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### Minority rights and freedom of expression: a dynamic interface

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### **Introduction**

Having introduced the main international and European legal standards on freedom of expression in Chapter 5, and set out their general scope, the purpose of this chapter is to give an overview of States’ negative obligations. In other words, it will examine the extent to which relevant standards oblige States to limit the right to freedom of expression. More specifically, the focus will be on limitations which protect the rights of persons belonging to minorities either permissible international and European legal standards for combating racist (“hate”) speech.<sup>1</sup> Inevitably, then, this chapter aims to assess the main provisions of international law that frame the struggle against racist speech. It will consider the implementation or development of a number of those provisions, as well as the actual

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<sup>1</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.

interplay between them. Relevant non-legal standards will be considered to the extent that they complete the broader normative picture.

## 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, commencing with the Genocide Convention because of the protection it seeks to secure for the *existence* of minorities.

### 6.1.1 Genocide Convention

Article II of the Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention), 1948, defines "genocide" as:

- ... any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
- (a) Killing members of the group;
  - (b) Causing serious bodily or mental harm to members of the group;
  - (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
  - (d) Imposing measures intended to prevent births within the group;
  - (e) Forcibly transferring children of the group to another group.

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>2</sup> Before proceeding to dissect this formula and its potential for curbing freedom of expression in the name of protecting minority rights, a few general remarks concerning the Genocide Convention would be apposite.

In his dissenting opinion in *Gitlow v. New York*,<sup>3</sup> Justice Oliver Wendell Holmes famously asserted that "[E]very idea is an incitement".<sup>4</sup> While he may have overstated the point, the quip certainly does contain a grain of truth. Incitement does depend on the intensity with

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<sup>2</sup> *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, ICTR (Chamber I) Judgment of 2 September 1998, para. 550. It should be noted that Streicher's conviction predated the elaboration of the Genocide Convention and was based on the notion of war crimes as described in the London Charter of the International Military Tribunal (which set out the laws and procedures governing the Nuremberg Trials), 1945.

<sup>3</sup> 268 US 652 (1925); Justice Brandeis joined in Justice Holmes' dissenting opinion. In this case, the US Supreme Court upheld the constitutionality of a New York statute under which Benjamin Gitlow had been convicted of criminal anarchy for printing, publishing and knowingly circulating political writings calling, inter alia, for proletarian action to accomplish the Communist Revolution. The writings in question also favoured the replacement of the existing political order with a "proletarian dictatorship" and "the complete structure of Communist Socialism".

<sup>4</sup> *Ibid.*, at 673.

which one seeks to cause a desired result to be achieved via the agency of a third party. This is borne out by 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>5</sup>

In keeping with Justice Holmes' assertion that "every idea is an incitement", notions such as advocacy and incitement could usefully be conceptualised as two points on a continuum of encouragement or persuasion.

Ordinarily, incitement is considered to be a so-called inchoate or preliminary offence (other examples of such offences are attempt and conspiracy).<sup>6</sup> The rationale for the offence is described by one leading academic commentator as being that "someone who instigates or encourages another person to commit an offence should be liable to conviction for those acts of incitement, both because he is culpable for trying to cause a crime and because such liability is a step towards crime prevention".<sup>7</sup> Furthermore, the "offence of incitement is committed irrespective of whether the person(s) incited respond by committing the offence concerned". Incitement is therefore an offence distinct from whatever offence it promotes. Indeed, whenever incitement proves successful and the person incited carries out the substantive offence intended by the inciter, the latter is then properly regarded as an accomplice to the substantive offence, which also leads to criminal liability (albeit of a different nature).

As with almost all other types of crime,<sup>8</sup> incitement comprises a conduct element (the *actus reus*) and a fault element (the *mens rea*); the former involves "some form of encouragement or persuasion to commit an offence", while the latter involves intent that the substantive offence be committed. The nature and implications of both elements of the offence will be given separate consideration, *infra*.

Andrew Ashworth endorses the tendency to include inchoate offences within the criminal law, "both on the consequentialist ground of the prevention of harm and on the 'desert' ground that the defendant has not merely formed a culpable and harm-directed mental attitude but has also manifested it".<sup>9</sup> He continues:

However, shifting the focus to the occurrence or non-occurrence of harm attributes too much significance to matters of chance. This may be appropriate in a system of compensation, but not in a system of public censure such as the criminal law. There is a respectable conception of fairness, connected to principles of individual autonomy, that favours penalizing people who tried and failed – even if, because of some fact unknown to them, their attempt was [469] bound to fail. The moral difference between those who fail and those who succeed in causing harm is too slender to justify exempting the former from criminal liability.<sup>10</sup>

The preventive and punitive features of the offence - thus sketched – argue persuasively for the appropriateness of its inclusion among the punishable acts enumerated in the Genocide Convention.

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<sup>5</sup> *Ibid.*

<sup>6</sup> Andrew Ashworth, *Principles of Criminal Law* (Second Edition), (Oxford, Clarendon Press, 1995), p. 442.

<sup>7</sup> *Ibid.*, p. 462.

<sup>8</sup> With the notable exception of strict-liability offences, which do not require *mens rea*.

<sup>9</sup> Andrew Ashworth, *Principles of Criminal Law* (Second Edition), *op. cit.*, p. 468.

<sup>10</sup> *Ibid.*, pp. 468-469.

The Convention has not undergone the same organic growth as subsequent treaties elaborated under the auspices of the United Nations. Its failure to establish its own implementation machinery (notwithstanding the possibility for States to have recourse to the International Court of Justice under Article 9 of the Convention) has meant that it has not benefited from the interpretive development normally achieved through continuous monitoring scrutiny or adjudicative decisions. Similarly, unlike other treaties, it has no designated body to offer interpretive guidance, eg. by means of general comments, or to offer legal and technical advice to States regarding their implementation of the Convention's provisions. However, the direct incorporation of the Article III definition of genocide into the Statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY) (Article 4.3) and the ICTR (Article 2.3) has re-actualised the definition of genocide in international law.<sup>11</sup> The ICTR, in particular, 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 technical means of mass communication, such as by radio or television.<sup>12</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>13</sup> The requirement of directness does not rule out the possibility that incitement can be coded or veiled, as long as the intended meaning of the message is clear to its target audience. "Camouflaged incitement"<sup>14</sup> or "oblique incitement"<sup>15</sup> can be devastatingly potent, as is clearly illustrated by the transcripts of, for example, *The Media Case*. Although writing from the context of the *Brandenburg* test (see further, *infra*), David Crump has compiled a test based on "eight evidentiary factors for determining whether an utterance is incitement",<sup>16</sup> notwithstanding its camouflaged appearance:

1. The express words or symbols uttered;
2. The pattern of the utterance, including any parts that both the speaker and the audience could be expected to understand in a sense different from the ordinary;
3. The context, including the medium, the audience, and the surrounding communications;
4. The predictability and anticipated seriousness of unlawful results, and whether they actually occurred;
5. The extent of the speaker's knowledge or reckless disregard of the likelihood of violent results;
6. The availability of alternate means of expressing a similar message, without encouragement of violence;
7. The inclusion of disclaimers, and
8. Whether the utterance has "serious literary, political, or scientific value" (or, alternatively, whether it is "speech on a matter of public concern").<sup>17</sup>

<sup>11</sup> Article 4.3, Statute of the ICTY, as amended; Article 2.3, Statute of the ICTR, as amended; Rome Statute establishing International Criminal Court.

<sup>12</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>13</sup> The *Akayesu* case, *op. cit.*, para. 557; the Media case, *op. cit.*, para. 1011.

<sup>14</sup> David Crump, "Camouflaged Incitement: Freedom of Speech, Communicative Torts, and the Borderland of the Brandenburg Test", 29 Ga. L. Rev. 1 (1994).

<sup>15</sup> Larry Alexander, "Incitement and Freedom of Speech", in David Kretzmer and F. Kershman Hazan, Eds., *Freedom of Speech and Incitement Against Democracy* (The Netherlands, Kluwer Law International, 2000), pp. 101-118, at p. 106.

<sup>16</sup> *Ibid.*, at p. 52.

<sup>17</sup> *Ibid.*, at pp. 54-69.

Crump's test is useful, but it would require some tweaking before it could be applied to international law provisions. As already noted, whether actual events occur as a result of the incitement (point 4) is not relevant to the commission of the offence. In point 8, the first formulation is based on First Amendment jurisprudence and probably too parochial for wider international application, whereas the parenthetical alternative is closer to well-established concepts in the case-law of other international interpretative and adjudicative bodies, such as the European Court of Human Rights. Crump's test is one particular illustration of how carefully-devised methodologies for a case-by-case approach to "camouflaged incitement" (or, indeed, other kinds of contested expression) can unpack particular utterances as well as their illocutionary projects and determine whether, all things considered, they can legitimately be restricted. At the very least, adjudicative bodies should not be fixated on certain or particular words or formulae.

The relevant *mens rea* required for the crime of direct and public incitement was held by the ICTR 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>18</sup> It is frequently pointed out that the definitional requirement of specific intent can, in practice, be difficult to prove – certainly in comparison to a test based on a more objective central criterion. Nevertheless, the subjectivity of the intent is an important and distinguishing feature of the Convention.<sup>19</sup> It is generally accepted that courts should be entitled to "infer the necessary intent from sufficient evidence",<sup>20</sup> and this view has indeed been borne out in practice.<sup>21</sup> The notion of intent was preferred to that of "motive" by the drafters of the Convention.<sup>22</sup>

It has been suggested that "the Convention's most conspicuous weakness is [perhaps] that it insufficiently formulates preventive measures" and that to meaningfully address that weakness, relevant "international short-term and long-term action would need to relate to different stages in the evolution of a genocidal process – anticipation of its happening; early warning of its commencement; and action to be taken at the outset of or during a genocide itself to stop it".<sup>23</sup> Any monitoring or early-warning work carried out on the basis of the Genocide Convention would necessarily have to reckon with "hate speech" as a contributory factor to genocidal events. It is widely recognised that various kinds of incendiary or inflammatory speech (commonly referred to as "hate speech") targeting specific groups which do not amount to "direct and public incitement to commit genocide" can nevertheless be

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<sup>18</sup> The *Akayesu* case, *op. cit.*, para. 560; the *Media* case, *op. cit.*, para. 1012.

<sup>19</sup> Nicodème Ruhashyankiko, Special Rapporteur, *Study of the Question of the Prevention and Punishment of the Crime of Genocide*, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Doc. E/CN.4/Sub.2/416, 4 July 1978, para. 100; Josef L. Kunz, "The United Nations Convention on Genocide", 43 *The American Journal of International Law* (No. 4, October 1949), pp. 738-746, at p. 743.

<sup>20</sup> Benjamin Whitaker, *Revised and updated report on the question of the prevention and punishment of the crime of genocide*, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Doc. E/CN.4/Sub.2/1985/6, 2 July 1985, para. 39;

<sup>21</sup> *Akayesu*, *op. cit.*, para. ?

<sup>22</sup> Benjamin Whitaker, *Revised and updated report on the question of the prevention and punishment of the crime of genocide*, *op. cit.*, para. 38; Nicodème Ruhashyankiko, Special Rapporteur, *Study of the Question of the Prevention and Punishment of the Crime of Genocide*, *op. cit.*, paras. 101-106.

<sup>23</sup> Revised and updated report on the question of the prevention and punishment of the crime of genocide prepared by Mr. B. Whitaker, 2 July 1985, UN Doc. No. E/CN.4/Sub.2/1985/6 (see also the Corrigendum thereto: UN Doc. No. E/CN.4/Sub.2/1985/6/Corr.1), para. 78.

instrumental in exacerbating inter-group tensions and thereby creating the kind of social climate which is conducive to the perpetration of genocidal activities.

The term “hate speech” is commonly used in international politico-legal discourse, despite the fact that it is not authoritatively defined in any binding international treaty. As a consequence, the precise ambit of the term is uncertain (see further, *infra*). Whereas direct and public incitement to commit genocide could be considered a (very extreme) form of “hate speech”, the converse is not necessarily true, i.e., it cannot be assumed that “hate speech” amounts to direct and public incitement to commit genocide. A very exacting definitional threshold must be crossed for hate speech to constitute the latter. Nevertheless, hate speech remains of great concern in the context of the Convention because of its potential contribution to the creation of a climate of hatred in which genocidal activities are more likely to be carried out. William Schabas has referred to hate propaganda (which is also a definitional notch above ordinary hate speech) as the Convention’s “blind spot”.<sup>24</sup> This line of thinking prompts a number of important considerations, concerning, in particular: the reasons for the original omission of hate propaganda from the Genocide Convention; the extent to which other international legal instruments compensate for that omission, and the extent to which the potential negative effects of that omission are being overcome by current-day efforts to anticipate and prevent genocidal tendencies.

During the drafting of the Convention, an amendment was proposed that would have included in Article III a sub-paragraph rendering punishable as acts of genocide: “All forms of public propaganda (press, radio, cinema, etc.) aimed at inciting racial, national or religious enmities or hatreds or at provoking the commission of acts of genocide”.<sup>25</sup> The arguments deployed against the proposed amendment prevailed.<sup>26</sup> First, it was submitted that propaganda for genocide would in virtually all cases also amount to incitement to genocide, so the enumeration of a separate offence of making propaganda for genocide would be superfluous. Second, it was submitted that the punishment of propaganda “aimed at inciting racial, national or religious enmities or hatreds” would go beyond the remit of the Convention insofar as “the intention to destroy a specific group, which was an essential part of the definition of genocide, would be absent”.<sup>27</sup> The standard argument that measures seeking to punish propaganda might unduly encroach on freedom of expression was also invoked.

Although Schabas has identified the failure of the Genocide Convention to prohibit hate propaganda as its blind spot, he does readily concede that this failure has been corrected somewhat “by subsequent international human rights instruments dealing with racial discrimination”.<sup>28</sup> In fact, international human rights instruments comprise a wide panoply of provisions – both generalistic and dealing specifically with racial discrimination – which extensively address hate speech (see *infra*). As such, there are ample measures available to the international community for dealing with the broader phenomenon of hate speech, and if they are used properly, i.e., coherently/synergically - and perhaps also imaginatively, there should

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<sup>24</sup> William A. Schabas, “Hate Speech in Rwanda: The Road to Genocide”, (2000) 46 McGill L.J. 141, at 162.

<sup>25</sup> Amendment (A/C.6/215/Rev.1), cited in Nicodème Ruhashyankiko, Special Rapporteur, *Study of the Question of the Prevention and Punishment of the Crime of Genocide*, *op. cit.*, para. 117. Ruhashyankiko also notes that the Secretary-General’s draft (E/447) “contained provisions whereby propaganda in favour of genocide was declared punishable” - *ibid.*

<sup>26</sup> For a description of the drafting process concerning this particular item, see William Schabas, “Hate Speech in Rwanda: The Road to Genocide”, *op. cit.*, at pp. 163-167.

<sup>27</sup> *Ibid.*, para. 119.

<sup>28</sup> William Schabas, “Hate Speech in Rwanda: The Road to Genocide”, *op. cit.*, at pp. 162-163.

be little ground for fears that hate speech which is unpunishable under the Genocide Convention would not be detected and dealt with under other international instruments.

To the extent that hate speech/propaganda is a relevant focus for early-warning mechanisms, the analysis needs to be both cautious and sophisticated. As noted by Benjamin Whitaker, any preventive international action “would need to relate to different stages in the evolution of a genocidal process – anticipation of its happening; early warning of its commencement; and action to be taken at the outset of or during a genocide itself to stop it”.<sup>29</sup> In this connection, it is imperative not only to condemn the causes of genocidal activities, but to be analytical of various processes of causation too.<sup>30</sup> The causal relationship between speech and action is complex and contentious at the best of times, but it seems intuitively sound to assume that the nature of that relationship (whatever it may be) will vary depending on the stage of the evolving genocidal process. Catharine MacKinnon sums up many of the complexities involved in her praise for the approach of the ICTR in *the Media Case*:<sup>31</sup> “Instead of trying to shoehorn the relation between expression and action into a single formulation, the Tribunal, sticking close to the factual record, recognized the many dynamic connections between word and deed that a complex social conflagration like genocide expectably generates”.<sup>32</sup> MacKinnon also perspicaciously notes that the relevance of “The strong but subtle principles articulated in *The Media Case*”<sup>33</sup> reaches beyond both the case at hand and the exceptional nature of (pre- or potentially) genocidal contexts. The principles in question are “applicable to many legal areas of speech regulation”<sup>34</sup> and are well-suited to the purposes of day-to-day adjudication and application.

The CERD declared its “determination to provide the Special Adviser on the Prevention of Genocide with timely and relevant information on laws, policies and practices that may indicate systematic or systemic discrimination based on race, colour, descent, or national or ethnic origin which may potentially result in violent conflict and genocide”.<sup>35</sup> For that purpose, it undertook “to develop a special set of indicators related to genocide, including the cultural and historic roots of genocide and the importance of recognizing the multicultural dimension of most societies”.<sup>36</sup>

CERD then proceeded to develop a set of “key indicators” which could “serve as a tool for the Committee, when examining the situation in a State party under one of its procedures, to assess the existence of factors known to be important components of situations leading to conflict and genocide”.<sup>37</sup> It explained its proposed approach as follows: “If one or more of the following indicators are present, this should be clearly stated in the concluding observations or decision, and the Committee shall recommend that the State party report, within a fixed deadline, to the Committee under the follow-up procedure on what it intends to do to

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<sup>29</sup> Benjamin Whitaker, *Revised and updated report on the question of the prevention and punishment of the crime of genocide, op. cit.*, para. 78.

<sup>30</sup> *Ibid.*, para. 80.

<sup>31</sup> Note: at the time of writing, the full text of the Appeal Judgment in this case was not publicly available.

<sup>32</sup> Catharine A. MacKinnon, “Prosecutor v. Nahimana, Barayagwiza, & Ngeze. Case No. ICTR 99-52-T”, 98 *The American Journal of International Law* (No. 2, April 2004), pp. 325-330, at 329.

<sup>33</sup> *Ibid.*, at 330.

<sup>34</sup> *Ibid.*

<sup>35</sup> Declaration on the prevention of genocide, Committee on the Elimination of Racial Discrimination, 17 October 2005, CERD/C/66/1, para. 3.

<sup>36</sup> *Ibid.*

<sup>37</sup> Decision on follow-up to the declaration on the prevention of genocide: indicators of patterns of systematic and massive racial discrimination, Committee on the Elimination of Racial Discrimination, 14 October 2005, CERD/C/67/1.



ameliorate the situation”. The collective scope of the indicators is broad; with discrete focuses of attention including: the lack of legislative and institutional frameworks to prevent racial discrimination and provide redress for victims; “Systematic official denial of the existence of particular distinct groups”; systematic exclusion from participation in public life; serious patterns of targeted violence which is ethnically-motivated. The indicators focusing specifically on matters with implications for freedom of expression are the following:

5. Grossly biased versions of historical events in school textbooks and other educational materials as well as celebration of historical events that exacerbate tensions between groups and peoples.
8. Systematic and widespread use and acceptance of speech or propaganda promoting hatred and/or inciting violence against minority groups, particularly in the media.
9. Grave statements by political leaders/prominent people that express support for affirmation of superiority of a race or an ethnic group, dehumanize and demonize minorities, or condone or justify violence against a minority.

The underlying concerns of these focuses, *viz.* the portrayal of historical events (which in turn raises broader questions about collective memory), the corrosive impact of hateful propaganda (and broader questions concerning the role and responsibilities of the media as regards the same), and the far-reaching effects of hateful statements by public figures and the legitimacy conferred on those statements by the status of those figures, are recurrent in debates concerning freedom of expression and minorities. They will be considered in greater depth, *infra*. In anticipation of that discussion, it suffices here to note that the importance of these concerns stems not only from their identification as possible indicators of situations which could degenerate into conflict or genocide. Equally, they are good markers of situations in which the objective of comprehensive pluralistic tolerance (discussed in Chapter 3, *supra*) is not being attained. As such, these concerns routinely inform the monitoring process under the Framework Convention for the Protection of National Minorities, as will be demonstrated below. Similarly, the UN Independent Expert on minority issues has also adverted to the relevance of such indicators and stressed their importance for protecting the physical integrity of minorities (which she has identified as one of her main areas of concern).<sup>38</sup> CERD’s already-mentioned intention to act as an early-warning mechanism for the SAPG also implies that office’s engagement with the practical application of the indicators. It is interesting to note that the SAPG has, off his own bat, commissioned a comprehensive study on international human rights standards relating to incitement to genocide and racial hatred.<sup>39</sup> The convergence of different institutional interests in the CERD Guidelines is clear evidence of their value as a tool for wide application (i.e., by other interested parties and not just in the formal context for which they were developed by CERD).<sup>40</sup>

Useful as these indicators are for monitoring and early-warning purposes, they should not be considered in isolation: their usefulness and importance would be greatly overstated if they were not assessed in light of the presence of other indicators and the overall contextual

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<sup>38</sup> Specific Groups and Individuals: Minorities, Report of the independent expert on minority issues, Gay McDougall, Commission on Human Rights (62<sup>nd</sup> session, 6 January 2006), E/CN.4/2006/74, para. 71. See also in this connection, *ibid.*, paras. 50 (where the Independent Expert welcomes the CERD initiatives on genocide-prevention, discussed *supra*) and 22 (where she sets out the “four broad areas of concern relating to minorities around the world, based on the [UN] Declaration on the Rights of Minorities and other relevant international standards relating to minority rights”).

<sup>39</sup> Toby Mendel, “Study on International Standards Relating to Incitement to Genocide or Racial Hatred” for the UN Special Advisor on the Prevention of Genocide (April 2006), document not public, but on file with author.

<sup>40</sup> See further: William A. Schabas, *Preventing Genocide and Mass Killing: The Challenge for the United Nations* (Minority Rights Group International, 2006), p. 20.

situation. CERD has been very forthright in its recognition of the risk that the reliability of its indicators could be compromised if their assessment was not sufficiently contextually embedded:

As these indicators may be present in States not moving towards violence or genocide, the assessment of their significance for the purpose of predicting genocide or violence against identifiable racial, ethnic or religious groups should be supplemented by consideration of the following subset of general indicators:

1. Prior history of genocide or violence against a group.
2. Policy or practice of impunity.
3. Existence of proactive communities abroad fostering extremism and/or providing arms.
4. Presence of external mitigating factors such as the United Nations or other recognized invited third parties.

In order to summarise the essential points of the foregoing discussion, a number of penultimate overall observations will now be marshalled. First, as suggested by its full title, the Genocide Convention pursues the twin objectives of prevention and punishment of genocide. Measures seeking to advance its preventive remit – both tried and theoretical – necessarily have implications for other human rights, not least freedom of expression. The most obvious illustration of this involves offsetting the presumptive causal connection between incitement and virulent forms of “hate speech” and genocide against the presumptive interference with the right to freedom of expression that regulation of such forms of speech entails. The foregoing discussion has shown that this conundrum is not intractable, but that considerable circumspection is required for its resolution. Interpretive clarity as regards key legal terminology is indispensable, as is sensitive, contextualised analysis of impugned speech. Various specialised human rights mechanisms have undertaken formal action designed to prevent genocide; much of this action has been concerted and achieved in a spirit of cooperation, thereby demonstrating the conceptual proximity of the mandates in question and the interdependence of the rights they protect. Insofar as these measures deal with issues relating to freedom of expression, they have by and large tended to emphasise the positive, non-prescriptive role that media can play in this regard.

The only significant exception to this tendency is a practice known as “information intervention”.<sup>41</sup> The term is perhaps deceptively euphemistic. The coiner of the term, Jamie Metzl, describes it as “a soft form of humanitarian intervention”<sup>42</sup> or a form of intermediate action “between neglect and armed intervention”.<sup>43</sup> Its essence is the use by the international community of “information tactics” in an “aggressive manner” against a particular State or States “when this is justified on strong human rights grounds”.<sup>44</sup> Given the involvement of the international community and the implications such action would have for the sovereignty of a targeted State, the legitimacy of “information intervention” must be assessed in light of relevant provisions of the UN Charter.

As set out in Article 2(1) of the Charter, the UN is “based on the principle of the sovereign equality of all its Members”. Article 2(7) firms up this principle by stating:

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<sup>41</sup> Jamie F. Metzl, “Information Intervention: When Switching Channels Isn’t Enough”, 76 *Foreign Affairs* (No. 6, November/December 1997), pp. 15-20.

<sup>42</sup> Mark Thompson, “Defining Information Intervention: An Interview with Jamie Metzl”, in Monroe E. Price & Mark Thompson, Eds., *Forging Peace: Intervention, Human Rights and the Management of Media Space* (Edinburgh, Edinburgh University Press, 2002), pp. 41-65, at p. 41.

<sup>43</sup> Jamie F. Metzl, “Information Intervention: When Switching Channels Isn’t Enough”, *op. cit.*, at p. 20.

<sup>44</sup> Mark Thompson, “Defining Information Intervention: An Interview with Jamie Metzl”, *op. cit.*, at p. 41.

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

Chapter VII, for its part, is entitled: “Action with respect to threats to the peace, breaches of the peace, and acts of aggression”. Article 39 states that “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security”. Articles 41 and 42 read as follows:

Article 41

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Article 42

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

These are the main pillars of the legal framework within which “information intervention” would have to manoeuvre.<sup>45</sup> The sponsorship of “information intervention” by Metzl and others is clearly the product of disillusionment at how politicised, selective and ultimately ineffective the UN Security Council’s track record in humanitarian intervention has been. “Information intervention” is therefore presented as an alternative, but less radical, last-ditch attempt by the international community to prevent the outbreak of massive violence or genocide in a particular State or States. These are not measures which the present author would advocate lightly. They should only be countenanced in the most exceptional circumstances (eg., after the triggering of recognised early-warning mechanisms of legitimate international bodies with a mandate for genocide-prevention, or the concurrence of findings of a number of reputable independent expert bodies) and even then only after the most stringent legal safeguards have been met. Given the wide discretion of the Security Council for deciding what constitutes a “threat to the peace, breach of the peace, or act of aggression”, it is vital to insist on the need for stringent objective safeguards. Metzl himself is also alert to the need for circumspection in this regard; after spelling out the importance of maintaining “relative consensus”<sup>46</sup> about the international definition[s] of incitement and the interpretation of Article 20, ICCPR (see further, *infra*), he states:

As a precaution, there should be a strong presumption against jamming, with a narrowly defined and clearly delineated exception for broadcasts that constitute incitement where a genocidal act appears imminent. This determination could appropriately be made by the Security Council but might also be delegated to an international commission of political and human rights experts.<sup>47</sup>

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<sup>45</sup> See further in this connection: Alexander C. Dale, “Countering Hate Messages that Lead to Violence: The United Nations’s Chapter VII Authority to Use Radio Jamming to Halt Incendiary Broadcasts”, 11 *Duke J. of Comp. & Int’l L.* 109.

<sup>46</sup> Jamie F. Metzl, “Rwandan Genocide and the International Law of Radio Jamming”, 91 *The American Journal of International Law* (No. 4, October 1997), pp. 628-651, at p. 648.

<sup>47</sup> [footnote omitted] *Ibid.*, at p. 649.

In the past, techniques of information intervention have tended to focus on radio-jamming, a practice that has been defined as the deliberate interference with a broadcast “by transmitting *terrible noise* on the same frequency in order to make reception impossible”.<sup>48</sup> Needless to say, other existing definitions offer greater technological precision than “terrible noise”; for example: “the deliberate emission of electromagnetic (EM) radiation to reduce or prevent hostile use of a portion of the EM spectrum”.<sup>49</sup> This can involve introducing a “disrupting signal (causing just noise or ‘fuzz’) or an overriding signal (a different broadcast) into a specific frequency on the electromagnetic spectrum”.<sup>50</sup> A further distinction can be made between two further types of jamming. “Spot jamming” is a “pinpoint technique of jamming” whereby a receiver is used “to find the signal frequency transmitting the incendiary broadcasts and then tune a jamming signal to that frequency”.<sup>51</sup> “Barrage jamming”, on the other hand, involves the simultaneous jamming of a large number of frequencies, thereby preventing targeted broadcasters from circumventing the jamming by frequency-hopping. Each of these jamming techniques have their pros and cons, in terms of costs, expediency and efficiency. Barrage jamming is clearly the more invasive, but it also has the potential to affect broadcasts that are not incendiary by virtue of its blanketing tendencies.

Although to date, the theory and practice of information intervention have primarily concentrated on radio-jamming, this would not preclude the application of qualitatively comparable measures to the Internet in the future. Indeed, examples/allegations of such Internet-based measures have already surfaced in various quarters.<sup>52</sup> Such measures would conceivably include denial-of-service (DOS) attacks, which can take various forms. Two general forms of DOS attacks have been identified: (i) “Force the victim computer(s) to reset or consume its resources such that it can no longer provide its intended service”, and (ii) “Obstruct the communication media between the intended users and the victim so that they can no longer communicate adequately”.<sup>53</sup> Examples of DOS attacks include:

- attempts to “flood” a network, thereby preventing legitimate network traffic;
- attempt to disrupt a server by sending more requests than it can possibly handle, thereby preventing access to a service;
- attempts to prevent a particular individual from accessing a service;
- attempts to disrupt service to a specific system or person.<sup>54</sup>

Finally, as regards technical details of DOS attacks, they take effect through the:

1. consumption of computational resources, such as bandwidth, disk space, or CPU time;
2. disruption of configuration information, such as routing information;
3. disruption of physical network components.<sup>55</sup>

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<sup>48</sup> (emphasis added) S. Leinwoll, cited in Arie Bloed & Pascale C.A.E. de Wouters d’Oplinter, “Jamming of Foreign Radio Broadcasts”, in Arie Bloed and Pieter van Dijk, Eds., *Essays on Human Rights in the Helsinki Process* (Dordrecht, Martinus Nijhoff Publishers, 1985), pp. 163-180, at p. 163.

<sup>49</sup> Don Herskovitz, cited in Alexander C. Dale, “Countering Hate Messages that Lead to Violence: The United Nations’s Chapter VII Authority to Use Radio Jamming to Halt Incendiary Broadcasts”, *op. cit.*, at p. 115.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> See, for example, Ian Traynor, “Russia accused of unleashing cyberwar to disable Estonia”, *The Guardian*, 17 May 2007. Similar accusations have been made against Russia in respect of Georgia [source].

<sup>53</sup> “Denial-of-service attack”, *Wikipedia*, consulted on 12 February 2007.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

In order to ensure the effective implementation of information intervention in practice, Metzl has recommended the establishment, under the auspices of the UN, of “an independent information intervention unit with three primary areas of responsibility: monitoring, peace broadcasting, and, in extreme cases, jamming radio and television broadcasts”.<sup>56</sup> He envisages it as a “well-trained and equipped rapid information response team to address and challenge media activities in a given country when those activities are inciting people to commit mass abuses whose realization appears imminent”.<sup>57</sup>

Finally, another issue with implications for freedom of expression concerns the status of genocide-denial. Under the Genocide Convention, this putative offence is not included among the enumerated “punishable” acts. Given that the prohibition of 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>58</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>59</sup>

### 6.1.2 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 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”.

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<sup>56</sup> Jamie F. Metzl, “Information Intervention: When Switching Channels Isn’t Enough”, *op. cit.*, at p.17.

<sup>57</sup> Jamie F. Metzl, “Rwandan Genocide and the International Law of Radio Jamming”, *op. cit.*, at p. 649.

<sup>58</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>59</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.

Nevertheless, Article 19 must be read in conjunction with Article 20, which further trammels the scope of the right. It reads:

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

Article 20(2) is crucial for the purposes of the present analysis, but before dispensing with Article 20(1) as being of lesser relevance to our central concerns, it is useful to note that it contains yet two more instances of definitionally problematic terms, i.e., “war” and “propaganda”. To repeat a point made in respect of “hate speech”, the term, “propaganda”, is sufficiently broad to cover a range of different types of expression which vary in terms of the harmfulness of their content, the sophistication of their presentation and strategies of dissemination and the gravity of their effects. In order to avoid undue encroachment on the right to freedom of expression, it is necessary that States exercise great caution when circumscribing the ambit of the term in legislative prohibitions at the national level. This concern featured prominently in debates during the drafting process.<sup>60</sup>

Turning, then, to Article 20(2), the obligation imposed on States can be essentialised as the adoption of the necessary legislative measures to prohibit the advocacy of national, racial or religious hatred when – and this is the crucial threshold – such advocacy amounts to incitement to discrimination, hostility or violence. As already explained in 6.1.1, advocacy must attain a certain degree of intensity before it can be considered to amount to incitement. It was also pointed out in that discussion that the nature of incitement is qualified by what is being incited. In the context of Article 20(2), “Incitement to ‘discrimination’ and ‘violence’ are legally defined (or definable) concepts”.<sup>61</sup> The same cannot be said of “hostility” and this has led to serious interpretive difficulties. Moreover, the term, “hatred”, is also very difficult to define in legal terms, although one commendable attempt to do so describes hatred as “an active dislike, a feeling of antipathy or enmity connected with a disposition to injure”.<sup>62</sup> Semantically, hatred is more intense than hostility, but the latter term (or at least some lexical variants thereof, eg. hostilities) does have a strong connotation of war. If Nowak’s insistence that Article 20 is unique among other substantive provisions of the ICCPR in terms of its clear responsiveness to the atrocities carried out by the Nazis and the general horrors of World War II<sup>63</sup> is to be taken seriously, the association of hostility with belligerent (inter-State) behaviour should not be ignored. However, other - more conventional - attempts to distinguish the meanings of “hatred” and “hostility” have also been put forward. Partsch, for instance, has suggested that “perhaps ‘hatred’ has a strong subjective element while ‘hostility’ suggests an attitude displayed externally”.<sup>64</sup> Unfortunately, neither the *travaux préparatoires* nor the HRC’s General Comment 11 (discussed *infra*) offer much guidance for deciphering the precise meaning of the terms and thereby unlocking the nature of their relationship. Interpretive difficulties concerning the qualifiers “national, racial or religious” did arise in the drafting of Article 20, but followed similar patterns to those in other comparable treaties and were not quite as problematic as hostility and hatred (and war and propaganda). Legal interpretive difficulties aside, these notions can also prove philosophically problematic. For instance, Michael Banton, drawing on the work of Karl Popper, rhetorically asks: “If

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<sup>61</sup> Karl Josef Partsch, “Freedom of Conscience and Expression, and Political Freedoms”, *op. cit.*, p. 228.

<sup>62</sup> 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.

<sup>63</sup> Nowak (2005), *op. cit.*, p. 468 and 475.

<sup>64</sup> Karl Josef Partsch, “Freedom of Conscience and Expression, and Political Freedoms”, *op. cit.*, at p. 228.

observable behaviour is the outward form of some inward condition, how can one be certain about the nature of that condition?”<sup>65</sup> Affective states cannot be detected or defined with medical objectivity; the determination is therefore necessarily subjective.

It is rarely disputed that Articles 19 and 20, ICCPR, are closely related. 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>66</sup> and another has written that it should be “understood as a *lex specialis* to” Article 19.<sup>67</sup> 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.<sup>68</sup> However, it is important to stress that the outcome of the drafting process was only achieved after much intense and divisive debate about the implications that restrictions such as those under discussion would be likely to have for the exercise of the right to freedom of expression. The intensity of States Parties’ ideological *prises de position* on this question can also be gauged from the tenor of the numerous reservations and interpretive declarations entered in respect of Article 20 upon ratification of the Covenant.<sup>69</sup> Similar ideological intensity flared up in the UN HRC during the preparation of its General Comment on Article 20 and appeared to jeopardise the practice of adopting consensual General Comments before necessary compromises were eventually brokered.<sup>70</sup>

It is 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), thereby prompting Nowak to label it “an alien element in the system of the Covenant”.<sup>71</sup> It provides for further restrictions by explicitly requiring that certain conduct “shall be prohibited by law”.<sup>72</sup> It does not prescribe “what kind of law” should assure prohibition at the national level and it would therefore appear that States enjoy some measure of discretion as to their choice of legislation.<sup>73</sup> It is clear, however, that some kind of law is required and that educational and purely administrative measures will not suffice to discharge the obligation of prohibition *by law*. The extent of the obligations created under Article 20 is often misinterpreted. It is therefore necessary to spell out that while Article 20(2) requires States to prohibit by law hatred that incites to discrimination, hostility or violence, it does not necessarily require States to criminalise such hatred.<sup>74</sup> This point, far from being of mere academic interest, has very practical consequences, as will be demonstrated in the discussion of State obligations under Article 4, ICERD, *infra*.

### *General Comment 11*

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<sup>65</sup> Michael Banton, *International Action Against Racism*, *op. cit.*, at p. 53.

<sup>66</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>67</sup> Nowak, *op. cit.* (2005), p. 477.

<sup>68</sup> Article 26 of the Human Rights Commission’s draft of 1954 had originally been positioned at the very end of the substantive provisions contained in the draft text. See further: Manfred Nowak, *op. cit.*, 2005, at p. 470; Marc Bossuyt, *op. cit.*, at p. 398?.

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<sup>70</sup> For an illuminating discussion of the preparation of General Comment, see: Dominic McGoldrick, *The Human Rights Committee*, *op. cit.*, pp. 484-490.

<sup>71</sup> Nowak (2005), *op. cit.*, p. 468.

<sup>72</sup> See further, Dominic McGoldrick, *The Human Rights Committee*, *op. cit.*, p. 480.

<sup>73</sup> Karl Josef Partsch, “Freedom of Conscience and Expression, and Political Freedoms”, *op. cit.*, at p. 228.

<sup>74</sup> *Ibid.*, at p. 229. Draft versions of the article would have obliged States to make incitement to racial hatred a crime, but such an approach did not prevail: Nowak, *op. cit.*, (2005), at p. 470.

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>75</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>76</sup>

A number of apposite analytical remarks should be made in relation to Article 20. First, its provisions are mandatory and “States parties are obliged to adopt the necessary legislative measures prohibiting the actions referred to therein”.<sup>77</sup> Second, as pointed out by the UN Human Rights Committee’s General Comment 11, “these required prohibitions are fully compatible with the right to freedom of expression as contained in article 19”.<sup>78</sup> Moreover, as also pointed out by the same General Comment, there is an umbilical link between these required prohibitions and the “special duties and responsibilities” that inhere in (the exercise of) the right to freedom of expression.<sup>79</sup> Fourth, there is a transfrontier dimension to Article 20(2), as it covers “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, whether such propaganda or advocacy has aims which are internal or external to the State concerned.”<sup>80</sup>

#### *Analysis of HRC Jurisprudence*

The jurisprudence of the HRC has, to date, provided only limited illumination of the relationship between Articles 19 and 20. For instance, in *J.R.T. and the W.G. Party v. Canada*,<sup>81</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>82</sup> The HRC, in declaring the case inadmissible, concluded that was no apparent need to consider the nexus between Articles 19 and 20.

In this regard, Nowak takes issue with McGoldrick’s conclusion that “A prohibition established in accordance with the terms of article 20 cannot found a violation of article 19”.<sup>83</sup> The essence of Nowak’s argument is that “the obligation in Art. 20 may not be interpreted in such a way as to establish for a State party the right to restrict other Covenant rights to an extent going beyond permissible interference therein”.<sup>84</sup> This means that “legal prohibitions under Art. 20 are to be interpreted in conformity with the restrictions that are legitimate under Art. 19(3)”.<sup>85</sup> It is submitted here that Nowak’s argument is correct and that it is also without

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<sup>75</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>76</sup> *Ibid.*

<sup>77</sup> UN Human Rights Committee, General Comment 11 – Prohibition of propaganda for war and inciting national, racial or religious hatred (Article 20) (19<sup>th</sup> session, 29 July 1983), para. 1.

<sup>78</sup> *Ibid.*, para. 2.

<sup>79</sup> *Ibid.*, para. 2.

<sup>80</sup> *Ibid.*, para. 2.

<sup>81</sup> Communication No. 104/1981, Decision of 6 April 1983.

<sup>82</sup> *Ibid.*, para. 8(b).

<sup>83</sup> Dominic McGoldrick, *The Human Rights Committee, op. cit.*, p. 491.

<sup>84</sup> Manfred Nowak (2005), *op. cit.*, p. 477.

<sup>85</sup> *Ibid.* This view is shared by Karl Josef Partsch; see: “Freedom of Conscience and Expression, and Political Freedoms”, *op. cit.*, at p. 230.



prejudice to the thesis that Articles 19 and 20 are contiguous (indeed, Nowak's subsequent arguments - to the effect that the "specific purposes for interference" set out in Article 20 could "easily be included under those in Article 19(3)" - confirm this<sup>86</sup>). Article 20 obliges States Parties to prohibit certain conduct by law, but does not specify how they should do so. As such, there is – as the expression goes – plenty of room for a slip 'twixt the cup and the lip. In other words, the manner in which the prohibition is assured at the national level could give rise to an impermissible restriction on the right to freedom of expression, for example if disproportionate measures were employed. It therefore stands to reason that measures adopted pursuant to the obligation contained in Article 20 should also have to pass muster under Article 19(3).

The case of *Faurisson v. France*<sup>87</sup> is one example of where the HRC 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>88</sup> While one Individual Opinion in the instant case posited that the statements on which Faurisson's conviction was based remained outside the boundaries of "incitement" as envisaged by Article 20(2), it is submitted here that the issue could have been probed further.<sup>89</sup>

In *Ross v. Canada*,<sup>90</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 restrictions may be permitted under article 19, may relate to other persons or to a community as a whole".<sup>91</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>92</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>93</sup>

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<sup>86</sup> *Ibid.*

<sup>87</sup> Communication No. 550/1993, HRC Decision of 8 November 1996.

<sup>88</sup> *Ibid.*, para. 9.6.

<sup>89</sup> *Ibid.*, Individual Opinion by Elizabeth Evatt and David Kretzmer, co-signed by Eckart Klein (concurring), para. 4. The Individual (concurring) Opinion of Cecilia Medina Quiroga also concurred in Evatt and Klein's Individual Opinion, but the Individual (concurring) Opinion by Rajsoomer Lallah considers the suitability of applying Article 20(2).

<sup>90</sup> Communication No. 736/1997, HRC Decision of 18 October 2000.

<sup>91</sup> *Ibid.*, para. 11.5.

<sup>92</sup> *Ibid.*, para. 11.5.

<sup>93</sup> *Ibid.*, para. 11.6.

### *Article 20's relationship with other ICCPR rights*

Article 20's connection with Article 19 is most obvious, but it is also connected to other articles in the ICCPR, even in fundamental ways. Article 20 can, for example, be "primarily conceived of as a special State obligation to take preventive measures at the horizontal level to enforce the rights to life (Art. 6) and equality (Art. 26)".<sup>94</sup> Because of the centrality of these two rights within the Covenant system, "it was decided to combat the roots of the main causes for their systematic violation (wars, as well as racial, national and religious discrimination) by way of preventive prohibitions in the area of formation of public opinion".<sup>95</sup> Article 20(2)'s connection with Article 26 is also of interpretive significance. Whereas Article 26 is concerned with the prohibition of, and provision of effective protection against, discriminatory acts, Article 20 is concerned with the prohibition of incitement to such acts.<sup>96</sup> This structural separation of incitement and principal acts reinforces the conceptual distinction between them which underscores the inchoate nature of incitement (see further, *supra*).

The restrictions set out in Article 20 can also have implications for other rights, such as freedom of religion, assembly and association, and minority rights. The link between Article 20 and Article 18 [the right to freedom of thought, conscience and religion] also merits scrutiny. The HRC has stated clearly that "no manifestation of religion or belief may amount to propaganda for war or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence".<sup>97</sup> Thus, advocacy of/incitement to such actions shall not be tolerated under the ICCPR, even if they are ostensible manifestations of religion or belief; in such circumstances, it is not only valid for States authorities to restrict the right to manifest religion or belief, they are obliged to do so.<sup>98</sup>

Article 20(2) also contemplates measures that "constitute important safeguards against infringement of the rights of religious minorities and of other religious groups to exercise the rights guaranteed by articles 18 and 27, and against acts of violence or persecution directed towards those groups".<sup>99</sup> Although the UN Human Rights Committee is right to describe these safeguards as "important", it would be erroneous to seek to infer therefrom any putative right not to be offended in one's (religious) beliefs or sensibilities. This point is relevant to a broader argument to be developed *infra*.

There have been calls, including by the UN Special Rapporteurs on freedom of religion or belief and on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, for the Human Rights Committee to elaborate a new General Comment on Article 20 that would, *inter alia*, elucidate "the interrelations between freedom of expression, freedom of religion and non-discrimination".<sup>100</sup>

### *Comparative perspective*

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<sup>94</sup> Manfred Nowak (2005), *op. cit.*, p. 468.

<sup>95</sup> *Ibid.*

<sup>96</sup> See further, *ibid.* (Partsch), at p. 229.

<sup>97</sup> UN Human Rights Committee, General Comment 22 – The right to freedom of thought, conscience and religion (Article 18) (48<sup>th</sup> session, 30 July 1993), para. 7.

<sup>98</sup> See further, *Ross v. Canada*, Communication No. 736/1997, paras. 11.5-11.8; Manfred Nowak, *U.N. Covenant on Civil and Political Rights – CCPR Commentary* (2<sup>nd</sup> revised edition) (Germany, N.P. Engel, 2005), pp. 426-7; 430.

<sup>99</sup> *Ibid.*, para. 9.

<sup>100</sup> Report further to Human Rights Council decision 1/107 on incitement to racial and religious hatred and the promotion of tolerance, *op. cit.*, at para. 61. See also, in this connection, *ibid.*, paras. 44-50 & 60.

For comparative purposes, it is interesting to consider how the similarly-inclined Article 13(5) of the American Convention on Human Rights (ACHR) has been crafted. Whereas Article 13(5), ACHR, borrows heavily from the wording of Article 20, ICCPR, it departs from that wording in one noteworthy respect: it recognises an explicit group element to general offences of hatred amounting to incitement to lawless violence or other similar illegal action:

Article 13(5)

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.

The focus of “incitement” here is on “lawless violence” or “any other similar illegal action”; the latter phrase is *prima facie* broad enough in scope to cover discrimination (specifically mentioned in Article 20(2), ICCPR), but it is doubtful whether it would also catch “hostility” (also specifically mentioned in Article 20(2), ICCPR), given the definition-resistant properties of the term and the resultant inconceivability that such a vague notion could be rendered illegal. Another significant difference is that Article 13(5), ACHR, refers to a non-exhaustive list of grounds for the advocacy in question. A structural difference between the two comparable provisions, which is not without substantive consequences, is that Article 13(5), ACHR, is incorporated into a more general article on the right to freedom of expression, thus explicitly recognising it as one of the permissible restrictions on that particular right. By way of contrast, Article 20, ICCPR, by virtue of its free-standing status, is applicable to other rights vouchsafed in the ICCPR as well (see further, *supra*).

### 6.1.3 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 organizations or activities as an offence punishable by law;
- (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

Article 4, ICERD, is rightly considered to be “one of the most difficult and controversial” articles of the entire Convention.<sup>101</sup> Because it explicitly creates a range of obligations for

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<sup>101</sup> Natan Lerner, *The U.N. Convention on the Elimination of all Forms of Racial Discrimination* (2<sup>nd</sup> Edition) (Alphen aan den Rijn, The Netherlands, Sijthoff & Noordhoff, 1980), p. 43.

States Parties which entail far-reaching interference with the exercise of the right to freedom of expression (in particular), Article 4 presented “many difficulties in all stages of its drafting”.<sup>102</sup> In that respect, it was no different to the corresponding article in the earlier UN Declaration on the Elimination of All Forms of Racial Discrimination (1963).<sup>103</sup> The complexity of the article is underscored by the varying nature of the obligations it creates.

The introductory paragraph to Article 4, ICERD, is condemnatory, but it also requires States to undertake to adopt certain “immediate and positive measures” 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. The use of the term “racial hatred” gave rise to the same kind of debates as those triggered by the term “hatred” in the context of the drafting of Article 20, ICCPR, (*supra*). Again, the question of the feasibility of effectively addressing a mental or emotional state was central here, but as Lerner points out, the question became much more acute in the context of the drafting of Article 4(a), where the term “hatred” was put forward as a crucial element of what would become a punishable offence.<sup>104</sup> The requirement that States “undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination” are not objectionable as such, but Theodor Meron has perceptively drawn attention to the largely under-scrutinised potential of the words “*inter alia*” which precede the specifically enumerated measures to be adopted by States to the aforementioned end.<sup>105</sup> However, as he sardonically also points out, “But even those measures which are enumerated pose problems”.<sup>106</sup>

Before examining the enumerated measures, a few words on the “due regard” clause are in order. The clause was introduced by way of amendment by the Nigerian delegate in the Third Committee. The purpose of the amendment was to assuage widely-held fears among (especially Western) delegates that the envisaged State obligations would unduly encroach on the right to freedom of expression (and association). The generalised reference to the UDHR implicitly included Articles 19 (freedom of opinion and expression) and 20 (freedom of assembly and association), as well as Article 29 (limitations on the exercise of rights and freedoms), to which Articles 19 and 20 are subject. Article 29(2) is of particular relevance; it 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.

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<sup>102</sup> *Ibid.*, at p. 47.

<sup>103</sup> Article 9 of the Declaration reads:

“1. All propaganda and organizations based on ideas or theories of the superiority of one race or group of persons of one colour or ethnic origin with a view to justifying or promoting racial discrimination in any form shall be severely condemned.

2. All incitement to acts of violence, whether by individuals or organizations against any race or group of persons of another colour or ethnic origin shall be considered an offence against society and punishable under law.

3. In order to put into effect the purposes and principles of the present Declaration, all States shall take immediate and positive measures, including legislative and other measures, to prosecute and/or outlaw organizations which promote or incite to racial discrimination, or incite to or use violence for purposes of discrimination based on race, colour or ethnic origin.”

<sup>104</sup> Natan Lerner, *op. cit.*, p. 48.

<sup>105</sup> 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, at p. 298.

<sup>106</sup> *Ibid.*

Thus, it is clear that the principles embodied in the UDHR include not only substantive rights, but also the permissibility of limitations on the exercise of those rights in certain circumstances.<sup>107</sup> Had the “due regard” clause not been so astutely inserted into Article 4’s opening paragraph, most of the enumerated measures would have been deemed incompatible with the right to freedom of expression.

Article 4(a), the first of the Article’s three operative paragraphs, enjoins States *inter alia* to declare a number of offences punishable by law. Given the abstruse style of writing throughout the Convention, especially in Article 4, it is useful to itemise the relevant offences, as follows:

- 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.

Questions about the nature and extent of State obligations under Article 4 are old, but recalcitrant. Differing interpretations of key terms and phrases have been advanced by various experts and the resultant confusion has been compounded by some astounding examples of drafting slippage by CERD itself. Whereas the individual offences which States are obliged to declare punishable by law have been unpacked here for the purposes of clarity, when CERD enumerated those offences in its General Recommendation No. 15 (“Organized violence based on ethnic origin” (Art. 4)), it failed to mention “incitement to racial discrimination”. Instead, it referred to “incitement to racial hatred” (para. 3), which simply does not figure in Article 4(a). Most unfortunately, this slippage was not a once-off occurrence. The mistake was repeated in General Recommendation No. 31 on the prevention of racial discrimination in the administration and functioning of the criminal justice system (para. 4(a)). Although this appears to be a simple editorial error, its consequences are potentially significant. The purpose of General Recommendations (GRs) is to elucidate the text of ICERD on the basis of CERD’s accumulated experience of monitoring procedures. As such, GRs are increasingly relied upon as valuable points of reference by States Parties and indeed all other interested parties as well. For such an inaccuracy to slip into two separate GRs significantly increases the risk of misquotation (and therefore misunderstanding) of the actual obligation, as set out in the original text of the Convention. Indeed, this risk has already materialised: the EU Network of Independent Experts on Fundamental Rights has, for example, referred to the categories of misconduct that are to be penalized under Article 4(a), ICERD, by quoting (but without spotting) the inaccurate wording of GR XV<sup>108</sup> instead of the primary text of the Convention. Of course, typical disclaimers about GRs not being binding on States Parties and the primacy of the original text of the Convention do serve to mitigate the effect of these slippages, but

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<sup>107</sup> For commentary, see: Torkel Opsahl, “Articles 29 and 30: The Other Side of the Coin”, in Asbjorn Eide, Gudmundur Alfredsson, Göran Melander, Lars Adam Rehof and Allan Rosas with the collaboration of Theresa Swinehart, Eds., *The Universal Declaration of Human Rights: A Commentary* (Norway, Scandinavian University Press, 1992), pp. 449-470.

<sup>108</sup> E.U. Network of Independent Experts on Fundamental Rights, *Combating Racism and Xenophobia through Criminal Legislation: The Situation in the EU Member States*, Opinion No. 5-2005, 28 November 2005, p. 27.

they certainly do not help the general problem of uncertainty about the precise obligations created by Article 4.

One final point to be made in this connection concerns the substantive offences which are the at the centre of the drafting errors in GRs XV and XXXI: the actual offence of “incitement to racial discrimination” and the interloper offence of “incitement to racial hatred”. The difference between these offences is by no means cosmetic, which underscores the seriousness of the drafting errors. As the UN High Commissioner for Human Rights succinctly put it when discussing relevant interpretive questions in a different context:

Unlike incitement to an act, it is almost impossible to prove whether hatred *per se* is or is not likely to result from the dissemination of certain statements. Regular evidentiary techniques may be employed to assess the risk of a particular illegal act occurring but these do not work well in assessing the risk of a purely psychological outcome. International courts have tended to avoid the issue and, instead, either simply conclude, perhaps after a cursory scan of the context, that the statements would be prone to have this result, or they focus on other factors, such as intent. (para. 69).

One key difference between the ICCPR and leading European treaties and other instruments which include measures for combating racism, on the one hand, and ICERD on the other hand, is that the latter requires that States render the dissemination of ideas based on racial superiority or racial hatred - without further explicit qualification – offences punishable by law. There is no requirement of intent, nor is there any requirement that harm or other concrete consequences would flow from the dissemination of such ideas. This is in striking contrast to other leading conventions and other non-treaty reference points in international law. For instance, the Additional Protocol to the Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems provides for certain acts to be criminalised “when committed intentionally and without right” (eg. Article 3.1); ECRI General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination also provides for the penalisation of certain acts “when committed intentionally”, as well as repeatedly emphasising that to penalise acts, they have to be committed “with a racist aim” (para. 18), and the as yet unadopted European Commission Proposal for a Council Framework Decision on combating racism and xenophobia provides for the criminalisation of certain “intentional conduct”, but also introduces some conditionalities relating to motive (“for a racist or xenophobic purpose”) and causation (“behaviour which may cause substantial damage to individuals or groups concerned”, “in a manner liable to disturb the public peace”) (draft Article 4).<sup>109</sup> Such requirements are important safeguards for the protection of the right to freedom of expression. The absence of such safeguards could rule out the possibility of examining any contextual situations (which could have a determinative impact on the consequences to which the impugned speech could lead). For example:

- Public debate: arguments advanced in the heat of debate and which unintentionally cause offence should not – normally speaking – be punishable, otherwise the vigour of public debate would be seriously jeopardised.
- Satire: by definition, satire and cartoons, etc., are irreverent and seek to challenge and provoke. In the absence of hatred or incitement, such types of expression clearly fall within the legitimate exercise of the right to freedom of expression.

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<sup>109</sup> All of these texts are properly contextualised and discussed in greater detail, *infra*.

- Unintentionally harmful expression: there is a world of difference between misguided or thoughtless expression that is incidentally harmful and expression that is deliberately calculated to be abusive or is fuelled by some kind of *animus*.

Nevertheless, in the context of ICERD, the relevance of qualifications such as intent and harmful consequences have been roundly dismissed, both by a major report on the implementation of Article 4,<sup>110</sup> and by CERD itself. As regards the former, José Inglés stated that “the mere act of dissemination is penalized, despite lack of intention to commit an offence and irrespective of the consequences of the dissemination, whether it be grave or insignificant”.<sup>111</sup> This has been borne out by CERD’s review of States reports. It is interesting to note that the original draft of Article 4(a) did include a consequentialist component, but that it was ultimately omitted from the final text after a divisive vote in the General Assembly.

As was recently pointed out by the UN High Commissioner for Human Rights, the absence of any requirement of intent or impact “may seem a subtle difference but it is significant in determining the scope of the law”<sup>112</sup> and, crucially, the manner of its formulation at the national level. ICERD in general and Article 4 in particular are not self-executing.<sup>113</sup> The amount of discretion available to States for the transposition of ICERD’s obligations into their domestic (legal) orders varies according to the specificity of the obligation. Thus, Article 2.1(d) confers some discretion on States as to the fulfilment of their general obligations under the Convention. It reads: “each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization”. The discretion – such as it is – stems from the import of the phrase “by all appropriate means” and from the clear suggestion that those means could include legislation “as required by circumstances”. Thus, the manner of implementation is not exclusively legal – other measures (which are often more effective for the attainment of specific goals in specific contexts) are also countenanced. Similarly, the adoption of new legislation is only required to the extent that existing legislation and other measures do not effectively fulfil relevant State obligations.

Nevertheless, Article 2.1(d) is only applicable to the extent that more specific obligations are not stipulated in individual articles, such as Article 4(a). Thus, the limited flexibility offered by Article 2.1(d) for the fulfilment of other State obligations is overridden by the explicit and more exacting requirement that States declare the acts enumerated in Article 4(a) “offences punishable by law”. As already intimated by the foregoing discussion, the phrase “punishable by law” is generally interpreted as obliging States to penalize or criminalize the offences in question. Furthermore, as with Article 4 in its entirety, the obligations created by Article 4(a) are mandatory in character.<sup>114</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>115</sup> It reasons:

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<sup>110</sup> José D. Inglés, CERD Special Rapporteur, Study on the Implementation of Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination, A/CONF.119/10, 18 May 1983.

<sup>111</sup> Inglés, *op. cit.*, at para. 83. This is shored up by similar individual references to all dissemination of ideas based on racial superiority (para. 93) and to all dissemination of ideas based on racial hatred (para. 96).

<sup>112</sup> *Op. cit.*, para. 39.

<sup>113</sup> Michael Banton, *op. cit.*, at ...

<sup>114</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>115</sup> CERD General Recommendation XV, *op. cit.*, para. 2.

“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>116</sup>

According to one leading commentator, the rationale behind the “strongly preventive or proactive 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>117</sup>

The mandatory nature of this requirement that States criminalise the enumerated acts, coupled with the lack of discretion available to States to make the punishability of the acts conditional on considerations such as the intent of its perpetrator or their (likely) harm-producing effects, is clearly very problematic from the perspective of freedom of expression. Even reliance on the “due regard” clause cannot resolve the potential frictions involved here as the utility of the clause lies in its reference to/invocation of prevailing standards of international law. However, the restrictions on freedom of expression provided for in Article 4(a), ICERD, go further than those countenanced in either the UDHR or the ICCPR.

In light of all the foregoing, Theodor Meron has concluded that in its interpretive approach to Article 4, CERD “appear[s] to endorse the notion that [Article 4] is based on absolute liability”.<sup>118</sup> This conclusion is radical, but not without some validity. Whereas “strict liability” can be taken to mean “Liability for a crime that is imposed without the necessity of proving *mens rea* with respect to one or more of the elements of the crime”,<sup>119</sup> Meron uses the term, “absolute liability”, which in some jurisdictions goes even further than strict liability and implies that “the only defences available [to the crime] are the basic ones of insanity, automatism, or necessity”.<sup>120</sup> Whether Article 4(a) does in fact rest on a notion of “strict” or “absolute” liability remains a moot question.

Article 4(a) also sits uneasily with certain other provisions in ICERD. The relationship between the limited flexibility as to the measures to be adopted by States under Article 2.1(d) and the strict requirement to declare certain acts “offences punishable by law” under Article 4(a) is not entirely coherent. One major incongruity is that “incitement to racial discrimination” is included under Article 4(a), meaning that it should be criminalized by States, whereas “racial discrimination” proper is covered by Article 2.1(d), meaning that it only has to be prohibited, but does not necessarily have to be criminalized, if other means are deemed more “appropriate” for bringing it to an end. Thus, provision is made for incitement to racial discrimination – an inchoate offence – to be more severely dealt with than racial discrimination – the principal offence being incited.<sup>121</sup>

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<sup>116</sup> *Ibid.*

<sup>117</sup> (footnote omitted). 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.*

<sup>118</sup> Theodor Meron, “The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination”, *op. cit.*, at p. 303.

<sup>119</sup> Elizabeth A. Martin, Ed., *A Dictionary of Law* (Fourth Edition) (Oxford, Oxford University Press, 1997).

<sup>120</sup> Andrew Ashworth, *Principles of Criminal Law* (Second Edition), *op. cit.*, p. 159.

<sup>121</sup> See further, 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. 27.



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 Rights and the rights explicitly set out in Article 5, ICERD.<sup>122</sup> “The right to freedom of opinion and expression” is among those rights specifically enumerated at Article 5.<sup>123</sup>

The Opinion of the Committee on the Elimination of Racial Discrimination in the case, *The Jewish Community of Oslo & others v. Norway*,<sup>124</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>125</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>126</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>127</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>128</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>122</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>123</sup> Article 5(d)(viii).

<sup>124</sup> Communication No. 30/2003, CERD Opinion of 22 August 2005.

<sup>125</sup> *Ibid.*, para. 3.1.

<sup>126</sup> (footnote omitted) *Ibid.*, para. 10.5. It does not, however, refer to any specific examples.

<sup>127</sup> *Ibid.*

<sup>128</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;

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>129</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>130</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.

On the basis of the brief foregoing analysis alone,<sup>131</sup> it seems difficult to speak of a universal approach to “hate speech”.<sup>132</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 not nearly as grave as the absence of *approximate* coherence across treaties would be.

#### 6.1.4 UNESCO standards

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<sup>129</sup> CERD General Recommendation XV, *op. cit.*, para. 4.

<sup>130</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>131</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>132</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, 2008).

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 organized 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.

This provision recognises the paradoxical potential of the media, both to curb and to exacerbate, racism and racial prejudice and highlights relevant responsibilities of media professionals. The provision is further bolstered, in particular, by Article 6.2<sup>133</sup> and Article 7<sup>134</sup> of the Declaration.

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.

Again, this is important recognition of the forum- and information-providing roles played by the media in pluralistic democratic society.

## **6.1.5 Other UN standards and mechanisms**

### **6.1.5(i) 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

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<sup>133</sup> Article 6.2 reads: "So far as its competence extends and in accordance with its constitutional principles and procedures, the State should take all appropriate steps, inter alia by legislation, particularly in the spheres of education, culture and communication, to prevent, prohibit and eradicate racism – racist propaganda, racial segregation and apartheid and to encourage the dissemination of knowledge and the findings of appropriate research in natural and social sciences on the causes and prevention of racial prejudice and racist attitudes with due regard to the principles embodied in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights."

<sup>134</sup> Article 7 reads: "In addition to political, economic and social measures, law is one of the principal means of ensuring equality in dignity and rights among individuals, and of curbing any propaganda, any form of organization or any practice which is based on ideas or theories referring to the alleged superiority of racial or ethnic groups or which seeks to justify or encourage racial hatred and discrimination in any form. States should adopt such legislation as is appropriate to this end and see that it is given effect and applied by all their services, with due regard to the principles embodied in the Universal Declaration of Human Rights [...]."

focus of the Declaration and Programme of Action of the World Conference<sup>135</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 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>136</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>137</sup> A list of suggested practical approaches to relevant problems is then enumerated.<sup>138</sup>

#### **6.1.5(ii) Work of Special Rapporteurs on Freedom of Expression**

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.

By way of final focus in this section, in their Joint Statement on Racism and the Media in 2001,<sup>139</sup> the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, insisted that:

Any civil, criminal or administrative law measures that constitute an interference with freedom of expression must be provided by law, serve a legitimate aim as set out in international law and be necessary to achieve that aim. This implies that any such measures are clearly and narrowly

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<sup>135</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.

<sup>136</sup> These issues are dealt with most extensively in paras. 86-94 of the Declaration.

<sup>137</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>138</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>139</sup> 27 February 2001, available at: <http://www.article19.org/docimages/950.htm>

defined, are applied by a body which is independent of political, commercial or other unwarranted influences and in a manner which is neither arbitrary nor discriminatory, and are subject to adequate standards against abuse, including the right of access to an independent court or tribunal. If these safeguards are not in effect, there is a very real possibility of such measures being abused, particularly where respect for human rights and democracy is weak, and hate speech laws have in the past been used against those they should be protecting.

In accordance with international and regional law, hate speech laws should, at a minimum, conform to the following:

- no one should be penalised for statements that are true;
- no one should be penalised for the dissemination of hate speech unless it has been shown that they did so with the intention of inciting discrimination, hostility or violence;
- the right of journalists to decide how best to communicate information and ideas to the public should be respected, particularly when they are reporting on racism and intolerance;
- no one should be subject to prior censorship; and
- any imposition of sanctions by courts should be in strict conformity with the principle of proportionality.

The Joint Statement takes a multifaceted approach to the relationship between racism and the media and in addition to the civil, criminal and administrative measures detailed above, it emphasises the importance of freedom of information and of promoting tolerance (discussed in greater detail, *infra*). While not legally binding in any formal sense, the Joint Statement is of certain interpretive value, not least because it reveals current thinking by the three special mandates for protecting freedom of expression about relevant existing legal standards.

### 6.1.6 European Convention on Human Rights<sup>140</sup>

The European Convention on Human Rights is the veritable centrepiece of human rights protection in Europe. Article 10, ECHR, reads as follows:

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

As with corresponding provisions in other international treaties, Article 10 sets out the right to freedom of expression, while recognising that its exercise involves duties and responsibilities and that it may be restricted on a number of enumerated grounds.

In its seminal ruling in *Handyside v. the United Kingdom*, the European Court of Human Rights affirmed that freedom of expression “is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the

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<sup>140</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.

demands of that pluralism, tolerance and broadmindedness without which there would be no democratic society”.<sup>141</sup> That ruling served to open up the critical space between types of expression that are inoffensive and therefore uncontroversially protected by Article 10 and types of expression that are excluded from its protection by virtue of Article 17.<sup>142</sup> The question of whether, or to what extent, “hate speech” should be protected is particularly contentious.

The European Court of Human Rights first examined the interaction between freedom of expression and relevant provisions of ICERD in *Jersild v. Denmark*.<sup>143</sup> In this case, also known as the “Greenjackets” case, the Court found that the conviction of a journalist - for aiding and abetting in the dissemination of racist views in a televised interview he had conducted with members of an extreme right-wing group (“the Greenjackets”) – amounted to a violation of Article 10, ECHR. The Court’s consideration of Article 10, ECHR, in light of ICERD (and in particular Article 4 thereof)<sup>144</sup> was, however, regrettably summary and it failed to grapple with the substantive issues involved. It merely stated that it is not for the Court to interpret the “due regard” clause in Article 4, ICERD, but that “its interpretation of Article 10 of the European Convention in the present case is compatible with Denmark’s obligations under the UN Convention”.<sup>145</sup> The Court held that Jersild’s conviction was not “necessary in a democratic society” and that it therefore violated his rights under Article 10, ECHR. This was largely due to considerations of context in (news) reporting and the importance of journalistic autonomy for the functioning of democracy. The positive obligations imposed on States Parties to ICERD by Article 4 were not deemed to have been contravened.<sup>146</sup>

The Grand Chamber of the European Court of Human Rights affirmed in its *Nachova* judgment 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>147</sup> This is an important formulation of the robust stance consistently taken by the Court against racism in its manifold manifestations, including racist expression. In a long line of cases, the Court has consistently refused to grant any protection under Article 10 ECHR to racist speech<sup>148</sup> or to statements

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<sup>141</sup> *Handyside v. the United Kingdom*, Judgment of the European Court of Human Rights of 7 December 1976, Series A, No. 24, para. 49.

<sup>142</sup> For extensive details of relevant case-law, see: Mario Oetheimer, “La Cour européenne des Droits de l’Homme face au discours de haine” (2007) 69(1) *Rev trim d h* 63; Anne Weber, “The case-law of the European Court of Human Rights on Article 10 ECHR relevant for combating racism and intolerance” in European Commission against Racism and Intolerance (ECRI), *Combating racism while respecting freedom of expression*, *op cit*, 97.

<sup>143</sup> *Jersild v. Denmark*, Judgment of the European Court of Human Rights of 23 September 1994, Series A, No. 298.

<sup>144</sup> Cited *supra*.

<sup>145</sup> *Jersild v. Denmark*, *op. cit.*, para. 30. See also, paras. 21, 28, 29, 31.

<sup>146</sup> Also of note here is the divisiveness of the judgment: the Court found in favour of a violation of Article 10 by twelve votes to seven.

<sup>147</sup> *Nachova and others v Bulgaria*, Judgment of the European Court of Human Rights (Grand Chamber) of 6 July 2005, para. 145. See also: *Timishev v Russia*, Judgment of the European Court of Human Rights (Second Section) of 13 December 2005, para. 56; *D.H. and Others v the Czech Republic*, Judgment of the European Court of Human Rights (Grand Chamber) of 13 November 2007, para. 176.

<sup>148</sup> Recent examples include: *Seurot v. France*, Inadmissibility decision of the European Court of Human Rights (Second Section) of 18 May 2004, Appn. No. 57383/00; *Norwood v. United Kingdom*, Inadmissibility decision of the European Court of Human Rights of 16 November 2004, Appn. No. 23131/03, Reports 2004-XI.

denying, disputing or minimising the Holocaust.<sup>149</sup> By way of illustration, the *Seurot* case concerned the publication in a school bulletin of a text by a teacher deploring the overrunning of France by hordes of Muslims from North Africa: the sanctioning of the teacher was found not to violate Article 10, ECHR, because of the undeniably racist tone of the article and the duties and responsibilities of the applicant in his capacity as a teacher. In the *Norwood* case, the applicant, a regional organiser for the British National Party (an extreme right-wing political party) displayed in the window of his flat a poster depicting the Twin Towers in flame, the words “Islam out of Britain – Protect the British People” and a symbol of a crescent and star in a prohibition sign. The applicant had been convicted of a public order offence by the domestic courts and the European Court of Human Rights agreed with the assessment of the domestic courts and concluded that his conviction did not breach Article 10, ECHR because:

[...] the words and images on the poster amounted to a public expression of attack on all Muslims in the United Kingdom. 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.

Cases involving claims for freedom of expression for racist, xenophobic or anti-Semitic speech,<sup>150</sup> Holocaust denial, or (neo-)Nazi ideas, are routinely held to be manifestly unfounded under Article 17 (‘Prohibition of abuse of rights’), ECHR, and thus declared inadmissible. Article 17 was designed as an in-built safety mechanism to prevent the Convention from being subverted by those whose motivation is contrary to its letter and spirit.<sup>151</sup> It reads:

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

Elements of Nazi ideology or activities inspired by Nazism have figured strongly in the bulk of the aforementioned batch of inadmissibility decisions. The extent to which Nazism is incompatible with the ECHR can be gauged from the oft-quoted pronouncement of the European Commission for Human Rights in *H., W., P. and K. v. Austria*: “National Socialism is a totalitarian doctrine incompatible with democracy and human rights and [that] its adherents undoubtedly pursue aims of the kind referred to in Article 17.”<sup>152</sup> The Court took its most trenchant stance against hate speech to date in the *Garaudy v. France* case,<sup>153</sup> which involved a challenge to the French Courts’ conviction of the applicant for the denial of crimes against humanity, the publication of racially defamatory statements and incitement to racial hatred. The European Court of Human Rights held that:

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<sup>149</sup> Recent examples include: *Garaudy v. France*, Inadmissibility decision of the European Court of Human Rights (Fourth Section) of 24 June 2003, Appn. No. 65831/01, Reports 2003-IX. See further, Tarlach McGonagle, “Wresting (Racial) Equality from Tolerance of Hate Speech” (2001) 23 *DULJ* 21.

<sup>150</sup> See, by way of recent example, *Ivanov v. Russia*, Inadmissibility decision of the European Court of Human Rights (First Section) of 20 February 2007, Appn. No. 35222/04.

<sup>151</sup> See further, Tarlach McGonagle, “Protection of Human Dignity, Distribution of Racist Content (Hate Speech)”, in Susanne Nikoltchev, Ed., *Co-Regulation of the Media in Europe, IRIS Special* (European Audiovisual Observatory, Strasbourg, 2003), pp. 43-46, at 46.

<sup>152</sup> Inadmissibility decision of the European Commission of Human Rights, Appn. No. 12774/87, 62 DR (1989) 216, at pp. 220/1.

<sup>153</sup> *Garaudy v. France*, Inadmissibility decision of the European Court of Human Rights (Fourth Section) of 24 June 2003, Application No. 65831/01.

[...] 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.

The Court considers that the main content and general tenor of the applicant's book, and thus its aim, are markedly revisionist and therefore run counter to the fundamental values of the Convention, as expressed in its Preamble, namely justice and peace. [...]<sup>154</sup>

A more problematic case, perhaps, as far as the boundaries of freedom of expression are concerned, was *Lehideux and Isorni v. France*.<sup>155</sup> The case concerned an advertisement in a national newspaper, *Le Monde*, as part of a campaign for the rehabilitation of the memory of General Philippe Pétain: the advertisement presented the General's life in a selective and positive manner, with certain dark chapters of the General's life being conspicuous by the absence of any reference thereto. In this case, the European Court again confirmed that protection would be withheld from remarks attacking the core of the Convention's values.<sup>156</sup> However, the impugned advertisement (as it did not amount to Holocaust denial or any other type of expression that would have prevented it from wriggling through the meshes of the Article 17 net) was held to be one of a class of polemical publications entitled to protection under Article 10.<sup>157</sup>

The above-cited judicial pronouncements have, both individually and collectively, usefully helped to clarify the status of performative speech<sup>158</sup> which is offensive, but does not necessarily amount to one of the various forms of advocacy or incitement defined in international human rights treaties.<sup>159</sup> As the relevant corpus of case-law from the European Court of Human Rights continues to grow, so too does the illumination of this rather grey area. *Gündüz v. Turkey*, for instance, also contributes to our understanding of where relevant lines are likely to be drawn by the Court. The case arose out of the participation of the applicant – the leader of an Islamic sect – in a live studio debate on topics such as women's clothing, Islam, secularism and democracy. The applicant was convicted by the Turkish Courts for incitement to hatred and hostility on the basis of a distinction founded on religion. However, the European Court of Human Rights held:

[...] Admittedly, there is no doubt that, like any other remark directed against the Convention's underlying values, expressions that seek to spread, incite or justify hatred based on intolerance, including religious intolerance, do not enjoy the protection afforded by Article 10 of the Convention. However, the Court considers that the mere fact of defending sharia, without calling for violence to establish it, cannot be regarded as "hate speech". Moreover, the applicant's case

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<sup>154</sup> *Ibid.*, p. 23 of the official English translation of excerpts from the decision.

<sup>155</sup> *Lehideux & Isorni v. France*, 23 September 1998, Reports of Judgments and Decisions, 1998-VII.

<sup>156</sup> *Ibid.*, para. 53. See also *Jersild v. Denmark*, *op. cit.*, para. 35.

<sup>157</sup> *Ibid.*, paras. 52, 55.

<sup>158</sup> For a general exploration of "performative speech", see: J. L. Austin, *How to do things with words* (Oxford/New York/Toronto/Melbourne, Oxford University Press, Repr., 1980).

<sup>159</sup> See, in particular, Article 20 of the International Covenant on Civil and Political Rights, which reads:

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

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



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>160</sup>

The foregoing paragraphs present the broad lines of the European Court of Human Rights' main principles governing (various kinds of) racist and hateful expression; this discussion is continued and expanded in s. 6.2, *infra*, when the finer details of relevant case-law will be explored and the contours of protected expression traced more sharply.

### 6.1.7 Other relevant 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.

#### 6.1.7(i) Cybercrime Convention and its Additional Protocol

One of the fiercest criticisms of the Council of Europe's Convention on Cybercrime<sup>161</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>162</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>163</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>164</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

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<sup>160</sup> *Gündüz v. Turkey*, Judgment of the European Court of Human Rights (First Section) of 4 December 2003, para. 51.

<sup>161</sup> ETS No. 185, entry into force: 1 July 2004.

<sup>162</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>163</sup> ETS No. 189, entry into force: 1 March 2006.

<sup>164</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.

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>165</sup>

A major section of the Additional Protocol concerns measures to be taken at the national level. In this regard, States are obliged to “adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the following conduct: distributing, or otherwise making available, racist and xenophobic material to the public through a computer system” (Article 3(1)). Central to this definition is the presence of intent or *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>166</sup>

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

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

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

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

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<sup>165</sup> See further, *ibid.*, paras. 10-22.

<sup>166</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.

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 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.

### **6.1.7(ii) European Convention on Transfrontier Television**

Article 7(1) of the European Convention on Transfrontier Television<sup>167</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”.

### **6.1.7(iii) 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>168</sup> has nevertheless elaborated a comprehensive strategy for tackling intolerance, hatred and (other) various contributory causes of hate speech.<sup>169</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, and is considered in detail in a separate section, *infra*.

## **6.1.8 European Union standards<sup>170</sup>**

### **6.1.8(i) General**

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<sup>167</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>168</sup> ETS No. 157, entry into force: 1 February 1998.

<sup>169</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, 2008).

<sup>170</sup> The author is grateful to Wouter Gekiere and Ilze Brands Kehris for helpfully identifying and locating documents consulted for the preparation of this section.

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.

Article 1 of the Charter of Fundamental Rights of the European Union stresses the inviolability of human dignity. That the Charter should begin with a focus on human dignity is not merely of symbolic importance; it also lays down one of the document's main ideological cornerstones.<sup>171</sup> It has been argued that Article 1 constitutes not only a fundamental right in itself, but the "real basis" of other fundamental rights.<sup>172</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 alignment is usefully synthesised in the Commentary of the Charter of Fundamental Rights of the European Union, as follows:

[...] according to the non-binding explanation of the Praesidium, pursuant to Article 52(3) of the Charter,<sup>173</sup> the meaning and scope of this right are the same as those guaranteed by the ECHR. Therefore 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>174</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).<sup>175</sup>

In 1996, a Joint Action (96/443/JHA) concerning action to combat racism and xenophobia was adopted on the basis of Article K.3 of the Treaty on the European Union.<sup>176</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

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<sup>171</sup> Article 1 reads: "Human dignity is inviolable. It must be respected and protected." See also the Charter's preambular reference to human dignity, which identifies it as one of the "indivisible, universal values" on which the European Union is founded (Recital 2).

<sup>172</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>173</sup> Author's footnote: Article 52 of the Charter is entitled "Scope of guaranteed rights".

<sup>174</sup> Gabor Halmay, "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>175</sup> It reads: "Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein."

<sup>176</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.

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>177</sup> Progress towards the adoption of the Proposal has been stymied by deep-seated concerns among certain Member States about the implications of the Proposal for freedom of expression.<sup>178</sup>

These concerns persisted despite the Proposal's 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".<sup>179</sup> The impasse that resulted from certain Member States' concerns 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 particular, on the issues surrounding the borderline between freedom of expression and the repression of racism and xenophobia",<sup>180</sup> which it duly did.

In 2006, Italy (which had strongly opposed the Commission's 2001 Proposal) withdrew its reservations to the text. That development enabled debate to be recommenced within the Council on the basis of a compromise proposal put forward during the Luxembourg Presidency in 2005.<sup>181</sup> Subsequently, in 2007, the Council reached a political agreement on the text and it was submitted to Parliament for renewed consultation.<sup>182</sup> The text was considered by the European Parliament in its legislative resolution of 29 November 2007.<sup>183</sup>

The main purposes of the Framework Decision can be gleaned from selected Recitals in its Preamble.<sup>184</sup> For instance, it is styled as a response to the need to define a common criminal law approach to racism and xenophobia within the EU, "in order to ensure that the same behaviour constitutes an offence in all Member States and that effective, proportionate and dissuasive penalties and sanctions are provided for natural and legal persons having committed or being liable for such offences" (Recital 5). However, its focus on criminal law "is limited to combating particularly serious forms of racism and xenophobia" and should be seen as one part of a broader framework of measures to counter racism and xenophobia

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<sup>177</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.

<sup>178</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.

<sup>179</sup> Recital 15, COM(2001) 664 final, *op. cit.*

<sup>180</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>181</sup> For further details of the chronology of the Proposal, see: Explanatory Statement to Draft Report on the proposal for a Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law (11522/2007 – C6-0246/2007 – 2001/0270(CNS)), Committee on Civil Liberties, Justice and Home Affairs (Rapporteur: Martine Roure), 19 September 2007.

<sup>182</sup> General Secretariat of the Council, Proposal for a Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law, Doc. No. 11522/07, n.d.

<sup>183</sup> European Parliament legislative resolution of 29 November 2007 on the proposal for a Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law (11522/2007 – C6-0246/2007 – 2001/0270(CNS)), Doc. No. P6\_TA-PROV(2007)0552.

<sup>184</sup> The dual aims of the draft Framework Decision were stated more succinctly in Article 1 of the Commission's 2001 Proposal: 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".

(Recital 6). Furthermore, owing to extant differences between Member States' cultural and legal traditions, "full harmonisation of criminal laws is currently not possible" (Recital 6). In other words, only a limited level of harmonisation is envisaged. It claims that the "[A]pproximation of criminal law should lead to combating racist and xenophobic offences more effectively, by promoting a full and effective judicial cooperation between Member States" (Recital 12). Finally, in this connection, Recital 13 is also important:

Since the objective of ensuring that racist and xenophobic offences are sanctioned in all Member States by at least a minimum level of effective, proportionate and dissuasive criminal penalties cannot be sufficiently achieved by the Member States individually, as rules have to be common and compatible, and since this objective can be better achieved at the level of the Union, the Union may adopt measures, in accordance with the principle of subsidiarity as referred to in Article 2 TEU and as set out in Article 5 TEC. In accordance with the principle of proportionality, as set out in the latter Article, this Framework Decision does not go beyond what is necessary to achieve those objectives.

The terms "racism and xenophobia" are of pivotal importance to the proposed Framework Decision. Nevertheless, neither term is defined in the latest draft of the text.<sup>185</sup> The Framework Decision's most important provisions are contained in its draft Article 1, which is entitled "Offences concerning racism and xenophobia". It reads as follows:

1. Each Member State shall take the measures necessary to ensure that the following intentional conduct is punishable:

(a) publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin;

(b) the commission of an act referred to in point a) by public dissemination or distribution of tracts, pictures or other material;

(c) publicly condoning, denying or grossly trivialising 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, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group;

(d) publicly condoning, denying or grossly trivialising the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group.

(e) For the purpose of paragraph 1 Member States may choose to punish only conduct which is either carried out in a manner likely to disturb public order or which is threatening, abusive or insulting.

(f) For the purpose of paragraph 1, the reference to religion is intended to cover, at least, conduct which is a pretext for directing acts against a group of persons or a member of such a group defined by reference to race, colour, descent, or national or ethnic origin.

2. Any Member State may, at the time of the adoption of this Framework Decision by the Council, make a statement that it will make punishable denying or grossly trivialising the crimes referred to in paragraph 1(c) and/or (d), only if the crimes referred to in these paragraphs have been established by a final decision of a national court of this Member State and/or an international court or by a final decision of an international court only.

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<sup>185</sup> The terms were defined in draft Article 3 of the Commission's 2001 Proposal, as follows: "the belief in race, colour, descent, religion or belief, national or ethnic origin as a factor determining aversion to individuals or groups".

Draft Article 2 enjoins Member States to take the measures necessary to ensure that aiding and abetting in the commission of, and the instigation of, conduct covered by draft Article 1, is punishable. Also of note is that draft Article 4 requires Member States to ensure that for offences other than those covered by draft Articles 1 and 2, racist and xenophobic motivation is considered an aggravating factor, or that such motivation may be taken into consideration by the courts in the determination of penalties for offences.

The current draft text contains repeated statements of deference to the right to freedom of expression, as enshrined in the ECHR and the Charter of Fundamental Rights of the European Union, and as developed in the constitutional and legal systems of Member States. Recitals 15 and 16 of the Preamble and Article 7 of the Framework Decision all profess this deference.<sup>186</sup> The clear repetition involved here can be explained as an endeavour to allay the fears of certain Member States that the Framework Decision would reduce the protection afforded to the right to freedom of expression, as discussed *supra*. A final provision meriting mention because of its direct implications for the right to freedom of expression is draft Article 9, entitled “Jurisdiction”. Express consideration is given to relevant conduct committed through information systems. More specifically, draft Article 9(2) provides:

When establishing jurisdiction in accordance with paragraph 1(a), each Member State shall take the necessary measures to ensure that its jurisdiction extends to cases where the conduct is committed through an information system and:

- (a) the offender commits the conduct when physically present in its territory, whether or not the conduct involves material hosted on an information system in its territory;
- (b) the conduct involves material hosted on an information system in its territory, whether or not the offender commits the conduct when physically present in its territory.

This provision is highly significant as it fills a gap left by older texts which did not anticipate the complex jurisdictional issues that would be raised by the subsequent advent of the Internet and Internet-based communicative techniques. As such, it reduces the possibility of offences committed through information systems remaining unpunished due to jurisdictional vacuums.

The Proposal is comprehensive in scope and if adopted, it is sure to prove the mainstay of future anti-racism action within the EU, not least because it would replace (and lead to the repeal of) Joint Action 96/443/JHA (discussed *supra*).<sup>187</sup> Although the Proposal has yet to be adopted, it has nevertheless already been relied upon by various bodies as an important point of reference.<sup>188</sup>

### **6.1.8(ii) The “Television without Frontiers” and Audiovisual Media Services Directives**

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<sup>186</sup> Article 7

Constitutional rules and fundamental principles

1. This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles, including freedom of expression and association, as enshrined in Article 6 of the Treaty establishing the European Union.

2. This Framework Decision shall not have the effect of requiring Member States to take measures in contradiction to fundamental principles relating to freedom of association and freedom of expression, in particular freedom of the press and the freedom of expression in other media as they result from the constitutional traditions or rules governing the rights and responsibilities of, and the procedural guarantees for, the press or other media where these rules relate to the determination or limitation of liability.

<sup>187</sup> Article 11. See also Recital 14.

<sup>188</sup> The European Court of Human Rights (Nachova case (Grand Chamber Judgment of 6 July 2005), *op. cit.*, para. 81); Network of Independent Experts on the EU Charter; ECRI... UN High Commissioner?

The “Television without Frontiers” (TWF) Directive devotes surprisingly little attention to measures to be taken to prevent the broadcasting of hateful content. The sole provision dealing *directly* with the issue is Article 22a, which reads:

Member States shall ensure that broadcasts do not contain any incitement to hatred on grounds of race, sex, religion or nationality.

Another relevant provision, however, is Article 12, which applies to advertising and teleshopping. It reads:

Television advertising and teleshopping shall not:  
(a) prejudice respect for human dignity;  
(b) include any discrimination on grounds of race, sex or nationality;  
(c) be offensive to religious or political beliefs;  
[...]

Under the new Audiovisual Media Services Directive (AVMSD), Article 22a, TWF, has been deleted, only to be reconfigured as Article 3b, which reads:

Member States shall ensure by appropriate means that audiovisual media services provided by media service providers under their jurisdiction do not contain any incitement to hatred based on race, sex, religion or nationality.

The new wording alters little in terms of the substance of the provision. However, it is noteworthy that it explicitly links the issues of “incitement to hatred” and “jurisdiction”. The tightening-up of the provisions on jurisdiction<sup>189</sup> was one of the major impulses in the process leading to the proposed revision of the Directive. A number of cases involving the broadcasting by satellite of “hate speech” into Europe have also conditioned regulatory thinking on this issue. It is also interesting to note that the initial formal proposal from the European Commission to revise the TWF Directive would have expanded the scope of the reference to incitement to hatred. It targeted incitement to hatred based on “sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”.<sup>190</sup> That proposed revision would have directly incorporated the impermissible grounds of discrimination set out in Article 13 of the EC Treaty (see further, *supra*), but it would also have juxtaposed notions of “hatred” and “discrimination”. The conceptual and practical implications of treating both notions in the same way have already been outlined in the context of ICERD, *supra*, and are also relevant here. The European Parliament proposed a number of amendments to the

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<sup>189</sup> See further: Berend Jan Drijber, “Jurisdictie in de Richtlijn audiovisuele mediadiensten”, 20 *Mediaforum* (Themanummer Richtlijn Audiovisuele Mediadiensten, Nr. 2, februari 2008), pp. 62-27; Egbert Dommering, [Chapter on Jurisdiction] in Oliver Castendyk, Egbert Dommering & Alexander Scheuer, Eds., *European Media Law* (Alphen a/d Rijn, Kluwer Law International, forthcoming 2008); Tarlach McGonagle & Ad van Loon, *IRIS Special: Jurisdiction over Broadcasters in Europe - Report on a Round-table Discussion*, (Strasbourg, European Audiovisual Observatory, 2002); Thomas Gibbons, “Jurisdiction over (Television) Broadcasters: Criteria for Defining ‘Broadcaster’ and ‘Content Service Provider’”, in A. Rossnagel, Ed., *Die Zukunft der Fernsehrichtlinie/The Future of the ‘Television without Frontiers’ Directive* (Baden-Baden, Germany, Nomos, 2005), pp. 53-60; André Lange & Susanne Nikoltchev, “Transfrontier Television in the European Union: Market Impact and Selected Legal Aspects”, Background Paper, Ministerial Conference on Broadcasting organised by the Irish Presidency of the European Union, Dublin and Drogheda, 1-3 March 2004.

<sup>190</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 (13 December 2005).



Commission's initial text, including the introduction of references to human dignity and integrity.<sup>191</sup> Those proposed amendments were ultimately not adopted in the final text.

For its part, Article 12, TWF, has been transmuted into Article 3e(c), AVMSD. It reads:

audiovisual commercial communications shall not:  
(i) prejudice respect for human dignity;  
(ii) include or promote any discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation;  
[...]

Its first prong (human dignity) remains unchanged; its second prong is extended to read “include or promote” and the range of bases for impermissible discrimination is expanded along the lines<sup>192</sup> proposed by the European Parliament for audiovisual media services and audiovisual commercial communications alike. As was shown in the preceding paragraph, the proposed expansion of the range of bases for impermissible discrimination was not adopted in respect of audiovisual media services. Finally, the reference to offensiveness to religious or political beliefs, contained in the third prong to Article 12, TWF, has been dropped. This is a significant omission, especially when considered in the context of the legal permissibility of offensive expression, as discussed at length, *infra*.

The question of banning/blocking (particular kinds of) broadcasts from other countries is neither new nor unique.<sup>193</sup> It raises a number of questions which are ideologically and legally troublesome.<sup>194</sup> Interestingly, one viewpoint aired during the drafting of Article 19 of the Universal Declaration of Human Rights, was that the phrase, “regardless of frontiers” implied ideological barriers and geo-political ones.<sup>195</sup> In Europe, the search for appropriate answers to relevant questions has become pressing,<sup>196</sup> but the general preoccupation is less with ideological concerns (as the broadcasts in question are measured against the yardstick of the

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<sup>191</sup> Amendment 44: Article 3e (Directive 89/552/EEC), Report on the 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, European Parliament Committee on Culture and Education, Rapporteur: Ruth Hieronymi, 22 November 2006, Doc. No. A6-0399/2006 (final); Amendment 107: Article 3e (Directive 89/552/EEC), European Parliament legislative resolution on the 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 (COM(2005)0646-C6-0443/2005-2005/0260(COD)) (Codecision procedure – first reading), 13 December 2006 (Doc. No. P6\_TA-PROV(2006)0559).

<sup>192</sup> Note that the European Parliament did not include “nationality” in its list of bases for impermissible discrimination, but that it was included in Article 3e(c) (ii), AVMSD.

<sup>193</sup> See *supra* in the context of the discussion of the Genocide Convention. For a European perspective, see also: Arie Bloed and Pascale C.A.E. de Wouters d'Oplinter, “Jamming of Foreign Radio Broadcasts”, in Arie Bloed and Pieter van Dijk, Eds., *Essays on Human Rights in the Helsinki Process* (Dordrecht, Martinus Nijhoff Publishers, 1985), pp. 163-180.

<sup>194</sup> See further, David Goldberg, “The most vexed question? Europe bans satellite television channels ‘inciting hatred’”, in Peter Molnar, Ed., *Hate Speech and its Remedies, op. cit.*, forthcoming 2008.

<sup>195</sup> The view was put forward by the Filipino delegate, Mr Aquino. For commentary, see: Albert Verdoodt, *Naissance et signification de la Déclaration des droits de l'homme* (Louvain, E. Warny, 1964), p. 190; Lauri Hannikainen and Kristian Myntti, “Article 19”, in Asbjorn Eide *et al.*, Eds., *The Universal Declaration of Human Rights: A Commentary, op. cit.*, pp. 275-286, at pp. 277-278.

<sup>196</sup> The issue has been described as “absolutely and urgently” requiring closer cooperation between relevant regulatory authorities throughout the EU, in candidate countries and in the European Economic Area. Conclusions of the High-level Group of Regulatory Authorities in the Field of Broadcasting - Incitement to hatred in broadcasts coming from outside of the European Union : European Broadcasting Regulators coordinate procedures to combat hate broadcasts in Europe, 17 March 2005.

main international legal norms) than with the legalistic/jurisdictional and technological complexities involved.<sup>197</sup> This is reflected in the focuses of the ongoing attempts of European regulatory authorities to consolidate existing cooperation between them, specifically with a view to combating incitement to hatred disseminated by (satellite) broadcasting.<sup>198</sup> The catalyst for these consolidation initiatives was a growing concern about the difficulties in regulating content that incites to racial and religious hatred which is broadcast from non-EU countries, as exemplified by the cases in which the French authorities banned the channels, *Al Manar*<sup>199</sup> and *Sahar 1*.<sup>200</sup> The channels were prohibited on account of the (violent) anti-Semitic content of their programming. Although both channels were subsequently also banned in other countries, eg. The Netherlands, their programming has continued to be available online.<sup>201</sup>

The above-cited prohibition on incitement to hatred contained in Article 22a, TWF, applies to all broadcasters established in EU Member States (Article 2(2) and (3)). In accordance with the criteria set out in Article 2(2) and (4), TWF, it also applies to third-country broadcasters if they use: a frequency granted by a Member State; a satellite transmission capacity appertaining to a Member State, or a satellite up-link located in a Member State.

It should also be noted in passing that an earlier precedent for such concerns was the *Med TV* saga.<sup>202</sup> In 1999, the former British Independent Television Commission (ITC) suspended and subsequently revoked the satellite television licence of *Med TV* (a service targeting a Kurdish audience) for repeated breaches of the terms of its licence agreement and the ITC Programme Code. More specifically, the ITC found that *Med TV* had broadcast material “likely to encourage or incite to crime or lead to disorder”.<sup>203</sup> In another case involving a Kurdish television station, *ROJ TV*, the Turkish Embassy in Denmark (where *ROJ TV* was based) submitted a complaint to the Danish Radio and Television Board alleging that the station had links with illegal organisations and that some of its programming amounted to incitement to hatred. The Danish Radio and Television Board considered the complaint and concluded that the impugned elements of *ROJ TV*'s programming did not amount to incitement to hatred, as

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<sup>197</sup> In the post-World War II period, however, the political debate about banning/blocking broadcasts was overtly ideological. In the debate, States positioned themselves on predictable sides of the usual Cold-War battle-lines. Whereas Western States promoted the principle of a free flow of information with minimal restrictions, the Soviet Bloc advocated principles of State sovereignty and non-intervention. This led to what has been termed an “Electronic War between East and West”: Arie Bloed and Pascale C.A.E. de Wouters d’Oplinter, “Jamming of Foreign Radio Broadcasts”, *op. cit.*, at p. 165. The debate was firmly polarised and particularly bitter, as can be gauged from relevant discussions which took place in the CSCE context: see further the account provided in *ibid.*

<sup>198</sup> Tarlach McGonagle, “European Commission: Broadcasting Regulators Fight Incitement to Hatred”, *IRIS* 2005-5: 5; Mara Rossini, “European Commission: Broadcasting Regulators Encouraged to Reinforce Cross-border Cooperation under the Television without Frontiers Directive”, *IRIS* 2006-5: 7.

<sup>199</sup> See further: Amélie Blocman, “FR – CSA Calls on Courts for Immediate Stop to Broadcasting by Unapproved Foreign Satellite Channel”, *IRIS* 2004-9: 11; Amélie Blocman, “FR – *Al Manar* TV Soap Opera Continues”, *IRIS* 2005-1: 12 and Amélie Blocman, “FR – Eutelsat Must Stop Broadcasting *Al Manar* TV”, *IRIS* 2005-2: 12; Philippe Achilléas, “La diffusion par satellite de programmes illégaux – L’affaire *Al Manar*”, *Communication – Commerce électronique* (Février 2005), pp. 39-42; “La régulation des chaînes extra-communautaires et la lutte contre le racisme et l’antisémitisme”, *La Lettre du CSA* (No. 185, June 2005), p. 15.

<sup>200</sup> See further: Amélie Blocman, “FR – CSA Serves another Formal Notice on Eutelsat”, *IRIS* 2005-3: 11; Amélie Blocman, “FR – *Conseil d’Etat* Upholds the Formal Notice Served on Eutelsat”, *IRIS* 2005-4: 9.

<sup>201</sup> See further: Rosa Hamming, “NL – Satellite Broadcasts Disseminating Hatred Blocked”, *IRIS* 2006-3: 17.

<sup>202</sup> See further: Stefaan Verhulst, “United Kingdom: MED-TV Receives Suspension Order”, *IRIS* 1999-4: 13; Tony Prosser, “United Kingdom: Regulator Revokes Licence of Satellite Broadcaster”, *IRIS* 1999-7: 12.

<sup>203</sup> ITC News Release of 22 March 1999.

set out in relevant legislative provisions, and therefore was not in breach of the same provisions.<sup>204</sup>

The need for maximum coordination and cooperation between regulatory authorities is particularly evident concerning jurisdictional questions.<sup>205</sup> The case of *Extasi TV* usefully illustrates the point.<sup>206</sup> The UK authorities banned the television service *Extasi TV* because it had been broadcasting violent pornography and had thereby “manifestly, seriously and gravely” infringed Article 22 of the TWF Directive.<sup>207</sup> The European Commission identified “uncertainty as to which Member State had jurisdiction over [Extasi TV]” as a complicating factor in the case.<sup>208</sup> It could therefore be suggested that enhanced coordination between relevant regulatory authorities might have served to dispel some of the uncertainty in question. One of the tangible consequences of the case was the inclusion of an identification requirement for audiovisual media service providers in Article 3a of the AVMS Directive.<sup>209</sup>

The need for coordination and cooperation between regulatory authorities is by no means limited to States within the “European audiovisual area”; recognition of the importance of intercultural dialogue has been a catalyst for the establishment of contact groups and meetings between European and non-European regulatory authorities.<sup>210</sup>

### 6.1.9 OSCE standards

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

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<sup>204</sup> For a full summary of the decision, see: Elisabeth Thuesen, “DK – Complaint of the Turkish Embassy against the Kurdish ROJ TV”, *IRIS* 2005-7: 10.

<sup>205</sup> See generally, Joan Botella I Corral and Emmanuelle Machet, “Co-ordination and Co-operation between Regulatory Authorities in the Field of Broadcasting” in Susanne Nikoltchev, Ed., *IRIS Special: Audiovisual Media Services without Frontiers – Implementing the Rules*, op. cit., pp. 13-20.

<sup>206</sup> See: David Goldberg, “GB – Government and Media Regulator Act Against Unacceptable Satellite TV Services and Programming”, *IRIS* 2005-3:12.

<sup>207</sup> Fifth Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 89/552/EEC “Television without Frontiers”, COM(2006) 49 final, 10 February 2006, p. 5. See further: The Foreign Satellite Service Proscription Order 2005, S.I. No. 220, 7 February 2005 (entry-into-force: 21 February 2005)

[http://www.culture.gov.uk/NR/rdonlyres/809B372B-4A20-449C-A10A-3036CCD9F12C/0/Foreign\\_Satellite\\_Service\\_Proscription\\_Order.pdf](http://www.culture.gov.uk/NR/rdonlyres/809B372B-4A20-449C-A10A-3036CCD9F12C/0/Foreign_Satellite_Service_Proscription_Order.pdf)

Regulatory Impact Assessment: The Foreign Satellite Service Proscription Order 2005, available at:

<http://www.culture.gov.uk/NR/rdonlyres/F86F1C6F-0D35-4B24-A532-C1C8501FFDC7/0/extasiriafinal.pdf>;

Explanatory Memorandum to the Foreign Satellite Service Proscription Order 2005, 2005 No. 220, available at: [http://www.opsi.gov.uk/si/em2005/uksiem\\_20050220\\_en.pdf](http://www.opsi.gov.uk/si/em2005/uksiem_20050220_en.pdf).

<sup>208</sup> COM(2006) 49 final, op. cit., p. 5.

<sup>209</sup> Article 3a now reads:

“Member States shall ensure that audiovisual media service providers under their jurisdiction shall make easily, directly and permanently accessible to the recipients of a service at least the following information:

- (a) the name of the media service provider;
- (b) the geographical address at which the media service provider is established;
- (c) the details of the media service provider, including his electronic mail address or website, which allow him to be contacted rapidly in a direct and effective manner;
- (d) where applicable, the competent regulatory or supervisory bodies.”

<sup>210</sup> See further, Karol Jakubowicz, “Implementation and Monitoring: Upholding Human Rights and Cultural Values” in Susanne Nikoltchev, Ed., *IRIS Special: Audiovisual Media Services without Frontiers – Implementing the Rules*, op. cit., pp. 35-44.

from the so-called “human dimension” of the OSCE’s work.<sup>211</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 has 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>212</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.

## 6.2 “Hate speech”<sup>213</sup>

The term, “hate speech”, which enjoys widespread and largely uncontested currency nowadays, does not lend itself easily to legal definition. 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 and what it does”.<sup>214</sup> However, we should be wary of the disarming and deceptive familiarity of the term, and of reflexive calls for the banning of “hate speech” because “hate speech” is a term which refers to a whole spectrum of negative discourse stretching from hate and incitement to hatred; to abuse, vilification, insults and offensive words and epithets; and arguably also to extreme examples of prejudice and bias.<sup>215</sup> In short, virtually all racist and related declensions of noxious, identity-assailing expression could be brought within the wide embrace of the term.

The shift from moral condemnation to legal regulation (or prohibition) inevitably 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

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<sup>211</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>212</sup> See further, the OSCE/ODIHR Tolerance and Non-discrimination Information System: < <http://tnd.odihhr.pl/>>.

<sup>213</sup> The author is grateful to Dirk Voorhoof, Toby Mendel, Ilze Brands Kehris and Mario Oettheimer for helpful exchanges on this topic.

<sup>214</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>215</sup> J. Jacobs & K. Potter, *Hate Crimes: Criminal Law and Identity Politics* (New York, OUP, 1998), p. 11.

drafting and the broader public policies involved when identifying [sic] the specific forms of anti-egalitarian expressions to discourage.<sup>216</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. The *precise* term was never used by the Court (or the now-defunct European Commission of Human Rights) before 1999.<sup>217</sup> Prior to that, the vocabulary was different, even if the targeted mischiefs were pretty much the same.<sup>218</sup> The Court has not yet defined the term and in some judgments, it sometimes even uses it in inverted commas (scare quotes).<sup>219</sup> One cannot help but wonder whether this indicates a certain unease with the concept?

It should be noted that the Court does not use the term, “hate speech”, systematically. It is perhaps still too early to say 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. 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>220</sup> This description is helpful, but only in a limited way, because the Recommendation is not legally-binding on States. Similarly, the gradual development and consolidation of relevant jurisprudence also help to further our understanding of the term, or at least of the Court’s interpretation of the term. The Court’s judgment in *Gündüz v. Turkey*, discussed *supra*, illustrates the point.

“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 (see further, *infra*). 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 (see further, s. 6.2.2, *infra*).<sup>221</sup> It seeks to ensure that law and policy are adequately informed by circumstances and experiences [of victims of racism].

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<sup>216</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>217</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>218</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”, in ECRI publication (title?), (Strasbourg, Council of Europe Publishing, forthcoming, 2007); 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>219</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>220</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 607<sup>th</sup> meeting of the Minister’s Deputies), Appendix.

<sup>221</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).

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>222</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>223</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>224</sup> All in all, the range of harms to be prevented is varied and complex. The challenge is therefore to identify “which criteria allow us to distinguish between harms that justify restrictions and those that do not”.<sup>225</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>226</sup> The right to freedom of expression, as vouchsafed by international law, comprises the right to hold opinions and to seek, 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 groups 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>227</sup> As Robert Post has noted, “Audiences always evaluate communication on the basis of their understanding of its social context”.<sup>228</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>229</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.

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<sup>222</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>223</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>224</sup> See generally, Mari Matsuda *et al.*, *Words that Wound*, *op. cit.*

<sup>225</sup> David Kretzmer, “Freedom of Speech and Racism”, 8 *Cardozo L. Rev.* 445 (1987), at p. 478.

<sup>226</sup> See further, *supra*.

<sup>227</sup> See further: David Kretzmer, “Freedom of Speech and Racism”, *op. cit.*, at p. 462.

<sup>228</sup> Robert C. Post, “Racist Speech, Democracy, and the First Amendment”, *op. cit.*, at p. 307.

<sup>229</sup> Michel Rosenfeld, “Hate Speech in Constitutional Jurisprudence: A Comparative Analysis”, 24 *Cardozo L. Rev.* 1523 (2003), at 1565.

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 *ne plus ultra* of permissible expression. Rather, a more comprehensive and nuanced approach is required. Such an approach would necessarily include the facilitation of expression and the promotion of pluralism and tolerance. The media are vital – in different ways - to the effectiveness of such an approach.

The role of the media as the Fourth Estate or democratic watchdog is well-documented (see s. 4.4.1, *supra*), but their importance for democracy is by no means limited to their checking function *vis-à-vis* the organs of State. Of increasing importance is their contribution to public debate by providing fora for expression and communication. In an ever-changing technological context, the level of moderation of expressive fora is also highly relevant. By way of illustration, the moderation of online fora points to control of content, whereas the absence, or reduced levels, of moderation suggest a more open debate. The responsibility of media for content, especially in interactive communicative fora online, is becoming increasingly tied to these and related considerations. Responsibility also extends to the conditions of access to the media because of the gate-keeping function they perform.

In its current state of development, international law does not recognise a freedom of forum or an individual or group right of access to particular media (absent any mitigating circumstances such as monopoly ownership in the broadcast sector). However, the ability to exercise the right to freedom of expression in an effective manner is contingent on the availability and accessibility of viable expressive/communicative opportunities and fora. Expressive opportunities cannot be considered viable if discriminatory practices prevail in relation to access to the media or other expressive fora. Thus, the right to non-discrimination/equality and the right to effective participation in public life are implicated here, along with the right to freedom of expression. This means that a powerful triumvirate of rights are brought to bear on the issue of access to the media, thereby demonstrating the synergic interplay between different rights, as stressed in the introduction to this paper.

Under international human rights law, it is possible to detect a significant emphasis on State obligations to facilitate expression, both for its own sake and also specifically because of its instrumental importance for promoting pluralism and tolerance. The Durban Declaration and Programme of Action<sup>230</sup> and the Framework Convention for the Protection of National Minorities, in particular, adopt root-and-branch approaches to combating “hate speech” and anti-egalitarian speech by targeting the hatred and intolerance from which they spawn.<sup>231</sup> Central to their strategies is the promotion of counter-speech, or more accurately, increased/enhanced expressive opportunities, especially via the media. The promotion of tolerance and of intercultural understanding 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>232</sup> Crucially, a sense of deference to principles of

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<sup>230</sup> World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, 2001: Declaration and Programme of Action.

<sup>231</sup> See further, Tarlach McGonagle, “The international and European legal standards for combating racist expression”, *op cit*.

<sup>232</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*, *op cit*.

media autonomy/editorial freedom is consistently advocated in respect of these measures. Encouragement, not prescription, is the strategy to be employed.<sup>233</sup>

Lee C. Bollinger brings tolerance and hate speech together in his tolerance principle of free speech, the starting-point of which is “an understood commitment to extraordinary self-restraint; coupled [...] with a willingness to be sensitive to context.”<sup>234</sup> He states that the “strong presumption in favor of toleration [...] can be overcome only after it is determined that the society has little or nothing to gain” from exercising tolerance, “and, by comparison, a great deal to lose.”<sup>235</sup> This is an allusion to the theory that hate speech – despite its moral repugnancy - *can* have some, limited, instrumental value to society.<sup>236</sup> Wojciech Sadurski, for instance, remarks that “hate speech” can, occasionally, sensitise the public to prevailing currents of racism in society, thus prompting a redoubling of efforts to eradicate it through educational and other initiatives.<sup>237</sup> He also notes that legal tolerance of such speech could allow us to challenge our closest-held convictions. Exposure to extremist view-points, the Mill-inspired argument runs, challenges us and forces us to re-examine our understandings, ideas and values by jolting us out of our unthinking complacency.<sup>238</sup> These liberal-minded, admittedly abstract theories, must not be lightly discounted. However, in the cut and thrust of policy formulation, they are often drowned out by clamouring for the prioritisation of consequentialist arguments.

Such arguments often explore, as Richard Delgado<sup>239</sup> has done, the far-reaching effects of hate speech targeting (racial) minorities: including the internalisation of insults by victims (leading to a colouration of societal values and attitudes); negative psychological responses to stigmatisation (leading to humiliation, isolation and emotional distress); the reinforcement of social stratification, etc. And it *is* minorities who are the real victims of hate speech as it is generally thought that the privileges flowing from the entrenched, socially-advantageous position of the majority protect its members from hate speech. By analogy, Lilliputian arrows are unable to hurt a social Gulliver.

Any abstract analysis of Bollinger’s tolerance of free speech principle fails to address many practical issues which would have to be scrupulously examined for the drafting of a legal framework to deal with hate speech. These would include: individual sensitivities to hate speech (in the event of the creation of a new tort for hate speech, should an egg-shell-skull rule or some other threshold apply?); group libel; whether a speech-action distinction should be recognised, or whether all expression (including symbolic speech) should be considered together, by virtue of its communicative impact.

### 6.2.1 The effectiveness of “hate speech” laws

Scepticism abounds concerning the effectiveness of so-called ‘hate speech’ laws, so much so that it has even been suggested that blanket prohibitions on racially-motivated hate speech, far

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<sup>233</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>234</sup> *Op.cit.*, p. 197.

<sup>235</sup> *Ibid.*

<sup>236</sup> R. Dworkin, *op. cit.*, p. 200.

<sup>237</sup> W. Sadurski, *op. cit.*, p. 78.

<sup>238</sup> F.S. Haiman, *Speech and Law in a Free Society* (USA, University of Chicago Press, 1981), p. 99.

<sup>239</sup> R. Delgado, “Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling”, 17 *Harvard Civil Rights-Civil Liberties Law Review* (1982), pp. 133-181.



from being a “noble innovation”, might amount to no more than a “quixotic tilt at windmills which belittles great principles of liberty.”<sup>240</sup> This is due in no small measure to the infinite variety of forms, the “endlessly variegated shades of meaning,”<sup>241</sup> of racist speech. The circumvention of laws prohibiting or restricting speech has never been a problem for those intent on doing so.<sup>242</sup> “All regulation encourages evasion, but the very ambiguity of speech that makes law such a crude response further facilitates evasion,” Richard Abel avers.<sup>243</sup>

He continues: “[R]acists translate hate into pseudo-science, substituting regression analyses for vulgarities.”<sup>244</sup> It is relatively easy for a skilled polemicist to appropriate an entirely new lexicon in order to avoid legal prosecution for the dissemination of ideas deemed noxious to society. Codified terms become common currency. Gloves of velvet are worn on iron claws of hatred. The platitudes of political correctness are a mere smokescreen for more sinister intent. The nature of discourse is altered and it will be as esoteric or as exoteric as the level of complicity between speaker and listener will dictate. Talk of “cultural coherence”, “traditional values”, “the erosion of a core identity” and “preservation of national unity” are all loaded terms: they are the sheathed daggers of racist and xenophobic mentalities.<sup>245</sup>

The inventiveness of this verbal chameleonism cannot be matched by any legislation, as legislation, by definition, must be clear and precise. This fundamental imbalance in the conflict between law and racism goes a long way towards explaining the ineffectiveness of hate speech laws designed to promote equality and to eradicate discrimination in all of its many ugly guises. “If suppression is directed only at the crudest or most “odious” messages, it will be dealing with the most superficial aspects of the problem of group prejudice and hatred, for the most odious are likely to be the least effective in accomplishing their purposes,” according to Franklyn S. Haiman.<sup>246</sup> “[G]roup prejudice and hatred when packaged in subtle or sophisticated communication wrappings,”<sup>247</sup> are not usually, therefore, susceptible to legal sanction.

Doubt may be cast over the effectiveness of hate speech laws for two reasons other than the recent trend towards deceptively sanitised racist speech. Firstly, it is very difficult to gauge the deterrent value of lending increased severity to legal sanctions when they involve an element of racial animus. Secondly, and more crucially, as Sandra Coliver argues on the basis of very comprehensive evidence, administrative and other informal measures targeting prevention and redress are often better-suited than legal remedies for the promotion of tolerance and non-discrimination. This thesis is bolstered by the observation that “[T]he

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<sup>240</sup> A. Bickel, *op. cit.*, p.71, quoting Jackson J. in *Kunz v. New York* 340 U.S. 290 (1951).

<sup>241</sup> R. Post, *op. cit.*, p.293; T. I. Emerson, *op. cit.*, p. 398: “Conflicts between groups will never be settled in litigation over the question whether one group has been defamed. The tactics of arousing racial, religious or class hatred are too subtle to be bound by such controls. The effort to use the judicial process for this purpose merely diverts attention and energies from far more important measures essential to resolve the underlying grievances.”

<sup>242</sup> In her examination of censorship from a historical perspective, Sue Curry Jansen shows this to have been the case throughout the ages: “The language of Aesop became the *lingua franca* of the new republic [Republic of Athens]... They used the slippery edges of language to comply with the letter of the law of Inquisition, while boldly defying its spirit.”, *op. cit.*, p. 69.

<sup>243</sup> R. Abel, *Speech and Respect* (London, Stevens & Sons/Sweet & Maxwell, 1994), p. 98.

<sup>244</sup> *Ibid.*, p. 100.

<sup>245</sup> These terms take “the place of outright appeals to racial prejudice; but although the language is softer and spoken more often than not by persons [...] innocent of consciously malign motives, it still serves racist ends in relation to which it stands as a code.” – S. Fish, *op. cit.*, p. 13.

<sup>246</sup> F. S. Haiman, *op. cit.*, p. 94.

<sup>247</sup> *Ibid.*, p. 88.

flagrant abuse of laws which restrict hate speech by the authorities at precisely those times when an even-handed approach to conflict is crucial provides the most troubling indictment of such laws.”<sup>248</sup> Thus, she posits, “equality and dignity rights, as well as free speech rights, are best advanced by the narrowest of restrictions on hate speech” and “[t]he possible benefits to be gained by such laws simply do not seem to be justified by their high potential for abuse”.<sup>249</sup>

Stereotyping, particularly in the media, has invidious and attritive effects on the groups selected as its victims. The denigratory quotient of stereotyping is high: “press attacks on black people defy the very existence of a culture. At a minimum they redefine that culture in terms of deprivation, atrophy, and destruction.”<sup>250</sup> Notwithstanding the tendency of stereotyping to perpetuate existing societal inequalities and reinforce prejudices, warnings against the dangers of censoring such practices are not misplaced.<sup>251</sup> Any legislative provisions seeking to address a concept as definitionally elusive as stereotyping would, by necessity, be grounded in vagueness. Dangers inhere in any policy that would seek to punish generally derogatory media portrayals of groups (in contradistinction to incitatory speech) or take action against overt and subliminal racism in the media. Heed should therefore be paid to the cautionary note sounded by T. I. Emerson: “repression has no stopping place. Once begun, it can quickly move all the way to a totalitarian system.”<sup>252</sup>

The mainstream media – as well as the partisan, hateful organs of propaganda - are quite capable of peddling negative images of particular groups, or racist ideas. There can be no doubt whatever as to the incredible power wielded by the mass media.<sup>253</sup> For some commentators, this power is so great, and the role of the media of such importance to the democratic paradigm, that there exists a compelling case for a radical reappraisal for Montesquieu’s tripartite division of State powers<sup>254</sup> which would see the institutionalisation of the media as a fourth organ of government. This model of the media is sometimes referred to as ‘The Fourth Estate’.<sup>255</sup> A corollary of the power of the media is that the judiciary in many national and international jurisdictions shows itself to be deferential to the notion of media

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<sup>248</sup> S. Coliver, “Hate Speech Laws: Do They Work?”, in S. Coliver (Ed.), *op. cit.*, pp. 363-373, at 373.

<sup>249</sup> *Ibid.*, p. 363.

<sup>250</sup> C. Ginsburg, “Destruction of Local Cultures Through Mass Communications”, K. Mahoney & P. Mahoney (Eds.), *Human Rights in the Twenty-first Century: A Global Challenge* (Part 2) (Netherlands, Kluwer Academic Publishers, 1993), pp. 777-781, at 780.

<sup>251</sup> See further, O. O’Neill, *op. cit.*, p.164.

<sup>252</sup> T. Emerson, *op. cit.*, p. 724. See also Salman Rushdie’s comment: “You think you can give away one per cent of your freedom and you’ve still got 99 per cent, but actually, once you give away the first one per cent it’s very remarkable how fast the other 99 per cent goes”, S. Rushdie, *op. cit.*, p. 29.

<sup>253</sup> Noam Chomsky and Edward Herman’s propaganda model considers the societal purpose of the media being “to inculcate and defend the economic, social, and political agenda of privileged groups that dominate the domestic society and the state. The media serve this purpose in many ways: through selection of topics, distribution of concerns, framing of issues, filtering of information, emphasis and tone, and by keeping debate within the bounds of acceptable premises.” – E.S. Herman & N. Chomsky, *Manufacturing Consent: The Political Economy of the Mass Media* (Great Britain, Vintage, 1994), p. 298. Stephen Sedley highlights the information- and communication-based power of the media: “[T]he mass media too have possession of large funds of information, and their power to manipulate or withhold it is no less than that of government. [...] There are today repositories of corporate power as capable as any State of invading the rights of individuals” – S. Sedley, “The First Amendment: A Case for Import Controls?”, in I. Loveland (Ed.), *op. cit.*, pp. 23-28, at 26.

<sup>254</sup> More commonly known as the doctrine of separation of powers, this model for the division of State powers was first enunciated by Charles de Secondat, Baron de Montesquieu, in *De L’esprit des lois* (*The Spirit of the Laws*), 1748. According to this doctrine, liberty is best safeguarded by the division of the legislative, executive and judicial functions of government between separate independent organs.

<sup>255</sup> One of its main proponents is Lucas A. Powe Jr. See, for example, his book, *The Fourth Estate and the Constitution: Freedom of the Press in America* (USA, University of California Press Ltd., 1992).

autonomy and self-regulation. The extensive jurisprudence of the European Court of Human Rights is the prime example of this deference.<sup>256</sup>

Spasmodic, and alas, systemic outpourings of racism have precipitated unprecedented media awareness of, and sensitivity to, the issue of race. This sensitivity, in its turn, has prompted the incorporation into journalistic codes of practice, ethics and house-style guides of principles and objectives aimed at ensuring a responsible treatment of subjects with potential for sparking social conflagrations.<sup>257</sup> The deleterious effects of negative stereotyping, prejudiced reporting and outright hatred have informed the drafting of these provisions. Heightened consciousness is equally being reflected in international norms that have been devised over the past few years, with the Johannesburg Principles being an obvious example.<sup>258</sup>

It is incontestable that the power of the media can be used towards egregious ends. Rabid, racist rants targeting asylum-seekers and members of minority groups feature all-too-regularly in public life and in the media with varying degrees of prominence. Equally incontestable is the fact that the media *can* play a role in the dissemination of hate speech, with *Radio Mille Collines* in Rwanda being an example of just how devastatingly influential propaganda can be in fomenting incitement to hatred and genocide.<sup>259</sup> Indeed, three key media figures (two from *Radio Mille Collines* and one from the *Kangura* newspaper) were convicted for “genocide, incitement to genocide, conspiracy, and crimes against humanity, extermination and persecution” by the International Criminal Tribunal for Rwanda in December 2003.<sup>260</sup> It is no surprise that Article 20, ICCPR, and Article 3 of the Genocide Convention (see *supra*) explicitly prohibit such incitement.

Policy preoccupations that are so manifest on the international scene are also replicated at the national level. Without seeking to diminish in any way the social imperative of eliminating racism, it must be stated that legislative intervention ought to be mindful of the potentially adverse effects any new and aggressive wording could have on the right to freedom of

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<sup>256</sup> See, for example, *Jersild v Denmark*, *op. cit.*; *Thorgeirson v Iceland*, Judgment of the European Court of Human Rights of 25 June 1992, Series A, No.239; *Oberschlick v Austria*, Judgment of the European Court of Human Rights of 23 May 1991, Series A, No. 204; *Bladet Tromsø & Stensaas v. Norway*, Judgment of the European Court of Human Rights of 20 May 1999, Reports of Judgments and Decisions, 1999 and *Unabhängige Initiative Informationsvielfalt v. Austria*, Judgment of the European Court of Human Rights of 26 February 2002.

<sup>257</sup> Typifying the approach of national journalistic codes of ethics, Article 10 of the NUJ’s Code of Conduct reads as follows: “A journalist shall only mention a person’s race, colour, creed, illegitimacy, marital status (or lack of it), gender or sexual orientation if this information is strictly relevant. A journalist shall neither originate nor process material which encourages discrimination, ridicule, prejudice or hatred on any of the above-mentioned grounds.” A specific section of the International Federation of Journalists, International Media Working Group Against Racism and Xenophobia (IMRAX), is responsible for conducting most of its anti-racism work.

<sup>258</sup> The Johannesburg Principles on National Security, Freedom of Expression and Access to Information – Principle 4. Prohibition of discrimination: “In no case may a restriction on freedom of expression or information, including on the ground of national security, involve discrimination based on race, colour, sex, language, religion, political or other opinion, national or social origin, nationality, property, birth or other status.”

<sup>259</sup> Aryeh Neier, “Clear and present danger”, 27 *Index on Censorship* 57 (1/1998), at 59. See generally, *Broadcasting Genocide: Censorship, propaganda and state-sponsored violence in Rwanda, 1990-1994* (ARTICLE 19, England, 1996), *Deadly Marionettes: State-sponsored violence in Africa* (ARTICLE 19, England, 1997) and also M. Lenkova (Ed.), *‘Hate Speech’ in the Balkans* (Athens, International Helsinki Federation for Human Rights, 1998).

<sup>260</sup> *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*, Case No. ICTR-99-52-T, Judgment of Trial Chamber 1 of the International Criminal Tribunal for Rwanda of 3 December 2003, available at: <http://www.ictr.org/>.

expression. The danger that the vigour of public debate could be asphyxiated by pandering excessively to societal sensitivities or exaggerated concerns for political correctness must be guarded against.<sup>261</sup> The uninhibited exercise of the right to freedom of expression can allow it to play a crucial role in the furtherance of anti-racism strategies. This is widely recognised.<sup>262</sup> Only when there is a direct and incontrovertible nexus between particular forms of expression and actual harm or distress, should there be contemplation of curbing or, *a fortiori*, sanctioning, that expression.

Legislation requires a very clear exposition of the policy objectives which inform it, accompanied by lucid, thoughtful and watertight definitions of all relevant terminology. A connection between expression and harm or other alleged negative consequences cannot simply be presupposed. Rather, a very strong causal link between particular instances of expression and evident adverse, proximate consequences ought to be proved as a prerequisite for punishing expression by the law. Thus, a crucial consideration will be the “nature and imminence”<sup>263</sup> of the impugned expression, which will necessarily vary from case to case.

As argued *supra*, racist speech comprises an entire spectrum of negatively-motivated discourse. Its chameleon qualities afford it a flexibility which legislation cannot match. Thus, nuanced, subtle, subliminal racism is always likely to wriggle its way through the meshes of any legal definition. Given the increased sanitisation of racist language, its infinitely variegated hues and potential for sophisticated packaging, it is important to resist the obvious temptation to have recourse to the blanket-banning of racist speech (which could only be sure of sanctioning the crudest, vilest forms of racism in any case).

It is important to realise that one single statute simply cannot be a panacea for all the outpourings of hatred in a given society. One piece of legislation cannot simultaneously be the alpha and the omega of an entire nation’s war against racism; nor should it entertain any ambition to fulfil such a role. Greater attention should be paid to the wider context in which key pieces of legislation operate; greater reliance should be placed on (complementary) non-legal measures which aspire to the realisation of the same broad aims. Education must top the list of non-legal measures, owing to its potential for stimulating greater public consciousness of racism and empathy towards its victims. Billowing black smoke does not warrant societal intolerance or legislative repression, for this is too little, too late. Rather, the focus should be on fire prevention.

## 6.2.2 Critical race theory

Section 6.2, *supra*, explored the incompatibility of “hate speech” with the most fundamental tenets of democracy and how international human rights law has consistently interpreted such speech to be unworthy of legal protection. It is also very important to analyse “hate speech”, or forms of expression tending towards “hate speech”, in terms of the impact – both potential and real – which it has on expressive and communicative opportunities generally. A growing body of interdisciplinary scholarship known as critical race theory deals precisely with this

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<sup>261</sup> See generally, Egbert Dommering, “Tolerantie, de vrijheid van meningsuiting en de Islam”, in A.W. Hins and A.J. Nieuwenhuis, Eds., *Van zender naar ontvanger* (Amsterdam, Otto Cramwinckel, 2003), pp. 89-108.

<sup>262</sup> The most recent formal acknowledgement of this observation on the international plane is, perhaps, the World Declaration (see, in particular, paras. 88, 90, discussed *supra*).

<sup>263</sup> R. Gavison, “Incitement and the Limits of Law”, in R. C. Post (Ed.), *Censorship and Silencing: Practices of Cultural Regulation* (Los Angeles, The Getty Research Institute for the History of Art and the Humanities, 1998), pp. 43-66, at p. 52.

topic.<sup>264</sup> In short, this scholarship derives from critical theory proper, which has been described as “a normative reflection that is historically and socially contextualized”.<sup>265</sup> By way of further elucidation: “Critical theory presumes that the normative ideals used to criticize a society are rooted in experience and reflection on that very society, and that norms can come from nowhere else”.<sup>266</sup>

Critical race theory, then, pursues a more specific, subjective agenda. For instance, it “challenges ahistoricism and insists on a contextual/historical analysis of the law. Current inequalities and social/institutional practices are linked to earlier periods in which the intent and cultural meaning of such practices were clear.”<sup>267</sup> Furthermore, it “insists on recognition of the experiential knowledge of people of color and our communities of origin in analyzing law and society.”<sup>268</sup>

It is frequently asserted by critical race theorists – and indeed others who position themselves outside that branch of scholarship - that engrained prejudicial, discriminatory and hateful attitudes towards particular societal groups and the cumulation of institutional and societal practices reflecting those attitudes lead to the erosion of self-esteem of members of affected groups, thereby ultimately resulting in a foreclosure of their speech. In a social climate where discrimination prevails, viewpoints of members of certain minority groups are regarded as being of inferior value in deliberative processes. The “silencing” argument – also frequently deployed by feminist scholars as an argument for the prohibition of pornography – is causal. Hate speech used by members of dominant societal groups becomes a tool of degradation and subordination. Hate speech does not simply result from that discriminatory climate – it actually contributes to its creation.

Two important penultimate observations about critical race theory must be made, both of which are prompted by the fact that the US has always been – and continues to be - the fountainhead of critical race theory and activism. This is important, first of all, because it points to a very particular cultural context and history of racism. It is important, secondly, because of its implicit acknowledgement that the development of critical race theory took place against the back-cloth of a particular constitutional ethos and system “in which free speech is given an especially exalted jurisprudential status [...]”.<sup>269</sup> In other words, critical race theory was largely born out of a distinctive set of circumstances and then shaped by a distinctive constitutional tradition. These observations go a long way towards explaining the polarised, black-and-white character of debates concerning critical race theory. The approach to racist speech that predominates in European and international law is much more straightforward. Freedom of expression is less absolutist, less hubristic, less gung-ho and commensurately more receptive to the accommodation of other societal imperatives, in particular the elimination of racism. The express recognition that the exercise of the right to freedom of expression is subject to certain limitations and that it carries with it “special duties

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<sup>264</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>265</sup> Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press, Princeton, 1990), p. 5.

<sup>266</sup> *Ibid.*

<sup>267</sup> Mari J. Matsuda *et al.*, *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment*, *op. cit.*, p. 6.

<sup>268</sup> *Ibid.*

<sup>269</sup> Kenneth Lasson, “To Stimulate, Provoke, or Incite?: Hate Speech and the First Amendment”, *op. cit.*, at 283.

and responsibilities” greatly facilitates the task of reconciling critical race theory with freedom of expression values.

Nevertheless, despite the entrenched, opposing positions of proponents of critical race and First Amendment theories, some commentators have sought to demonstrate that the two standpoints are not irredeemably polarised. Mari Matsuda, for instance, has argued that racist speech could be actionable without violating the essence of contemporary understanding of the First Amendment. She takes the view that “racist speech is best treated as a *sui generis* category, presenting an idea so historically untenable, so dangerous, and so tied to perpetuation of violence and degradation of the very classes of human beings who are least equipped to respond that it is properly treated as outside the realm of protected discourse.”<sup>270</sup> She puts forward three characteristics that distinguish “the worst, paradigm example of racist hate messages from other forms of racist and nonracist speech”,<sup>271</sup> which would allow for prosecution of the former. Those “identifying characteristics” are:

1. The message is of racial inferiority
2. The message is directed against a historically oppressed group
3. The message is persecutory, hateful, and degrading<sup>272</sup>

Immediately after enumerating the characteristics, Matsuda insists that “Making each element a prerequisite to prosecution prevents opening of the dreaded floodgates of censorship”.<sup>273</sup> It is instructive to lift Matsuda’s characteristics out of their immediate First Amendment context and to consider them in terms of prevailing international law. It is submitted here that the mere fact that a message is “persecutory, hateful, and degrading” would presumptively, i.e., absent any particular and unusual mitigating circumstances, be sufficient reason to deny that message protection under Article 10(2), ECHR, Article 19(3), ICCPR, or *a fortiori*, Article 4 *juncto* 5, ICERD. The communication of a message of “racial inferiority” would clearly contravene Article 4(a), ICERD. The targeting of a “historically oppressed group” is, of itself, clearly an insufficient reason to deny protection to a particular message, but its redolence of Article 27, ICCPR, could help to usefully bolster a claim based on either of the other two arguments.

Although it may at times appear that the values promoted by critical race theorists and First Amendment scholars are antipodal, Matsuda’s attempt to reconcile the would-be opposites is but one example of how that myth could be debunked. There are surely others. The relationship between critical race theory and international law is fraught with discernibly less tension. Indeed, as will be outlined below, critical race theory is largely congruent with the essential thrust of generalist international human rights law. The main source of tension that could be identified is a source of tension that characterises the relationship between Articles 19 and 20, ICCPR, on the one hand, and ICERD (especially Articles 1, 4 and 5) on the other hand.

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<sup>270</sup> Mari J. Matsuda, “Public Response to Racist Speech: Considering the Victim’s Story”, in Mari J. Matsuda *et al.*, Eds., *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment*, *op. cit.*, pp. 17-51, at 35.

<sup>271</sup> *Ibid.*, p. 36.

<sup>272</sup> *Ibid.* It is interesting to note that in an earlier enumeration of these “identifying characteristics”, the third characteristic was formulated differently: “The message endorses or implements persecution, hatred, or degradation of the group” - Mari J. Matsuda, “Outsider Jurisprudence: Toward a Victim’s Analysis of Racial Hate Messages”, in Monroe H. Freedman & Eric M. Freedman, Eds., *Group Defamation and Freedom of Speech*, *op. cit.*, pp. 87-120, at 101.

<sup>273</sup> *Ibid.*

### 6.3 Limits of permissible expression under international law

This section analyses the validity of these assertions and the limits and general suitability of the law for addressing the harms in question.

There is no doubt that the myriad questions surrounding the regulation of hate speech collectively represent a very perplexing moral, legal and socio-political conundrum. The apparent intractability of the whole often seems to be captured in T.S. Eliot's image of squeezing "the universe into a ball" and rolling it "towards some overwhelming question".<sup>274</sup> Yet, the conundrum need not be so intractable, actually. Just how overwhelming and intractable the question may seem will depend on the frame of enquiry in which it is placed: philosophical, political, legal or some combination or offshoot of the foregoing. The frame chosen here is international human rights law and necessarily its animating principles of democracy and justice.

Before exploring that frame of enquiry, however, a few cursory remarks plucked from a couple of time-honoured texts of political philosophy seem apposite for the purposes of contextualisation. It should be noted, for instance, that even seminal treatises such as Locke's *A Letter Concerning Toleration* and Mill's *On Liberty*, purposely fix principled boundaries for what is societally tolerable in terms of public expression. Locke sought to demarcate the zone of toleration in similar terms: "No opinions contrary to human society, or to those moral rules which are necessary to the preservation of civil society, are to be tolerated by the magistrate."<sup>275</sup>

It is often overlooked that Mill, for his part, clearly countenanced the denial of legal protection to certain types of expression due to the moral repugnancy of its content. Indeed, Mill's whole treatise is sprinkled with important recognitions of exceptions to the sanctity of his truth-championing rationale for freedom of expression. For instance, he acknowledges the legitimacy of restricting the principle of freedom of expression on the basis of considerations such as "harm to others"<sup>276</sup> and "injury to others".<sup>277</sup> He continues in a more explicit vein: "Whenever, in short, there is a definite damage, or a definite risk of damage, either to an individual or to the public, the case is taken out of the province of liberty, and placed in that of morality or law."<sup>278</sup>

The foregoing sections have analysed the limitations on freedom of expression explicitly set out in international treaty law, as interpreted by the competent adjudicative bodies established by relevant treaties. This section explores the nature and scope of limitations on freedom of expression that have been inferred from treaty law. These are limitations that do not match prevailing understandings of "hate speech" and thus fall to be considered separately.

From the foregoing, it is clear that the regulation of "hate speech" – owing to its moral repugnancy and probable harm to others – is hardly in dispute. The preferred frame of enquiry

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<sup>274</sup> The full citation is: "To have squeezed the universe into a ball/To roll it towards some overwhelming question", T.S. Eliot, "The Love Song of J. Alfred Prufrock", in T.S. Eliot, *The Complete Poems and Plays* (England, Faber & Faber, 1969), pp. 13-17, at 15.

<sup>275</sup> John Locke, *A Letter Concerning Toleration*, pp. 14-56, in John Horton & Susan Mendus, Eds., *John Locke A Letter Concerning Toleration in Focus* (London, Routledge, 1991).

<sup>276</sup> *Ibid.*, p. 62.

<sup>277</sup> *Ibid.*, p. 63.

<sup>278</sup> *Ibid.*, p. 91.

here, *viz.* international human rights law, is even more dispositive of the question. By virtue of the – by now – well-entrenched “abuse of rights” doctrine in positive international human rights law, proponents of hate speech are, absent extraordinary mitigating factors, precluded from relying on international instruments in order to defend their putative right to freedom of speech. A detailed discussion of the operation of this doctrine in relation to “hate speech” under the European Convention on Human Rights is provided in Chapter 2, *supra*. Here, it is sufficient to recall that the doctrine is regularly relied upon to prevent the proverbial hijacking of relevant instruments for purposes that are contrary to their letter and spirit.<sup>279</sup>

If the regulation or prohibition of hate speech is relatively uncontroversial from the perspective of international human rights law, the same cannot be said of the question of defining hate speech. When international adjudicative bodies assess the necessity of measures deemed to constitute an interference with the right to freedom of expression, there should be systematic examination of a number of considerations, such as: intent of speaker, context (including form of expression), demonstrable harmful impact. The systematic examination of these considerations would necessarily have to show sensitivity to “contextual variables”,<sup>280</sup> such as “the particular history and nature of discrimination, status as minority or majority group, customs, common linguistic practices, and the relative power or powerlessness of speakers and their targets within the society involved”.<sup>281</sup>

If impugned speech does not amount to hate speech or is unlikely to lead to violence, there remains one further angle of enquiry to be explored. This involves prising open the nature of the protection afforded “the reputation or rights of others” by Article 10(2). This leads to a particularly difficult – and subjective – judgment-call. The explicit protection of reputational and other rights of other persons (and the permissibility of certain restrictions on the exercise of the right to freedom of expression, when adequately based on those grounds) – is difficult to square with one of the central and constant principles of the European Court’s jurisprudence, *i.e.*, that protection of freedom of expression, as guaranteed by Article 10, ECHR, extends to information or ideas “that offend, shock or disturb the State or any sector of the population”.

Freedom of expression is generally regarded as concerning “speakers, recipients (listeners, readers, and viewers), and of the general public”,<sup>282</sup> and how the respective (and sometimes competing) rights and interests of each of the interested parties measure up to one another cannot viably be determined *in abstracto*, but only on a case-by-case basis.<sup>283</sup> The difficulty of reconciling the rights of others with the protection of offensive speech brings the third-listed (and often neglected) category – the general public – into analytical prominence. In certain cases, it is the rights of a particular sub-set of the general public, *i.e.*, the non-target

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<sup>279</sup> By way of aside, though, it is interesting to note Fred Schauer’s philosophical challenge to the notion of “abuse” of the right to freedom of expression. He reasons that “the proper use of ‘abuse’ implies that the conduct referred to is within the scope of the right, and that is consistent with [the argument that] that conduct is outside that scope”: Frederick Schauer, *Free speech: a philosophical enquiry*, *op. cit.*, p. 146. See also, pp. 145 and 147.

<sup>280</sup> Michel Rosenfeld, “Hate Speech in Constitutional Jurisprudence: A Comparative Analysis”, 24 *Cardozo L. Rev.* 1523 (2003), at 1565.

<sup>281</sup> *Ibid.* This list is not intended to be exhaustive.

<sup>282</sup> Eric Barendt, *Freedom of Speech* (2<sup>nd</sup> Edition), *op. cit.*, p. 6; see also, Frederick Schauer, *Free speech: a philosophical enquiry*, *op. cit.*, p. 49. Alternative configurations are, of course, possible: for instance, T.M. Scanlon refers to the interests of participants, audience and bystanders: T.M. Scanlon, “Freedom of expression and categories of expression”, in T.M. Scanlon, *The Difficulty of Tolerance: Essays in Political Philosophy* (United Kingdom, Cambridge University Press, 2003), pp. 84-112, at 86-93.

<sup>283</sup> See further, Frederick Schauer, *Free speech: a philosophical enquiry*, *op. cit.*, p. 105.



audience or bystanders,<sup>284</sup> that seem most jeopardised by offensive speech. T.M. Scanlon has posited that the interests of bystanders in restricting speech are in: (i) “avoiding the undesirable side effects of acts of expression” (eg. traffic jams, noise and litter, etc.), and more importantly, (ii) “the effect expression has on its audience”, i.e., “harmful changes in audience belief and behavior” towards (particular) bystanders, eg. minorities.<sup>285</sup> Regulation of expression in order to meet the second objective is *prima facie* considerably more far-reaching than the “time, place and manner” restrictions that would typically be entailed by the former. The reason is that it requires the prevention of the “effective communication of an idea”.<sup>286</sup>

The reconciliation exercise is much more complicated than pitting critical race theory against a hard-nosed version of individualistic liberalism. Critical race theory holds that offence directed at a participant in a public debate on account of his/her membership of a particular group can qualitatively affect his/her ability to participate in that debate. This view has been vigorously contested in other quarters, however. Ronald Dworkin, for one, pays short shrift to the idea that individuals are (or even should be) entitled to be insulated from speech that would adversely affect their self-esteem (or self-respect) or the esteem (or respect) in which others hold them. He argues: “People of a thousand different convictions or shapes or tastes understandably feel ridiculed or insulted by every level of speech and publication in every decent democracy in the world.”<sup>287</sup> He then continues:

A culture of independence almost guarantees that this will be so. Certainly, we should be decent to one another, and bigotry is despicable. But if we really came to think that we violated other people’s rights whenever we reported sincere views that denigrated them in their own or others’ eyes, we would have compromised our own sense of what it is to live honestly. We must find other, less suicidal, weapons against racism and sexism. We must, as always, put our faith in freedom, not repression.<sup>288</sup>

If there is no *general* right not to be offended – and it is submitted here that there is not – to what extent can the virtue of pluralistic tolerance be taken to cover the protection of respectfulness towards members of other ethnicities, religious persuasions, etc.? The forthcoming analysis will reveal the existence of a circumspect right not to be offended in certain, particular circumstances – namely where racism and religious beliefs are directly concerned – and even then only when the offence attains a certain level of intensity. Racist expression and other types of “hate speech” and has been amply dealt with *supra*. The forthcoming analysis will therefore deal with the even greyer area of religious beliefs.

It is both surprising and disappointing that the case of *I.A. v. Turkey*<sup>289</sup> has yet to be subjected to significant critical scrutiny. The central feature of the case – a conviction arising out of “an abusive attack on the Prophet of Islam” – could hardly be more topical and one could legitimately have expected the European Court of Human Rights to have provided instructive guidance on the interplay of relevant principles in the case. This was not to be, however. The Second Section of the Court held that there had been no violation of Article 10, but the judgment was split (by four votes to three)<sup>290</sup> and the joint dissenting opinion was unusually

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<sup>284</sup> T.M. Scanlon, “Freedom of expression and categories of expression”, *op. cit.*, at 92-93.

<sup>285</sup> *Ibid.*, p. 92.

<sup>286</sup> *Ibid.*, p. 93.

<sup>287</sup> Ronald Dworkin, *Freedom’s Law* (Oxford University Press, New York, 1999), p. 259-260.

<sup>288</sup> (footnote omitted) *Ibid.*, p. 260.

<sup>289</sup> Judgment of the European Court of Human Rights (Second Section) of 13 September 2005.

<sup>290</sup> Judges Baka, Turmen, Ugrekhelidze and Mularoni subscribed to the majority opinion, whereas Judges Costa (Section President), Cabral Barreto and Jungwiert issued a joint dissenting opinion.

forthright in its suggestion that “the time has perhaps come to ‘revisit’” the case-law on which the instant case was based. Nevertheless, the case was not referred to the Grand Chamber under Article 43 of the European Convention on Human Rights (hereinafter, ECHR)<sup>291</sup> and as a result, we have been left none the wiser as to the workings of the murky doctrinal interface between the rights to freedom of expression and religion.

The Court, as is its wont, re-emphasised the central importance of freedom of expression in democratic society and recalled that, subject to Article 10(2), “it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb”.<sup>292</sup> The exercise of the right, however, comes with concomitant duties and responsibilities, including – in the context of religious beliefs – “a duty to avoid expressions that are gratuitously offensive to others and profane”. In consequence, “as a matter of principle it may be considered necessary to punish improper attacks on objects of religious veneration”.<sup>293</sup>

In the absence of any “uniform European conception of the requirements of the protection of the rights of others in relation to attacks on their religious convictions”, Member States are afforded a wide margin of appreciation when addressing “matters liable to offend intimate personal convictions within the sphere of morals or religion”.<sup>294</sup> Although it may be legitimate for a State to adopt measures aimed at repressing certain activities, including the dissemination of information and ideas, when such activities are judged to be incompatible with Article 9, ECHR, the European Court of Human Rights is the final arbiter of whether or not such measures are consistent with the ECHR. In that capacity, the Court assesses whether, in the circumstances of a particular case, the interference in question corresponds to a “pressing social need” and is “proportionate to the legitimate aim pursued”.<sup>295</sup> The Court also recalled that in the spirit of pluralism, tolerance and broadmindedness that is constitutive of democratic society, members of religious groups “cannot reasonably expect to be exempt from all criticism”: “They 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>296</sup>

After setting out the foregoing principles (as well as certain details of its own *modus operandi*), the Court then proceeded to apply them to the circumstances of the case at hand. It did so in just one paragraph:

However, the present case concerns not only comments that offend or shock, or a “provocative” opinion, but also an abusive attack on the Prophet of Islam. Notwithstanding the fact that there is a certain tolerance of criticism of religious doctrine within Turkish society, which is deeply attached to the principle of secularity, believers may legitimately feel themselves to be the object of unwarranted and offensive attacks through the following passages: “Some of these words were, moreover, inspired in a surge of exultation, in Aisha’s arms. ... God’s messenger broke his fast through sexual intercourse, after dinner

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<sup>291</sup> Article 43 (‘Referral to the Grand Chamber’) reads as follows:

“1. Within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber.

2. A panel of five judges of the Grand Chamber shall accept the request if the case raises a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance.

3. If the panel accepts the request, the Grand Chamber shall decide the case by means of a judgment.”

<sup>292</sup> *Ibid.*, para. 23.

<sup>293</sup> *Ibid.*, para. 24.

<sup>294</sup> *Ibid.*, para. 25.

<sup>295</sup> *Ibid.*, para. 26.

<sup>296</sup> *Ibid.*, para. 28.

and before prayer. Muhammad did not forbid sexual intercourse with a dead person or a live animal.”<sup>297</sup>

It then found that the measures interfering with the applicant’s freedom of expression aimed to offer protection against offensive attacks on matters regarded as sacred by Muslims and as such, corresponded to a “pressing social need”.<sup>298</sup> It affirmed that the Turkish authorities had not overstepped their margin of appreciation and that the stated reasons for the impugned restrictions were “relevant and sufficient”.<sup>299</sup> As regards the proportionality question, the Court referred to the fact that copies of the book had not been seized and also to the “insignificant” nature of the fine imposed.<sup>300</sup>

### *Joint dissenting opinion*

The joint dissenting opinion of Judges Costa, Cabral Barreto and Jungwiert is rather forceful, particularly in its candid criticism of the doctrinal precedents on which the instant judgment relies so heavily (see further *infra*). Their dissent raises a number of highly pertinent concerns about the Court’s application of key general principles gleaned from its jurisprudence to the specific facts of the instant case.

The joint dissenting opinion begins by cautioning against being *blasé* about the Court’s seminal pronouncement in *Handyside* (cited, *infra*), or using it in a merely sloganistic way.<sup>301</sup> It emphasises the “limited practical impact on society of the author’s statements”<sup>302</sup> and points out that the likelihood that unorthodox religious views would “offend or shock the faith of the majority of the population” is an insufficient reason “in a democratic society to impose sanctions on the publisher of a book”.<sup>303</sup> It readily acknowledges that the attacks on Muhammad contained in the passage from the book quoted *supra* “may cause deep offence to devout Muslims, whose convictions are eminently deserving of respect.” In the same vein, it also refers to the “sacred” status of the Prophet in Islam.<sup>304</sup> Nonetheless, it rejects the idea that an entire book be condemned and its publisher criminally sanctioned on the basis of isolated passages in the book. It particularly rues the institution of criminal proceedings by the public prosecutor – and not by an offended member of the public – in the present case.<sup>305</sup> The dissenting judges also took issue with the perceived proportionality of the sanctions imposed on the applicant. They insist that any criminal conviction gives rise to a chilling effect and leads to increased incidence of self-censorship.<sup>306</sup>

The joint dissenting opinion also advances three main critiques of the *Otto-Preminger*<sup>307</sup> and *Wingrove*<sup>308</sup> cases, on which the present case draws extensively. First, there is the crucial difference between the impact that is likely to be achieved by a novel (in the instant case) and

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<sup>297</sup> *Ibid.*, para. 29.

<sup>298</sup> *Ibid.*, para. 30.

<sup>299</sup> *Ibid.*, para. 31.

<sup>300</sup> *Ibid.*, para. 32.

<sup>301</sup> Joint dissenting opinion, *ibid.*, para. 1.

<sup>302</sup> Joint dissenting opinion, *ibid.*, para. 2.

<sup>303</sup> Joint dissenting opinion, *ibid.*, para. 3.

<sup>304</sup> Joint dissenting opinion, *ibid.*, para. 4.

<sup>305</sup> Joint dissenting opinion, *ibid.*, para. 5.

<sup>306</sup> Joint dissenting opinion, *ibid.*, para. 6.

<sup>307</sup> *Otto-Preminger-Institut v. Austria*, Judgment of the European Court of Human Rights of 20 September 1994, Series A, no. 295-A.

<sup>308</sup> *Wingrove v. United Kingdom*, Judgment of the European Court of Human Rights of 25 November 1996, Reports of Judgments and Decisions, 1996-V.

a film (in *Otto-Preminger*) and a short experimental video (in *Wingrove*). Second, it points out that in both cases, the Court occasioned a *volte-face* from the decisions of the Commission<sup>309</sup> and that the final Court judgments were themselves divided.<sup>310</sup> Finally, the real thunder-clap of the dissenting opinion bursts open: “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 conception of freedom of the press.”<sup>311</sup>

Broadly speaking, apart from one – potentially significant - discrepancy, there is little amiss with the Court’s normative principles concerning permissible limits to freedom of expression when the exercise of the right interferes with the religious beliefs and convictions of others (summarised *supra*). Where the Court’s approach misfires, and has repeatedly misfired in the past, is in its application of those principles to specific factual situations.

### *Relevant case-law*

The critical discharge of the joint dissenting opinion in the *I.A.* case was aimed specifically at the cases of *Otto-Preminger-Institut v. Austria* and *Wingrove v. United Kingdom*.

In *Otto-Preminger*, the applicant association (a private film-house) claimed (ultimately unsuccessfully) that its rights under Article 10, ECHR, had been violated by the seizure and forfeiture of a film (*Das Liebeskonzil*) it had planned to screen. The domestic Austrian courts found the characterisations of God, Jesus and Mary in the film to come within the definition of the criminal offence of disparaging religious precepts. Before it could actually be shown, the film was seized by the relevant national authorities in the context of criminal proceedings against the manager of the applicant association concerning the film.

At issue in the *Wingrove* case was the rejection by the British Board of Film Classification of an application for a classification certificate for the applicant’s film, *Visions of Ecstasy*. The film, a short experimental video work, portrayed Saint Teresa engaging in acts of an overtly sexual nature, including with the body of the crucified Christ.<sup>312</sup>

Other relevant cases that were not explicitly targeted by the dissenting judges in *I.A.*, but which will be referred to in passing *infra*, include: *Gay News Ltd. & Lemon v. United Kingdom*,<sup>313</sup> *Müller & others v. Switzerland*,<sup>314</sup> *Choudhury v. United Kingdom*,<sup>315</sup> *Murphy v. Ireland*<sup>316</sup> and *Giniewski v. France*.<sup>317</sup>

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<sup>309</sup> For example, in the *Otto Preminger* case, the Commission voted by nine votes to five that there had been a violation of Article 10 as regards the seizure of the film, and by 13 votes to one that there had been a violation of Article 10 as regards the forfeiture of the film. The Opinion of the Commission is appended to the Judgment of the Court, *op. cit.*

<sup>310</sup> In *Otto Preminger*, the Court held by six votes to three that there had been no violation of Article 10 in respect of either the seizure of the film or its forfeiture. In *Wingrove*, the Court held by seven votes to two that no breach of Article 10 had taken place.

<sup>311</sup> Joint dissenting opinion, *ibid.*, para. 8.

<sup>312</sup> Paras. 9, 61.

<sup>313</sup> *X. Ltd. & Y. v. United Kingdom*, Application No. 8710/79, Decision of inadmissibility of the European Commission of Human Rights of 7 May 1982, 28 D.R. 77 (November 1982). The case involved a conviction for blasphemy arising out of the publication of a poem, “The Love that Dares to Speak its Name” by Prof. James Kirkup, in a magazine called *Gay News*. According to the headnote of the House of Lords’ decision in the case, the poem “purported to describe in explicit detail acts of sodomy and fellatio with the body of Christ immediately after his death and ascribed to Him during His lifetime promiscuous homosexual practices with the Apostles and other men.” – cited in *ibid.*, para. 1.

### *Rough coherence of principles*

Pluralism and tolerance are among the most powerful of the ECHR's animating principles. Time and again, the Court has averred in its case-law on freedom of religion that [societal] pluralism has been hard-won over the ages and that it is indissociable with democratic life. In the same vein, the Court has consistently held in its case-law on freedom of expression that pluralism, along with its kindred concepts of tolerance and broadmindedness, constitutes one of the essential hallmarks of democratic society. Pluralism entails diversity and divergence, which in turn can often involve a certain amount of contention and even antagonism.<sup>318</sup> This is all part of the democratic experiment,<sup>319</sup> the cut and thrust of debate that is free, robust and uninhibited.<sup>320</sup> Thus, as famously stated in the *Handyside* case, information and ideas which "offend, shock or disturb the State or any sector of the population" must be allowed to circulate in order to safeguard the "pluralism, tolerance and broadmindedness" that underpin "democratic society".<sup>321</sup> In principle, this vigorous conception of freedom of expression applies to all matters of general public interest, including religious beliefs and affairs.<sup>322</sup>

But the concepts of pluralism and tolerance, as developed by the European Court of Human Rights, are clearly contiguous. Indeed, we could perhaps – without any sleight of hand -

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<sup>314</sup> *Müller & others v. Switzerland*, Judgment of the European Court of Human Rights of 24 May 1988, Series A, No. 133. In this case, the applicant artists were convicted and their paintings confiscated on the grounds that the latter were obscene; the Court found that the measure served the legitimate aim of protecting public morals and held that Article 10 had not been violated.

<sup>315</sup> *Choudhury v. United Kingdom*, Decision of inadmissibility of the European Commission of Human Rights of 5 March 1991, Application No. 17439/90. The applicant "sought to have criminal proceedings brought against the author and publisher of "Satanic Verses" in order to vindicate his claim that the book amounted to a scurrilous attack on, inter alia, his religion" – *ibid.*, para. 1.

<sup>316</sup> Judgment of the European Court of Human Rights (Third Section) of 10 July 2003. In this case, the applicant (a pastor affiliated to the Irish Faith Centre – "a bible based Christian ministry in Dublin" *ibid.*, para. 7) argued unsuccessfully that the refusal to broadcast an advertisement for the Irish Faith Centre, pursuant to a legislative prohibition on the broadcasting of religious advertising in Ireland, violated his rights under Articles 9 and 10, ECHR. Although the case was not *prima facie* about offence to the religious beliefs of others, the issue was considered in the Court's judgment.

<sup>317</sup> *Giniewski v. France*, Judgment of the European Court of Human Rights (Second Section) of 31 January 2006. This case involved the conviction of a journalist (however, he was acquitted on appeal, but ordered to pay nominal damages and to foot the bill for the publication of the appellate decision in one national newspaper) for defamation in respect of an article he had written criticising a Papal Encyclical and exploring possible links between a particular doctrine and the origins of the Holocaust. The European Court of Human Rights found that the applicant's right to freedom of expression had been violated because his article did not set out to attack religious beliefs, but to contribute to an ongoing debate on topics of interest to the general public.

<sup>318</sup> *Kokkinakis v. Greece*, Judgment of the European Court of Human Rights of 19 April 1993, para. 33; *Metropolitan Church of Bessarabia and others v. Moldova*, Judgment of the European Court of Human Rights of 13 December 2001, para. 123; *Hasan & Chaush v. Bulgaria*, Judgment of the European Court of Human Rights of 26 October 2000, para. 78; *Serif v. Greece*, Judgment of the European Court of Human Rights of 14 December 1999, para. 49; *Agga v. Greece*, Judgment of the European Court of Human Rights of 17 October 2002, paras. 53, 56; *Manoussakis v. Greece*, Judgment of the European Court of Human Rights of 29 August 1996, para. 44; *Supreme Holy Council of the Muslim Community v. Bulgaria*, Judgment of the European Court of Human Rights of 16 December 2004, para. 93.

<sup>319</sup> Paraphrasal of Holmes, J., dissenting, in *Abrams v US*, 250 US 616 (1919), at p. 630, when he described both the US Constitutional enterprise and life itself as being experimental.

<sup>320</sup> Paraphrasal of the United States Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>321</sup> *Handyside v. the United Kingdom*, Judgment of the European Court of Human Rights of 7 December 1976, Series A, No. 24, para. 49.

<sup>322</sup> However, a crucial caveat to this general proposition will be entered *infra*.

merge the concepts into one and speak more meaningfully about pluralistic tolerance,<sup>323</sup> a notion that implies a certain degree of reciprocal respect between the different constituent groups of any democratic society. Pluralistic tolerance can be well served by robust protection for freedom of expression, for example, when offensive expression advances discussions on matters of public interest. As posited by Robert Post: “Outrageous speech calls community identity into question, practically as well as cognitively, and thus it has unique power to focus attention, dislocate old assumptions, and shock its audience into the recognition of unfamiliar forms of life”.<sup>324</sup> However, the operative definition of “outrageous speech” is crucial here and would have to be qualified. In any case, if the right to freedom of expression is to be interpreted consistently with the notion of pluralistic tolerance, the protection of the rights of others must be borne in mind.

In this respect, Article 10(2) refers explicitly to the “duties and responsibilities” on which the exercise of the right to freedom of expression is contingent, and also the legitimacy of restricting the exercise of the right in order to protect the rights of others. As regards the application of these considerations to religious beliefs and affairs, the Court recognises the need to protect the deepest feelings and convictions of “others” from substantial or serious offence.<sup>325</sup> Similarly, it considers that the “respect for the religious feelings of believers as guaranteed in Article 9 [...] can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration; and such portrayals can be regarded as malicious violation of the spirit of tolerance [...]”.<sup>326</sup> This is because the beliefs in question are qualitatively different to other types of beliefs. One commentator has explained that qualitative difference by observing that “The recognition of what is ‘sacred’ involves an affirmation of what is believed to be of ultimate value in experience, and of what is of deepest concern in life”.<sup>327</sup> That is the transformative factor that legitimates the special consideration for earnestly and deeply held religious beliefs.

Having said that, it is imperative that the exceptional regard in which religious beliefs can be held not be used as a convenient excuse for stifling debate on matters of interest to the public.<sup>328</sup> Again, to cite David Edwards: “The determination of spiritual value is a matter of persuasion, of exposition, and (perhaps) argument, and in any such process there must be the possibility of contradiction, condemnation and offence”.<sup>329</sup>

### *Niggling definitional discrepancy*

In the *Otto-Preminger-Institut* case, the European Court of Human Rights held that “in the context of religious opinions and beliefs”, the duties and responsibilities which accompany the right to freedom of expression, may legitimately include:

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<sup>323</sup> Joseph Raz sometimes uses the term “pluralist toleration”, which seems to have essentially the same meaning: Joseph Raz, “Free Expression and Personal Identification”, 11 *Oxford Journal of Legal Studies* (No. 3, 1991), pp. 303-324, at 322.

<sup>324</sup> Robert C. Post, *Constitutional Domains: Democracy, Community, Management* (Cambridge, Massachusetts, Harvard University Press, 1995), p. 139.

<sup>325</sup> *Wingrove v. United Kingdom*, *op. cit.*, para. 58.

<sup>326</sup> *Otto-Preminger-Institut v. Austria*, *op. cit.*, para. 47.

<sup>327</sup> David Edwards, “Toleration and the English blasphemy law”, in John Horton & Susan Mendus, Eds., *Aspects of Toleration* (London & New York, Methuen & Co., 1985), pp. 75-98, at 84.

<sup>328</sup> See, in this respect, *Giniewski v. France*, *op. cit.*, paras. 50 & 51.

<sup>329</sup> *Ibid.*, p. 82.

an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs.<sup>330</sup>

Whether by accident or design, the reformulation of this principle in *Wingrove v. United Kingdom* and in *Murphy v. Ireland* differs from its original articulation in *Otto-Preminger*. This is not a problem in itself; indeed, many principles are reworked and refined by the Court in the course of subsequent applications. In this case, however, some unexplained shifts of definitional emphasis appear to have been introduced. Instead of referring to expressions that are gratuitously offensive to others *and* an infringement of their rights *and* worthless from the perspective of public debate, the Court uses the more terse, alternative formula, “gratuitously offensive to others and profanatory”.<sup>331</sup> No explanation is offered as to why the cumulative elements of the infringement of rights of others and the absence of any contribution to public debate were dropped. Nor is any attempt made to tease out the definitional scope of the notion of profanity, although it could be deduced from *Wingrove* that the “degree of profanation” would have to be “high” and the extent of insult to religious feelings “significant”.<sup>332</sup> As a result of this inconsistent use of phraseology in the Court’s approach to offensiveness in the context of religious opinions and beliefs, it is not possible to state with much confidence or precision what the official barometer actually is.

Frederick Schauer has claimed that in previous and ongoing efforts to elucidate the scope of the right to freedom of expression, “there has been too much distillation and not enough dissection”.<sup>333</sup> The *I.A.* case illustrates Schauer’s point perfectly. The essence of the Court’s judgment in that case is a distillation of the main principles from its relevant case-law, but its application of those principles to the facts of the case is limited to one paragraph.<sup>334</sup> In other words, what is missing is the dissection of key principles through their application to a set of specific factual circumstances.

When the Court applies its normative principles to specific factual circumstances, it should systematically examine whether sufficient weighting has been given to factors such as: the intent of the speaker; “contextual variables”,<sup>335</sup> and the demonstrably harmful impact of the impugned expression. The Court has repeatedly stressed the importance of a context-sensitive approach, but as will presently be shown, it does not always practise what it preaches. The intent or motivation of the speaker is important as it can have significant bearing on how expression that is offensive to religious convictions is evaluated. There is a world of difference between misguided or thoughtless expression and that which is deliberately calculated to be offensive or which is fuelled by some kind of *animus*. Therefore, proof of an element of *scienter* (i.e., knowledge that the expression will or is likely to cause offence)

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<sup>330</sup> *Op. cit.*, para. 49; *Giniewski v. France, op. cit.*, para. 43.

<sup>331</sup> *Wingrove v. United Kingdom, op. cit.*, para. 52. The formulation, “gratuitously offensive to others and profane”, was used in *Murphy v. Ireland, op. cit.*, para. 65.

<sup>332</sup> *Wingrove v. United Kingdom, op. cit.*, para. 60.

<sup>333</sup> Frederick Schauer, *Free speech: a philosophical enquiry* (New York, Cambridge University Press, 1982), p. 85.

<sup>334</sup> The paragraph in question is para. 29. It reads: “However, the present case concerns not only comments that offend or shock, or a “provocative” opinion, but also an abusive attack on the Prophet of Islam. Notwithstanding the fact that there is a certain tolerance of criticism of religious doctrine within Turkish society, which is deeply attached to the principle of secularity, believers may legitimately feel themselves to be the object of unwarranted and offensive attacks through the following passages: “Some of these words were, moreover, inspired in a surge of exultation, in Aisha’s arms. ... God’s messenger broke his fast through sexual intercourse, after dinner and before prayer. Muhammad did not forbid sexual intercourse with a dead person or a live animal.”

<sup>335</sup> Michel Rosenfeld, “Hate Speech in Constitutional Jurisprudence: A Comparative Analysis”, 24 *Cardozo L. Rev.* 1523 (2003), at 1565.

should be required in order for liability to attach in civil proceedings,<sup>336</sup> and proof of *mens rea* in criminal proceedings.<sup>337</sup> Contextual variables 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, etc. The requirement of “demonstrably harmful impact” is a safeguard measure that insists on the establishment of a clear causal link between the impugned expression and the alleged resultant harm to others (eg. gratuitous offence to their religious convictions). Other authors have employed different terminology (such as “appreciable”<sup>338</sup>) to create comparable safeguards, but those terms are suggestive of weaker forms of probabilism and are therefore liable to unduly restrict the right to freedom of expression.

### *Limited impact of publication*

The joint dissenting opinion in *İ.A.* emphasises the likely impact of the publication. It had a limited,<sup>339</sup> once-off print-run, and the evidence before the Court did not indicate how many people actually read the book. The dissenting judges deduce from the fact that the book was not reprinted that the number of actual readers was small. Thus, one of the frequently-invoked rationales for regulating or restricting expression, *viz.* the impact/influence argument, offers a rather weak justification for interfering with the applicant’s right to freedom of expression in the circumstances of the present case. Furthermore, as pointed out by the same Section of the Court just a few months before it returned its *İ.A.* judgment, the novel as a medium is “a form of artistic expression that appeals to a relatively narrow public compared to, for example, the mass media”.<sup>340</sup> By counterpoising a novel with the “mass media”,<sup>341</sup> the Court seeks (albeit with clumsy wording) to distinguish between different media on the basis of their circulation, and by extension, their potential reach and impact.<sup>342</sup> The specificity of a particular medium and its potential impact on the public are rightly considered by the Court to be relevant contextualising factors in many cases.<sup>343</sup> For instance, as the Court has repeatedly pointed out, “the audiovisual media have often a much more immediate and powerful effect than the print media”.<sup>344</sup>

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<sup>336</sup> By analogy, the *scienter* element is quite a common feature of (campus) hate speech codes: see further, Richard Delgado & Jean Stefancic, *Understanding Words That Wound* (Westview Press, USA, 2004), p. 115.

<sup>337</sup> It should however be noted in passing that the European Commission of Human Rights found the strict liability nature of the crime of blasphemous libel unobjectionable in the facts of *Gay News Ltd. & Lemon v. United Kingdom*, *op. cit.*, para. 12.

<sup>338</sup> George Kateb writes: “[...] expression is harmful when its long-term tendency or indirect but appreciable result is the invasion of rights or fundamentally immoral conduct on a significant scale.” - George Kateb, “The Freedom of Worthless and Harmful Speech”, in Bernard Yack, Ed., *Liberalism without Illusions* (Chicago, Uni. of Chicago Press, 1996), pp. 220-240, at p. 228.

<sup>339</sup> Note that para. 5 of the Court’s judgment refers to a print-run of 2,000 copies, whereas para. 2 of the joint dissenting opinion refers to 2,500. The correct figure would appear to be 2,000 copies, as the original French-language versions of the judgment and joint dissenting opinion both refer to 2,000 copies.

<sup>340</sup> *Alinak v. Turkey*, Judgment of the European Court of Human Rights (Second Section) of 29 March 2005, para. 41.

<sup>341</sup> One could, for instance, argue that a novel could be included in a definition of “mass media”; it is submitted here that the Court actually intended to distinguish between novels on the one hand, and newspapers and broadcasting on the other.

<sup>342</sup> The Court has also taken this approach in other cases: see, for example, *Arslan v. Turkey*, Judgment of the European Court of Human Rights of 8 July 1999, para. 48.

<sup>343</sup> *Murphy v. Ireland*, *op. cit.*, para. 69.

<sup>344</sup> *Jersild v. Denmark*, Judgment of the European Court of Human Rights of 23 September 1994, Series A, no. 298, para. 31; *Murphy v. Ireland*, *op. cit.*, para. 69; *Radio France v. France*, Judgment of the European Court of



For present purposes, it should additionally be noted that there can be no suggestion of a captive audience here, and that members of the public would have had to buy the book in order to be confronted with its content. However, arguments such as these have not had a particularly happy history before the adjudicative organs of the ECHR, or at least not in the context of offence to religious beliefs. They do not, for instance, correspond to the approach taken by the European Commission of Human Rights in the *Gay News Ltd. & Lemon v. United Kingdom*.<sup>345</sup> In that case, the Commission observed that “The issue of the applicants’ journal containing the incriminated poem was on sale to the general public, *it happened to get known in some way or other* to the private prosecutor who was so deeply offended that she decided to take proceedings against the publication of this poem [...]”<sup>346</sup>.

Although the case of *Müller v. Switzerland* involved (sexual) morals rather than offence to religious convictions, it offers a useful analogy on the question of the public’s exposure to potentially offensive material. In that case, a crucial consideration for the Court was that the impugned paintings were:

          painted on the spot - in accordance with the aims of the exhibition, which was meant to be spontaneous - and the general public had free access to them, as the organisers had not imposed any admission charge or any age-limit. Indeed, the paintings were displayed in an exhibition which was unrestrictedly open to - and sought to attract - the public at large.<sup>347</sup>

Another – little-known – case, *S. v. Switzerland*,<sup>348</sup> also concerning the display of obscene material to the general public, is analogously useful as well. The European Commission of Human Rights concluded from the facts of the case that “There was no danger of adults being confronted with the film against or without their intention to see it” and that it was undisputed “that minors had no access to the film” either.<sup>349</sup> The Commission continued by stating that “since no adult was confronted unintentionally or against his will with the film [...] there must be particularly compelling reasons justifying the interference at issue”.<sup>350</sup>

In its *Otto-Preminger* judgment, the Court observed that access to the (proposed) screening of the film was subject to an admission fee and an age-limit. As “the film was widely advertised”, “There was sufficient public knowledge of the subject-matter and basic contents of the film to give a clear indication of its nature”. The Court then offers a baffling *non sequitur*: “for these reasons, the proposed screening of the film must be considered to have been an expression sufficiently ‘public’ to cause offence”.<sup>351</sup> This finding goes against the grain of the relevant reasoning relied upon in *Müller, supra*. The dissenting judges reached a very different conclusion, *viz.* that the advance publicity material issued by the applicant

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Human Rights of 30 March 2004, para. 39, and (for very similar wording) *Purcell et al. v. Ireland*, Decision of inadmissibility of the European Commission of Human Rights of 16 April 1991, Application No. 15404/89.

<sup>345</sup> *Op. cit.*

<sup>346</sup> (Emphasis added), *ibid.*, para. 12. The poem in question was: “The Love that Dares to Speak its Name”, written by Prof. James Kirkup. It appeared in a magazine called *Gay News*. According to the headnote of the House of Lords’ decision in the case, the poem “purported to describe in explicit detail acts of sodomy and fellatio with the body of Christ immediately after his death and ascribed to Him during His lifetime promiscuous homosexual practices with the Apostles and other men.” – cited in *ibid.*, para. 1.

<sup>347</sup> *Op. cit.*, para. 36.

<sup>348</sup> *S. v. Switzerland*, Report of the European Commission of Human Rights of 14 January 1993, Application No. 17116/90, para. 62.

<sup>349</sup> *Ibid.*, para. 62.

<sup>350</sup> *Ibid.*, para. 65.

<sup>351</sup> *Op. cit.*, para. 54.

cinema: (i) aimed to warn the public about the critical way in which the film dealt with the Roman Catholic religion, and (ii) actually “did so sufficiently clearly to enable the religiously sensitive to make an informed decision to stay away”. These conclusions prompted two further conclusions of note by the dissenting judges: (i) there was “little likelihood” of “anyone being confronted with objectionable material unwittingly”, and (ii) the applicant association had acted “responsibly in such a way as to limit, as far as it could reasonably have been expected to, the possible harmful effects of showing the film”.<sup>352</sup> It is submitted here that the dissenting opinion is more convincing than the majority opinion on this particular point.

In the *Wingrove* case, the European Commission had placed considerable store by the probability that a short experimental video work would have a very limited reach and impact. The Delegate of the Commission submitted to the Court that “The risk that any Christian would unwittingly view the video was therefore substantially reduced and so was the need to impose restrictions on its distribution”.<sup>353</sup> The possibility of further restricting distribution of the video to licensed sex shops was mooted and it was also pointed out that the boxes containing the video cassettes would have included a description of its content.<sup>354</sup> The Court, however, responded by pointing out that once available, videos can be “copied, lent, rented, sold and viewed in different homes, thereby easily escaping any form of control by the authorities”.<sup>355</sup> Thus, it found the consideration of the UK authorities that the film “could have reached a public to whom it would have caused offence” to be “not unreasonable” in the circumstances of the case.<sup>356</sup>

### *Specificity of genre*

A novel should ordinarily be “entitled to be judged by the criteria relevant to that genre including a considerable freedom of imaginative exploration”.<sup>357</sup> The applicant argued in domestic proceedings that the impugned novel should have been analysed by literary specialists. This argument does not appear to have been pursued by the applicant before the European Court, which limited itself to acknowledging that the author’s views were conveyed in a “novelistic style”, without probing the matter any further. The joint dissenting opinion, likewise, failed to adequately pick up on the argument. In its case-law, the Court has consistently held that Article 10 “protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed”.<sup>358</sup> It is submitted here that in order to adequately protect the substance of ideas and information expressed in a novel, the Court ought to give due consideration to stylistic and other specificities that are relevant to the genre. Indeed, this is the thrust of one of its main lines of reasoning in the aforementioned *Alinak* case.<sup>359</sup>

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<sup>352</sup> *Ibid.*, Joint dissenting opinion of Judges Palm, Pekkanen and Makarczyk, para. 9.

<sup>353</sup> *Ibid.*, para. 62.

<sup>354</sup> *Ibid.*

<sup>355</sup> *Ibid.*, para. 63.

<sup>356</sup> *Ibid.*

<sup>357</sup> Bhikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Second Edition) (New York, Palgrave Macmillan, 2006), p. 320. Parekh’s supporting example relates specifically to Salman Rushdie’s novel, *The Satanic Verses*, but it is nevertheless illustrative of a broader range of possibilities: he points out that “The offensive passages occur within the dream of a demented man, and hence not in the same category as unambiguous expressions of abuse and ridicule by the author”, *ibid.*

<sup>358</sup> See, amongst other authorities, *De Haes & Gijssels v. Belgium*, Judgment of the European Court of Human Rights of 24 February 1997, Reports of Judgments and Decisions 1997-I, para. 48.

<sup>359</sup> *Op. cit.*, paras. 41-45.

By selecting the passages in the book that were deemed to be the most offensive, isolating them and examining them out of context, the conclusion that they were unacceptably abusive was a foregone one. The same conclusion might very well have been reached if the passages had been examined in their original context (as intended by the author), but the conclusion would have been all the stronger for having been subjected to such an embedded analysis. As it stands, without the benefit of any insights that might have been generated by such an analysis, the Court's conclusion may be intuitively correct from a moral perspective, but it lacks methodological rigour. It should be noted, by way of contrast, that the Court's finding of a violation of Article 10 in its *Patuvel* judgment was partly due to the fact that the French Courts had convicted the applicant on the basis of impugned extracts from a written work which had been assessed out of the context of the work as a whole and without acknowledging the documentary materials which had been provided in the work in support of the impugned passages.<sup>360</sup> The importance of reading impugned passages in their original context is recurrently emphasised in the Court's case-law,<sup>361</sup> which makes it all the more puzzling that its *IA* decision deviated from that norm.

### *Proportionality of sanctions*

The Court has frequently observed that “the nature and severity of the penalty imposed are factors to be taken into account when assessing the proportionality of the interference”,<sup>362</sup> especially when the penalty in question risks creating a chilling effect on discussion of matters of public interest.

In the present case, the Court takes cognisance, first of all, of the fact that the domestic authorities did not seize the book. Puzzlingly, this seems tantamount to praising the Turkish authorities merely for abstaining from a course of action that is generally regarded as anathema to freedom of expression. As a measure effectively constituting prior restraint, the seizure of the impugned novel would rightly have been regarded as a very far-reaching infringement of the applicant's freedom of expression. However, in the stream of case-law currently under discussion, prior restraint has encountered considerably less resistance than in other types of Article 10 cases. In *Otto-Preminger*, neither the seizure nor the forfeiture of the film was found to amount to a violation of Article 10. However, the dissenting judges in that case did warn that “There is a danger that if applied to protect the perceived interests of a powerful group in society, such prior restraint could be detrimental to that tolerance on which pluralist democracy depends”.<sup>363</sup> In *Wingrove*, the ban on the video was total, a fact which prompted the Court to acknowledge that the prior restraint involved in the case called for “special scrutiny”.<sup>364</sup> In the heel of the hunt, the measure of “special scrutiny” required was arguably not forthcoming, as the Court professed its satisfaction at the “high threshold of

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<sup>360</sup> Case of *Patuvel v. France*, Judgment of the European Court of Human Rights (First Section) of 22 December 2005, para. 50.

<sup>361</sup> See, amongst other examples, *Abdullah Aydin v. Turkey (No. 2)*, Judgment of the European Court of Human Rights (Third Section) of 10 November 2005, para. 25.

<sup>362</sup> *Süreç v. Turkey (No. 1)*, Judgment of the European Court of Human Rights of 8 July 1999, Reports of Judgments and Decisions, 1999-IV, para. 64.

<sup>363</sup> *Op. cit.*, Joint dissenting opinion, para. 4.

<sup>364</sup> *Ibid.*, para. 58, following its earlier findings in *Observer & Guardian v. United Kingdom*, Judgment of the European Court of Human Rights of 26 November 1991, Series A, no. 216, para. 60. See also in this connection the dissenting opinions of Judges De Meyer and Lohmus in the *Wingrove* case.

profanation embodied in the definition of the offence of blasphemy under English law” and ceded a wide margin of appreciation to the national authorities in the matter.<sup>365</sup>

Secondly, the Court also takes cognisance of the [monetary] insignificance of the fine imposed. The joint dissenting opinion concedes that the fact that the prison sentence was commuted into a modest fine is significant, but the fears of the dissenting judges have not been completely allayed: “Freedom of the press relates to matters of principle, and 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’.”<sup>366</sup> The same argument was also applied by the Court in its unanimous finding of a violation of Article 10 in the *Tatlav* case.<sup>367</sup>

Generally-speaking, the Court’s approach to the dissuasive impact of a criminal sanction tends to vary according to the circumstances of the case.<sup>368</sup> The least that could be said about the Court’s handling of the issue in the present case is that it should have been less perfunctory.

### *Conclusion*

It is most unlikely that the Court will formally take the bold step of severing its own doctrinal chain, as it was urged to do by the dissenting judges in the *İ.A.* case. But perhaps such a radical step, with all the political and face-losing consequences it would likely entail, is not entirely necessary in order to reshape relevant case-law in its future judgments. To the extent that the principle of *stare decisis* “creates a chain of cases, in which each decision is an interpretation of immediately prior decisions”, it offers the flexibility of distinguishing between the application of relevant principles in previous and new sets of circumstances.<sup>369</sup> As has been argued throughout this note, the relevant principles are – by and large – sound; it is the application of those principles that has been a source of disappointment. As the principles are not objectionable, there is no pressing need to repudiate them; rather, the focus should be on ensuring that whenever the Court applies relevant principles in the future, it does so in a way that distinguishes unsatisfactory precedents set by the mis-application of principles in its earlier case-law. The recent case of *Giniewski* provides useful relevant examples of how this can be done: it distinguishes, *inter alia*, certain contextualising elements of the *Otto-Preminger* and *İ.A.* cases, from the circumstances with which it was faced.<sup>370</sup> A recurrent problem in the relevant case-law of the Court is the inadequate attention it has tended to give to contextualising factors when assessing whether impugned practices measure up to its principles. Contextualising factors can often have a relativising (or occasionally, even a transformative) impact on the interpretation of the bare facts of a case, and the Court should pay increased attention to the importance of contextualising factors in the future.

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<sup>365</sup> *Ibid.*, para. 61.

<sup>366</sup> Joint dissenting opinion, *İ.A. v. Turkey*, *op. cit.*, para. 6.

<sup>367</sup> *Aydın Tatlav v. Turkey*, Judgment of the European Court of Human Rights (Second Section) of 2 May 2006, para. 30.

<sup>368</sup> Contrast, for example, *Sürek v. Turkey (No. 1)*, *op. cit.*, paras. 63 and 64 and *Chauvy & Others v. France*, Judgment of the European Court of Human Rights (Second Section) of 29 June 2004, para. 78, with *Jersild v. Denmark*, *op. cit.*, para. 35 and *Giniewski v. France*, *op. cit.*, para. 55.

<sup>369</sup> Robert Post, “Theories of Constitutional Interpretation”, in Robert Post, Ed., *Law and the Order of Culture* (California, University of California Press, 1991), pp. 13-41, at 20.

<sup>370</sup> *Op. cit.*, para. 52.

### *Margin of appreciation*

The foregoing section details specific examples of contextualising factors that have been under-explored in the relevant case-law of the Court. Finally – to round off the foregoing critical dissection with further critical distillation – another lingering problem with *Otto Preminger* and its jurisprudential progeny must be addressed, or at least flagged for more thorough discussion at a later stage. The problem concerns the lax and seemingly unquestioning manner in which the Court has tended to apply the margin of appreciation doctrine in relevant cases.

It cannot be gainsaid that religious affairs have an immense inherent capacity for contentiousness. It is also generally true that States authorities are in the best position to take the measure of local religious sensitivities (but whether they can be trusted to do so fairly and objectively is another matter entirely). Nevertheless, the margin of appreciation doctrine must not be allowed to become a smoke-screen behind which States and the European Court can hide, instead of facing up to complex, divisive issues. In a number of the cases analysed in detail, *supra*, the Court has readily endorsed States authorities' justifications of measures restricting the right to freedom of expression.

Those justifications have often included the preservation of religious peace and harmony and the avoidance of societal divisions – even when those goals do not seem to be particularly threatened by the impugned expression.<sup>371</sup> For example, it seems both implausible and incongruous that the broadcasting of an informative, inoffensive advertisement for a particular minority religious group would lead to “unrest” in contemporary Ireland. That argument, however, was factored into the Court’s reasoning in the *Murphy* case.<sup>372</sup> The question of religious advertising was made the subject of a public consultation conducted by the Irish Department of Communications, Marine and Natural Resources in 2003. The public consultation was concluded after the European Court had found that the statutory prohibition on broadcasting religious advertising *as applied to the facts in the Murphy case* did not amount to a violation of Article 10. Upon the conclusion of the public consultation, it was announced at the beginning of 2004 that there would be no change to the *status quo*.<sup>373</sup> Interestingly, apart from acknowledging that the subject is “very emotive”, the Minister did not rely on the argument of divisiveness which had struck such a loud chord with the European Court in the *Murphy* case. Rather, he stated his preoccupying concern to be the intrusiveness of religious advertisements when broadcast to captive audiences and the principle of equality of arms.<sup>374</sup>

The outcome, in each case, has been in favour of majoritarian or orthodox or conventional religious beliefs. Quite simply, as David Richards has pointed out, “the measure of constitutional protection for conscientiously dissenting speech could not be the dominant orthodoxy that it challenged, for that would trivialize the protection of free speech to whatever

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<sup>371</sup> For further exploration of this point, see: Tarlach McGonagle, “Commercial expression – the usefulness of an imperfect notion?”, in Eoin O’Dell, Ed., *Freedom of Expression* (Dartmouth, forthcoming).

<sup>372</sup> *Murphy v. Ireland*, *op. cit.*, paras. 73 *et seq.*

<sup>373</sup> “Dermot Ahern Retains Ban on Religious Advertising”, Press Release of the Department of Communications, Marine and Natural Resources, 29 January 2004.

<sup>374</sup> The Minister’s press release stated: “Advertising on radio and television is significantly more intrusive than advertising in other media given the pervasive nature of the media. I don’t believe that Irish people would want, on balance, that religious interests should be able to buy air-time to deliver an unchallenged message – one which other interests through lack of resources might not be able to match or counter.”

massaged the prejudices of dominant majorities.”<sup>375</sup> Greater critical engagement with the particular circumstances of individual cases is required in order to ensure that the Court’s judgments in this area are realistic and convincing.

Context may not be everything (although an old platitude of literary criticism tells us otherwise), but if the European Court of Human Rights continues to ignore the importance of contextualising factors in its jurisprudence, it will surely do so at its peril.

## 6.4 Specific current controversies

Having analysed the relevant jurisprudence of the European Court of Human Rights at length, and before closing the discussion on the scope of the heavily qualified right not to be offended, three current controversies merit close attention: denial or trivialisation of genocide and other crimes against humanity; “defamation” of religions; protection of founders of religions.

### 6.4.1 Denial or trivialisation of genocide and other crimes against humanity

Debates centring on whether or not free speech principles should afford any protection for the denial or trivialisation of genocide and other crimes against humanity remain topical and heated.<sup>376</sup> Nevertheless, international human rights law consistently refuses to extend protection to such types of expression, as will presently be demonstrated.

#### 6.4.1(i) The Holocaust/Negationism

Holocaust denial is a *sui generis* type of hate speech. It is morally reprehensible for a number of reasons: it is a common and convenient vehicle for conveying anti-Semitic sentiments; it denies survivors recognition of the dignity-stripping devastation which defines the Holocaust; it minimises the suffering and ultimate fate of those who were murdered in pursuit of the Nazis’ programme of elitarian-inspired hatred; it amounts to hatred directed against a group and against individual members of that group and it reinforces trends of discrimination and persecution. And this is true of every group that was subjected to systematic annihilation under the Nazi regime – Jews, Communists, Gypsies, the Mentally and Physically Disabled and others. In light of the harm caused by Holocaust denial, the case for legal prohibitions on such speech would appear to be socially imperative. The thesis that Holocaust denial should automatically be proscribed, irrespective of considerations such as intent, the time, place and manner of its delivery or its actual impact, is built on the premise that to allow Holocaust denial is, *ipso facto*, to confer a certain legitimacy on the content of this kind of speech.<sup>377</sup>

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<sup>375</sup> David A.J. Richards, *Free Speech and the Politics of Identity* (New York, Oxford University Press, Inc., 1999), p. 197.

<sup>376</sup> David Irving’s conviction in Austria; the extradition of Ernest Zundel for trial; initial plans during German Presidency of EU to extend prohibition of Holocaust Denial; the draft French law prohibiting the denial of the Armenian genocide; political debate in the Netherlands about the desirability of prohibiting the denial of all crimes against humanity.

<sup>377</sup> A. Bickel, *op. cit.*, p. 73; R. Eatwell, “The Holocaust Denial: a Study in Propaganda Technique”, in L. Cheles, R. Ferguson & M. Vaughan (Eds.), *Neo-Fascism in Europe* (New York, Longman Inc., 1991), pp. 120-146, at 123.

It is often the wont of so-called ‘revisionist historians’ and (extreme) right-wing politicians to seek to dress up their work or statements in the emperor’s clothing of “academic freedom” and “freedom of speech”. Neither claim is of immediate relevance, however. Myriad sound bites seek to strike high-minded chords: the truth is unattainable; our conceptions thereof are doomed to relativity; no facts should be immune to challenge, to vigorous questioning, as this is a vector for the advancement of society; no belief should be allowed to be sclerotised in accordance with the prevailing currents of any time or creed. The high road to self-righteousness is paved with such platitudes, perversely chosen in the hope that their rhetorical resonance will distract from the main issues involved.

But these are no more than empty sound bites and their echo *is* hollow, for not all disputes concerning the veracity of established facts are of a similar nature. People of this ilk are often quick to liken their contestations of orthodox accounts of the history of the Second World War to Galileo’s dissent from the catholic, conventional wisdom of yesteryear which dictated that the sun revolved around the earth. However, the primordial difference between Holocaust denial and Galileo’s celebrated refusal to recant (“*eppur si muove!*”) is that the issue of hatred was not central to the debate in which the principles of modern astronomy finally triumphed. Doubting and questioning with a view to stimulating reflection and debate are laudable, but not when their propelling force is hatred.

Such is the emotive content of any expression merely evoking the Shoah,<sup>378</sup> that the delicate judicial balancing of seemingly antipodal interests will be necessarily deferential to the rights and reputations of those affected by the harmful tendencies of such speech. Echoing the argument from truth<sup>379</sup> and Justice Holmes’s dissent in *Abrams*,<sup>380</sup> Stanley Fish concedes that “although we ourselves are certain that the Holocaust was a fact, facts are notoriously interpretable and disputable; therefore nothing is ever really settled, and we have no right to reject something just because we regard it as pernicious and false.”<sup>381</sup> However, he continues, “when it happens that the present shape of truth is compelling beyond a reasonable doubt, it is our moral obligation to act on it and not defer action in the name of an interpretative future that may never arrive.”<sup>382</sup> In aggregate, this is recognition that conceptions of truth can only ever be relative and that ideas *can* be suppressed on the basis of their harmful content. The upshot of Fish’s assertion is that the memory of those who perished in the Holocaust should never be jettisoned in favour of a cargo of spuriously-motivated arguments about the fallibility of any so-called ‘truth’.

There are discernible similarities in the material facts of most of the negationist cases to have been brought before the European Commission for Human Rights. The applicants all sang from the same heinous hymn-sheet. Holocaust denial was their common refrain, but there were slight variations in the specific cadenzas of this distasteful orchestra, including: allegations that the Holocaust was invented for the purposes of extorting monetary compensation from the German authorities; aggressive advocacy of the reinstatement of National Socialism and the racial discrimination inherent in its philosophy; various Nazi-

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<sup>378</sup> See, for instance, the controversy (misplaced accusations of trivialisation of the Holocaust) which surrounded ‘La vita è bella’ (Italy, 1997), the Roberto Benigni film which won the Grand Prix at the Cannes Film Festival in 1998 and the Academy Award for Best Foreign Language Film in the same year. See further in this connection, Anne-Marie Bacon, *The Shoah on screen – Representing crimes against humanity* (Volume I) (Strasbourg, Council of Europe, 2006).

<sup>379</sup> Attributable to both Milton and Mill, as well as forming the basis for Scanlon’s Millian Principle.

<sup>380</sup> C.f. quote *supra*, especially the section referring to how “time has upset many fighting faiths...”

<sup>381</sup> S. Fish, *There’s No Such Thing as Free Speech and it’s a Good Thing, Too* (New York, OUP, 1994), p. 113.

<sup>382</sup> *ibid.*

inspired activities; the sinister, spurious questioning of the scientific feasibility of mass gassing.

In *X v. FRG*,<sup>383</sup> it was held that to prohibit an individual from displaying pamphlets alleging that the Holocaust was “a lie” and a “zionistic swindle” “is a measure necessary in a democratic society for the protection of the reputation of others.” The Commission focused not only on the pamphlets’ distortion of relevant historical facts, but also on the attack they contained on the “reputation of all those who were described as liars or swindlers, or at least as persons profiting from or interested in such lies or swindles.”<sup>384</sup> The conviction of a journalist for the publication of pamphlets aggressively advocating the reinstatement of National Socialism and the racial discrimination inherent in its philosophy, was held, in *Kühnen v. FRG*,<sup>385</sup> to be necessary in democratic society “in interests of national security and public safety and for protection of rights of others.”<sup>386</sup> Similarly, in *Rebhandl v. Austria*,<sup>387</sup> the Commission upheld the conviction of the applicant for, *inter alia*, distributing “publications denying in particular the existence of the gassing of Jews in the concentration camps under the Nazi regime” on the basis of the public interest in the prevention of crime and disorder and the protection of reputations and rights. This, too, was the logic applied by the Commission in *Witzsch v. Germany*,<sup>388</sup> a case involving a conviction for disparaging the dignity of the dead. In this case, the language employed was more open-ended, as it spoke of “the requirements of protecting the interests of the victims of the nazi regime”.

*H., W., P., and K. v. Austria*<sup>389</sup> dealt with convictions for acts performed by the applicants in connection with their membership of and leadership in Aktion Neue Rechte (ANR). The Commission held that legal prohibitions on activities inspired by National Socialism *are* “necessary in a democratic society in the interests of national security and territorial integrity and for the prevention of crime.”<sup>390</sup> It is perhaps noteworthy that the activities of the applicants involved the preparation and publication of pamphlets which described the Holocaust as a lie; propagated theories about alleged biological differences between races, principles of elitarianism and endorsements of Lebensraum and other National Socialist doctrines which constituted part of their own party’s manifesto. The most significant feature of this case was the Commission’s observation that “National Socialism is a totalitarian doctrine incompatible with democracy and human rights and that its adherents undoubtedly pursue aims of the kind referred to in Article 17.”<sup>391</sup> This is a very candid and important recognition of the hateful ideology that forms the bedrock of Nazism. It is, in effect, the equation of membership of the National Socialist Party with an espousal of all of its ideals. *Ochensberger v. Austria*<sup>392</sup> was another case challenging a conviction for National Socialist activities and was declared inadmissible on much the same grounds.

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<sup>383</sup> Appn. No. 9235/81, 29 DR 194 (1982).

<sup>384</sup> *Ibid.*, p. 198.

<sup>385</sup> Appn. No. 12194/86, 56 DR 205 (1988).

<sup>386</sup> *Ibid.*, p. 205.

<sup>387</sup> Appn. No. 24398/94.

<sup>388</sup> Appn. No. 41448/98.

<sup>389</sup> Appn. No. 12774/87, 62 DR (1989) 216.

<sup>390</sup> *Ibid.*, p. 216.

<sup>391</sup> *Ibid.*, pp. 220/1. See p. 216 for almost identical language, and also *Nachtmann v. Austria*, Appn. No.

36773/97. This unsuccessful application was taken by the head of editorial staff of a periodical that published an article which grossly denied and minimised National Socialist genocide and other National Socialist crimes.

Nigh-identical language is also employed in *Schimaneck v. Austria*, Appn. No. 32307/96.

<sup>392</sup> Appn. No. 21318/93, 18 EHRR-CD, pp. 170-172.



The Commission's finding in *Honsik v. Austria*<sup>393</sup> is a carbon-copy of its finding in the *H., W., P. and K. v. Austria* application as exactly the same reasons are offered in attesting to the necessity of the conviction for social democracy. Furthermore, the incompatibility of National Socialism with democracy and human rights is reiterated. The conviction in the instant case was “pour avoir nié dans une publication la réalité du génocide perpétré dans les chambres à gaz des camps de concentration sous le régime national-socialiste.”<sup>394</sup>

In *Walendy v. Germany*,<sup>395</sup> the Commission refused to admit a complaint by the applicant about a search and the seizure of an unlawful publication containing an article which amounted to a denial of the systematic annihilation of Jews under the Third Reich. This, the Commission held, “constituted an insult to the Jewish people and at the same time a continuation of the former discrimination against the Jewish people.”<sup>396</sup> In *E.F.A. Remer v. Germany*,<sup>397</sup> the applicant's suggestions that “le sort des Juifs sous le régime national-socialiste avait été ‘inventé’ de toutes pièces à des fins d’extorsion”<sup>398</sup> ensured that his attempt to challenge his conviction for incitement to hatred and to racial hatred was declared inadmissible.

Notwithstanding the Commission's repeated refusals even to countenance speech involving Holocaust denial, or by extension, speech used by proponents of National Socialism in furtherance of their stigmatised brand of politics, one case which did manage to slip through the net and was duly considered by the Court in 1998 was *Lehideux & Isorni v. France*, discussed *supra*.<sup>399</sup> This judgment was a rare instance of freedom of expression outweighing the perceived harms of discourse which is colourably negationist, anti-Semitic or totalitarian, when these two potentially countervailing concerns were balanced on the judicial scales. Other highly-publicised cases centring on Holocaust denial have also originated in France.<sup>400</sup>

The application in *Marais v. France*,<sup>401</sup> declared manifestly unfounded by the Commission, arose out of an article entitled ‘La chambre à gaz homicide du Struthof-Natzweiler, un cas particulier’ (‘The homicidal gas chamber of Struthof-Natzweiler, a particular case’; author's translation) written by the applicant for the periodical *Revision*. The Commission considered the content of the article to question “l'existence et l'usage de chambres à gaz pour une extermination humaine de masse.”<sup>402</sup> The conviction of Marais was pursuant to “l'article 24bis de la loi du 29 juillet 1881” (otherwise known as “la loi Gaysot”, 13 July 1990). A wave of anti-semitism swept through France in 1990, culminating in the desecration of tombs in a Jewish cemetery at Carpentras in August of that year. The Government's response to this

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<sup>393</sup> Appn. No. 25062/94, 83-B DR 77 (1995).

<sup>394</sup> “[F]or having denied in a publication the reality of the genocide perpetrated in the gas chambers of the concentration camps under the National-Socialist regime” (author's translation). *Ibid.*, p. 77.

<sup>395</sup> Appn. No.21128/92, 80-A DR 94.

<sup>396</sup> *Ibid.*, p. 99.

<sup>397</sup> Appn. No. 25096/94, 82-A DR 117.

<sup>398</sup> “[T]he fate of the Jews under the National-Socialist regime had been ‘invented’ purely for the purposes of extortion” (author's translation). *Ibid.*, p. 122.

<sup>399</sup> Reports, 1998-VII.

<sup>400</sup> These include (albeit only in the national courts) the conviction of Jean-Marie Le Pen, leader of the extreme right-wing party, *Le Front national*, for describing the Nazi gas chambers as “un point de détail” in the history of the Second World War. He was found guilty by the Cour de cassation (the French equivalent of the Supreme Court) in 1989 for the banalisation of constitutive acts of crimes against humanity (“banalisation d'actes constitutifs de crimes contre l'humanité”). See further, J.-Y. Camus, *Le Front National* (Toulouse, Editions Milan, 1998), p. 41.

<sup>401</sup> Appn. No. 31159/96, 86-A DR 184 (1996).

<sup>402</sup> “[T]he existence and use of gas chambers for mass human extermination” (author's translation). *Ibid.*, p. 190.

surge in anti-Semitism was the enactment of the so-called Gayssot Act. Also the fulcrum of the aforementioned case, *Faurisson v. France*, the Gayssot Act was intended to be a main plank in the French Government's programme against racism and anti-Semitism; a hefty legislative sandbag to counter the rising tide of intolerance.

The so-called "revisionist historian", David Irving, was mentioned in an application which was rejected by the European Commission – *Nationaldemokratische Partei Deutschlands Bezirksverband Munchen-Oberbayern v Germany*.<sup>403</sup> At issue in the case was an imposition on the organisers of a meeting (at which Irving was due to speak) of an obligation to take appropriate measures to ensure that the Nazi persecution of Jews would not be denied or called into question during the meeting.

If it is accepted that Holocaust Denial is a legitimate and proportionate, and indeed, necessary restriction on freedom of expression, this begs the question whether the same should be the case for speech seeking to minimise, trivialise or deny the occurrence of other genocides. This question is problematic as Article 3 of the Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention) does not include genocide-denial as one of its five enumerated "punishable" acts.<sup>404</sup> These acts are: "(a) genocide [as defined in Article 2]; (b) conspiracy to commit genocide; (c) direct and public incitement to commit genocide; (d) attempt to commit genocide; (e) complicity in genocide." As documented *supra*, various aspects of the crime of incitement were the subject of protracted wrangling during the drafting of the Genocide Convention, but genocide-denial as such was not dwelt upon.<sup>405</sup>

It is certainly a question deserving further exploration whether the scope of the Genocide Convention could be extended to include genocide-denial. It is difficult to envisage different standards being applied to different genocides: international law would surely be above the egregious practice of hierarchising horror. In any event, the definition of genocide would have to be stringently applied, for as posited by William Schabas: "There is no magic threshold past which ethnically motivated killing becomes genocide. The real test lies in the intent of the perpetrator."<sup>406</sup> Genocide is defined by Article 2 of the Genocide Convention as:

- ... any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
- (a) Killing members of the group;
  - (b) Causing serious bodily or mental harm to members of the group;
  - (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
  - (d) Imposing measures intended to prevent births within the group;
  - (e) Forcibly transferring children of the group to another group.

Once the definitional criteria of "genocide" have been met, a further question comes a-begging: should temporal restrictions attach to a putative offence of genocide-denial. How recent would the genocide have to be in order to merit its classification as an offence punishable by law? Of course, the debate surrounding the criminalisation of genocide-denial

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<sup>403</sup> Appn. No. 25992/94, 84-A DR 149 (1996).

<sup>404</sup> The Convention on the Prevention and Punishment of the Crime of Genocide, 1948, Article 3: "The following acts shall be punishable: (a) genocide [as defined in Article 2]; (b) conspiracy to commit genocide; (c) direct and public incitement to commit genocide; (d) attempt to commit genocide; (e) complicity in genocide."

<sup>405</sup> See generally, William A. Schabas, "Hate Speech in Rwanda: The Road to Genocide", 46 *McGill Law Journal* 141 (2000), at pp. 141-171.

<sup>406</sup> *Ibid.*, p. 144.

need not be the sole preserve of the Genocide Convention. However, other international law instruments have been slow to meet the issue head on. In fact, the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (mentioned *supra*) is the only international treaty to date which seeks to tackle the issue of the denial of genocides other than/as well as the Holocaust (and it has yet to enter into force). The operative provision of the Additional Protocol reads as follows:

**Article 6 – Denial, gross minimisation, approval or justification of genocide or crimes against humanity**

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 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.

While the text of Article 6 is silent on possible temporal restrictions to the recognition of genocides for the purpose of penalising their denial, one can extrapolate from the Explanatory Report to the Additional Protocol that the focus is primarily on genocides perpetrated in the latter half of the twentieth century up to the present day. The basis of this reading of the text is the following passage:

[...] The drafters agreed that it was important to criminalize expressions which deny, grossly minimise, approve or justify 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 April 1945. This owing to the fact that the most important and established conducts, which had given rise to genocide and crimes against humanity, occurred during the period 1940-1945. However, the drafters recognised that, since then, other cases of genocide and crimes against humanity occurred, which were strongly motivated by theories and ideas of a racist and xenophobic nature. Therefore, the drafters considered it necessary not to limit the scope of this provision only to the crimes committed by the Nazi regime during the 2<sup>nd</sup> World War and established as such by the Nuremberg Tribunal, but also to genocides and crimes against humanity established by other international courts set up since 1945 by relevant international legal instruments (such as UN Security Council Resolutions, multilateral treaties, etc.). Such courts may be, for instance, the International Criminal Tribunals for the former Yugoslavia, for Rwanda, the Permanent International Criminal Court. This Article allows to refer to final and binding decisions of future international courts, to the extent that the jurisdiction of such a court is recognised by the Party signatory to this Protocol.<sup>407</sup>

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<sup>407</sup> Explanatory Report to the Additional Protocol to the Convention on Cybercrime, *op. cit.*, para. 40.

Where would this leave the French Bill on the calling into question of the Armenian Genocide?<sup>408</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 force of its laws to mandate particular interpretations of historical events?<sup>409</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 legal standards.

The European Court of Human Rights has considered questions such as these on a number of occasions. The case of *Odabasi and Koçak v. Turkey* concerned the conviction by the Turkish courts of an author and publisher for having defamed the memory of Atatürk.<sup>410</sup> The Court concluded that the convictions constituted a violation of Article 10, ECHR, and the key part of its reasoning reads as follows:

En l'occurrence, la Cour ne peut négliger qu'Atatürk, père fondateur de la Turquie, est une figure emblématique de la Turquie moderne. En sanctionnant les requérants, les autorités turques ont voulu agir pour empêcher que la société turque, attachée à cette figure, ne se sente attaquée dans ses sentiments de manière injustifiée. Cependant, lorsque l'on examine les affirmations litigieuses dans leur ensemble, force est de constater qu'elles ne visaient pas directement et personnellement Atatürk, mais l'idéologie <<kémaliste>>. Dès lors, la Cour observe que les requérants n'ont pas porté de jugement de valeur et se sont contentés de relater certains faits sous la forme introductive, invitant le lecteur, et plus précisément la gauche turque, à y répondre. [...] <sup>411</sup>

The cited passage provides cause for concern. First, the Court points out that the impugned statements did not target Atatürk directly and personally. Instead they targeted Kemalist ideology. The cause for concern here is the apparent implication of the Court's remarks, namely that if the impugned statements had targeted Atatürk directly and personally that there may have been grounds to restrict the applicants' right to freedom of expression. Notwithstanding Atatürk's "emblematic status in modern Turkey", he was a political figure. Thus, any suggestion that he or his (posthumous) reputation should benefit from additional protection, is surely at odds with one of the most consistent lines in the Court's Article 10 case-law, namely that in democratic society, and especially in the context of public or political debate, politicians ought to withstand robust criticism. Second, the Court places store by the fact that the applicants did not make value-judgments, but limited themselves to introducing certain facts and inviting the reader and more specifically, the political left, to respond to the same. Again, the cause for concern lies in what the remark could seem to imply, i.e., that if the applicants had made value-judgments that they might not have benefited from the same level of protection. This would clearly have been out of kilter with the Court's settled case-law on value-judgments, which are an integral part of public debate and journalistic activity. Protection for value-judgments can only be contested when they have no factual grounding and are made maliciously. This was patently not the case here. A third

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<sup>408</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.

<sup>409</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).

<sup>410</sup> Judgment of the European Court of Human Rights (Fourth Section) of 21 February 2006.

<sup>411</sup> *Ibid.*, para. 23.

cause for concern lies in a statement by the Court in paragraph 24 of its judgment, which immediately follows the above-cited excerpt. It concludes that the impugned passages in the book do not incite to violence, armed resistance or uprising and that they do not amount to hate speech. However, further explanation of this conclusion is not forthcoming and in the absence of a firm definition of “hate speech”, our understanding of relevant issues is not elucidated in any way.

A second example of the Court engaging with such issues concerns historical events and collective memory. In *Chauvy & Others v. France*, the Court took the view that, aside from “the category of clearly established historical facts – such as the Holocaust – whose negation or revision is removed from the protection of Article 10 by Article 17”:

[...] it is an integral part of freedom of expression to seek historical truth and it is not the Court’s role to arbitrate the underlying historical issue, which is part of a continuing debate between historians that shapes opinion as to the events which took place and their interpretation.<sup>412</sup>

The case required the balancing of two competing interests, *viz.*, the public interest in being informed of the circumstances in which Jean Moulin, a leading figure in the French Resistance against the Nazi occupation in the Second World War, was arrested, and the need to protect the reputation of Mr and Mrs Aubrac, two other important members of the Resistance. It had been suggested in a book that the latter had been in some way responsible for the arrest, suffering and death of Moulin. In exercising its supervisory function, the European Court of Human Rights found that the approach and reasoning in the French courts’ decisions constituted “relevant and sufficient reasons” for the convictions imposed in the domestic legal system. It therefore concluded that Article 10 had not been violated.

The judgment did, however, contain a couple of other statements which potentially have relevance beyond the facts of the instant case. Most importantly, for present purposes, was the Court’s acceptance to the French courts’ finding that “the author had failed to respect *the fundamental rules of historical method* in the book and had made particularly grave insinuations”.<sup>413</sup> The reference to the fundamental rules of historical method can be taken as a concrete example of the duties and responsibilities that accompany the exercise of the right to freedom of expression in the context of historical debate. As such, it is a rare reference by the Court to specific duties pertaining to a particular profession other than journalism or politics.

*Prima facie*, a judicial focus on Holocaust denial may seem slightly anachronistic, as World War II and its atrocities very gradually recede into the collective memory and younger generations succeed previous generations, whose lives were closer to the tragedies and suffering of those years. Such an observation would, however, be simplistic. The heyday of Nazism did indeed span a fixed and finite period. However, its spectre continues to haunt modern times and the supposed values, or more accurately, the counter-values, of Nazism are immutable. These are counter-values against which society must always guard vigilantly. As noted by the writer William Faulkner: “The past is never dead. It’s not even past.”<sup>414</sup>

These perspectives resonate in one of the theses advanced by Lawrence Douglas, namely that “the problem that the Holocaust poses to the law today is less one of assigning responsibility than one of preserving responsible memory [...] The law has been enlisted in the project of

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<sup>412</sup> *Chauvy & Others v. France*, Judgment of the European Court of Human Rights of 29 June 2004, para. 69.

<sup>413</sup> (emphasis added). *Ibid.*, para. 77.

<sup>414</sup> William Faulkner, *Requiem for a Nun* (New York, Vintage Books, 1975), Act I, Scene III, (Stevens), p. 80.

safeguarding historical truth.”<sup>415</sup> This is one rationale for the continued existence and enforcement of Holocaust-denial laws; the second is that consistently advanced by the French Government in defence of the Gayssot Act (considered *supra*). Defamation of the dead and insulting of survivors lies somewhere in-between these two rationales, given that it approximates towards the “intentional infliction of emotional distress”.<sup>416</sup> Douglas’s synthesis of these rationales is insightful:

[...] criminalizing Holocaust denial anticipates a time when the event will no longer remain alive in the memory of survivors, as the group of plaintiffs who could claim emotional distress will have died off. The law thus prepares us for a rapidly approaching future in which the Holocaust will have become an artifact of history. [...] Why then do we need the law to secure the Holocaust in responsible memory, when we do not need a law to remind us that the earth revolves around the sun or that Napoleon’s armies fought at Waterloo? Part of the answer seems to lie in a fear of the spread of the disbelief that Primo Levi notes first greeted news of the camps. The very extraordinary nature of Nazi genocide, it is argued, renders it vulnerable to a campaign of scepticism.<sup>417</sup>

He continues by extending the logic of his own analysis to a broader plane:

Perhaps, then, it can be argued that Holocaust denial does not so much offend a particular group or history itself as it insults the very notions of meaning upon which the liberal concept of public discourse is predicated. This claim is far more foundational, for it does not insist that Holocaust denial can be silenced because it insults codes of civil behavior and speech; rather, it contends that because Holocaust denial makes a mockery of conventions of truth-testing and good faith conversation, it violates the most basic norms that make intelligible the concept of public discourse.<sup>418</sup>

This analysis would appear to underlie the European Commission’s finding in *Rebhandl v. Austria* (discussed *supra*) that “the applicant’s publications ran counter one of the basic ideas of the Convention, as expressed in its preamble, namely justice and peace, and further reflect racial and religious discrimination.”<sup>419</sup> According to this school of thought, Holocaust denial is but one, specific form of attack on justice, peace, equality, harmony and other venerated values of democracy. However, the case which offers the clearest elucidation yet of the rationales governing the Court’s approach to Holocaust denial is the recent *Garaudy v. France* judgment.<sup>420</sup> The following extract from the judgment is revelatory of the Court’s reasoning:

[...] 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

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<sup>415</sup> Lawrence Douglas, “Policing the Past: Holocaust Denial and the Law”, in Robert Post, [...], pp. 67-87, at p. 68.

<sup>416</sup> *Ibid.*, p. 69, quoting Elie Wiesel.

<sup>417</sup> *Ibid.*, p. 70.

<sup>418</sup> *Ibid.*, p. 71.

<sup>419</sup> The same reasoning and language were employed by the Commission in *D.I. v. Germany*, Appn. No. 26551/95; a case in which the applicant “historian”’s denial of the existence of gas chambers at Auschwitz had led to his conviction by the German courts under the relevant sections of the German Penal Code, for insult and for blackening the memory of the deceased.

<sup>420</sup> *Garaudy v. France*, Inadmissibility decision of the European Court of Human Rights (Fourth Section) of 4 July 2003 (?), Application No. 65831/01.

anti-Semitism are based and constitutes a serious threat to public order. Such acts are incompatible with democracy and human rights because they infringe the rights of others. Its proponents indisputably have designs that fall into the category of aims prohibited by Article 17 of the Convention.

The Court considers that the main content and general tenor of the applicant's book, and thus its aim, are markedly revisionist and therefore run counter to the fundamental values of the Convention, as expressed in its Preamble, namely justice and peace. [...] <sup>421</sup>

The various rationales for prohibiting negationism, as discussed in the preceding paragraphs, are broadly congruent. They focus on the protection of the rights of others, namely their dignity and good name, as well as non-discrimination and equality. Next to those rationales, however, other rationales have been advanced, but they do not fit easily into the aforementioned congruence. For instance, William Schabas has noted that negationism has been described “as a form of incitement to genocide”. It is respectfully submitted here that this suggestion appears to rest both on a *non sequitur* and on a misrepresentation. As to the former: it is difficult to conceive of circumstances in which negationist statements *per se* would readily be interpreted as inciting new genocidal offences. However egregious the minimalisation or trivialisation or denial of previous genocides, in particular the Holocaust, may be, in the absence of other determinant factors, negationism on its own, cannot be assumed to constitute the intensity of advocacy necessary to meet the definitional criteria of incitement to genocide (which, under Article III of the Genocide Convention, would have to be “direct and public” incitement anyway).

As to the misrepresentation: Schabas attributes the description of negationism as a form of incitement to genocide to Benjamin Whitaker, who was the Special Rapporteur to the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities charged with the task of preparing a major report “on the question of the prevention and punishment of the crime of genocide” in the mid-1980s.<sup>422</sup> The alleged source of the description - para. 49 of Whitaker’s report - does not make any reference to incitement, let alone incitement to genocide. Rather, the paragraph notes the plans of the German Government to criminalise attempts to deny or minimise the truth about Nazi crimes. It then acknowledges that different States have different views and policies on those questions, as well as the sincerity in the “differences of opinion [...] as to whether this problem is best dealt with by education and constant vigilance or by the influence of legislation”. Nor is negationism described as incitement to genocide in either of the two preceding paragraphs that make up the relevant section (“Propaganda in favour of genocide”) of the report. In para. 47, Whitaker notes the suggestion that “public propaganda aimed at promoting the commission of acts of genocide, or attempts to rewrite history so as either to falsify the truth about or to glorify its occurrence, of which there are examples in more than one country today, should be brought within the terms of the Convention”,<sup>423</sup> but ultimately does not take a stand on the question. In para. 48, he writes that “it can be argued that propaganda for genocide should not be considered as any less grave than propaganda for war, prohibited by Article XX(1) of the Covenant on Civil and Political Rights, or propaganda in favour of racial superiority, prescribed by Article IV of the Convention on the Elimination of All Forms of Racial Discrimination”. This is a reasonable argument, but again, it cannot be construed as bracketing together negationism and incitement to genocide. It is important to scotch the suggestion that Whitaker described negationism as a

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<sup>421</sup> *Ibid.*, p. 23 of the official English translation of excerpts from the decision.

<sup>422</sup> Revised and updated report on the question of the prevention and punishment of the crime of genocide prepared by Mr. B. Whitaker, 2 July 1985, UN Doc. No. E/CN.4/Sub.2/1985/6 (see also the Corrigendum thereto: UN Doc. No. E/CN.4/Sub.2/1985/6/Corr.1).

<sup>423</sup> Emphasis added.

form of incitement to genocide because of the *de facto* or political imprimatur that could be perceived as attaching to such a description by virtue of the official capacity in which his report was written.

#### 6.4.2 “Defamation” of religions

In the final years of the UN Commission on Human Rights’ existence, the topic, “Combating defamation of religions”, became a recurrent agenda item. Every year, since 1999, the Commission adopted a Resolution on the topic – sponsored by individual States (usually Pakistan) on behalf of the Organization of the Islamic Conference.<sup>424</sup> In December 2005, the UN General Assembly followed suit by adopting an identically-titled Resolution.<sup>425</sup> In December 2006<sup>426</sup> and December 2007,<sup>427</sup> the UNGA again adopted identically-titled Resolutions. In March 2007, the UN Human Rights Council which replaced the Commission, adopted an identically-titled Resolution too.<sup>428</sup> These texts strongly resemble each other; any differences are minor, with one exception (see further, *infra*).

The Resolution can be roughly divided into four main focuses: a preamble; provisions that identify and criticise particular practices that do or could plausibly relate to the alleged offence of “defamation” of religions (although the text makes no attempt to define the alleged offence); provisions that identify and criticise practices that do not appear to be even of penumbral relevance to the alleged offence, and suggested measures to be undertaken in order to combat “defamation” of religions.

Of greatest interest here are the second and third categories. Among the practices that would or could fall within the presumptive definitional ambit of “defamation” of religions are:

- “negative stereotyping of religions [...]”<sup>429</sup>
- “intensification of the campaign of defamation of religions”<sup>430</sup>
- “Islam is frequently and wrongly associated with human rights violations and terrorism”<sup>431</sup>
- “programmes and agendas pursued by extremist organizations and groups aimed at the defamation of religions, in particular when supported by Governments”<sup>432</sup>
- “in the context of the fight against terrorism and the reaction to counter-terrorism measures, defamation of religions becomes an aggravating factor that contributes to

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<sup>424</sup> UN Human Rights Commission Resolutions 1999/82 of 30 April 1999, 2000/84 of 26 April 2000, 2001/4 of 18 April 2001, 2002/9 of 15 April 2002, 2003/4 of 14 April 2003, 2004/6 of 13 April 2004 and 2005/3 of 12 April 2005. See further, Kevin Boyle, “The Danish Cartoons”, 24 *Netherlands Quarterly of Human Rights* (No. 2, 2006), pp. 185-191.

<sup>425</sup> “Combating defamation of religions”, UN General Assembly Resolution 60/150 of 20 January 2006 (60<sup>th</sup> session, agenda item 71 (b)), Doc. No. A/Res/60/150.

<sup>426</sup> “Combating defamation of religions”, UN General Assembly Resolution 61/164, 19 December 2006 (61<sup>st</sup> session, agenda item 67(b)), Doc. No. A/61/PV.81.

<sup>427</sup> “Combating defamation of religions”, UN General Assembly Resolution 62/154, 18 December 2007 (62<sup>nd</sup> session, agenda item 70(b)), Doc., No. A/Res/62/154.

<sup>428</sup> Report to the General Assembly on the Fourth Session of the Human Rights Council (Vice-President and Rapporteur: Mr. Mousa Burayzat), 12 June 2007, Doc. No. A/HRC/4/123.

<sup>429</sup> Res. 60/150 & Res. 61/164: para. 1; Res. 62/154: para. 2.

<sup>430</sup> Res. 60/150 & Res. 61/164: para. 3; Res. 62/154: para. 6.

<sup>431</sup> Res. 60/150 & Res. 61/164: para. 4; Res. 62/154: para. 5.

<sup>432</sup> Res. 60/150 & Res. 61/164: para. 5; Res. 62/154: para. 4 (where “condoned” is used instead of “supported”).



the denial of fundamental rights and freedoms of target groups, as well as their economic and social exclusion<sup>433</sup>

Taken together, these provisions prompt a number of conceptual criticisms. The most fundamental of those criticisms is that religions do not have any “right”, as such, to be protected from criticism, no matter what level of intensity that criticism may reach. One could, however, argue that the duties and responsibilities that accompany the exercise of the right to freedom of expression require those exercising that right to abstain from engaging in criticism of religions that is abusive towards their adherents. But that is not at all the same thing as to imply the existence of a reputational right for religions. Nor does it imply a specific right for aggrieved adherents of those religions. One can only validly speak of an actual right not to have one’s freedom of religion interfered with.

As already signalled, the Resolution addresses a number of concerns that are only tangentially related to the alleged offence of “defamation” of religions (if at all):

- “[...] manifestations of intolerance and discrimination in matters of religion or belief [...]”<sup>434</sup>
- “physical attacks and assaults on businesses, cultural centres and places of worship of all religions as well as targeting of religious symbols”<sup>435</sup>
- “the ethnic and religious profiling of Muslim minorities in the aftermath of the tragic events of 11 September 2001”<sup>436</sup>
- “the use of the print, audio-visual and electronic media, including the Internet, and any other means to incite acts of violence, xenophobia or related intolerance and discrimination against Islam or any other religion”<sup>437</sup>

Manifestations of intolerance and discrimination in matters of religion or belief are best dealt with under existing provisions against discrimination. Likewise, the problem of ethnic and religious profiling also falls squarely under existing provisions and mechanisms against discrimination.

The focus on attacks on premises is conceptually unsatisfying too. First, the conventional meaning of “assault” under criminal law is an attack (or imminent/impending attack) on a person (not on buildings or artefacts as suggested in the Resolutions). Second, attacks on, or the causation of damage to, property are best dealt with under standard criminal law provisions.

Similar objections must be raised to paragraph on the media. First, violence, xenophobia or related intolerance and discrimination can, by definition, only take place against persons – not doctrines. By extension, the same must apply to incitement to such actions. Furthermore, as an offence, incitement is very distinct from defamation. The former is undue inducement to commit certain (in this context, prohibited) acts; the latter concerns causation of damage to reputational interests.

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<sup>433</sup> Res. 60/150, Res. 61/164 & Res. 62/154: para. 7.

<sup>434</sup> Res. 60/150 & Res. 61/164: para. 1; Res. 62/154: para. 2.

<sup>435</sup> Res. 60/150 & Res. 61/164: para. 2; Res. 62/154: para. 3.

<sup>436</sup> Res. 60/150 & Res. 61/164: para. 3; Res. 62/154: para. 6.

<sup>437</sup> Res. 60/150 & Res. 61/164: para. 6; Res. 62/154: para. 8.

Looking beyond a purely textual analysis of the Resolutions, the ostensible aim of this initiative is clear: to curb (harsh) criticism of religions, particularly Islam. Its motivation is brazenly partisan: as reflected by the texts, the concern is primarily for the protection of Islam, and extends only secondarily to other religions. Such partisanship and hierarchisation of religions are difficult to justify, especially in a text with aspirations to universal application. Non-Muslim States would probably be less resistant to the aims of this initiative if it were to be calibrated in a more religion-neutral manner, eg. if it were to seek to curb the “defamation” of all religions in a more egalitarian way.<sup>438</sup> Incidentally, a similar criticism could be levelled at other comparable IGO initiatives that seek to prioritise the interests of specific religions.<sup>439</sup> Absent convincing and pressing reasons for such a confessional hierarchisation, the practice should be avoided.

The use of scare quotes in this study when referring to the “defamation” of religions is a deliberate ploy to alert the reader to the conceptual confusion engendered by the term. Defamation, traditionally and conventionally, is centrally about the protection of an individual’s good name and reputation; the esteem in which s/he is held by other (right-thinking) members of society.<sup>440</sup> Definitions of defamation abound and the one followed here is taken from ARTICLE 19’s *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*.<sup>441</sup> According to these principles:

Defamation laws cannot be justified unless their genuine purpose and demonstrable effect is to protect the reputations of individuals – or of entities with the right to sue and be sued – against injury, including by tending to lower the esteem in which they are held within the community, by exposing them to public ridicule or hatred, or by causing them to be shunned or avoided.<sup>442</sup>

Another relevant definitional criterion for defamation, which is not expressly mentioned in the foregoing citation, but which is generally implicit in *Defining Defamation*, is that it consists of the wrongful publication of a *false* statement about a person.<sup>443</sup> This explains the legitimacy of “proof of truth” as a defence in defamation actions. It also points up the unsuitability of defamation actions as a mechanism for seeking to legally restrict or punish expressions of opinion. By definition, the truth of statements of opinion (or “value-judgments”) is not susceptible to proof, and as such, they must be distinguished from statements of fact, the truth of which can ordinarily be proven (to some level of satisfaction, at least).<sup>444</sup>

The regular scope of defamation is also subject to a couple of further delimitations, both of which are captured well by *Defining Defamation*. Principle 2(b) reads:

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<sup>438</sup> See further, Kevin Boyle, “The Danish Cartoons”, *op. cit.*

<sup>439</sup> See, for example, the OSCE’s initiative “on Combating Racism, Xenophobia and Discrimination, also focusing on Intolerance and Discrimination against Christians and members of other religions”.

<sup>440</sup> See generally, Marie McGonagle, *Media Law* (Second Edition) (Dublin, Thomson Round Hall, 2003), Chapter 4 – “Defamation”, pp. 64-149; for the essential features of the offence and an historical overview of its development, see in particular, pp. 64-74.

<sup>441</sup> London, ARTICLE 19, 2000. These Principles are part of ARTICLE 19’s International Standards Series; they “are based on international law and standards, evolving state practice (as reflected, inter alia, in national laws and judgments of national courts), and the general principles of law recognised by the community of nations. [...]”, “Introduction”, *ibid.*, p. 1.

<sup>442</sup> *Ibid.*, Principle 2: Legitimate Purpose of Defamation Laws: (a).

<sup>443</sup> See, for example, Bryan McMahon & William Binchy, *Irish Law of Torts* (3<sup>rd</sup> Edition), (Dublin, Butterworths, 2000), p. 882.

<sup>444</sup> *Lingens v. Austria*, Judgment of the European Court of Human Rights of 8 July 1986, Series A, No. 103, para. 46.

Defamation laws cannot be justified if their purpose or effect is to protect individuals against harm to a reputation which they do not have or do not merit, or to protect the ‘reputations’ of entities other than those which have the right to sue and to be sued. In particular, defamation laws cannot be justified if their purpose or effect is to:

[...]

ii. protect the ‘reputation’ of objects, such as State or religious symbols, flags or national insignia;

[...]

v. allow individuals to sue on behalf of a group which does not, itself, have status to sue.

Because the notion of “reputation” is at the very core of defamation, its extension to “religions” is problematic. Religions *qua* belief systems do not have reputations in the same sense that individuals do. This distinction is implicitly recognised by the European Court of Human Rights: in the *Giniewski* case (see further, *supra*), the Court upheld the legitimacy of the aim of the challenged interference with the applicant’s right to freedom of expression, which it summarised as being “to protect a group of persons from defamation *on account of their membership of a specific religion*”.<sup>445</sup> The Court held that this aim corresponded to the protection of “the reputation or rights of others” (Article 10(2), ECHR). Crucially, the focus was on defamation of (*a group of*) persons, not religions, as such. It is more apt to speak of the (cognitive and affective) associations made by individuals in relation to religions, but it would involve considerable semantic stretch to characterise such associations as reputational. This particular analogy is therefore limited. The analogy of group defamation, on the other hand, is more viable, because it is concerned with a group – necessarily comprising a body of individuals – and not a creed or any other inanimate object.<sup>446</sup>

This conceptual reservation about the transferability of defamation leads into the second relevant delimitation of the scope of defamation, announced *supra*. Principle 2(c) of *Defining Defamation* reads:

Defamation laws also cannot be justified on the basis that they serve to protect interests other than reputation, where those interests, even if they may justify certain restrictions on freedom of expression, are better served by laws specifically designed for that purpose. In particular, defamation laws cannot be justified on the grounds that they help maintain public order, national security, or friendly relations with foreign States or governments.

Clearly, therefore, defamation is not the malleable concept that some people would like to believe. A useful addendum to Principle 2(c) is that defamation is equally unsuited to protecting the very vague notion of “dignity”, a concept with which reputation has a certain affinity.<sup>447</sup>

When these general principles are applied to the aforementioned initiative within the UN, “Combating defamation of religions”, the conceptual premises of that initiative – just like its political motivation (see *infra*) - are revealed to be shaky. It represents an attempt to extend the scope of defamation to cover a subject for which it is ill-suited. If that subject is deserving of protection, alternative means to ensure that protection should be explored. My own view is

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<sup>445</sup> (emphasis added) *Giniewski v. France*, *op. cit.*, para. 40.

<sup>446</sup> For comprehensive treatment of group defamation, see: Monroe H. Freedman & Eric M. Freedman, Eds., *Group Defamation and Freedom of Speech: The Relationship Between Language and Violence* (USA, Greenwood Press, 1995). See, in particular, Louis Henkin, “Group Defamation and International Law”, *ibid.*, pp. 123-134. See also: Natan Lerner, *Group Rights and Discrimination in International Law* (2<sup>nd</sup> Edition) (The Hague, Martinus Nijhoff Publishers, 2003); Thomas David Jones, *Human Rights: Group Defamation, Freedom of Expression and the Law of Nations* (The Netherlands, Martinus Nijhoff Publishers, 1998).

<sup>447</sup> See further: Marie McGonagle, *Media Law*, *op. cit.*, at 64; Eric Barendt, “What is the point of Libel Law?”, 52 *Current Legal Problems* (1999) 110, at 117.

that while religions are not entitled to protection *per se*, persons who do hold religious beliefs are entitled not to have those beliefs abused or outraged. The distinction is perhaps a fine one, but it is not necessarily unworkable, and the definition of abusive expression developed by Gaudreault-DesBiens and discussed *supra*, could be applied here. I would also contend that no new measures are required to safeguard such a right: adequate mechanisms are already at hand. The ECHR is well-poised to deal dispositively with the issue (see further, *supra*), as is the ICERD – at least to the extent that the abuse of religious beliefs could be considered a proxy for racial discrimination. In this connection, caution has been urged not to confuse “a racist statement and an act of defamation of religion”,<sup>448</sup> but given the amount of conceptual confusion that inheres in the latter, it is plausible that certain types of abusive expression (in the sense set out by Gaudreault-DesBiens) could come within the scope of ICERD’s attentions. As noted by Conor Gearty, some religions have a “powerful ethnic tinge” and “[i]n such situations, the concept of religious intolerance must stand or fall apart from ethnicity in a way that is not altogether unproblematic”.<sup>449</sup>

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>450</sup>

Notwithstanding this clarification of the actual scope of relevant provisions of international law, the latest two UNGA Resolutions on “Combating defamation of religions” (i.e., Res. 61/164 and Res. 62/154) and the Human Rights Council’s Resolution 4/9, also entitled, “Combating defamation of religions”, misrepresent the legal reality. The misrepresentation takes place in the following paragraph:

*Emphasizes* that everyone has the right to freedom of expression, which should be exercised with responsibility and may therefore be subject to limitations as provided by law and necessary for respect of the rights or reputations of others, protection of national security or of public order, public health or morals and respect for religions and beliefs<sup>451</sup>

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<sup>448</sup> Implementation of 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 49.

<sup>449</sup> Conor A. Gearty, “The Internal and External ‘Other’ in the Union Legal Order: Racism, Religious Intolerance and Xenophobia in Europe”, in Philip Alston *et al.*, Eds., *The EU and Human Rights* (Oxford University Press, New York, 1999), pp. 327-358, at 337.

<sup>450</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.

<sup>451</sup> (Italics per original text; underlining added for emphasis) UNGA Res. 61/164, para. 9 and UN Human Rights Council Resolution 4/9, para. 10. The equivalent paragraph in UNGA Res. 62/154, para. 10, is worded slightly differently, but the misrepresentation remains the same. It reads: “*Emphasizes* that everyone has the right to hold opinions without interference and the right to freedom of expression, and that the exercise of these rights carries with it special duties and responsibilities and may therefore be subject to limitations as are provided for by law and are necessary for respect of the rights or reputations of others, protection of national security or of public

The limitations on the right to freedom of expression listed in the cited paragraph are consistent with those explicitly enumerated in Article 19(3), ICCPR, except for the underlined limitation – “respect for religions and beliefs”. That limitation is without any basis in international human rights law and it is hard to avoid the conclusion that it has been included in a deliberately stealthy manner in order to further the objectives of the Resolution as a whole. It is a serious misrepresentation, all the more so because of its repetition (in UNGA Res. 62/154 and Human Rights Council Res. 4/9).

A third and closely related 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 being a subject of debate, or of criticism, for that matter. In the absence of any explicit or ulterior racist or discriminatory 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, to use the formulae of the European Court of Human Rights.

The defilement of religions – a comparable notion, but one that does not carry the same baggage of conceptual confusion as defamation of religions – is also gradually beginning to make inroads into the case-law of the European Court of Human Rights (again, see further, *supra*). The Court considered the offence in *Aydin Tatlav v. Turkey*,<sup>452</sup> but held that the impugned book did not amount to a defilement of Islam, despite its strong criticism of that religion in the socio-political sphere. Crucial to the Court’s reasoning was its finding that the tone of the book was not insulting and that it did not constitute an abusive attack against sacred symbols. It is not yet clear whether the offence of defilement of religions will develop over time into a type of protection that is qualitatively different from the existing, heavily qualified, protection afforded to the religious beliefs of others under the ECHR.

Having considered the conceptual shortcomings of “defamation of religions”, attention can now be switched to the political ramifications of the campaign. As already noted, one of the major instigators and sponsors of the campaign is the Organization of the Islamic Conference. The campaign must be understood as an attempt to counter the undeniable intensification of Islamophobia in the wake of 11 September 2001.<sup>453</sup> However, notwithstanding whatever sympathy European States may have with the objective of combating Islamophobia, they have overwhelmingly opposed the campaign to combat “defamation” of religions in the General Assembly. This is evident from voting patterns in the GA on Resolutions 60/150, 61/164 and 62/154, both of which were approved by convincing majorities.<sup>454</sup> Of the (then) 55

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order, public health or morals and respect for religions and beliefs” (Italics per original text; underlining added for emphasis).

<sup>452</sup> Judgment of the European Court of Human Rights (Second Section) of 2 May 2006, Application No. 50692/99.

<sup>453</sup> See for example, European Monitoring Centre on Racism and Xenophobia, “Muslims in the European Union: Discrimination and Islamophobia” (2006).

<sup>454</sup> Resolution 60/150 was adopted by a recorded vote of 101 in favour to 53 against, with 20 abstentions (source: Official Records of UN General Assembly Sixtieth session, 64<sup>th</sup> plenary meeting, 16 December 2005, Doc. A/60/PV.64, p. 11); Resolution 61/164 was adopted by a recorded vote of 111 in favour to 54 against, with 18 abstentions (source: Official Records of UN General Assembly Sixty-first session, 81<sup>st</sup> plenary meeting, 19 December 2006, Doc. A/61/PV.81, p. 19).

Participating States of the OSCE, only nine voted in favour of the former Resolution.<sup>455</sup> One State abstained<sup>456</sup> and the remainder<sup>457</sup> voted against the Resolution. Votes cast by European States in respect of the subsequent two Resolutions were exactly the same.<sup>458</sup> On each occasion, the nature of the vote was such that no prior debate took place in the GA plenary meeting. However, after the recorded vote, delegations were invited to give explanations of their votes. On neither occasion did any European State take the floor in its own right and interventions made on behalf of the European Union by delegates representing the States holding the EU Presidency at the operative time (i.e., the United Kingdom and Finland, respectively) focused on Resolutions other than ‘Combating defamation of religions’. Given that the EU Member States voted *en bloc* against the Resolution, it is perhaps surprising that no formal statement was made outlining collective European concerns about the Resolution. On the other hand, such concerns had to some extent already been aired in relevant Third Committee sessions preceding the plenary meeting.<sup>459</sup>

There is another very impelling reason why the conceptual shortcomings of “defamation of religions” must be assessed in political terms. This concerns “the principle of the ratchet”, which has been developed elsewhere by Michael Banton.<sup>460</sup> According to that principle, when particular concepts or formulations are agreed upon in international fora and are consequently included in official texts, they can serve as a basis for the achievement of further political gains at a later stage. This is because they can be re-affirmed and strengthened in subsequent texts (such is the nature of progress in political discussions<sup>461</sup>). Conversely, though, it can prove very difficult to dislodge concepts and terminology once they become embedded in official texts. Depending on the nature of the texts in question, those concepts and terminology could form the basis of obligations for States. As regards General Assembly Resolutions such as those concerning “defamation of religions”, the relevant obligations are political rather than legal in character, but that does not rule out the possibility that a future convention (which would be legally binding on all States acceding to it) would not draw on the language of such resolutions on the basis that they are the expression of agreement among a majority of States on a specific topic. The reference to the ratchet is explained by the ease with which particular formulations can move up a notch and the concomitant difficulties in brining them back down again. Banton illustrates the practical operation of the principle as follows:

A group of states takes an initiative, secures agreement on a particular action, and then tries to use this as a foundation for a further step forward whenever an opportunity presents itself. Once a form of words has been accepted it can be used again [/80] or moved up a notch; this is the function of

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<sup>455</sup> Azerbaijan, Belarus, Kazakhstan, Kyrgyzstan, the Russian Federation, Tajikistan, Turkey, Turkmenistan and Uzbekistan.

<sup>456</sup> Armenia. It should be noted that no European States were absent when the vote was taken.

<sup>457</sup> The only OSCE Participating State which is not a member State of the United Nations is The Holy See. It does enjoy observer status at the UNGA, but it does not have voting rights.

<sup>458</sup> The only difference was that whereas Serbia & Montenegro voted against the Resolution in 2005, only Serbia did so in 2006. Following the dissolution of Serbia & Montenegro as a unitary political entity and the establishment of Montenegro as an independent State, Montenegro was accepted as a UN Member State on 28 June 2006 by virtue of GA Resolution A/RES/60/264. However, there is no mention of Montenegro having participated in the relevant GA vote, or as having been absent at the operative time. Not yet represented in the GA at that time? Check status. In 2007, both Serbia and Montenegro voted against Res. 62/154.

<sup>459</sup> Insert details.

<sup>460</sup> Michael Banton, *The International Politics of Race*, *op. cit.*, pp. 77, 79-80.

<sup>461</sup> He writes: “If a discussion leads to a conclusion such that the next discussion starts from the position reached on the previous occasion, then some progress has been made. At the UN such a conclusion is usually expressed in the form of a resolution, which can sometimes move on to a General Assembly declaration and eventually to a convention.” - Michael Banton, *International Action Against Racial Discrimination*, *op. cit.*, at p. 48.

rhetoric in official conferences. It is difficult to disengage a ratchet and undo a previous agreement. Opportunities for tightening a ratchet and taking that further step may arise after a disaster when there is a feeling that ‘something must be done’, or when a special meeting – like a world conference – is convened to consider a particular problem.

It is certainly plausible that highly volatile incidents such as the Danish Cartoons affair could further galvanise an already very potent political alliance within the UNGA, spearheaded by the OIC but with many fellow-travellers rightly riled at the intensification of Islamophobia in Western States and continued US-led intervention in Iraq, Afghanistan and elsewhere. In such a scenario, it is most likely that the language of the three existing UNGA Resolutions on “combating defamation of religions” would be built upon, ratchet-like, in order to further the campaign. Indeed, the ratchet has already been engaged, insofar as the follow-up measures envisaged by the Resolutions have required the High Commissioner on Human Rights and a number of the Special Rapporteurs to address the issue and report their findings to the Human Rights Council.<sup>462</sup> The legitimacy conferred on the concept of “defamation of religions” by virtue of its inclusion in successive UNGA Resolutions has allowed it to seep into other branches of the UN and seek further legitimation there. This has the effect of familiarising and consolidating the concept through extra exposure.

### 6.4.3 Protection of founders of religions

The drafting process of the UN draft Convention on Freedom of Information (see further, Chapter 3, *supra*) provides an interesting aside to the present discussion. It will be recalled that in 1959, the Third (Social, Humanitarian and Cultural) Committee of the UN General Assembly began a detailed discussion of a draft text of the proposed Convention. “Article 2, dealing with permissible restrictions on the exercise of the freedom of information, was widely regarded in the Third Committee as the heart of the draft Convention.”<sup>463</sup> Relevant official documentation from the United Nations reveals that there was concern within the Third Committee that “if far-reaching limitations were made permissible, the Convention would be transformed into an instrument for restricting freedom of information”.<sup>464</sup> On 2 December 1960, the Third Committee adopted Article 2 as a whole and as amended.<sup>465</sup> The adopted version of the Article read:

#### Article 2

1. The exercise of the freedoms referred to in article 1 carries with it duties and responsibilities. It may, however, be subject only to such necessary restrictions as are clearly defined by law and applied in accordance with the law in respect of: national security and public order (*ordre public*); systematic dissemination of false reports harmful to friendly relations among nations and of expressions inciting to war or to national, racial or religious hatred; attacks on founders of religions; incitement to violence and crime; public health and morals; the rights, honour and reputation of others; and the fair administration of justice.
2. The restrictions specified in the preceding paragraph shall not be deemed to justify the imposition by any State of prior censorship on news, comments and political opinions and may not be used as grounds for restricting the right to criticize the Government.

Of particular significance for present purposes is the uncommon inclusion of “attacks on founders of religions” as an explicit, permissible ground for restricting the right to freedom of

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<sup>463</sup> *Yearbook of the United Nations 1960*, p. 335.

<sup>464</sup> *Ibid.*

<sup>465</sup> This involved a roll-call vote of 50 to 5, with 19 abstentions.

expression. This limitation is distinguishable from the more common – and generic – limitation “expressions inciting to [...] national, racial or religious hatred”. The inclusion of the limitation protecting the founders of religions was proposed by the Pakistani representative and it was accepted by the Third Committee by 22 votes to nine, with 47 abstentions.

As this draft Convention was ultimately never adopted, any assessment of its provisions will be, at best, speculative. Nevertheless, it is useful to dwell on the significance of the limitation on freedom of expression that had been envisaged for the founders of religions. It is perhaps facile to suggest that if the draft Convention had been adopted, the recent Danish cartoons controversy could have been resolved very summarily by international law. However, without the benefit of interpretative aids, it is difficult to say with any degree of precision how the terms “religions” and “founders” would have been defined. The stringency with which draft Article 2(2) would have been applied would also surely have been instructive.

The issue of protection for founders of religions has also been explored in ongoing discussions of recent controversies. For example, Egbert Dommering has drawn a distinction between the Church (as an institution) and Faith (as personified by a religious deity).<sup>466</sup> The former is a legitimate target of scrutiny, criticism and parody, he argues, whereas the latter is at least a more problematic, if not an illegitimate, target of such treatment. This distinction could be usefully considered alongside other contextualising factors<sup>467</sup> wherever relevant, or most topically, in the recent Danish cartoons affair. Such factors could include the:

- (i) motivation of the newspaper in deciding to publish the cartoons
- (ii) context in which the cartoons were published
- (iii) manner in which the cartoons were published (i.e., how they were presented)
- (iv) subsequent behaviour of the newspaper
- (v) subsequent behaviour of other newspapers<sup>468</sup>
- (vi) unrest and violence in *alleged* reaction to the publication of the cartoons

One problematic and inescapable question concerning any legally-enshrined protection for the founders of religion arises from the growing number of belief systems recognised as religions. The founders of some of those religious movements will inevitably continue to be responsible for the spiritual leadership and guidance of their congregations. Could the protection of founders of religion insulate such religious leaders from the kind of criticism to which politicians are expected to withstand by virtue of the public nature of their functions? The question is of great practical importance. There is a real danger that any would-be right to protection for such religious leaders, unless very carefully circumscribed, would serve as a shield against legitimate criticism.

Another conundrum that arises from the related question of whether religious deities generally (whether they are also recognised as the founders of religions or not) should be entitled to

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<sup>466</sup> Egbert Dommering, “Mohammed in cartoons” [n.d., text on file with author]. See further: E.J. Dommering, “De Deense beeldenstorm”, 11 *NJB* (17 March 2006) 634-638.

<sup>467</sup> For a more detailed analysis of the importance of contextualising factors generally, see further, *infra*. For an exploration of contextualising elements specifically in the Danish cartoons affair, see: Kevin Boyle, “The Danish cartoons”, *op. cit.*

<sup>468</sup> It should be noted that an application concerning the republication of the “Danish cartoons” in France has been lodged with the European Court of Human Rights: *Le Conseil régional musulman de Champagne-Ardenne v. France*, Appn. No. 7071/06. See also, in this connection, the verdict in the *Charlie Hebdo* case, in which the weekly paper, *Charlie Hebdo*, reprinted the cartoons, along with additional ones.



protection from severe criticism. It is submitted here that the same reasoning outlined in the previous paragraph in respect of founders of religions should also be applied here. Religions which recognise multiple deities would require careful and particular consideration in this connection. It would, in any event, be inappropriate for States authorities to purport to distinguish between deities or rank them in terms of sacredness.<sup>469</sup>

These questions must be considered in the broader context of the discussion, *supra*, about the extent to which particular types of expression are actually capable of interfering with the religious rights of others. More specifically, attention should focus on the extent to which disparagement of, or insult to, religious leaders could actually interfere with ability of their followers to effectively hold or manifest their religious beliefs. In *Choudhury v. the United Kingdom*, the European Commission of Human Rights found that the causal link between the expression in question (Salman Rushdie's novel, *The Satanic Verses*) and an interference with the religious rights of others had not been established.<sup>470</sup> It found that in the circumstances of the case at hand, Article 9, ECHR, did not guarantee a right to institute criminal proceedings "against those who, by authorship or publication, offend the sensitivities of an individual or a group of individuals". In its decision in *Dubowska & Skup v. Poland* (concerning "the distorted publication of sacred images" of worship of a particular religious group),<sup>471</sup> the Commission was more willing to countenance the possibility that expression could interfere with the religious rights of others and that States are accordingly obliged to ensure that means of legal redress are available to ensure that "an individual will not be disturbed in his worship by the activities of others". However, in the specific circumstances of the case, the necessary link was not established to the satisfaction of the Commission. The reasoning behind the need to establish a clear link between offensive expression and the violation of religious rights must also apply, *mutatis mutandis*, to any would-be protection for the founders of religions.

## 6.5 Theoretical foundations for an integrated approach to combating hate speech

This section will examine and evaluate the theory – variously conceived – that a policy of "more speech" or "counter-speech" can be an effective means of combating hate speech. It is sometimes posited that effective opportunities to respond to hate speech – to meet it head-on – can help to reduce its impact or expose its frailties. However, this proposition is open to challenge, especially in the context of individual situations where the "inflammatory words [are] spit out nose-to-nose"<sup>472</sup> and the target of hate speech is in a position of subjugation or intimidation *vis-à-vis* the speaker.

Critical race theorists are very dismissive of the alleged usefulness of "more speech" as a particularised remedy for hate speech, for a number of reasons. First, the utterance of hate speech in an individualised situation is frequently likened to a slap in the face rather than an

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<sup>469</sup> For an enlightening discussion of these and related questions, see: David Edwards, "Toleration and the English blasphemy law", in John Horton & Susan Mendus, Eds., *Aspects of Toleration* (London & New York, Methuen & Co., 1985), pp. 75-98, esp. at 84 *et seq.*

<sup>470</sup> *Choudhury v. the United Kingdom*, Decision of inadmissibility of the European Commission of Human Rights of 5 March 1991, Appn. No. 17439/90.

<sup>471</sup> *Dubowska & Skup v. Poland*, Decision of inadmissibility of the European Commission of Human Rights of ... Appn. Nos. 33490/96 and 34055/96.

<sup>472</sup> Kenneth Lasson, "To Stimulate, Provoke, or Incite?: Hate Speech and the First Amendment", in Monroe H. Freedman & Eric M. Freedman, Eds., *Group Defamation and Freedom of Speech: The Relationship Between Language and Violence* (USA, Greenwood Press, 1995), pp. 267-306, at 267.

invitation to engage in rational, reasonable discourse.<sup>473</sup> As explained by Charles R. Lawrence III:

The injury is instantaneous. There is neither an opportunity for intermediary reflection on the idea conveyed nor an opportunity for responsive speech. [...] The racial invective is experienced as a blow, not a proffered idea, and once the blow is struck, it is unlikely that dialogue will follow. Racial insults are undeserving of [...] protection because the perpetrator's intention is not to discover truth or initiate dialogue, but to injure the victim.<sup>474</sup>

Thus styled, the speech act is much more performative than propositional. It clearly falls in the category of socially worthless epithets that are “not in any proper sense communication of information or opinion [...]” deserving of protection. Its performative character is abusive and assaultive. Instead of eliciting a verbal response from the target, a more probable reaction would be “flight rather than fight”.<sup>475</sup> Such a response is in itself problematic because “Targets choose to avoid racist encounters whenever possible, internalizing the harm rather than escalating the conflict”.<sup>476</sup> The psychic effects of assaultive, racist speech can be far-reaching, especially when the harm they occasion tends to be internalised.<sup>477</sup> Furthermore, from the perspective of criminal law: “Lack of a fight and admirable self-restraint then defines the words as nonactionable”.<sup>478</sup>

Its contribution to a discussion on matters of public interest or to an “unfettered interchange of ideas for the bringing about of political and social changes desired by the people” is nil. In fact, given the intimidatory context in which it is uttered, it is pre-emptive of further discussion. The intimidatory element can be reinforced by broader contextual circumstances, such as the doctrine of historical inequities and their continuing effects (discussed in Chapter 3, *supra*) or general “structural injustice”. David Richards has defined this term as “a cultural pattern and practice that abridge the human rights of an entire class of persons on inadequate grounds of dehumanizing stereotypes of religion or race or gender or gendered sexuality”.<sup>479</sup>

As posited by Lawrence: “Each individual message gains its power because of the cumulative and reinforcing effect of countless similar messages that are conveyed in a society where racism is ubiquitous”.<sup>480</sup> Lawrence may have overstated the point here, but nevertheless, it does seem highly plausible that in a society where racism or hostility towards (particular) minorities is deep-seated and prevalent, the sense of vulnerability ordinarily felt by persons belonging to minorities would be compounded. Patterns of discriminatory practices or persecution against specific groups are inevitably going to colour the personal experiences of their individual members, as well as their participation in public life.

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<sup>473</sup> Richard Delgado & Jean Stefancic, *Understanding Words That Wound* (Westview Press, USA, 2004), p. 207.

<sup>474</sup> Charles R. Lawrence III, “If He Hollers Let Him Go: Regulating Racist Speech on Campus”, in Mari J. Matsuda, Charles R. Lawrence III, Richard Delgado, and Kimberle Williams Crenshaw, *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Westview Press, USA, 1993), pp. 53-88, at 68.

<sup>475</sup> Mari J. Matsuda, “Public Response to Racist Speech: Considering the Victim’s Story”, in Mari J. Matsuda *et al.*, *Words That Wound*, *op. cit.*, pp. 17-51, at 35.

<sup>476</sup> *Ibid.*

<sup>477</sup> See further, Richard Delgado, “Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling”, 17 *Harvard Civil Rights-Civil Liberties Law Review* (1982), pp. 133-181, and the more in-depth discussion of this topic in Chapter 2, *supra*.

<sup>478</sup> *Ibid.*

<sup>479</sup> David A.J. Richards, *Free Speech and the Politics of Identity* (New York, Oxford University Press, Inc., 1999), p. 240.

<sup>480</sup> Charles R. Lawrence III, “If He Hollers Let Him Go”, *op. cit.*, at 68-69.

The arguments of the foregoing paragraphs can also be merged into a more complex – but perhaps also more tenuous - argument, *viz.* that hate speech can also be performative of discrimination.<sup>481</sup> In other words, because of its perlocutionary effects,<sup>482</sup> an expression of hate speech could be considered an act of discrimination. An analogous argument has regularly been deployed in feminist literature claiming that pornography is an act of discrimination and subjugation and should not therefore be regarded as a category of expression that is entitled to any kind of constitutional protection. This argument has proved highly controversial in academic circles, not least because of the evidentiary difficulty involved: it can be very difficult to establish – to the satisfaction of a court of law - a causal relationship between a precise utterance and precise discriminatory consequences. Such a case is usually built on empirical evidence. Regardless of how far this argument can be pushed, it does provide a useful additional point of reference. Lee C. Bollinger has - without even referring to the anti-pornography or analogous arguments - given a rather clear-worded formulation to one of their essential upshots: “The general point is not only that free speech sometimes involves situations where minorities are being injured (by the speech), but also that the implementation of free speech protection may itself become implicated in that injury, thus reinforcing or stimulating other (non-speech) discrimination.”<sup>483</sup>

Hitherto, the focus has been on the harm occasioned by hate speech on individuals and on the groups of which they are members. A further dimension also deserves mention: the broader public. Although society is not directly harmed (eg. in a psychic sense) by individual instances of hate speech, it is adversely affected.<sup>484</sup> Hate speech has broader repercussions than those visited on its immediate victims: prevailing societal attitudes could conceivably be affected by the prevalence of hate speech (particularly if such a phenomenon is met with official impunity or unchecked by societal resistance); community relations could deteriorate due to heightened tensions brought on by a hardening of public discourse; norms of civility and mutual respect could be damaged, etc. On the other hand, though, it is also conceivable that a rising spiral of hate speech in a given community could galvanise its members into taking concerted (informal) action against the phenomenon.

In conclusion, when elevated from the micro- to the macro-level,<sup>485</sup> however, the “counter-speech” theory against hate speech becomes more promising, although it does remain somewhat resistant to empirical verification. The institution of counter-speech at societal level prompts a reconceptualisation of counter-speech as not merely a reactionary force against hate speech (with limited effect), but as a pre-emptive force (with considerable potential) as well. As such, it is a longer-term strategy that places considerable faith in the empowering and

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<sup>481</sup> See further, Wojciech Sadurski, “Racial Vilification, Psychic Harm, and Affirmative Action”, in Tom Campbell & Wojciech Sadurski (Eds.), *Freedom of Communication* (England, Dartmouth Publishing Company, 1994), pp. 77-94; Rae Langton, “Speech Acts and Unspeakable Acts”, 22 *Philosophy & Public Affairs* 293; Wojciech Sadurski, “On ‘Seeing Speech Through an Equality Lens’: A Critique of Egalitarian Arguments for Suppression of Hate Speech and Pornography”, 16 *Oxford Journal of Legal Studies* (No. 4, Winter 1996), pp. 713-723.

<sup>482</sup> For an influential exploration of locutionary, illocutionary and perlocutionary acts, see: J.L. Austin, *How to do things with words* (Great Britain, Oxford University Press, 1980 (reprint of second edition)), esp. Chapters VIII *et seq.*

<sup>483</sup> Lee C. Bollinger, “Notes Toward an Idea: Freedom of Speech and Minorities in the United States”, in Y. Dinstein & M. Tabory, Eds., *The Protection of Minorities and Human Rights*, pp. 171-185, at 180.

<sup>484</sup> See further: Thomas David Jones, *Human Rights: Group Defamation, Freedom of Expression and the Law of Nations* (The Netherlands, Martinus Nijhoff Publishers, 1998), p. 89.

<sup>485</sup> See generally in this connection, Katharine Gelber, *Speaking Back: The free speech versus hate speech debate* (John Benjamins Publishing Company, Amsterdam, 2002).

identity-sustaining properties of speech. It also implicitly endorses the importance of egalitarian public debate and dialogical interaction as prerequisites for pluralistic tolerance.

## 6.6 An integrated approach in practice: the Council of Europe

This section will offer an analysis of how the twin goals of facilitating and creating expressive opportunities and of promoting intercultural dialogue and understanding are becoming increasingly prominent in the Council of Europe's approaches to the protection of minority rights. The Council of Europe's flagship convention dealing with minority rights, the Framework Convention for the Protection of National Minorities (FCNM), contains provisions which provide for freedom of expression (including rights of access to various types of media) and for the promotion of tolerance. These provisions are expressly linked in the FCNM and their interaction to date has proved instructive. The coupling of freedom of expression and the promotion of tolerance has also been a feature of other Council of Europe standard-setting measures, with varying results.

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

What is instructive about the FCNM's approach to the protection of minorities against hate or discriminatory speech is the synergic interaction of Articles 6 and 9. For instance, Article 6(2) has been described as providing "negative reinforcement" for *inter alia* Article 9.<sup>486</sup> The synergies generated represent a particularly promising strategy for countering hate speech on a long-term basis. They seek to address the problem before it actually spawns, by emphasising the need to foster improved inter-ethnic and intercultural (the terms are used interchangeably in AC Opinions) understanding and tolerance through the development of dialogical relationships between communities. As will be seen below, a key role has been identified for the media in this preventive strategy: one which involves the harnessing of their communicative potential for the promotion of tolerance and intercultural understanding.

An important caveat ought to be entered at this juncture: the media should in no way be compelled to serve the goal of promoting tolerance and intercultural understanding. Such compulsion (as opposed to encouragement) – by legal or other means – would presumptively fall foul of the principle of media autonomy, which is protected under the more general right to freedom of expression. Any commitments by the media to pursue such objectives must therefore be undertaken voluntarily. As explained in a different, but not entirely dissimilar, context:

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>487</sup>

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<sup>486</sup> Geoff Gilbert, "Article 6", in Marc Weller, Ed., *The Rights of Minorities in Europe*, *op. cit.*, at p. 191.

<sup>487</sup> Explanatory Memorandum to Recommendation No. R (97) 20 on "Hate Speech", *op. cit.*, para. 12. This was the reasoning behind the decision for the Committee of Ministers to adopt two separate Recommendations on relevant issues, 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 (see further, *supra*).

As will be shown below, this caveat is consistently heeded in the FCNM monitoring process.

### **6.6.1(i) Studying the chemistry between Articles 6 and 9**

Although there are two main prongs to the process of monitoring the implementation of the FCNM at national level, *viz.*, the adoption of Opinions by the AC and Resolutions by the Committee of Ministers, the emphasis in this section will be on the former. The reason is that the vastly superior level of detail in AC Opinions is more conducive to the formulation of an overall FCNM strategy against hate and discriminatory speech than the comparative terseness of corresponding Committee of Ministers' Resolutions. Moreover, it is easier to discern the contours of an overall strategy where issues and responses are most fully explored. The format of Committee of Ministers' Resolutions is (necessarily) summary and reflective of the follow-up functions for which such Resolutions are intended.

The AC's approach to the promotion of tolerance, intercultural dialogue, respect and understanding is comprehensive and considered. It recognises: (a) the media *can* play an influential role in shaping societal attitudes and behaviour (for better or for worse); (b) societal attitudes and behaviour are shaped by a multitude of factors (of which the media are only one), and (c) attitudinal and behavioural patterns in society are highly complex and composite in character (and they in turn influence the environment in which the media operate).

#### **(a) Media influence**

Among the main preoccupations of the AC is the ability of the media to contribute to the promotion of tolerance and intercultural understanding, as well as to the elimination of negative stereotyping and negative portrayal of minorities. These objectives are clearly intertwined, both in theory and in practice. Unsurprisingly, they have consistently been flagged as issues of concern in the majority of AC Opinions.<sup>488</sup>

The agenda-setting role of the media can have great importance for the validation of the cultures, languages, lifestyles and other central concerns of minorities. In this context, the following questions gain in pertinence: Is coverage of minority issues quantitatively and qualitatively adequate? Is that coverage responsive to the informational, cultural, linguistic and other needs of its target minority audiences? Are representatives of minorities involved to a meaningful extent in the selection of the topics and the production of the programmes? Are such programmes broadcast in mainstream or minority media? To what extent are minority issues covered by the public service broadcasting system? Is coverage assured during primetime or merely during off-peak slots? These – and a gamut of other related – questions have occasionally surfaced in connection with Article 6, but they fall more squarely within the ambit of Article 9.<sup>489</sup>

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<sup>488</sup> Unless stated otherwise, references to specific AC “Opinions” designate Opinions adopted by the AC in the course of the First Monitoring Cycle. Opinions adopted in the course of the Second Monitoring Cycle will be explicitly described as such.

<sup>489</sup> See further in this connection, Tarlach McGonagle, “Commentary: Access to the media of persons belonging to national minorities”, in *Filling the Frame, op. cit.*, pp. 144-159.

Nevertheless, their relevance to the promotion of intercultural understanding, in particular, cannot be gainsaid. For instance, as stated by the AC: “In order to facilitate mutual understanding and dialogue and to increase public awareness about minorities, the public television service should find ways to provide more convenient time-slots for minority programmes”.<sup>490</sup> The transmission of minority-centred programmes can expose wider *tranches* of society to minority perspectives and cultures, thereby raising the profile of minority cultures and their prestige outside of minority groups themselves. These are important arguments for the transmission and legitimisation of minority cultures. They give considerable credence to the argument that “more speech” can, in certain circumstances, amount to an effective, pre-emptive strategy against hate speech. The nature and extent of media coverage are related to, but also logically prior to, the problem of negative reporting on, and stereotyping of, minorities.

Various responses have been proposed by the AC to the problem of negative reporting, many of which centre on the promotion of balanced and accurate reporting;<sup>491</sup> adherence to journalistic codes of ethics and standards, etc.<sup>492</sup> The AC has consistently placed heavy emphasis on the importance of special training initiatives and programmes for journalists on minority issues.<sup>493</sup> The goal is to familiarise journalists with minority issues and pertinent sensitivities that are likely to arise in the course of their coverage of those issues. Exchange programmes for journalists have also been considered, with the same goals in mind.<sup>494</sup> Related strategies also include the establishment of ethnically diverse training courses in journalism,<sup>495</sup> with a view to increasing the number of persons from different ethnic, religious and other groups entering the media sector in professional capacities.<sup>496</sup> These emphases are part of a rather comprehensive approach to counter negative reporting.<sup>497</sup>

The AC often calls for vigilance by State authorities towards negative reporting as a suitable counter-measure to the same. However, those calls are accompanied by standard reminders of the need to show deference to the principle of (editorial) independence of the media, and also, on occasion, by reminders of the need to observe overarching principles of freedom of expression as well.<sup>498</sup> For example:

The Advisory Committee *finds* that in the field of media, certain widely read newspapers continue, when reporting on subjects concerning immigration and asylum, to adopt an approach which contributes to the feelings of hostility and rejection against immigrants, refugees and asylum seekers and to strengthening the stereotypes associated with Roma. The Advisory Committee

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<sup>490</sup> AC’s Second Opinion on Romania, adopted on 24 November 2005, para. 120. See also the AC’s Second Opinion on the Czech Republic, adopted on 24 February 2005, paras. 108 and 193.

<sup>491</sup> See, for example, AC’s Opinion on Slovakia, adopted on 22 September 2000, Section: “In respect of Article 6”.

<sup>492</sup> Of particular importance in this connection is the practice of only mentioning the ethnic origin of subjects of reporting when strictly relevant: see, for example, AC’s Opinion on the United Kingdom, adopted on 30 November 2001, para. 53.

<sup>493</sup> See, for example, AC’s Opinions on Albania, adopted on 12 September 2002 (para. 98), Lithuania, adopted on 21 February 2003 (para. 45), Spain, adopted on 27 November 2003 (para. 63), Sweden, adopted on 20 February 2003 (paras. 34, 78), Ukraine, adopted on 1 March 2002 (para. 39).

<sup>494</sup> AC’s Opinion on Slovakia, *op. cit.*, Section: “In respect of Article 6”.

<sup>495</sup> AC’s Second Opinion on Denmark, adopted on 9 December 2004, para. 95.

<sup>496</sup> *Ibid.*, para. 103.

<sup>497</sup> AC’s Opinion on the Russian Federation, adopted on 13 September 2002, para. 135.

<sup>498</sup> AC’s Second Opinion on Italy, adopted on 24 February 2005, para. 82.

considers that the Austrian authorities should pursue their efforts to impress on the media, without encroaching on their editorial independence, the need to report fairly on minorities.<sup>499</sup>

On a related tack, it is significant that the AC resists any temptation to endorse a hypodermic media model. Rather, it recognises – correctly – that while the media do *influence* public opinion, they do not simply *determine* it. While media coverage may perpetuate, reinforce<sup>500</sup> or exacerbate negative societal attitudes and prejudices towards minorities, they can only be charged with having generated those prejudices in the first place in very exceptional circumstances. This presumption can be brought under intense scrutiny when the culpability of the media in fomenting inter-ethnic tensions and unrest is blatant, for example in the much-publicised riots in Kosovo in March 2004.<sup>501</sup>

In the same vein, the AC recognises that the media are not the only actors involved in the influencing of public opinion. For instance, it frequently draws attention to the roles and special responsibilities of law enforcement agents and the judiciary in combating racism. The AC regularly brings politicians and public officials under scrutiny on account of racist views and utterances. Importantly, it does not do so in a blanket or mantra-like way: it tends to specify the levels at which or sectors in which the emergence of discrimination or racist views and practices are most acutely in evidence (eg. *local* public authorities<sup>502</sup> and politicians<sup>503</sup>).

#### (b) The shaping of societal attitudes and behaviour

The previous sub-section broached the issue of how the media can contribute to the shaping of societal attitudes and behaviour. Obviously, the media can usefully provide fora where diverse societal groups can build up awareness and understanding of one another, but by the same token, other non-media fora can also prove very effective for such purposes. The general importance of raising mutual cultural awareness among various groups in society is consistently prioritised in the AC's approach;<sup>504</sup> this applies not only to majority-minority relations (including between States authorities and relevant NGOs<sup>505</sup>), but also between various minorities.<sup>506</sup> Awareness is implicitly taken to be a stepping-stone to intercultural understanding. Recommended awareness-raising measures can be either general in character, or can relate to specific groups or events or issues (eg. the Holocaust<sup>507</sup>). Thus viewed, awareness helps to ground the dialogical processes that lead to the achievement of greater

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<sup>499</sup> (emphasis per original) AC's Opinion on Austria, adopted on 16 May 2002, para. 85. See also, AC's Opinion on "the former Yugoslav Republic of Macedonia", adopted on 27 May 2004, para. 55.

<sup>500</sup> AC's Second Opinion on Estonia, adopted on 24 February 2005, para. 73.

<sup>501</sup> AC's Opinion on Kosovo, adopted on 25 November 2005, para. 58. This Opinion does not fall squarely within the regular monitoring work of the AC; rather, it was adopted pursuant to the Agreement between the Council of Europe and the United Nations Interim Administration Mission in Kosovo (UNMIK) on the Technical Arrangements Related to the Framework Convention for the Protection of National Minorities, concluded on 23 August 2004. See further, Tarlach McGonagle, "Advisory Committee on the Framework Convention for the Protection of National Minorities: Media-specific Provisions in Opinion on Kosovo", *IRIS – Legal Observations of the European Audiovisual Observatory*, 2006-4: 3; Robert Gillette, "Kosovo: Media and the Riots of March 2004", in Susanne Nikoltchev, Ed., *IRIS Special – Political Debate and the Role of the Media: The Fragility of Free Speech* (Strasbourg, European Audiovisual Observatory, 2004), pp. 101-103.

<sup>502</sup> AC's Second Opinion on the Czech Republic, *op. cit.*, para. 11.

<sup>503</sup> AC's Second Opinion on Croatia, adopted on 1 October 2004, para. 80.

<sup>504</sup> See, for example, AC's Opinions on Bosnia & Herzegovina, adopted on 27 May 2004 (para. 138), Ireland, adopted on 22 May 2003 (para. 67), Slovenia, adopted on 12 September 2002 (para. 91).

<sup>505</sup> AC's Second Opinion on Moldova, adopted on 9 December 2004, para. 58.

<sup>506</sup> See, for example, AC's Opinion on "the former Yugoslav Republic of Macedonia", *op. cit.*, para. 122.

<sup>507</sup> AC's Second Opinion on Romania, *op. cit.*, para. 86.

societal tolerance. The AC has tentatively teased out this philosophy on several occasions, such as in the following specific situation in the Slovak Republic:

[...] the Advisory Committee is convinced that a fuller understanding of Roma culture by the public at large and by officials, which can only be gained if Roma themselves are willing to provide input, would help to counter discriminatory acts and attitudes. In this connection, the Advisory Committee also notes that studies suggest that the attitudes of the majority towards the Hungarian minority are most positive in the regions where Hungarians constitute a relatively high proportion of the population and where there is constant interaction between the majority and the said minority. [...]<sup>508</sup>

The AC has also developed this philosophy in respect of the often inextricable nature of culture, language and identity. It has, for instance, warned that “Over-insistence on the homogeneity of the Polish population may have an adverse effect on the rights of persons belonging to national minorities to assert their identity”.<sup>509</sup> This implies a sense of concern that a level playing pitch would exist for minorities to define themselves on their own terms at the national level.

Communicative engagement is essential for the purpose of building inter-group awareness and understanding. This implies a need for opportunities for the sharing of information and perspectives. Opportunities for self-definition are crucial for minorities, especially given the corrective potential of such opportunities *vis-à-vis* dominant or prevalent societal attitudes regarding them. The AC has rightly recognised the centrality of prevalent, negative attitudes towards (discrete) minorities in the larger picture of societal tolerance and intercultural understanding. Such attitudes are often a product of ignorance, fear and long-held prejudices (eg. anti-Semitism and anti-Roma sentiment),<sup>510</sup> but they can also be coloured by specific situations (eg. regional agitations – or overflow therefrom,<sup>511</sup> ongoing conflicts<sup>512</sup>) or happenings (eg. increased Islamophobia in the wake of the terrorist attacks of 11 September 2001<sup>513</sup>).

Various examples of societal attitudes hardening around specific religious and linguistic differences between discrete groups in society are also considered by the AC. A recurrent source of contention in different countries is the adequacy of facilities for religious minorities to worship. As noted by the AC, such disputes can escalate to the point of potentially “undermining intercultural dialogue with persons belonging to the Muslim faith”<sup>514</sup> (to give one concrete example). Disagreements about language-related matters have also been known to spawn intolerance.<sup>515</sup> Aside from confrontations over religious and linguistic differences, the latter can also form a purely practical obstacle to inter-group communication and

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<sup>508</sup> AC’s Opinion on Slovakia, *op. cit.*, para. 25.

<sup>509</sup> AC’s Opinion on Poland, adopted on 27 November 2003, para. 48.

<sup>510</sup> Respectively: AC’s Opinions on Switzerland, adopted on 20 February 2003, para. 40, and Ukraine, *op. cit.*, para. 91.

<sup>511</sup> AC’s Second Opinion on Hungary, adopted on 9 December 2004, para. 61, which refers to certain consequences in Hungary of unrest in the Balkans.

<sup>512</sup> Eg. Chechnya – AC’s Opinion on the Russian Federation, *op. cit.*, paras. 57, 65, 138; Transnistria – AC’s Second Opinion on Moldova, *op. cit.*, para. 60.

<sup>513</sup> AC’s Opinions on Norway, adopted on 12 September 2002 (para. 36), Sweden, *op. cit.* (para. 37), the United Kingdom, *op. cit.* (para. 51).

<sup>514</sup> In this particular example, the dispute surrounded the absence of any “full-scale mosque in Denmark”: AC’s Second Opinion on Denmark, *op. cit.*, para. 88. For similar facts and assessment/prognosis, see also, AC’s Second Opinion on Slovenia, adopted on 26 May 2005, para. 98.

<sup>515</sup> AC’s Opinions on Moldova, adopted on 1 March 2002 (paras. 45, 106, 107), Norway, *op. cit.* (para. 35) and Ukraine, *op. cit.* (paras. 35, 90); AC’s Second Opinion on Moldova, *op. cit.* (paras. 17, 59).



understanding. This helps to explain the AC's finding in its First Opinion on Estonia that "further efforts are needed to counter excessive division in the media environment between the media consumed by the majority population and that followed by the minority population".<sup>516</sup> The "excessive division" referred to was largely along linguistic lines. The AC also advocated support for bilingual initiatives in the media sector, which "should be seen as a central element of integration efforts in Estonia, where many persons belonging to national minorities continue to follow to a large extent the media based in the Russian Federation".<sup>517</sup>

(c) The complex and composite character of societal attitudes and behaviour

The comprehensive approach of the AC to Article 6 facilitates an examination of the many influences that contribute to the shaping of societal attitudes. Prime examples of such influences include recent patterns of immigration and migration or other demographic shifts;<sup>518</sup> recent or ongoing armed conflict;<sup>519</sup> swells in racist sentiment and surges in racist crimes.<sup>520</sup> Sensitivities surrounding historical symbols can also cause tensions to flare up.<sup>521</sup> The AC is right to dwell on these factors as their explanatory power is considerable. When a general "climate of hostility" (eg. towards immigrants) prevails in a given society, or when a "strong seam of intolerance" can readily be detected, it is hardly surprising that such attitudes would be expressed in the media as well, thereby contributing to a vicious opinion-shaping circle.<sup>522</sup>

Mention of hostility towards immigrants prompts a very important aside. The protection afforded by the FCNM is, as its title suggests, restricted to "national minorities". Perplexingly, as noted *supra*, this term is neither defined nor adequately explained in either the text of the FCNM or in its Explanatory Report. The precise meaning of the term is highly contestable.<sup>523</sup> Nevertheless, the AC has repeatedly insisted that Article 6 "has a wide personal scope of application, covering also asylum seekers, migrants and other persons belonging to groups that have not traditionally inhabited the country concerned".<sup>524</sup> While the language varies from Opinion to Opinion (eg. sometimes reference is made instead to "immigrants and refugees"<sup>525</sup> coming within its scope), the essential point remains the same: the objectives set out in Article 6 are to be strived for also in respect of new or non-traditional minorities, or in other words, "all persons living on the territory"<sup>526</sup> of a Contracting State.<sup>527</sup>

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<sup>516</sup> AC's Second Opinion on Estonia, *op. cit.*, para. 70.

<sup>517</sup> *Ibid.*, para. 19. See also, para. 72.

<sup>518</sup> See, for example, AC's Opinions on Ireland, *op. cit.* (paras. 58, 115), Italy, adopted on 14 September 2001 (para. 40), "the former Yugoslav Republic of Macedonia", *op. cit.* (para. 57).

<sup>519</sup> See, for example, AC's Opinions on Bosnia & Herzegovina, *op. cit.* (para. 135) and "the former Yugoslav Republic of Macedonia", *op. cit.* (para. 121).

<sup>520</sup> See, for example, AC's Opinions on Hungary, *op. cit.* (Section: "In respect of Article 6"), the Russian Federation, *op. cit.* (para. 137), Slovakia, *op. cit.* (para. 27).

<sup>521</sup> AC's Second Opinion on Italy, *op. cit.*, para. 75.

<sup>522</sup> AC's Second Opinion on Denmark, *op. cit.*, paras. 20, 77, 80, 96.

<sup>523</sup> For discussions of conflicting interpretations of the meaning of the term, see *inter alia*: Geoff Gilbert, "The Council of Europe and Minority Rights", 18 *Human Rights Quarterly* (1996) pp. 160-189, at pp. 165-166 and pp. 169-170; Heinrich Klebes, "The Council of Europe's Framework Convention on National Minorities", *op. cit.*, p. 93; Rosalyn Higgins, "Minority Rights: Discrepancies and Divergencies Between the International Covenant and the Council of Europe System", in Rick Lawson & Matthijs de Blois, Eds., *The Dynamics of the Protection of Human Rights in Europe: Essays in Honour of Henry G. Schermers (Vol. III)* (Dordrecht, Martinus Nijhoff Publishers, 1994), pp. 195-209, at p. 202.

<sup>524</sup> AC's Opinion on Ireland, *op. cit.*, para. 61.

<sup>525</sup> AC's Opinion on Spain, *op. cit.*, para. 49.

<sup>526</sup> AC's Second Opinion on the Czech Republic, *op. cit.*, para. 87.

In this sense, the personal scope of Article 6 is more far-reaching than that of most other provisions of the FCNM.<sup>528</sup> This would suggest that whenever tolerance and intercultural understanding are threatened – as they would be by hate or discriminatory speech, persons belonging to *all* minorities would stand to benefit from the FCNM’s provisions.

Attitudes that prevail in society inevitably seep into institutional frameworks too. The effects of embedded, institutionalised racism and discrimination are highly exclusionary. They foreclose opportunities for effective participation in deliberative processes. They erode trust and respect for the organs of the State. Systematic or routine police brutality against specific minorities illustrates the point most sharply. The AC has found that such practices “have disastrous psychological effects on the persons concerned and are bound to undermine the community’s confidence in the police”.<sup>529</sup> The AC has pointed firmly towards the role to be played by State authorities to curb such practices.

Next to institutional practices and culture, a State’s constitutional and legislative culture is also of cardinal contextual importance. The AC has frequently homed in on the problem of inadequate enforcement of (legislative) provisions designed to curb racist activities. The problem has many facets. In the first place, there is the problem of under-reporting and -recording of racist incidents<sup>530</sup> and the inadequate availability of data on racist or ethnically-motivated crimes generally.<sup>531</sup> Second, there is the problem of lax enforcement of existing legislation, which results in few prosecutions being initiated and even fewer prosecutions being successfully concluded. Third, these factors combine to undermine the deterrent and symbolic value assigned to relevant legislation. The dangers for society accruing from a culture of lax enforcement or impunity are great, even if they are not obviously immediate and tangible. A kind of “slow-burn” principle can apply. As the AC has cautioned:

Even though there are not always individually identifiable victims or economic interests at stake [...] the possible effects on the spirit of tolerance, mutual respect and understanding among all persons, irrespective of their ethnic, cultural or religious identity, must not be underestimated.<sup>532</sup>

### **6.6.1(ii) Affirmation of the AC’s approach**

At the beginning of the previous section, the importance of Committee of Ministers’ Resolutions in shaping a distinct FCNM strategy against hate and discriminatory speech was somewhat relativised and downplayed. However, the intention was not to write the Committee of Ministers out of the script altogether. Although its Resolutions do not ordinarily provide extra elucidation of concepts or issues, the Committee of Ministers has meaningfully picked up on a number of the themes explored in the foregoing paragraphs. If nothing else, this has at least helped to affirm and consolidate the strategy pursued by the AC, particularly

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<sup>527</sup> Another slight variant on the formulation crops up in the context of the AC’s Second Opinion on Italy, adopted on 24 February 2005, where the scope of Article 6 is stated as applying to all persons living on the [national] territory, including “asylum-seekers, refugees and persons belonging to other groups that have not traditionally inhabited the country concerned”: para. 77. The usefulness of this particular wording lies in its neatly suggested coverage for immigrants and migrants alike.

<sup>528</sup> See also, in this connection, Article 4, FCNM, which concerns equality and non-discrimination.

<sup>529</sup> AC’s Opinion on Romania, adopted on 6 April 2001, para. 41. The causes that contribute to the erosion of confidence in State institutions such as the police and the courts are captured well in the AC’s Second Opinion on the Czech Republic, *op. cit.*, para. 98.

<sup>530</sup> AC’s Opinion on the United Kingdom, *op. cit.*, para. 113.

<sup>531</sup> AC’s Opinion on Spain, *op. cit.*, para. 55.

<sup>532</sup> AC’s Opinion on Poland, *op. cit.*, para. 57.

as regards the need for States Parties to encourage media engagement in the promotion of intercultural dialogue and in combating discrimination, negative stereotypes, intolerance and xenophobia.<sup>533</sup>

### **6.6.1(iii) Conclusions**

The coupling of freedom of expression and the promotion of tolerance is a feature of various Council of Europe standard-setting measures, most notably the Committee of Ministers' twin Recommendations on "Hate Speech" and on the media and the promotion of a culture of tolerance.<sup>534</sup> What is distinctive about the FCNM is the extent to which its monitoring process has facilitated an exploration of the actual interplay between freedom of expression and the promotion of tolerance.

Crucially, that exploration highlights the interconnectedness of diverse factors which tend to engender circumstances in which hate and discriminatory speech can flourish. By insisting on the need to pre-emptively address those contributory causes of hate speech, the FCNM seeks to reduce the incidence of manifestations of intolerance and hatred (including hate speech).

The root-and-branch nature of the approach adopted in the FCNM monitoring process boasts two key strategic strengths: (i) it facilitates preventive, pre-emptive measures for combating hate speech; (ii) it does not preclude or even prejudice the possibility of ultimate recourse to tighter, punitive measures against hate speech (if and when dictated by the urgency of circumstances). As such, it is submitted here that the approach merits increased consideration by law- and policy-makers alike.

### **6.6.2 Non-treaty-based approaches to hate speech**

The Council of Europe actively engages in a wide range of standard-setting activities which are not based on specific treaties.

#### **6.6.2(i) Standard-setting by the Committee of Ministers**

##### *Resolution 68 (30)*

The primary aim of Resolution 68 (30), entitled, "Measures to be taken against incitement to racial, national and religious hatred",<sup>535</sup> is to press Member States of the Council of Europe to sign, ratify and subsequently give domestic legal effect to ICERD.<sup>536</sup> It requests governments to affirm the importance of the schemes of human rights protection offered by both the Universal Declaration of Human Rights and the ECHR when depositing their instruments of

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<sup>533</sup> The terms used here have been cherry-picked from a number of country-specific Resolutions adopted by the Committee of Ministers, most specifically: Resolution ResCMN(2005)5 on the implementation of the FCNM by Croatia, 28 September 2005; Resolution ResCMN (2006)5 on the implementation of the FCNM by Italy, 14 June 2006; Resolution ResCMN(2005)8 on the implementation of the FCNM by Moldova, 7 December 2005, and Resolution ResCMN(2006)6 on the implementation of the FCNM by Slovenia, 14 June 2006. All of these Resolutions pertain to the Second Monitoring Cycle.

<sup>534</sup> *Op. cit.*

<sup>535</sup> Adopted by the Ministers' Deputies on 31 October 1968.

<sup>536</sup> *Ibid.*, para. A.1.

ratification of ICERD.<sup>537</sup> It urges States authorities to bring their influence to bear on the United Nations to push for the successful completion of work on a draft convention for the elimination of all forms of intolerance and of discrimination based on religion or belief.<sup>538</sup> As can be seen from its first three substantive provisions, Resolution 68 (30) was very much a product of its time.<sup>539</sup> Under the Resolution's fourth substantive provision, governments are asked to "review their legislation in order to ensure that it provides for effective measures on the matter of prohibition of racial discrimination as well as on the related question of the elimination of all forms of intolerance and discrimination based on religion or belief".

### *Recommendations*

One of the two main points in Recommendation (92) 19 on video games with a racist content is that States authorities should: "review the scope of their legislation in the fields of racial discrimination and hatred, violence and the protection of young people, in order to ensure that it applies without restriction to the production and distribution of video games with a racist content".<sup>540</sup>

Recommendation (97) 20 on "Hate Speech"<sup>541</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>542</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>543</sup> The Group examined existing international legal instruments, the domestic legislation of Member States of the Council of Europe and various relevant studies,<sup>544</sup> including a specially-commissioned study on codes of ethics dealing with media and intolerance.<sup>545</sup>

It is clear from the Preamble to the Recommendation that it is anchored in the prevailing standards of international law as regards both freedom of expression and anti-racism. It is not

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<sup>537</sup> *Ibid.*, para. A.2.

<sup>538</sup> *Ibid.*, para. A.3.

<sup>539</sup> For example, the decision to prioritise the preparation of a UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (adopted in 1981) in effect eventually led to the (indefinite) abandonment of plans to elaborate an international convention on the same themes. See further: Kevin Boyle, "Religious Intolerance and the Incitement of Hatred", *op. cit.*, at 63-64; Natan Lerner, "The Nature and Minimum Standards of Freedom of Religion and Belief", *op. cit.*, at 918.

<sup>540</sup> Recommendation No. R (92) 19 of the Committee of Ministers to Member States on video games with a racist content (adopted by the Committee of Ministers on 19 October 1992, at the 482nd meeting of the Ministers' Deputies), para. a.

<sup>541</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>542</sup> Explanatory Memorandum to Recommendation No. R (97) 20 on "Hate Speech", para. 23.

<sup>543</sup> *Ibid.*, para. 8.

<sup>544</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>545</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.

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

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

The principles in question address a wide range of issues. Principle 1 points out that public officials are under a special responsibility to refrain from making statements – particularly to the media – which could be understood as, or have the effect of, hate speech.<sup>546</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 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>547</sup>

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<sup>546</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.”

<sup>547</sup> Explanatory Memorandum to Recommendation No. R (97) 20, *op. cit.*, para. 38.

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.”

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>548</sup> Recommendation (97) 21 on the media and the promotion of a culture of tolerance<sup>549</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>550</sup>

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

Broadcasters, especially those with public service mandates, are encouraged to “make adequate provision for programme services, also at popular viewing times, which help

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<sup>548</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>549</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>550</sup> Explanatory Memorandum to Recommendation No. R (97) 20, *op. cit.*, para. 12.

promote the integration of all individuals, groups and communities as well as proportionate amounts of airtime for the various ethnic, religious and other communities”. They are also encouraged to promote the values of multiculturalism in their programming, especially in their programme offer targeting children. Finally, the Recommendation mentions the benefits of advertising codes of conduct which prohibit discrimination and negative stereotyping. It equally mentions the usefulness of engaging the media to actively disseminate advertising campaigns for the promotion of tolerance.

The purpose of Recommendation (2000) 4 on the education of Roma/Gypsy children in Europe<sup>551</sup> is to attempt to set right the entrenched disadvantages affecting Roma/Gypsy children in the education sector. The Recommendation therefore addresses structural and content-related matters; recruitment and training of teachers; quality control and review; consultation and coordination.

As its title suggests, Recommendation (2001) 6 on the prevention of racism, xenophobia and racial intolerance in sport,<sup>552</sup> aims to eradicate racism in sporting circles. Its point of departure is a broad definition of racism and it focuses on coordination and the sharing of responsibilities between relevant authorities and other parties. It proposes numerous legislative measures and pays particular attention to the possible mechanics of their implementation. It also countenances other, non-legislative measures to be taken in sports grounds, as well as at local and institutional levels.

While Recommendation (2001) 8 on self-regulation concerning cyber content<sup>553</sup> does not contain any provisions dealing specifically with racism or racist speech, its Preamble recalls the relevance of such issues to self-regulation of online content. It refers to, *inter alia*, Recommendation (92) 19 on video games with a racist content, Recommendation (97) 20 on “Hate Speech” and Article 4, ICERD.

For its part, Recommendation Rec(2003)9 on measures to promote the democratic and social contribution of digital broadcasting<sup>554</sup> emphasises in its preambular section “the need to safeguard essential public interest objectives in the digital environment, including freedom of expression and access to information, media pluralism, cultural diversity, the protection of [...] human dignity [...].” In the Appendix to the Recommendation, this emphasis is placed on a more substantive footing by a call for “[T]he protection of [...] human dignity, and non-incident to hatred and violence, notably that of racial and religious origin” to “continue to

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<sup>551</sup> Recommendation No. R (2000) 4 of the Committee of Ministers to member states on the education of Roma/Gypsy children in Europe (Adopted by the Committee of Ministers on 3 February 2000 at the 696<sup>th</sup> meeting of the Ministers’ Deputies).

<sup>552</sup> Recommendation Rec (2001) 6 of the Committee of Ministers to member states on the prevention of racism, xenophobia and racial intolerance in sport (adopted by the Committee of Ministers on 18 July 2001 at the 761<sup>st</sup> meeting of the Ministers’ Deputies).

<sup>553</sup> Recommendation Rec (2001) 8 of the Committee of Ministers to member states on self-regulation concerning cyber content (self-regulation and user protection against illegal or harmful content on new communications and information services) (Adopted by the Committee of Ministers on 5 September 2001 at the 762<sup>nd</sup> meeting of the Ministers’ Deputies).

<sup>554</sup> Recommendation Rec(2003)9 of the Committee of Ministers to member states on measures to promote the democratic and social contribution of digital broadcasting (Adopted by the Committee of Ministers on 28 May 2003 at the 840<sup>th</sup> meeting of Ministers’ Deputies).

receive particular attention in the digital convergence environment”.<sup>555</sup> It is by no means superfluous to insist on the continued relevance of these fundamental values in the context of the digitisation of the media, as they tend to often be eclipsed by technology-related discussions.

### *Declarations*

A number of the Committee of Ministers’ (political) Declarations also contain provisions that deal with the perpetration of racist offences via various forms of mass media. For instance, its Declaration on a European policy for new information technologies calls on States:<sup>556</sup>

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

While the Declaration on freedom of communication on the Internet<sup>557</sup> does not zone in specifically on racism, its Preamble does refer to several principles and international instruments which treat relevant issues extensively. As such, it is a document which is of clear – but only indirect and general – relevance.

The Preamble to the Declaration on freedom of political debate in the media<sup>558</sup> recalls the Committee of Ministers’ earlier Recommendation on hate speech and emphasises “that freedom of political debate does not include freedom to express racist opinions or opinions which are an incitement to hatred, xenophobia, antisemitism and all forms of intolerance”. In the substantive part of the Declaration – under the heading ‘Remedies against violations by the media’ – it is stated that:

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

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<sup>555</sup> Appendix to the Recommendation, para. 9.

<sup>556</sup> Declaration on a European policy for new information technologies (1999) (Adopted by the Committee of Ministers on 7 May 1999, at its 104th Session), Section (v), ‘With respect to Protection of rights and freedoms’.

<sup>557</sup> Council of Europe Committee of Ministers Declaration on freedom of communication on the Internet (Adopted by the Committee of Ministers on 28 May 2003 at the 840th meeting of the Ministers’ Deputies).

<sup>558</sup> Council of Europe Committee of Ministers Declaration on freedom of political debate in the media (Adopted by the Committee of Ministers on 12 February 2004 at the 872nd meeting of the Ministers’ Deputies).



The Declaration on freedom of expression and information in the media in the context of the fight against terrorism<sup>559</sup> “invites” media professionals “to consider” suggestions such as:

- to bear in mind the significant role which they can play in preventing “hate speech” and incitement to violence, as well as in promoting mutual understanding;
- to be aware of the risk that the media and journalists can unintentionally serve as a vehicle for the expression of racist or xenophobic feelings or hatred;
- to bear in mind the importance of distinguishing between suspected or convicted terrorists and the group (national, ethnic, religious or ideological) to which they belong or to which they claim to subscribe;
- to set up training courses, in collaboration with their professional organisations, for journalists and other media professionals who report on terrorism, on their safety and the historical, cultural, religious and geopolitical context of the scenes they cover, and to invite journalists to follow these courses.

Terrorism is a highly flammable topic, both in terms of political policy and debate, as well as in media coverage of the same. Its flammability increases the risk of emotionally-fuelled treatment of relevant issues. Hence the importance of specific provisions aiming to ensure that the depiction of certain groups remain within the bounds of the temperate, despite the flammability of the subject matter. Responsible, value-sensitive journalism is the lodestar here, but the aim is followed in a non-coercive way, thereby respecting the principle of media autonomy. The Declaration’s promotion of responsible journalism concerns professional practice and training programmes: this is evidence of a simultaneous commitment to the immediate and longer-term goals of countering hate speech.

The Declaration on human rights and the rule of law in the Information Society, adopted in May 2005,<sup>560</sup> was submitted as a Council of Europe contribution to the Tunis Phase of the World Summit on the Information Society (WSIS)<sup>561</sup> in November 2005.

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

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

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<sup>559</sup> Declaration on freedom of expression and information in the media in the context of the fight against terrorism (Adopted by the Committee of Ministers on 2 March 2005 at the 917th meeting of the Ministers’ Deputies).

<sup>560</sup> Declaration of the Committee of Ministers on human rights and the rule of law in the Information Society, 13 May 2005, CM(2005)56 final.

<sup>561</sup> The WSIS is an initiative organised by the International Telecommunication Union (ITU), a UN agency under the auspices of which “governments and the private sector coordinate global telecom networks and services”. The Summit is being held in two phases: the first took place in Geneva in 2003 and the second is due to take place in Tunis later in 2005. See further: <http://www.itu.int/wsis/>.

With regard to self- and co-regulatory measures which aim to uphold freedom of expression and communication, private sector actors are encouraged to address in a decisive manner the following issues:

- hate speech, racism and xenophobia and incitation to violence in a digital environment such as the Internet;
- [...]
- the difference between illegal comment and harmful comment.

## 6.6.2(ii) European Ministerial Conferences on Mass Media Policy

The first three European Ministerial Conferences on Mass Media Policy and the sixth such Conference did not examine the issues of hate speech or tolerance and intolerance in the media sector in any direct or meaningful way. Their thematic preoccupations lay elsewhere.<sup>562</sup>

In the 4<sup>th</sup> European Ministerial Conference on Mass Media Policy,<sup>563</sup> however, these issues were broached in two of the texts adopted during the Conference. In Resolution No. 2: Journalistic Freedoms and Human Rights, Principle 7(f) sets out generally that the “practice of journalism in a genuine democracy” implies “avoiding the promotion of any violence, hatred, intolerance or discrimination based, in particular, on race, sex, sexual orientation, language, religion, politics or other opinions, national or regional origin, or social origin.” In the Declaration on media in a democratic society, the Ministers of participating States condemn, “in line with the Vienna Declaration, all forms of expression which incite to racial hatred, xenophobia, anti-Semitism and all forms of intolerance, since they undermine democratic security, cultural cohesion and pluralism”.<sup>564</sup> They also affirm “that the media can assist in building mutual understanding and tolerance among persons, groups and countries and in the attainment of the objectives of democratic, social and cultural cohesion announced in the Vienna Declaration”.<sup>565</sup> These two principles again reflect the conceptual bifurcation between curbing hate speech and promoting understanding and tolerance – a distinction that has (by and large) consistently been adhered to throughout relevant Council of Europe instruments. Relatedly, in the Action Plan adopted at the Conference, it was proposed that the Committee of Ministers of the Council of Europe “**Study**, in close consultation with media professionals and regulatory authorities, possible guidelines which could assist media professionals in addressing intolerance in all its forms”.<sup>566</sup>

It was the 5<sup>th</sup> European Ministerial Conference on Mass Media Policy<sup>567</sup> that paid the greatest attention to relevant issues to date. Paras. 11 and 12 of the Political Declaration adopted at that Conference refer in general terms to the potential offered and risks posed by new communications and information services for freedom of expression and other rights and values. In a similar vein, Resolution No. 1: The impact of new communication technologies on human rights and democratic values, emphasises the Ministers’ condemnation of the use of

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<sup>562</sup> 1<sup>st</sup> European Ministerial Conference on Mass Media Policy (Vienna, 9-10 December 1986): *The future of television in Europe*; 2<sup>nd</sup> European Ministerial Conference on Mass Media Policy (Stockholm, 23-24 November 1988): *European Mass Media Policy in an international context*; 3<sup>rd</sup> European Conference on Mass Media Policy (Nicosia, 9-10 October 1991): *Which way forward for Europe’s media in the 1990s?*; 6<sup>th</sup> European Ministerial Conference on Mass Media Policy (Cracow, 15-16 June 2000): *A media policy for tomorrow*.

<sup>563</sup> Prague, 7-8 December 1994: *The media in a democratic society*.

<sup>564</sup> Principle 7.

<sup>565</sup> Principle 8.

<sup>566</sup> (emphasis per original) Action Plan setting out strategies for the promotion of media in a democratic society addressed to the Committee of Ministers of the Council of Europe (Point 6 – “Media and intolerance”).

<sup>567</sup> Thessaloniki, 11-12 December 1997: *The Information Society: a challenge for Europe*.

new technologies and services “for spreading any ideology, or carrying out any activity, which is contrary to human rights, human dignity, and democratic values”, as well as their resolve to “combat such use”.<sup>568</sup>

Resolution No. 2: Rethinking the regulatory framework for the media, calls on participating States to give domestic effect to the principles enshrined in the Committee of Ministers’ Recommendations on, *inter alia*, “hate speech” and on the media and the promotion of a culture of tolerance.<sup>569</sup> It also calls on States authorities “to ensure that measures for combating the dissemination of opinions and ideas which incite to racial hatred, xenophobia, anti-Semitism and all forms of intolerance through the new communications and information services duly respect freedom of expression and, where applicable, the secrecy of correspondence”.<sup>570</sup> The reinforcement of cooperation within the Council of Europe, while liaising with other IGOs and “interested professional organisations”, is also advocated.<sup>571</sup> Such cooperation should have standard-setting aspirations, initially for Europe and later for further afield too. The suggested focus is on “problems of delimiting public and private forms of communication, liability, jurisdiction and conflict of laws in regard to hate speech disseminated through the new communications and information services”.<sup>572</sup>

The Conference’s Action Plan calls for study of “the practical and legal difficulties in combating the dissemination of hate speech, violence and pornography via the new communications and information services, with a view to taking appropriate initiatives in a common pan-European framework”. As already mentioned *supra*, it also calls for the “periodical evaluation” of Member States’ “follow-up” to the Committee of Ministers’ Recommendations on, *inter alia*, “hate speech” and on the media and the promotion of a culture of tolerance. In addition, it seeks a periodical evaluation of the implementation of Article 7, ECTT, by Member States, particularly as regards the “responsibilities of broadcasters with regard to the content and presentation of their programme services”. Finally, it provides for an examination – “as appropriate” – of the “advisability of preparing in addition other binding or non-binding instruments”.

Finally in this section, the relevance of the 7<sup>th</sup> European Ministerial Conference on Mass Media Policy, which was held in Kyiv (Ukraine) in March 2005, should also be flagged.<sup>573</sup> At the conference, the ministers of participating States undertook, *inter alia*, to: “step up their efforts to combat the use of the new communication services for disseminating content prohibited by the Cybercrime Convention and its additional Protocol concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems.”<sup>574</sup>

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

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<sup>568</sup> Para. 9. See also, para. 19(i), where these points are reiterated in very similar language.

<sup>569</sup> Para. 8(i).

<sup>570</sup> Para. 8(ii).

<sup>571</sup> Para. 8(iii).

<sup>572</sup> Para. 8(iii).

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<sup>574</sup> Resolution No. 3, “Human rights and regulation of the media and new communication services in the Information Society”, para. 18. See further, Tarlach McGonagle, “Ministerial Conference on Mass Media Policy”, *IRIS – Legal Observations of the European Audiovisual Observatory*, 2005-7: 2.

The Council of Europe's commitment to the advancement of the struggle against racism is by no means restricted to the ECHR and its other legal conventions.<sup>575</sup> The European Commission against Racism and Intolerance (ECRI), for instance, was established in 1993, and it was under its auspices that the preparations in Europe for the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (2001) were largely coordinated.

ECRI's work has three main focuses: its so-called "country-by-country" approach (which involves the ongoing monitoring of relevant issues in Member States<sup>576</sup>) and work on general themes (which includes the elaboration of general policy recommendations, as well as the collection and promotion of examples of "good practice" in the struggle against racism), and engagement with civil society. More specifically, its objectives have been listed as follows:

- to review member states' legislation, policies and other measures to combat racism, xenophobia, antisemitism and intolerance, and their effectiveness;
- to propose further action at local, national and European level;
- to formulate general policy recommendations to member states;
- to study international legal instruments applicable in the matter with a view to their reinforcement where appropriate.<sup>577</sup>

The challenge of combating racism and intolerance in a way that is duly respectful of the right to freedom of expression is a recurrent issue in both ECRI's country-monitoring work and its work on general themes.<sup>578</sup> In order to take stock of and evaluate appropriate legal and policy measures for the realisation of this aim, ECRI has actively engaged with civil society, most notably by organising a multi-party expert seminar on the topic at the end of 2006.<sup>579</sup> While it is too early yet to assess (or even predict) the impact of that seminar on ECRI's strategies for meeting the challenge, it can be observed that its engagement with relevant issues to date has produced mixed results.

The different focuses of ECRI's work cast it in different roles which entail different responsibilities. In its country-monitoring work, ECRI's role is essentially that of a watchdog. It monitors and analyses ongoing developments and periodically issues specific recommendations tailored to specific problems. The exercise presents and processes information about (especially problematic) developments with a view to facilitating their ultimate resolution. In its work on general themes, on the other hand, ECRI assumes a more explicit and general standard-setting role. By virtue of its normative intentions in this respect, its responsibilities are greater. The elaboration of recommendations designed for general application by all States requires greater care and precision than the formulation of specific problem-solving recommendations focusing on specific issues in specific States. This is not to downplay the importance of the latter task; rather, it seeks to make an epistemological relativisation, the importance of which will become apparent in the following analysis. The relativisation in question is this: in light of their purported wider applicability and (presumably) longer durability, the ability of general policy recommendations to withstand

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<sup>575</sup> Relevant texts issued by the Committee of Ministers and Parliamentary Assembly of the Council of Europe will be discussed throughout this thesis in appropriate contexts.

<sup>576</sup> This is a report-based system.

<sup>577</sup> Article 1, Appendix to Resolution (2002)8 Statute of the European Commission against Racism and Intolerance (ECRI).

<sup>578</sup> Explanatory Note to ECRI Expert Seminar on combating racism while respecting freedom of expression, Strasbourg, 16-17 November 2006, p. 1.

<sup>579</sup> The publication of the proceedings of the expert seminar is forthcoming: Heike Klempa/ECRI, Ed., ... (Strasbourg, Council of Europe Publishing, 2007).

strict scrutiny in terms of their conceptual and terminological precision is more important than in the case of issue-/situation-specific recommendations. As will be demonstrated, occasional lapses in conceptual and terminological precision could serve to undermine the credibility of ECRI's standard-setting role in respect of certain key issues.

The following analysis will analyse how the challenge of combating racism and intolerance in a way that is duly respectful of the right to freedom of expression has been dealt with, first in ECRI's most recent country-monitoring work and then in its work on general themes.

### *Country-monitoring work*

On the basis of the third (and ongoing) round of ECRI's country-monitoring work, there is clear evidence that ECRI espouses a root-and-branch approach, similar to that pursued by the Advisory Committee on the FCNM, to the imperative of countering racist expression and intolerance. There is also clear evidence that ECRI's approach, again like that of the AC, is mindful of the importance of the right to freedom of expression and the differential roles of the media in this context. As such, the overall pattern that emerges from the country reports surveyed includes recommendations for both punitive and preventive measures, the most salient of which will now be discussed.

In terms of punitive measures, a recurrent general recommendation is that States authorities strengthen existing legislative provisions prohibiting incitement to hatred,<sup>580</sup> or ensure that existing provisions are vigorously implemented.<sup>581</sup> Similarly, ECRI regularly recommends particular vigilance in identifying and prosecuting cases of incitement to or dissemination of hatred by media professionals.<sup>582</sup> In cases where racist articles have been published, ECRI often calls for the perpetrators to be prosecuted and punished.<sup>583</sup> Curiously, in the reports surveyed, ECRI has focused on the *publication* of racist *articles* and not made any comparable recommendation about the dissemination of racist expression via the broadcast media. Some of the recommendations for punitive measures specifically concern racist and xenophobic material on the Internet, however.<sup>584</sup> The specificity of such a focus demonstrates the growing nature of the problem, yet such recommendations are by no means systematic in ECRI's country reports. This begs the question of whether the problem is equally pressing in all States.

Alongside its recommendations for prosecution and punishment in a system built around legislation and the courts, other recommendations call for the adoption<sup>585</sup> and/or implementation<sup>586</sup> by the media sector of self-regulatory codes which would include

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<sup>580</sup> Denmark, para. 92; Norway, para. 101; Former Yugoslav Republic of Macedonia, para. 95.

<sup>581</sup> Lithuania, para. 62.

<sup>582</sup> Czech Republic, para. 65; Luxembourg, para. 77; Romania, para. 113; Russia, para. 120; Sweden, para. 9.

<sup>583</sup> Bulgaria, para. 63; Croatia, para. 82; Estonia, para. 115 (the phrase, "duly prosecuted", is used here instead of the reference to "prosecute and punish"); Greece, para. 98; Poland, para. 79; Turkey, para. 100. It could cynically be observed that given the preponderance of prosecutions in Turkey for speech-related offences, often loosely based on anti-racism provisions, the fact that ECRI "strongly encourages the Turkish authorities to make every endeavour to prosecute and punish those responsible [for the publication of racist articles]" seems irrelevant.

<sup>584</sup> Finland, para. 91; France, para. 107; Germany, para. 111; Lithuania, para. 64; Portugal, para. 92; Sweden, para. 83.

<sup>585</sup> Albania, para. 70; Austria, para. 73; Czech Republic, para. 65; Germany, para. 78; Turkey, para. 100.

<sup>586</sup> Austria, para. 73; Belgium, para. 59; Germany, para. 78; Hungary, para. 85; Norway, para. 80; Former Yugoslav Republic of Macedonia, para. 94.

provisions on racism, discrimination and responsible reporting on minorities. The frequency with which this kind of recommendation is made is indicative of ECRI's awareness of, and deference to, the principle of media autonomy which is a central principle of the Council of Europe's approach to freedom of expression. ECRI's commitment to this principle is even more obvious in its regular encouragement of the State authorities to: "impress on the media, without encroaching on their editorial independence, the need to ensure that reporting does not contribute to creating an atmosphere of hostility and rejection towards members of any minority groups".<sup>587</sup> Slight, mainly negligible, variations in wording occur,<sup>588</sup> but a more significant variation involves instances in which particular minority groups are specified.<sup>589</sup> In the report on the United Kingdom, the authorities are furthermore encouraged to impress on the media (without encroaching on their editorial independence) "the need to play a proactive role in countering such an atmosphere".<sup>590</sup>

In respect of certain countries, the wording does change in ways that (possibly/presumably) reflect certain contextual specificities of those countries. In the case of Ireland, for instance, "ECRI recommends that, while fully respecting the principle of freedom of expression and editorial independence, the authorities encourage fairness when issues pertaining to ethnic minority groups, asylum seekers, refugees and immigrant communities are discussed by the media".<sup>591</sup> In the report on Germany, the focus of attention is on "the need to ensure that reporting does not perpetuate racist prejudice and stereotypes".<sup>592</sup> These emphases on fairness and on racist prejudice/stereotypes are more particularised than the more open-ended formula, "atmosphere of hostility and rejection", thus suggesting a more pointed, situation-specific approach by ECRI (as opposed to a sound, but vague, recommendation that could uncontroversially be applied to any country situation). Another, somewhat blander, variant on the general theme is that States authorities alert the media (i.e., professionals and organisations) to "the dangers of racism and intolerance".<sup>593</sup> It is unclear why this less demanding recommendation is preferred to the more robust formula discussed in the current and previous paragraphs for some countries.

It is significant to note that this particular recommendation is systematically accompanied by the further recommendation that States authorities should: "engage in a debate with the media and members of other relevant civil society groups on how this could best be achieved".<sup>594</sup> An exception to the rule is found in the report on the Russian Federation and it is submitted that

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<sup>587</sup> See, for example, Cyprus, para. 90; Finland, para. 90.

<sup>588</sup> See, for example, Austria, para. 73; Portugal, para. 87.

<sup>589</sup> For example, in the report on Iceland, members of "immigrant, Muslim or Jewish communities" are singled out for attention (para. 80); in the report on Italy, the "minority groups" are explicitly considered to include "non-EU citizens, Roma, Sinti and Muslims" (para. 79); in the report on Lithuania, members of the "Jewish, Roma and Chechen communities" are expressly mentioned (para. 63); in the report on Portugal, the specification involves "immigrants and Gypsies" (para. 87); in the report on the Russian Federation, "visible minority groups" (the formula that is used instead of "any minority groups") are stated as "including Roma, Chechens and other Caucasians, as well as citizens from CIS countries" (para. 121); in the report on Spain, particular reference is made to "the Roma, Muslims and immigrants" (para. 86); in respect of the United Kingdom, the atmosphere of hostility and rejection to be avoided is described as being "towards asylum seekers, refugees and immigrants or members of any minority group, including Roma/Gypsies, Travellers and Muslims" (para. 79).

<sup>590</sup> United Kingdom, para. 79; see also, Germany, para. 78.

<sup>591</sup> Ireland, para. 112.

<sup>592</sup> Germany, para. 78.

<sup>593</sup> Bulgaria, para. 63; Croatia, para. 82; Greece, para. 98; Hungary, para. 85 (here, the reference is to "the danger of negative reporting"); Poland, para. 79; Switzerland, para. 60 (here, the point is styled as further sensitisation to the need to report on asylum-seekers and refugees in a more balanced fashion, "without resorting to language and propaganda which are likely to exacerbate public prejudice and hostility"); Turkey, para. 100.

<sup>594</sup> Cyprus, para. 90; Finland, para. 90; Iceland, para. 80; Italy, para. 79; Lithuania, para. 63; Slovenia, para. 87.

that was a missed opportunity to underscore the importance of civil society participation in media policy formulation in a country where weak traditions of such participation need to be strengthened.<sup>595</sup> Again, slight, mainly negligible variations in wording arise in this respect,<sup>596</sup> but in the report on the United Kingdom, ECRI recommends that “any successful initiatives developed at local level in this field, be reproduced on a broader scale at national level”.<sup>597</sup> In the report on Spain, the need for measures at the local and national levels is also adverted to.<sup>598</sup> In the report on Portugal, the authorities are encouraged to “hold discussions with the media and other relevant civil society players [...]”<sup>599</sup> and it is submitted that the reference to discussions is preferable to the more consistently used reference to “debate”, which has the connotation of a more confrontational encounter.

As already mentioned, ECRI has also shown its awareness of the potential role that freedom of expression can play in countering racist speech. It has sought to harness that potential by encouraging (rather than prescribing, again out of deference to the principle of media autonomy) more and better media coverage of minority issues,<sup>600</sup> a goal which could be advanced in a number of ways. For example, it recommends more State support for training schemes for media professionals on issues such as reporting in a diverse society;<sup>601</sup> human rights, racism, racial discrimination<sup>602</sup> and anti-Semitism.<sup>603</sup> Another way of advancing the goal of more and better media coverage of minority issues is by seeking to ensure greater representation of persons from immigrant backgrounds in the media profession.<sup>604</sup> This approach is explicitly based on the assumption that the enhanced representation of immigrants in media structures will have a positive impact on the representation of immigrants in media output.

ECRI also underscores the importance of access to electronic and print media for persons belonging to minorities, generally,<sup>605</sup> as well as the specific importance of ensuring the “adequate availability of electronic media in the language of national minorities”.<sup>606</sup> The promotion via the media of minority identities<sup>607</sup> and of “an atmosphere of appreciation of diversity”<sup>608</sup> are also recommended, as is the creation of a shared forum in which separate linguistic communities can receive the same information, with a view to strengthening inter-group relations.<sup>609</sup>

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<sup>595</sup> Russian Federation, para. 121.

<sup>596</sup> See, for example, Portugal, para. 87.

<sup>597</sup> United Kingdom, para. 79.

<sup>598</sup> Spain, para. 86.

<sup>599</sup> Portugal, para. 87.

<sup>600</sup> Albania, para. 71; Austria, para. 74; Former Yugoslav Republic of Macedonia, para. 137.

<sup>601</sup> Austria, para. 73; Germany, para. 78;

<sup>602</sup> Denmark, para. 108; Estonia, para. 115; Romania, para. 112 (“national and local media training courses on combating discrimination”); Slovakia, para. 91 (this provision is directed at “professionals”, presumably including, although without specifying, “media” professionals).

<sup>603</sup> Luxembourg, para. 77.

<sup>604</sup> Austria, para. 73; Belgium, para. 60; France, para. 105 (and see also para. 104 for details of a positive initiative in this connection); Germany, para. 78; Norway, para. 80. In these examples, references to “the press” are presumably expansive, i.e., to the press as an institution. It is submitted here that “the media” would have been a more suitable term.

<sup>605</sup> Albania, para. 72.

<sup>606</sup> Austria, para. 74.

<sup>607</sup> Slovenia, paras. 73-74.

<sup>608</sup> Albania, para. 70.

<sup>609</sup> Estonia, para. 114.

The striking similarities between the approaches taken by ECRI and the AC FCNM augur well for the further development and consolidation of a broadly consistent approach by the various bodies of the Council of Europe to the perennial problem of effectively combating racist and discriminatory speech without circumscribing the right to freedom of expression beyond the legitimate restrictions on the right which are recognised under international law.

### *Work on general themes*

ECRI's General Policy Recommendations (GPRs) are the mainstay of its work on general themes. They are as follows:

1. Combating racism, xenophobia, antisemitism and intolerance (1996)
2. Specialised bodies to combat racism, xenophobia, antisemitism and intolerance at national level (1997)
3. Combating racism and intolerance against Roma/Gypsies (1998)
4. National surveys on the experience and perception of discrimination and racism from the point of view of potential victims (1998)
5. Combating intolerance and discrimination against Muslims (2000)
6. Combating the dissemination of racist, xenophobic and antisemitic material [*sic*] via the Internet (2000)
7. On national legislation to combat racism and racial discrimination (2002)
8. On combating racism while fighting terrorism (2004)
9. On the fight against antisemitism (2004)
10. On combating racism and racial discrimination in and through school education (2006)
11. On combating racism and racial discrimination in policing (2007)
12. On combating racism and racial discrimination in sports (forthcoming, September 2008)

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

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

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

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



This citation of GPR No. 1 in GPR No. 6 is, however, abridged, although no indication is given that this is the case. The omitted section of the full, original text is italicised below; in the relevant part of GPR No. 1, ECRI recommends States governments to:

Ensure that national criminal, civil and administrative law expressly and specifically counter racism, xenophobia, anti-semitism and intolerance, inter alia by providing:

[...]

*- that, in conformity with the obligations assumed by States under relevant international instruments and in particular with Articles 10 and 11 of the European Convention on Human Rights,*

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

This omission pushes the language employed in GPR No. 6 away from the wording of existing international law standards. And it does so to a significant extent. Articles 10 (Freedom of expression) and 11 (Freedom of assembly and association), ECHR, both contain limiting – or so-called “claw-back” - clauses (which could easily be invoked, and are in practice, to counter racist expression and activities); similar limitations govern the exercise of the rights to freedom of expression and association as guaranteed by the International Covenant on Civil and Political Rights; ICERD contains a crucial “due regard” clause, which requires a balancing of anti-racist objectives with other fundamental human rights. It is therefore very remiss of ECRI to fail to consider its own immediate objectives in the context of existing human rights as provided for by international law, especially the right to freedom of opinion, expression and information. This failure to square up to the potential interaction (and incidental friction) between rights is apparent in ECRI’s other GPRs too.

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

GPR No. 8,<sup>610</sup> which examines how anti-racism could be integrated into the fight against terrorism, also departs from the tried and trusted formulae of “hard” international law, albeit to a lesser extent. In its Preamble, it stresses that “the response to the threat of terrorism should not itself encroach upon the very values of freedom, democracy, justice, the rule of law, human rights and humanitarian law that it aims to safeguard, nor should it in any way weaken the protection and promotion of these values”. This recognition of relativism is welcome. However, it could also be submitted that this statement would have been all the more forceful if it had been more firmly rooted in international human rights treaties. The verbal phrase, “encroach upon”, is vague and invites subjective interpretation. If the statement had been aligned more closely to the language employed in specific provisions of, for

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<sup>610</sup> ECRI general policy recommendation no. 8 on combating racism while fighting terrorism, adopted on 17 March 2004.

example, the ECHR, or if it had clearly referred to such provisions, the degree of subjectivity would have been reduced. Closer conceptual and linguistic alignment with the ECHR would automatically point to a body of relevant judicial pronouncements, thereby offering authoritative interpretative clarity.

Furthermore, GPR No. 8 refers to “certain visible minorities”, a term which is not used in any (well-known) international (legal or political) instruments.<sup>611</sup> The problems of defining and categorising minorities have proved vexed enough under international law,<sup>612</sup> without muddying the waters further by introducing novel terms of uncertain scope. Indeed, no multi-lateral European-, or global-level, treaty contains a definition of “minority”. For their part, the drafters of the FCNM conceded the impossibility of forging “a definition capable of mustering general support of all Council of Europe member States”.<sup>613</sup> It would appear that the appeal of the term “certain visible minorities” lies in the alleged flexibility it offers ECRI in the course of its work.<sup>614</sup> However, that argument, as well as the claim that the notion of visibility can cover linguistic and religious minorities,<sup>615</sup> is unconvincing.

To suggest that linguistic and religious minorities are categories of “visible minorities” seems to confuse visibility with identifiability. Visibility refers to features that can be seen, i.e., physical and superficial details, and it is only by serious doctoring (if not corruption) of the ordinary meaning of visibility that it could be extended to linguistic and religious characteristics. Granted, the outward manifestation of religious beliefs can often be visible (eg. particular types of clothing, symbols or other details of self-presentation), but not always. Furthermore, the argument that linguistic specificity can also be visible is, at best, somewhat strained. In short, it is reductionist to seek to describe (the expression of) identity-related specificities as visible; the reality of their existence and expression is much more complex and multi-dimensional. Finally, in this connection, the term “certain visible minorities” has considerable exclusionary potential. Whatever protection is intended by the term would appear to be limited by the cumulative qualifiers, “certain” and “visible”. On the basis of such wording, “certain other” visible minorities, as well as “invisible” minorities, are implicitly excluded from the protection on offer.<sup>616</sup> For this reason, use of the term has been discouraged in certain circles, eg. the English judiciary.<sup>617</sup> Given the problematic nature of the focus on “certain visible minorities”, it is difficult to agree with the suggestion that it boasts superior flexibility to alternative formulations of equivalent notions that are more ingrained in international legal and political discourse.

A second *forte* of ECRI’s thematic approach is that it enables more generous attention to be given to specific groups, for example those groups which have traditionally suffered - and

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<sup>611</sup> The term is, however, used by some commentators (eg. Ted R. Gurr, *Peoples versus States: Minorities at Risk in the New Century* (Washington, United States Institute of Peace, 2000), at p. 165) and in conventional political discourse in some countries (eg. Canada).

<sup>612</sup> See generally: Francesco Capotorti, *Study on the rights of persons belonging to ethnic, religious and linguistic minorities* (E/CN.4/Sub.2/384/Rev.1) (New York, United Nations, 1979), esp. p. 96, para. 568; John Packer, “Problems in Defining Minorities”, in Deirdre Fottrell and Bill Bowring, Eds., *Minority and Group Rights in the New Millennium* (The Netherlands, Kluwer Law International, 1999), pp. 223-273; Geoff Gilbert, “The Council of Europe and Minority Rights”, 18 *Human Rights Quarterly* (1996), pp. 160-189.

<sup>613</sup> Explanatory Report to the Framework Convention for the Protection of National Minorities, para. 12.

<sup>614</sup> Conversation with ECRI staff members, Strasbourg, 6 April 2006.

<sup>615</sup> *Ibid.*

<sup>616</sup> I am grateful to Geoff Gilbert for suggesting this point to me.

<sup>617</sup> Lord Chief Justice Woolf, *Equal Treatment Benchbook* (May 2004); for commentary, see: ‘In the News’, *Index on Censorship* 3/2004, p. 6. Kymlicka?

continue to suffer - from racism and racist discrimination. This is illustrated by the GPRs focusing specifically on the Roma/Gypsies, Muslims and anti-Semitism. These policy recommendations are very important as they address the root causes of racism and not merely its concrete manifestations. As such, they look at situational and systemic discrimination and explore ways of countering and eliminating the same.

The three GPRs were not cast in the same mould: differences in prioritisation and language are easily detectable. Of itself, this is not a problem. Indeed, it is perfectly understandable that different groups could be best served by different emphases and approaches. However, one can also witness here a recurrence of the previously mentioned tendencies to resort to language that is inconsistent with that of codified international law and the failure to adequately capture the underlying concepts of international law. In particular, insufficient consideration has been given to relevant interlinkage with other rights guaranteed by international law,<sup>618</sup> meaning that a hugely important and hugely relevant source of legal and philosophical inspiration has not been fully tapped into.

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

(iii) The third *forte* of the thematic approach to combating racism is that it has provided ECRI with a very useful means to address policy, institutional and methodological/procedural questions. In terms of policy, GPR Nos. 1 and 7 are the most important. GPR No. 1, entitled “Combating racism, xenophobia, antisemitism and intolerance”,<sup>619</sup> stands out among other GPRs for its ability to see the proverbial bigger picture. It recognises that international law is the backdrop to the struggle against racism and that the obligations imposed on States by international law must remain salient. GPR No. 7 – on national legislation to combat racism and racial discrimination<sup>620</sup> - is somewhat weaker in that regard, but its shortcomings are offset to some extent by its accompanying Explanatory Memorandum. This is the only GPR to have such an appendix, and the explanatory detail it provides on the recommendations concerning constitutional, civil and administrative, and criminal law, is to be welcomed.<sup>621</sup>

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<sup>618</sup> GPR No. 3 does not explicitly refer to any specific provisions of the ECHR; GPR No. 5 mentions Articles 9 and 14, ECHR, but not, for example, Article 10; GPR No. 9 mentions Article 14, ECHR, Protocol No. 12 to the ECHR, and Article 10, ECHR (but this reference is not so much an affirmation of the right to freedom of expression as a reiteration of the fact that certain types of expression do not enjoy Article 10 protection).

<sup>619</sup> ECRI general policy recommendation no. 1: Combating racism, xenophobia, antisemitism and intolerance, adopted on 4 October 1996.

<sup>620</sup> ECRI general policy recommendation No. 7 on national legislation to combat racism and racial discrimination, adopted on 13 December 2002.

<sup>621</sup> For further commentary, see: Giancarlo Cardinale, “The Preparation of ECRI General Policy Recommendation No 7 on National Legislation to Combat Racism and Racial Discrimination”, in Jan Niessen and Isabelle Chopin, Eds., *The Development of Legal Instruments to Combat Racism in a Diverse Europe*, op. cit., pp. 81-92.

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

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

(iv) By way of conclusion to this analysis of ECRI's thematic work, two other recent documents should also be briefly discussed: its Declaration on the use of racist, antisemitic and xenophobic elements in political discourse<sup>622</sup> and its Annual Report for 2004.

The Declaration begins by stating that tolerance and pluralism are cornerstones of democracy and that diversity "considerably enriches" democratic societies. Any affirmation of the right to freedom of expression is once again conspicuous by its absence. Given the thematic focus, this omission is regrettable: the counterbalancing and promotional qualities of free expression could usefully have been emphasised in the context of removing racist expression from political discussion.<sup>623</sup>

When stressing that "political parties can play an essential role in combating racism, by shaping and guiding public opinion in a positive fashion", the Declaration appears to have missed a useful opportunity to pick up on, and thereby consolidate, precedents in ECRI's earlier thematic work. For instance, it could have explicitly referred to "the particular responsibility of political parties, opinion leaders and the media not to resort to racist or racially discriminatory activities or expressions" in contexts where terrorism fans racist flames.<sup>624</sup>

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

Internet continues to be used for the dissemination of racist, xenophobic and anti-Semitic material. ECRI deplores the current extent of differences between States in dealing with this phenomenon. It

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<sup>622</sup> Adopted on 17 March 2005.

<sup>623</sup> See, in particular, Recommendation No. R (97) 21 of the Committee of Ministers to Member States on the media and the promotion of a culture of tolerance (discussed further, *infra*).

<sup>624</sup> For a consideration of the responsibilities of parliamentarians in combating hate speech, see: Summary and Recommendations presented by the Rapporteur of the Seminar, Mr. Emile Guirieoulou, Seminar for Chairpersons and Members of Parliamentary Human Rights Bodies on Freedom of Expression, Parliament and the Promotion of Tolerant Societies, Organized jointly by the Inter-Parliamentary Union and ARTICLE 19, Geneva, 25-27 May 2005.

hopes that the Convention on Cybercrime and its Additional Protocol will rapidly enter into force and that international co-operation will improve, enabling a more effective fight against racism and xenophobia on the Internet.

This statement appears to overlook the fact that the Cybercrime Convention entered into force on 1 July 2004, having secured the requisite five ratifications by States.<sup>625</sup> Aside from this inaccuracy, it also fails to recognise the full extent of the many (and often countervailing) factors at play. While it is, unfortunately, correct that the Internet is being used for racist acts and expression, no indication is given in the same section of the ECRI report that many intergovernmental, governmental, self- and co-regulatory, civil society as well as industry-driven, initiatives are in place which strive to minimise such practices. This is a surprising omission, given that ECRI's *raison d'être* is to *combat* racism. Viewed from such a perspective, one might reasonably have expected initiatives countering online racism to have been detailed, or at least acknowledged. If the nefarious potential of the Internet is to be stressed, so too should its corrective potential.

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

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

### **6.6.3 Assessment of integrated approaches to combating “hate speech”**

Racism will never be driven away by a resolute alliance of prohibitive measures and (threats of) criminal sanctions. Long, hard experience has taught that the only way of effectively combating racism is to address its root causes as well as its various manifestations. What is required is a comprehensive approach, comprising educational, cultural, social, legal,

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<sup>625</sup> Pursuant to Article 36(3) of the Convention, it would only enter into force after it had been ratified by five States, including three Member States of the Council of Europe (as the Convention is open for signature by non-Member States as well – Article 36(1)).

political, economic and other initiatives. The validity and viability of such a multi-faceted approach to countering racism apply equally at international, national and sub-national levels.

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

However, the centripetal tendencies in the Council of Europe's anti-racism policies and practices do not always yield positive results. What is gained in flexibility of approach is too often lost in coherence and consistency of result. The main message of the latter half of this chapter is that the Council of Europe's anti-racism activities would be rendered more effective if they were to be better focused and coordinated. Whatever its shortcomings, the ECHR offers a definite conceptual and legal framework within which the democratic imperative of combating racism can be pursued. It is therefore very important to retain the ECHR as a central reference point; for it to continue to be the touchstone for the Council's anti-racist strategies. The body of case-law built up by the Strasbourg court over the years situates the elimination of racism at the heart of the Convention's aspirations, but without allowing it to unquestioningly override other fundamental rights.

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

This is perhaps best illustrated by exploring the relationship between the right to freedom of expression and the right not to be subjected to racism or racist discrimination. This relationship is often – erroneously – presumed to be conflictual, because of “excessive focus on the negative, rather than the positive, impact of freedom of expression on racial equality”.<sup>626</sup> Freedom of expression is not only a constitutive right, but an instrumental one. As such, it can serve specific ends, like facilitating the expression of those who oppose racism.<sup>627</sup> The media, in particular, can play a powerful corrective and promotional role against racism.<sup>628</sup>

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<sup>626</sup> ARTICLE 19 – Global Campaign for Free Expression, Memorandum on Freedom of Expression and Racism for The World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, London, 2001, p. 4.

<sup>627</sup> It can even be argued that given the inherent limitations on the exercise of the right to freedom of expression, and the resultant legal restrictions on racist expression, anti-racists are in a position to enjoy the benefits of the right more consummately than their racist counterparts.

<sup>628</sup> See further: Recommendation (97) 21 on the media and the promotion of a culture of tolerance, *op. cit.*; Joint Statement on Racism and the Media by the UN Special Rapporteur on Freedom of Opinion and Expression, the

It is also often assumed that when the right to freedom of expression and the right not to be subjected to racism or racist discrimination are applied to the same factual situation, one of the “competing” sets of objectives will triumph over the other. However, such an assumption over-simplifies matters. The relationship between the right to freedom of expression and the right to be free from racism is not necessarily confrontational and interaction between the two rights/objectives rarely involves one simply triumphing over the other. According to the European Court of Human Rights, protecting freedom of expression on the one hand, and fighting racism and intolerance on the other, are reconcilable goals.<sup>629</sup> Moreover, both are imperatives for democratic society, which prompts the conclusion that “it would be unacceptable to give, in a general fashion, precedence to either one at the expense of the other”.<sup>630</sup> Instead of a blanket or general rule preferring one set of objectives to the other, what is required is “highly contextualized analysis”<sup>631</sup> on a case-by-case basis. This would facilitate the search for equitable accommodations of divergent interests and – ultimately - for “those circumstances and conditions in which one right should be preferred over the other”, as well as “coherent justifications for which right is preferred in particular circumstances”.<sup>632</sup>

In conclusion, other branches of the Council of Europe, especially ECRI, would do well to seek to emulate the Court’s tendency to contextualise the fight against racism in the catalogue of rights vouchsafed not only by the ECHR, but also by other relevant instruments of international law, such as ICERD.<sup>633</sup> Proper legal contextualisation would provide a solid basis for optimising the enormous potential of diversified anti-racism strategies.

Whereas s. 6.6 considered the Council of Europe’s anti-racism strategies, in particular those pursued under the FCNM, as an example of an integrated approach to combating hate speech and promoting tolerance, the question of the existence or feasibility of a similarly coherent model at the global level, was not specifically addressed. A case could perhaps be made for the suitability of ICERD as a basis for such a model. The main drawback of such an approach would be that both ICERD and CERD place much heavier emphasis on prohibitive and punitive measures than on promotional ones, so much so that some academic commentators have deplored the neglect suffered by Article 7, ICERD,<sup>634</sup> which reads:

States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.

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OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 27 February 2001.

<sup>629</sup> See the discussion of the *Jersild* case, *supra*.

<sup>630</sup> Explanatory Memorandum to Recommendation No. R (97) 20 on “Hate Speech”, *op. cit.*, para. 23.

<sup>631</sup> Mari J. Matsuda, “Public Response to Racist Speech: Considering the Victim’s Story”, in Mari J. Matsuda *et al.*, Eds., *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment*, *op. cit.*, pp. 17-51, at 46.

<sup>632</sup> Kevin Boyle, “Overview of a Dilemma: Censorship versus Racism”, in Sandra Coliver, Ed., *Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination*, *op. cit.*, pp. 1-8, at 1.

<sup>633</sup> First step in that direction: Expert seminar, November 2006 – forthcoming publication.

<sup>634</sup> See, for example: Stephanie Fariior, “The Neglected Pillar: The “Teaching Tolerance” Provision of the International Convention on the Elimination of All Forms of Racial Discrimination”, 5 *ILSA J. Int’l & Comp. L.* 291 (1999), pp. 291-299.

Irrespective of the feasibility of replicating the “model” of the FCNM for combating hate speech and promoting tolerance at the global level, it is important to note that the essence of the approach that characterises the FCNM “model” is regularly advocated at the global level. Examples include recent CERD General Recommendations (see further, *supra*), the Programme of Action adopted at the Durban World Conference against Racism in 2001 (again, see further, *supra*) and a number of the annual joint declarations issued by the various IGOs’ specialised mandates on the right to freedom of expression.<sup>635</sup> Of particular relevance here are the specialised mandates’ Joint Statement on Racism and the Media of 2001 and their (untitled) Joint Declaration of 2006. The following excerpt is from the former:

#### Promoting Tolerance

Media organisations, media enterprises and media workers – particularly public service broadcasters – have a moral and social obligation to make a positive contribution to the fight against racism, discrimination, xenophobia and intolerance. There are many ways in which these bodies and individuals can make such a contribution, including by:

- designing and delivering media training programmes which promote a better understanding of issues relating to racism and discrimination, and which foster a sense of the moral and social obligations of the media to promote tolerance and knowledge of the practical means by which this may be done;
- ensuring that effective ethical and self-regulatory codes of conduct prohibit the use of racist terms and prejudicial or derogatory stereotypes, and unnecessary references to race, religion and related attributes;
- taking measures to ensure that their workforce is diverse and reasonably representative of society as a whole;
- taking care to report factually and in a sensitive manner on acts of racism or discrimination, while at the same time ensuring that they are brought to the attention of the public;
- ensuring that reporting in relation to specific communities promotes a better understanding of difference and at the same time reflects the perspectives of those communities and gives members of those communities a chance to be heard; and
- promoting a culture of tolerance and a better understanding of the evils of racism and discrimination.

The following excerpt is from their 2006 Joint Declaration:

#### Freedom of Expression and Cultural/Religious Tensions

- The 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. High profile instances of the media and others exacerbating social tensions tend to obscure this fact.
- 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.
- Professional and self-regulatory bodies have played an important role in fostering greater awareness about how to report on diversity and to address difficult and sometimes controversial subjects, including intercultural dialogue and contentious issues of a moral, artistic, religious or

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<sup>635</sup> Annual Joint Declarations by the Special Rapporteurs on freedom of expression/media have been adopted since 1999. The integral texts of the Declarations are available at: [www.article19.org](http://www.article19.org).



other nature. An enabling environment should be provided to facilitate the voluntary development of self-regulatory mechanisms such as press councils, professional ethical associations and media ombudspersons.

The mandates of public service broadcasters should explicitly require them to treat matters of controversy in a sensitive and balanced fashion, and to carry programming which is aimed at promoting tolerance and understanding of difference.

## Conclusions

There has been much debate in recent years about the actual and desirable limits to freedom of expression. The former can be objectively determined whereas the latter tend to be subjective and sometimes speculative. There is a pressing need for law- and policy-makers to have a very clear understanding of the precise limitations on the right to freedom of expression that are permissible under international law, as well as the precise nature and extent of the State obligations which they engender. Any permissible limitations on the right to freedom of expression must be interpreted restrictively. Through meticulous analysis, this Chapter provides the necessary clarification in respect of limits concerning incitement, hatred, offence, etc.

Much of the confusion about relevant limitations originates in the primary texts, but is perpetuated from within by bodies charged with interpretation or monitoring of relevant treaties. As far as the ICCPR is concerned, the main interpretive standards are very outdated: the General Comments on Articles 19 and 20 were adopted in 1983. HRC Communications on relevant issues are not voluminous and only offer limited clarification of the frictional aspects of the relationship between the right to freedom of expression and the right to non-discrimination/equality. The confusion surrounding exact State obligations under (Article 4 of) ICERD is generally the result of poor drafting exacerbated by over-zealous and under-contextualised application of standards. More particularly, as this Chapter has shown, CERD has misquoted the Convention it is supposed to oversee in at least two of its General Recommendations. Although this glaring error does not appear to have been spotted by other commentators, it represents an embarrassing setback for the aim of enhancing clarity and awareness of the precise content of relevant State obligations under ICERD. As regards the Council of Europe's standards, this Chapter cautions against over-reliance on the term, "hate speech". It is demonstrated that the term is not organic to the ECHR and that it was first used by the Court in 1999, without any explanation of why it was being introduced into its jurisprudential lexicon or where its theoretical origins lay. In the absence of any attempt by the Court to define the term (which, owing to its origins in critical race theory in the US, has a much broader meaning than is generally appreciated), it should be used with circumspection. While the importance of countering "hate speech" cannot be gainsaid, once the term is used in a legal sense, there is a greater need for conceptual and terminological precision to attach to the notion than in respect of non-legal measures.

The central question, at all times, concerns the most effective measures for countering "hate speech" without emasculating the right to freedom of expression in the process. For instance, negative stereotyping and biased portrayals of minorities do not meet internationally-recognised grounds for restricting the right to freedom of expression, but nevertheless, they are certainly capable of having harmful consequences, not just for persons targeted by them, but society in general. This apparent dilemma does not, however, leave States powerless to deal with such practices. Not only is it possible for States to resort to a range of non-legal remedies and pro-active policies to counter such practices, they are under a duty to do so. The

precise nature of those duties must be informed at all times by the public operative value of comprehensive pluralistic tolerance.

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. 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. Abusive speech can unproblematically be restricted by legal measures, but for other types of speech not meeting the threshold required by internationally-recognised restrictions, a coherent and systematic approach to contextualising factors is necessary. The imperative of combating “hate speech” creates a range of different obligations for States authorities, which are discharged through different types of action. The advocated root-and-branch approach should comprise an appropriately equilibrated set of legal and non-legal measures.

The Council of Europe’s anti-racism strategies, in particular those pursued under the FCNM and by ECRI, provide an example of an integrated approach to combating “hate speech” and promoting pluralistic tolerance, which has successfully led to the development of an important body of best practices for States authorities and third parties such as the media. The feasibility of replicating a similarly coherent model at the global level is more difficult, owing to the divergence of treaties involved, each with its own particular objectives, standards and emphases. No single existing treaty at UN-level would be an obvious choice as a basis for such a model. As regards ICERD, for example, both the text of the Convention and CERD place much heavier emphasis on prohibitive and punitive measures than on promotional ones, thereby resulting in a failure to fully reflect the necessary interplay between relevant human rights and the stabilising role of pluralistic tolerance.

Irrespective of the feasibility of replicating the “model” of the FCNM for combating hate speech and promoting tolerance at the global level, it is important to note that the essence of the approach that characterises the FCNM “model” is regularly advocated at the global level. Examples include *recent* CERD General Recommendations, the Programme of Action adopted at the Durban World Conference against Racism in 2001 and a number of the annual joint declarations issued by the various IGOs’ specialised mandates on the right to freedom of expression.