, pp. 251-265.

<sup>233</sup> See, for example the joint concurring opinion of Judges Palm, Tulkens, Fischbach, Casadevall and Greve, *Sürek and Özdemir v. Turkey* judgment, cited above.

leads the Court to exercising strict supervision. Conversely, where religious beliefs are at issue, the Court's supervision diminishes and almost disappears in favour of the States.

## 2. Attacks on religious convictions

The European Court has pointed out that when it deals with attacks on religious beliefs, the question that arises involves "weighing up the conflicting interests of the exercise of two fundamental freedoms: the right of the applicant to impart to the public his views on religious doctrine on the one hand, and the right of other persons to respect for their freedom of thought, conscience and religion on the other hand"<sup>234</sup>.

The former European Commission of Human Rights had to consider this issue for the first time in 1982<sup>235</sup>, following the application by the publisher and editor of a journal, found guilty of blasphemous libel. In this case the Commission noted that "the existence of an offence of blasphemy does not as such raise any doubts as to its necessity", and consequently dismissed the allegation of a violation of Article 10 as manifestly ill-founded, thereby neutralising the conflict between the two freedoms involved. Subsequently, the European Court had to decide on two types of cases related to attacks on religious beliefs: those concerning prosecution on the basis of legislation making blasphemy a criminal offence<sup>236</sup> and those which are not based on such legislation but are similar insofar as the national authorities held that the impugned remarks were likely to offend certain persons on account of their religious sensitivities<sup>237</sup>.

An analysis of the Court's case-law in this area shows that the Court pays only little attention to some aspects of the case and concentrates solely on the nature of the expression in question, namely religious expression.

### 2.1. The existence of factors that do not affect the conclusions reached by the Court

In cases involving religious beliefs, the Court sometimes refers to certain factors which in principle call for strict supervision on its part but which in these cases do not result in a narrower margin of appreciation for the respondent States. These factors may be grouped under two main headings: the potential impact of the medium of expression used and the nature of the interference.

#### 2.1.1. The potential impact of the medium of expression used

In pointing out that "the potential impact of the medium of expression concerned is an important factor in the consideration of the proportionality of an interference"<sup>238</sup>, the Court apparently intended to assign certain consequences to the type of medium used to disseminate the remarks, and therefore to the extent of their dissemination.

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<sup>234</sup> See most recently ECourtHR, *Aydin Tatlav v. Turkey*, 2 May 2006, § 26.

<sup>235</sup> ECommHR, *X. Ltd and Y. v. United Kingdom*, dec. 7 May 1982, D&R No.28, p.77.

<sup>236</sup> ECourtHR, *Otto Preminger Institut v. Austria*, 20 September 1994, Series A No.295-A; ECourtHR, *Wingrove v. United Kingdom*, 25 November 1996, Rec.1996-V; ECourtHR, *I.A. v. Turkey*, 13 September 2005 and ECourtHR, *Aydin Tatlav v. Turkey*, 2 May 2006.

<sup>237</sup> ECourtHR, *Murphy v. Ireland*, 10 July 2003, ECHR 2003-IX and ECourtHR, *Giniewski v. France*, 31 January 2006.

<sup>238</sup> ECourtHR, *Murphy v. Ireland*, cited above, § 69.

However, although this parameter is sometimes mentioned in the Court's judgments, it does not generally have an effect on the Court's findings.

Such is the case in the *Otto Preminger Institut* (OPI) judgment, in which the Court finds that the interference - in this case the seizure and forfeiture of the film *Das Liebeskonzil* - was necessary, while at the same time pointing out that access to the cinema showing the impugned film was subject to payment of an admission fee and an age-limit and that the film was therefore aimed only at an informed audience. The minority judges even add that in their view, "the announcement put out by the OPI was intended to provide information about the critical way in which the film dealt with the Roman Catholic religion; in fact, it did so sufficiently clearly to enable the religiously sensitive to make an informed decision to stay away"<sup>239</sup>. However, the majority holds that the film was widely advertised and that consequently "there was sufficient public knowledge of the subject-matter and basic contents of the film to give a clear indication of its nature": it was therefore "an expression sufficiently 'public' to cause offence"<sup>240</sup>.

In the *Wingrove* case, the Commission held that the fact that the impugned film, *Visions of Ecstasy*, was a short video work and not a feature film meant that its distribution would have been more limited and less likely to attract publicity; it therefore concluded that there was no "pressing social need" to ban the video. In contrast, the Court does not consider it necessary to take into account this aspect. Reaching the opposite conclusion from that of the Commission, the Court notes that "it is in the nature of video works that once they become available on the market they can, in practice, be copied, lent, rented, sold and viewed in different homes, thereby easily escaping any form of control by the authorities" (§ 63). Lastly, in the *I.A.* judgment, the Court pays no attention to the fact that the impugned novel was printed in only 2,500 copies, even though the impact of the author's remarks on society was certainly limited by this. In their dissenting opinion, the minority judges highlight this omission, noting that "the evidence before the Court does not indicate how many people actually read the novel but the number is probably small, as is suggested by the fact that the book was never reprinted"<sup>241</sup>. Yet "a film or a video is likely to have much more of an impact than a novel with limited distribution"<sup>242</sup>.

### 2.1.2. The nature of the interference

The nature of the interference is not a determining factor in the Court's line of reasoning on the subject. In particular, the severity of the interference seems to play no role at all, including when it takes the form of prior ban on distribution, or even seizure.

While asserting that in principle prior restrictions call for special scrutiny on its part<sup>243</sup>, the Court in practice exhibits a fair degree of understanding in its assessment of this aspect. In the *Otto Preminger Institut* case for example, the Court holds that "although the forfeiture made it permanently impossible to show the film anywhere in Austria (...) the means employed were not disproportionate to the legitimate aim pursued" (§ 57). In the *Wingrove* judgment, the Court simply points out that the

<sup>239</sup> *Otto Preminger Institut v. Austria*, joint dissenting opinion of Judges Palm, Pekkanen and Makarczyk, § 9.

<sup>240</sup> ECourHR, *Otto Preminger Institut v. Austria*, cited above, § 54.

<sup>241</sup> *I.A. v. Turkey*, joint dissenting opinion of Judges Costa, Cabral Barreto and Jungwiert, § 2.

<sup>242</sup> *Ibid.*, § 8.

<sup>243</sup> See ECourHR, *Wingrove v. United Kingdom*, cited above, § 58.

measures taken by the authorities, which admittedly amounted to a complete ban on the film's distribution, were the logical consequence of the competent authorities' opinion that distribution of the video would infringe criminal law. On the other hand, in the *I.A.* judgment, the Court takes account of "the fact that the domestic courts did not decide to seize the book" and therefore holds that the insignificant fine imposed on the applicant was proportionate to the aims pursued. The fact of prior restraint is therefore mentioned only when such a measure is precisely not at issue, in order to support the Court in its finding that there has been no violation of Article 10.

A change is nevertheless discernible when it comes to taking account of the penalty imposed, since in the *Giniewski* and *Aydin Tatlav* judgments, the Court notes the dissuasive nature of the albeit light sanctions imposed on the applicants, and appears to agree on this point with the judges' dissenting opinion in the *I.A.* case. In this opinion the dissenting judges emphasised that "any criminal conviction has what is known as a 'chilling effect' liable to discourage publishers from producing books that are not strictly conformist or 'politically (or religiously) correct'. Such a risk of self-censorship is very dangerous for this freedom, which is essential in a democracy, to say nothing of the implicit encouragement of blacklisting or 'fatwas'"<sup>244</sup>.

It is nonetheless surprising that when examining the proportionality of the interference, the Court has not hitherto attached greater weight to the existence of alternative measures which interfere to a lesser extent with freedom of expression. Thus, in the *Otto Preminger Institut* case, the Court finds that there has been no violation of Article 10 of the Convention although there was a less restrictive possibility than seizure of the film, one which was actually made use of, namely the fact that minors under 17 years of age were prohibited from seeing the film. In the *Wingrove* judgment, the Court mentions "the use of a box including a warning as to the film's content", but considers that this "would have had only limited efficiency"<sup>245</sup> and that in any event the national authorities were in a better position than the Court to assess the likely impact of such a video. In the *Murphy* judgment, the Court goes so far as to hold that a total prohibition on the broadcasting of religious advertisements would be preferable to the arrangements proposed by the applicants for filtering such advertisements, on the grounds that such arrangements would sit uneasily with the nature and level of religious sensitivities in Ireland and with the principle of neutrality in the broadcast media<sup>246</sup>.

## 2.2. The determining factor: the absence of a uniform conception of the significance of religion in society

"The fact that there is no uniform European conception of the requirements of the protection of the rights of others in relation to attacks on their religious convictions means that the Contracting States have a wider margin of appreciation when regulating freedom of expression in connection with matters liable to offend intimate personal convictions within the sphere of morals or religion"<sup>247</sup>. With this statement of principle, the Court takes a position in favour of granting a wide margin of

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<sup>244</sup> *I.A. v. Turkey*, joint dissenting opinion of Judges Costa, Cabral Varreto and Jungwiert, § 6.

<sup>245</sup> ECourHR, *Wingrove v. United Kingdom*, cited above, § 63.

<sup>246</sup> ECourHR, *Murphy v. Ireland*, cited above, § 76.

<sup>247</sup> This wording is used in all the judgments studied, with a variant in the *Murphy v. Ireland* judgment, which specifies that "there appears to be no uniform conception of the requirements of the 'protection of the rights of others' in the context of the legislative regulation of the broadcasting of religious advertising" (§ 81).

appreciation to Contracting States where attacks on religious convictions are at stake. Here, it reiterates the approach already adopted in the sphere of morals, where the absence of a “common denominator” prompted it to grant States a substantial margin of appreciation. In this case, the Court justifies the existence of a wide margin of appreciation by arguing that it is not possible “to arrive at a comprehensive definition of what constitutes a permissible interference with the exercise of the right to freedom of expression where such expression is directed against the religious feelings of others”. The Court draws attention here to the wide variety of conceptions of religion<sup>248</sup>, which can even vary within a single country<sup>249</sup>.

This diversity factor explains why the Court attaches little weight to the other aspects of the case and leaves the assessment of the general situation entirely to the respondent State. It considers that the national authorities “are in principle in a better position than the international judge to give an opinion on the exact content of these requirements”<sup>250</sup>. This wide margin of appreciation leads the Court to put the emphasis on the particular context of the cases brought before it. The Court thus refers to the fact that the Roman Catholic religion, portrayed in the impugned film, is the religion of the overwhelming majority of Tyroleans (*Otto Preminger Institut v. Austria* judgment); it also refers to religious sensitivities in Ireland, including the fact that religion has been a divisive factor in Northern Ireland (*Murphy v. Ireland* judgment), and to the very religious nature of Turkish society, which is attached to religious doctrine notwithstanding its attachment to the principle of secularity (*I.A. v. Turkey* judgment).

Yet the absence of a uniform European concept of religion, although being a decisive criterion, does not explain all of the solutions adopted by the Court in this area.

### 2.3. Towards a review of the States’ margin of appreciation?

In the first four cases dealing with attacks on religious beliefs that the Court had to deal with, it granted a wide margin of appreciation to the respondent States, which meant that it found in each case that there had not been a violation of Article 10. In contrast, in the two more recent judgments, *Giniewski* and *Aydin Tatlav*, the States’ margin of appreciation diminishes - the Court affirms a “narrow” margin - leading to two unanimous findings that there has been a violation of Article 10. Does this mean that the Court followed the recommendations of the minority judges in the *I.A. v. Turkey* case, who invited it to “revisit”<sup>251</sup> its case-law on the subject?

Yet it seems that this is not the case, since the Court simply made use of other criteria than in the first few judgments, giving priority to considerations which are nevertheless not new to the Court’s reasoning. In the *Giniewski* judgment, for example, the emphasis is put on the importance of freedom of the press and of debate on questions of public interest. Therefore, despite the fact that the impugned article challenged a number of principles of the Catholic religion, the

<sup>248</sup> In the *Wingrove v. United Kingdom* judgment, cited above, the Court notes in this respect that “what is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place to place, especially in an era characterised by an ever-growing array of faiths and denominations” (§ 58).

<sup>249</sup> ECtHR, *Otto Preminger Institut v. Austria*, cited above, § 50.

<sup>250</sup> ECtHR, *Wingrove v. United Kingdom*, cited above, § 58.

<sup>251</sup> *I.A. v. Turkey*, joint dissenting opinion of Judges Costa, Cabral Barreto and Jungwiert, § 8: “Lastly, the time has perhaps come to ‘revisit’ this case-law, which in our view seems to place too much emphasis on conformism or uniformity of thought and to reflect an overcautious and timid concept of freedom of the press”.

.....

Court does not consider the case from the angle of attacks on religious convictions. It rather holds that the article was part of a view which the applicant wished to express as a journalist and historian, on a question of indisputable public interest in a democratic society - namely the various possible reasons behind the extermination of the Jews in Europe. Likewise, in the *Aydin Tatlav* judgment, the lack of consistency in the attitude of the State, which brought a prosecution when a book was reprinted for the fifth time although it had authorised the first four editions, seems to be sufficient for the Court to rule in favour of the applicant.

There are nevertheless three strong arguments in favour of a reversal of the Court's case-law concerning attacks on religious convictions in general and blasphemy in particular.

Firstly, the link established in this context with freedom of religion poses a problem. When considering the legitimate aim of the interference, the Court systematically emphasises the protection of the rights of others, and more specifically "the right of citizens not to be insulted in their religious feelings by the public expression of views of other persons", an aim which "is fully consonant with the aim of the protections afforded by Article 9 to religious freedom". However, this interpretation seems to be mistaken. The Convention does not expressly guarantee a right to protection of religious feelings<sup>252</sup>: Article 9 protects respect for the right of persons to practise the religion they have chosen, not respect for religious beliefs as such. This is perfectly clear from a number of decisions of the European Commission of Human Rights, which points out that Article 9 does not imply a right to bring criminal proceedings against those who, as authors or publishers, have offended the sensitivities of an individual or a group of individuals<sup>253</sup>. On the contrary, both the Commission and the Court have pointed out that believers must tolerate and accept the denial by others of their religious beliefs, and even the propagation by others of doctrines hostile to their faith<sup>254</sup>. In attempting to strike a balance between freedom of expression and freedom of religion, the Court confuses two things: the remarks in question admittedly criticise religion, but they are not intended to disrupt religious practice.

Secondly, the finding that there is no "uniform conception" of blasphemy, a decisive factor in the Court's reasoning does not appear to be fully proven. On the contrary, there would currently appear to be a trend towards removing blasphemy from the ambit of criminal law in Europe. In 1996 the Court acknowledged in the *Wingrove* judgment, on the subject of blasphemy laws, that "the application of these laws has become increasingly rare and several States have recently repealed them altogether. In the United Kingdom only two prosecutions concerning blasphemy have been brought in the last seventy years" (§ 57). It even added that "strong arguments have been advanced in favour of the abolition of blasphemy laws", particularly because British blasphemy laws are seen as discriminatory insofar as they protect only the followers of the Christian religion and more specifically those of the established Church of England.

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<sup>252</sup> See to that effect the joint dissenting opinion of Judges Palm, Pekkanen and Makarczyk, *Otto Preminger Institut v. Austria*.

<sup>253</sup> ECommHR, *Choudhury v. United Kingdom*, dec. 5 March 1991. On the basis of Article 9, the applicant complained in this case that it was impossible for him to request that criminal proceedings be brought for the offence of blasphemy, against the author and publisher of "The Satanic Verses", since proceedings could be brought only in respect of blasphemous statements against the Christian religion. The Commission replied that it did not see a connection between this case and freedom of religion as guaranteed by Article 9.

<sup>254</sup> ECourHR, *Otto Preminger Institut v. Austria*, cited above, § 47. See also ECommHR, *Dubowska and Skup v. Poland*, dec.18 April 1997.

Thirdly, these cases generally result in judgments against views and opinions which admittedly “shock” or “offend”, but are nonetheless forms of expression that are in principle free under European case-law. Unlike the cases considered from the angle of incitement to hatred, in which attacks on persons are at issue, these are simply attacks on views and opinions. It would therefore be a welcome development if the Court were to “revisit” its position on the matter and adopt a more liberal position which more fully protects freedom of expression, along the lines of its most recent judgments. Otherwise, the ritual phrase whereby freedom of expression also covers views that “shock, offend or disturb the State or any sector of the population” will be meaningless. To quote the Court’s famous phrase: “Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’”.

In the final analysis, European case-law is more or less consistent when taken in “blocks”: the Court exercises strict supervision when there is a risk of incitement to hatred, but grants a wide margin of appreciation to States when dealing with attacks on religious beliefs. The Court’s line of reasoning thus differs according to whether the statements in question are directed against human beings or only against their views and beliefs. It would be desirable that this approach was more clearly highlighted in European case-law, so that the Court abandons its restrictive position on expression related to religion. There is an indication of such an approach in the recent *Aydin Tatlav* judgment (§ 28), where the Court notes that the impugned remarks were not targeting directly the believers themselves.

Tolerance works both ways here: it is important to reject violent, hate-filled attacks on persons, but to accept the expression of criticism of opinions and beliefs.



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## **“A REVIEW OF THE WORK OF THE EUROPEAN COMMISSION AGAINST RACISM AND INTOLERANCE”**

*PAPER PREPARED BY THE SECRETARIAT OF ECRI*

### **Introduction:**

The right to be free from racism and racial discrimination and freedom of expression constitute two of the most important cornerstones of international human rights protection. The work of the European Commission against Racism and Intolerance (ECRI) shows that it fully acknowledges the principle of freedom of expression enshrined in the European Convention on Human Rights (ECHR) as interpreted by the European Court of Human Rights. For instance, in the context of its monitoring of the situation in each member State of the Council of Europe, ECRI underlines that members of minority groups vulnerable to racism should be able to exercise their freedom of expression (as well as their freedom of assembly and association) in full respect of the ECHR and without any discrimination. However, due to its mandate which is to combat racism in all its forms, ECRI also deals with the other side of freedom of expression, when it has to combat racist expression.

In this context, one of the major challenges ECRI has been confronted with is how to strike the right balance between the repression of racist discourse and freedom of expression, which is rightfully considered to be one of the main foundations of democratic societies. It is clear from Article 10 Paragraph 2 of the ECHR that there are limits to freedom of expression. The case-law of the European Court of Human Rights shows that the exercise of freedom of expression can be limited by member States in case of racist statements, through adoption and application of criminal law provisions prohibiting such forms of expression. In line with this provision and case-law, ECRI recommends both in its General Policy Recommendations and in its country reports that member States adopt and duly implement criminal law provisions prohibiting racist expression.

This document illustrates ECRI’s approach concerning the issue of combating racism while respecting freedom of expression. It is divided into two parts.

The first part (I) contains the relevant extracts from ECRI’s General Policy Recommendation N° 7 on national legislation to combat racism and racial discrimination, concerning limits to freedom of expression.

The second part (II) contains some examples of recommendations taken from ECRI’s third round country-by-country monitoring reports relevant to the issue of combating racism while respecting freedom of expression. The aim is to show ECRI’s approach to this issue in the context of its country-specific monitoring work.

### **I. ECRI’s General Policy Recommendation N° 7 on national legislation to combat racism and racial discrimination, concerning limits to freedom of expression**

ECRI’s General Policy Recommendations are addressed to the governments of all member States and provide guidelines which policy-makers are invited to use when drawing up national strategies and policies. ECRI has so far adopted nine General Policy Recommendations. The most relevant in this context is General Policy Recommendation N° 7 on national legislation to combat racism and racial

discrimination. However, there are other General Policy Recommendations which also concern to some extent the issue of combating racism while protecting freedom of expression, such as General Policy Recommendation N° 6 on combating the dissemination of racist, xenophobic and antisemitic material via the internet<sup>255</sup>.

Below are the relevant extracts of General Policy Recommendation N° 7<sup>256</sup>. In this document, ECRI defined racism for the purpose of the Recommendation (see: I. Definition). It asked for constitutional provisions providing that the exercise of freedom of expression may be restricted with a view to combating racism (see: II. Constitutional law). It also spelled out the criminal law provisions prohibiting racist behaviour and more particularly racist expression which should be adopted by all member States (see: IV. Criminal Law).

### Relevant extracts of ECRI’s General Policy Recommendation N° 7:

In its General Policy Recommendation N° 7, ECRI recommends that the governments of member States:

- a. “enact legislation against racism and racial discrimination, if such legislation does not already exist or is incomplete ;”
- b. “ensure that the key components set out below are provided in such legislation.”

Some of these key components concern the issue of combating racism while respecting freedom of expression. They are reproduced below, along with the corresponding extracts of the Explanatory Memorandum to the Recommendation.

**“Key elements of national legislation against racism and racial discrimination:**

(...)

**I. Definitions**

1. For the purposes of this Recommendation, the following definitions shall apply :

- a) “racism” shall mean the belief that a ground such as race<sup>257</sup>, colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons.

(...)

<sup>255</sup> All General Policy Recommendations of ECRI can be consulted on ECRI’s website: [www.coe.int/ecri](http://www.coe.int/ecri) .

<sup>256</sup> The full text of the Recommendation can be consulted in several languages on ECRI’s website: [www.coe.int/ecri](http://www.coe.int/ecri) .

<sup>257</sup> Since all human beings belong to the same species, ECRI rejects theories based on the existence of different “races”. However, in this Recommendation ECRI uses this term in order to ensure that those persons who are generally and erroneously perceived as belonging to “another race” are not excluded from the protection provided for by the legislation.

*Explanatory Memorandum*<sup>258</sup>:

Unlike the definition of racial discrimination (paragraphs 1 b) and c) of the Recommendation), which should be included in the law, the definition of racism is provided for the purposes of the Recommendation, and member States may or may not decide to define racism within the law. If they decide to do so, they may, as regards criminal law, adopt a more precise definition than that set out in paragraph 1 a), in order to respect the fundamental principles of this branch of the law. For racism to have taken place, it is not necessary that one or more of the grounds listed should constitute the only factor or the determining factor leading to contempt or the notion of superiority; it suffices that these grounds are among the factors leading to contempt or the notion of superiority.

<b>II. Constitutional law</b>
(...)
2. The constitution should provide that the exercise of freedom of expression, assembly and association may be restricted with a view to combating racism. Any such restrictions should be in conformity with the European Convention on Human Rights.

*Explanatory Memorandum*<sup>259</sup>:

According to paragraph 3 of the Recommendation, the constitution should provide that the exercise of freedom of expression, assembly and association may be restricted with a view to combating racism. In articles 10 (2) and 11 (2), the European Convention on Human Rights enumerates the aims which may justify restrictions to these freedoms. Although the fight against racism is not mentioned as one of these aims, in its case-law the European Court of Human Rights has considered that it is included. In accordance with the articles of the Convention mentioned above, these restrictions should be prescribed by law and necessary in a democratic society.

<b>IV. Criminal law</b>
18. The law should penalise the following acts when committed intentionally:
<ul style="list-style-type: none"> <li>a) public incitement to violence, hatred or discrimination,</li> <li>b) public insults and defamation or</li> <li>c) threats</li> </ul>
<p style="padding-left: 40px;">against a person or a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin;</p>
<ul style="list-style-type: none"> <li>d) the public expression, with a racist aim, of an ideology which claims the superiority of, or which depreciates or denigrates, a grouping of persons on the grounds of their race, colour,</li> </ul>

<sup>258</sup> Paragraph 7 of the Explanatory Memorandum.

<sup>259</sup> Paragraph 11 of the Explanatory Memorandum.

- e) language, religion, nationality, or national or ethnic origin; the public denial, trivialisation, justification or condoning, with a racist aim, of crimes of genocide, crimes against humanity or war crimes;
  - f) the public dissemination or public distribution, or the production or storage aimed at public dissemination or public distribution, with a racist aim, of written, pictorial or other material containing manifestations covered by paragraphs 18 a), b), c), d) and e);
- (...)

*Explanatory Memorandum*<sup>260</sup>:

The Recommendation limits the scope of certain criminal offences set out in paragraph 18 to the condition that they are committed in “public”. Current practice shows that, in certain cases, racist conduct escapes prosecution because it is not considered as being of a public nature. Consequently, member States should ensure that it should not be too difficult to meet the condition of being committed in “public”. Thus, for instance, this condition should be met in cases of words pronounced during meetings of neo-Nazi organisations or words exchanged in a discussion forum on the Internet.

Some of the offences set out in paragraph 18 of the Recommendation concern conduct aimed at a “grouping of persons”. Current practice shows that legal provisions aimed at sanctioning racist conduct frequently do not cover such conduct unless it is directed against a specific person or group of persons. As a result, expressions aimed at larger groupings of persons, as in the case of references to asylum seekers or foreigners in general, are often not covered by these provisions. For this reason, paragraph 18 a), b), c), and d) of the Recommendation does not speak of “group” but of “grouping” of persons.

The term “defamation” contained in paragraph 18 b) should be understood in a broad sense, notably including slander and libel.

Paragraph 18 e) of the Recommendation refers to the crimes of genocide, crimes against humanity and war crimes. The crime of genocide should be understood as defined in Article II of the Convention for the Prevention and Punishment of the Crime of Genocide and Article 6 of the Statute of the International Criminal Court (see paragraph 45 of the present Explanatory Memorandum). Crimes against humanity and war crimes should be understood as defined in Articles 7 and 8 of the Statute of the International Criminal Court.

Paragraph 18 f) of the Recommendation refers to the dissemination, distribution, production or storage of written, pictorial or other material containing racist manifestations. These notions include the dissemination of this material through the Internet. Such material includes musical supports such as records, tapes and compact discs, computer accessories (e.g. floppy discs, software), video tapes, DVDs and games.

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<sup>260</sup> Paragraphs 38-42 of the Explanatory Memorandum.

20. The law should provide that intentionally instigating, aiding, abetting or attempting to commit any of the criminal offences covered by paragraph 18 (...) is punishable.

(..)

22. The law should provide that legal persons are held responsible under criminal law for the offences set out in paragraph 18 (...).

*Explanatory Memorandum*<sup>261</sup>:

According to paragraph 22 of the Recommendation, the law should provide for the criminal liability of legal persons. This liability should come into play when the offence has been committed on behalf of the legal person by any persons, particularly acting as the organ of the legal person (for example, President or Director) or as its representative. Criminal liability of a legal person does not exclude the criminal liability of natural persons. Public authorities may be excluded from criminal liability as legal persons.

23. The law should provide for effective, proportionate and dissuasive sanctions for the offences set out in paragraph 18 (...). The law should also provide for ancillary or alternative sanctions.

*Explanatory Memorandum*<sup>262</sup>:

According to paragraph 23 of the Recommendation, the law should provide for ancillary or alternative sanctions. Examples of these could include community work, participation in training courses, deprivation of certain civil or political rights (e.g. the right to exercise certain occupations or functions; voting or eligibility rights) or publication of all or part of a sentence. As regards legal persons, the list of possible sanctions could include, besides fines: refusal or cessation of public benefit or aid, disqualification from the practice of commercial activities, placing under judicial supervision, closure of the establishment used for committing the offence, seizure of the material used for committing the offence and the dissolution of the legal person (...).

## **II. Synthesis of ECRI's approach to combating racism while respecting freedom of expression in its country reports**

The country-by-country approach is a method whereby ECRI closely examines the situation in each of the member States of the Council of Europe (hereafter: member States) and draws up, following this analysis, suggestions and proposals as to how the problems of racism and intolerance identified in each country might be overcome. The aim of this exercise is to formulate helpful and well-founded proposals which may assist governments in taking practical and precise steps to counter racism and intolerance.

Such an approach is therefore built on a case-by-case basis, allowing for specific recommendations for each country. Nevertheless, there are similar problems in many countries, which means that ECRI makes similar recommendations in its country

<sup>261</sup> Paragraph 48 of the Explanatory Memorandum.

<sup>262</sup> Paragraph 49 of the Explanatory Memorandum.

reports. This is particularly true of the recommendations concerning the implementation of criminal law provisions prohibiting racist expression. The following developments aim at summarising and exemplifying ECRI's approach to combating racism while respecting freedom of expression in its country-specific monitoring work. The extracts of reports reproduced hereafter are given as examples. Similar analyses or recommendations can be found in other country reports, including those which are not mentioned in this document<sup>263</sup>.

#### **A. Ratification of international legal instruments to combat racist expression**

ECRI systematically checks in all its reports whether the State in question has ratified the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). The CERD contains a provision requiring that signatories declare, among others, all dissemination of ideas based on racial superiority or hatred as an offence punishable by law (see Article 4 of the Convention). In countries where the CERD has not yet been ratified, ECRI always recommends that the States ratify it as soon as possible.

In its reports, ECRI encourages States which have not yet done so to declare that they recognise the competence of the Committee on the Elimination of Racial Discrimination to receive and consider communications from individuals or groups of individuals claiming to be victims of a violation by a State party of any of the rights set forth in the CERD (see Article 14 of the Convention).

The Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, was adopted on 28 January 2003. Since then, in all of its country reports, ECRI systematically recommends to member States which have not yet done so to ratify this instrument.

#### **B. Criminal law provisions to combat racist expression**

In each of its country reports, ECRI monitors the operation of criminal law provisions to combat racism, and more particularly those which are aimed at prohibiting racist expression. It usually examines the extent and the content of such provisions and makes recommendations if it considers that there are shortcomings in the legislation (1). Moreover, ECRI systematically examines the implementation of the existing legislation in the country in question and makes recommendations aimed at improving the situation in this field (2). ECRI also recommends that data on racist incidents, including racist expression, be collected (3).

##### **1. Existence and content of criminal law provisions to combat racist expression**

In each report, ECRI examines the existing legislation aimed at combating racist expression. It sometimes recommends adopting additional provisions to ensure that the legislation covers every situation in which ECRI considers that criminal law should apply (a). In other cases, ECRI simply recommends changes to an existing provision in order to make it more efficient (b).

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<sup>263</sup> All ECRI country reports can be consulted on its website : [www.coe.int/ecri](http://www.coe.int/ecri) .

a) **Lack of criminal law provisions to combat racist expression**

When ECRI considers that the existing criminal law provisions are not sufficient to duly combat all forms of racist expression, it recommends adopting further provisions. In this respect, it encourages member States to draw inspiration from its General Policy Recommendation N° 7 on national legislation to combat racism and racial discrimination (hereafter: GPR N° 7).

Example:

In its second report on San Marino<sup>264</sup>, ECRI stressed that at that time there were no criminal law provisions against racist expression. See the extract below:

*“There are, however, no criminal law provisions against racist expression - for instance incitement to racial violence, hatred or discrimination, dissemination of ideas based on racial superiority or racist insults or threats -- and against racist organisations. (...) The authorities of San Marino have stated that, even if there have been no cases where this has been necessary, certain types of racist behaviour could be addressed through existing provisions establishing common offences, such as injury and defamation. ECRI considers however, that specific legislation against racism would ensure better protection should the need arise. It notes that, following its ratification of the International Convention on the Elimination of all forms of Racial Discrimination, San Marino is under an obligation to legislate in these fields and strongly encourages the authorities of San Marino to do so as swiftly as possible. In this respect, ECRI draws the attention of the authorities of San Marino to its General Policy Recommendation N°7 on national legislation to combat racism and racial discrimination, in which ECRI describes the elements it considers key to a comprehensive legislation in these fields.”*

b) **Changes to be brought to existing provisions to combat racist expression**

In some cases, ECRI considers that the existing provisions could be improved to better combat all forms of racist expression. In this respect, it encourages member States to draw inspiration from its GPR N° 7. Here are some examples of changes to criminal law which have been recommended by ECRI and implemented by the authorities.

- **Introduction of the possibility to prosecute racist expression *ex officio***

ECRI encourages national authorities to introduce the possibility to prosecute racist expression *ex officio*, i.e. for instance not only solely on the complaint of an individual.

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<sup>264</sup> Paragraph 11.

Example:

In its third report on Greece<sup>265</sup>, ECRI welcomed the introduction of a provision granting the public prosecutor the possibility to act *ex officio* in the case of racist expression. See the extract below:

*“ECRI notes with satisfaction that law no. 2910/2001 grants the public prosecutor the possibility of acting ex officio, and no longer solely on the complaint of an individual personally wronged, in respect of offences of incitement to racial discrimination, hatred or violence as provided in article 1 of law no. 927/1979. This amendment enables a prosecutor to take action upon learning of a potential offence, such as when alerted by organisations that defend human rights or that represent a group targeted by statements constituting incitement to racial hatred (...)”*

- **Extension of the prescriptive period for prosecuting racist expression**

According to ECRI, the period during which the prosecution of racist expression is allowed should be long enough to ensure the efficiency of the provision prohibiting such expression.

Examples:

In its third report on France<sup>266</sup>, ECRI welcomed the reinforcement of the legislation by extending the prescriptive period for prosecuting offences of racist expression. See the extract below:

*“ECRI is pleased to note that criminal legislation aimed at sanctioning racist acts and statements has been reinforced since the adoption of its second report. As concerns racist statements, the law of 9 March 2004 extended the prescriptive period from three months to one year for prosecuting the offences of: incitement to racial discrimination, hatred and violence; negationism; and racial defamation and insults. (...)”*

In its third report on Sweden<sup>267</sup>, ECRI welcomed changes brought to the legislation in order to extend the time within which offences committed through certain means of communication must be prosecuted. See the extract below:

*“Sweden has two constitutional laws regulating the exercise of freedom of expression in the media: the Fundamental Law on Freedom of Expression, which applies to media such as radio, television and recordings of sounds, pictures and text, and the Freedom of the Press Act, which applies to printed material. Both laws contain provisions prohibiting hate speech which are equivalent to those contained in the criminal offence of racial agitation. However, if committed through a means of communication falling under the scope of the constitutional laws, such offences are not prosecuted by the Prosecutor General but by the Chancellor of Justice, according to a specific procedure. ECRI notes that prosecutions of hate speech under the Fundamental Law on Freedom of Expression and the Freedom of the Press Act*

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<sup>265</sup> Paragraph 13.

<sup>266</sup> Paragraph 15.

<sup>267</sup> Paragraphs 8 and 9.

are very rare. (...) Non-governmental organisations have expressed concern that, as a result of the restrictive approach to prosecutions under the Fundamental Law on Freedom of Expression and the Freedom of the Press Act, explicitly racist material is legally disseminated in Sweden through means of communication covered by these laws. In its second report ECRI noted that, in order to improve this situation, the Swedish authorities planned to adopt amendments extending the time within which offences committed through certain means of communication must be prosecuted. These means of communication, widely used by the White Power movement, are technical recordings, such as music CDs, which do not carry the date of publication. ECRI is pleased to note that these amendments had been in force since 1 January 2003. However, although the Swedish authorities reported that there are more investigations at present than before the adoption of the amendments, it did not appear that the latter had so far led to an increase in the number of cases of hate speech tried in court. ECRI recommends that the Swedish authorities ensure that hate speech disseminated through means of communication covered by the Fundamental Law on Freedom of Expression and the Freedom of the Press Act is effectively countered. In this respect, ECRI draws the attention of the Swedish authorities to its General Policy Recommendation No. 7, where it recommends that the constitution “should provide that the exercise of freedom of expression [...] may be restricted with a view to combating racism”.

**- Clarification of the elements constituting an offence of racist expression**

In some cases, ECRI has asked for a clarification of the elements constituting an offence of racist expression in order to ensure that a specific criminal law provision be duly applied.

Example:

In its third report on Austria<sup>268</sup>, ECRI observed that Section 283 (incitement to religious or racial hatred) was still relatively rarely applied. See the extract below:

*“According to ECRI this is due to several factors, including the fact that for Section 283 to be applied, it is necessary that the act of incitement be likely to jeopardise public order (283.1) and that it target a specific group”. (...) “It has also been reported to ECRI that the elements constituting the offences contained in Section 283 are not clearly defined, which results in them being construed very narrowly in jurisprudence”.*

**- The need to provide effective, proportionate and dissuasive sanctions**

In some cases, ECRI regrets the fact that the legislation against racist expression is made more lenient as the new legislation does not allow for effective, proportionate and dissuasive sanctions. In other cases, ECRI recommends adopting a wider range of sanctions to ensure that the sanction imposed is efficient.

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<sup>268</sup> Paragraph 12.

Examples:

In its third report on Italy<sup>269</sup>, ECRI stressed the need to provide effective, proportionate and dissuasive sanctions. See the extract below:

*“(...) ECRI notes with concern that since its second report, lack of support for protection against incitement to racial hatred - and sometimes outright hostility towards providing such protection - has publicly and repeatedly been expressed at high political level. (...). Furthermore, ECRI notes with regret that (...) legislation against incitement to racial discrimination and violence has been made more lenient. (The maximum length of imprisonment for breach of the relevant provisions has been reduced from three years to eighteen months and the possibility for the judge to replace imprisonment with a fine has been introduced). ECRI recommends that the Italian authorities ensure that adequate criminal law provisions are in place to counter racism and racial discrimination. In particular, ECRI recommends that the Italian authorities review the provisions in force against incitement to racial violence and discrimination and bring them into line with ECRI’s General Policy Recommendation No.7 on national legislation to combat racism and racial discrimination, which prescribes that effective, proportionate and dissuasive sanctions should be provided for against such offences.”*

As stated in ECRI’s third report on the Russian Federation<sup>270</sup>, “in ECRI’s view, certain provisions aimed at combating racially motivated hate speech in the media should also be reviewed in the light of experience. At present, the only possible sanction is the mere closure of the media concerned after a certain number of official warnings. This cumbersome procedure and its serious consequences do not encourage the police and the prosecutors to introduce an action against a media on the ground of racist statements. It has been suggested that the Russian authorities introduce a wider range of penalties aimed at media or journalists responsible for hate speech, allowing the judges to choose the most appropriate sentence”. ECRI therefore encourages the Russian authorities “to review and complement the criminal law provisions aimed at combating racially motivated hate speech in the media. In this respect, they should take account of the sections on criminal law provisions contained in ECRI’s General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination. In particular, the criminal law should provide for effective, proportionate and dissuasive sanctions for all racist offences. It should also provide for ancillary or alternative sanctions such as: participation in training courses, refusal or cessation of public benefit or aid or publication of all or part of a sentence”.

## **2. The implementation of criminal law provisions to combat racist expression**

In all of its country reports, ECRI examines to what extent criminal law provisions in place to combat racist expression are implemented. ECRI noted a general lack of implementation of criminal law concerning racist offences and more particularly racist expression, despite reports of widespread incidents of racially-motivated offences. To effectively counter non-implementation of legal provisions, ECRI encourages member States to actively review the implementation of criminal law provisions in this area (a). In other cases, ECRI asks member States to prevent abuses in the implementation of measures aimed at combating racist expression (b).

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<sup>269</sup> Paragraphs 12 and 13.

<sup>270</sup> Paragraphs 14-15.

a) **Lack of implementation of criminal law provisions to combat racist expression**

In general, ECRI recommends raising awareness among potential victims, lawyers, police, prosecutors and judges of the problem of racism and of the need to combat racist offences, including racist expression. ECRI considers that awareness-raising campaigns for potential victims and initial and on-going training for all members of the criminal law justice system on the need to combating racism are some of the solutions allowing for improvement in this field.

In its reports, ECRI tries to analyse the reasons behind the gaps in the implementation of criminal law to combat racist expression. Some of the explanations given for this widespread problem are discussed below. It is impossible to spell out here all of the difficulties which can be encountered in this field. Only a few examples of obstacles and of the corresponding recommendations are given below.

- **Cases where the argument of freedom of expression is put forward to justify a lack of prosecution or sanction**

In some cases, the prosecution authorities or judges put forward the argument according to which there is a need to protect freedom of expression, explaining that this principle prevents them from prosecuting or punishing some cases of racist expression. However, as stated above in its GPR 7, ECRI believes that the exercise of freedom of expression should be limited to combat racism.

Examples:

As indicated in ECRI's third report on Poland<sup>271</sup>, *“another argument put forward to justify the lack of prosecutions is freedom of expression, implying that people should be free to say and write anything they wish. However, while understanding the concerns over the risk of infringing upon the right to freedom of expression, ECRI recalls that the European Court of Human Rights has admitted in successive judgements that, under certain conditions, State authorities may restrict the exercise of this freedom by taking criminal sanctions against the authors of racist and antisemitic acts”*. In this case, ECRI recommended that Polish authorities take the appropriate measures to ensure that legislation aimed at preventing and sanctioning antisemitism is effectively implemented by all persons involved at all levels of the criminal justice system: police, prosecutors, judges. ECRI recommended offering targeted training to these persons with a view to increasing knowledge about antisemitic crimes and how such acts can be effectively prosecuted<sup>272</sup>.

In its third report on Norway<sup>273</sup> ECRI considered that Norwegian legislation, as it currently stood and was interpreted, did not provide individuals with adequate protection against racist expression. See the extract below:

*“In ECRI's opinion, this has become particularly apparent following the Supreme Court's judgment of 17 December 2002, which overturned a Court of Appeals decision to condemn the defendant for breach of Article 135a. In the context of an*

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<sup>271</sup> Paragraph 98

<sup>272</sup> Paragraph 101.

<sup>273</sup> Paragraph 99.

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*illegal demonstration held in memory of Rudolf Hess, attended by about 30 persons - some of them carrying Norwegian or South State flags - the defendant resorted to strongly anti-immigrant and antisemitic speech, including the following: "(...) every day our people and country is robbed and destroyed by Jews who take the wealth and replace it with immorality and anti-Norwegian thoughts." After the speech, the defendant requested one minute's silence in memory of Rudolf Hess and then shouted "Sieg Heil". The defendant was acquitted in first instance by the District Court. The Court of Appeals found the defendant guilty in respect of the antisemitic part of his speech, while it considered that his anti-immigrant statements were protected by freedom of speech. In the Supreme Court, all judges agreed that the defendant's anti-immigrant statements were not punishable. A majority of 11 judges, however, held that also the antisemitic statements were protected by freedom of speech and the defendant was therefore released of all charges. The majority of the judges held that the right to freedom of expression required that a person should not risk being punished for an opinion that was not explicitly expressed but only interpreted into his statements. A minority of six judges found, on the other hand, that it was not sufficient to take into consideration only the words spoken outside their context, when this gave a completely different impression than the words taken in the context in which they were uttered. ECRI deeply regrets that statements such as those uttered in the circumstances and in the case in question may go unpunished."*

**- Problems of interpretation of what constitutes racist expression**

Another problem with which ECRI is sometimes faced is the fact that the police, prosecutors or judges do not see a specific statement as being of a racist nature, in contradiction with the general view of experts specialised in this field. In such cases, ECRI recommends that the members of the criminal law system receive adequate information and training to help them identify what constitutes racist expression and when they should intervene.

Examples:

In its third report on Lithuania<sup>274</sup>, ECRI noted that there was a problem of interpretation of what constitutes incitement to racial hatred. See the extract below:

*"(...) In February and March 2004 a series of articles of an antisemitic character were published in the daily newspaper Respublika and in March 2004 these articles were published in a separate edition which was received by all readers of that newspaper and of another newspaper, Vakaro žinios. ECRI notes that, at the request of civil society organisations, the General Prosecutor's Office opened an investigation into possible breach of Article 170 (incitement to racial hatred) of the Criminal Code. ECRI also notes that the Inspector of Journalists' Ethics and the Commission on the Ethics of Journalists and Editors concluded that the provisions against incitement to racial or religious hatred contained in the Law on Provision of Information to the Public had been breached and that an ad hoc commission set up to consider these articles concluded that the articles in question amounted to incitement to racial hatred. However, ECRI notes that in March 2005 the General Prosecutor's Office decided to discontinue the case, reportedly on grounds, inter alia, that these articles did not constitute incitement to racial hatred, but were rather of a humorous nature. However, ECRI is pleased to note that, following much public*

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<sup>274</sup> Paragraph 55.

criticism of the decision of the General Prosecutor's Office to discontinue the case, the latter decided more recently to re-open the investigations.”

- **Other obstacles to prosecuting cases of racist expression**

In some cases, the lack of racist intent is put forward to justify the absence of prosecution.

Example:

In its third report on the Russian Federation<sup>275</sup>, ECRI commented on the argument of lack of racist intent put forward by the authorities for justifying the absence of prosecutions. See the extract below:

*“Concerning racist statements made in public or contained in publications, the police and prosecutors [do not prosecute because they] sometimes consider that publishers distribute racist material, such as the Protocols of the Elder of Zion, without any racist intent and only for commercial reason. (...) ECRI recommends that the Russian authorities considerably strengthen their efforts to train police, prosecutors, judges and judicial candidates on issues pertaining to the implementation of legislation concerning racist offences.”*

In other cases, the social harm of a racist expression is considered to be too low for prosecution.

Example:

As indicated in ECRI's third report on Poland<sup>276</sup>, *“the prosecutors frequently use their right not to prosecute or to discontinue a case on the grounds that the antisemitic expression at stake has such a low social harm that it does not necessitate any further action”*. In this case, ECRI recommended that the Polish authorities take the appropriate measures to ensure that legislation aimed at preventing and sanctioning antisemitism be effectively implemented by all persons involved at all levels of the criminal justice system: police, prosecutors, judges. ECRI also recommended offering targeted training to these persons with a view to increasing knowledge about antisemitic crimes and how such acts can be effectively prosecuted.

- **Problems of victims' access to the criminal law justice system**

When victims hesitate to come forward and lodge complaints against racist expressions or when there are serious problems of functioning in the criminal law justice system of a more general nature, this has an impact on the extent to which provisions against racist expression are implemented. In such cases, ECRI recommends in general that all necessary measures be taken to raise the awareness of the general public concerning the prohibition of racist acts as well as to combat any obstacle that might prevent victims from coming forward and bringing complaints to the police, such as a lack of confidence in the institution.

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<sup>275</sup> Paragraphs 18 and 21.

<sup>276</sup> Paragraph 98.

Examples:

In the context of its third report on France<sup>277</sup>, “ECRI has been informed that victims often hesitate to lodge complaints of racist acts and statements concerning them, but especially of acts of racial discrimination. ECRI notes that in the opinion of non-governmental organisations, the law enforcement officers and justice officials to whom complaints are referred are not always sufficiently aware of the racist aspect of the offences, and the victims are not always adequately informed about avenues available to pursue complaints or supported in doing so, which can have the effect of discouraging them”.

In its third report on Albania<sup>278</sup>, ECRI reiterated its recommendation to the Albanian authorities “to carry out the necessary measures so that criminal provisions relating to racism, discrimination and intolerance may be effectively implemented. In addition to general measures aimed at improving the functioning of the criminal justice system, ECRI reiterated “the importance of providing all of those involved in the criminal justice system - police, prosecution, and judiciary - with specific training on relevant provisions in national law as well as raising officials’ awareness of issues of racism, discrimination and intolerance”.

**b) Preventing abuses in the implementation of measures aimed at combating racist expression**

When ECRI asks member States to find a way of combating racism while respecting freedom of expression, this does not only mean that legal provisions to combat racist expression should be adopted. It also implies that the existing criminal law provisions aimed at combating racist expression should not be applied in an abusive way, particularly to the detriment of some minority groups.

Examples:

In its third report on Turkey<sup>279</sup>, ECRI observed that “Article 312 - which prohibits incitement to hatred - apparently continued to be used without real justification by certain public prosecutors particularly in order to prosecute members of human rights NGOs or personalities expressing “pro-Kurdish views”. However, ECRI also acknowledged the fact that “the courts increasingly acquit persons wrongly prosecuted on the basis of this provision”. ECRI goes on to explain that “in July 2004, the Court of Cassation (8th Criminal Chamber) quashed a decision of the Istanbul State Security Court which had interpreted Article 312 in a manner which violated the right to freedom of expression. A few days later, the same Chamber applied Article 312 to a case concerning a person who had made racist comments against Kurds, by holding that this was a case of discrimination and incitement to hatred against “citizens of Kurdish identity”. In two other cases, a Prosecutor in Istanbul instituted legal proceedings under Article 312, against two people who had made antisemitic statements. ECRI welcomed “these latest developments as they respect the real purpose of Article 312 which is to punish racist remarks so as to show that they cannot be tolerated in a pluralist democratic society”. In this case, ECRI recommended that the Turkish authorities “continue their efforts to ensure that Article 312 of the Criminal Code prohibiting incitement to hatred is applied for the purpose of punishing racist statements in compliance with the letter and spirit

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<sup>277</sup> Paragraph 23.

<sup>278</sup> Paragraph 16.

<sup>279</sup> Paragraphs 14 and 20.

of this provision”. It encouraged them “to continue to organise training courses for public prosecutors, judges and lawyers to enable them to identify the situations in which Article 312 applies, bearing in mind the case-law of the European Court of Human Rights on freedom of expression”.

As indicated in ECRI’s third report on the Russian Federation<sup>280</sup>, “in commenting on the 2002 Federal Law on Counteracting Extremist Activities, many NGOs have argued that its definition of extremism is too broad, giving room for abusive interpretation and implementation. NGOs have suggested that there are already some examples of abusive proceedings introduced against local human rights and humanitarian NGOs on the grounds that they have been inciting racial hatred or violence against the State. ECRI understands that the problem lies more in the interpretation of the Law by the police and prosecutors - sometimes confirmed and other times rejected by the judges - than in the content of the Law itself”. According to ECRI, “it is therefore important that Article 282 be implemented in full respect of the European Convention on Human Rights and notably its Articles 10 (freedom of expression) and 11 (freedom of association) as interpreted by the European Court of Human Rights”.

### 3. Data collection concerning the implementation of criminal law provisions to combat racist expression

In many cases, it is difficult for ECRI to assess the situation in a given country as regards implementation of the criminal law provisions to combat racist expression. The main reason is that there is a lack of comprehensive data collection in this respect. ECRI systematically asks for information about the number of cases where a specific criminal law provision has been applied, and this over a certain period of time. However, the answer often given to ECRI is that such information is not available because there is no established system of collection of such data. In such cases, ECRI recommends that data on the implementation of anti-racist criminal law provisions, and more particularly on provisions against racist expression, be duly collected. Such data should include information concerning the number of racist and xenophobic offences reported to the police, the number of prosecutions, their outcomes and reasons for not prosecuting.

Examples:

In its third report on Switzerland<sup>281</sup>, ECRI recalled that it had already encouraged in its previous report “the Swiss authorities to closely monitor the implementation of Article 261 bis of the Criminal Code, (which penalises public incitement to racial hatred or discrimination, spreading racist ideology, denying crimes against humanity and refusing to supply a public service), particularly through the collection and publication of data on the number of cases reported, the follow-up given to complaints, and the outcome of cases brought before the courts, at federal and cantonal level”. As indicated in ECRI’s third report, “since the entry into force of Article 261 bis in 1995, the Office of the Director of Public Prosecutions of the Confederation and, since January 2000, the Federal Police Office, have been recording acts which are the subject of complaints based on this provision. The judgments delivered are transmitted in an anonymous form to the Federal Commission against Racism, whose tasks include monitoring the implementation of Article 261 bis of the Criminal Code”. ECRI recommended that the Swiss authorities continue to monitor the application of Article 261 bis.

<sup>280</sup> Paragraph 13.

<sup>281</sup> Paragraphs 7 and 12.

In its third report on Bulgaria<sup>282</sup>, ECRI recalled that in its previous report it had encouraged the Bulgarian authorities to give high priority to criminal prosecution of offences of a racist or xenophobic nature and to collect and publish accurate data and statistics on the number of racist and xenophobic offences reported to the police, the number of prosecutions, their outcomes and reasons for not prosecuting. This recommendation was reiterated in its third report.

**C. Principle of non-discrimination combined with the principle of freedom of expression**

In some cases, ECRI underlines the fact that national authorities should ensure the respect of freedom of expression for minority groups. Such an approach is based on the principle of non-discrimination according to which all rights, and more particularly freedom of expression, should be protected in a non discriminatory way.

Example:

In its third report on Greece<sup>283</sup>, ECRI promoted the recognition of freedom of expression for some minority groups. See the extract below:

*“ECRI notes that the Greek authorities are more ready to recognise the existence of minority groups in Greece, such as the Pomaks or the Roma, including the fact that certain members of these groups have a native language other than Greek. However, other groups still encounter difficulties, the Macedonians and Turks for example. Even today, persons wishing to express their Macedonian, Turkish or other identity incur the hostility of the population. They are targets of prejudices and stereotypes, and sometimes face discrimination, especially in the labour market”. In this case, ECRI encouraged the Greek authorities to “take further steps toward the recognition of the freedom of association and expression of members of the Macedonian and Turkish communities living in Greece”.*

**D. Policy responses to combating racism while respecting freedom of expression**

The means to combat racist expression do not only entail legal responses. Therefore, as a complement to legal means, ECRI recommends the adoption of policy responses whose implementation helps in reducing the number of instances of racist expression. Education and awareness raising on one side, and self-regulation on the other are two policies that should be encouraged in this respect.

**1. Education and training**

Among other education and awareness-raising measures, the steps taken to empower minority groups and to report diversity are of particular relevance when it comes to preventing racist discourse.

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<sup>282</sup> Paragraphs 16 and 18.

<sup>283</sup> Paragraphs 81 and 84.

a) **Empowering minority groups**

Involvement of members of minority groups should be secured in respect of all efforts to improve their situation from the planning to the implementation phase. In parallel with these efforts, additional efforts should be undertaken to increase representation of members of minority groups in public life (where such groups are under represented) and to improve the climate of opinion regarding such groups, including through the initiation of awareness raising activities.

Example:

In its third report on Slovakia<sup>284</sup>, ECRI insisted on the need to empower the Roma community to play an active part in initiatives aimed at improving its position in society. See the extract below:

*“(...) the participation of Roma in public affairs at the national level remains limited. No Roma political party has achieved representation in Parliament despite the large size of the community in question, while, with a few notable exceptions such as the Plenipotentiary, few Roma hold positions in governmental structures. Their representation in other important societal elites such as the legal profession and judges is also extremely limited, although it is difficult to monitor such representation due to the prohibition of the collection of data based on ethnic origin. (...)”.* “ECRI recommends that further emphasis be placed on ensuring that the Roma community is involved at all stages of the planning and implementation of measures which concern them, at as local a level as possible. In particular, the preparation and appointment of persons who can act as mediators between Roma communities and the authorities could be most opportune. ECRI stresses the importance of encouraging projects and initiatives which emanate from the Roma community itself, through the on-going provision of funding and the widening of successful projects to other areas”.

b) **“reporting diversity”**

In respect of countries with a significant population of minority language speakers, measures should be undertaken to prevent the further polarisation of society through the delivery of substantively diverse media services. ECRI supports the adoption of legal provisions which place an obligation on public broadcasters to reserve an adequate portion of air time for broadcasts in minority languages. ECRI encourages member States to undertake efforts to improve access for members of minority groups to the media and to increase representation of members of such groups in media organisations.

Example:

As explained in ECRI’s third report on Albania<sup>285</sup>, *“the Albanian media are generally said to avoid promoting racism and discrimination, although on some occasions they promote negative stereotypes about minority groups, particularly Roma. ECRI has also received information indicating that the media sometimes stir up negative feelings about the Greek, Macedonian and Montenegrin minorities. On the other hand, the Albanian media reportedly does not give sufficient coverage to the daily*

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<sup>284</sup> Paragraphs 70, 72 and 74.

<sup>285</sup> Paragraphs 69-71.

*lives, problems and concerns of members of minority groups. Furthermore, representatives of different minority groups have expressed concern to ECRI that they are not given adequate possibilities for access to the electronic or print media.” Therefore, ECRI recommends to the Albanian authorities that they impart on media professionals the need to adopt codes of self-regulation to combat reporting that fuels racism, discrimination and intolerance and instead promote coverage that is balanced, impartial and promotes an atmosphere of appreciation of diversity. ECRI also recommends that the Albanian authorities inform media professionals of the need to strive to give adequate coverage to the daily lives, problems and concerns of members of minority communities. Furthermore, ECRI recommends that members of minority groups be given adequate opportunities for access to the electronic and print media”.*

## **2. Self-regulation**

A way of combating racist expression without encroaching on freedom of expression is to ask relevant actors to adopt self-regulation measures. ECRI encourages such measures both in the political and sphere and in the media.

### **a) Political sphere**

ECRI adopted a Declaration on the use of racist, antisemitic and xenophobic elements in political discourse on 17 March 2005. This declaration summarises the suggestions regularly made by ECRI in its reports concerning “self-regulatory measures which can be taken by political parties or national parliaments” and “the signature and implementation by European political parties of the Charter of European Political Parties for a Non-Racist Society which encourages a responsible attitude towards problems of racism, whether it concerns the actual organisation of the parties, or their activities in the political arena”.

Example:

In its third report on Luxembourg<sup>286</sup>, ECRI recalled that it had drawn the Luxembourg Government’s attention to the principles laid down in the Charter of European Political Parties for a Non-Racist Society and hoped that these principles would be reflected in political life in Luxembourg.

### **b) Media**

ECRI encourages media organisations to draw up and operate within codes of self-regulation. These codes should aim to prevent the negative stereotyping of minority groups and the sensationalising of conflict between minority groups. In particular, ECRI stresses the need to end the practice of highlighting the racial or ethnic background of persons accused or convicted of criminal offences where this factor is irrelevant.

Example:

In its third report on Germany<sup>287</sup>, ECRI invited the media profession to devote particular attention to the need to ensure that reporting does not perpetuate racist prejudice and stereotypes and also to the need to play a proactive role in countering such prejudice and stereotypes. See the extract below:

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<sup>286</sup> Paragraph 78.

<sup>287</sup> Paragraph 78.

*“ECRI invites the media profession to devote particular attention to the need to ensure that reporting does not perpetuate racist prejudice and stereotypes and also to the need to play a proactive role in countering such prejudice and stereotypes. To these ends, ECRI considers that the adoption, where necessary, and the implementation of codes of self-regulation may be useful tools. It is also important to ensure that media professionals are equipped with special training on reporting in a diverse society. Finally, ECRI stresses that a stronger representation of persons of immigrant background in the media profession could positively affect the image of persons of immigrant background reflected by the press.”*



“THE FRAMEWORK AND JUDICIAL REVIEW CONCERNING RACIST AND DISCRIMINATORY EXPRESSION IN A SELECTED NUMBER OF EUROPEAN COUNTRIES”

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The following remarks provide examples of restrictions on racist and xenophobic speech (hereinafter called “racist speech”) in selected European countries. This compilation intends to highlight the inherent dangers such penal restrictions could impose on freedom of expression. The discrepancies between European states indicate a high level of diversity and uncertainty. The precarious balance that was dictated by considerations of anti-racism is currently under a new pressure due to attempts to criminalise speech that is offensive to religion. Insult to religion is understood to serve as a proxy for racist attacks and such presumptions endanger critical discussion of public interest concerning religion.

For the sake of brevity, this presentation is limited to criminal law measures. Specific problems or obligations regarding broadcasting, where the direct impact of racial incitement causes more complex problems, harder to counter, are not considered. Furthermore, I will not discuss incitement to commit acts of illegal discrimination, as such incitement aims to encourage illegal acts or to promote by action a constitutionally prohibited situation. Legal action against such incitement is less problematic for freedom of speech than incitement to hatred and attacks on dignity. However, speech discussing discrimination often borders on speech that emphasises distinctions, which does not amount to racial discrimination and seems to fall unconditionally within the sphere of protected speech.

I. *National legislation and constitutional reactions*

GERMANY<sup>288</sup>

The German Basic Law protects freedom of opinion, but this protection is not absolute. Verbal and written racist and xenophobic attacks are criminalised as criminal defamation and various forms of incitement to hatred provisions can also be used to punish racist speech.

*Insult.* Individual and collective defamation or insult is prohibited in Articles 185 to 200 of the Criminal Code. Insult consists in “an illegal attack on the honour of another person by intentionally showing disrespect or no respect at all.” Factual allegation (calumny) made in public that is likely to bring into contempt or cause a loss of public esteem is considered to be a more serious crime. The defence of truth does not apply if the insult results from the form of communication. The insult law applies to racist speech where the insult is addressed to groups (*Sammelbeleidigung*). Of course, not only racial or ethnic groups can be subject to such insult. It is required that all members of the target group be addressees of the insult. Insult provisions address racist speech issues in the following sense. The protected value is honour, which implies respect of the person as a member of the human community. Thus the implication of subhumanity, as in the case of racial inferiority, amounts to an attack

<sup>288</sup> See Winfried Brugger, The Treatment of Hate Speech in German Constitutional Law. *German Law Journal*. Vol. 4. No. 1-2.2003.

on honour. A face to face statement of racial inferiority can be punished under this approach. Additionally, attacks on the personality are prohibited by the insult law (including ‘fighting’ words and gestures), as the constitution requires a minimum of mutual social respect from members of society. Moreover, statements that diminish one’s reputation fall under insult.

However, the Constitutional Court provides protection to harsh, even exaggerated statements. This protection applies primarily to the field of public debate. In other words, private racial slur is clearly unprotected, whereas with regard to political discourse, especially where there is a public clash of opinions, the Constitutional Court requires that free speech considerations be incorporated into the possible application of sanctions.

As to racial, ethnic, immigrant, or religious groups, this approach implies that a less stringent standard of offensiveness applies in the case where these groups enter into public debate.<sup>289</sup> The obvious problem is that it is not an ethnic group as such that enters into public debate but certain associations, or political parties that represent or take a stand on behalf of such groups. In addition, the extent to which the public presence of religious organisations amounts to ‘entering into the arena of political debate’ needs further consideration. Without such qualification, a speech attacking the position of a church or of an ethnic association may not be subject to free speech considerations.

The possibility of criminal group libel has raised constitutional concerns in Germany, without denying the constitutionality of this cause of action. “Only a delimitable, graspable group”<sup>290</sup> can be collectively defamed or insulted. As the Constitutional Court has stated, “the larger the collective to which a disparaging statement relates, the weaker the personal involvement of the individual member can be.”<sup>291</sup> Even very large groups like Catholics can be insulted, but the insult has to refer to a feature that is present in all members of the group. In the case of minorities the Court might be inclined to find insult when this targets “ethnic, racial, physical or mental characteristics” implying “the inferiority of a whole group of persons and that therefore simultaneously of each individual member.”<sup>292</sup> Immutable characteristics are generally such characteristics. However, even in this case the usual difficulties of defining what constitutes racism emerge. For example, is a statement about a minority’s specific higher IQ or ‘race specific’ advantageous physical characteristics racist per se? In this context there is no reference to inferiority as far as the target group is concerned.

*Incitement to hatred.* A second tool to restrict racist speech is provided by Article 130 of the Criminal Code, which interprets incitement to hatred or violence against “parts of the population” to be a punishable offence, as a form of disturbing public peace. Attacks on human dignity by insulting, maliciously degrading or defaming parts of the population or against groups determined by nationality, race, religion, or ethnic origin are punishable for up to five years. Incitement to hatred does not require a call to a specific act of violence or other criminal or illegal act. Attacks against human dignity by insulting, maliciously ridiculing or defaming parts of the population or specific groups are also covered by the incitement provision. Although there seems to be considerable overlap between criminal libel and parts of

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<sup>289</sup> See, in particular, BVerfGE 12, 114 (1961) (Schmid-Spiegel Case).

<sup>290</sup> BVerfGE 93, 266 at 300.

<sup>291</sup> Idem at 301.

<sup>292</sup> Idem at 304.

incitement, in the case of incitement one of the primary goals of the legislation is to prevent the formation of a social atmosphere favorable to hate crimes. The impact on actual victims is secondary and criminal investigation and prosecution takes place ex officio. Contrary to criminal libel, here the prosecution is in charge of the case.

As applied, the incitement to hatred provisions cover areas beyond traditional racist speech that advocates racial superiority. In 1994, a poem describing Germans as stupid for allowing asylum seekers to abuse the right to asylum and bring drugs and AIDS to Germany was found to fall under Article 130 as incitement.<sup>293</sup> As the characteristics ('criminality') are not shared by all members of the group such speech is not likely to fall under the less punitive criminal libel provisions. The publication of the poem was held to be incitement, notwithstanding the constitutional protection granted to the arts and notwithstanding the fact that debates about the nature of the right to asylum were part of the current political debate. Given this approach, it might become difficult to conduct an otherwise legitimate political discussion on asylum policies that refers to abuses of the right to asylum and refers to statistics that indicate higher criminality among immigrants, even if such concerns can be raised in less aggressive forms with impunity. From a free speech perspective, the offensiveness of such statements and their likely relationship to xenophobia are not sufficient grounds for restrictions *per se*. In fact, such restrictions would contradict basic assumptions of free speech, namely that counter-arguments are capable of eradicating factually incorrect statements or viewpoints. In principle, this is also the understanding of the German Constitutional Court<sup>294</sup>.

There are additional penal provisions applicable against racist speech. Symbols of propaganda by unconstitutional and National Socialist organisations (symbolic hate speech, Art 86, 86a) and Holocaust denial or glorification of acts of violence committed under the national-socialist regime (Art. 130) are specifically criminalised. The criminalisation of Holocaust denial was upheld by the Constitutional Court on grounds of violation of the dignity of Jews whose identity contains the memory of the Holocaust. However, for the law to be found constitutional, it was the specific historical obligation of Germans originating from the Holocaust that was held to be the decisive element, not an attack on any specifically Jewish dignity. With regard to the glorification of Nazi violence, the Court has had no opportunity so far to rule on the constitutionality of the paragraph that entered into force in 2005, but it has indicated that the provision raises difficult constitutional questions (1 BvQ 25/05). In the light of current criticism, especially in France, the extent to which debates about and evaluations of historical events that seem to offend a minority or a majority amount to "offences to dignity", and if so to what extent these should be dealt with by criminal law, as part of the fight against racism, remains a highly contested matter, given both prudential and free speech considerations.

*Incitement against sections of the population and the problem of assembly.* The Public Meetings Act allows for the preventive ban of assemblies in cases where a crime is expected to be committed at the assembly. The German Constitutional Court found constitutional the ban of an assembly where David Irving was to give a

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<sup>293</sup> BayOblG Jan 31, 1994. NJW 1994. 952. See also VG Frankfurt, Febr 22, 1993. NJW. 1993. 2067. A pamphlet that accused foreign residents of a transit camp with having committed crimes (prostitution, drug trafficking was considered racist incitement to hatred in Belgium. Bruges Criminal Court, 23 April, 2002.

<sup>294</sup> BVerfGE 90, 1 (The History Falsification Case).

talk. It was assumed by the authorities that Irving would speak about the “Auschwitz Hoax”, which amounts to a crime under the article cited above. The potential of the Public Meetings Act to restrict speech is documented by a number of decisions of the German Constitutional Court (see, for example, the decisions of the First Chamber of the First Senate between 24 March and 1 May 2001). The German authorities issued preventive bans, among others to prevent racist propaganda. These decisions of the First Chamber found the bans to be in violation of the Constitution. The above provision of the Public Meetings Act clearly has the potential to restrict speech, though the special fast-track procedure provided by the Constitutional Court has mitigated that danger.

## FRANCE

Article 24, paragraph 5, of the 1881 Press Act criminalises “those who, [in print etc.], incite to hatred or violence against a person or group of persons on account of their origin or membership or non-membership of a particular ethnic group, nation, race or religion”. The purpose of the incitement has to be discriminatory conduct prohibited by Article 225-2 of the Penal Code. (For example, refusing to provide goods or services, dismissing or refusing to hire a person, etc.). The incitement may also be intended to encourage among members of the public psychological or physical reactions hostile to the group concerned. (Paragraph 6).

The Court of Cassation requires the incitement to be explicit and in light of the jurisprudence this condition is easy to satisfy. For example, a factually correct simple list of ‘incidents’ involving people pertaining to immigrant groups satisfies the requirement, as it inevitably raises feelings of rejection and violence among the readers.<sup>295</sup> A call to fight immigration fiercely, calling for the “invaders” to be driven out immediately falls under Article 24, irrespective of the fact that the statement was made in an election campaign.<sup>296</sup> The new French Penal Code, which left the provisions of the Press Act in place, also added a novel provision to the anti-racist arsenal (625-7), which criminalises *non-public* incitement. (In a number of countries the criminal code does not expressly require that the incitement be made in public - see, for example, Italy or Spain; in Britain statements made in a ‘dwelling’ are protected).

Public defamation results from any allegation or imputation of specific and erroneous facts affecting the honour or esteem of a particular person or group of persons on account of race, religion or national or ethnic background. Thus, a false allegation made against a person or group of persons concerning a crime or lesser offence, or conduct contrary to morals, probity or the duties dictated by patriotism, constitutes defamation. (Article 32, paragraph 2). Public insult that consists of the use of any term of contempt or offensive expression might also be used against racist insult. It differs from defamation in that defamation involves the allegation of a specific fact which can be proved to be true or false without difficulty.

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<sup>295</sup> See e.g. the ‘Plural society’ article case; Cour de Cassation, Chambre criminelle 94-83365. Decision of 21 May 1996, Crim. Bull. 210. [U]ne énumération de méfaits graves et une manifestation religieuse, dont la juxtaposition a donné au texte une force particulière et a été de nature à susciter immédiatement chez le lecteur, contre les personnes visées comme les auteurs de tels agissements et “ les vecteurs principaux des formes les plus répréhensibles de la délinquance ”, des réactions de rejet, voire de haine et de violence.

<sup>296</sup> Cour de Cassation, Chambre criminelle 95-81187. Decision of 24 June 1997, Crim. Bull. 253. For the first time the term “group of persons” was extended to “foreigners residing in France who are singled out because they do not belong to the French nation”.

Further, Article 24 paragraph 2 criminalises the apology for war crimes and crimes against humanity.

#### UNITED KINGDOM

The United Kingdom is one of the many Western countries which acceded to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) with a reservation and committed itself to legislate under Article 4 ICERD only with due regard to freedom of opinion and assembly. The British government is of the opinion that it has found the right balance between freedom of speech and protecting individuals from violence and hatred and it is concerned (primarily) with protecting individuals, and not with the psychological climate created by the statements.

Part III of the Public Order Act 1986 relates to incitement to racial hatred. The Act defines racial hatred as "hatred against a group of persons in Great Britain defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins". The use of threatening, abusive or insulting words or the distribution of such materials is an offence if incitement to racial hatred is intended or is likely to be stirred up thereby. As the 1985 White Paper, *Review of Public Order Law* indicated: "The more level-headed the recipients of racially inflammatory material, the more difficult it is to show that racial hatred is likely to be stirred up". There is no likelihood of incitement in cases where the material is likely to cause feelings of sympathy. Intent to threaten etc. is an element of the offence, but if no intent can be proven it is enough to show that the accused realised that the words etc. *might* be threatening. A special defence applies to plays. In the case of incitement by words, there is no need to show any likelihood that the words will cause distress, while this is a requirement with respect to *materials*. Helen Fenwick claims that "a reasoned argument of a racist nature would not incur liability, since the racist words or material must be threatening, abusive or insulting. Furthermore, the term 'hatred' is a strong one: merely causing offence or bringing into ridicule is not enough and nor is racial harassment."<sup>297</sup>

In 2006, the Racial and Religious Hatred Act extended the scope of the offence to include the stirring up of religious hatred. The material or words have to be threatening. Moreover, the crime can only be committed intentionally and not, as the Government proposed, by the mere possibility of stirring up hatred. "Religious hatred" means hatred against a group of persons defined by reference to religious belief or lack of religious belief. The provision protecting freedom of expression allows even for abuse of religion and religious practices, and it expressly exempts ridiculing from the offence.<sup>298</sup> From a free speech perspective it is worthy of full quotation:

*"Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system."*

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<sup>297</sup> Helen Fenwick, *Civil Liberties and Human Rights*. 3rd ed. Cavendish Publishing. 2004. 329.

<sup>298</sup> Contrary to Canadian law not even the showing of good faith is required.

Notwithstanding the stated concern of English law with the protection of individuals, risks to public order resulted in decisions restricting speech very similar to those in Germany with regard to freedom of assembly. In *R (on the Application of Louis Farrakhan) versus Secretary of State for the Home Department*<sup>299</sup> the Court of Appeal upheld the exclusion of the Nation of Islam Leader, because of the likelihood of his planned speech causing racial disharmony and being deeply offensive to large sections of the population. Recent guidelines issued by the Crown Prosecutor stated that prosecutors should not ask courts to consider binding-over orders unless there is evidence of past conduct which, if repeated, is likely to cause a breach of the peace in future (Crown Prosecution Service Casework Bulletin No. 6 of 2000).

As to specific racially sensitive contexts (Holocaust denial, glorification of war crimes) Section 1 of the Malicious Communications Act 1988 makes it an offence to send information which is indecent, grossly offensive or false and known to be false by the sender. For an offence to be committed under this section, one of the purposes of sending the material must be to cause distress or anxiety to the recipient. Statements about racial characteristics may also fall, under specific circumstances, under this provision.

## HUNGARY

In the early years of transition to democracy a robust theory of speech developed in the context of incitement to racial hatred. The prohibition on incitement prohibited “incitement [uszítás] to hatred against the Hungarian nation or any nationality or against any national, religious, or ethnic group, or any group of the population in front of a large audience.” (See “incitement”; Art. 269 (1) of the Criminal Code as adopted in 1989). Furthermore, section (2) of Art. 269, concerning denigration, stated that “one who in front of a large public gathering uses an offensive or denigrating expression against the Hungarian nation, any other nationality, people, creed or race, or commits other similar acts, is to be punished for the offence by imprisonment for up to one year, corrective training or a fine”. Denigration was found to be an unconstitutional violation of free speech and also of the legal certainty requirements of a state where the rule of law prevails. The Hungarian Constitutional Court (hereinafter the HCC) recognised that *in principle* free speech has an especially high ranking among fundamental rights. In the process of defining the proportionality of a restriction on speech imposed by criminal law provisions, the HCC also considered whether there is any lesser restriction available (in some of its formulations the criminal sanction applied to speech must be absolutely necessary). The more distant or speculative the reason for restriction is, the more important it has to be in order to justify a limitation of freedom of speech.<sup>300</sup> Incitement to hatred against groups of persons may result in intolerance that is contrary to maintaining the democratic order. This warrants turning to criminal law as a last resort, particularly since the wording of the crime of incitement is precise enough to avoid abuse. Notwithstanding concerns regarding the social consequences of its decision, the HCC came to the conclusion that, on balance, criminalisation was unconstitutional since existing civil remedies sufficed.<sup>301</sup> Following its early precedent, the HCC systematically rejected the attempts of the government of that time to criminalise denigration (group libel) with greater precision. In 2004 the criminalisation of instigation (disparagement) was held to be unconstitutional,

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<sup>299</sup> [2002] All ER 289.

<sup>300</sup> 30/1992 AB. Hat.

<sup>301</sup> In practice several attempts were made to use civil law courts, but these were rejected in most cases for lack of standing as the defamatory statement was not found to be addressed to the plaintiff.

because it did not result in a clear and present danger of disrupting public peace.<sup>302</sup> Criminal group libel defined as “humiliation violating human dignity directed against racial or ethnic etc. groups” was also found to be constitutionally impermissible for again not posing a clear and present danger to fundamental rights.

There are no specific provisions in the criminal libel section of the Criminal Code about racist speech, though to the extent the racist etc. attack is offensive to dignity and honour it can be criminally prosecuted.

Following a somewhat obscure sentence in the 1992 HCC decision, ordinary courts became very reluctant to apply the incitement to hatred provisions. The prosecution does not find it applicable to antisemitic chants at football games (such as “the trains are ready for Auschwitz”). Furthermore, a parliamentarian called for the exclusion of Jews in the local press. The terms ‘exclude them’ were identical to those used in the preparation of race laws of the Hungarian fascist regime. This was found to fall outside Article 268 because of the lack of a clear and present danger. It was argued that in the current political situation one can rule out that such statements will result in the use of legislation covering racial discrimination.

## SWEDEN

Swedish legislation, considered among the most committed to fighting racism, clearly demonstrates the potential of repressive legislation that might restrict speech in a way that shocks public opinion. The relevant case is unrelated to racism but it shows potential misapplications in that context. Chapter 16, Section 8 of the Criminal Code provides that a person becomes guilty of agitation against a group by making a statement or otherwise spreading a message that threatens or expresses contempt for an ethnic group or any other group of people with reference to their race, skin colour, nationality or ethnic origin, religious belief or sexual orientation. Note that simple expression of contempt is included. Statements that are not considered to go beyond the limits of objective criticism of certain groups are not liable to punishment. For a statement to trigger criminal liability, it must clearly overstep the limits of objective and responsible debate regarding the group in question.

One of the official reasons for extending the protection against incitement against homosexuals as a group (beyond the needs of a vulnerable group) was the fact that racist ideologies often agitate against homosexuals and homosexuality as a part of their propaganda, interlinked with their general racist and antisemitic campaigns.

In the relevant case Pastor Green gave a sermon, in which referring to the position of the Bible he depicted homosexuals as sources of the spread of AIDS and their actions as ‘bestiality’. The courts found such speech threatening (not only regarding homosexuals) as the speech must be seen as containing insulting judgments about the group in general, even though Pastor Green was not completely categorical since he made certain reservations indicating that not all homosexuals are like those targeted by his criticism. (Note that insult *is* identified with threat!) Pastor Green was convicted and following the jurisprudence of the Supreme Court of Sweden the criminal law was considered not to be in violation of the freedom of expression provision of the Constitution and as there can be no religion-based exceptions in matters of contempt. The Supreme Court found, however, that the conviction would violate the European Convention on Human Rights (ECHR) for constituting a disproportionate restriction, as the speech in question did not amount to “hate

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<sup>302</sup> 18/2004 (V. 25.) AB hat.

speech” as allegedly understood by the ECHR. It held that nothing Pastor Green said is something that can be deemed to encourage or justify hatred of homosexuals.<sup>303</sup>

## **II. General problems with prevailing criminal law approaches from a freedom of expression perspective**

European constitutional systems are protective of free speech, while there is increasing importance attributed to the fight against discrimination and racism. Criminal laws are enacted in order to fight discrimination, but this was done at the national level in many countries without specific speech-related considerations. Nevertheless, constitutional principles everywhere require that in specific judicial decisions a proper balance should be achieved, even with regard to racist speech.

The prevailing anti-discrimination approach entails certain problems regarding freedom of expression. Firstly, it is not convincing that criminal law measures are necessary to achieve the objectives of protection against racism, xenophobia and actual acts of discrimination. Secondly, the context-bound approach, which considers the impact of speech always in the given context of the statement, might be speech restrictive *per se* in the sense that it does not offer clear guidance and due to its vagueness not only threatens legal certainty but also has a disturbing effect on the right to freedom of speech. In some instances, given the broad language intended to protect against racism, the courts are forced to use odd techniques of legal dogmatics as illustrated in the *Green* case, or in the finding of the Danish court in the Danish cartoons (civil) libel case, where in order to protect free speech, without saying so, the Aarhus Court had to conclude that the cartoons might have been offensive to some Muslims, but that "there is no sufficient reason to assume that the cartoons are or were intended to be insulting... or put forward ideas that could hurt the standing of Muslims in society."<sup>304</sup> (sic!)

Only in a few cases<sup>305</sup> have constitutional courts taken *categorical* positions in favour of freedom of expression in instances clearly related to racist speech. In addition to the Hungarian incitement decision already mentioned above, a recent decision of the Belgian *Cour d'Arbitrage* (157/2004) can be considered here. Further to a complaint made by the Vlaams Belang party, a provision of the 2003 law intended to combat discrimination<sup>306</sup> was found partially unconstitutional. Criminalising incitement to discrimination, hatred or violence against individuals or groups etc. because of religion, sexual orientation etc. is constitutional if discrimination is direct and intentional. It was found that a simple declaration of the intent to discriminate

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<sup>303</sup> The Supreme Court of Sweden. B 1050-05. 29 November 2005. Similar statements made by an imam and a protestant minister in the Netherlands were not found insulting as being expressions of hate and were intended to contribute to the public debate. Both the Swedish and the Dutch arguments show the problematic nature of the criminalization of certain forms of racist speech: like in the Dutch case racist speech often intends to contribute to public discussion by persuasion, though it might have threatening, intimidating impacts as well as it may contribute to hate or contempt. (See the El Moumni case and the Hoge Raad decision 14 January 2003 (LJN AE7632).

<sup>304</sup> Note in this context the importance to sustain the intentionality requirement for the crime. The Czech Supreme Court acquitted in 2005 Mr Zitko, the publisher of *Mein Kampf*. Lower courts sentenced him for supporting a movement aimed at suppressing human rights. The acquittal was based on lack of intent as Mr Zitko stated on the cover of the book that he published to book to demystify Hitler.

<sup>305</sup> For example, the Spanish Constitutional Court found against freedom of expression finding that there is need for banning racist and xenophobic public campaigns.

<sup>306</sup> Loi du 25 février 2003 tendant à lutter contre la discrimination et modifiant la loi du 15 février 1993 créant un Centre pour l'égalité des chances et la lutte contre le racisme. This law was intended to implement the equal treatment and race directives.

constitutes a disproportionate restriction of freedom of expression, as it makes it impossible for any debate to take place. Such debate could discourage a person who stated such an intention from acting on the basis of that intention (paragraphs B.59 to B.62). A statement which may or may not produce certain consequences cannot be considered incitement. The Court added that incitement requires encouragement, pushing someone to do something. Given that the 1981 Belgian law on the criminalisation of racial discrimination follows the same doctrinal approach that was used in the 2003 antidiscrimination act, the constitutionality of the anti-racism act became questionable. After all, a simple advocacy cannot be considered as ‘pushing’ and except in the case of an action plan, the consequences of racist statements may be completely speculative.

*‘Climate control’ and content restriction.* It is believed in many European countries that tolerating racist ideologies and the fallacies (such as Holocaust denial) that serve to justify such ideologies are impermissible in the light of the genocidal historical experience of Europe. This neither arbitrary nor capricious assumption forms the basis of the criminal legislation that aims at fighting racism and xenophobia. But lack of arbitrariness does not make the approach less problematic from the perspective of freedom of expression. The assumption that such preventive goals require criminalisation remains not fully convincing. As to contemporary, partly non-political racism and xenophobia it remains questionable that the same assumption is applicable. In other words, concerns and concepts based, for example, on scenarios dealing with Nazism or ethnic wars and genocide in the Balkans do not make much sense in the context of migrants. It seems more than unlikely that genocidal desires with sufficient political or street support will prevail in the member states of the European Union. The concept of *Klimakontrolle* seems to be insufficient to justify an across the board, generalised criminalisation of speech.

Of course, incitement to hatred in the sense of stirring up passions that could lead to violence is a crime, but here the “communication of ideas” element is secondary to the contribution to an illegal act, which makes the freedom of speech concern secondary. However, both German and Austrian law (Art. 283 of the Austrian Criminal Code) are satisfied with a *likelihood* of or *capacity* for such disturbance. Thus, in this case a kind of *res ipsa loquitur* applies. In other words, the fact that such statements were made, at least in serious form, means that these are capable of stirring up hatred and therefore do constitute a breach of public peace. Of course, such an interpretation of freedom of expression has the potential to violate fundamental assumptions concerning speech: speech is protected exactly because it is troubling. For a genuine protection of speech only actual breaches of the peace and the disruption of public order set acceptable limits to speech. To what extent there is a well founded sense of being threatened might of course be a consideration in the concept of social peace and public order. Compared to speculations of potential dangers to public peace and order, actual attacks on human dignity and the imposition of a badge of inferiority are of a different nature, since the principle of equal protection before the law requires the state to provide protection in such matters. However, it is not clear why criminal law is the proper (least restrictive) form of such protection instead of private law.

In as far as incitement to hatred is at least likely to generate actual violence against (racial, ethnic, migrant) groups or members of groups, it is close to violent action and therefore borders on preparing violence. Thus in this case it does not pose serious freedom of expression concerns. The violence triggered by speech deprives the utterance of its protection (or turns speech into action). However, lack of proximity of violence as a result of the speech may raise speech concerns. Incitement

to hatred may also be found in calls for discrimination against a race (ethnicity) etc. Such statements may also amount to calls to illegal action. Even where there is no such call the speech may be directed against constitutionally guaranteed equality. But a call for legalising (racial etc.) discrimination is unlikely to become governmental policy unless extreme violence changes democracies into something different, as it would require overturning of the constitutional order. In a democracy even advocacy that aims at changing the constitutional order without violence is generally accepted. As with all content prohibition there are practical difficulties too, and as such bans might silence minority positions. This was one of the crucial reasons why minority groups fighting racial segregation in the United States opted for unrestricted speech. After all, under specific circumstances a policy for segregated (or gender discriminating etc.) schools might be proposed by minorities and at least the affected minority would find that the very punishment of their speech in the name of anti-racism to be racist or xenophobic. To allow Roma or religious activists to voice such proposals but not to allow others to advocate similar schemes would run the risk of double standards and viewpoint discrimination.

*Attacks on religion as a proxy for racist speech.* The Belgian and Slovak<sup>307</sup> criminal laws do not include religion among the grounds of incitement to hatred. On the other hand German, Austrian, Czech, Hungarian, Danish and Swedish laws make no distinction between attacks based on religion, on race or against members of a religion or race. Therefore, attacks on religious grounds are treated as racist attacks and of course cover situations where religion is served as a proxy. A similar French provision resulted in the prosecution (and acquittal) of Michel Houellebecq. It is true that the incitement law clearly talks about attacks against groups determined on grounds of religion and not about attacks against religion (doctrines, objects of veneration, practices), but members of religious groups often believe that attacks on their religion equal attacks on religious groups. The borderline is difficult to determine, especially in statements where the negative behaviour or trait of the group is discussed as a consequence of the religion. (For an example of such difficulties see the trial against Oriana Fallaci.)

The above-mentioned amendment by the House of Lords to the Racial and Religious Hatred Bill, *supra* limits the possibility of using religion as a proxy for racist speech, while it allows in all other contexts the strong criticism and even ridiculing of religion and religious practices.

It should be added that by allowing considerations related to racism to prevail over other forms of discrimination is in a way a banalisation of the problem of racism. Anti-discrimination policies are tempted to apply a “one measure fits all approach” and handle different minorities identically because of the advantages of a mental economies of scale. This seems to be the source of the increasing tension between protection against discrimination and freedom of expression. Legislators interested in status quo maintenance extended what was thought to be reasonable in the race context to speech directed at other groups. Though all forms and grounds of discrimination based on more or less immutable characteristics should be condemned, there are substantial and even qualitative differences between racism and other forms of xenophobia and discriminatory speech. Although the European Union is moving towards a blanket approach to discrimination, it is not by accident that ICERD dealt with racism only, applying at least in some regards a rather narrow understanding. A similar drift or extension is to be noticed when racism,

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<sup>307</sup> It is, however, a crime in Slovakia to defame a group of inhabitants for their faith (Article 198 of the Criminal Code).

antisemitism and islamophobia are treated without the necessary distinction and mentioned together as a list in a sentence. Racism is essentially non-contextual, even if it is socially construed. Antisemitism is, however, contextual and has specific connotations in the sense that it led to the most systematic genocide in some countries but not in others, and therefore the likelihood of mass injustice is very different. As to islamophobia, which is a serious problem, fortunately we have no historically conditioned patterns of genocide or mass rights deprivation in Europe that exists in the context of racism or antisemitism. There are analytical differences among denials of humanity, especially when such denial occurs on grounds of alleged group pertinence.

The outrage of racism, its impact on dignity and its consequences, should not be compared with other group-related offences, and certainly not with attacks on religion (which even in terms of logic is different in the sense that it is not about an immutable character). These differences should be taken into consideration when one considers restrictions on speech, even if such considerations run against the prohibition of content discrimination.

It follows that for a better protection of speech, differences regarding the grounds of discrimination should be kept in mind in a systematic way. What might be an acceptable restriction of speech in certain societies with a given history and with serious social tension in the context of racism, at least as an exception, might not serve as a justification for similar restrictive measures in the context of less heinous discrimination and assumptions of inferiority, especially if it is not directed directly against an identifiable person.

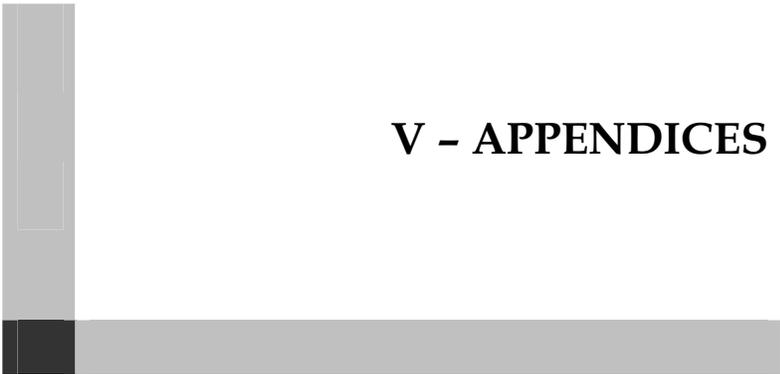
Freedom of expression is not only victim to the overgeneralisations of racism but also to the extensions and misplacements that apply to the effects of speech. While sanctioning threatening speech is reasonable and there might be compelling reasons to have recourse to the law against such utterances, threat is often replaced with insult. A similar drift occurs when the potential for violence and humiliating obstruction is identified with hate.

*Incitement.* Incitement remains a poorly defined concept. Its wideness invites speech restriction. It seems that it entails advocacy of racist views and the diffusion of racially offensive ‘facts’, e.g. ‘statistical data on group inferiority’. The inclusion of advocacy into incitement seems to contradict the more careful balance of the International Covenant of Civil and Political Rights (ICCPR), Art . 20(2). The ICCPR requires the prohibition of any advocacy of racial hatred that *constitutes incitement to discrimination, hostility or violence*. (Note that the Covenant does not require criminal prosecution, only some form of prohibition by law!) In the approach of the Covenant only advocacy that incites to discrimination etc. is punishable, not incitement to hatred. From a freedom of expression perspective, a clear distinction between mere advocacy and incitement should be drawn.

Certain efforts have been made to sustain that distinction. Hungarian courts that are motivated above all by concerns of legal certainty argue that incitement occurs when the speech intends to have an effect on intellectually uncontrollable emotions. The Hungarian Constitutional Court’s incitement decision also refers to this distinction, which, however, might not be fully in conformity with elementary notions of psychology, given the role emotions play in cognitive processes. The law in the United Kingdom concentrates on the *manner* of the expression: the incitement occurs only if the speech is threatening, abusive or insulting. (The inclusion of insult into incitement remains troubling.)

*Hatred.* One of the centrepieces of the legislation against racist speech is incitement to hatred. The criminalisation of the evocation of a specific sentiment has the potential to affect speech. After all, what is capable of generating such feelings remains a matter of speculation, bound by context and conjecture. The prominent role attributed to hate has to do partly with legal history. In some countries the term was used regarding crimes that endangered public peace by agitating hatred against social classes. It was believed that socialist agitators undermined peace by implanting passions into the masses which would then lead to insubordination. Secondly, the great trauma of racist genocide that motivated ICERD was Nazi racism. In this model systematic propaganda was capable of generating contemporary and lasting hatred against specific groups, in particular against so called ‘races’ (Jews in particular). But comparable tragedies of ethnic/religious conflict, such as that which occurred during India’s partition, cannot be explained on similar grounds, even if some level of hate propaganda (governmental but primarily private) is present. Interestingly, not even Article 4 of ICERD requires the criminalisation of incitement to hatred: it is mostly concerned about *incitement to discrimination*. The only hatred related concern is present in Article 4, paragraph a), where the Convention requires States to declare “an offence punishable by law all dissemination of ideas *based on racial superiority or hatred*”. Here, however, contrary to incitement to hatred, hate is not the consequence of speech but the source of a specific opinion. English law tends to limit the speech restrictive impact of the concept of ‘causing’ hate by excluding ridicule and perhaps contempt.

*Conclusion.* Criminal law (if it is efficient at all) is not the least intrusive means of fighting racism and xenophobia. Even if anti-racist penal provisions are felt inevitable to alter a racist climate or are needed to serve ‘climate control’, including a climate of security for ethnic and other vulnerable minorities -- a most questionable assumption --, present uncertainties and the largesse of criminal law concepts like ‘incitement’ ‘stirring up’ and ‘hate’ have excessive speech restrictive impact and are in need of radical narrowing.



## **V - APPENDICES**



## PROGRAMME

**Moderator: Professor Eva SMITH ASMUSSEN, Chair of ECRI**

### **SESSION 1: Setting the frame**

- 9:00 Welcome by Mr Philippe BOILLAT, Director General of Human Rights, Council of Europe
- 9:15 - 9:45 Combating racism while respecting freedom of expression: the challenges ahead
- Ms Isil GACHET, Executive Secretary to ECRI
  - Ms Jolien SCHUKKING, Chair of the Committee of Experts for the Development of Human Rights of the Council of Europe
  - Ms Agnes CALLAMARD, Executive Director, Article 19
  - Mr Aidan WHITE, General Secretary, International Federation of Journalists
- 9:45 - 10:30 Discussion
- 10:30 - 10:45 Coffee Break

**Moderator: Ms Winnie SORGDRAGER, Vice-Chair of ECRI**

### **SESSION 2: The destructive power of racist and discriminatory speech and expression: exploring the extent and the context**

- 10:45 - 11:00 Racist discourse: a powerful tool for fostering and perpetuating ideologies of racism and racial discrimination
- Professor Teun A. van DIJK, Universitat Pompeu Fabra
- 11:00 - 11:30 Racist and discriminatory expression in specific contexts:
- Political sphere: Professor Bronislaw GEREMEK, member of the European Parliament
  - Media: Mr Andrea BONANNI, *La Repubblica*
  - Internet: Mr Yaman AKDENIZ, Director of Cyber-Rights and Cyber-Liberties
- 11:30 - 13:00 Discussion
- 13:00 - 14:30 Lunch Break

**Moderator: Ms Sandra COLIVER, Senior Legal Officer for Freedom of Information and Expression, Open Society Justice Initiative, Open Society Institute**

### **SESSION 3: Defending freedom of expression and the right to be free from racism and racial discrimination: legal standards**

- 14:30 - 14:45 International and European legal standards for combating racist expression
- Mr Tarlach MCGONAGLE, Institute for Information Law, University of Amsterdam
- 14:45 - 15:00 The case law of the European Court of Human Rights
- Ms Françoise TULKENS, Judge at the European Court of Human Rights
- 15:00 - 15:20 The legislative framework and judicial review concerning racist and discriminatory expression in a selected number of European countries
- Professor Andras SAJO, Chair of Comparative Constitutional Programs, Legal Studies Department, Central European University
- 15:20 - 16:30 Discussion
- 16:30 - 16:45 Coffee Break

**Moderator: Professor Gün KUT, member of ECRI**

**SESSION 4: Combating racism while respecting freedom of expression: policy responses I**

- 16:45 - 17:00 Conclusions to be drawn from ECRI's monitoring work
- Professor Eva SMITH ASMUSSEN, Chair of ECRI
- 17:00 - 17:15 The recording and monitoring of racist expression: the challenges ahead
- Ms Beate WINKLER, Director of the European Monitoring Centre on Racism and Xenophobia (EUMC)
- 17:15 - 18:00 Discussion
- 18.00 - 19.00 Reception

**17 November 2006**

**Moderator: Mr Matthias TRAIMER, Member of the Steering Committee on the Media and New Communication Services (CDMC) of the Council of Europe**

**SESSION 5: Combating racism while respecting freedom of expression: policy responses II**

- 9:00 - 9:20 Education and training:
- Empowering minority groups
    - Mr Rui MONTEIRO, More Colour in the Media, Chairman of the Nordic Multiethnic Media Association (NORDSAM), Director of Invandrer TV
  - Reporting diversity
    - Ms Milica PESIC, Director, Media Diversity Institute
- 9:20 - 10:00 Discussion
- 10:00 - 10:20 Self-regulation:
- Political sphere
    - Mr Ed van THIJN, member of the Parliamentary Assembly of the Council of Europe
  - Media
    - Ms Dunja MIJATOVIC, Vice-Chairperson of the European Platform of Regulatory Authorities (EPRA) and Director of the Broadcasting Division in the Communications Regulatory Authority of Bosnia and Herzegovina
- 10:20 - 11:00 Discussion
- 11:00 - 11:30 Coffee Break

**Moderator: Mr Nils MUIZNIEKS, member of ECRI**

**SESSION 6: Towards a common strategy**

- 11:30 - 11:50 Presentation of the main findings by the Rapporteur of the seminar
- Mr Michael HEAD, member of ECRI
- 11:50 - 12:30 Discussion
- 12:30 Closing of the seminar

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