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The Council of Europe against online hate speech: Conundrums and challenges

EXPERT PAPER

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Introduction¹

Although the term, hate speech, is widely used in legal, policy-making and academic circles, there is often disagreement about its scope and about how it can best be countered. This paper will commence by briefly unravelling the term, hate speech, and explaining why differentiated strategies are required to effectively combat hate speech. The introduction will also briefly situate hate speech within international human rights treaty law. Section I will provide a general overview of the Council of Europe's strategies against hate speech, which include treaty-based approaches, monitoring systems, political and policy-making measures, educational, informational and cultural initiatives, etc. This overview does not purport to be comprehensive, much less exhaustive. Rather, it will sketch, in an indicative manner, the broad lines of the Council of Europe's strategies against hate speech. The European Convention on Human Rights (ECHR) will be examined in greater detail than the other treaties because of its central position in the Council's legal arsenal and its consequent referential value for all of the Council's other treaties and instruments. Particular attention will be paid to the tensions between freedom of political expression and the permissibility of hate speech as the challenge of resolving those tensions represents a real stress test for the ECHR's commitment to the right to freedom of expression. Section II of the paper will explore new dimensions to hate speech that have emerged – and continue to emerge – in the online environment. It will then provide by an assessment of the Council of Europe's specific responses to these new dimensions. It will conclude by putting forward a number of recommendations for policy making and future lines of action by various Council of Europe bodies in order to tackle online hate speech.

Unravelling "hate speech"

"Hate speech" has not (yet) been defined in a watertight or authoritative way, either in international human rights law or in relevant scholarship. The term is a convenient shorthand way of referring to a broad spectrum of extremely negative discourse stretching from hatred and incitement to hatred; to abusive expression and vilification; and arguably also to extreme forms of prejudice and bias.² Robert Post has posited that a certain threshold of intensity must be reached before a particular expression can be qualified as hate speech.³ He points to the *Oxford English Dictionary* entry for "hate": "an emotion of extreme dislike or aversion; detestation, abhorrence, hatred".⁴ For Post, the

¹ This paper draws – and expands – on earlier work by the author, including: "The troubled relationship between free speech and racist hate speech: the ambiguous roles of the media and internet", Expert Paper, Day of Thematic Discussion "Racist Hate Speech" (28 August 2012), UN Committee on the Elimination of Racial Discrimination, 81st Session, Geneva, 6-31 August 2012; *Minority rights, freedom of expression and of the media: dynamics and dilemmas* (Antwerp, Intersentia, 2011); "A Survey and Critical Analysis of Council of Europe Strategies for Countering 'Hate Speech'", in Michael Herz & Peter Molnar, Eds., *Content and Context: Rethinking Regulation and Remedies for Hate Speech* (New York, Cambridge University Press, 2012), pp. 456-498; "Minorities and Online 'Hate Speech': A Parsing of Selected Complexities", 9 *European Yearbook of Minority Issues* (2010), pp. 419-440. The author is grateful to Rade Obradovic, a research intern at IViR, for his helpful assistance with an initial literature search.

² James B. Jacobs and Kimberly Potter, *Hate Crimes: Criminal Law and Identity Politics* (New York, Oxford University Press, 1998), p. 11.

³ Robert Post, "Hate Speech", in Ivan Hare and James Weinstein, Eds., *Extreme Speech and Democracy* (New York, Oxford University Press, 2009), p. 123-138, at 123.

⁴ *Ibid.*

threshold or definitional prerequisite is the qualification, “extreme”, because ordinary “intolerance and dislike are necessary human emotions which no legal order could pretend to abolish”.⁵

From a legal perspective, the hate speech spectrum stretches from types of expression that are not entitled to protection under international human rights law (eg. incitement to various specified acts), through types of expression that may or may not be entitled to protection, depending on the existence and weighting of a number of “contextual variables”⁶ (eg. extremely offensive expression), to types of expression that presumptively would be entitled to protection, despite their morally objectionable character (eg. negative stereotyping of minorities⁷). The right to freedom of expression necessarily covers expression that may “offend, shock or disturb” certain groups in society (which is not the same thing as a *right* to offend⁸).⁹ Democracy is not without its rough edges and tough talk is part of the cut and thrust of public debate and discourse.

The challenge, then, is to identify the tipping point at which robust debate, contestation or criticism transforms into hate speech, or more precisely, a type of hate speech. It is important to differentiate between the various types of expression on the hate speech spectrum: they vary in terms of the intent of the speaker,¹⁰ the intensity of the expression, the severity of its impact, etc. Recognition of contextual factors can therefore usefully help to calibrate responses to, or formulate policies for, different types of hate speech.¹¹ Further differentiation between forms of hate speech can be attained by determining whether the expression is: “direct (sometimes called ‘specific’) or indirect; veiled or overt; single or repeated; backed by power, authority, or threat, or not”.¹² These types of differentiation are of crucial relevance when attempting to gauge the impact of hate speech on its targets/victims.

⁵ *Ibid.*

⁶ Michel Rosenfeld, “Hate Speech in Constitutional Jurisprudence: A Comparative Analysis”, 24 *Cardozo Law Review* (2003), 1523-1567, at 1565.

⁷ For a detailed analysis of this – and related topics – see: Alexandra Timmer, “Toward an Anti-Stereotyping Approach for the European Court of Human Rights”, 11 *Human Rights Law Review* (No. 4, 2011), 707-738.

⁸ See further, Onora O’Neill, “A Right to Offend?”, *The Guardian*, 13 February 2006; Francesca Klug, “Freedom of Expression Must Include a Licence to Offend”, 1(3) *Religion and Human Rights* (2006), 225-227.

⁹ *Handyside v. the United Kingdom*, Judgment of the European Court of Human Rights of 7 December 1976, Series A, No. 24, para. 49.

¹⁰ In this connection, Jogchum Vrieling usefully distinguishes three categories of perpetrators of (racist) hate speech: offenders by conviction, activists/instrumentalists and incidentalists: Jogchum Vrieling, *Van haat gesproken? Een rechtsantropologisch onderzoek naar de bestrijding van rasgerelateerde uitingsdelicten in België* (Antwerp, Maklu, 2011). pp. 466 *et seq.*

¹¹ See further: 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”, 46 *McGill Law Journal* (2000), 121-139, at 133. See also in this connection, Bhikhu Parekh, “Is There a Case for Banning Hate Speech?”, in Michael Herz & Peter Molnar, Eds., *Content and Context: Rethinking Regulation and Remedies for Hate Speech*, *op. cit.*, pp. 37-56, at 54-55.

¹² Richard Delgado and Jean Stefancic, “Four Observations about Hate Speech”, 44 *Wake Forest Law Review* (2009), 353-370, at 361. See also: Richard Delgado and Jean Stefancic, *Understanding Words That Wound* (Boulder, Colorado, Westview Press, 2004), pp. 11-12.

Once the differentiation inherent in the term hate speech and its significance have been recognized and understood, meaningful examination of the rationales for regulating hate speech can commence.

The purpose of regulating hate speech is to prevent interference with other rights and to prevent the occasioning of certain harms. In the first place, hate speech can interfere with other human rights or “operative public” values:¹³ dignity, non-discrimination and equality, (effective) participation in public life (including public discourse¹⁴), freedom of expression, association, religion, etc. Second, the prevention of particular harms suffered by individual victims should also be considered: psychological harm, damage to self-esteem, inhibited self-fulfilment, fear, etc.¹⁵

All in all, the range of harms to be prevented or minimised 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”.¹⁶ Those criteria should then guide relevant regulatory and other approaches to hate speech. Whereas some types of hate speech – the most egregious forms – may be best dealt with by regulatory (even including criminal) measures, others are more suitably dealt with by educational, cultural, informational and other non-regulatory (and necessarily non-criminal) measures. Insofar as a regulatory framework is necessary to counter hate speech, that framework should be holistic, in recognition of the fact that hate speech covers a range of different types of expression. But it is not enough for that regulatory framework to be holistic: the approaches it sets out must also be differentiated. The regulatory framework must also be complemented by a framework for non-legal action. The “horses for courses” principle applies.

Hate speech and international law

Although the term, hate speech, is neither enshrined nor defined in international law, numerous international instruments contain provisions focusing on different types of expression that would typically be considered as constituting hate speech. They include, most saliently:¹⁷

- The Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention) (esp. Article III(c) - direct and public incitement to commit genocide);
- The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (esp. Articles 4 and 5 – all dissemination of ideas based

¹³ Operative public values are those values “that a society cherishes as part of its collective identity and in terms of which it regulates the relations between its members”, and which “constitute the moral structure of its public life and give it coherence and stability”: Bhikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (2nd Edition) (New York, Palgrave Macmillan, 2006), p. 363.

¹⁴ For a thorough analysis of this topic, see: Robert C. Post, “Racist Speech, Democracy, and the First Amendment”, 32 *William and Mary Law Review* (1991), 267-327.

¹⁵ See generally, Mari J. Matsuda, Charles R. Lawrence III, Richard Delgado and Kimberlè Williams Crenshaw, Eds., *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Boulder/San Francisco/Oxford, Westview Press, 1993).

¹⁶ David Kretzmer, “Freedom of Speech and Racism”, 8 *Cardozo Law Review* (1987), 445-513, at 478.

¹⁷ For critical analysis and evaluation of each of these treaties, see: Tarlach McGonagle, *Minority Rights, Freedom of Expression and of the Media: Dynamics and Dilemmas*, *op. cit.*, Chapter 6.

- on racial superiority or racial hatred, incitement to racial discrimination, with due regard to the right to freedom of expression);
- The International Covenant on Civil and Political Rights (ICCPR) (esp. Articles 19 and 20 – respectively, freedom of expression (including permissible grounds for restricting the right) and advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence).

ICERD is widely – and correctly - perceived as an outlier among other international human rights treaties that contain provisions governing the relationship between freedom of expression and hate speech, insofar as Article 4, ICERD, creates more far-reaching obligations for States parties than comparable provisions in other treaties. Article 4, ICERD, requires States to render several types of expression *punishable* by law, whereas, for instance, Article 20 of the ICCPR requires that a narrower range of types of expression be *prohibited* by law. Article III of the Genocide Convention also renders direct and public incitement to commit genocide *punishable*, but that is more tightly-focused than the list of offences set out in Article 4, ICERD.

The scope and content of a number of these treaty provisions have been further clarified by General Comments or Recommendations, eg. the Human Rights Committee's General Comment (GC) No. 34 on the right to freedom of expression¹⁸ and the Committee on the Elimination of Racial Discrimination's (CERD) General Recommendation (GR) No. 35, entitled "Combating racist hate speech".¹⁹ The Human Rights Committee's GC No. 34 only gives summary treatment to the relationship between Articles 19 and 20, ICCPR and clarifies its previous jurisprudence on relevant issues. CERD's GR No. 35, on the other hand, appears to signal a new *démarche* in the Committee's approach to hate speech. Whereas CERD's approach has traditionally relied heavily on criminal measures against (racist) hate speech, the new GR emphasises the relevance and potential of alternative responses, *inter alia*, of an educational, informational and cultural nature. This navigational turn could, in time, lead to a closer re-alignment of ICERD with other international human rights treaties such as the ICCPR and thereby allow it to lose its perceived outlier status for freedom of expression issues.

It is important to view the Council of Europe's strategies against hate speech – the focus of the next section - against the backdrop of the aforementioned (and other) international instruments and political developments and initiatives.²⁰

¹⁸ United Nations Human Rights Committee, General Comment No. 34 – Article 19: Freedoms of opinion and expression, Doc. No. CCPR/C/GC/34, 12 September 2011, paras. 50-52. For commentary and analysis, see: Michael O'Flaherty, "Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee's General Comment No 34", 12 *Human Rights Law Review* (No. 4, 2012), pp. 627-654.

¹⁹ CERD General Recommendation No. 35 - Combating racist hate speech, CERD/C/GC35, 9 September 2013 (adopted at the 83rd session of CERD, 12-30 August 2013).

²⁰ See, for example, the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, Conclusions and recommendations emanating from the four regional expert workshops organised by OHCHR, in 2011, and adopted by experts in Rabat, Morocco on 5 October 2012.

Section I: The Council of Europe and hate speech

The Council of Europe employs a number of concurrent strategies to counter hate speech. These strategies have been developed pursuant to the Council's various treaties and other standard-setting and monitoring initiatives. While they are broadly congruent in terms of their overall objectives and approaches, each initiative is characterised by its own priorities, emphases, and procedural possibilities. This has resulted in considerable diversity in the range of strategies devised by the Council to combat hate speech. They include: the denial or reduction of legal protection for hate speech; the facilitation and creation of expressive opportunities (especially access to the media) for minorities; and the promotion of intercultural dialogue and understanding at the societal level.

This Section will provide an overview of the most salient of the aforementioned strategies for tackling hate speech, as well as the normative standards, jurisprudence, and monitoring practices on which they are based. It will start with treaty-based mechanisms and move on to other standard-setting and monitoring initiatives that are not treaty-based. The main treaties considered are the European Convention on Human Rights (ECHR), the Framework Convention for the Protection of National Minorities, the European Convention on Transfrontier Television and the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems. The other, non-treaty-based initiatives have been developed under the auspices of the Committee of Ministers, the Parliamentary Assembly and the European Commission against Racism and Intolerance (ECRI), as well as the periodic Ministerial Conferences on Mass Media Policy/Media and New Communication Services.

1. The European Convention on Human Rights

1.1 Freedom of expression

Article 10 ECHR is the centrepiece of European-level protection for the right to freedom of expression. It reads:

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.

Article 10(1) sets out the right to freedom of expression as a compound right comprising three distinct components: the freedom to hold opinions and to receive and impart information and ideas. Article 10(1) also countenances the possibility for States to regulate the audiovisual media by means of licensing schemes. This provision was inserted mainly as a reaction to the abuse of radio, television and cinema for Nazi propaganda during the Second World War.

Article 10(2) then proceeds to trammel the core right set out in the preceding paragraph. It does so by enumerating a number of grounds, based on which the right *may* legitimately be restricted, *provided that* the restrictions are *prescribed by law* and are *necessary in a democratic society*. It justifies this approach by linking the permissibility of restrictions on the right to the existence of *duties* and *responsibilities* which govern its exercise. Whereas the right to freedom of expression is regarded as being subject to general duties and responsibilities, the European Court of Human Rights sometimes refers to the specific duties or responsibilities pertaining to specific professions, eg. journalism, politics, education, military service, etc. In light of the casuistic nature of the Court's jurisprudence on duties and responsibilities and in light of its ongoing efforts to apply its free expression principles to the Internet (see further, below), it is only a matter of time before it begins to proffer indications of the content of Internet actors' duties and responsibilities in respect of freedom of expression.

The European Court of Human Rights has developed a standard test to determine whether Article 10, ECHR, has been violated. Put simply, whenever it has been established that there has been an interference with the right to freedom of expression, that interference must first of all be prescribed by law (i.e., it must be adequately accessible and reasonably foreseeable in its consequences). Second, it must pursue a legitimate aim (i.e., correspond to one of the aims set out in Article 10(2)). Third, it must be necessary in a democratic society (i.e., correspond to a "pressing social need") and be proportionate to the legitimate aim(s) pursued.

Under the margin of appreciation doctrine, which has an important influence on how the ECHR is interpreted at national level, States are given a certain amount of discretion in how they regulate expression.²¹ The extent of this discretion, which is subject to supervision by the European Court of Human Rights, varies depending on the nature of the expression in question. Whereas States only have a narrow margin of appreciation in respect of political expression, they enjoy a wider margin of appreciation in respect of public morals, decency and religion. This is usually explained by the absence of a European consensus on whether/how such matters should be regulated. When exercising its supervisory function, the European Court of Human Rights does not take the place of the national authorities, but reviews the decisions taken by the national authorities pursuant to their margin of appreciation under Article 10, ECHR. Thus, the Court looks at the expression complained of in the broader circumstances of the case and determines whether the reasons given by the national authorities for the restriction and how they implemented it are "relevant and sufficient" in the context of the interpretation of the Convention.

²¹ Initially developed in the Court's case-law, a reference to the doctrine will be enshrined in the Preamble to the ECHR as soon as the Convention's Amending Protocol No. 15 enters into force.

Besides the margin of appreciation doctrine, three other interpretive principles espoused by the Court are of particular relevance for the right to freedom of expression: the practical and effective doctrine; the living instrument doctrine and the positive obligations doctrine. According to the practical and effective doctrine, all rights guaranteed by the ECHR must be “practical and effective” and not merely “theoretical or illusory”.²² Under the “living instrument” doctrine,²³ the ECHR is regarded as a “living instrument” which “must be interpreted in the light of present-day conditions”.²⁴ The essence of the positive obligations doctrine is that in order for States to ensure that everyone can exercise all of the rights enshrined in the ECHR in a practical and effective manner, the typical stance of non-interference (or negative obligation) by State authorities will often not suffice. As the Court affirmed in *Özgür Gündem v. Turkey*: “Genuine, effective exercise of [the right to freedom of expression] does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals”.²⁵

1.2 Hate speech

In its seminal ruling in *Handyside v. the United Kingdom* (a case involving restrictions on the right to freedom of expression in order to protect morals), the Court affirmed that freedom of expression “is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there would be no democratic society”.²⁶ The *Handyside* judgment recognises that in democratic society, space has to be created and sustained for public discussion and debate. Democratic society is not without its rough edges and pluralistic public debate necessarily involves disagreement and confrontation between opposing viewpoints. Such disagreement and confrontation – even when expressed in strong terms (because Article 10 protects not only the substance of information and ideas, but also the form in which they are conveyed) – ordinarily come within the scope of the protection offered by Article 10.

The outer extremity of that protection is determined by Article 17, ECHR, which is a classical prohibition of abuse of rights clause.²⁷ It can be regarded as a safety mechanism, designed to prevent the ECHR from being misused or abused by those whose intentions are contrary to the letter and spirit of the Convention. Although the

²² *Airey v. Ireland*, Judgment of the European Court of Human Rights of 9 October 1979, para. 24.

²³ For an overview of the historical development of the “living instrument” doctrine (including recent developments) by the European Court of Human Rights, see: Alastair Mowbray, “The Creativity of the European Court of Human Rights”, *Human Rights Law Review* 5: 1 (2005), 57-79.

²⁴ *Tyrer v. the United Kingdom*, Judgment of the European Court of Human Rights of 25 April 1978, Series A, no. 26, para. 31; *Matthews v. the United Kingdom*, Judgment of the European Court of Human Rights of 18 February 1999, para. 39.

²⁵ *Özgür Gündem v. Turkey*, Judgment of the European Court of Human Rights (Fourth Section) of 16 March 2000, para. 43.

²⁶ *Handyside v. the United Kingdom*, *op. cit.*, para. 49.

²⁷ 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”.

Court has not always applied Article 17 consistently,²⁸ it generally tends to invoke it in order to ensure that Article 10 protection is not extended to racist,²⁹ xenophobic or anti-Semitic speech;³⁰ statements denying, disputing, minimising or condoning the Holocaust,³¹ or (neo-)Nazi ideas.³² As such, the Court has routinely held cases involving these types of expression to be manifestly unfounded and therefore inadmissible.

The term, hate speech, is not enshrined in the ECHR, and the Court used the actual term, “hate speech”, for the first time in 1999,³³ but without explaining its introduction, intended purpose or relationship with existing case-law. So far, the Court has refrained from defining the term.³⁴ Instead, the Court appears to prefer to “analyse each case submitted to it on its own merits and to ensure that its reasoning – and its case-law – is not confined within definitions that could limit its action in future cases”.³⁵

In three of the first four judgments in which it used the term, “hate speech”, the Court resorted to exactly the same wording:

“The Court stresses that the “duties and responsibilities” which accompany the exercise of the right to freedom of expression by media professionals assume special significance in situations of conflict and tension. Particular caution is called for when consideration is being given to the publication of the views of representatives of organisations which resort to violence against the State *lest the media become a vehicle for the dissemination of hate speech and the promotion of violence.* [...]” (emphasis added)

As such, the Court was warning against and seeking to avoid the propagation of a particular type of expression. The fact that hate speech was not defined in this

²⁸ For in-depth analysis, see: Hannes Cannie & Dirk Voorhoof, “The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection?”, 29 *Netherlands Quarterly of Human Rights* (No. 1, 2011), pp. 54-83; David Keane, “Attacking hate speech under Article 17 of the European Convention on Human Rights”, 25 *Netherlands Quarterly of Human Rights* (No. 4, 2007), pp. 641-663.

²⁹ 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.

³⁰ See, for example, *Pavel Ivanov v. Russia*, Inadmissibility decision of the European Court of Human Rights (First Section) of 20 February 2007, Appn. No. 35222/04.

³¹ 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, “Wrestling (Racial) Equality from Tolerance of Hate Speech” (2001) 23 *Dublin University Law Journal* 21-54.

³² For example, *H., W., P. and K. v. Austria*, Inadmissibility decision of the European Commission of Human Rights, Appn. No. 12774/87, 62 DR (1989) 216.

³³ It would appear that the term was first used in four Judgments of the European Court of Human Rights, all of 8 July 1999: *Sürek v. Turkey* (No. 1), para. 62; *Sürek & Özdemir v. Turkey*, para. 63; *Sürek v. Turkey* (No. 4), para. 60 and *Erdogdu & Ince v. Turkey*, para. 54.

³⁴ See further: Tarlach McGonagle, *Minority rights, freedom of expression and of the media: dynamics and dilemmas*, op. cit., Chapters 6.2.1 and 7.1.

³⁵ Françoise Tulkens, “When to say is to do: Freedom of expression and hate speech in the case-law of the European Court of Human Rights”, in Josep Casadevall, Egbert Myjer, Michael O’Boyle & Anna Austin, Eds., *Freedom of Expression: Essays in honour of Nicolas Bratza* (Oisterwijk, The Netherlands, Wolf Legal Publishers, 2012), pp. 279-295, at 281.

connection is unsatisfactory, from the point of view of judicial interpretation, doctrinal development and general predictability and foreseeability. However, it is not substantively determinative, because concrete instances of hate speech were not centrally at issue in the cases. Arguably, it is more important to define what is at issue than what is not.

This point is borne out in the remaining case of the batch of four in which the term hate speech was first used. In *Sürek v. Turkey*, the Court relied on the term in a way that did have significant interpretive consequences. The Court reiterated that “the mere fact that ‘information’ or ‘ideas’ offend, shock or disturb does not suffice to justify” an interference with the right to freedom of expression. It then stipulated: “What is in issue in the instant case, however, is hate speech and the glorification of violence”.³⁶ The significance of this stipulation is that the Court has conjured up a new type of expression which it considers to go beyond the scope of the protection carved out by *Handyside* and its progeny.³⁷ When used in this way, *viz.* to distinguish between types or categories of expression which are protected under Article 10, ECHR, and those which are not, the need to explain and delineate the concept becomes much more urgent. If a particular type or category of expression is to be denied protection, it is of the utmost importance, not least from the perspective of legal certainty and foreseeability, that the Court would provide a clear sense of what the concept/category actually entails.

In the absence of a definition, piecemeal clarification is slowly being provided by a growing body of case-law (selected focuses of which are discussed in the next paragraphs).³⁸ Nevertheless, because of the different types of expression potentially covered by the term hate speech, it is important to also differentiate between the types of (legal) responses, for example by placing greater emphasis on incitement rather than on the tendencies of hate speech to lead to particular results.³⁹ It is also important to guard against any further inflation of the term, or its unwarranted expansion.⁴⁰ In 2012, the European Court of Human Rights recognised homophobic hate speech for the first time;⁴¹ it is unclear whether the Court will also in the future recognise sexist or misogynist hate speech or hate speech targeting persons with disabilities – types of hate

³⁶ (emphasis added). *Ibid.*, para. 62.

³⁷ *Handyside v. the United Kingdom*, *op. cit.*

³⁸ See further in this connection: Press Unit, European Court of Human Rights, *Factsheet – Hate speech*, July 2013; Tarlach McGonagle, “A Survey and Critical Analysis of Council of Europe Strategies for Countering ‘Hate Speech’”, *op. cit.*; Mario Oetheimer, “Protecting Freedom of Expression: The Challenge of Hate Speech in the European Court of Human Rights Case Law”, 17 *Cardozo J. Int’l & Comp. L.* 427 (2009); 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, *Manual on hate speech* (Strasbourg, Council of Europe Publishing, 2009).

³⁹ Stefan Sottiaux, “‘Bad Tendencies’ in the ECtHR’s ‘Hate Speech’ Jurisprudence”, 7 *European Constitutional Law Review* (2011, No. 1), p 40-63, at 62-63. See also, *ibid.*, at 57-58.

⁴⁰ Françoise Tulkens, “When to say is to do: Freedom of expression and hate speech in the case-law of the European Court of Human Rights”, *op. cit.*, p. 295.

⁴¹ *Vejdeland & others v. Sweden*, Judgment of 9 February 2012. In 2010, the Committee of Ministers and Parliamentary Assembly both adopted texts setting out measures to combat discrimination on grounds of sexual orientation or gender identity, respectively: Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, 31 March 2010; Parliamentary Assembly of the Council of Europe, Resolution 1728 (2010), “Discrimination on the basis of sexual orientation and gender identity”, 29 April 2010, and Parliamentary Assembly of the Council of Europe, Recommendation 1915 (2010), “Discrimination on the basis of sexual orientation and gender identity”, 29 April 2010.

speech that present strong cases for inclusion within contemporary understandings of the term.

The European Court of Human Rights' judgment in the *Jersild v. Denmark* case has proved very influential in shaping the contours of the Court's jurisprudence on the relationship between freedom of expression and hate speech.⁴² The case involved the conviction of Jens Olaf Jersild, a Danish journalist, for aiding and abetting in the dissemination of racist statements in a televised interview he had conducted. The statements in question were uttered by members of an extreme right-wing group known as the "Greenjackets" and the journalist was convicted largely because he had failed to explicitly contradict, or distance himself from, the racist and xenophobic statements of the interviewees. The European Court of Human Rights held that Jersild's conviction was not "necessary in a democratic society" and that it therefore violated his rights under Article 10 of the European Convention on Human Rights. This conclusion rested largely on considerations of context in (news) reporting and the importance of journalistic autonomy for the functioning of democracy. The Court held that the journalist's right to freedom of expression had been infringed, *inter alia*, because it was not for the courts to determine which journalistic techniques (e.g. "the methods of objective and balanced reporting") should be used.⁴³

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".⁴⁴

In the *Seurot* case, a teacher was sanctioned for an article he wrote that was published in a school bulletin. In the article, he deplored – as he put it - the overrunning of France by "hordes of Muslims"⁴⁵ from North Africa. The European Court of Human Rights found that this sanction did not violate the applicant's rights under 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:

⁴² *Jersild v. Denmark*, Judgment of the European Court of Human Rights of 23 September 1994, Series A, No. 298.

⁴³ *Ibid.*, para. 31.

⁴⁴ *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.

⁴⁵ Author's translation (the decision is only available in French), p. 2.

[...] 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.

The Court followed this key finding in *Pavel Ivanov v. Russia*,⁴⁶ a case involving a conviction for incitement of hatred towards the Jewish people. The European Court of Human Rights agreed with the domestic courts' finding that the series of articles written and published by the applicant had a "markedly anti-Semitic tenor".⁴⁷

Elements of Nazi ideology or activities inspired by Nazism have featured strongly in the bulk of the decisions, referred above, that have been routinely declared inadmissible by the Court (and in the past by the former European Commission of Human Rights). The extent to which Nazism is incompatible with the ECHR can be gauged from the oft-quoted pronouncement of the European Commission of 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".⁴⁸ The Court adopted a very trenchant stance against hate speech in the *Garaudy v. France* case,⁴⁹ which involved a challenge to the French courts' conviction of the applicant for the denial of crimes against humanity, the publication of racially defamatory statements and incitement to racial hatred. The European Court of Human Rights held that:

[...] There can be no doubt that denying the reality of clearly established historical facts, such as the Holocaust, as the applicant does in his book, does not constitute historical research akin to a quest for the truth. The aim and the result of that approach are completely different, the real purpose being to rehabilitate the National-Socialist regime and, as a consequence, accuse the victims themselves of falsifying history. Denying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incitement to 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. [...]⁵⁰

⁴⁶ *Pavel Ivanov v. Russia*, *op. cit.*

⁴⁷ *Ibid.*, p. 4.

⁴⁸ Inadmissibility decision of the European Commission of Human Rights, Appn. No. 12774/87, 62 DR (1989) 216, at pp. 220/1.

⁴⁹ *Garaudy v. France*, *op. cit.*

⁵⁰ *Ibid.*, p. 23 of the official English translation of excerpts from the decision.

A more problematic case, perhaps, as far as the boundaries of freedom of expression are concerned, was *Lehideux and Isorni v. France*.⁵¹ 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.⁵² 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 10.⁵³

The above-cited judicial pronouncements have, both individually and collectively, usefully helped to clarify the status of performative speech⁵⁴ which is offensive, but does not necessarily amount to one of the various forms of advocacy or incitement defined in international human rights treaties.⁵⁵ 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 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

⁵¹ *Lehideux & Isorni v. France*, 23 September 1998, Reports of Judgments and Decisions, 1998-VII.

⁵² *Ibid.*, para. 53. See also *Jersild v. Denmark*, *op. cit.*, para. 35.

⁵³ *Ibid.*, paras. 52, 55.

⁵⁴ 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); Judith Butler, *Excitable Speech: A Politics of the Performative* (New York, etc., Routledge, 1997).

⁵⁵ See, in particular, Article 20, ICCPR, 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."

taking part. Accordingly, the Court considers that in the instant case the need for the restriction in issue has not been established convincingly.⁵⁶

The case, *Féret v. Belgium*,⁵⁷ arose from the conviction of a Belgian politician for incitement to hatred, discrimination and violence due to the racist and xenophobic content of party political tracts distributed in the context of an electoral campaign. At the operative time, the applicant, Daniel Féret, was chairman of the far-right Belgian political party, Front National, editor-in-chief of the party's political publications, owner of the party's website (which was also used to distribute the impugned political tracts) and a member of the Belgian House of Representatives. Féret was sentenced to 250 hours of community service relating to the integration of foreign nationals in Belgium, together with a 10-month suspended prison sentence. Furthermore, he was ruled ineligible to stand for parliamentary elections for a 10-year period and ordered to pay a provisional sum of 1 Euro to each of the civil parties involved.

The European Court of Human Rights found that the applicant's right to freedom of expression had not been violated, *inter alia*, because of the volatility of racist or xenophobic expression during electoral periods⁵⁸ and the duty of politicians "to refrain from using or advocating racial discrimination and recourse to words or attitudes which are vexatious or humiliating because such behaviour risks fostering reactions among the public which are incompatible with a peaceful social climate and could erode confidence in democratic institutions".⁵⁹ In light of the civil nature of the sanctions and the suspended nature of the prison sentence, the Court found the sanctions not to be excessive.⁶⁰ The controversial nature of this judgment and the extent to which relevant questions persist can be gleaned from the Joint Dissenting Opinion to the judgment, in which, *inter alia*, the relationship between heated political invective and racist expression is examined, as well as the speculative nature of the link between the impugned expression and the potential harms it could cause.⁶¹

The foregoing analysis sketches the broad lines of the European Court of Human Rights' main principles governing (various kinds of) racist and hateful expression. At first glance, Article 17 appears to *prima facie* deny protection to a range of particularly abusive types of expression, but when the finer contours of relevant case-law are traced, it can be seen that substantive examinations are mounted by the Court. This points up that the Court's reliance on Article 17 is not always consistent in practice, which is certainly a concern for future doctrinal development. Because of Article 17's very far-reaching consequences for freedom of expression (which has also led to its description as a "guillotine" provision⁶²), leading commentators have called for it to be used "in moderation",⁶³ or even for the Court to refrain from using it, in favour of the substantive

⁵⁶ *Gündüz v. Turkey*, Judgment of the European Court of Human Rights (First Section) of 4 December 2003, para. 51.

⁵⁷ *Féret v. Belgium*, Judgment of the European Court of Human Rights (Second Section) of 16 July 2009.

⁵⁸ *Ibid.*, para. 76.

⁵⁹ *Ibid.*, para. 77. Author's translation (as of this writing, the judgment is only available in French).

⁶⁰ *Ibid.*, para. 80.

⁶¹ Dissenting Opinion of Judge Sajo, joined by Judges Zagrebelsky and Tsotsoria.

⁶² Françoise Tulkens, "When to say is to do: Freedom of expression and hate speech in the case-law of the European Court of Human Rights", *op. cit.*, p. 284.

⁶³ *Ibid.*, pp. 284-285.

test applied when hate speech is examined from an Article 10 perspective.⁶⁴ The argument for the latter position is that: “before one can conclude with (relative) certainty that such activities took or will take place, all factual and legally relevant elements of the specific case, such as content, context, intention, impact and the proportionality of the interference, should be taken into consideration”.⁶⁵

1.3 Political Expression

Rationales for the protection of freedom of expression are numerous, rich and varied.⁶⁶ They include arguments centring on participation in democratic society; individual self-realisation, the search for truth, distrust of government and other functionalist arguments. Arguments from democracy have traditionally and consistently enjoyed pride of place in the Article 10 case-law of the Court. This can be explained by the “the primordial place of democracy”⁶⁷ among the objectives of the ECHR, as well as in the legal systems of States Parties to the Convention. In fact, the Court has even gone so far as to suggest that democracy “appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it”.⁶⁸

The Court has also held that “[F]ree elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system”.⁶⁹ States are therefore under the obligation, *inter alia*, to hold “free elections at reasonable intervals by secret ballot under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature”.⁷⁰ According to the Court, “Parliament or such comparable bodies are the essential fora for political debate” and that “[V]ery weighty reasons must be advanced to justify interfering with the freedom of expression exercised therein”.⁷¹ But heightened protection for political expression extends beyond institutional frameworks and processes as well because “freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention”.⁷²

In this broad context, the Court has distinguished between the roles of a variety of political actors, such as elected representatives (of the opposition), political parties and the government, and has explained how the right to freedom of expression of each actor is shaped by the nature of the position exercised or status enjoyed.

⁶⁴ Hannes Cannie & Dirk Voorhoof, “The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection?”, *op. cit.*

⁶⁵ *Ibid.*, at 83.

⁶⁶ See generally: Eric Barendt, *Freedom of Speech* (2nd Edition) (Oxford, Oxford University Press, 2005), pp. 6-23; Frederick Schauer, *Free speech: a philosophical enquiry* (Cambridge, etc., Cambridge University Press, 1982).

⁶⁷ Luzius Wildhaber, “A constitutional future for the European Court of Human Rights?”, in 23 *HRLJ* 161 (2002), at 162.

⁶⁸ *United Communist Party of Turkey & Others v. Turkey*, Judgment of the European Court of Human Rights of 30 January 1998, para. 45.

⁶⁹ *Bowman v. the United Kingdom*, Judgment of the European Court of Human Rights of 19 February 1998, Reports of Judgments and Decisions, 1998-I, para. 42.

⁷⁰ *United Communist Party of Turkey & Others v. Turkey*, *op. cit.*, para. 44.

⁷¹ Jerusalem, para. 40; *A. v. the United Kingdom*, no. 35373/97, ECHR 2002-X, para. 79.

⁷² *Lingens v. Austria*, Judgment of the European Court of Human Rights of 8 July 1986, Series A, no. 103, para. 42.

In the *Lingens* case, the Court found, seminally, that the “limits of acceptable criticism” are wider for politicians than for private individuals because politicians “inevitably and knowingly” lay themselves “open to close scrutiny of [their] every word and deed by both journalists and the public at large, and [they] must consequently display a greater degree of tolerance”.⁷³

The limits of permissible criticism are even wider as regards the government because in a democratic system “the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion”.⁷⁴ “Moreover”, the Court continues, “the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries”.⁷⁵

As noted by the majority judgment in the *Féret* case, freedom of expression is especially important for “an elected representative of the people as s/he represents the electorate, draws attention to their preoccupations and defends their interests”.⁷⁶ This applies, *a fortiori*, to members of the parliamentary opposition. Both of these principles have been developed in earlier case-law.⁷⁷

The Court sees political parties as having an “essential role in ensuring pluralism and the proper functioning of democracy”.⁷⁸ The unique importance of political parties stems from the fact that they are “the only bodies which can come to power, also have the capacity to influence the whole of the regime in their countries”.⁷⁹ Moreover, “[B]y the proposals for an overall societal model which they put before the electorate and by their capacity to implement those proposals once they come to power, political parties differ from other organisations which intervene in the political arena”.⁸⁰

The primacy of political expression has consistently been upheld in the Court’s case-law over the years. Indeed, its scope has expanded incrementally and is now understood to include debate on matters of public interest in a broad sense of the term.⁸¹ The media

⁷³ *Ibid.*

⁷⁴ *Incal v. Turkey*, Judgment of the European Court of Human Rights of 9 June 1998, Reports 1998-IV, para. 54; *Arslan v. Turkey*, Judgment of the European Court of Human Rights (Grand Chamber) of 8 July 1999, para. 46; *Öztürk v. Turkey*, Judgment of the European Court of Human Rights (Grand Chamber) of 28 September 1999, ECHR 1999-VI; para. 66; *Sener v. Turkey*, Judgment of the European Court of Human Rights of 18 July 2000, para. 40.

⁷⁵ *Arslan v. Turkey*, *op. cit.*, para. 46; *Öztürk v. Turkey*, *op. cit.*, para. 66; see also, for almost identical wording: *Incal v. Turkey*, *op. cit.*, para. 54 and *Sener v. Turkey*, *op. cit.*, para. 40.

⁷⁶ *Féret v. Belgium*, *op. cit.*, para. 65.

⁷⁷ *Castells v. Spain*, Judgment of the European Court of Human Rights of 23 April 1992, Series A, no. 236, para. 42; *Piermont v. France*, Judgment of the European Court of Human Rights of 27 April 1995, Series A, no. 314, para. 76; *Jerusalem v. Austria*, Judgment of the European Court of Human Rights (Third Section) of 27 February 2001, Reports of Judgments and Decisions 2001-II, para. 36; *Ibrahim Aksoy*, 49.

⁷⁸ *United Communist Party of Turkey & Others v. Turkey*, *op. cit.*, para. 43.

⁷⁹ *Refah Partisi (The Welfare Party) & Others v. Turkey*, Judgment of the European Court of Human Rights (Grand Chamber) of 13 February 2003, para. 87.

⁸⁰ *Ibid.*

⁸¹ See further: *Thorgeir Thorgeirson v. Iceland*, Judgment of the European Court of Human Rights of 25 June 1992, Series A, no. 239; *Bladet Tromsø & Stensaas v. Norway*, Judgment of the European Court of

have a role to play here, too: it is “incumbent on [the press] to impart information and ideas on political issues just as on those in other areas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them”.⁸²

1.4 Political expression and hate speech

It is clear that political expression and hate speech are poles apart in terms of the extent of the legal protection they enjoy under Article 10, ECHR, or *a fortiori*, Article 17, ECHR. Although both types of expression frequently coincide in practice, their legal relationship may appear to be a case of never the ‘twain shall meet. At the very least, this makes for a vexed relationship. The elucidation of the relationship would benefit enormously from meticulous engagement with the Court’s established case-law on relevant topics.

It is puzzling, to say the least, that the Court did not anchor its *Féret* judgment in factually similar case-law, such as the *Norwood* case, which was adopted by the same section of the Court a few years earlier.⁸³ Other reference points were also overlooked, but the Court’s failure to consider *Norwood* was inexplicable.⁸⁴ In *Norwood*, Article 17 was deemed to be applicable, whereas in *Féret*, it was not. It would have been very helpful if the Court had clarified this apparent discrepancy, if only to confirm that the vehemence of the attack was the determinative consideration.

Everyone engaging in political debate is, in principle, subject to the general limits of freedom of expression, but given the importance of political debate, specific contextual variables sometimes require particularly close scrutiny, eg. the content, context, or form of the expression; the status and intent of the speaker or party; the nature and severity of the interference and sanction. For example, relevant distinctions can sometimes be made between (i) live debates or election meetings or rallies, where there can be a high incidence of heated, off-the-cuff remarks, as well as limited practical possibilities for corrective (editorial) expression, and (ii) concerted, calculated political or election manifestos or campaign communications, from which a greater seriousness of political intent can be inferred. Relevant distinctions can also be drawn between whether expression aims to contribute to public debate, be satirical, exploit sensitive societal issues for electoral gain, or incite to hatred or violence. In the same vein, it can be

Human Rights of 20 May 1999, Reports of Judgments and Decisions, 1999-III; *Nilsen & Johnsen v. Norway*, Judgment of the European Court of Human Rights of 25 November 1999, Reports of Judgments and Decisions, 1999-VIII; *Fressoz & Roire v. France*, Judgment of the European Court of Human Rights of 21 January 1999, Reports of Judgments and Decisions, 1999-I; *Bergens Tidende & Others v. Norway*, Judgment of the European Court of Human Rights of 2 May 2000, Reports of Judgments and Decisions, 2000-IV. For additional commentary, see Tarlach McGonagle, “Workshop Report: The Changing Hues of Political Expression in the Media” 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. 1-30.

⁸² *Lingens v. Austria*, Judgment of the European Court of Human Rights of 8 July 1986, Series A, no. 103, para. 41.

⁸³ The Belgian Government invoked *Norwood* (see para. 50), but the Court did not refer to it elsewhere in the judgment.

⁸⁴ See, for example, *Glimmerveen and Hagenbeek v. the Netherlands*, Appn. nos. 8348/78 and 8406/78, Inadmissibility decision of the European Commission of Human Rights of 11 October 1979, Decisions and Reports 18, p. 187. The *Jersild* case also only had a cameo role in *Féret*.

pertinent to enquire whether a message (eg. a tweet) could communicate specific or coded meanings to particular groups. Other questions that could prove pertinent include whether parliamentary immunity covers the expression; whether a sanction involving a prohibition on standing for political office is proportionate, etc. The possibility to explore these often complex contextual factors would be precluded through the direct application of Article 17.

Another point that could usefully be clarified in future case-law concerns relevant duties and responsibilities of politicians. Freedom of political expression is not absolute: the exercise of this freedom is governed by duties and responsibilities. In this connection, the Court has stressed that: “[as] the struggle against all forms of intolerance is an integral part of human rights protection, it is crucially important for politicians, in their public discourse, to avoid expression that is likely to foster intolerance”.⁸⁵ Thus, notwithstanding the robust protection enjoyed by freedom of political expression in democratic society, that freedom does not include “freedom to express racist opinions or opinions which are an incitement to hatred, xenophobia, antisemitism and all forms of intolerance”.⁸⁶

The trade-off between strong protection for political expression and attending to the duties and responsibilities that accompany that protection, offers perhaps the most viable prospect of reconciling political and racist expression. It is therefore to be regretted that the *Féret* judgment provided little explanation of the applicant’s relevant duties and responsibilities as an elected public representative.

The challenge of reconciling political and racist expression can be seen as a veritable stress test for the Court because it seeks to resolve the tension between protection of the ECHR’s core values and one of the greatest threats to those values. As politicians, political parties and governments increasingly rely on new information and communications technologies, the tensions between political expression and hate speech will accordingly play out more and more in an online environment.

Against the backdrop of legal limitations on political hate speech, there is ample scope for non-legal, promotional measures to encourage best practices among politicians and political parties. Such measures appeal to the sense of “duties and responsibilities” of all political actors and they have been developed extensively in the context of ECRI’s monitoring work (see further, below), as well as that of the Advisory Committee on the Framework Convention for the Protection of National Minorities. Initiatives such as ECRI’s Declaration on the use of racist, anti-Semitic and xenophobic elements in political discourse⁸⁷ and the Charter of European Political Parties for a Non-Racist Society⁸⁸ have the potential for further uptake and operationalisation.

⁸⁵ [Author’s translation from original French] *Erbakan v. Turkey*, Judgment of the European Court of Human Rights (First Section) of 6 July 2006, para. 64. See also, for relevant duties and responsibilities of a mayor, *Willem v. France*, Judgment of the European Court of Human Rights (Fifth Section) of 16 July 2009, para. 37.

⁸⁶ Preamble, Committee of Ministers’ Declaration on freedom of political debate in the media, 12 February 2004.

⁸⁷ Adopted on 17 March 2005.

⁸⁸ Adopted on 28 February 1998.

2. Other Council of Europe strategies against hate speech

2.1 Treaty-based strategies

Framework Convention for the Protection of National Minorities

The Framework Convention for the Protection of National Minorities (FCNM) sets out a range of rights to be enjoyed by persons belonging to national minorities. Its Articles 6 (encouragement of a spirit of tolerance and intercultural dialogue) and 9 (freedom of expression and access to the media) are the most pertinent provisions in respect of the relationship between freedom of expression and hate speech. Pursuant to these two articles, in particular, the Advisory Committee on the FCNM (the main monitoring body for the treaty) has elaborated a comprehensive strategy for tackling intolerance, hatred and (other) various contributory causes of hate speech. It seeks to address the problem of hate speech before it actually spawns by emphasising the need to foster, including via the media, improved inter-ethnic and intercultural understanding and tolerance through the development of dialogical relationships between communities. These strategies are informed by a realisation that the media are capable of contributing to the promotion of tolerance and intercultural understanding, as well as to the elimination of negative stereotyping and negative portrayal of minorities. Although the textual emphasis in Article 9, FCNM, is on the print and broadcast media, there is a growing awareness of the importance of the online dimension within the monitoring activities.

*European Convention on Transfrontier Television*⁸⁹

The main purpose of the European Convention on Transfrontier Television (ECTT) is to “facilitate, among the Parties, the transfrontier transmission and the retransmission of television programme services”⁹⁰ and thereby advance the general objectives of the Council of Europe, including freedom of expression and information, pluralism, cultural development, etc.⁹¹ Article 7, ECTT, entitled ‘Responsibilities of the broadcaster’, recalls the need for broadcasts to respect human dignity and the fundamental rights of others, and to avoid incitement to racial hatred.

Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems

The Council of Europe’s Convention on Cybercrime was roundly criticised for its failure to address racism and xenophobia, and an Additional Protocol (AP) to the Convention was promptly drawn up in order to fill this lacuna. The AP requires States Parties to adopt (and enforce) legislation and/or other effective measures to render various types of racist conduct committed via computer systems criminal offences under domestic law, “when committed intentionally and without right”. The measures to be taken at

⁸⁹ It should be noted that this treaty now faces an uncertain (political) future, following an official announcement that its revision has been discontinued. For details, see: Council of Europe Press Release, “Transfrontier television: the revision of the Convention discontinued”, 4 February 2011, available at: http://www.coe.int/t/dghl/standardsetting/media/T-TT/default_en.asp .

⁹⁰ Article 1, ECTT.

⁹¹ Preamble, ECTT.

national level should target: the dissemination of racist and xenophobic material via computer systems (Article 3); racist and xenophobic motivated threat (Article 4) and insult (Article 5); the denial, gross minimisation, approval or justification of genocide or crimes against humanity (Article 6), and aiding or abetting in the above (Article 7). As suggested by its title, the AP concerns first and foremost criminal-law measures against online hate speech; this express focus leaves little room for exploring civil-law and other (non-legal) remedies and responses.

2.2 Political, policy-making and monitoring strategies

Committee of Ministers

The Committee of Ministers' most extensive engagement with hate speech came in 1997, with the adoption of Recommendations on "hate speech"⁹² and on the media and the promotion of a culture of tolerance.⁹³ The former deals with the negative role the media may play in the propagation of hate speech, while the latter deals with the positive contribution the media can make to countering such speech. The complementarity of the two Recommendations is therefore obvious. For the purposes of Recommendation 97(20), hate speech is taken to cover:

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.⁹⁴

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 acknowledges 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 recognizes 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.

⁹² Recommendation No. R (97) 20 of the Committee of Ministers to Member States on "Hate Speech", 30 October 1997.

⁹³ Recommendation No. R (97) 21 of the Committee of Ministers to Member States on the media and the promotion of a culture of tolerance, 30 October 1997.

⁹⁴ Recommendation No. R (97) 20, *op. cit.* The drafting process of the Recommendations can be traced to the Summit of Heads of State and Government of the Council of Europe Member States held in Vienna in 1993. The Summit concluded with the adoption of, *inter alia*, a Declaration and Action Plan on combating racism, xenophobia, antisemitism, and intolerance. That Declaration set out the parameters for the work that was to follow. This is the formal explanation for why the resulting Recommendation (97) 20 on "hate speech" does not cover all forms of intolerance (e.g., "intolerance on grounds of sex, sexual orientation, age, handicap, etc."). Explanatory Memorandum to Recommendation No. R (97) 20 on "Hate Speech", para. 22.

The operative part of the Recommendation calls on national governments to take appropriate steps to implement the principles annexed to the Recommendation; “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.⁹⁵

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. 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. Principle 5 highlights the need for a guarantee of proportionality whenever criminal sanctions are imposed on persons convicted of hate speech offences.

Whereas the Recommendation as a whole is redolent of the *Jersild* case generally,⁹⁶ Principle 6 specifically harks back to one of the Court’s key findings in the case: it calls for national law and practice to 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”.⁹⁷ 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), ECHR;
- when examining the necessity of restrictions on freedom of expression, national authorities must have proper regard for relevant case-law of the European Court

⁹⁵ Recommendation No. R (97) 20, *op. cit.*, paras. 1-4.

⁹⁶ See: Explanatory Memorandum to Recommendation No. R (97) 20, *op. cit.*, paras. 19, 30, 38, 46 *et seq.*

⁹⁷ *Ibid.*, para. 38.

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”.⁹⁸

Recommendation 97(21)

Whereas combating hate speech may be considered a defensive or reactive battle, the promotion of tolerance – an objective to which it is intimately linked – is more proactive. Recommendation (97) 21 on the media and the promotion of a culture of tolerance was conceived of as the logical complement to the Recommendation on “Hate Speech”. The main justification for preparing a separate Recommendation dealing with the positive contribution which the media can make to countering hate speech was:

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.⁹⁹

The Recommendation urges Member States to raise awareness of the media practices they promote in all sections of the media and to remain open to supporting initiatives which would further the objectives of the Recommendation. 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 viably could be complemented by codes of conduct.

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

Together, the twin Recommendations on “hate speech” and on the media and the promotion of a culture of tolerance serve as an influential reference point among standard-setting texts adopted by the Committee of Ministers. They are frequently

⁹⁸ Recommendation No. R (97) 20, *op. cit.*, Appendix; Principle 7.

⁹⁹ Explanatory Memorandum to Recommendation No. R (97) 20, *op. cit.*, para. 12.

invoked in other Recommendations and Declarations. For instance, they – or their underlying principles, such as the protection of human dignity - have informed the Committee of Ministers’ approaches to freedom of political debate, the fight against terrorism, the promotion of intercultural dialogue, the safeguarding of human rights in a digital environment, and the protection of minors, especially in an online context.¹⁰⁰

Parliamentary Assembly

The Parliamentary Assembly’s engagement with hate speech, especially in recent years, has tended to focus on the various flashpoints in the relationship between freedom of expression, freedom of religion and hate speech. Its overall approach to relevant questions, like that of other bodies of the Council of Europe, blends restrictive and promotional measures for principled and strategic reasons. As such, in some contexts it advocates criminalisation of certain kinds of expression and in other contexts it calls for emphasis on, and adherence to, media codes of ethics for tackling stereotyping and intolerance, enhanced communicative opportunities for different groups in society, as well as capacity-building measures.

European Commission against Racism and Intolerance

The work of the European Commission against Racism and Intolerance (ECRI) is divided into three main strands: the monitoring of racism and related issues on a country-by-country basis; work on general themes, especially the elaboration of general policy recommendations and the promotion of best practices against racism; and engagement with civil society.¹⁰¹ Generally speaking, ECRI pursues a root-and-branch approach against hate speech. It advocates both punitive and preventive measures against hate speech and thus alternates – depending on the situation – between strategies that are restrictive of certain types of expression and strategies that seek to promote other types of expression or expressive opportunities. Its General Policy Recommendations (GPRs) deal with topics such as specialised bodies to combat racism, national legislation to combat racism, racism in education, policing and the fight against terrorism, racism against particular groups and online racism. In its country monitoring work, in particular, ECRI consistently pays attention to the use/impact of racist expression in/on public discourse – by politicians, via the media and Internet. For instance, it frequently calls for greater vigilance in monitoring forms of racist expression propagated via the Internet and greater efforts to prosecute those responsible for such expression. In this connection, it routinely cites its GPR No. 6 – Combating the dissemination of racist, xenophobic and anti-Semitic material via the Internet.¹⁰² Although ECRI has not (yet) adopted a GPR specifically on combating racism while respecting freedom of expression, it has organized an expert seminar on the topic,¹⁰³ which could perhaps be built on in the future.

¹⁰⁰ For details and analysis, see: Tarlach McGonagle, “A Survey and Critical Analysis of Council of Europe Strategies for Countering ‘Hate Speech’”, *op. cit.*, at 478-483.

¹⁰¹ See further: Lanna Hollo, *The European Commission against Racism and Intolerance (ECRI): Its first 15 years* (Strasbourg, Council of Europe Publishing, 2009).

¹⁰² Adopted on 15 December 2000.

¹⁰³ 16-17 November 2006. See the conference proceedings (2007, available via the ECRI website).

Ministerial Conferences on Mass Media Policy

European Ministerial Conferences on Mass Media Policy have been held periodically since the mid-1980s. These conferences involve the participation of Ministers (or their delegates) with relevant portfolios at the national level. As such, the Ministerial Conferences can be distinguished from the day-to-day activities of the Council of Europe. Their relevance stems from their purpose to map out future European media policy, supplemented by action plans for its implementation. In order to reflect changing notions of the media, the most recent conference was calibrated differently - as the "1st Council of Europe Conference of Ministers responsible for Media and New Communication Services".¹⁰⁴

Of the seven Conferences on Mass Media Policy, the 4th, 5th, and 7th have most directly engaged with the issues of hate speech or tolerance and intolerance in the media.¹⁰⁵ It was the 5th European Ministerial Conference on Mass Media Policy,¹⁰⁶ held in 1997, that paid the greatest attention to issues related to hate speech. Paragraphs 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 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".¹⁰⁷

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.¹⁰⁸ 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".¹⁰⁹ The reinforcement of cooperation within the Council of Europe, while liaising with other IGOs and "interested professional organisations," is also advocated.¹¹⁰ Such cooperation should have standard-setting aspirations, initially for Europe and later more widely. 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".¹¹¹

¹⁰⁴ *A new notion of media?*, 28-29 May 2009, Reykjavik, Iceland.

¹⁰⁵ The political texts adopted at the 1st Council of Europe Conference of Ministers Responsible for Media and New Communication Services, *A new notion of media?*, pay minimal attention to hate speech.

¹⁰⁶ Thessaloniki, 11-12 December 1997: *The Information Society: a challenge for Europe*.

¹⁰⁷ Para. 9. See also, para. 19(i), where these points are reiterated in very similar language.

¹⁰⁸ Para. 8(i).

¹⁰⁹ Para. 8(ii).

¹¹⁰ Para. 8(iii).

¹¹¹ Para. 8(iii).

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, European Convention on Transfrontier Television, 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".¹¹²

Synopsis

The foregoing survey of the main components of the Council of Europe's overall approach to hate speech provides summary details of various treaty-based and institutional standard-setting and monitoring initiatives. Relevant treaties legally bind their States Parties, but instruments and practices that are not legally binding should not be dismissed as unimportant. They can be politically persuasive and may influence legal approaches. For example, the European Court of Human Rights often refers to standard-setting work developed by the Committee of Ministers and ECRI.¹¹³ The added value of standard-setting texts lies in their ability: (i) to engage with specific themes in a more detailed and expansive way than is usually possible when an adjudicatory body deals with the specifics of a given case, and (ii) to take into account and reflect current State practice and anticipate future developments. For their part, monitoring mechanisms can usefully complement legal measures by enabling the collation and evaluation of a range of different (and often creative) measures to deal with the range of different types of expression covered by the term, hate speech.

The foregoing survey also reveals great diversity in the Council of Europe's approaches to hate speech. They contain various focuses on Internet-specific questions relating to hate speech and its regulation which will become increasingly prominent and pressing in the coming years. These points will be developed in the next Section.

¹¹² All of the citations in this paragraph are from: Action Plan for the promotion of freedom of expression and information at the pan-European level within the framework of the Information Society, 5th European Ministerial Conference on Mass Media Policy Section F. See also, for related issues, Section E.

¹¹³ For example, the Committee of Ministers' Recommendation No. R (97)20 on "hate speech" is cited in the European Court of Human Rights' judgments in *Gündüz v. Turkey* of 4 December 2003 (para. 22) and *Féret v. Belgium* of 16 July 2009 (paras. 44 and 72).

SECTION II: Online hate speech

1. New and pressing issues

In recent years, due mainly to the advent and relentless growth of the internet, the media have been undergoing profound changes; they are generally becoming increasingly instantaneous, international and interactive.¹¹⁴ In tandem, ideas, information and content of all kinds are generally becoming more abundant, accessible and amplified to wider sections of society. As a result of these changes, the current media offering is more plentiful and varied than it has been at any point in history. These developments have prompted observations that internet content is “as diverse as human thought”.¹¹⁵ There is now a greater range of media at our disposal than ever before, offering wider and more diversified functionalities/capabilities and greater differentiation in types of access, participation and output.

These advances in information and communications technologies can clearly have far-reaching consequences for how hate speech is disseminated and processed. The internet holds unprecedented potential for multi-directional communicative activity: unlike traditional media, it entails relatively low entry barriers. Whereas in the past it was necessary to negotiate one’s way through the institutionalised media in order to get one’s message to the masses, this is no longer the case. There is reduced dependence on traditional points of mediation and anyone can, in principle, set up a website or communicate via social media. Messages therefore can - and do - spread like wildfire across the globe. Often, all that is needed for a message to “go viral” is a combination of strategy and happenstance. While there are no guarantees that an individual’s message will actually reach vast international audiences, the capacity to communicate on such a scale clearly does now exist for an ever-expanding section of the population. This capacity has obvious benefits for the democratisation of society and public discourse, but at the same time, it also facilitates the growth of “low level digital speech”.¹¹⁶

The accessibility and effectiveness of the internet as a medium of communication is largely due to the ease, speed and versatility with which expression can be disseminated online. It is increasingly¹¹⁷ being used for spreading hate speech in different ways and contexts, including:

- dissemination of propaganda, other types of (mis-)information, conspiracy theories and hate spam;

¹¹⁴ See generally, Karol Jakubowicz, *A New Notion of Media? Media and Media-Like Content and Activities on New Communications Services* (Strasbourg, Council of Europe, 2009).

¹¹⁵ *ACLU v. Reno*, 929 F. Supp. 824 (11 June 1996), 842, para. 74.

¹¹⁶ For an exploration of this notion and the level of legal protection it should be afforded, see: Jacob Rowbottom, “To rant, vent and converse: protecting low level digital speech”, *Cambridge Law Journal* 2012, 71(2), 355-383.

¹¹⁷ Empirical studies of the growing online presence of hate speech are surveyed *inter alia* in: Barbara Perry and Patrik Olsson, “Cyberhate: The Globalization of Hate”, 18(2) *Information & Communications Technology Law* (2009), 185-199; James Banks, “Regulating Hate Speech Online”, 24(3) *International Review of Law, Computers & Technology* (2010), 233-239; Yaman Akdeniz, *Racism on the Internet* (Strasbourg, Council of Europe Publishing, 2009). Organizations active in the monitoring of online hate speech include the Simon Wiesenthal Center (<www.wiesenthal.com>) and the Anti-Defamation League (<www.adl.org>).

- exchange of information and ideas, e.g. via social media networks, discussion groups, listservs and communities of interest;
- search engine optimisation techniques, such as hyperlinking strategies designed to generate better search results;
- attracting inadvertent users by “usurping domain names” and “using misleading meta-tags”;¹¹⁸
- organisational purposes such as the coordination of activities, planning of events, training, recruitment drives;
- commercial ends such as fund-raising, the sale of publications, videos, memorabilia and paraphernalia;
- trolling and other such disruptive practices;
- pursuit of various offences against the person and other criminal or invasive behaviour, e.g. the targeting of (potential) victims, cyber-bullying, cyber-stalking.

From a regulatory perspective, new technological possibilities and how they are exploited in practice present a number of complicating factors. The first cluster of factors can be grouped around liability and jurisdictional issues and the second cluster comprises factors affecting victims of hate speech. After considering these two clusters of factors, attention will turn to responses and remedies and implications for the future.

1.1 Liability and jurisdictional issues

Owing to the virtual, globalized and decentralized features of the architecture of the internet, online hate-mongers enjoy a high degree of mobility. These technological features allow such hate-mongers to offer content via Internet Service Providers (ISPs) based in a jurisdiction of their choice. This is clearly relevant for the struggle against online hate speech because national laws can vary quite considerably in the extent to which they tolerate hate speech. In the United States, for instance, the free speech tradition cultivated by a robustly-worded First Amendment, has resulted in a very strong presumption of constitutional protection for hate speech.¹¹⁹

It is common practice for hate websites to be hosted in jurisdictions that are considered to be favourable to, or tolerant of, hate speech. The practice of strategically choosing favourable jurisdictions in which to host a site is sometimes called forum-shopping. It leads to regulatory circumvention and attempts to evade legal liability for hateful content. Similarly, it is also common practice for hate websites that have been either blocked or banned in one jurisdiction to subsequently relocate to another, more favourable, jurisdiction.¹²⁰ The ease with which hate websites can relocate in this

¹¹⁸ Elizabeth Phillips Marsh, “Purveyors of Hate on the Internet: Are We Ready for Hate Spam?”, 17 *Georgia State University Law Review* (2000), 379-407, at 391.

¹¹⁹ The First Amendment to the US Constitution reads: “Congress shall make no law [...] abridging the freedom of speech, or of the press [...]”. For overviews and analysis of relevant First Amendment jurisprudence, see: Anthony Lewis, *Freedom for the Thought That We Hate: A Biography of the First Amendment* (New York, Basic Books, 2007); James Weinstein, “An Overview of American Free Speech Doctrine and its Application to Extreme Speech”, in Ivan Hare and James Weinstein, Eds., *Extreme Speech and Democracy*, *op. cit.*, pp. 81-91; and Steven J. Heyman, “Hate Speech, Public Discourse, and the First Amendment”, in *ibid.*, pp. 158-181.

¹²⁰ An example is the website of Holocaust denier, Ernst Zündel. For background and analysis, see: Yaman Akdeniz, “Stocktaking on Efforts to Combat Racism on the Internet”, Background Paper for the High Level Seminar of the Intergovernmental Working Group on the Effective Implementation of the Durban

manner means that blocking or banning cannot be regarded as effective measures against, or remedies for, such sites.

Whereas different jurisdictions have different laws governing hate speech, different ISPs within a given jurisdiction may well have different policies on hate speech too. Some ISPs' terms of service/use contracts, community guidelines and notice-and-take-down policies are more detailed and/or stringent as regards hate speech than others.

However, the implementation of those policies is not always transparent. Relevant actors are typically private actors and consequently, their involvement in content regulation could potentially be seen as private censorship. In its Transparency Report, Google seeks to address this concern.¹²¹ It explains: "Like other technology and communications companies, Google regularly receives requests from government agencies and courts around the world to remove content from our services or to review such content to determine if it should be removed for inconsistency with a product's community policies". The Report purports to "disclose the number of requests we receive from each government in six-month periods with certain limitations."

The Report documents Internet traffic disruption to Google products and services in countries across the world, typically due to State intervention to block particular sites. It also provides statistical information about governments' requests to remove content, distinguishing between requests pursuant to (i) court orders, and (ii) executive, police, etc. It categorises the types of content at issue in these requests and it is interesting to note that since July 2010, hate speech has accounted for 0% of the total number of requests pursuant to court orders and only 2% of the total requests made by executive or police. Exactly the same statistics apply to the adjacent category of religious offence. While the Report does offer a measure of transparency, it remains at the level of macro-statistics. It offers no real insights into how requests for removal concerning alleged hate speech are dealt with in terms of substantive internal review.

Determining legal liability for hate speech online is not only complicated from a jurisdictional perspective. Technological considerations also cause a number of complications in practice. Potentially, a multiplicity of different actors could be involved in the creation and dissemination of hateful content: creating or sourcing it; publishing it; developing it; hosting it or otherwise facilitating its dissemination, accessibility or retrievability. Liability could attach to each of the implicated actors in different ways, depending on the nature of the communication; the scope and details of relevant national laws, and other "contextual variables".¹²² Different actors have different relationships with content; degrees of editorial control could prove determinative of the extent of liability incurred for user-generated content (UGC), for example. To what extent can a newspaper be held liable for racist comments posted by readers on its online discussion forum?¹²³ Can Twitter be held liable for racist tweets? Or YouTube for

Declaration and Programme of Action, Fourth Session (16-27 January 2006), United Nations Commission on Human Rights Doc. No. E/CN.4/2006/WG.21/BP.1, 9 January 2006, 16-18.

¹²¹ Google Transparency Report: <http://www.google.com/transparencyreport/removals/government/>.

¹²² Michel Rosenfeld, "Hate Speech in Constitutional Jurisprudence: A Comparative Analysis", *op. cit.*, at 1565.

¹²³ See generally in this connection: Karmen Erjavec & Melita Poler Kovacic (2012) "You Don't Understand, This is a New War!" Analysis of Hate Speech in News Web Sites' Comments, *Mass*

racist videos? Or Facebook for racist pages? Or, perhaps more controversially, Google for racist search results?¹²⁴ These questions are enormous and enormously complicated and as such, it is beyond the scope of this background paper to offer a fuller exploration of their intricacies. What can be stated in general terms, however, is that relevant legal distinctions could be made between different types of UGC because of differing levels of editorial involvement/control and responsibility/liability:

- A. UGC that is prepared by users and then incorporated into otherwise professionally-produced and editorially-controlled content;
- B. UGC that has a stand-alone character, i.e., UGC that exists alongside professionally-produced and editorially-controlled content;
- C. UGC that is the product of co-creation by media professionals and users.
- D. UGC that is created via and maintained on purpose-built fora and networks and is not incorporated into professional media content.¹²⁵

Another problematic aspect of liability and jurisdictional issues concerns prosecution vagaries. Episodic or unsuccessful prosecutions have little deterrence value as they give rise to claims that relevant laws are paper tigers or toothless bulldogs. Conversely, however, overzealous prosecution can have serious chilling effects on freedom of expression and public debate. The tendency of “hate speech” laws to be formulated in terms that are over-broad, has long been a concern of some civil rights organizations and academic commentators. Vague and overbroad statutes can, for instance, be abused in order to stifle hard-edged political criticism. Prosecutions for hate speech can also help perpetrators who are motivated by ideological or activist goals to cultivate an image of free-speech martyrdom or victimhood.¹²⁶

1.2 Victims’ perspectives

As already mentioned in the introduction to this paper, it is important to be aware of the differentiation inherent in the term hate speech when assessing the harms it occasions and when calibrating relevant regulatory and other responses. Harms caused by hate speech and the resultant suffering of victims can be intensified by circumstances that are born out of technological capabilities or consequences. Thus, the relative ease of maintaining anonymity in an online environment¹²⁷ can contribute to an exacerbation of the emotional or psychological harm inflicted on victims of hate speech. For instance, when the true identities of those responsible for cyber-bullying, or hateful messages

Communication and Society, 15: 6, 899-920; Matthew W. Hughey & Jessie Daniels, “Racist comments at online news sites: a methodological dilemma for discourse analysis” (2013) *Media, Culture and Society* 35(3) 332-347.

¹²⁴ See further in this connection: Arwa Mahdawi, “Can Googling be racist?”, *The Guardian*, 5 February 2013, available at: <http://www.guardian.co.uk/commentisfree/2013/feb/05/can-googling-be-racist?INTCMP=SRCH>.

¹²⁵ Tarlach McGonagle, “User-generated Content and Audiovisual News: The Ups and Downs of an Uncertain Relationship”, in Susanne Nikoltchev, Ed., *Open Journalism, IRIS plus 2013-2* (Strasbourg, European Audiovisual Observatory), pp. 7-25, at p. 10.

¹²⁶ Jogchum Vrieling, *Van haat gesproken?, op. cit., ‘Deel’* (Section) IV (generally). See also, more generally: Joost van Spanje & Claes de Vreese, “The good, the bad and the voter: The impact of hate speech prosecution on electoral support for his party” 2013 *Party Politics* 1-16.

¹²⁷ See generally on this topic: Margot Kaminski, “Real Masks and Real Name Policies: Applying Anti-Mask Case Law to Anonymous Online Speech”, 23 *Fordham Intell. Prop. Media & Ent. L.J.* 815-896.

disseminated by mobile phone texts or via social networks, are cloaked in anonymity or pseudonymity, the very suspicion that those persons may live nearby the victim, or frequent the same social, educational or professional circles, is likely to compound his/her distress. Similarly, when messages of hate are circulated via social networking services, the actual amplification of those messages, coupled with a perception that their dissemination is uncontrollable, can also increase victims' distress levels. So, too, can the apparent social validity or authority conferred on such messages by the large numbers of likes, mentions, favourites, friends or followers they may attract.

The potential permanency of content made available online is also a relevant consideration when quantifying the nature and extent of the harms caused by racist hate speech. Online manifestations of hate speech are generally more refractory than their traditional, offline equivalents. This has given rise to the term, "cyber-cesspools",¹²⁸ which conjures up the image of putrid, stagnant pools that pose a danger to public health. The durability of online content, facilitated in the first place by an absence of storage limitations, is also assured by hyperlinking and online searchability. Content remains traceable and largely retrievable after its original dissemination to an unprecedented extent when that dissemination takes place online, even when the original content has been cached. This means that there is a danger that victims of hate speech will continuously, or at least repeatedly, be confronted by the same instances of hate speech after their original articulation. Leading critical race theorists have argued cogently that the "incessant and compounding" aspects of hate speech exacerbate its impact.¹²⁹ If multi- or cross-posting or extensive hyperlinking has taken place, the removal of particular material from a particular online source cannot guarantee the unavailability of the same material elsewhere, thus strengthening its "incessant and compounding" aspects.

Besides making content more difficult to remove, hyperlinking can also affect search results, due to the technical design of algorithms like 'Page Rank', which is influenced by linking practices.¹³⁰ Thus, search engine optimisation strategies could increase search results for particular types of content, including (particular instances of) hate speech. Hyperlinks can also acquire or indicate "social significance" insofar as they seek to associate with or distance themselves from other sites or content.¹³¹ They can also be indicators of authority,¹³² or popularity. Hyperlinking is done for a purpose, or for a variety of purposes,¹³³ but there "is no guarantee that indication of the author's intentions can be found in the link itself, or in the linked resource".¹³⁴ Ambiguity surrounding the intent behind hyperlinking can give rise to questions of morality or

¹²⁸ Brian Leiter, "Cleaning Cyber-Cesspools: Google and Free Speech", in Saul Levmore and Martha C. Nussbaum, Eds., *The Offensive Internet: Speech, Privacy, and Reputation* (Cambridge, Massachusetts and London, Harvard University Press, 2010), pp. 155-173.

¹²⁹ Richard Delgado and Jean Stefancic, "Four Observations about Hate Speech", *op. cit.*, at 367-368.

¹³⁰ Juliette De Maeyer, "Towards a hyperlinked society: A critical review of link studies", *New Media & Society*, 2012, 1-15, at 4.

¹³¹ *Ibid.*, p. 3.

¹³² *Ibid.*

¹³³ David Weinberger, "The Morality of Links", in Joseph Turow and Lokman Tsui, Eds., *The Hyperlinked Society: Questioning Connections in the Digital Age* (Ann Arbor, MI, Michigan University Press), pp. 181-190, at 184.

¹³⁴ Juliette De Maeyer, "Towards a hyperlinked society: A critical review of link studies", *op. cit.*, p. 9.

liability. In the context of journalism, for instance, “hypertextuality is [often¹³⁵] associated with positive journalistic values such as interactivity, transparency, credibility or diversity,”¹³⁶ but if a hyperlink is created to prohibited instances of hate speech, thereby facilitating access to or the retrievability of the latter, liability could be incurred.¹³⁷

1.3 Responses and remedies

Again, due to the inherent differentiation in racist hate speech, a variety of regulatory measures, including criminal law provisions, are typically employed to combat online hate speech. However, besides regulatory measures, a range of alternative and additional approaches can also be suited to the specifics of different types of racist hate speech in an online setting. Such measures include: “the option of doing nothing, social norms, self-regulation, co-regulation, and technical means, information, education and awareness campaigns”.¹³⁸ They can offer a number of advantages; for instance, they can be “less costly, more flexible and quicker to adopt than prescriptive government legislation”.¹³⁹ However, neither regulatory measures nor any of the other measures discussed are without their shortcomings.

Against a background of scepticism regarding the effectiveness of non-regulatory measures for combating online racist hate speech, it is useful to flag a few examples of good practices. Various instances of fruitful collaboration between civil society interest groups and individual ISPs or content providers in combating hate speech have been documented.¹⁴⁰ Typically, such collaborative initiatives involve the former seeking to promote greater social responsibility on the part of the latter, by promoting (awareness of) reporting mechanisms for illegal material offered (by third parties) on their services. Another example of good practice is the International Association of Internet Hotlines (INHOPE),¹⁴¹ which provides an extremely important service by enabling members of the public to anonymously report online content that they suspect to be illegal (especially child sexual abuse material, but also illegal types of hate speech). INHOPE hotlines “ensure that the matter is investigated and if found to be illegal the information will be passed to the relevant Law Enforcement Agency and in many cases the Internet Service Provider hosting the content”.¹⁴² Notwithstanding these examples of good

¹³⁵ Inserted by the present author.

¹³⁶ *Ibid.*, p. 7.

¹³⁷ *UEJF, LICRA v. Yahoo!, Inc.*, Tribunal de Grande Instance, Paris, 20 November 2000.

¹³⁸ Yaman Akdeniz, “Introduction”, in *Legal Instruments for Combating Racism on the Internet*, Report prepared and updated by the Swiss Institute of Comparative Law, Lausanne (Strasbourg, Council of Europe Publishing, 2009), pp. 7-37, at 28; Yaman Akdeniz, “Governance of Hate Speech on the Internet in Europe”, in Christian Möller and Arnaud Amouroux, Eds., *Governing the Internet: Freedom and Regulation in the OSCE Region* (Vienna, OSCE Representative on Freedom of the Media, 2007), pp. 91-117, at 108. For a more detailed discussion of these measures, see: Yaman Akdeniz, “Governing Racist Content on the Internet: National and International Responses”, 56 *University of New Brunswick Law Journal* (2007), 103-161, at 140-158; Yaman Akdeniz, *Racism on the Internet*, *op. cit.*, pp. 111-134.

¹³⁹ *Ibid.*

¹⁴⁰ For examples and analysis, see: Jessica S. Henry, “Beyond Free Speech: Novel Approaches to Hate on the Internet in the United States”, 18(2) *Information and Communications Technology Law* (2009), 235-251. For an exploration of what more might be done in this regard, see: Brian Leiter, “Cleaning Cyber-Cesspools: Google and Free Speech”, *op. cit.*, at 169-172.

¹⁴¹ Official website available at <www.inhope.org>.

¹⁴² *Ibid.*

practices for combating online racist hate speech, there remain general problems of transparency, consistency and enforceability concerning self- and co-regulatory mechanisms and processes governing ISPs.

The suitability of counter-speech, or more specifically, intergroup communication, strategies for combating hate speech is often stressed.¹⁴³ The effectiveness of counter-speech as a remedy for racist hate speech in an online environment is perhaps less self-evident than it is in the physical world. As a result of vastly enhanced communicative opportunities enabling individuals to connect with multitudes of other individuals, it seems plausible that changing patterns of individual, intra-group and intergroup communication will become discernible between off- and online variants. These developments prompt a need for fresh reflection on the effectiveness of continued normative reliance on the empowering and identity-sustaining properties of freedom of expression in an online environment.

It may, at first glance, seem paradoxical to suggest that counter-speech is likely to be less effective in an environment of informational abundance. Yet that abundance includes an abundance of hate speech, the pervasiveness and permanence of which is assured by the internet's archiving, hyperlinking and searching capabilities.¹⁴⁴ Whether overall informational abundance will drown out the abundance of hate speech, or dilute its impact, is too broad a question to answer *in abstracto*.

Another relevant consideration is that enhanced individual selection and filtering capacities allow individuals to choose (or "pull") their own content instead of having particular content "pushed" towards them by general intermediaries, as the institutionalized media have traditionally done. These capacities increase the ability of individuals to avoid exposure to particular types of content. The broader consequence of this is that they also reduce the chances of conflicting opinions meeting each other head-on in an online environment.¹⁴⁵ Such individual selection and filtering capacities can affect communicative practices at a societal level in different ways. Growing reliance on these capacities can lead to the creation of a multitude of "public sphericules" instead of a unified public sphere¹⁴⁶ and lead to the proliferation of communities of interest in which ideological insulation and intensification take place. The online forums in which particular types of information and especially viewpoints are reinforced by their amplification have been described as "online echo chambers".¹⁴⁷

¹⁴³ For a rich theoretical exposition of counter speech and the question of its suitability as a remedy for hate speech, see: Katharine Gelber, *Speaking Back: The Free Speech Versus Hate Speech Debate* (Amsterdam/Philadelphia, John Benjamins Publishing Company, 2002), and Katharine Gelber, "Reconceptualizing Counterspeech in Hate Speech Policy (with a Focus on Australia)", in Michael Herz & Peter Molnar, Eds., *Content and Context: Rethinking Regulation and Remedies for Hate Speech*, *op. cit.*, pp. 198-216.

¹⁴⁴ Elizabeth Phillips Marsh, "Purveyors of Hate on the Internet: Are We Ready for Hate Spam?", *op. cit.*, at 391.

¹⁴⁵ For a general discussion of selection and filtering issues concerning the Internet, see: Jonathan Zittrain, "A History of Online Gatekeeping", 19(2) *Harvard Journal of Law and Technology* (2006), 253-298.

¹⁴⁶ See further: Todd Gitlin, "Public Sphere or Public Sphericules?", in Tamar Liebes and James Curran, Eds., *Media, Ritual, Identity* (London, Routledge, 1998), pp. 168-175.

¹⁴⁷ See further, Cass R. Sunstein, *Republic.com 2.0* (Princeton NJ, Princeton University Press, 2007).

As a result of these informational and communicative trends, the likelihood of intergroup engagement and interaction in cyberspace cannot simply be assumed; its potential is significantly reduced, compared with the offline, real-world context. Granted, “alternative (mini-) spheres”¹⁴⁸ can prove vitally important for intragroup communication, for purveyors of hate and minority groups alike. Some empirical research even suggests that deliberation in online echo chambers does not necessarily/always lead to more entrenched/extreme positions and that intra-group deliberation can benefit inter-group deliberation.¹⁴⁹ Nevertheless, in order for more speech or counter-speech strategies to have any prospect of fostering tolerance, there must be, as a minimum, communicative intent and actual communicative contact.

The failure of internet-based expression to achieve linkage to “the general public domain”¹⁵⁰ could lead to communication being predominantly spatial and insufficiently social. Online hate speech *has* real-life consequences, as explained above,¹⁵¹ so it is crucial for online counter-speech to also realize its potential for offline effects. The promotion of targeted educational, media literacy (generally understood as “the ability to access, analyze, evaluate, and create messages in a variety of forms”¹⁵²) and journalistic training initiatives could all help to create such linkage in practice.¹⁵³

Moreover, as David Heyd has astutely pointed out, “education to toleration requires the development of open-mindedness, critical scepticism, the power of deliberation, and the willingness to change one’s attitude”.¹⁵⁴ This resonates very loudly with the view that democratic society cannot exist unless it is underpinned by “pluralism, tolerance and broadmindedness”.¹⁵⁵ By circulating information and ideas throughout society and by providing forums for dialogical interaction, the media can certainly serve these goals, including in an online environment. However, relevant policies and strategies will have to be carefully tailored to the specificities of the online context.¹⁵⁶

¹⁴⁸ Donald R. Browne, *Ethnic Minorities, Electronic Media and the Public Sphere: A Comparative Approach* (Cresskill, New Jersey, Hampton Press, Inc., 2005), p. 11. For a broad discussion of relevant issues, see: John Downing and Charles Husband, *Representing ‘Race’: Racisms, Ethnicities and Media* (London, SAGE Publications, 2005), esp. Chapter 9, “The Multi-Ethnic Public Sphere and Differentiated Citizenship”.

¹⁴⁹ See, for example: Cass R. Sunstein, “Ideological Amplification”, 14(2) *Constellations* (2007), 273-279; Cass R. Sunstein, *Why Groups Go to Extremes* (Washington, D.C., The AEI Press, 2008).

¹⁵⁰ Myria Georgiou and Eugenia Siapera, “Introduction: Revising multiculturalism”, 2(3) *International Journal of Media and Cultural Politics* (2006), 243-247, at 246.

¹⁵¹ See further, Alexander Tsesis, “Hate in Cyberspace: Regulating Hate Speech on the Internet”, 38 *San Diego Law Review* (2001), 817-874, at 836 *et seq.*

¹⁵² Sonia Livingstone, “Media Literacy and the Challenge of New Information and Communication Technologies”, 7 *The Communication Review* (No. 1, 2004), pp. 3-14, at p. 5.

¹⁵³ The OSCE Representative on Freedom of the Media recently made a recommendation to this effect: “Media literacy programs, including technical and content Internet literacy, shall be supported and promoted and educational programs and training materials for young people about countering hate speech should be developed.” Recommendation No. 7, *Shaping policies to advance media freedom: OSCE Representative on Freedom of the Media Recommendations from the Internet 2013 Conference*, available at: <http://www.osce.org/fom/100112>.

¹⁵⁴ David Heyd, “Education to Tolerance: Some Philosophical Obstacles and their Resolution”, in Catriona McKinnon and Dario Castiglione, Eds., *The Culture of Toleration in Diverse Societies: Reasonable Tolerance* (Manchester and New York, Manchester University Press, 2003), pp. 196-207, at 204.

¹⁵⁵ *Handyside v. the United Kingdom*, *op. cit.*, para. 49.

¹⁵⁶ See further in this connection: Ulla Carlsson & Sherri Hope Culver, Eds., *Media and Information Literacy and Intercultural Dialogue*, MILID Yearbook 2013 (Göteborg, Nordicom, 2013), available at: http://www.nordicom.gu.se/clearinghouse.php?portal=publ&main=info_public.php&ex=379&me=3.

1.4 Implications for the future

As already noted, successive waves of technological developments, especially and most recently, the advent of the internet, have profoundly altered informational and communicative realities throughout the world. Those changes were not only *unforeseen* when leading international and European human rights treaties were being drafted, they were probably also *unforeseeable*. Consequently, prior understandings of the scope of the right to freedom of expression require urgent updating, adaptation and expansion in order to take account of, and accurately reflect, the complexities of the new communicative dispensation and their impact on the realization of the right to freedom of expression and other rights in practice. This exercise will require the institutional guardians of the right to freedom of expression to demonstrate a keen appreciation of the substance and scope of the right, as well as its potential for continued development.

2. The Council of Europe and online hate speech

The particular importance of the media for democratic society has been stressed repeatedly by the Court. To date, the European Court of Human Rights has engaged meaningfully with the Internet generally¹⁵⁷ and the specific features of the online communications environment in particular in a surprisingly limited number of cases.¹⁵⁸ In its *Ahmet Yildirim v. Turkey* judgment of 18 December 2012, the Court finally recognised in a very forthright way the importance of the Internet in the contemporary communications landscape:

The Internet has become one of the principal means for individuals to exercise their right to freedom of expression today: it offers essential tools for participation in activities and debates relating to questions of politics or public interest.¹⁵⁹

This recognition clearly places great store by the participatory dimension of free expression. It also recognises the specific functionalities of the Internet – as a medium – that enable it to enhance public debate in democratic society. In doing so, the Court follows the trend in its established case-law of acknowledging the specific features of the (print and) audiovisual media that enable them to facilitate democratic deliberation and foster public debate.

¹⁵⁷ Therese Murphy and Gearoid Ó Cuinn, “Works in Progress: New Technologies and the European Court of Human Rights”, 10(4) *Human Rights Law Review* (2010), pp. 601-638, at 636; European Court of Human Rights (Research Division), *Internet: case-law of the European Court of Human Rights* (Strasbourg, Council of Europe, 2011); European Court of Human Rights (Press Unit), *Fact sheet – New technologies* (Strasbourg, Council of Europe, July 2013).

¹⁵⁸ Dirk Voorhoof, “Het Europese ‘First Amendment’ - De Straatsburgse jurisprudentie over artikel 10 EVRM: 2004-2009 (deel 2)”, *Mediaforum* 2010-6, pp. 186-201, at pp. 195-196; Tarlach McGonagle & Kim de Beer, “A brave new media world revisited. Een nog kritischer blik op het nieuwe mediabeleid van de Raad van Europa”, 24 *Mediaforum* 2012-11/12, pp. 338-345; Tarlach McGonagle, ‘User-generated Content and Audiovisual News: The Ups and Downs of an Uncertain Relationship’, *op. cit.*, pp. 7-25; Nina Vajic & Panayotis Voyatzis, “The internet and freedom of expression: a ‘brave new world’ and the ECtHR’s evolving case-law”, in Josep Casadevall, Egbert Myjer, Michael O’Boyle & Anna Austin, Eds., *Freedom of Expression: Essays in honour of Nicolas Bratza*, *op. cit.*, pp. 391-407.

¹⁵⁹ Judgment of the European Court of Human Rights of 18 December 2012, para. 54.

In its burgeoning case-law on Internet-related issues, the Court has focused on, *inter alia*, the duty of care of ISPs,¹⁶⁰ the added value of online newspaper archives for news purposes¹⁶¹ and interestingly, the challenges of sifting through the informational abundance offered by the Internet.¹⁶²

These developments are tentative in the Court's case-law, but more advanced in other standard-setting activities. While not legally binding, such standard-setting work, notably by the Committee of Ministers¹⁶³ and Parliamentary Assembly,¹⁶⁴ is politically persuasive.¹⁶⁵ Nevertheless, the standard-setting texts focusing on freedom of expression online, pay only scant attention to online hate speech. As already noted, in the political texts adopted at the 1st Council of Europe Conference of Ministers Responsible for Media and New Communication Services, *A new notion of media?*,¹⁶⁶ there was minimal attention for hate speech. This is difficult to explain, given that: (i) there is a real resurgence of "hate speech" in a new media context, which poses considerable regulatory challenges, and (ii) the purpose of the Conference was to map out priorities in European media policy to be addressed by the Council of Europe in the coming years. In the normative roll-out from the Ministerial Conference, some of the most relevant texts adopted by the Committee of Ministers contained few, if any, specific/significant provisions on online hate speech:

- Recommendation on a new notion of media (one provision/paragraph);¹⁶⁷
- Recommendation on the protection of human rights with regard to search engines (no reference);¹⁶⁸
- Recommendation on the protection of human rights with regard to social networking services (no reference).¹⁶⁹

¹⁶⁰ *K.U. v. Finland*, Judgment of the European Court of Human Rights of 2 December 2008, para. 49.

¹⁶¹ *Times Newspapers Ltd. (nos. 1 & 2) v. the United Kingdom*, Judgment of the European Court of Human Rights of 10 March 2009, para. 45.

¹⁶² *Editorial Board of Pravoye Delo & Shtekel v. Ukraine*, Judgment of the European Court of Human Rights of 5 May 2011, para. 63.

¹⁶³ Susanne Nikoltchev & Tarlach McGonagle, Eds., *Freedom of Expression and the Media: Standard-setting by the Council of Europe, (I) Committee of Ministers - IRIS Themes* (Strasbourg, European Audiovisual Observatory, 2011).

¹⁶⁴ Susanne Nikoltchev & Tarlach McGonagle, Eds., *Freedom of Expression and the Media: Standard-setting by the Council of Europe, (II) Parliamentary Assembly - IRIS Themes* (Strasbourg, European Audiovisual Observatory, 2011).

¹⁶⁵ Tarlach McGonagle & Kim de Beer, "A brave new media world? Een kritische blik op het nieuwe mediabeleid van de Raad van Europa", 22 *Mediaforum* 2010-5, pp. 146-156.

¹⁶⁶ The 1st Council of Europe Conference of Ministers Responsible for Media and New Communication Services, Reykjavik, 28-29 May 2009.

¹⁶⁷ Recommendation CM/Rec(2011)7 of the Committee of Ministers to member states on a new notion of media, 21 September 2011. The only specific provision is para. 91: "Media should refrain from conveying hate speech and other content that incites violence or discrimination for whatever reason. Special attention is needed on the part of actors operating collective online shared spaces which are designed to facilitate interactive mass communication (or mass communication in aggregate). They should be attentive to the use of, and editorial response to, expressions motivated by racist, xenophobic, anti-Semitic, misogynist, sexist (including as regards LGBT people) or other bias. Actors in the new media ecosystem may be required (by law) to report to the competent authorities criminal threats of violence based on racial, ethnic, religious, gender or other grounds that come to their attention".

¹⁶⁸ Recommendation CM/Rec(2012)3 of the Committee of Ministers to member States on the protection of human rights with regard to search engines, 4 April 2012. Hate speech is not even mentioned in the section entitled, 'Human rights and fundamental freedoms can be threatened by the operation of search engines'.

In light of this under-integration of the Council of Europe’s general principles and experience in combating hate speech in its recent incursions into the protection of freedom of expression in an online environment, it is imperative that systematic attention be paid to logical connections and synergies in the future. A first step in this direction would involve a rearguard action identifying already-existing points of connection and synergy and an exploration of the scope for analogous application of principles of media freedom to other actors in the online communications environment.

Conclusions and recommendations

1. *Repurpose* the Committee of Ministers’ Recommendations (97) 20 and 21 for optimal application in the online environment;
2. *Foreground* online hate speech in the Council of Europe’s standard-setting work;
3. *Provide guidance* on the calibration of rights, duties and responsibilities in the digital age, in particular regarding online hate speech;
4. *Enhance* capacity-building and awareness-raising;
5. *Crowd-source* and *collaborate* in the search for solutions;
6. *Develop* and *effectively promote* an ‘Anti-Hate Speech Pledge’ for politicians and political parties.

1. *Repurpose* the Committee of Ministers’ Recommendations (97) 20 and 21 for optimal application in the online environment

The importance of the Committee of Ministers’ Recommendation on “hate speech” has already been underscored. Its continued across-the-board relevance in the Council of Europe’s overall approach to hate speech will depend partly on its ability to effectively address the growing number of questions relating specifically to online hate speech. A number of years ago, the Committee of Ministers turned down a request by the Parliamentary Assembly “to revise its Recommendation No. R (97) 20 on ‘hate speech’ or to prepare guidelines taking into account new developments on this subject, notably as regards the European Court of Human Rights’ case-law”.¹⁷⁰

The 5th Ministerial Conference on Mass Media Policy called for States to implement the principles set out in the twin Recommendations and to ensure that measures targeting hate speech disseminated through new information and communications services duly respect freedom of expression. This is consistent with Principle 2 of Recommendation No. R (97) 20, which calls on States, *inter alia*, to “review the existing legal framework in order to ensure that it applies in an adequate manner to the various new media and communications services and networks”.

¹⁶⁹ Recommendation CM/Rec(2012)4 of the Committee of Ministers to member States on the protection of human rights with regard to social networking services, 4 April 2012. Hate speech is not even mentioned in the section entitled, ‘Human rights may be threatened on social networks’.

¹⁷⁰ See: Parliamentary Assembly of the Council of Europe, Recommendation 1814 (2007) Towards decriminalisation of defamation, 4 October 2007, para. 3, and the Reply by the Committee of Ministers, Doc. 11640, 11 June 2008, para. 5.

The ECHR is a living instrument and it aims to ensure that rights are not just theoretical or illusory, but practical and effective. It is also concerned with ensuring that effective remedies are available whenever human rights are violated. Other Council of Europe instruments, whatever their legal or political status, share these aims and concerns. It is therefore imperative that relevant standards – in particular Recommendations (97) 20 and 21 – be repurposed for optimal application in the reconfigured communications environment.

2. *Foreground* online hate speech in the Council of Europe’s standard-setting work

The repurposing exercise could be initiated by a study identifying key conundrums and challenges that arise specifically in the context of online hate speech. A scoping exercise could follow, which would meticulously map the identified issues with relevant Council of Europe standard-setting and monitoring work and explore in detailed fashion how existing texts and initiatives could meaningfully address those issues. All of this could feed into a concerted foregrounding of key issues into relevant standard-setting work by the Council of Europe’s various organs.

3. *Provide guidance* on the calibration of rights, duties and responsibilities in the digital age, in particular regarding online hate speech

Recommendations (97) 20 and 21 are solidly grounded in key principles of the European Court of Human Rights for safeguarding freedom of expression, while resolutely tackling hate speech. Those principles are nuanced and plead for differentiated responses. It is imperative in this connection that rights, duties and responsibilities of all relevant actors are not conflated; the relationship between rights, on the one hand, and the duties and responsibilities that accompany the exercise of those rights, on the other hand, are properly calibrated. Promotional measures, rather than restrictive ones, are often best suited to sensitising actors to their duties and responsibilities.

4. *Enhance* capacity-building and awareness-raising

The Council of Europe should seize its current anti-hate speech momentum and take it to new levels. Over the years, its various treaties and bodies have played a very valuable role in fostering inter-cultural dialogue and understanding. Renewed efforts are required to consolidate past achievements and strengthen focuses on the online environment, eg. through the further development of the No Hate Speech Movement, Living Together Online, etc. Investment in capacity-building measures for a variety of actors and awareness-raising targeting all sections of society should therefore be increased.

5. *Crowd-source* and *collaborate* in the search for solutions

These suggested measures necessarily have to be conducted in collaboration with a wide range of stakeholders from all sections of society. States authorities should participate in a stock-taking and evaluation exercise focusing on whether their national (legal) systems adequately reflect and implement the principles set out in Recommendation (97) 20, including in respect of the online environment. Such an

exercise could provide valuable, evidence-based, input for the distillation of guidance or best practices on how to repurpose the twin Recommendations for optimal application in the online environment.

6. *Develop and effectively promote* an ‘Anti-Hate Speech Pledge’ for politicians and political parties

Notwithstanding the importance of clarifying some doctrinal divergence in the case-law of the European Court of Human Rights, the Council of Europe is ideally-placed to compile a detailed tool-kit of concrete anti-hate speech measures/best practices that could be adopted by political parties throughout Europe. Such measures could be gleaned from the extensive combined expertise and experience of various Council of Europe bodies. The compilation could be presented as a ‘Pledge’; a certain minimum number of commitments would have to be entered into, in return for which, a party could display the logo for the Pledge on all of its official materials. In order to ensure seriousness of purpose and meaningful uptake, participating party leaders would be obliged to attend annual meetings to explain and evaluate their parties’ actions to combat hate speech. A non-roll-back clause could be included in order to ensure that annual achievements would continuously be built on.¹⁷¹

¹⁷¹ This suggestion is inspired by the *modus operandi* of the Creative Diversity Network: <http://creativediversity.com>.