Faith in public debate: an inquiry into the relationship between freedom of expression and hate speech pertaining to religion and race in France, the Netherlands and European and international law

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Chapter 3 – EUROPEAN AND INTERNATIONAL LAW
Introduction

The previous chapter discussed the relevant international scientific literature on the relationship between freedom of expression and the regulation of hate speech – on the basis of religion, using four factors: actions versus opinions; public debate versus other types of expression; facts versus value judgments; and race versus religion. The chapter provided a definition of these factors and taken together they formed an analytical framework for the analysis of the positive law. This chapter analyses the international and European law on the restriction of hate speech. Five international and European instruments are selected that are particularly relevant to the regulation of hate speech in Europe. As both France and the Netherlands are state parties to the selected instruments, these are directly relevant to the comparative study in the following chapters. The aim of this chapter is twofold. Firstly, it aims to determine what, according to the selected legal instruments, the state obligations with regard to the restriction of hate speech are. Secondly, it aims to evaluate the consistency thereof in the light of the factors of the analytical framework.

The chapter begins with a detailed analysis of the case law of the European Court of Human Rights (ECtHR) on Article 10 of the European Convention of Human Rights (ECHR). After all, decisions of the ECtHR are binding and whatever norms on hate speech arise from the Court’s case law have effect on national law (para. 1). In the following two paragraphs a number of non-binding standards with regard to the regulation of hate speech of different sections of the Council of Europe are discussed, subdivided into a selection of Resolutions and Recommendations of institutions of the Council of Europe (para. 2) and the Additional Protocol to the Convention on cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems (para. 3). These are followed by an examination of the obligations arising from Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law of the European Union (para. 4).

Then the attention is shifted to international law. Paragraph five analyses the obligation for states to prohibit by law ‘any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence’ of Article 20 (2) of the International Covenant on Civil and Political Rights (ICCPR) and its relationship with the right to freedom of expression protected in Article 19 ICCPR (para. 5). Subsequently, paragraph six discusses the obligation for states to criminalize forms of racial hate speech of Article 4a of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and its relationship with the ‘due regard’ clause of Article 5 ICERD. Unlike with the ECHR, the focus is more on the interpretation of the norms themselves than on the case law of the monitoring bodies of the ICCPR and ICERD; after all, other than the ECtHR, the latter issue non-binding communications in cases of individual complaints.
The chapter concludes with a brief summary of the state obligations with regard to the restriction of hate speech as they arise from the selected instruments and the consistency thereof in the light of the factors from the analytic framework (para. 7).

1. The European Convention on Human Rights (ECHR)

The European Convention on Human Rights (ECHR) was adopted in 1950 and entered into force in 1953. The European Court of Human Rights (ECtHR) ensures the enforcement and the implementation of the Convention by the member states and deals with individual complaints about alleged violations of the Convention articles. Its decisions are binding on the member states. The ECtHR has in its case law developed a number of general standards for the interpretation and application of the right to freedom of expression as protected in Article 10 ECHR (1.1). Subsequently, the Court’s case law sets clear and strict requirements with regard to the restriction of speech directed against the government that amounts to incitement to violence (1.2). The standards for restrictions to hate speech are, however, less clear (1.3). The same applies to the demarcation of hate speech from blasphemy and religious offence (1.4). The Court treats Holocaust denial as a particularly condemnable form of hate speech (1.5). Although speech that amounts to hate speech may be prohibited, the ECtHR appears reluctant to develop any positive state obligations with regard to its criminalization and prosecution (1.6). The paragraph concludes with a synthesis of the state obligations with regard to the restriction of hate speech under the ECHR and the consistency thereof in the light of the factors from the analytic framework (1.7).

1.1 The general framework of Article 10 ECHR

*Scope of freedom of expression under Article 10 (1) ECHR*

Freedom of expression is protected in Article 10 (1) ECHR that reads ‘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.’240 The ECtHR is generally said to interpret the scope of freedom of expression broadly.241

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240 Article 10 ECHR does not explicitly guarantee the freedom to seek information and ideas. However, the refusal by public bodies to provide access to documents holding information needed for public debate is a violation of Article 10. See: ECHR 14 April 2009, no. 37374/05 (Társaság a Szabadággigokért v. Hungary, para. 35-39). See also: ECtHR (Grand Chamber) 3 April 2012, no. 41723/06 (Gillberg v. Sweden).

This primarily applies to the *substance* of expression. The ECtHR has considered that ‘freedom of expression is applicable not only to ‘information’ or ‘ideas’ that are favorably 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’.\(^{242}\) This phrase has become standard case law, which the ECtHR has reiterated on many occasions.\(^{243}\)

Furthermore, the ECtHR has emphasized that ‘Article 10 protects not only the substance of the ideas and information expressed, but also the *form* in which they are conveyed’.\(^{244}\) Article 10 is not restricted to ‘certain categories of information, ideas or forms of expression’.\(^{245}\) Finally, the ECtHR has stated that ‘Article 10 applies not only to the content of information, but also to the *means* of transmission or reception since any restriction to the means necessarily interferes with the right to receive and impart information’.\(^{246}\)

Hence, in principle Article 10 (1) protects freedom of expression of ideas and information regardless of their substance or nature and regardless of the medium or distribution channel used.\(^{247}\) Subsequently, the broad protection of Article 10 (1) has been afforded to a wide range of expressions, including offensive or insulting speech, defamatory statements, political criticism in a polemic and aggressive tone, advertisements, artistic expression, interviews and statements in books, articles, magazines, newspapers, on the radio or television, pamphlets, cartoons, public speeches and many more.\(^{248}\)

Next to oral and written speech, Article 10 also covers conduct consisting of *physical actions*. The ECtHR has considered that protests, although in the form of physically impeding the activities of which the protesters disapproved, nonetheless constituted expressions of opinion within the meaning of Article 10.\(^{249}\) Likewise, with regard to symbolic speech, the ECtHR has considered that a person’s decision to wear a red star in public must be regarded as his way of expressing his political views and that the display of vestimentary symbols falls within the ambit of Article 10.\(^{250}\) However, not all physical actions

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\(^{242}\) ECtHR 7 December 1976, no. 5493/72 (Handyside v. United Kingdom), para. 49.

\(^{243}\) ECtHR 24 May 1985, no. 10737/84 (Muller v. Switzerland), para. 33; ECtHR (Grand Chamber) 23 September 1994, no. 15890/89 (Jersild v. Denmark), para. 37.

\(^{244}\) ECtHR (Grand Chamber) 23 September 1994, no. 15890/89 (Jersild v. Denmark), para. 31; ECtHR 23 May 1991, no. 11662/85 (Oberschlick v. Austria), para. 57.

\(^{245}\) ECtHR 16 December 1992, no. 12945/87 (Hadjianastassiou v. Greece), para. 39.

\(^{246}\) ECtHR 22 May 1990, no. 12726/87 (Autronic v. Switzerland), para. 47.

\(^{247}\) Vande Lanotte & Haeck 2004, p. 900.

\(^{248}\) Vande Lanotte & Haeck 2004, p. 901-911.

\(^{249}\) ECtHR 23 September 1998, no. 24838/94 (Steel and Others v. The United Kingdom), para. 92.

\(^{250}\) ECtHR 8 July 2008, no. 33629/06 (Vajnai v. Hungary), para 47.
are afforded protection under 10 ECHR, only ‘expressive’ conduct that communicates information or ideas.

Freedom to express opinion can be closely connected to the exercise of other fundamental rights protected in the ECHR, notably freedom of thought, conscience and religion (9 ECHR) and freedom of assembly and association (11 ECHR). The latter freedoms could be regarded as leges speciales to Article 10. One could argue that Article 9 ECHR protects the freedom to express opinions that reflect an author’s conviction. In situations where several persons jointly express a given opinion, for example during a demonstration, Article 11 ECHR may apply next to Article 10. The delimitation of the articles and their application may vary according to the particular circumstances of the case (infra).

Not every measure by the state that in some way affects a person’s freedom of expression however constitutes a matter falling within the scope of Article 10, only when a measure is, for example, primarily based on a person’s political opinion. According to the Court, this was the case with regard to the dismissal of a civil servant by virtue of her association with the German Communist Party and with regard to the decision not to promote a police officer on the ground of his membership of an extreme-right winged party.

Although the scope of freedom of expression under Article 10 (1) is thus quite broad – it includes all kind of conduct as long as it communicates information or ideas – not all measures that may affect freedom of expression form an Article 10 issue, but measures based on such information or ideas do.

Limitations to freedom of expression under 10 (2) ECHR

Freedom of expression as protected under Article 10 (1) ECHR is not absolute, but may be restricted under the conditions set in 10 (2). Article 10 (2) stipulates that the exercise of freedom of expression carries with it duties and responsibilities. Such reference is absent with regard to the exercise of other freedoms listed in the Convention. During the drafting of the ECHR, it was maintained that freedom of expression was a precious heritage as well as a dangerous instrument and, in view of the powerful influence the modern media of expression had on individuals and on national and international affairs, that

253 ECHR (Grand Chamber) 26 September 1995, no. 17851/91 (Vogt v. Germany).
254 ECHR 24 November 2005, no. 27574/02 (Otto v. Germany).
255 Article 10 (2) reads ‘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.’
these ‘duties and responsibilities’ should be specially emphasized. This would offer State parties an express tool to counter abuse of power by the modern mass media.\footnote{256}

The reference could suggest that there are inherent or implied limitations to freedom of expression. As a general rule, the reference is, however, not to be interpreted as such.\footnote{257} In its case law, the ECtHR rather seems to refer to the duties and responsibilities of a speaker as an additional argument in case the Court has come to the conclusion that a restriction to a particular statement was justified, which is notably the case with regard to speech uttered by political figures (para. 1.3 infra).

Under 10 (2) the ECtHR primarily determines whether a measure by the State constitutes an interference with an applicant’s freedom of expression or opinion in the form of ‘formalities, conditions, restrictions or penalties’. Preventive measures are not prohibited as such.\footnote{258} Subsequently, the ECtHR determines whether a measure by the State constitutes a violation of an applicant’s freedom of expression or opinion by reviewing whether a restriction is a) prescribed by law; pursues b) a legitimate aim; and is c) necessary in a democratic society. Given the broad scope of Article 10 (1), the onus is on the State to demonstrate that its interference is justified under 10 (2).

ECtHR has further elaborated these requirements. A norm must be ‘accessible’ to a citizen in order for him to have an adequate indication of the legal rules applicable to a given case and ‘foreseeable’, i.e. formulated with ‘sufficient precision’ to enable a citizen to foresee the consequences which a given action may entail.\footnote{259} It has been established that even though the general prohibition of the wrongful act in a country’s civil law code might produce problems of interpretation, such a provision is not too vague and insufficiently precise to form a legal basis for restrictions to freedom of expression, if the norm is further elaborated in the case law of the Supreme Court.\footnote{260} However, in the chapters on France and the Netherlands it will become apparent that the national law of European countries may strongly differ on this point.

The limitative enumeration of grounds on which a state may impose restrictions does not concern the content of expression, but a listing of permissible purposes for interference. It includes ‘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

\footnote{256} Council of Europe, European Commission of Human Rights Preparatory work on Article 10 of the European Convention on Human Rights, DH (56) 15.
\footnote{257} Harris, O’Boyle & Warbrick 2009, p. 493.
\footnote{258} Although, –temporary- prohibitions on press publications call for ‘particularly close scrutiny’, because they can annul their news value. See: ECtHR 26 April 1979, no. 6538/74 (Sunday Times v. The United Kingdom), para. 63.
\footnote{259} ECtHR 26 April 1979, no. 6538/74 (Sunday Times v. The United Kingdom), para. 49.
\footnote{260} ECtHR, 21 October 1998, Mediaforum 1999-1, nr. 3.
or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary’. These grounds must be interpreted restrictively and ‘within the meaning of the Convention’.261

Most relevant to this study are the limitation grounds of morals, the reputation or rights of others, national security, public safety and the prevention of disorder. With the term ‘disorder’ the drafters of the ECHR aimed to avoid the uncertainty that was connected to the broader term of the protection of the ‘public order’ used in other human rights instruments.262 The English non-legal term ‘public order’ was generally used to mean the absence of disorder. Contrarily, the French legal term ‘l’ordre public’ was best translated as ‘public policy’ and would allow for far-reaching restrictions that could completely undermine freedom of expression.263

In the evaluation of restrictions by the ECtHR, the emphasis is often on the necessity-test. The Court has explained the test as follows: in order for a restriction to be necessary there must be a pressing social need for the restriction; the restriction must be proportional to the legitimate aim pursued; and the reasons for the restriction must be relevant and sufficient.264 265 Furthermore, the necessity of a restriction must be convincingly established.266 It is generally assumed that the ECtHR balances the interest in freedom of expression of the applicant against the countervailing interest of the state and/or other persons protected by the restriction in the light of all the circumstances of the case. Important factors in the balancing-test include the content and context of expression, the person of the speaker, his intention, the medium used, the possible impact of expression on the public and the nature (proportionality) of the restriction.

The ECtHR, however, has a different function than national courts and does not constitute a court of ‘fourth instance’. It therefore affords state parties a certain margin of appreciation for determining whether a restriction is necessary, because ‘by reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position to judge the necessity of a particular restriction’. Nevertheless, the ECtHR stipulates that the domestic margin of appreciation ‘goes hand in hand with a European supervision’, which is not limited to a due diligence review

261 ECtHR 26 April 1979, no. 6538/74 (Sunday Times v. The United Kingdom), para. 55.
262 Article 19 ICCPR.
263 Council of Europe, European Commission of Human Rights Preparatory work on Article 10 of the European Convention on Human Rights, DH (56) 15, p. 25.
264 ECtHR 7 December 1976, no. 5493/72 (Handyside v. The United Kingdom), para. 48-50; ECtHR 26 April 1979, no. 6538/74 (Sunday Times v. The United Kingdom), para. 62.
266 ECtHR (Grand Chamber) 6 May 2003, no. 48898/99 (Perna v. Italy), para. 39.
and ascertaining whether a respondent State exercised its discretion ‘reasonably, carefully and in good faith’.  

In fact, the extent of the margin of appreciation depends on the particular nature of expression and the particular limitation ground in question. With regard to limitation grounds concerning ‘objective notions’ and speech for which there exists a ‘European common ground’, the ECHR affords states a small margin. Examples are restrictions on the press and political speech and for the protection of national security or the prevention of disorder. In such cases, the ECHR generally exercises an integral review and independently evaluates the arguments of the opposing parties.

Contrarily, as morals and religion concern ‘subjective notions’ for which no such ‘European common ground’ exists, in these fields the ECHR affords states a large margin. In such cases, the ECHR generally exercises a more distanced, restrained or marginal review. The application of a marginal review by the ECHR is criticized for sometimes amounting to balancing in abstracto the interest of the expression itself against the interest of the purpose of the restriction – so-called ‘speech/harm balancing’ – instead of starting from the right to freedom of expression that is subjected to a limitative number of restrictions that are to be interpreted restrictively.

It is argued that such an abstract test runs the risk of merely rationalizing legal preferences and disregarding the context of the case. Moreover, the ECHR is criticized for sometimes starting from a ‘presumption in favour of the State’ and shifting the onus to the side of the plaintiff, who then must demonstrate the unreasonableness of the measure. One may question whether in such cases the Court performs an actual balancing-test. When the ECHR affords states a large margin, it generally determines whether or not a State could have reasonably come to its decision. This may come down to a mere due diligence review after all.

It is argued that the ECHR’s use of the margin of appreciation doctrine as an instrument to deal with the need to reconcile European standard setting and national diversity must be improved; especially the legal certainty created by proper application of the doctrine in a predictable and well-structured fashion is of great value in a highly case-based system. Moreover, it is argued that the application of the doctrine must be embedded more into the ECHR’s

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267 ECHR 26 April 1979, no. 6538/74 (Sunday Times v. The United Kingdom), para. 59.
practice of ‘incrementalism’ and the gradual creation of general principles through case-based decision-making that are applicable in following cases.\footnote{Gerards, J.H., Diverging Fundamental Rights Standards and the Role of the European Court of Human Rights, To be published in: M. Claes and M. De Visser (eds), \textit{Constructing European Constitutional Law}, Oxford: Hart 2014.}

It is notably in the field of freedom of expression that the ECtHR has created such general principles, which will be discussed in following sections. But a consistent application of these principles is precisely complicated by the ECtHR’s use of the margin of appreciation. Why would the ECtHR not exercise a stringent review of restrictions on hate speech uttered in a political discussion on a country’s immigration problems, like it normally does with regard to political speech? And why would the ECtHR not apply the distinction between facts and value judgments, which it uses to evaluate convictions for defamation, to hate speech that generally consists of factual imputations against or strong value judgments about a particular group? These questions will be elaborated on later (para. 1.3 infra).

The evaluation system of restrictions to freedom of expression as used by the ECtHR results in a complex body of Article 10 case law. Deriving a consistent line therein is complicated, on the one hand by the manner in which the doctrine of margin of appreciation and general principles are applied and on the other hand, by the (laudably) high contextualization of ‘stringent review’ cases. Moreover, the ECtHR is often strongly divided and in such cases the final judgment of the Court is counterbalanced by the dissenting opinions that may reflect a diametrically opposite view. This also notably applies in cases concerning forms of hate speech (para. 1.3 infra).

\textit{Categorization of expression}

For the evaluation of restrictions to freedom of expression the ECtHR generally distinguishes between different categories of speech. Hate speech may fall under any of these categories. Depending on the nature of the speech at issue, the ECtHR uses a different standard of review, which must be seen in the broader context of the doctrine of the ‘margin of appreciation’ granted to the national authorities to determine the necessity of a restriction to a particular expression (\textit{supra}). The ECtHR affords the highest level of protection to political speech, for which it uses a stringent standard of review (\textit{supra}).

The ECtHR has furthermore brought artistic expression under the scope of Article 10, considering that it ‘affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds (...) Those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society. Hence the obligation on the State not to encroach unduly on
their freedom of expression. An important aspect of artistic expression is the freedom to receive it.

Artistic expression is nevertheless accorded a less privileged position than political expression. This may be explained by the fact that in cases before the ECtHR concerning artistic expression the expression concerned often questions existing public morals or religious convictions in a provocative manner. As morals or religious convictions may vary from one society to another, the ECtHR gives states more leeway to restrict speech concerning these issues. The ECtHR’s case law concerning artistic expression thus reflects a certain relativism regarding morals.

In certain cases, this results in allowing the state to prohibit harsh criticism of a minority in order to protect the sensitivities and feelings of a religious majority. However, the norm that expression may ‘offend, shock and disturb’ is especially important to artistic expression, because of the ‘inherently subversive nature of the artistic impulse’. Moreover, the role of avant garde that artists play is essential for a pluralistic democracy.

Finally, commercial expression, which may be defined as ‘the expression of information and ideas for the promotion of an economic activity and the right to receive it’, falls under the scope of Article 10. Such commercial expression is afforded even less protection than political or artistic expression. The ECtHR justifies its lax standard of review of restrictions to commercial expression by referring to the values underlying freedom of expression that would primarily purport to protect political ideas, to the need to protect consumers from misleading advertising and to the need to restrict unfair competition practices.

The ECtHR seemingly treats political, artistic and commercial speech as mutually exclusive categories and may be criticized for not acknowledging more explicitly the possibility of category-crossovers. It is exactly the existence of mixed categories that entails the risk of mis-categorization. In cases that held the ECtHR strongly divided, a pivotal question was often whether or not the artistic or commercial expression entered into a political or public debate and

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273 ECtHR 24 May 1988, no. 10737/84 (Muller and Others v. Switzerland), para. 27 and 33.
274 ECtHR 16 February 2010, no. 41086/04 (Akdas v. Turkey), para. 30. In this case concerning the criminal conviction for the publication of a Turkish translation of the French erotic novel ‘Les onze mille verges’ of Appolinaire, the ECtHR stressed the importance of having access to European literary heritage.
275 See further para. 1.4.
277 Harris, O’Boyle & Warbrick 2009, p. 474, f. 114.
280 Randall 2006, p. 75-76.
consequently which standard of review was to be used.\textsuperscript{281} In some cases, the ECHR decided that gratuitously offensive expression could not form part of public debate.\textsuperscript{282}

This markedly applies in the field of religion. The ECHR has not developed a particular category of ‘religious expression’ under 10 ECHR. On the one hand, religiously motivated expression directed against secular values fall under the broader category of anti-democratic speech (para. 1.3 infra).\textsuperscript{283} On the other hand, whether or not criticism of religious convictions forms part of public debate, notably depends on the form or media used (para. 1.4 infra).\textsuperscript{284}

\textbf{Facts or value judgments}

Another form of ‘categorization’ of expression used by the ECHR for the evaluation of restrictions to freedom of expression is the distinction that the ECHR makes between statements of fact and the expression of value judgments. In principle, the protection of the reputation and honor of individuals through the prohibition of defamatory expression in criminal or civil law is a legitimate aim. Such an interference with freedom of expression is allowed under Article 10 (2) in order to protect ‘the rights of others’. It falls outside the scope of this study to give a detailed account of the rich case law, in which the ECHR examined the proportionality of national measures against alleged defamatory speech.\textsuperscript{285} From this case law a number of general principles can however be derived.

The Court primarily emphasizes that ‘a careful distinction needs to be made between facts and value judgments. The existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof.’\textsuperscript{286} The ECHR considered the accusation of the Austrian Prime Minister of ‘the basest opportunism’ and acting in an ‘immoral’ and ‘undignified’ manner to constitute a value judgment on a matter of political concern for which the state could not require the proof of truth. Therefore, the conviction for defamation by lack of proof was disproportionate.\textsuperscript{287}

Likewise, the ECHR found the conviction for defamation with regard to

\begin{footnotesize}
\begin{enumerate}
\item See notably: ECHR 29 March 2005, no. 40287/98 (Alinak v. Turkey); ECHR 8 July 1999, no. 23168/94 (Karakaş v. Turkey); ECHR 25 January 2007, no. 68354/01 (Vereinigung Bildender Künstler v. Austria).
\item ECHR 20 September 1994, no. 13470/87 (Otto Preminger Institute v. Austria).
\item ECHR (Grand Chamber), 13 February 2003, no. 41340/98 41342/98 41343/98 41344/98 (Refah Partisi and others v. Turkey).
\item Notably: ECHR 24 May 1988, no. 10737/84 (Muller and Others v. Switzerland); ECHR 20 September 1994, no. 13470/87 (Otto Preminger Institute v. Austria). See further para. 1.4.
\item For a thorough analysis, see: Harris, O’Boyle & Warbrick 2009, p. 479-482; 496-511.
\item ECHR 8 July 1986, no. 9815/82 (Lingens v. Austria), para. 46; ECHR 24 February 1997, no. 19983/92 (De Haes and Gijsels v. Belgium), para. 42.
\item ECHR 8 July 1986, no. 9815/82 (Lingens v. Austria), para. 42-43.
\end{enumerate}
\end{footnotesize}
a description of the leader of the Austrian Freedom Party (FPO), Jörg Haider, as an ‘idiot’ to violate freedom of expression. According to the Court, the term did not constitute ‘a gratuitous personal attack’, but an opinion in a polemic tone. It formed part of a political discussion provoked by a speech of Haider that was itself provocative.\footnote{ECHR 1 July 1997, no. 20834/92 (Oberschlick v. Austria no. 2), para. 33.}

The ECtHR thus generally thoroughly examines whether the expression at issue must be classified as either a factual assertion or a value judgment and does not leave states a wide margin in this area. The ECtHR does not examine statements in isolation, but may conclude on the basis of their overall context that they constitute ‘value judgments for which no proof of truth is possible’.\footnote{ECHR 28 August 1992, no. 13704/88 (Schwabe v. Austria), para. 34.} Furthermore, the ECtHR uses a broad meaning of the notion of value judgment. In this manner it affords a high level of protection to freedom of expression.

For example, a politician had been convicted for defamation with regard to his remark that sects have as a common feature a totalitarian character and show fascist tendencies. The national court considered this to be a statement of fact not proven to be true. Contrarily, the ECtHR considered the remark to be a value judgment and a fair comment on matters of public interest.\footnote{ECHR 27 February 2001, no. 26958/95 (Jerusalem v. Austria), para. 44.} Likewise, the ECtHR found the comparison by a Jehovah’s Witness of the method of ‘deprogramming’ offered by an organization that aided victims of religious sects with the Soviet method of psychological internment of dissidents to constitute a value judgment, not a statement of fact.\footnote{ECHR 22 December 2005, no. 54968/00 (Paturel v. France).}

However, the ECtHR considers that \textit{strong} value judgments must be grounded in at least some objective data and therefore examines whether such value judgments have a ‘sufficient factual basis’.\footnote{ECHR 26 February 2002, no. 28525/95 (Unabhängige Initiative Informationsvielfalt v. Austria), para. 39-40; ECtHR (Grand Chamber) 17 December 2004, no. 49017/99 (Pedersen and Baadsgaard v. Denmark, para. 76.} The Court found the remark \textit{‘But these are Nazis, these are Nazi methods’}, made in the course of a local discussion about the creation of a foster home for mentally ill persons in reaction to an opponent of the plan who argued that the value of houses would be lowered in the neighbourhood, to be particularly offensive given the special stigma attached to Nazism. Therefore the applicant had exceeded the limits of acceptable criticism.\footnote{ECtHR 17 November 2005, no. 56720/00 (Metzger v. Germany).}

Yet, the distinction between facts and value judgments is less important with regard to political speech than in other contexts. In one case, the ECtHR considered that ‘the distinction between statements of fact and value judgments is of less significance in a case such as the present, where the impugned statement is made in the course of a lively political debate at local level and

\footnote{\textsuperscript{288} ECHR 1 July 1997, no. 20834/92 (Oberschlick v. Austria no. 2), para. 33. \textsuperscript{289} ECHR 28 August 1992, no. 13704/88 (Schwabe v. Austria), para. 34. \textsuperscript{290} ECHR 27 February 2001, no. 26958/95 (Jerusalem v. Austria), para. 44. \textsuperscript{291} ECHR 22 December 2005, no. 54968/00 (Paturel v. France). \textsuperscript{292} ECHR 26 February 2002, no. 28525/95 (Unabhängige Initiative Informationsvielfalt v. Austria), para. 39-40; ECHR (Grand Chamber) 17 December 2004, no. 49017/99 (Pedersen and Baadsgaard v. Denmark, para. 76. \textsuperscript{293} ECHR 17 November 2005, no. 56720/00 (Metzger v. Germany).}
where elected officials and journalists should enjoy a wide freedom to criticize
the actions of a local authority, even where the statements made may lack a clear
basis in fact."294

With regard to statements made in a novel, an artistic, literary work
based on real political events and figures, the making of a consistent distinction
between facts and value judgments and the proof of a factual basis becomes
particularly difficult. The ECtHR found a criminal conviction for defamation
with regard to the comparison of an ‘ex-leader of an extreme right political
party’ with a ‘chief of a gang of killers’ and the allegation against him of having
‘advocated’ the murder of an immigrant in the novel ‘Jean-Marie Le Pen on
Trial’ not to violate Article 10. This equally applied to a reproduction of the
statements in the press.295

The ECtHR considered that ‘there is no need to make this distinction
(fact/opinion – EHJ) when dealing with extracts from a novel’, but that it does
become fully pertinent where ‘the impugned work is not one of pure fiction but
introduces real characters or facts’. The applicants had failed to make a ‘basic
verification’ for their factual assertions that were formed in particularly virulent
words.296 The dissenters objected that ‘a reality novel largely remains a novel,
just as docu-fiction remains, for the most part, fiction.’ The distinction becomes
‘partly pertinent when the novel and the reality coincide.’297

In the press, factual accusations, contrary to value judgments, cannot be
expressed rashly. Journalists must act ‘in good faith to provide accurate and
reliable information in accordance with the ethics of journalism.’298 In a way, this
‘duty and responsibility’ counterbalances their right to include ‘a certain degree
of exaggeration and provocation.’299 The ECtHR thus reviews whether
journalistic research has been carefully conducted, notably with regard to
serious accusations, such as the imputation of criminal facts.300 However,
journalists who report in the press may rely on authoritative sources, such as a
government report concerning the malpractices in seal-hunting.301 Then the

294 ECtHR 24 April 2007, no. 7333/06 (Lombardo v. Malta), para. 60.
295 It was legitimate to try to ensure ‘a minimum degree of moderation and propriety,
especially as the reputation of a politician, even a controversial one, must benefit from the
protection afforded by the Convention.’ ECtHR (Grand Chamber) 22 October 2007, no.
21279/02 36448/02 (Lindon, Ootchakovsky-Laurens and July v. France), para. 57.
296 Ibid., para. 37.
297 Ibid., Joint partly dissenting opinion of judges Rozakis, Bratza, Tulkens and Šikuta,
para. 5.
298 ECtHR (Grand Chamber) 20 May 1999, no. 21980/93 (Bladet Tromsø and Stensaas v.
Norway), para. 65.
299 ECtHR 30 March 2004, no. 53984/00 (Radio France and others v. France), para. 38.
300 ECtHR 10 July 2012, no. 46443/09 (Björk Eiðsdóttir v. Iceland).
301 ECtHR (Grand Chamber) 20 May 1999, no. 21980/93 (Bladet Tromsø and Stensaas v.
Norway), para. 68.
press does not have to check all relevant facts for itself. 302

When a defendant is criminally convicted for defamation based on the falsity of his statement, he must have had the opportunity to prove the truth of his allegation. In a case concerning a conviction for the allegation that the police was responsible for the murder of Basque activists and that the Government was responsible for the impunity of the perpetrators, the ECtHR found the fact that the defence of truth was not allowed in respect of insults directed at the state institutions to violate freedom of expression. 303 Another case concerned a conviction for the allegation that the Moroccan Royal family had a direct responsibility in international drug trafficking. Likewise, the ECtHR considered the inadmissibility of the proof of truth for the charge of the offence of insulting a foreign head of state disproportionate. 304

Sometimes the ECtHR notably evaluates an interference with freedom of expression as disproportionate on the basis of the severity of the sanction. The ECtHR considers that ‘a criminal sentence or an award of damages for defamation must bear a reasonable relationship of proportionality to the injury to reputation suffered.’ 305 This is not the case in relation to the award of excessive damages 306 or far reaching injunctions such as a total ban on the distribution of expression. 307 The absence of legal aid for a defendant in a defamation case may amount to an inequality of arms, thus unfair proceedings that have a chilling effect on freedom of expression. 308

The question arises as to whether the general principles the ECtHR has developed for the distinction between facts and value judgments in its case law concerning defamation about individuals and public figures are also relevant for the Court’s evaluation of restrictions to hate speech that generally consists of imputations against or strong value judgments about a particular group and, if so, whether these principles are consistently applied by the Court (para. 1.3 infra). From the foregoing it is clear that the distinction between facts and value judgments is relevant in particular with regard to statements made in the press and the media.

305 ECtHR 13 July 1995, no. 18139/91 (Tolstoy Miloslavsky v. The United Kingdom), para. 49.
306 ibid.
307 ECtHR 18 May 2004, no. 58148/00 (Editions Plon v. France), para. 53-55.
308 ECtHR 15 February no. 68416/01, (Steel and Morris v. The United Kingdom), para. 72; 95.
Public debate and the media

According to the ECHR, the press plays the vital role of a ‘public watchdog’ in a democracy.\(^{309}\) It is the task of the press and journalism to impart information and ideas on matters of public interest, including political issues, which the public has the right to receive. On the one hand, the press places policy decisions and government actions and omissions under the scrutiny of the public opinion. On the other hand, the press facilitates citizens to participate in the decision making process.\(^{310}\) Moreover, a free press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders.\(^{311}\)

The press is thus an important means to shape an informed public opinion and stimulate critical debate that extends to all matters of general public interest.\(^{312}\) Given its vital role in democracy, the ECHR has afforded a large scope of press freedom that may include a certain degree of exaggeration and provocation.\(^{313}\) Restrictions on press freedom call for strict scrutiny by the ECHR and criminal sanctions in the form of prison sentences and high penalties or the prohibition to exercise one’s profession may have an unacceptable chilling effect.\(^{314}\)

Furthermore, the ECHR has brought freedom of expression through television and radio broadcasts\(^ {315}\) and the Internet,\(^ {316}\) under the scope of Article 10. A state may regulate its national broadcasting through a licensing system or even through a public monopoly in order to ensure objective and impartial reporting and the existence of a diversity of opinions or to preserve cultural diversity through a balanced and diverse program content. Such measures may not, however, have discriminatory results.\(^ {317}\)

The press and the media could, just as politicians and political parties (infra), be seen as ‘actors’ in political and public debate and the ECHR has also set boundaries to their use of freedom of expression. The Court has considered that the suspension of a radio-broadcasting license for a year for having broadcasted songs during a radio program that incited to violence, terrorism,

\(^{309}\) ECHR 26 November 1991, no. 13166/87 (Sunday Times 2 v. The United Kingdom), para. 50 (b).

\(^{310}\) ECHR 23 April 1992, no. 11798/85 (Castells v. Spain), para. 43.

\(^{311}\) ECHR 8 July 1986, no. 9815/82 (Lingens v. Austria), para. 42.

\(^{312}\) ECHR (Grand Chamber) 17 December 2004, no. 33348/96 (Cumpana v. Romania), para. 93.

\(^{313}\) ECHR 30 March 2004, no. 53984/00 (Radio France and Others v. France), para. 37.

\(^{314}\) ECHR (Grand Chamber) 17 December 2004, no. 33348/96 (Cumpana v. Romania), para. 114.

\(^{315}\) ECHR 10 July 2003, no. 44179/98 (Murphy v. Ireland).

\(^{316}\) ECHR 18 October 2005, no. 5446/03 (Perrin v. The United Kingdom); ECHR 10 March 2009, no. 3002/03 23676/03 (Times Newspapers LTD v. United Kingdom no. 1 and 2).

\(^{317}\) ECHR 7 November 2000, no. 44802/98 (United Christian Broadcasters Ltd. V. The United Kingdom).
racial discrimination and feelings of hatred did not violate Article 10.\textsuperscript{318} Contrarily, the ECtHR found that the criminal conviction of a journalist for ‘aiding and abetting’ the racist statements of a particular youth group by broadcasting them in a television interview did violate Article 10. The item did not have as its purpose the propagation of racist views and ideas, but was aimed at informing the public and animating public discussion about the existence of the racist views of the group. As well as this, the journalist had distanced himself from and rebutted the racist statements.\textsuperscript{319} Statements made by interviewed persons thus cannot simply be attributed to the interviewing journalist (para. 1.3 \textit{infra}). The media has a special role in the fulfilling of the function of freedom of expression in a democracy.

\textit{Public debate and democracy}

In its preamble, the ECtHR establishes a clear connection between the Convention and democracy in general by stating that the maintenance and further realization of human rights and fundamental freedoms are best ensured by an effective political democracy. The ECtHR has pointed out that democracy is a fundamental feature of the European public order\textsuperscript{320} and that the Convention was designed to maintain and promote the ideals and values of a democratic society.\textsuperscript{321} Furthermore, from the fact that restrictions to Articles 8-11 ECtHR must be ‘necessary in a democratic society’, the ECtHR has deduced that ‘democracy appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it’.\textsuperscript{322}

Freedom of expression, as protected by Article 10 ECtHR has a special position within the ECtHR. This is mainly due to its capability to support the assurance of other fundamental rights; through free expression the public can be informed about the development of the democratic state and the status of human rights.\textsuperscript{323} On many occasions, the ECtHR has taken as a starting point that freedom of expression ‘constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual’s self-fulfilment.’ Ideas and information may offend, shock or

\textsuperscript{318} ECtHR 14 November 2006, no. 32842/02 (Medya FM Reha Radyo ve İletişim Hizmetleri A.Ş. v. Turkey).
\textsuperscript{319} ECtHR (Grand Chamber) 23 September 1994, no. 15890/89 (Jersild v. Denmark), para. 33-36.
\textsuperscript{320} ECtHR (Grand Chamber) 23 March 1995, no. 15318/89 (Loizidou v. Turkey), para. 75.
\textsuperscript{321} ECtHR 7 December 1976, no. 5095/71 5920/72 5926/72 (Kjeldsen, Busk Madsen and Pedersen v. Denmark), para. 53.
\textsuperscript{322} ECtHR (Grand Chamber) 30 January 1998, no. 19392/92 (United Communist Party of Turkey and Others v. Turkey), para. 45.
\textsuperscript{323} Vande Lanotte & Haeck 2004, p. 854.
disturb, because ‘such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’’.  

One of the principal characteristics of democracy is ‘the possibility it offers of resolving a country’s problems through dialogue, without recourse to violence, even when they are irksome. Democracy thrives on freedom of expression’. Freedom of expression thus has special relevance, when its aim is to contribute to the development of vulnerable ‘newly established democracies’. In the end, it is the government who is the ‘ultimate guarantor of the principle of pluralism’. Hence, the state has the obligation to ensure the existence of a plurality of opinions.

The state must therefore afford ample room to political and public debate. The ECHR has emphasized that ‘freedom of political debate constitutes a particular aspect of freedom of expression. Indeed, freedom of political debate is at the very core of the concept of a democratic society’. In other words, ‘freedom of political debate and free elections form the bedrock of any democratic system’. Therefore, the ECHR considers that ‘there is little scope under 10 (2) of the Convention for restrictions on political speech or on matters of public interest’. Restrictions on political expression call for stringent review by the Court and ‘must however be construed strictly and the need for any restrictions must be established convincingly’. In order to effectively guarantee freedom of political expression, the ECHR reviews, amongst others, whether a restriction has a ‘chilling effect’ or whether there was a ‘less restrictive alternative’. The ECHR thereby pays attention to the speaker as a particular actor in public debate.

Public debate, politicians and political parties or groupings

The ECHR has highlighted freedom of expression of certain actors within political and public debate. Next to the press and the media (supra), the freedom of expression of parliamentarians and politicians must particularly be

324 ECHR 24 May 1985, no. 10737/84 (Muller v. Switzerland), para. 33; ECHR (Grand Chamber) 23 September 1994, no. 15890/89 (Jersild v. Denmark), para. 37.
325 ECHR (Grand Chamber) 30 January 1998, no. 19392/92 (United Communist Party of Turkey and Others v. Turkey), para. 57.
329 ECHR (Grand Chamber) 19 February 1998, no. 24839/94 (Bowman v. The United Kingdom), para. 42.
331 ECHR 8 June 2001, no. 24699/94 (VGT Verein gegen Tierfabriken v. Switzerland), para. 66.
332 Harris, O’Boyle & Warbrick 2009, p. 455.
safeguarded. The ECtHR has recalled that ‘while freedom of expression is important for everybody, it is especially so for an elected representative of the people. He represents his electorate, draws attention to their preoccupations and defends their interests. Accordingly, interferences with the freedom of expression of an opposition Member of Parliament, like the applicant, call for the closest scrutiny on the part of the Court’.

Moreover, immunity may even be afforded to political speech uttered during the parliamentary debates in parliament in order to protect the interest of the entire parliament.

The question is whether a politician’s greater freedom is accompanied by a greater responsibility in the context of hate speech (para. 1.3 infra). One can ascribe an exemplary role to politicians, whose words inevitably have a larger impact on society. To a certain extent, the duties and responsibilities of politicians can be compared with those of teachers, who, according to the ECtHR, form a symbol of authority for their students and therefore must act with reserve and tolerance, even in their activities outside the school.

The other side of the coin (of political freedom) is that members of government and political figures must tolerate a higher degree of criticism than private persons, when such criticism concerns their political function. As the ECtHR has considered: ‘[u]nlke the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance’. This notably applies when a politician has made himself a public statement that is susceptible to criticism. The same applies to individuals or associations that voluntarily enter the arena of public debate.

Although the reporting of aspects of the private lives of political figures may serve the public interest, this does not include details on the private lives of public figures that are irrelevant to their public function.

Furthermore, the ECtHR has considered that political parties have ‘an essential role in ensuring pluralism and the proper functioning of democracy’ and that ‘[i]nasmuch as their activities form part of a collective exercise of the freedom of expression, political parties are also entitled to seek the protection of Article 10 of the Convention’. However, the ECtHR has set boundaries to the use of this freedom by political parties in order to incite to violence and aim to

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333 ECtHR 23 April 1992, no. 11798/85 (Castells v. Spain), para. 42; ECtHR 27 February 2001, no. 26958/95 (Jerusalem v. Austria), para. 36.
334 ECtHR 17 December 2002, no. 35373/97 (A. v. The United Kingdom).
335 ECtHR 18 May 2004, no. 57383/00 (Seurat v. France); ECtHR 7 June 2011, no. 48135/08 (Gollnisch v. France).
336 ECtHR 8 July 1986, no. 9815/82 (Lingens v. Austria), para. 42.
337 ECtHR 27 February 2001, no. 26958/95 (Jerusalem v. Austria), para. 38.
338 ECtHR 18 May 2004, no. 58148/00 (Plon v. France).
339 ECtHR 24 June 2004, no. 59320/00 (Hannover v. Germany), para. 62-64.
340 ECtHR (Grand Chamber) 30 January 1998, no. 19392/92 (United Communist Party of Turkey and Others v. Turkey), para. 43.
destroy the democratic system or the rights of others.\textsuperscript{341} To a certain extent, the ECHR thus seems to advocate the concept of the ‘militant democracy’.

However, the ECHR has also stressed that ‘measures of a preventive nature to suppress freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles – however shocking and unacceptable certain views or words used may appear to the authorities, and however illegitimate the demands made may be – do a disservice to democracy and often even endanger it’.\textsuperscript{342} The question thus is in which situations political parties constitute such a danger to democracy that their speech may be curtailed or they may even be dissolved.

In \textit{Refah Partisi v. Turkey}, the ECHR considered that the dissolution of a political party can be justified depending on (i) the proof that ‘the risk to democracy’ was ‘sufficiently imminent’; (ii) whether the acts and speeches of the leaders and members of the political party concerned were imputable to the party as a whole; and (iii) whether the acts and speeches imputable to the political party formed a whole which gave a clear picture of a model of society conceived and advocated by the party which was incompatible with the concept of a ‘democratic society’.\textsuperscript{343}

The ECHR finally found the dissolution of Refah Partisi, the Welfare Party, by the Turkish Constitutional Court acceptable under 11 (2), because its long-term political policy to set up a regime based on the Sharia was contrary to the concept of a democratic society and also because its leaders did not exclude the recourse to violence to force the implementation of this policy.\textsuperscript{344} The Court considered that a state cannot be required to wait, before intervening, until a political party has seized power and begun to take concrete steps to implement a policy incompatible with the standards of the Convention and democracy, when the danger of that policy for democracy is sufficiently established and imminent.\textsuperscript{345}

This was the case and a pressing social need existed for the dissolution, because the opinion polls bore witness to a considerable rise in Refah’s influence as a political party and its chances of coming in to power alone. The ECHR

\textsuperscript{341} ECHR (Grand Chamber), 13 February 2003, no. 41340/98 41342/98 41343/98 41344/98 (Refah Partisi and others v. Turkey), para. 98, 110.

\textsuperscript{342} ECHR 2 October 2001, no. 29221/95 29225/95 (Stankov and the United Macedonian Organization Ilinden v. Bulgaria), para. 97.

\textsuperscript{343} ECHR (Grand Chamber) 13 February 2003, no. 41340/98; 41342/98; 41343/98 and 41344/98 (Refah Partisi and Others v. Turkey), para. 104.

\textsuperscript{344} Ibid., para. 132. Contrarily, in \textit{Erbakan v. Turkey}, the ECHR considered the conviction of the leader of the Welfare Party for the public incitement to religious hatred and hostility to constitute a violation of Article 10, precisely because his political discourse during an election campaign did not generate ‘an actual risk’ and ‘imminent danger’ for society. See: ECHR 6 July 2006, no. 59405/00 (Erbakan v. Turkey). An important factor did form the large time lap between the moment on which the expression was uttered and the prosecution of its author.

\textsuperscript{345} Ibid., para. 102.
accordingly considered that at the time of its dissolution, Refah had the real potential to seize political power without being restricted by the compromises inherent in a coalition. If Refah had proposed a programme contrary to democratic principles, its monopoly of political power would have enabled it to establish the model of society envisaged in that programme.\textsuperscript{346}

The strict ‘imminent risk’ standard for anti-democratic speech appears somewhat tailored to the far-reaching measure of the dissolution of political parties. This signifies that, in principle, the dissolution of a relatively small political party due to its anti-democratic ideas and policies is not likely to be found acceptable by the ECtHR, when it only has little political support and few seats in Parliament. The ECtHR has been criticized for affording political parties a larger freedom to contribute to public and political debate under Article 11 than individuals have under Article 10, while anti-democratic ideas expounded by political parties form a greater threat to democracy the more they reach the centre of power.\textsuperscript{347}

But an important decisive factor appears to be whether the ECtHR interprets a statement either as speech that is primarily directed against the democratic system or as hate speech primarily directed against particular groups in society. For example, in Gündüz v. Turkey, the ECtHR found a conviction of the leader of an Islamic sect for the public defence of the Sharia in a television show without the call to establish such a system by using violence to constitute a violation of Article 10.\textsuperscript{348} Contrarily, the dissenters considered the restriction to freedom of expression justified, because the notion of hate speech equally comprised the incitement to hatred on account of religion and other forms of hatred based on religious intolerance. In fact, the ECtHR considers that such speech that targets a particular group in society may be restricted sooner, because minorities are in need of such protection (para. 1.3 infra).

For precisely the latter reason, the ECtHR has laid particular emphasis on the rights of minorities to form associations and to express their views. On several occasions the ECtHR has considered that ‘Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position’.\textsuperscript{349} Hence, the ECtHR at least adheres to a concept of democracy that aims to counter majoritarian tendencies. For example

\textsuperscript{346} Ibid., para. 107.


\textsuperscript{348} ECtHR 4 December 2003, no. 35071/97 (Gündüz/Turkey).

\textsuperscript{349} ECtHR 13 August 1981, no. 7601/76 7806/77 (Young, James and Webster v. the United Kingdom), para. 63; ECtHR (Grand Chamber) 29 April 1999, no. 25088/94 28331/95 28443/95 (Chassagnou v. France), para. 112; ECtHR (Grand Chamber) 10 November 2005, no. 44774/98 (Leyla Sahin v. Turkey), para. 108. 105
it must be possible to freely express controversial opinions during organized demonstrations.

The ECtHR has considered that, when a demonstration is organized against, and held nearby an anti-racism demonstration, a state should find the least restrictive means to prevent a disturbance of the peace and the occurrence of violence that would, in principle, enable both demonstrations to take place.\textsuperscript{350} The ECtHR found that the sanctioning of the act of silently holding the Őrpád striped flag, a symbol of the Hungarian Nazi (Arrow Cross) Regime, in such a context purely on the basis of its provocative character, to constitute a violation of Article 10. Il feelings and sentiments of outrage or uneasiness cannot alone, in the absence of intimidation, set the limits to freedom of expression; otherwise, the latter freedom is subjected to the ‘heckler’s veto’.\textsuperscript{351}

In \textit{Vona v. Hungary}, the ECtHR, however, found the dissolution of the Hungarian Guard Movement acceptable under 11 (2), because the movement had held a series of paramilitary parades organized to keep ‘Gipsy criminality’ at bay, amongst others in villages with a large Roma population. The parades were reminiscent of the Arrow Cross movement, which was the backbone of the regime that was responsible for the mass extermination of Roma in Hungary. According to the ECtHR, such a paramilitary march goes beyond the mere expression of a disturbing or offensive idea, but amounts to \textit{intimidation} and a \textit{true threat} – its message is accompanied by the physical presence of a threatening group of organized activists – and is capable of implementing a policy of racial segregation.\textsuperscript{352}

The ECtHR thus considers that a democratic society can restrict the freedom of politicians, political parties or groupings to express their opinions under 10 (2) or 11 (2), if their speech amounts to the expounding of doctrines contrary to democratic principles, incitement to violence or intimidation. Moreover, the ECtHR can consider that such speech even falls outside the scope of the right to freedom of expression, because it would constitute an abuse of the right in the sense of Article 17 ECHR.

\textit{Article 17 ECHR in the light of Article 10}

Early drafts of the ECHR did not contain the abuse of rights clause of Article 17. Its final insertion into the ECHR can be explained by reference to the political climate in Europe at the time of the elaboration of the ECHR and the general intention of its drafters to provide for an institutional framework based on liberal democratic values to overcome the Nazism and Fascism as recently experienced by European states and as a counterbalance against the emerging

\textsuperscript{350} Cf. ECtHR 29 June 2006, no. 76900/01 (Őllinger v. Austria).
\textsuperscript{351} ECtHR 24 July 2012, no. 40721/08 (Fáber v. Hungary), para. 57.
\textsuperscript{352} ECtHR 9 July 2013, no. 35943/10 (Vona v. Hungary), para. 63-69. The intimidating effect of the marches was increased by the fact that they were backed up by an officially registered political association, the Hungarian Guard Association, with which the Movement had an organizational link.
threat of Communism at the time. The Parliamentary Assembly of the Council of Europe adopted the provision without much debate.

On the necessity to include the Article, the Greek representative stated that: ‘[h]uman freedom just because it is sacred must not become an armory in which the enemies of freedom can find weapons which they can later use unhindered to destroy this freedom.’ ‘Every right implies as an indispensable, inseparable, irrefutable corollary, a corresponding duty which is inherent in law.’ The ECHR had to be drafted ‘not only against the tyrannical acts of those who misuse power, but also against those who misuse freedom.’

This motivation is clearly reflected in the wording of Article 17 ECHR, which reads: ‘[n]othing 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’. Article 17 ECHR can thus be regarded as an instrument of a ‘militant human rights concept’. It applies to those cases where fundamental rights and democracy are threatened, but when one cannot speak of a state of emergency threatening the nation that would justify the entire derogation from certain Convention rights for the purposes of Article 15 ECHR.

A particular feature of Article 17 is that it is addressed at both individuals and the state and thus can be invoked by an individual against a state interference with a particular Convention right and by the state to justify such an interference. Furthermore, Article 17 cannot be invoked independently, but only together with a Convention right or freedom alleged to be abused. The ECmHR has considered that Article 17 covers ‘essentially those rights which will facilitate the attempt to derive therefrom a right to engage personally in activities aimed at the destruction of any of the rights and freedoms set forth in the Convention’. In particular, the Commission has found that the freedom of expression enshrined in Article 10 of the Convention may not be invoked in a sense contrary to Article 17.

Indeed, most Article 17 cases concern the abuse of the right to freedom of expression and/or freedom of association. The question arises in relation to when the mere expression of an opinion can be qualified as an activity or act aimed at destroying or limiting the rights of others. On many occasions the ECmHR and ECtHR have recalled that ‘the general purpose of Article 17 is to prevent totalitarian groups from exploiting in their own interests the principles

353 Council of Europe, European Commission of Human Rights Preparatory work on Article 17 of the European Convention on Human Rights, DH (57) 4, CDH (75) 7, p. 10.
354 Ibid., p. 2-3.
355 Harris, O’Boyle & Warbrick 2009, p. 650.
356 ECmHR 28 May 1986, no. 12194/86 (Kuhnlen v. Germany).
357 Council of Europe, European Commission of Human Rights Preparatory work on Article 17 of the European Convention on Human Rights, DH (57) 4, CDH (75) 7, p. 20.
enunciated by the Convention. The ECtHR and ECmHR thus have applied Article 17 primarily with regard to political parties and movements or its members that formed a threat to the democratic system and institutions by expounding totalitarian doctrines or engaging in activities inspired by National-Socialism.

For example, the ECmHR allowed the ban of the Communist Party by Germany, because the party proclaimed the aim of the proletarian revolution and the dictatorship of the proletarian. The recourse to a dictatorship for the establishment of a regime is incompatible with the Convention, inasmuch as it includes the destruction of many of the rights or freedoms enshrined therein. In another case, the ECmHR considered that the publications of a leader of an organization aiming to reestablish the NSDAP in Germany, by advocating National-Socialism, aimed at impairing the basic order of freedom and democracy. The applicant sought to use the freedom of information as a basis for activities, which were ‘contrary to the text and spirit of the Convention’. 

In subsequent cases, the ECtHR has broadened the scope of Article 17 to situations outside of the context of totalitarian groups and thus to other activities deemed as ‘contrary to the text and spirit of the Convention’. The ECtHR has considered that the negation or revision of ‘clearly established historical facts’ (Holocaust denial) ‘undermines the Convention’s underlying values that support the fight against racism and anti-Semitism’ and is ‘removed from protection of Article 10 by Article 17’. Furthermore, the ECtHR has applied Article 17 in cases concerning anti-Semitic expression and incitement to hatred against Jews unrelated to Holocaust denial. On one occasion, the ECtHR has even considered that Islamophobic expression constituted ‘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.’

Finally, the ECtHR has applied Article 17 with regard to cases concerning incitement to violence. The ECtHR allowed the ban in Germany of Hizb Ut-Tahrir, an Islamic organization that advocates the overthrow of governments throughout the Muslim world and their replacement by an Islamic State in the form of a recreated Caliphate. In several publications it had called to Jihad, aimed at the violent destruction of the State of Israel, as a solution to the

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358 For example: ECtHR 1 July 1961, no. 332/57 (Lawless v. Ireland no. 3), para. 6; ECtHR 2 September 2004, no. 42264/98 (W.P. and Others v. Poland).
359 ECtHR 20 July 1957, no. 250/57 (Kommunistische Partei Deutslands v. Germany).
360 ECtHR 12 May 1988, no. 12194/86 (Kuhnen v. Germany).
361 ECtHR 24 June 2003, no. 12194/86 (Garaudy v. France).
362 ECtHR 23 September 1998, no. 24662/94 (Lehideux and Isorni v. France), para. 47.
363 ECtHR 2 September 2004, no. 42264/98 (W.P. and others v. Poland); ECtHR 20 February 2007, no. 35222/04 (Ivanov v. Russia).
364 ECtHR 16 November 2004, no. 23131/03 (Norwood v. The United Kingdom).
Israeli-Palestinian conflict and the killing of Jews. Such ends were ‘clearly contrary to the values of the Convention, notably the commitment to the peaceful settlement of international conflicts and to the sanctity of human life.’

Here, the ECtHR seemed to connect the Convention values more with the consequential effects of the speech in question.

The broadening of the scope of Article 17 to all these forms of extreme speech is highly criticized, notably because of its radical function as a ‘guillotine provision’. When the ECtHR qualifies a particular expression as an abuse of rights, the ECtHR declares the complaint of a violation of freedom of expression inadmissible and does not have to review a restriction under 10 (2). Through this direct application of Article 17, the ECtHR excludes certain categories of expression from the protection of Article 10 (1) in the admissibility-phase by reference to broad Convention values. As a negative effect, such admissibility decisions are prima facie based on the content of expression, do not place the expression in its broader context, balance opposing interests and thoroughly review the necessity and proportionality of the state measure as a review under 10 (2) would demand, but instead strongly rely on the argumentation of the state that invoked Article 17.

The ECtHR, however, increasingly applies Article 17 in an indirect manner, as an interpretative tool, when it examines the necessity of a restriction on expression in a democratic society under 10 (2) in the case on the merits. This notably also applies to cases concerning hate speech (para. 1.3 infra). Some authors welcome this development, because it prevents an abusive recourse by states to Article 17 or the adoption of implied limitations; Article 10 (1) should cover all types of speech, however appalling, but limitations to them may be justified and must be reviewed under 10 (2). Others consider any application of Article 17 undesirable, because of the aforementioned negative effects and the idea that the goal of Article 17 to protect the democratic system and human rights could be achieved under the framework of Article 10 just as well.

From the increasingly indirect application by the ECtHR, one may deduce that there is a general preference of the ECtHR to review all restrictions to freedom of expression, including those justifiable under Article 17, under Article 10 (2)/ 11 (2) or at least that they comply with the limitation clauses. But when the ECtHR joins Article 17 in the case on the merits, it often does not explicitly refer to Article 17 in its explanation for its decision under 10 (2)/ 11 (2).

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365 ECtHR 12 June 2012, no. 31098/08 (Hizb Ut-Tahrir v. Germany).
367 Cannie & Voorhoof 2011, p. 58.
368 Harris, O’Boyle & Warbrick 2009, p. 450.
369 Cannie & Voorhoof 2011, p. 73.
An example is the Refah Partisi case, in which the ECtHR found the dissolution of Refah acceptable under 11 (2) on the ground of its ‘imminent risk to democracy’ (supra).

However, the added value of Article 17 appears notably to be that it could explicitly ground the development of such a test and form an additional argument in the Court’s reasoning to justify the far-reaching measures of the prohibition or dissolution of larger groupings and political parties that abuse their freedom of expression for anti-democratic designs, measures that might not easily pass the test in accordance with Article 10 (2)/ 11 (2). Furthermore, Article 17 could play a role in the development of positive obligations; it seems reasonable that expression that can be qualified as an abuse of rights must at least be prohibited by law or even criminalized and prosecuted by the state. This in principle does not only apply to political parties, but also to individual politicians or citizens (para. 1.6 infra).

The main criticism in relation to the direct application of Article 17 by the ECtHR remains, however, that so many different types of extreme speech are prima facie excluded from the protection of Article 10 (1) if their aims are deemed contrary to broad Convention values or ‘intentions’ rather than on the basis of their ‘real or expected consequences’.370 Although, in cases of incitement to violence the ECtHR seems to interlink these two grounds (supra). In the categorical approach the Court does not thoroughly weigh the interest in preventing the harmful effects of speech against the interest of public debate nor does it thereby distinguish between factual statements and value judgments or between racial remarks and speech about religion. However, when the ECtHR evaluates restrictions to extreme speech under 10 (2) these considerations can equally dissolve in the large margin of appreciation as sometimes used by the ECtHR. In this respect, it again appears decisive whether the ECtHR qualifies expression as hate speech primarily directed against particular groups in society (para. 1.3 infra) or as incitement to violence against state authorities.

1.2 Incitement to violence

Much of the ECtHR’s criteria for ‘incitement to violence’ can be derived from the hundreds of cases against Turkey concerning complaints about a violation of freedom of political expression and press freedom starting in the mid and late 1990s, and particularly in a series of decisions by the Grand Chamber in 1999.371 Since 1991, Turkey has had an Anti-Terrorism Act prohibiting propaganda

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against ‘the territorial integrity of the Republic of Turkey’ or ‘the indivisible union of the nation’. The Act has formed the basis for many convictions concerning expression about the Armenian or Kurdish question and criticism on the Turkish unitary state. In the majority of these cases, the ECtHR found a violation of freedom of expression. On several occasions, the Court has summarized its general principles as follows:

‘The Court reiterates that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on matters of public interest.

Furthermore, the limits of permissible criticism are wider with regard to the government than in relation to a private citizen or even a politician. 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.

Moreover, 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. Nevertheless, it certainly remains open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal-law nature, intended to react appropriately and without excess to such remarks.

Finally, where such remarks incite to violence against an individual, a public official or a sector of the population, the national authorities enjoy a wider margin of appreciation, when examining the need for an interference with the exercise of freedom of expression.’

In the early case Zana v. Turkey, the ECtHR found no violation of Article 10.373 The case concerned the conviction of a former mayor of an important Turkish city for having ‘publicly praised or defended a serious crime’ with regard to the statement in an interview published in a national newspaper: ‘I support the PKK national liberation movement; on the other hand, I am not in favor of massacres. Anyone can make mistakes, and the PKK kill women and children by mistake.’ The Court found the interference justified in order to maintain national security and public safety ‘at a time when serious disturbances were raging in south-east Turkey’.

The interference was also proportionate. Although the statements contained contradictions and ambiguities, they were uttered by a former mayor in a daily newspaper, ‘coincided with murderous attacks carried out by the PKK on civilians in south-east Turkey’ and in that special context were ‘likely to exacerbate an already explosive situation in that region’.374 This emphasis on the particular context of the case, the authority of the speaker and the ‘likelihood of

372 ECtHR (Grand Chamber) 8 July 1999, no. 23556/94 (Ceylan v. Turkey), para. 34; ECtHR 28 September 1999, no. 22479/93 (Öztürk v. Turkey), para. 66.
373 ECtHR (Grand Chamber) 25 November 1997, no. 18954/91 (Zana v. Turkey).
374 ECtHR (Grand Chamber) 25 November 1997, no. 18954/91 (Zana v. Turkey), para. 60.
the danger’ has been compared with the American ‘clear-and-present-danger’-test.\textsuperscript{375}

The ECHR’s approach to incitement to violence however clearly differs from American doctrine. This can be illustrated by \textit{Sürek no. 1 v. Turkey}, in which the ECHR equally found no breach of freedom of expression.\textsuperscript{376} The applicant had been convicted for dissemination of separatist propaganda by publishing two letters in a weekly review that vehemently condemned the military actions of the Turkish authorities in South-East Turkey, but did not explicitly call for violent resistance. According to the Court, the expression had ‘a clear intention to stigmatize the other side to the conflict’ by the use of labels such as ‘the fascist Turkish army’, ‘the TC murder gang’ and ‘the hired killers of imperialism’ and references to ‘massacres’, ‘brutalities’ and ‘slaughter’.

According to their content, the letters ‘amounted to an appeal to bloody revenge by stirring up base emotions and hardening already embedded prejudices, which have manifested themselves in deadly violence’. Given the security situation in South-East Turkey, ‘the content of the letters must be seen as capable of inciting to further violence (…) the message which is communicated to the reader is that recourse to violence is a necessary and justified measure of self defence in the face of the aggressor.’\textsuperscript{377}

The dissenters precisely criticized the Court’s focus on the content and tone of the expression rather than its likely impact considering the general context. Palm objected that the applicant had been convicted for his political message. According to Palm, his harsh language constituted mere ‘fighting words’ that were protected by Article 10, because there was not ‘a real or genuine risk’ of his speech inciting to hatred or to violence. Tulkens, Casadevall and Greve held that freedom of expression might only be curtailed when there is ‘direct provocation to commit serious criminal offences’.\textsuperscript{378}

Bonello advocated the ‘clear-and-present-danger’-test and considered ‘When the invitation to the use of force is intellectualized, abstract, and removed in time and space from the foci of actual or impending violence, then the fundamental right to freedom of expression should generally prevail.’\textsuperscript{379} Furthermore he opined that ‘only the advocacy of violence that is directed to incite or produce imminent lawlessness and is likely to excite or produce such action may be proscribed’.\textsuperscript{380}

\textsuperscript{376} ECHR (Grand Chamber) 8 July 1999, no. 26682/95 (Sürek no. 1 v. Turkey).
\textsuperscript{377} \textit{Ibid.}, para. 62.
\textsuperscript{378} \textit{Ibid.}, Partly dissenting opinion of Judge Palm.
\textsuperscript{379} \textit{Ibid.}, Joint partly dissenting opinion of Judges Tulkens, Casadevall and Greve.
\textsuperscript{380} \textit{Ibid.}, Partly dissenting opinion of Judge Bonello.
In many other cases the ECtHR considered that the Turkish Government had to tolerate severe criticism on its policy and the actions of the Turkish army in South East Turkey, the public support for the PKK (Workers Party of Kurdistan) and the claim to independence of the Kurdish people or the call to find a peaceful resolution of the Kurdish question. The Court often considered the high pecuniary penalties and convictions to imprisonment and preventive measures such as the confiscation of publications to be disproportionate.  

On one occasion, the ECtHR considered that even against the background of serious disturbances in South East Turkey the support of the idea of a separate Kurdish entity could not be regarded as ‘inevitably exacerbating the situation’. Therefore, the criticism of the authorities and the security forces even ‘in colorful and derogatory terms’ could not be regarded as advocating or inciting the use of violence. In another case, the ECtHR considered that it was ‘naturally aware of the concern of the authorities about words or deeds which have the potential to exacerbate the security situation in the region’, but that ‘the views expressed in the interview cannot be read as an incitement to violence; nor could they be construed as liable to incite to violence’.  

The ECtHR thus does attach importance to the probable harmful effect of the expression and for that purpose takes into account the form/medium used. Expression disseminated through mass media, given its wide audience, has a possibly large impact on the general public. Therefore the ECtHR stresses that ‘the duties and responsibilities (…) of 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 organizations which resort to violence against the State lest the media become a vehicle for the dissemination of hate speech and the promotion of violence.’  

Contrarily, the Court considered a work of poems that through the frequent use of pathos and metaphors called for self-sacrifice for ‘Kurdistan’ and included some particularly aggressive passages directed at the Turkish authorities to be protected by freedom of expression; although ‘taken literally, the poems might be construed as inciting readers to hatred, revolt and the use of violence’, ‘the medium used by the applicant was poetry, a form of artistic expression that appeals to only a minority of readers’.  

Likewise, the ECtHR found a conviction with regard to an academic work that alleged that ‘the ‘racist policy of denial’ vis-à-vis the Kurds had been

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381 Examples of cases where the ECtHR found a violation of Article 10 form Incal, eleven of thirteen decisions of 8 July 1999, Zarakolu and C.S.Y.
382 ECtHR 16 March 2000, no. 23144/93 (Özgür Gündem v. Turkey), para. 70.
383 ECtHR (Grand Chamber) 8 July 1999, no. 25067/94 25068/94 (Erdoğan and Ince v. Turkey), para. 52.
384 Ibid., para. 54.
385 ECtHR (Grand Chamber) 8 July 1999, no. 23168/94 (Karataş v. Turkey), para. 49.
instrumental in the development of the ‘fascist movement’, to be disproportionate. As the statements ‘featured in an academic study on the socio-economic evolution of Turkey in a historical perspective and of the prevailing political ideology in that country’, the authorities had ‘failed to have sufficient regard to the freedom of academic expression and to the public’s right to be informed of a different perspective on the situation in south-east Turkey, irrespective of how unpalatable that perspective may be for them’.386

The latter also formed a primary consideration of the ECtHR in a case concerning the conviction for incitement to violence with regard to the publication and distribution of the statement of a leading member of the PKK: ‘[t]he war will go on until there is only one single individual left on our side’ made during an interview with a weekly review. The conviction constituted a breach of freedom of expression, because ‘the interviews had a newsworthy content which allowed the public both to have an insight into the psychology of those who are the driving force behind the opposition to official policy in south-east Turkey and to assess the stakes involved in the conflict’.387

This reasoning may be contrasted with other case law. In Zana, the ECtHR found the conviction proportionate, amongst others because the author of the expression was a person with some political standing – a former mayor and activist for the Kurdish cause. Contrarily in Inal v. Turkey, the ECtHR found the conviction of a member of the Turkey’s People Party for distributing a pamphlet that criticized the ‘state terror against Turkish and Kurdish proletarians’ disproportionate, amongst others because nothing indicated that the author ‘was in any way responsible for the problems of terrorism in Turkey’.388

Particularly striking is the fact that the ECtHR in all these cases deals with restrictions to alleged incitements to violence under the general framework of 10 (2). As – even – Holocaust denial generally engages Article 17 (para. 1.5 infra), one could question why the incitement to violence or terrorism against the state or individuals is not also suitable to engage Article 17.389 The ECtHR, however, consistently exercised an integral review and conducted a detailed contextual analysis under 10 (2), in which it evaluated the content and tone of expression, the person of the speaker, his intent, the medium used, the impact of expression and the nature of the sanction.

The Court thereby set relatively clear and strict criteria for ‘incitement’ and the likelihood of its impact. Although, whether these criteria are met might in the end depend on the interpretation by the majority of the ECtHR of the

386 ECtHR (Grand Chamber) 8 July 1999, no. 23536/94 24408/94 (Başkaya and Okçuoğlu v. Turkey), para. 64-65.
387 ECtHR (Grand Chamber) 8 July 1999, no. 23927/94 24277/94 (Sürek and Özdemir v. Turkey), para. 61.
388 ECtHR (Grand Chamber) 9 June 1998, no. 22678/93 (Incal v. Turkey), para. 58.
389 Cannie & Voorhoof 2011, p. 74.
particular words used given the particular context. The ECHR did not require any ‘imminent’ threat of violence, but afforded the state a large margin – only – for the assessment of the national security situation.

The interpretation of the expression by the Court is, however, open for debate. For example, what to think of Le Roy v. France, in which the ECHR unanimously found the conviction for glorification of terrorism with regard to the publication of a cartoon of the attacks of 9/11 with the slogan ‘We have all dreamt about it … Hamas did it.’ – a parody of the advertisement ‘We have all dreamt about it … Sony did it.’ – in a Basque weekly acceptable under 10 (2). According to the ECHR, the cartoon did not criticize American imperialism, but supported and glorified its violent destruction. It thereby violated the dignity of the victims of the attacks and its publication in a politically sensitive area and right after the terrorist attacks could attract violence.\(^{390}\)

In its ‘Turkish case law’ the ECHR generally qualified alleged incitements to violent and terrorist action as political criticism directed against the government, restrictions on which call for the strictest scrutiny by the Court. The Court’s case law concerning incitement to violence appears to diverge from its case law concerning hate speech and Holocaust denial particularly on the point of the margin of appreciation.

1.3 Hate speech

*The notion of hate speech in the ECHR’s case law*

The ECHR does not have a specific prohibition of hate speech comparable with Article 20 (2) ICCPR. Although the ECHR in its case law often uses the notion of hate speech, it has never given a precise definition of the term.\(^{391}\) The ECHR generally describes hate speech as ‘all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance).’\(^{392}\) But the term is not evidently clear and we will see that it does not in itself form a solution to the disagreement within the Court about its exact criteria.

This broad conception of hate speech is inspired by Recommendation no. R (97) 20 on ‘hate speech’ of the Committee of Ministers of the Council of Europe that defines hate speech as ‘all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism 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’.\(^{393}\)

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\(^{390}\) ECHR 2 October 2008, no. 36109/03 (Le Roy v. France), para. 43-45.  
\(^{392}\) ECHR 4 December 2003, no. 35071/97 (Gündüz v. Turkey), para. 40.  
\(^{393}\) Recommendation No. R (97) 20 on “hate speech” adopted by the Committee of Ministers of the Council of Europe on 30 October 1997.
The ECHR often refers to the Recommendation, as well as other non-binding international human rights instruments, such as ECRI’s General Policy Recommendation no. 7 on national legislation to combat racism and racial discrimination, when dealing with hate speech.\textsuperscript{394} However, the ECHR uses an autonomous interpretation of the term; it does not consider itself bound by definitions used in these instruments, nor in national laws or by national jurisdictions. It has been argued that the Court prefers to proceed on a case-by-case basis and avoid being constrained by definitions, which could limit its power of action in subsequent cases.\textsuperscript{395}

Therefore, the ‘hate speech’-case law of the Court comprises cases concerning convictions based on a large variety of national prohibitions, including incitement to hatred, discrimination or violence, Holocaust denial and group defamation. In fact, the ECHR even referred to the term in Sürek no. 1 v. Turkey, next to the glorification of violence.\textsuperscript{396} Even subversive speech and incitement to violence and terrorism may thus be considered as a form of hate speech, when it is directed against particular persons or groups.\textsuperscript{397} Based on the ECHR’s case law convictions for hate speech on the ground of such national prohibitions will normally not constitute a violation of Article 10 ECHR as long as criminal sanctions remain proportionate.

Furthermore, as a result of the case law the ECHR’s notion of hate speech does not only include utterances that target people on the basis of their race or religion, but also utterances that target people on the basis of their sexual orientation. In Vejdeland and Others v. Sweden, the ECHR found the conviction for the agitation against homosexuals with regard to the distribution of leaflets in a secondary school to constitute no violation of Article 10.\textsuperscript{398} According to the ECHR, although the statements did not directly recommend individuals to commit hateful acts, they were serious and prejudicial allegations. The Court thereby stressed that discrimination based on sexual orientation is as serious as discrimination based on ‘race, origin or colour’.\textsuperscript{399} The Court thus does not

\textsuperscript{394} General Policy Recommendation no. 7 of the Council of Europe’s European Commission against Racism and Intolerance (ECRI) on national legislation to combat racism and racial discrimination adopted on 13 December 2002.


\textsuperscript{396} ECHR (Grand Chamber) 8 July 1999, no. 26682/95 (Sürek no. 1 v. Turkey), para. 62.

\textsuperscript{397} See also the ECHR’s Factsheet on Hate speech of July 2013, available at: http://www.echr.coe.int/Documents/FS_Hate_speech ENG.pdf .

\textsuperscript{398} ECHR 9 February 2012, no. 1813/07 (Vejdeland and Others v. Sweden). The leaflets described homosexuality as ‘a deviant sexual proclivity’ that had ‘a morally destructive effect on the substance of society’ and as one of the main reasons why HIV and AIDS gained foothold and alleged that the ‘homosexual lobby’ tried to play down paedophilia.

\textsuperscript{399} Ibid., para. 54-56. An important factor did form the fact that the leaflets were left in the pupils’ lockers and thereby imposed on them on a sensitive age.
principally distinguish between racist hate speech and hate speech on other discriminatory grounds and implies that all are equally reprehensible.

Finally, as a result of the case law, the prohibition of hate speech under the ECHR is thus primarily informed by its underlying values of equal human dignity and non-discrimination. According to the ECHR, it may be considered necessary in certain democratic societies to sanction or even prevent hate speech, because ‘tolerance and respect for the equal dignity of all human beings constitutes the foundations of a democratic, pluralistic society’.

General, vehement attacks against a particular group are ‘incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination’. More generally, the Convention’s underlying values ‘support the fight against racism and anti-Semitism’.

The ECHR therefore interprets Article 10 in line with international human rights instruments to that effect, notably the international Convention on the Elimination of all forms of Racial Discrimination (Art. 4 ICERD). In one case, the ECHR considered that ‘the object and purpose pursued by the UN Convention are of great weight in determining whether the applicant’s conviction, which – as the Government have stressed – was based on a provision enacted in order to ensure Denmark’s compliance with the UN Convention, was ‘necessary’ within the meaning of Article 10 para. 2 (…) Denmark’s obligations under Article 10 must be interpreted, to the extent possible, so as to be reconcilable with its obligations under the UN Convention.

However, between the judges of the ECHR large disagreement exists not only in relation to the exact definition of hate speech, but also about the interpretation of the relevant international instruments, how to balance prohibitions of hate speech with freedom of expression under Article 10 (2) and/or the application of Article 17. In relation to hate speech the ECHR, therefore, has not developed clear standards and precise criteria of review comparable with those for incitement to violence. Important considerations – about the specific harmful effects of speech in question weighed against the interest of public debate or about the place of the distinction between factual statements and value judgments or between racial remarks and speech about religion therein – are often dissolved in the large margin of appreciation the ECHR affords states to set restrictions to hate speech under 10 (2) or in the categorical approach under 17.

401 ECHR 4 December 2003, no. 35071/97 (Gündüz v. Turkey), para. 40.
402 ECHR 16 November 2004, no. 23131/03 (Norwood v. The United Kingdom).
403 ECHR 24 June 2003, no. 12194/86 (Garaudy v. France).
404 ECHR (Grand Chamber) 23 September 1994, no. 15890/89 (Jersild v. Denmark), para. 30.
Hate speech on the basis of race under Article 17

An early case concerning racial hate speech under Article 17 was Glimmerveen and Hagenbeek v. the Netherlands. The case concerned the conviction of two members of a Dutch extreme right political party, the ‘Nederlandse Volks Unie’ (NVU), for possessing leaflets found to be inciting to racial discrimination. The basic principles of the NVU were ‘a world conception which grants each nation a proper state, as well as the belief that the general interest of a state is best served by an ethnical homogeneous population and not by racial mixing’.

The leaflets, addressed to the ‘white Dutch people’, contained statements such as ‘the major part of our population since a long time has had enough of the presence in our country of hundreds of thousands Surinamers, Turks and other so-called guest workers’ and ‘as soon as the NVU will have gained political power in our country, it will put order into business and to begin with: 1) remove Surinamers, Turks and other so-called guest workers from the Netherlands’.

The ECmHR appeared insusceptible to the argument made by the applicants during the national proceedings that they had aimed to reach their goal merely through lawful means; the Commission considered that ‘the policy advocated by the applicants is inspired by the overall aim to remove all non-white people from the Netherlands’ territory, in complete disregard of their nationality, time of residence, family ties, as well as social, economic, humanitarian or other considerations’ and ‘this policy is clearly containing elements of racial discrimination, which is prohibited under the Convention’.

The ECmHR underscored the seriousness of – the aim of – racial discrimination, amongst others, by pointing out that ‘discrimination based on race could, in certain circumstances, of itself amount to degrading treatment within the meaning of Article 3 of the Convention’.

The ECmHR was of the opinion that the duties and responsibilities that accompany the exercise of the right to freedom of expression ‘find an even stronger expression in a more general provision, namely Article 17’ and that Article 17 does not permit the use of Article 10 to spread ideas, which are racially discriminatory. According to the ECmHR, ‘the expression of the political ideas of the applicants clearly constitutes an activity within the meaning of Article 17’. Therefore, the applicants could not rely on Article 10. The NVU leaflets thus fell outside of the scope of Article 10 on the basis that their aims were deemed to be contrary to the Convention rather than on the basis of their harmful effects.

Another case concerning racial hate speech under Article 17 is that of Pavel Ivanov v. Russia. The case concerned a conviction for public incitement to

405 ECmHR 11 October 1979, no. 8348/78 8406/78 (Glimmerveen and Hagenbeek v. the Netherlands).
406 ECHR 20 February 2007, no. 35222/04 (Pavel Ivanov v. Russia).
ethnic, racial and religious hatred through the use of the mass media with regard to a series of publications in a newspaper portraying the Jews as the source of evil in Russia. The ECHR opined that in the articles the applicant accused an entire ethnic group of plotting a conspiracy against the Russian people and ascribed Fascist ideology to the Jewish leadership. Both in his publications and during the national proceedings, he consistently denied the Jews the right to national dignity, claiming that they did not form a nation.

The ECHR therefore found the complaint of violation of Article 10 manifestly ill founded by reason of Article 17 considering that ‘[t]he Court has no doubt as to the markedly anti-Semitic tenor of the applicant’s views and it agrees with the assessment made by the domestic courts that he sought through his publications to incite hatred towards the Jewish people. Such a general and vehement attack on one ethnic group is in contradiction with the Convention’s underlying values, notably tolerance, social peace and non-discrimination’. This direct application of Article 17 by the ECHR reflects the Court’s desire to underscore its firm rejection of speech that is incompatible with fundamental democratic values.  

The publications thus fell outside the scope of Article 10 on the basis of their aims, which were deemed contrary to Convention values rather than on the basis of their harmful effects. The underlying reason why the ECHR found the statements to constitute a prohibited attack on Jews appears to be that they constituted ‘false factual allegations or strong negative value judgments that lacked a sufficient factual basis’ about them. But the ECHR did not explicitly refer to these principles.

Hate speech on the basis of race under Article 10 (2)
The ECHR dealt with racial hate speech for the first time on the merits under Article 10 (2) in Jersild v. Denmark. It set criteria for racial hate speech in the sense that it results from this case that the racist statements concerned lacked the protection of Article 10. Prior to Jersild, complaints of violation of freedom of expression with regard to convictions for racist speech had all been declared inadmissible (supra). As the dissenters in the case pointed out: ‘[t]his is the first time that the Court has been concerned with a case of dissemination of racist remarks which deny to a large group of persons the quality of ‘human beings’. In earlier decisions the Court has – in our view, rightly – underlined the great importance of the freedom of the press and the media in general for a democratic society, but it has never had to consider a situation in which ‘the reputation or rights of others’ (art. 10-2) were endangered to such an extent as here.’

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408 ECHR (Grand Chamber) 23 September 1994, no. 15890/89 (Jersild v. Denmark).
409 ibid., Joint dissenting opinion of judges Ryssdal, Benhardt, Spielmann and Loizou, para. 1.
The dissenters disagreed with the ECtHR’s finding of a violation of freedom of expression by 12:7 votes. The case concerned the criminal conviction of Jersild, a journalist, for having broadcasted a television interview, in which three members of the youth group called the ‘Greenjackets’ made racist statements such as the comparison of blacks with animals, gorillas and drug dealers. Jersild was found guilty of ‘aiding and abetting’ the public ‘statement or other communication by which a group of persons are threatened, insulted or degraded on the basis of their race, color, national or ethnic origin’.

The ECtHR considered that taken in isolation the statements of the Greenjackets were highly insulting, but the reputation or rights of others were not significantly affected and, as legitimate aims for restricting the freedom of expression, carried little weight; the remarks were made by members of an insignificant group of persons and rather had the effect of ridiculing their authors. Moreover, the program drew attention to racism, intolerance and simplen mindedness and the final message, which was conveyed, was that of anti-racism. The program thus touched upon an issue of great public concern. The ECtHR found the interference disproportionate to the legitimate aim pursued and not ‘necessary in a democratic society’.  

The dissenters in the Commission found, on the other hand, that although there was no evidence that the statements in question provoked any acts of racist persecution, they were, nevertheless, outrageous and likely to insult and hurt the feelings of people belonging to certain minority groups in Denmark. The assumption that the sole effect of the program was to ridicule the persons behind the propaganda was purely theoretical; the program was seen by a wide public, comprising people who may not necessarily have a critical mind, and whose living conditions may render more receptive to racist propaganda.  

The dissenters notably grounded their opinion in ICERD considering that ‘[i]t was the view of the Danish courts that such statements could only be justified if balanced by opposing considerations which could have outweighed the wrongfulness of the statements. This is very much in line with the interpretation indicated in the preparatory work of the Convention on the Elimination of All Forms of Racial Discrimination and of the following amendments of the Danish Penal Code which clearly were not intended to restrict scientific or otherwise serious discussion of problems of public concern.‘

Before the ECtHR the question of how Article 10 ECHR should interrelate with Article 4 ICERD became a pivotal issue between the parties. According to Denmark, Article 10 could not be interpreted in such a way as to

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411 Ibid., Dissenting opinion of Mr. Gaukur Jörundsson, joined by Sir Basil Hall and Mr. Jean-Claude Geus.
412 Ibid.
limit, derogate from or destroy the right to protection against racial discrimination under ICERD. Contrarily, Jersild referred to the due regard clause of Article 4 ICERD to underline the need to strike a balance between freedom of expression and the rights of others. After stressing the importance of ICERD to the interpretation of Article 10 (supra), the ECtHR considered: ‘[h]owever, it is not for the ECtHR to interpret the ‘due regard’ clause in Article 4 of the UN Convention, which is open to various constructions. Nonetheless the ECtHR found its interpretation of Article 10 in the present case to be compatible with Denmark’s obligations under the UN Convention.’ 413

Subsequently, the ECtHR summed up the factors for its assessment of the necessity of Jersild’s conviction: the manner in which the Greenjackets feature was prepared, its contents, the context in which it was broadcast and the purpose of the program and, given the obligations under ICERD, whether the item appeared from an objective point of view to have had as its purpose the propagation of racist views and ideas. 414 The ECtHR considered: ‘[t]here can be no doubt that the remarks in respect of which the Greenjackets were convicted were more than insulting to members of the targeted groups and did not enjoy the protection of Article 10’. This consideration has given rise to the question whether the ECtHR conceived the remarks as an abuse of rights by the Greenjackets in the sense of Article 17. However, according to the Court, the item of the journalist did not have as its purpose the propagation of racist views and ideas, but aimed to inform the public and animate public discussion about the existence of the racist views of the group. It was part of a serious Danish news program and was intended for a well-informed audience. 415

In the Court’s view, the journalist had sufficiently distanced himself from and rebutted the racist statements. Most importantly, the ECtHR considered that news reporting based on interviews constitutes one of the most important means whereby the press is able to play its vital role of ‘public watchdog’. The punishment of a journalist for statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and could only be justified by particularly strong reasons. The fact that Jersild was sanctioned with a limited fine was irrelevant; what mattered was that the journalist was convicted. 416

The dissenters of the ECtHR objected that Jersild should have added at least a clear statement of disapproval, because certain parts of the public could find in the television spot support for their racist prejudices. ICERD also supported the opinion that the media too can be obliged to take a clear stand in the area of racial discrimination and hatred. The protection of racial minorities

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413 ECtHR (Grand Chamber) 23 September 1994, no. 15890/89 (Jersild v. Denmark), para. 27-28; 30.
414 ibid., para. 31.
415 ibid., para. 33-34.
416 ibid., para. 35.
couldn’t have less weight than the right to impart information and the ECHR should not have substituted its own balancing of the conflicting interests for that of the Danish Supreme Court that had a margin of appreciation in deciding in this sensitive issue.\textsuperscript{417}

The stringent review that the ECHR applied in this landmark case seems notably grounded in the importance of press freedom and the role of journalists and can be contrasted by the Court’s approach in another case concerning racial hate speech, \textit{Balsyte-Lideikiene v. Lithuania} in which the ECHR unanimously found no violation of freedom of expression.\textsuperscript{418}

The case concerned the publication of the annual Lithuanian calendar in 2000, which portrayed the Poles as the executioners of the Lithuanians and the Jews as accomplices of the Russian occupants and referred to them as perpetrators of war crimes and genocide against the Lithuanians. Moreover, the back cover of the calendar contained a map of the Republic of Lithuania, on which the neighbouring territories of Poland, Russia and Belarus were marked as ‘ethnic Lithuanian lands under temporary occupation’. Before the national court, the publisher of the calendar was sanctioned with an administrative penalty in the form of a warning for the ‘production, storage and distribution of information materials promoting ethnic, racial or religious hatred’ and the unsold copies of the calendar and the production means were confiscated.

The ECHR’s assessment of the case focused on the necessity-test and afforded a large margin to Lithuania in determining the pressing social need of the measures. The ECHR took into account ‘the Government’s explanation as to the context of the case that after the re-establishment of the independence of the Republic of Lithuania on 11 March 1990 the questions of territorial integrity and national minorities were sensitive’. As the calendar had caused negative reactions from diplomatic representations of Poland, Belarus and Russia, the ECHR pointed to Lithuania’s obligations under international law.\textsuperscript{419}

Subsequently, the ECHR qualified the language used in the calendar as ‘aggressive nationalism and ethnocentrism’ and the statements as ‘inciting hatred against the Poles and the Jews’. The Court adopted the analysis of the expert report used in the national proceedings that, although the calendar did not directly incite violence against the Jewish population, nor did it advocate implementing discriminatory policy against this ethnic group, ‘a one-sided

\textsuperscript{417} Ibid., Joint dissenting opinion of judges Ryssdal, Benhardt, Spielmann and Loizou, para. 3; 5.

\textsuperscript{418} ECHR 4 November 2008, no. 72596/01 (Balsyte-Lideikiene v. Lithuania).

portrayal of relations among nations hindered the consolidation of civil society and promoted national hatred.\footnote{Ibid., para. 16; 28; 79-80.} In relation to the proportionality of the measures, the ECtHR found that the confiscation could be considered relatively serious, but the warning was the mildest administrative punishment available. Overall, the measures thus could ‘reasonably be considered necessary in a democratic society to protect the reputation or rights of others’.\footnote{Ibid., para. 84-85.} The underlying reason why the ECtHR found the statements to constitute a prohibited hatred against the Poles and the Jews appears to be that they constituted ‘false factual allegations or strong negative value judgments that lacked a sufficient factual basis’. But again, the ECtHR did not explicitly refer to these principles.

A case before the ECtHR concerning the \textit{direct} incitement to discrimination is that of \textit{Willem v. France}.\footnote{ECtHR 16 July 2009, no. 10883/05 (Willem v. France).} Strictly speaking, the case concerned discrimination based on \textit{nationality} and not \textit{race}. However, the ECtHR upheld a conviction and would certainly do the same with regard to the incitement to racial discrimination. The case concerned the conviction of Willem, mayor of the small French town of Secin, for incitement to discrimination based on ethnic background, nation, race or religion with regard to his announcement, in which he requested his catering services to boycott Israeli products as a protest against the politics of Sharon against the Palestinian people uttered during a City council meeting and published in an open letter on the city’s website. By 6:1 votes, the ECtHR, strongly relying on the argumentation of the state, found no violation of freedom of expression.

According to the ECtHR, the mayor was not convicted for his political opinions, but his appeal on the catering services to a positive act of discrimination and an explicit refusal to enter into commercial relations with producers with an Israeli nationality.\footnote{Ibid., para. 35.} The diffusion of the message on the Internet in polemic terms aggravated its discriminatory character.\footnote{Ibid., para. 36.} A mayor had the duty and responsibility to conserve certain neutrality and reserve and could not act as the Government in ordering boycotts.\footnote{Ibid., para. 37; 39.}

However, even such literal incitements to concrete action are open to different interpretations and therefore the judges of the Court can disagree whether they must be interpreted as having a discriminatory racist purport. Dissenting judge Jungwiert objected that the ECtHR had disregarded the intention of the mayor; the expression rather reflected an opinion or political position of an elected official in the context of an escalation of violence in the
Israeli-Palestinian conflict. In the context of a public debate of general interest, certain exaggeration and provocation was permitted. Moreover, the proposal was quite vague as to its effectuation; its impact was limited as it concerned the catering services of a small community and finally, its concrete effects and practical consequences had not been demonstrated. The decision thus lacked sufficient reasoning on the necessity of the measure.

Hate speech on the basis of religion under Article 17

Although the case law of the ECtHR does suggest that racist expression and anti-Semitism, notably in the form of Holocaust denial, qualifies sooner as an abuse of rights, the ECtHR has also found extreme speech about religion to fall outside the scope of Article 10 by reference to Article 17. The ECtHR dealt with Islamophobic speech under Article 17 for the first time in Norwood v. United Kingdom.427 The case concerned the conviction of Norwood, a regional organizer for the extreme right British National Party (BNP), for displaying in the window of his flat a BNP poster with a photograph of the Twin Towers in flames, the words ‘Islam out of Britain – Protect the British people’ and a symbol of a crescent and star in a prohibition sign. Norwood was fined GBP 300 for ‘displaying, motivated by hostility towards a racial or religious group, any writing, sign or other visible representation which is threatening, abusive or insulting, within the sight of a person likely to be caused harassment, alarm or distress by it’.

The applicant held that his poster referred to Islamic extremism and was not abusive or insulting. He submitted that criticism of a religion was not to be equated with an attack upon its followers. In any event, he lived in a rural area not greatly afflicted by racial or religious tension and there was no evidence that a single Muslim had seen the poster. Remarkably, the ECtHR unanimously declared the complaint inadmissible by reference – on its own initiative – to Article 17. The Court adopted the vision of the national courts that the words and images on the poster amounted to a public attack on all Muslims in the UK and concluded that: ‘[s]uch 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.’

Again, although the ECtHR did not explicitly refer to these principles, the underlying reason why the ECtHR found the poster to constitute a prohibited attack against Muslims appears to be that it constituted a ‘false factual allegation or strong negative value judgment that lacked a sufficient factual basis’ about them. In any event, under certain circumstances strong allegations about Islam that do not explicitly name Muslims as a group thus may be interpreted as an (indirect) urge to readers that all Muslims should be

426 Ibid., dissenting opinion of judge Jungwiert.
427 ECtHR 16 November 2004, no. 23131/03 (Norwood v. The United Kingdom).
removed from the country and as a warning that the presence of Muslims in the country constitutes a threat or danger to the people.

Hate speech on the basis of religion under Article 10 (2)
The ECtHR generally deals with religious hate speech under 10 (2). The Court’s approach to religious hate speech can be explained on the basis of three relatively recent cases, being *Soulas and others v. France, Féret v. Belgium* and *Le Pen v. France*. In all cases, the ECtHR upheld a criminal conviction and found no violation of freedom of expression. In *Soulas* and *Le Pen*, the ECtHR unanimously reached its decision, but the ECtHR decided with only a slight majority of 4:3 in *Féret*. As a result of this case law, expression that amounts to ‘hate speech’ may be prohibited, but the term is not evidently clear and does not in itself form a solution to the disagreement within the Court about its exact criteria.

In relation to hate speech the ECtHR, therefore, has not developed clear standards and precise criteria of review comparable with those for incitement to violence. Important considerations – about the specific harmful effects of speech in question weighed against the interest of public debate or about the place of the distinction between factual statements and value judgments or between racial remarks and speech about religion therein – are often dissolved in the large margin of appreciation the ECtHR affords states to set restrictions to hate speech.

*Soulas and others v. France* concerned the conviction of the publisher and the author of the book entitled ‘The colonization of Europe’ and subtitled ‘True discourse about the immigration and the Islam’ that notably claimed the incompatibility between the European and Islamic civilizations within one geographic area and proclaimed the necessity of a violent conflict between native inhabitants and immigrants. The applicants were fined with €7622.45 and had to pay the symbolic amount of €0.15 in damages to the civil parties for ‘incitement to hatred, discrimination and violence on the ground of race, nation, ethnic background or religion’.

The ECtHR primarily considered that the book addressed a topic of general interest, because the problems related to the installation and integration of immigrants formed the object of heated debates in European societies, both in politics as in the media. This applied, in particular, to France, who had accommodated a large number of immigrants, whose integration process was long, laborious and difficult and therefore had already resulted in violent clashes between the police and some radical elements of the population. However the ECtHR opined that, as the problems related to immigration and integration varies from country to country, states could set the limitations to the public debate about this topic differently. The ECtHR thus afforded the state a

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428 ECtHR 10 July 2008, no. 15948/03 (Soulas and others v. France); ECtHR 16 July 2009, no. 15615/07 (Féret v. Belgium); ECtHR 20 April 2010, no. 18788/09 (Le Pen v. France).
large margin of appreciation in the matter, while this is unusual with regard to restrictions on contributions to political debate (para. 1.1 supra). 429

This approach thus appears inconsistent and also questionable. Firstly, immigration and integration are highly political – European – issues and the ECHR generally exercises a stringent review of restrictions on political speech, regardless of its specific topic. The fact that member states may adopt different solutions to counter political problems generally does not alter this. Secondly, the exercise of a stringent review of restrictions on political speech need not necessarily result in the conclusion that Article 10 ECHR has been violated. The two should not be equated. The ECHR could also arrive at the conclusion that a measure is justified because a particular form of hate speech is not acceptable in political debate. The ECHR, however, essentially seems to be reluctant to set criteria for hate speech in the politically sensitive context of immigration and integration.

Another remarkable point is that the ECHR considered the book to address a large public due to its accessible style, while it generally considers the impact of books rather limited. As to its content, the ECHR found the style polemic and several passages to present a negative image of the targeted groups and the effects of immigration as catastrophic. 430 The ECHR dealt with the appeal to Article 17 made by France in the case on the merits, but explicitly stated that the passages concerned were not sufficiently serious to constitute an abuse of rights. 431

Based on the motivation of the national courts that ‘the words in the book were intended to provoke in the reader a sense of rejection and antagonism – increased by the use of military language – against targeted communities identified as the main enemy, and to induce him to share the solution advocated by the author, that of a war of ethnic conquest.’ and the fact that no prison sentence was imposed, the ECHR did find the restriction necessary in a democratic society under 10 (2). 432

An important factor thus was that, according to the ECHR, the book did not enter into a free discussion about the place of Islam in society as a result of immigration, but concerned the attribution of negative qualities or behavior to immigrants, foreigners, or a particular ethnic group on account of their religion, as it were their inherited biological characteristics. If the ECHR found the restriction in this case acceptable, because a religion was in fact treated as the hallmark of people’s racial and ethnic identity, it had better more explicitly explain why.

429 ECHR 10 July 2008, no. 15948/03 (Soulas and others v. France), para. 36-38.
430 Ibid., para. 39; 41.
431 Ibid., para. 23; 48.
432 Ibid., para. 43; 46.
The *Soulas* case formed an important precedent for *Féret v. Belgium*. The case concerned the conviction of Daniel Féret, president of the extreme right political party Front National and representative in Parliament at the time of the national proceedings, as the author and editor of a series of posters and leaflets distributed and published on the Internet during the election campaigns. The publications comprised statements against the immigration of freeloaders and the ‘Islamization’ of Belgium and slogans such as ‘Priority for the Belgians and the Europeans’ and ‘Attacks in USA: it is the couscous clan’.

After the public prosecution had obtained the waiver of his parliamentary immunity, Féret was prosecuted for ‘incitement to discrimination, segregation, hatred or violence against a group, community or its members on account of race, colour, nation or ethnic background’ and he was convicted to 250 hours of employment in the sector of the integration of foreigners and prohibited to exercise the right of eligibility for ten years.

The ECtHR again joined the exception of Article 17 evoked by Belgium in the case on the merits, but finally found that the content of the publications could not justify the application of Article 17. The restriction was however admissible under 10 (2), because ‘the publications presented immigrant communities as criminal and interested in exploiting the advantages of residing in Belgium and aimed to mock them. Such a discourse inevitably evoked with the public, especially among the least informed, feelings of disdain, rejection or, even with some, hatred against foreigners.’

According to the ECtHR, the language used clearly incited to racial hatred and discrimination. With regard to the tract ‘Attacks in USA: it is the couscous clan’, the ECtHR adopted the vision of the national courts that ‘such an oversimplified representation that equated all Muslims with terrorists was an incitement to hatred against all members of this group, without distinction, and translated the desire of its authors to recur to this hatred.’

The Court’s main concern was that in order for a restriction to be acceptable ‘the incitement to hatred does not necessarily require this or that act of violence or another punishable act. The injury of persons by insulting, ridiculing or defaming certain parts of the population and specific groups or the incitement to discrimination, as in the present case, suffices in order for the authorities to privilege the fight against racist discourse facing a freedom of expression that is irresponsible and violates the dignity or even the security of these parties or groups of the population. Political discourses that incite to hatred founded on religious, ethnic or cultural prejudices represent a danger for the social peace and political stability in the democratic States.’

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433 ECtHR 16 July 2009, no. 15615/07 (Féret v. Belgium), para. 52; 82.
434 *ibid.*, para. 69.
435 *ibid.*, para. 71.
436 *ibid.*, para. 73.
The ECtHR interpreted Féret’s statements thus as an incitement to hatred against Muslims rather than political criticism of the Government’s immigration policy. Another point stressed by the ECtHR thus concerned the duties and responsibilities of politicians: ‘it is of crucial importance that politicians, in their public discourses, avoid to diffuse remarks susceptible to nourish intolerance.’ ‘Politicians should be particular attentive to the defence of democracy and its principles, because their ultimate objective is the seizure of power itself.’ The ECtHR found the waiver of Féret’s parliamentary immunity justified, because ‘the incitement to exclusion of foreigners constitutes a fundamental violation of the rights of individuals’.437

The ECtHR acknowledged that political discourse required a high level of protection and that political parties had a broad freedom of expression in order to convince their electors and propose solutions for problems related to immigration. However, in the context of an electoral campaign that aimed to reach the electorate at large, thus the entire population, racist and xenophobic discourse had a larger and more harmful impact on the public order and the cohesion of the social group. ‘Such behaviour risks to evoke with the public reactions incompatible with a serene social climate and to undermine the confidence in the democratic institutions.’438 As Belgium, despite the length of the ineligibility, had testified for restraint in the recourse to criminal law, the restriction was necessary in a democratic society.

The ECtHR did not develop clear standards and precise criteria for review comparable with incitement to violence, such as the expression of actual ‘incitement’, the intention of the speaker to stigmatize others and the likelihood of subsequent violent action as a probable effect of the expression. Nor did the ECtHR require any demonstration of how hate speech consisting of group defamation affects the dignity or security of the target group, for example, by reference to its psychological effects. The ECtHR’s approach towards hate speech has therefore been compared with the American ‘bad tendency test’ and criticized on this account: the nature of the act – incitement – and the intention of the author are deduced from the ‘tendency’ of the words to persuade others to adopt hateful or discriminatory attitudes.439

The underlying reason why the ECtHR found the statements to constitute a prohibited incitement to hatred against Muslims appears to be, however, that they constituted ‘false factual allegations or strong negative value judgments that lacked a sufficient factual basis’ about them. An important factor therein appeared to be that, according to the ECtHR, Islam as a religion was in fact treated as the hallmark of people’s racial and ethnic identity (that of immigrants/foreigners). But again, the ECtHR did not explicitly refer to these

437 Ibid., para. 75.
438 Ibid., para. 76-77.
principles in its reasoning. In fact, the ECtHR left the national authorities a certain margin to interpret and apply its national provisions prohibiting specific forms of hate speech.

The dissenters took a diametrical opposite view on freedom of expression and the criminal restrictions that are allowed in a democratic society.\footnote{Ibid., Dissenting opinion of judge Sajó, Zagrebelsky and Tsotsoria.} Firstly, they acknowledged that the long-term impact of xenophobic propaganda constitutes a major problem for democratic societies. However, they objected to the regulation of a discourse on the basis that its mere content was deemed incompatible ‘with the spirit of the Convention’, because a ‘spirit’ does not offer a clear standard and opens the door for abuse.

Moreover, the dissenters opined that human beings tend to qualify as inadmissible, opinions that are inconvenient to them. However, when remarks are considered to be of little value in the search for truth, this was to be demonstrated undeniably in the light of the circumstances of the specific case concerned. The protection of political opinions was precisely grounded on the idea that human beings are sufficiently rational to make informed choices; the controllers of political powers were not to establish a catalogue of false or inacceptable ideas. This apparently also applied to defamatory statements and negative value judgments about an entire group in society, without distinction, such as those of Féret.

According to the dissenters, expressions that form part of public debate could only be sanctioned if they incited particular acts or forms of discrimination. This would, for example, be the case if expression called the public to boycott, refuse services to or avoid migrants – such as in \textit{Willem v. France}. It was incumbent upon the State to demonstrate the \textit{direct effect} of such speech; a \textit{potential} impact on the rights of others did not suffice for the restriction of a human right. For the criteria for ‘incitement’ to discrimination, the dissenters based themselves on the case \textit{Sürek no. 1} concerning incitement to violence and considered that ‘expressions must be susceptible to favour discrimination by instilling a profound and irrational hatred against those who were presented as responsible for the alleged atrocities. Discrimination, like violence, implies action.’

This signified, in the eyes of the dissenters, that in order for a restriction on discourse to be acceptable the demonstration of the existence of a punishable illegal act that directly resulted from the discourse or was at least significantly and truly favoured by it was required. Another crime had to be committed or had to be susceptible to be committed and that’s when prevention intervenes. Incitement constituted ‘a strong, or even decisive, psychological exhortation supposed to give birth to another punishable offence.’ The simple intolerance, the sentiment without action or at least without the manifest tendency to action
could not constitute an offence; its criminalization would constitute a ‘délit d’opinion’, i.e. a thought crime.

Féret’s expression did not meet the dissenters’ high thresholds. His remarks had to be interpreted neither in isolation nor in combination with other randomly chosen remarks, but in the context of the entire publication. The remarks had to be qualified as political criticism directed against the Government, the political parties and their politics favourable to migrants and vague political proposals addressed to the Government that did not call on actions on the part of the population. Neither did Féret incite them to violence against a part of the population, in which case the state would have had a larger margin of appreciation.

The dissenters admitted that ambiguity of expression could contribute to the formation of a xenophobic mentality that could lead to discriminatory or violent behaviour and could also result in the support of political parties with anti-democratic aims. However, this was a problem of the ‘militant democracy’, whose norms applied rather to political parties than to individuals – like Féret. Apparently, the dissenters opined that individuals are entitled to a larger freedom of expression. The dissenters criticized the fact that the ECHR had used the broad definition of hate speech in Recommendation no R (97) 20, because this instrument aimed at prohibiting the media such as radio and television stations from distributing a ‘discourse of hatred’ and thus did not apply in this case. We will see later on that this argument is incorrect, because the recommendation is not specifically limited to the media (para. 2 infra).

The dissenters also strictly distinguished racism from other forms of discrimination. Féret’s remarks were not racist in themselves, because they neither referred to the superiority or inferiority of a race nor attributed inherited biological characteristics to an identifiable group. ICERD, to which the ECHR had referred, included discrimination on other grounds, but not between citizens and non-citizens. It also did not include the incitement to religious and cultural prejudices.

According to the dissenters, the ECHR had thus rapidly extended the list of acceptable prohibitions on political opinions on the simple ground of constituting ‘dangerous discourse’ without further precision, while in a democracy elections did not constitute a source of danger requiring special restrictions on discourse. Finally, the dissenters found the severity of Féret’s penalty to be comparable with that of a war criminal for the offence of collaboration and hence disproportionate. Given the voting weights in the case, this dissenting opinion could be considered as an important counter balance to the ECHR’s majority opinion.

To recapitulate, to a majority of the ECHR the bad influence of hatred based on prejudices on the political stability and serene social climate (mid/ long term effects) and the violation of people’s dignity is sufficient in order to justify its restriction. The Court does not, however, differentiate between types of hate
speech (incitement, insult, defamation, intolerance) and does not set clear criteria for ‘incitement’ or require any demonstration of how hate speech harms people’s dignity. An underlying consideration often appears to be that speech in question may be prohibited, because it constitutes ‘false factual allegations or strong negative value judgments that lacked a sufficient factual basis’ about a group and treat people’s religion as the hallmark of their racial and ethnic identity.

The minority within the ECHR requires a stricter connection between the content of expression (actual incitement) and subsequent concrete forms of discrimination and violence by others in order to justify a restriction. It also makes a stricter distinction between classic racist speech and other forms of intolerance. Criticism of government policy can consist of factual allegations and negative value judgments about a group, the wrongfulness of which must be determined by public debate itself.

The approach of the dissenters in the Féret case was, however, not adopted in the subsequent inadmissible decision of the ECHR in Le Pen v. France. Le Pen, at the time president of the extreme right political party Front National, was sanctioned with a fine of €10,000 for ‘provocation to discrimination, hatred or violence’ with regard to his statement in an interview with the newspaper Le Monde ‘On the day that France will count no longer 5 million but 25 million of Muslims, they will be in command. The French will clean the streets and walk the sidewalks with their eyes facing down. If they don’t, they will be told: ‘Why are you looking at me like that? Are you looking to fight?’ And if then you don’t run, you’ll get punched.’

The ECHR dealt with the case under 10 (2) and made no reference to Article 17. It primarily noted that the statements made by Le Pen formed part of a debate of general interest about the problems relating to the immigration and integration of foreigners. However, the ECHR subsequently recalled, referring to the Soulas case, that states had a large margin to determine the necessity of restrictions to the debate on immigration and integration. The ECHR cited the analysis of the national courts, i.e. that Le Pen’s words were susceptible to give a negative, and even alarming, image of the ‘Muslim community’ as a whole and instilled in the mind of the public the conviction that the security of the French would proceed with the rejection of Muslims and that the anxiety and fear caused by their presence in France would stop if they would decrease in numbers and disappear. In this manner, the ECHR concluded that Le Pen set the French against a community explicitly designated on the basis of its religion and presented as a menace to the dignity and security of the French. His words were susceptible to evoke a feeling of rejection and hostility towards the targeted community.

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441 ECHR 20 April 2010, no. 18788/09 (Le Pen v. France).
Importantly, for the first time the ECtHR gave explicit consideration to the distinction between facts and value judgments in the context of hate speech, just as the dissenters in Féret had referred to the ‘catalogue of false ideas’. But here the ECtHR precisely rejected Le Pen’s reference to news facts that were supposed to support his assertions; these did not constitute ‘a sufficient factual basis’ for his value judgments, but in reality challenged the appreciation of the national courts. The question arises as to what according to the ECtHR would have constituted a sufficient factual basis for Le Pen’s assertions. However, the ECtHR neither discussed the content of these news facts nor did it provide any further explanation of this point. Therefore, the decision does not shed much light on the requirement of a ‘sufficient factual basis’ for allegations in hate speech cases. As Le Pen in principle was liable for a prison sentence, his conviction of a fine was not disproportionate and Article 10 was not violated.

1.4 Demarcation with blasphemy and religious offence

The right to respect for religious feelings in accordance with 9 ECHR

The ECtHR’s case law concerning blasphemy and religious offence must be distinguished from the previously discussed case law concerning religious hate speech. Unlike the latter, the ECtHR generally conceives the former issue as a direct conflict between freedom of expression and freedom of religion that subsequently – oddly enough – does not engage Article 17. The starting point of the ECtHR’s established case law concerning blasphemy were the cases of Otto Preminger Institute v. Austria and Wingrove v. United Kingdom. In both cases the ECtHR upheld the measures and found no violation of freedom of expression by 6:3, and 7:2 votes respectively.

The Otto Preminger case concerned the film ‘Das Liebeskonzil’, the plot of which was based on a play by playwright Panizza, in which God appears as a senile old man, Jesus is mentally defective and God, Jesus and the Virgin Mary agree with the devil to punish immorality by infecting the world with syphilis. The Otto Preminger Institute in Innsbruck (Tyrol) had announced the screening of the film in its bulletin, in several display windows and in a local newspaper. Before it was shown, the film was seized and confiscated for constituting blasphemy, prohibited by Austrian criminal law.

The ECtHR found that the measure pursued the legitimate aim of protecting the rights of others, more specifically the right to respect one’s religious feelings and considered this to be an integral part of the right to freedom of religion as protected in Article 9 ECHR. The ECtHR recalled that

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freedom of religion ‘is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life.’

Although religious believers could not ‘reasonably expect to be exempt from all criticism’, ‘in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them.’ The respect for the religious feelings of believers could already be violated ‘by provocative portrayals of objects of religious veneration; and such portrayals can be regarded as malicious violation of the spirit of tolerance, which must also be a feature of democratic society.’

The ECHR continued that amongst the ‘duties and responsibilities’ connected with the exercise of freedom of expression – in the context of religious opinions and beliefs – may legitimately be included ‘an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs’. This being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent improper attacks on objects of religious veneration.

However, the ECHR observed that it was ‘not possible to discern throughout Europe a uniform conception of the significance of religion in society’. Therefore, it was ‘not possible to arrive at a comprehensive definition of what constitutes a permissible interference with the exercise of the right to freedom of expression where such expression is directed against the religious feelings of others.’ Finally, the ECHR thus afforded the state a large margin of appreciation to determine the necessity of restrictions on such speech.

The ECHR subsequently quite uncritically adopted the arguments put forward by the state. It considered that, although the access to the film was subjected to an admission fee and an age limit, the film was widely advertised and therefore sufficiently ‘public’ to cause offence. Moreover, the film constituted an abusive attack on the Roman Catholic religion according to the conception of the Tyrolean public. As this was the religion of ‘the overwhelming majority of Tyroleans’, Austria acted ‘to ensure religious peace in that region and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner’.

The ECHR’s marginal review resulted in the conclusion that Austria had not overstepped its margin of appreciation. The Court neither balanced the opposing interests for itself in the light of the full context of the case, nor

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444 Ibid., para. 47.
445 Ibid., para. 47.
446 Ibid., para. 49.
447 Ibid., para. 50.
448 Ibid., para. 56.
assessed the existence of a pressing social need for the restriction, its proportionality and whether its reasons were relevant and sufficient. It thereby placed a very high burden on the applicant to prove a violation of freedom of expression and placed a very low burden on the state to prove the legitimacy of its measures.

The ECHR’s approach was very similar in Wingrove v. The United Kingdom. The case concerned the video Visions of Ecstasy, for which the British Board of Film Classifications (BBFC) refused to accord a ‘classification certificate’ and thereby obstructed its distribution in England. The video depicted the visions of the sixteenth century nun Saint Theresa of Avila as erotic ecstasies for which she was assisted by Christ and a woman symbolizing her spirit. According to the BBFC, the video was blasphemous and therefore violated English criminal law.

Importantly, the Court rejected the arguments of the applicant that the offence of blasphemy was too vague and found the interference prescribed by law, considering that: ‘the offence of blasphemy cannot by its very nature lend itself to precise legal definition. National authorities must therefore be afforded a degree of flexibility in assessing whether the facts of a particular case fall within the accepted definition of the offence.’

The ECHR found that the state’s aim of affording protection against the presentation of a religious subject in a contemptuous, reviling, insulting, scurrilous or ludicrous tone, style or spirit calculated to outrage religious believers or sympathizers to correspond with the protection of the ‘rights of others’ in Article 10 (2) and also fully consonant with the aim of the protections afforded by Article 9 to freedom of religion. Despite this initial reference to Article 9, the Court subsequently laid less emphasis on freedom of religion than it had done in Otto Preminger. It concluded that the refusal of a distribution certificate was intended to ‘provide protection against seriously offensive attacks on matters regarded as sacred by Christians’, but did not explicitly qualify such protection as an integral part of the right to freedom of religion.

Finally, the ECHR affirmed the large margin of appreciation for states to determine the extent and necessity of measures against attacks on religious convictions stating: ‘[w]hat is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place to place, especially in an era characterized by an ever growing array of faiths and denominations.’

Again the ECHR applied a rather marginal review and accepted the vision of the state that the work focussed ‘less on the erotic feelings of the

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450 Ibid., para. 42.
451 Ibid., para. 48.
452 Ibid., para. 57.
453 Ibid., para. 58.
character than on those of the audience, which is the primary function of pornography’ and engaged the viewer in a ‘voyeuristic erotic experience’ and therefore could outrage and insult the feelings of believing Christians.454 The fact that the measure amounted to a total distribution ban was not unreasonable, because once videos become available on the market they can, in practice, easily escape from control. Other measures such as restricting the distribution to licensed sex shops or using a case with a warning about the content would therefore only have had a limited effect.455

The decisions in Otto Preminger and Wingrove have been highly criticized by both the dissenters and commentators. The dissenter in Otto Preminger stressed that ‘it should not be open to the authorities of the State to decide whether a particular statement is capable of ‘contributing to any form of public debate capable of furthering progress in human affairs’; such a decision cannot but be tainted by the authorities’ idea of ‘progress’. They also pointed out that ‘The Convention does not, in terms, guarantee a right to protection of religious feelings. More particularly, such a right cannot be derived from the right to freedom of religion, which in effect includes a right to express views critical of the religious opinions of others.’ In the end, the advertisement of the film enabled the religiously sensitive to make an informed decision to stay away and made it unlikely that anyone would be confronted with the material unwittingly.456

Commentators have also notably criticized the presentation of the issue of religious offence as a conflict between freedom of expression and freedom of religion.457 It has been argued that the freedom of religion of others certainly constitutes a legitimate ground for limiting free speech, but should not be equated with a right not to be insulted in one’s religious feelings. It cannot be advanced as a ground for limitation on speech by a state without at least some proof and concrete indication that religious rights are at stake. This threshold is much higher than the likelihood of a group being insulted.458 Moreover, the ECtHR’s argument that an overwhelming majority of the population adhered to Catholicism could also be turned around; it was quite unlikely that an extreme

454 ibid., para. 61.
455 ibid., para. 62-63.
456 Joint dissenting opinion of judges Palm, Pekkanen and Makarczyk, para. 3; 6; 9 at: ECHR 20 September 1994, no. 13470/87 (Otto Preminger Institute v. Austria).
view of a minority could effectively undermine anyone’s religious rights. This would be more plausible if the targeted group was a vulnerable minority or if the group according to statistics indeed suffered from hate crimes or persecution.  

The dissenters in Wingrove questioned the necessity of the measure in a democratic, pluralistic society on the basis of the discriminatory nature of the offence of blasphemy that solely protected the Christian faith. The ECtHR should at least have expressed its reasoning in terms of both religious beliefs and philosophical convictions; the rights of others under 10 (2) could not be restricted solely to protect the rights of others in a single category of religious believers or philosophers or a majority of them.

Despite this harsh criticism the ECtHR continued its line of reasoning in I.A. v. Turkey, concerning the conviction for blasphemy against ‘God, the Religion, the Prophet and the Holy Book’ with regard to the publication of a novel by Abdullah Riza Ergüven entitled ‘Yasak Tümceler’ (The forbidden phrases) that included the passage: ‘Look at the triangle of fear, inequality and inconsistency in the Koran; it reminds me of an earthworm. God says that all the words are those of his messenger. Some of these words, moreover, were inspired in a surge of exultation, in Aisha’s arms. ... God’s messenger broke his fast through sexual intercourse, after dinner and before prayer. Muhammad did not forbid sexual relations with a dead person or a live animal.’

By a narrow majority of 4:3, the ECtHR found no violation of freedom of expression. It considered that ‘[t]he issue before the Court therefore involves weighing up the conflicting interests of the exercise of two fundamental freedoms, namely the right of the applicant to impart to the public his views on religious doctrine on the one hand and the right of others to respect for their freedom of thought, conscience and religion on the other hand’. The Court has been lauded for no longer referring to the right not to be insulted in one’s religious feelings under Article 9.

However, again the ECtHR did not explain in which manner the expression that did not deny Muslims the free exercise of any aspect of their faith could have interfered with and violated their freedom of religion. The ECtHR simply found the novel to constitute ‘an abusive attack on the Prophet of Islam’ and the measure against it intended to provide protection against

459 Temperman 2011, p. 735.
461 Dissenting opinion judge Pettiti at: ibid.
463 Ibid., para.27.
464 Temperman 2011, p. 734.
'offensive attacks on matters regarded as sacred by Muslims'\textsuperscript{465} and reasonable as it concerned a limited fine.

The dissenters objected that any criminal conviction has a ‘chilling effect’ and that the \textit{limited practical impact} of the novel on society was not taken into account. They called the ECtHR to revise all of its case law that placed too much emphasis on conformism or uniformity of thought.\textsuperscript{466} Indeed, in theory every critical opinion on religious affairs that does not presume their sacredness devalues the character of such affairs and could therefore be considered as gratuitously offensive, even when conveyed in neutral terms.

Starting in 2006, the ECtHR changed course and increasingly began to distinguish unprotected attacks on people on the basis of their religion from protected criticism on religious dogmas. It has been argued that the ECtHR did so in reaction to international developments at the time such as the affair of the Danish Cartoons and the UN ‘defamation of religions’ resolutions.\textsuperscript{467} Subsequently, the following case Tatlat v. Turkey sharply contrasted with the ECtHR’s previous case law.\textsuperscript{468}

In this case, the ECtHR unanimously found a conviction for the profanation of ‘one of the Religions’ with regard to the publication of a book entitled ‘İslamiyet Gerçek’i (the Reality of Islam), which formed a critical commentary of the Koran to constitute a violation of freedom of expression.\textsuperscript{469} According to the ECtHR, the issue again ‘implied a balancing act between the right to communicate one’s ideas on a religious doctrine to the public and the right of others to respect for their freedom of thought, conscience and religion’.\textsuperscript{470}

However, the ECtHR found the assertion in the book that the effect of religion was to legitimize social injustice by presenting it as the ‘Will of God’ to form ‘a critical point of view of a non-believer regarding religion in the socio-political domain’. Contrary to the I.A. case, the book did not have an insulting tone directed at the person of believers, nor did it constitute a harmful attack on sacred symbols, notably of Muslims, even though they certainly could feel

\textsuperscript{465} ECtHR 13 September 2005, no. 42571/98 (I.A. v. Turkey), para. 30.
\textsuperscript{466} Ibid., Joint dissenting opinion of judges Costa, Cabral Barreto and Jungwiert, para. 26; 8.
\textsuperscript{468} ECtHR 26 May 2006, no. 50692/99 (Aydin Tatlav v. Turkey).
\textsuperscript{469} The book proclaimed that Islam had the tendency to repress criticism and freedom of thought and constituted an ideology based on cruel sanctions, because of a lack of self-confidence. In fact, God did not exist but was created by the mind of the illiterate and the Koran was a primitive, superficial book filled with repetitions. See: Ibid., para. 12.
\textsuperscript{470} Ibid., para. 26.
offended by this sharp comment on their religion.\textsuperscript{471} Now the ECtHR concluded that ‘a criminal conviction could deter authors and editors from publishing opinions not conformist to religion and forms an obstacle in the protection of pluralism, which is indispensable for the healthy evolution of a democratic society.’\textsuperscript{472}

\textit{Group defamation on the basis of religion}

The ECtHR’s case law concerning blasphemy can be contrasted with the Court’s case law concerning national convictions for group defamation on the basis of religion. In the former, the ECtHR conceived offensive criticism of religious dogmas as an indirect insult of religious adherents and therefore found restrictions to such speech acceptable. Contrarily, it results from the latter that criticism on the conduct of particular religious institutions or officials cannot be considered as an indirect defamation of the entire group of adherents on account of their religion and/ or a violation of their freedom of religion per se. According to the ECtHR, such speech rather forms a contribution to public debate and, when it is not gratuitously offensive, its restriction violates freedom of expression.

A famous example is the case of \textit{Giniewski v. France}.\textsuperscript{473} In reaction to the publication of the papal encyclical ‘Veritatis Splendor’, Giniewski had published an article in a French newspaper, in which he criticized the Catholic Church and the position of the Pope and alleged that ‘[m]any Christians have acknowledged that anti-Judaism and the doctrine of the ‘fulfillment’ of the Old Covenant in the New lead to anti-Semitism and prepared the ground on which the idea and implementation of Auschwitz took seed.’\textsuperscript{474}

The ECtHR unanimously found the civil conviction for defamation of the Christian community on the basis of their religion to violate Article 10. The interference did have the legitimate aim of protecting ‘the reputation or rights of others’ and was also fully consonant with the aims of Article 9.\textsuperscript{475} This reference to freedom of religion is striking. Generally, the ECtHR regards reputation rights as forming part of the right to privacy protected in Article 8 ECHR. Now it seemingly connected the protection of the reputation of religious groups with freedom of religion.

The ECtHR, however, continued stating that ‘[b]y considering the detrimental effects of a particular doctrine, the article in question contributed to discussion of the various possible reasons behind the extermination of the Jews in Europe, a question of indisputable public interest in a democratic society.’ Although the issue concerned ‘a doctrine upheld by the Catholic Church, and

\begin{itemize}
  \item \textsuperscript{471} \textit{Ibid.}, para. 28.
  \item \textsuperscript{472} \textit{Ibid.}, para. 30.
  \item \textsuperscript{473} ECtHR 31 January 2006, no. 64016/00 (Giniewski v. France).
  \item \textsuperscript{474} \textit{Ibid.}, para. 14.
  \item \textsuperscript{475} \textit{Ibid.}, para. 40.
\end{itemize}
hence a religious matter,’ the article did not ‘contain attacks on religious beliefs as such, but a view which the applicant wishes to express as a journalist and historian.’ It was ‘essential in a democratic society that a debate on the causes of acts of particular gravity amounting to crimes against humanity should be able to take place freely.’

The state had argued that the article did not convey an opinion or a value judgment but referred to an (untrue) fact; it charged the Catholic Church, and therefore its members, with responsibility for the extermination of the Jews by the Nazi regime. Contrarily, the ECtHR considered that the article did not ‘cast doubt in any way on clearly established historical facts’ and ‘it is an integral part of freedom of expression to seek historical truth’, and that ‘it is not its role to arbitrate’ the underlying historical issues. Finally, the article was not gratuitously offensive, because it was not intentionally insulting or defamatory, nor did it incite hatred or disrespect.

The ECtHR confirmed its approach in *Klein v. Slovakia*, where it again unanimously found a violation of Article 10. The case concerned an article published in a weekly that sharply criticized a Catholic Archbishop for calling to withdraw the film ‘The People versus Larry Flynt’ and its advertisement on the basis of its blasphemous character. The article questioned why decent Catholics do not leave the organization, which is headed by such an ‘ogre’. Two religious organizations complained that the defamatory statement about the highest representative of the Catholic Church in Slovakia had offended the religious feelings of their members. Subsequently, the author of the article was prosecuted and convicted of religious group defamation.

According to the ECtHR however, the article neither unduly interfered with the right of believers to express and exercise their religion, nor did it denigrate the content of their religious faith. Furthermore, the strongly worded pejorative opinion related exclusively to the Archbishop and the statements did not discredit and disparage a sector of the population on the basis of their Catholic faith. The fact that the statements could have offended some members of the Catholic Church did not alter this. Therefore, the conviction of the criminal offence of defamation of other persons’ belief was in itself inappropriate in the particular circumstances of the case.

Interestingly, the ECtHR started by pointing out that the issue ‘does not require the examination of whether a sufficient factual basis existed for the

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478 ECtHR 31 October 2006, no. 72208/01 (Klein v. Slovakia).
479 More specifically, the offence of public defamation of ‘a group of inhabitants of the republic for their political belief, faith or because they have no religion’.
impugned statements directed at the person of the Archbishop’, but did not
further explain this point.\[^{482}\] Therefore, it remains unclear whether, according to
the Court, this requirement in principle does not apply to (religious) group
defamation, or whether in casu it was irrelevant, because the article exclusively
criticized the Archbishop and thus did not constitute group defamation. Also,
the Archbishop had withdrawn from the criminal proceedings as an injured
party and publicly pardoned the applicant.

In this respect, the case conflicted with \textit{Albert Engelmann v. Austria}.\[^{483}\] The latter
concerned a conviction for individual defamation in a civil case initiated by the
Vicar General of the Archdiocese of Salzburg, Paarhammer, with regard to a
publication in a Catholic newspaper that suggested that he was a ‘rebel’ and
reproached him for having publicly criticized and disparaged the Pope in an
extremely offensive manner.\[^{484}\] The ECtHR did, however, find a violation of
Article 10.

Firstly, the ECtHR stressed that the statements ‘related to a religious
debate, which was of considerable interest to the concerned religious
community at the time of the events.’\[^{485}\] Furthermore, contrary to the national
courts that qualified the statements as statements of fact that lacked sufficient
factual basis, the ECtHR considered that they had to be understood as
permissible value judgments. Their sufficient factual basis consisted in the proof
of Paarhammer’s public criticism against the Holy See. They did not constitute a
‘gratuitous personal attack on his person’.\[^{486}\]

1.5 Holocaust denial as a particular form of hate speech

Holocaust denial can be regarded as a particular form a hate speech in the
ECtHR’s case law. The ECtHR affords a special protection against revisionist
speech and Holocaust denial and has gradually treated it as a particular
category of expression that is excluded from the protection of Article 10 by
Article 17. In certain early cases concerning publications suggesting that the gas
chambers in the concentration camps during the Nazi regime had never existed,
the former ECtHR held that such publications ‘ran counter to one of the basic
ideas of the Convention, as expressed in its preamble, namely justice and peace,

\[^{482}\] \textit{Ibid.}, para. 49.
\[^{483}\] ECtHR 19 January 2006, no. 46389/99 (Albert-Engelmann-Gesellschaft MBH v
Austria).
\[^{484}\] Subsequently, Paarhammer was recalled from his function and appointed elsewhere. Dissenting
judges Steiner & Kovler therefore objected that the quite severe allegations (of fact) had positively
damaged Paarhammer’s reputation and found no violation of Article 10.
\[^{485}\] \textit{Ibid.}, para. 30.
\[^{486}\] \textit{Ibid.}, para. 32-33.
and further reflect racial and religious discrimination.\textsuperscript{487} The ECmHR considered the criminal convictions of an editor and a publisher for incitement to hatred and race hatred for false propaganda to constitute measures that were necessary in a democratic society and justified under 10 (2) for the prevention of disorder and crime and the protection of the reputation and rights of others. On these grounds, the ECmHR found the applications manifestly ill-founded and inadmissible and only indirectly referred to Article 17.\textsuperscript{488}

In a number of cases, notably against France, the ECtHR further elaborated the application of Article 17 in the context of Holocaust denial and revisionist speech. \textit{Lehideux and Isorni v. France} concerned the criminal conviction for the publication of an advertisement in the French journal \textit{Le Monde} that sought the rehabilitation of Marshal Pétain, French Head of State during the Vichy Regime, on the ground of publicly defending the crimes of collaboration with the enemy.\textsuperscript{489}

According to the ECtHR, the publication by describing Pétain’s policy as ‘supremely skillful’ rather supported the ‘double game theory’ (according to which Vichy aimed to protect France from the excesses of Nazism and secretly engaged with the Allies waiting for the right time to switch sides). The ECtHR considered ‘it is not its task to settle this point, which is part of an ongoing debate among historians about the events in question and their interpretation. As such, it does not belong to the category of clearly established historical facts – such as the Holocaust – whose negation or revision would be removed from the protection of Article 10 by Article 17.’\textsuperscript{490,491}

The categorical approach to Holocaust denial by the ECtHR can be explained by the direct historical context, in which the ECtHR was drafted, and can be contrasted with the ECtHR’s approach to other forms of hate speech that are generally dealt with on the merits under 10 (2) (para. 1.3 supra). \textit{Garaudy v.}

\textsuperscript{487} ECmHR 6 September 1995, no. 25096/94 (Otto E.F.A. Remer v. Germany); ECmHR 18 October 1995, no. 25062/94 (Honsik v. Austria).
\textsuperscript{488} See also: ECmHR 24 June 1996, no. 31159/96 (Marais v. France).
\textsuperscript{489} On the one hand, the publication ‘tried to justify Pétain’s decisions by endeavoring to give them a different meaning’ and on the other hand, it ‘omitted to mention historical facts which were a matter of common knowledge and inescapable and essential for any objective account of the policy concerned’ ECtHR 23 September 1998, no. 24662/94 (Lehideux and Isorni v. France), para. 46.
\textsuperscript{490} ECtHR 23 September 1998, no. 24662/94 (Lehideux and Isorni v. France), para. 47.
\textsuperscript{491} The ECtHR finally found a violation of freedom of expression. Certain dissenters objected that the issue arose out of particular French historical circumstances and fell into the \textit{moral} domain. France therefore should have a large margin to decide whether the publication constituted an implicit support of the Regime and whether such racism and Anti-Semitism could be condoned. See: Joint dissenting opinion of judges Foighel, Loizou and Sir John Freeland at: ECtHR 23 September 1998, no. 24662/94 (Lehideux and Isorni v. France).
France illustrates this point well. The case concerned the controversial book *The founding Myths of Israeli Politics* by French philosopher, writer and former politician Garaudy. Garaudy had been convicted on the one hand for denial of crimes against humanity by denying the attempt of the Nazis to exterminate the Jews and on the other hand for racial defamation and incitement to racial hatred by strongly criticizing the political actions of the State of Israel and the Jewish community. The ECtHR separated these two issues. It dealt with the conviction for denial of crimes against humanity under Article 17 and considered that Garaudy questioned the reality, extent and seriousness of the historical events relating to the Second World War that are not the subject of debate between historians, but – on the contrary – are clearly established;

‘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. Their proponents indisputably have designs that fall into the category of aims prohibited by Article 17 of the Convention.’

Contrarily, the ECtHR dealt with the convictions for racial defamation and incitement to racial hatred under 10 (2). The Court expressed serious doubts about whether Garaudy’s opinions could be protected by Article 10, given the generally revisionist tenor of the book. Although political criticism of a State indisputably fell under the Article, Garaudy had not limited himself to such criticism, but pursued a proven racist aim. Unanimously, the ECtHR found the application manifestly ill-founded and declared it inadmissible.

In subsequent cases, the ECtHR has continued to distinguish free serious historical research from prohibited denial of clearly established historical facts with a racist aim. In one clear case of Holocaust denial, the ECtHR considered that ‘the requirements of protecting the interests of the victims of the Nazi regime, outweigh, in a democratic society the applicant’s freedom to impart views denying the existence of gas chambers and mass murder therein’.

Contrarily with regard to a critical book about of the possible involvement of certain members of the French Resistance in the arrest of their

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492 ECtHR 24 June 2003, no. 65831/01 (Garaudy v. France).
493 ECtHR 24 June 2003, no. 65831/01 (Garaudy v. France).
494 ECtHR 20 April 1999, no. 41448/98, (Witschz v. Germany).
leaders by the Nazi Regime, the Court considered: ‘it is an integral part of freedom of expression to seek historical truth and it is not the Court’s role to arbitrate the underlying historical issues, which are part of a continuing debate between historians that shapes opinion as to the events which took place and their interpretation’.495

Likewise with regard to a television programme that critically examined the role of Switzerland during the Second World War, the ECHR considered it unreasonable to require the journalist who made the programme ‘to make it any clearer that the programme reflected his own ‘subjective’ views and not the ‘sole historical truth’ – which, in any event, does not exist in relation to historical debate’.496 Hence, the aim of authorities to ensure objective accounts of historical truth must not result in protecting a ‘government declared truth’.

The ECHR is very clear in its rejection of Holocaust denial and revisionist speech. Nevertheless, the case law raises a number of questions. Firstly, it seems to be inconsistent of the ECHR to treat Holocaust denial under Article 17, precisely because it qualifies Holocaust denial as a form of ‘racial defamation and incitement to hatred’, with which it generally deals under 10 (2). Moreover, as the ECHR gives an autonomous qualification of expression, Holocaust denial cases before the ECHR may very well originate in national convictions for racial defamation, insult or hatred.

Secondly, the ECHR qualifies Holocaust denial as a ‘reflection of racial and religious discrimination’, but does not require that in order for such an opinion to constitute an abuse that it is directly accompanied by or is likely to induce others to actions aimed at destroying or limiting the rights of others. In fact, the ECHR is silent about the imminence of the threat that such expression poses. It is sufficient that it ‘undermines the values on which the fight against racism and anti-Semitism are based’ and that an author uses his freedom of expression ‘for ends which are contrary to the text and spirit of the Convention. Such ends, if admitted, would contribute to the destruction of the rights and freedoms guaranteed by the Convention.’497 This reasoning is highly hypothetical.

Thirdly, the latter can notably be considered worrisome, because the ECHR has brought not only the flat denial but also the minimization or trivialization of ‘clearly established historical facts’ under Article 17. Critical or negative remarks about such a sensitive issue as the Holocaust may easily be interpreted as minimizing or trivializing it. For example, the ECHR found a disciplinary measure for the statement ‘[a]s to the existence of the gas chambers, this is up to historians to discuss and determine.’ acceptable on the basis of its ambiguous nature and eventual contribution to revisionist theories and possible

495 ECHR 29 September 2004, no. 64915/01 (Chauvy v. France), para. 69.
496 ECHR 21 December 2006, no. 73604/01 (Monnat v. Switzerland), para. 68.
497 ECHR 24 June 2003, no. 65831/01 (Garaudy v. France).
subsequent disorder. Another point is whether the category of revisionist speech equally includes historical facts other than the Holocaust. The difficulty is that it may be undisputed that certain atrocities historically have taken place, but that it is highly disputed whether they could be qualified in law as a crime against humanity.ů

Unlike other categories of speech, the ECtHR continues to treat holocaust denial and the proclaiming of revisionist theories under Article 17. The question is whether it would also be preferable to evaluate this category of speech under 10 (2). Then the ECtHR could perform a more contextual analysis to determine the possible racist aim and purport of such speech and the actual threat it poses to the rights of others and the democratic system.

1.6 Positive state obligations and access to the ECtHR

Hate speech

Freedom of expression under Article 10 ECHR is essentially a negative right against state interference. In first instance, the ECtHR therefore determines not which restrictions are prescribed but only which restrictions are in violation with Article 10 and which not. The ECtHR thus does not oblige states to criminalize forms of hate speech, but does leave this possibility for states open. The ECtHR does not principally favor the use of civil law to counter hate speech. Based on the ECtHR’s case law concerning hate speech one could argue that national convictions for utterances that amount to hate speech will not evidently constitute a violation of Article 10 as long as criminal sanctions remain proportionate and for example do not consist of long prison sentences.

But the question arises as to whether member states also have any positive obligations under the Convention to prosecute and convict utterances that amount to hate speech, thus to restrict and sanction such use of freedom of expression. A subsequent question is whether victims of hate speech can complain before the ECtHR, when a state refuses to prosecute or to convict in a particular case of hate speech. Given the large margin of appreciation that the ECtHR affords states to determine the necessity of restrictions to hate speech, no such obligations can be derived from the ECtHR’s case law, even as regards the abuse of rights. However, Article 17 could play a role in the development of positive obligations; it seems reasonable that expression that can be qualified as an abuse of rights must at least be prohibited by law or even criminalized and prosecuted by the state (para. 1.1 supra).

In a relatively recent decision by the Grand Chamber, the ECtHR did consider that Article 8 ECHR can comprise a positive obligation for states to take measures to prevent the stigmatization of a person on the ground of his ethnic

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498 ECHR 7 June 2011, no. 48135/08 (Gollnisch v. France).
499 Cf. Harris, O’Boyle & Warbrick 2009, p. 452.
identity to effectively ensure his private life. According to the ECtHR, ‘any negative stereotyping of a group, when it reaches a certain level, is capable of impacting on the group’s sense of identity and the feelings of self-worth and self-confidence of members of the group. It is in this sense that it can be seen as affecting the private life of members of the group.’ However, the ECtHR found that in casu the state did not violate Article 8 by allowing the expression concerned.

The case concerned the book ‘The Gypsies of Turkey’ published by the Ministry for Culture that referred to the biased portrayal of the Roma in order to demonstrate the perception of the Roma community by the public. It also concerned two dictionaries – one entitled ‘Dictionary for pupils’ – published by the Turkish Language Association and part-financed by the Ministry of Culture that was comprised of entries concerning the word Gypsy that explained their ‘metaphorical use’, i.e. significance in common parlance. ‘Becoming a Gypsy’ was for example defined as ‘displaying miserly behaviour’.

In national proceedings the applicant requested the confiscation of the book and a ban on its distribution for being insulting towards the Roma/Gypsy community, and requested the removal of the dictionary entries alleged to be discriminatory to Gypsies. Furthermore, he requested damages, because the publications would constitute an attack on his identity as a Roma/Gypsy. After the national courts rejected the claims, the applicant complained of a violation of Article 8 and 14 ECHR before the ECtHR.

The ECtHR found that the book, examined as a whole, was neither insulting nor did it have a racist intention. Although the author pointed to certain illegal activities on the part of some members of the Roma community living in particular areas, nowhere in the book did he make negative remarks about the Roma population in general or claim that all members of the Roma community were engaged in illegal activities. The book had to be considered as a serious academic work. As for the dictionary entries, the ECtHR observed that a dictionary is a source of information, which reflects the language used by society. In a dictionary aimed at pupils, more diligence is required when giving the definitions of daily language. Therefore, it was preferable to label such expressions as ‘pejorative’ or ‘insulting’, rather than merely ‘metaphorical’. However, the dictionary was not a school textbook, was not distributed to schools, nor was it recommended by the Ministry for Education.

For these reasons, in the end, the State could ‘reasonably have come to its conclusions’ and in doing so had ‘not overstepped its margin of appreciation’. An important factor also was that the applicant was provided

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500 ECtHR (Grand Chamber) 15 March 2012, nos. 4149/04 and 41029/04 (Aksu v. Turkey).
501 Ibid., para. 58-59.
502 Ibid., para. 70-72.
503 Ibid., para. 84-86.
504 Ibid., para. 76; 88.
with an effective means of redress. The ECtHR thus appeared quite reluctant to further develop any concrete positive obligations under Article 8 to prevent the stigmatization on account of ethnic identity – even for government-funded speech directed at pupils. It did stress that the Roma formed a vulnerable minority that required special protection and agreed with the conclusions of reports by ECRI that the Turkish Government should pursue their efforts to combat negative stereotyping of the Roma, notably through education.

Dissenting judge Gyulumyan disagreed with the conclusion of the majority that ‘the applicant has not succeeded in producing prima facie evidence that the impugned publications had a discriminatory intent or effect’ and objected: ‘Alternatively [the Court] should, in my view, hold that when a member of a disadvantaged minority group suffers harm in an environment where racial tensions are high and impunity of State offenders epidemic, the burden to prove that the event was not ethnically induced shifts to the Government.’

Another important point is that the case concerned the complaint concerning a violation of Article 8 filed by an individual about being personally insulted by the publications. The state contested the applicant’s victim status, because he had not been directly affected by the expressions, and qualified his complaint as an actio popularis that the Convention did not permit. Contrarily, the ECtHR stressed ‘the need to apply the criteria governing victim status in a flexible manner’ and found that although the applicant was not personally targeted by the passages, he could have felt offended by the remarks concerning the ethnic group to which he belonged. Furthermore, the applicant’s standing in the national proceedings had not been in dispute.

It has been argued that the ECtHR should also develop positive obligations to counter hate speech against particular groups and afford them standing under Article 8 and/ or Article 9 ECHR. This would remove the inequality of access to the ECtHR between speakers who can complain about violations of their freedom of expression and addressees who cannot complain about violations of their dignity, reputation or safety. It seems unlikely that such a development could be hindered by problems related to the standing and

505 Ibid., para. 73; 87.
506 Ibid., para. 75; 85.
507 Ibid., Dissenting opinion of judge Gyulumyan, para. 1.
508 The ECtHR has found acquittals for individual defamation with regard to publications that accused persons mentioned by name of specific facts to violate the positive state obligation under Article 8 to protect their reputation in: ECtHR 14 October 2008, no. 78060/01 (Petrina v. Romania); ECtHR 30 March 2010, no. 20928/05 (Petrenco v. Moldova).
509 Ibid., para. 46; 53.
victim status of the minorities targeted by the hate speech.\textsuperscript{511} In practice, it seems likely that the Court will consider groups of individual victims, anti-racism and minority organizations that were an undisputed party in national proceedings and which members belong to the target group to be directly affected by the (absence of a) measure. In principle, however, organizations may only defend their own rights before the ECtHR and not those of its members, unless they have obtained their explicit mandate.\textsuperscript{512}

Another important admissibility criterion may be whether the national remedies have truly been exhausted. This may depend on the precise relationship between criminal and civil law in the national system concerned. For example, when the victims of certain hate speech joined a criminal prosecution for this speech as a civil party and the case resulted in an acquittal and a rejection of their civil claims, the question arises as to whether the civil parties could appeal this latter decision or subsequently initiate a civil case and whether they actually did so. In the end, however, the further materialization by the ECtHR of concrete obligations for member states to counter hate speech may be rather hindered by the Court’s broad understanding of the term and margin of appreciation in this field.

In this respect, it is a pity that the ECtHR found the complaint of a violation of Article 9 with regard to the acquittal of Dutch politician Geert Wilders from group insult and incitement to hatred, discrimination and violence on the basis of religion with regard to his statements about Islam and Muslims inadmissible.\textsuperscript{513} The case could have further clarified the positive obligations to

\textsuperscript{511} Article 34 ECHR determines that ‘The Court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto.’

\textsuperscript{512} Van Dijk, Van Hoof, Van Rijn & Zwaak 2006, p. 509.

\textsuperscript{513} The complaint was denied by letter of 11 October 2012 sent to the applicant (unpublished). Therefore, one can only speculate about the ECtHR’s motivation. One reason could be that the applicant, the As-Soennah mosque in Rotterdam, lacked victim status and standing. On the one hand, the mosque did obtain an explicit mandate of its members to represent their interests before the ECtHR. On the other hand, although the Mosque had obtained the court order that ordered the public prosecution to prosecute Wilders, it did not form a joint civil party to the criminal case on the merits. Another reason could be that the national remedies were not exhausted. In fact, under Dutch law, speech that is not punishable may nevertheless be prohibited under civil law on the ground of due diligence norms. As the mosque could have started a civil case, the national civil remedies appeared not to be exhausted. A final reason could be the motivation of the complaint. The applicant argued that Wilders’ offensive statements about Islam and the Koran affected the ‘peaceful enjoyment’ by its members of their freedom of religion (Application of 12 August 2011 filed by the As-Soennah mosque, unpublished). The applicant might have had more success, if it had complained of 1) a violation of Article 9 on the ground that Wilders’ political proposals were discriminatory towards Muslims and formed an actual threat to the equal exercise of their religion or b) a violation of Article 8, on the ground that notably Wilders’ attribution of an inherent criminal nature to Muslims on account of their religion and culture formed ‘a negative stereotyping of the group, capable of impacting on the group’s sense of identity and the feelings of self-worth and self-
prevent religious hate speech that can be located somewhere in between those in the ‘light’ cases of religious offence and those in the ‘severe’ case of religious violence.

**Blasphemy, religious offence and religious violence**

If the ECtHR envisions the issue of blasphemy and religious offence as a direct conflict between freedom of expression and freedom of religion, one could imagine that the Court would declare complaints about the refusal of states to prevent such speech admissible and, in certain situations, would find such omissions to constitute a violation of Article 9. So far, the ECtHR however notably established a possible positive obligation of the state to ensure the rights flowing from Article 9 in very general terms – in Otto Preminger.  

On the one hand, this did not obligate states on the ground of Article 9 to prevent certain expression about a particular religion, by some experienced as insulting, in specific cases. In *Choudhury v. United Kingdom*, the ECtHR found the complaint of a violation of Article 9 and 14 with regard to the refusal to prosecute the publishers of *The Satanic Verses* by Salman Rushdie on the ground of blasphemy, because this common law offence did not extend to religions other than Christianity, inadmissible.  

The refusal to prosecute did not directly interfere in the applicant’s freedom to manifest his religion or belief. Furthermore, Article 9 did not extend to guarantee a right to bring any specific form of proceedings against those who offend the sensitivities of an individual or of a group of individuals. Therefore, there also was no issue of discrimination in the enjoyment of Article 9. One could object that although the Convention does not require states to prohibit blasphemy in order to protect freedom of religion, it does allow states to do so and, in that case, they may not apply their laws in a discriminatory manner.

Furthermore, a right to have criminal proceedings instituted against a third person can also not be derived from Article 6 ECHR, which guarantees the right to a fair trial and more specifically the right of access to a court. Hence, in *Dubowska and Skup v. Poland*, the ECtHR rejected such a claim with regard to the decision of the public prosecution to discontinue the criminal investigations on the suspicion of publicly insulting religious feelings with regard to the image of Madonna and Child covered with gasmasks on the cover of a weekly with the headline ‘Death in the air – norms exceeded by 120%’. The ECtHR also considered that the applicants were not inhibited from exercising their freedom to hold and express their belief and the fact that the authorities, after careful

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514 ECtHR 20 September 1994, no. 13470/87 (Otto Preminger Institute v. Austria), para. 47.
515 ECtHR 5 March 1991, no. 17439/90 (Choudhury v. United Kingdom).
516 This right of access to a court under Article 6 rather affords a *suspect* the right to be tried on the charge in a court.
517 ECtHR 18 April 1997, no. 33490/96 (Dubowska and Skup v. Poland).
research, found no violation of an offence did not in itself amount to a violation of Article 9.

Finally, the decision of the Danish public prosecution not to prosecute the Danish newspaper *Jyllands-Posten* for publishing the Danish cartoons, despite the many complaints of Muslim organizations filed with the police about their blasphemous and insulting nature, has equally been challenged before the ECtHR on the ground of Article 9.\(^{518}\) It may be considered a pity that the ECtHR had to declare itself incompetent to decide in this famous case, since there was no jurisdictional link between the applicants, a Moroccan national and two associations based in Morocco, and Denmark.

On the other hand, when a state does not afford individuals any protection against religiously inspired violence and does not take any steps to investigate the discriminatory motives of such violence, that state violates a positive obligation on the ground of Articles 3 *juncto* 9 *juncto* 14 ECHR. This results from 97 *members of the Gldani congregation of Jehovah’s witnesses and 4 others v. Georgia* that concerned the refusal of the police to promptly intervene in the physical attacks and intimidation of members of the Congregation of the Jehovah’s Witnesses during a religious meeting by a group of Orthodox extremists and the subsequent refusal of the authorities to investigate the criminal offences.\(^{519}\) With regard to Article 9, the ECtHR considered that ‘through their inactivity, the relevant authorities failed in their duty to take the necessary measures to ensure that the group of Orthodox extremists led by Father Basil tolerated the existence of the applicants’ religious community and enabled them to exercise freely their rights to freedom of religion.’\(^{520}\)

### 1.7 Synthesis ECHR

The ECtHR describes hate speech broadly as ‘all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance)’. The prohibition of hate speech thus described under the ECHR is primarily informed by its underlying values of equal human dignity and non-discrimination. According to the case law of the ECtHR, expression may be prohibited as hate speech for the reason that it is insulting, ridiculing or defamatory of a group and violates their dignity and security and because it can lead to intolerance and feelings of distrust, rejection or hatred towards foreigners or other groups.

The negative influence of hatred based on prejudices on the political stability and serene social climate is thus sufficient in order to justify a restriction. The ECtHR has, therefore, not developed clear standards and precise

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\(^{518}\) ECtHR 11 December 2006, no. 5853/06 (Ben El Mahi and others v. Denmark).

\(^{519}\) ECtHR 3 May 2007, no. 71156/01 (97 members of the Gldani congregation of Jehovah’s witnesses and 4 others v. Georgia).

\(^{520}\) *ibid.*, para. 134.
criteria of review comparable with incitement to violence, such as the expression of actual ‘incitement’, the intention of the speaker to stigmatize others and the likelihood of subsequent violent action as a probable effect of the expression. Nor does the ECHR require any demonstration of how hate speech consisting of defamatory and insulting remarks affects the dignity or security of the target group, for example by reference to its psychological effects. In fact, the ECHR does not principally distinguish between different types of hate speech.

An implicit consideration of why the ECHR finds restrictions to statements about a group acceptable, however, often appears to be that they consist of ‘false factual allegations or strong negative value judgments that lacked a sufficient factual basis’ about them. As for speech concerning people’s religion, an important factor therein appears to be that, according to the ECHR, a religion is in fact treated as the hallmark of people’s racial and ethnic identity (that of immigrants/foreigners). But the ECHR does not explicitly refer to these principles in its reasoning. Important considerations – about the specific harmful effects of speech in question weighed against the interest of public debate or about the place of the distinction between factual statements and value judgments or between racial remarks and speech about religion therein – are often dissolved in the broad notion of hate speech used by the ECHR and the large margin afforded to states in determining the restrictions to the immigration and the integration debate under 10 (2).

The latter appears to be inconsistent with the ECHR’s general strict review of restrictions to political speech. If the ECHR would start using a stricter review of restrictions to the highly sensitive immigration debate as well, it could differentiate more between different types of hate speech and develop clear and consistent standards for their restriction and for distinguishing free critical remarks from prohibited hate speech, just as it has increasingly done with regard to the distinction between free criticism of religion and religious group defamation and free historical debate and Holocaust denial. Possible inconsistencies in the ECHR’s case law might, however, continue to flow from difficulties in interpreting expression.

In the end, the ECHR leaves national authorities a certain margin to interpret and apply its national provisions prohibiting specific types of hate speech. This has consequences for the effect of the ECHR’s case law on national law on hate speech. This would only be different, if clearly defined obligations to make the act in question a criminal offence followed from this case law, and at the moment this is not the case, even as regards the abuse of rights. The ECHR applies Article 17 also inconsistently. Its added value appears to be that it could form an additional argument in the Court’s reasoning to justify far-reaching measures against speech that constitutes an imminent risk to democracy under Article 10 (2)/ 11 (2). Moreover, it could play a role in the development of positive obligations for the criminalization and prosecution of forms of hate speech by the state.
2. Selection of Resolutions and Recommendations of institutions of the Council of Europe

At the Summit of Heads of State and Government of the Council of Europe member states, held in Vienna from 8-9 October 1993, a Declaration and Plan of Action on combating racism, xenophobia, anti-Semitism and intolerance was adopted that set out a range of measures in order to effectively counter the resurgence of these phenomena.\(^{521}\) It notably also stressed the relevance of the media in the fight against racism and intolerance.\(^{522}\) Subsequently, the Council of Europe has developed a number of strategies to counter hate speech.\(^{523}\)

Recommendation No. R (97)20 of the Committee of Ministers to member states on ‘hate speech’ was adopted on 30 October 1997. Its definition of hate speech makes it clear that the recommendation applies to hate speech generally and does not seek to create special legal obligations for the media. The recommendation puts particular emphasis on hate speech disseminated via the media, because of its greater and more damaging impact, notably in situations of tension or armed conflict. Public institutions and officials must refrain from hate speech in the media. The freedom of the media to report on racism and other forms of intolerance must, however, be protected.\(^{524}\)

The recommendation’s broad notion of hate speech that includes ‘all forms of intolerance’ must be understood against the background of the Vienna Declaration; it thus focuses on combatting racism, xenophobia and anti-Semitism. Although ‘intolerance’, in principle, covers a very wide range of attitudes and opinions relating to a wide range of discriminatory grounds, the grounds of sex, sexual orientation, age, handicap etc. were expressly excluded.\(^{525}\)

According to the recommendation, member states ‘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 the rights

\(^{521}\) Vienna Declaration, 9 October 1993, Vienna.

\(^{522}\) Given the importance of media freedom and editorial independence, it was decided to prepare two recommendations: one on ‘hate speech’ in general addressed to member states that calls for legal measures and another one addressed at the media that rather calls for measures of encouragement. See: Recommendation No. R (97)21 of the Committee of Ministers to member states on ‘the media and the promotion of a culture of tolerance’, adopted on 30 October 1997.


\(^{525}\) Explanatory Memorandum, para. 22.
of others’. 526 Interferences with freedom of expression must however be narrowly circumscribed and meet the standards of Article 10 (2) ECHR. 527

With regard to criminal law, the recommendation stresses that prosecution authorities must be allowed to give special attention to, but must also be particular cautious in dealing with hate speech cases. 528 Given the difficulties in obtaining sufficient evidence, ‘it might be advisable to concentrate efforts on strong cases where prosecution is likely to result in a conviction. In the area of hate speech, there is a real danger that suspects present themselves to the public as ‘martyrs’ or ‘victims’ or, in the event of an acquittal, that they present the outcome of the case as a victory for their views’. Therefore it is recommended that a coordinated prosecution policy in this field should be established. Prison sentences for hate speech should remain the exception. 529

It was however thought that criminal law may not always be suited to deal with particular cases of hate speech and that civil law generally offers greater flexibility. 530 Therefore, the recommendation suggests the examination of means to ‘enhance the possibilities of combating hate speech through civil law, for example by allowing interested non-governmental organizations to bring civil law actions, providing for compensation for victims of hate speech and providing for the possibility of court orders allowing victims a right of reply or ordering retraction’. 531

The European Commission against Racism and Intolerance (ECRI) forms the Council of Europe’s monitoring body, specialized in combating racism, xenophobia, anti-Semitism and intolerance in Europe. 532 ECRI has made several general policy recommendations in the field. Worth mentioning is ECRI General Policy Recommendation No. 7 on National legislation to combat racism and racial discrimination, adopted on 13 December 2002. It recommends, amongst others, the criminalization of five forms of hate speech, committed intentionally: a) public incitement to violence, hatred or discrimination; b) public insults and defamation; c) threats; d) the public expression of a racist ideology; and e) the public denial of grave crimes. 533 Furthermore, it recommends the criminalization of the ‘public dissemination or distribution’ and the ‘instigating, aiding, abetting or attempting to commit’ thereof. 534

These offences are defined quite broadly. ‘Public’ includes words pronounced during meetings of neo-Nazi organizations or exchanged in a

526 Principle 2.
527 Principle 3; Explanatory Memorandum, para. 27-30.
528 Principle 5.
529 Explanatory Memorandum, para. 37.
530 Ibid., para. 34.
531 Principle 2.
532 ECRI was established as part of the Vienna Declaration of 1993.
533 General Policy Recommendation No. 7, para. 18 a-e.
534 Ibid., para. 18 f; 20.
discussion forum on the Internet and ‘dissemination’ includes dissemination through the Internet. All offences in (a-c) must be committed ‘against a person or a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin’. ‘Groupings’ is not limited to a specific group, but includes larger groupings such as asylum seekers or foreigners.\(^{535}\) The offence in (d) includes ‘any ideology which claims the superiority of or which depreciates or denigrates’ such a grouping on such grounds. The offence in (e) includes the ‘denial, trivialization, justification or condoning of crimes of genocide, crimes against humanity or war crimes’ as defined in international law.\(^{536}\) Both offences in (d-e) must however be committed ‘with a racist aim’.

In the specific field of blasphemy and religious hatred, the Parliamentary Assembly of the Council of Europe has established several non-binding principles. Resolution 1510 (2006) on Freedom of expression and respect for religious beliefs was adopted on 28 June 2006, after the affair of the Danish Cartoons. It takes the position that freedom of expression should not be further reduced to meet increasing sensitivities of certain religious groups.\(^{537}\) Attacks on individuals on the ground of their religion or race cannot be permitted, but blasphemy laws should not be used to curtail freedom of expression and thought. At the same time, the Assembly emphasizes that hate speech against any religious group is not compatible with the ECHR and the case law of the ECHR. Finally, it invites media to discuss media ethics and encourages ‘intercultural and interreligious dialogue’.\(^{538}\)

The following Recommendation 1805 (2007) on Blasphemy, religious insults and hate speech against persons on grounds of their religion, adopted on 29 June 2007, takes it a step further. It assumes that a distinction should be drawn between condemning insults (religious or other) and related acts and criminalizing them.\(^{539}\) It recommends that the Committee of Ministers ensures that national law and practice a) are reviewed in order to decriminalize blasphemy as an insult to a religion; and only criminalize expressions that b) call for a person or group to be subjected to hatred, discrimination or violence on account of religion as on any other group and c) intentionally and severely disturb the public order and call for public violence by reference to religious matters.\(^{540}\)

The Recommendation is in line with the conclusions of a report adopted on 17-18 October 2008 by the Council of Europe’s European Commission for

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\(^{535}\) Explanatory Memorandum to General Policy Recommendation No. 7, para. 38-40; 42.

\(^{536}\) Ibid, para. 41. That is, the Convention for the Prevention and Punishment of the Crime of Genocide (Art. II); the Statute of the International Criminal Court (Art.6); and the Statute of the International Criminal Court (Art. 7-8).


\(^{538}\) Resolution 1510 (2006), para. 3;12; 15-16.

\(^{539}\) Explanatory Memorandum to Recommendation 1805 (2007), Doc. 11296, 8 June 2007.

\(^{540}\) Recommendation 1805 (2007), para. 4;12; 13; 15; 17.2.2-17.2.4.
Democracy through Law (the Venice Commission) that was requested to compile the national legislation of member states in this field.\footnote{\textit{The relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred}, Report of the Venice Commission, Study no. 406 2006, Strasbourg, 23 October 2008, CDL-AD(2008)026.} \footnote{The report and other CoE documents are included in: \textit{Blasphemy, insult and hatred, Finding answers in a democratic society}, Science and technique of democracy, No. 47, Venice Commission, Strasbourg: Council of Europe Publishing 2010.} It recommended that a) incitement to religious hatred should be punishable and the offence should contain an explicit requirement of intention or recklessness; b) it is neither necessary nor desirable to create an offence of religious insult (that is, insult to religious feelings) \textit{simpliciter}, without the element of incitement to hatred as an essential component; and c) the offence of blasphemy should be abolished.\footnote{Report of the Venice Commission 2008, para. 89 a-c.}

The approach in these recommendations thus differs from the approach of the ECHR towards religious offence and certainly from the UN ‘defamation of religions’ resolutions adopted at the time. They rather match the current interpretation of the relationship between Articles 19 and 20 (2) ICCPR (para. 5.3 infra).

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

The Convention on Cybercrime, adopted on 8 November 2001 by the Committee of Ministers of the Council of Europe,\footnote{Convention on Cybercrime, CETS No. 185.} is principally aimed at harmonizing domestic criminal offences committed by means of computer-systems, providing for domestic criminal procedural law powers and setting up a fast and effective regime of international co-operation in the area of ‘cybercrime’.\footnote{Explanatory report to the Convention on Cybercrime, para. 16.} During its drafting, the possible inclusion of the offence of the distribution of racist propaganda through computer systems was discussed, but no consensus could be reached on the criminalization of such conduct. Therefore, it was decided to draw up an additional Protocol to the Convention, a binding legal instrument open to the signature and ratification of the Convention parties.\footnote{Additional Protocol to the Convention on cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems, ETS No. 189, Explanatory report, para. 4.} The Additional Protocol entered into force on 1 March 2006 and has been signed by 17 states and ratified by 20 states, including France and the Netherlands.\footnote{In France, the Additional Protocol entered into force on 1 May 2006. In the Netherlands, the Additional Protocol entered into force on 1 November 2010.}
It was thought that ‘the emergence of international communication networks like the Internet provide certain persons with modern and powerful means to support racism and xenophobia and enables them to disseminate easily and widely expressions containing such ideas’. The purpose of the Protocol therefore is ‘firstly, harmonizing substantive criminal law in the fight against racism and xenophobia on the Internet and, secondly, improving international co-operation in this area’.  

For this purpose, the Protocol obliges states parties to criminalize four acts of a racist and xenophobic nature committed through computer systems, being: dissemination of racist and xenophobic material through computer systems (Art. 3); racist and xenophobic motivated threat (Art. 4); racist and xenophobic motivated insult (Art. 5); and denial, gross minimization, approval or justification of genocide or crimes against humanity (Art. 6). Furthermore, it oblige the criminalization of the ‘aiding and abetting’ of these offences (Art.7).

To satisfy these obligations, state parties not only must enact appropriate legislation, but must also to ensure that it is effectively enforced. The Protocol, however, explicitly allows state parties to make certain reservations to these offences. It thereby allows states to require a relatively strict connection between expression and resulting actions compared to the non-binding standards of the Council of Europe and the notion of hate speech employed by the ECtHR. The question thus arises of whether the Protocol will meet its objective of harmonization. The Explanatory Report to the Protocol gives detailed definitions of the terms used in these offences that facilitate their interpretation and application. With regard to certain elements of the offences, it precisely determines that they may be interpreted according to domestic criminal law.

All offences require that the conduct involved be done ‘without right’. This signifies that the conduct described is not punishable per se, but may be justified by principles or interests that lead to the exclusion of criminal liability, such as for law enforcement, academic or research purposes, but are not covered by established legal defences. States are free to determine how such exemptions are implemented within their domestic legal system. Furthermore, all offences

548 Explanatory report, para. 3.
549 ‘Aiding and abetting’ includes the intent that the crime be committed. Without such intent, a service provider cannot be held criminally liable under the provisions for serving as a conduit or host of a website containing material that amounts to one of the offences. To avoid criminal liability, a service provider thus does not have to actively monitor content. Ibid., para. 45.
550 Explanatory report, para. 9.
551 It however does not constitute an instrument providing an authoritative interpretation of the Protocol.
must be committed ‘intentionally’, the meaning of which is left to national interpretation (and thus may vary from specific intent to mere recklessness).\textsuperscript{553}

Finally, the ‘insult’, ‘threat’ or ‘advocacy, promotion, or incitement to hatred, discrimination or violence’ must be directed against a person or group distinguished by ‘race, colour, descent or national or ethnic origin, as well as religion, if used as a pretext for any of these factors’.\textsuperscript{554} According to the Explanatory report, ‘religion’ is to be interpreted in this strict sense. Although the term ‘religion’ refers to ‘conviction and beliefs’, its insertion as such would carry the risk of going beyond the ambit of the Protocol.\textsuperscript{555} This implies that, strictly speaking, the Additional Protocol only obliges member states to criminalize cases of an ‘intersectionality’ between race and religion and ‘multiple’ or ‘aggravated’ racism. States however remain free to criminalize the offences on account of religion more broadly.

In relation to the dissemination of ‘racist and xenophobic material’ (Art. 3 (1)), the latter is defined as ‘any written material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or violence’. The definition refers to conduct to which the content of the material may lead, rather than to the expression of feelings/belief/aversion as contained in the material concerned. Hence, the dissemination of mere ‘ideas as such’ is not punishable, but those that constitute ‘advocacy, promotion or incitement’ are.\textsuperscript{556} States may however reserve the right not to criminalize conduct that advocates, promotes or incites discrimination that is not associated with hatred or violence, provided that other effective remedies are available (Art. 3 (2)). Moreover, they may reserve the right not to apply the offence at all to those cases of discrimination for which they cannot provide such remedies in the light of freedom of expression (Art. 3 (3)).

As for racist and xenophobic motivated ‘insult’ (Art. 5 (1)), the latter refers to ‘any offensive, contemptuous or invective expression, which prejudices the honour or dignity of a person’. It should be clear from the expression itself that the insult is directly connected with the insulted person’s belonging to the group.\textsuperscript{557} States may however require that the insult has the effect that the

\textsuperscript{553} For example, without the required intent under domestic law, a service provider cannot be held criminally liable under the provisions for serving as a conduit or host of a website containing material that amounts to one of the offences. \textit{Ibid.}, para. 25.

\textsuperscript{554} ‘Descent’ refers to groups or persons, who descend from persons identifiable by certain characteristics that not necessarily still exist. ‘National origin’ refers to the nationality or origin of one’s ancestors or people’s own national belonging. See: para. 18; 20.

\textsuperscript{555} \textit{Ibid.}, para. 21.

\textsuperscript{556} ‘Advocates’ refers to ‘a plea in favor of’, while ‘promotes’ to ‘an encouragement to or advancing’; and ‘incites’ to ‘urging others to’ hatred discrimination or violence. ‘Violence’ refers to ‘the unlawful use of force’, while ‘hatred’ to ‘intense dislike or enmity’ and ‘discrimination’ to ‘a different unjustified treatment given to persons or to a group of persons on the basis of certain characteristics’. Whether treatment is discriminatory or not must be considered ‘in the light of the specific circumstance of the case’. See: para. 13-16.

\textsuperscript{557} \textit{Ibid.}, para. 36.
person or the group is actually exposed to hatred, contempt or ridicule (Art. 5
(2)).

With regard to the dissemination of the denial of grave crimes (Art. 6
(1)), it was thought that such expressions ‘have inspired, stimulated and
encouraged racist and xenophobic groups in their action’, insult the – memory
of – the victims of such evil and their relatives and ‘threatens the dignity of the
human community’. The offence extends to the denial of grave crimes as
defined by international law and recognized as such by final and binding
decisions of international courts. States may however require that the denial is
committed ‘with the intent to incite to hatred, discrimination of violence’ (Art. 6
(2)). For example, the Netherlands has made a reservation to that effect.

With regard to the offences of insult and the denial of grave crimes,
states are even allowed to reserve the right not to apply the paragraph in the
whole. Contrarily, the offence of ‘racist and xenophobic threat’ (Art. 4) offers no
possibility for any reservation. It concerns the threatening with the commission
of a ‘serious criminal offence’, the interpretation of which is left to states. The
article also covers threats ‘by private communications’, while the other offences
are limited to the ‘public’ insult and the distribution or otherwise making
available ‘to the public’ of material that is racist or xenophobic or denies grave
crimes.

The Additional Protocol thus specifically takes into account the interest
in freedom of expression by offering states the possibility to make reservations
as to the scope of the offences and by limiting them to public communication.

4. EU Council Framework Decision on combating certain forms and
expressions of racism and xenophobia by means of criminal law

The Framework Decision on combating certain forms and expressions of racism
and xenophobia by means of criminal law, adopted on 28 November 2008 by the
Council of the European Union, obliges member states to criminalize the
incitement to hatred or violence and the denial of grave crimes. The Framework
Decision replaced the non-binding Council Joint Action concerning action to

558 Id., para. 39.
559 The reservation reads ‘The Kingdom of the Netherlands will comply with the obligation to
criminalize the denial, gross minimization, approval or justification of genocide or crimes against
humanity laid down in Article 6, paragraph 1, of the Protocol where such conduct incites hatred,
discrimination or violence on the grounds of race or religion.’
560 Id., para. 34-35.
561 In addition, Article 15 of the Convention itself determines that the establishment,
implementation and application of criminal procedural law powers for these offences
must comply with the state obligations under the ECHR and ICCPR and must
‘incorporate the principle of proportionality’.
combat racism and xenophobia, adopted on 15 July 1996, whose main objective was to ensure effective legal cooperation between member states in combating racism and xenophobia. However, it left member states the choice of incriminating the forms of conduct concerned. According to the evaluation of the Joint Action, some difficulties were still experienced regarding judicial cooperation and therefore, there was a need for further approximation of member states’ criminal law.

The Framework Decision acknowledges that combating racism and xenophobia requires various kinds of measures and may not be limited to criminal matters. Nevertheless, its objective is ‘namely ensuring that racist and xenophobic offences are sanctioned in all member states by at least a minimum level of effective, proportionate and dissuasive criminal penalties’. States may have more far-reaching offences. Although it was necessary to define a common criminal law approach in the EU to racism and xenophobia, given the member states’ different cultural and legal traditions, full harmonization of criminal laws was not possible. Therefore, the Framework Decision is limited to particularly serious forms of ‘racism and xenophobia’, terms that are contrary to an earlier draft, not defined. The Decision is binding upon member states in relation to the result to be achieved, but leaves them the choice of the form and methods of implementation.

Article 1(1) cites the offences concerning racism and xenophobia that member states must criminalize. Only intentional conduct is punishable. The offences require a relatively strict connection between expression and resulting actions compared to the non-binding standards of the Council of Europe and the notion of hate speech employed by the ECHR. Articles 1(1) a) and b) are limited to the public incitement to violence and hatred and the dissemination thereof. Articles 1(1) c) and d) are limited to the public condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes that are

564 It was adopted to avoid so-called ‘forum-shopping’.
566 Council Framework Decision, preamble, para. 4. In fact, the various reports of racism in Europe by the EUMC and ECRI were grounds for concern. See: COM(2001) 664 final, Explanatory Memorandum, p. 2-3.
567 Ibid., para. 6.
568 Ibid., para. 13.
569 Ibid., para. 5-6.
570 ‘racism and xenophobia’ were defined as ‘the belief in race, colour, descent, religion or belief, national or ethnic origin as a factor determining aversion to individuals or groups’. See: COM(2001) 664 final, Explanatory Memorandum, p. 8.
571 COM(2001) 664 final, Explanatory Memorandum, p. 7; Article 34(2)(b) TEU.
572 Article 2 obliges member states to criminalize the ‘instigation, aiding and abetting’ of the conduct referred to in Article 1.
likely to incite to violence or hatred. It concerns the grave crimes as defined in the Statute of the International Criminal Court (Art. 6-8) and the Charter of the International Military Tribunal (Art. 6). Member states have the choice to only criminalize the denial of these crimes, when they have been established by a final decision of a national and/or international court.\textsuperscript{573} Furthermore, member states may prohibit the denial of crimes against a group defined by, for example, social status and political convictions.\textsuperscript{574}

As for the implementation of the offences of Article 1 (1), member states may ‘choose to only punish conduct which is either carried out in a manner likely to disturb public order or which is threatening, abusive or insulting’.\textsuperscript{575} This option may be interpreted as a possibility for member states, for example the UK, to ensure the criminalization of the conduct in Article 1 (1) under (the terminology of) existing national offences that set higher requirements with regard to the effect expression must have on either third parties and society at large or the members of the group it targets. In fact, an earlier draft included more far-reaching offences, such as ‘public incitement to racist or xenophobic behaviour which may cause substantial damage to individuals or groups concerned; public insults or threats towards individuals or groups for a racist or xenophobic purpose; and public dissemination or distribution of material containing expressions of racism and xenophobia’.\textsuperscript{576} On these offences no consensus could be reached.

The current offences criminalize incitement, dissemination thereof and denial of crimes directed against a group or person defined by reference to ‘race, colour, religion, descent or national or ethnic origin’.\textsuperscript{577} ‘Religion’ must be understood ‘as broadly referring to persons defined by reference to their religious convictions or beliefs’.\textsuperscript{578} However, it is provided that the reference to ‘religion’ is intended to cover, at least, conduct which is a pretext for directing acts against a group or person defined by reference to ‘race, colour, descent, or national or ethnic origin’.\textsuperscript{579} This implies again that, strictly speaking, the Framework Decision only obliges member states to criminalize cases of an ‘intersectionality’ between race and religion and ‘multiple’ or ‘aggravated’ racism. States, however, remain free to criminalize the offences on the basis of religion more broadly.

According to the Framework Decision, the offences must be punishable by criminal penalties of a maximum of at least between 1 and 3 years of

\textsuperscript{573} Article 1 (4).
\textsuperscript{574} Council Framework Decision, preamble, para. 10.
\textsuperscript{575} Article 1 (2).
\textsuperscript{576} COM(2001) 664 final, Explanatory Memorandum, p. 17.
\textsuperscript{577} ‘Descent’ refers to groups or persons, who descend from persons identifiable by certain characteristics that not necessarily still exist. See: Council Framework Decision, preamble, para. 7.
\textsuperscript{578} ibid., para. 8.
\textsuperscript{579} Article 1 (3).
imprisonment. Furthermore, it determines that the investigation into or prosecution of the offences shall not be dependent on a report or an accusation made by a victim. Finally, for other offences, member states must ensure that racist and xenophobic motivation is considered to be an aggravating circumstance or that such motivation may be taken into consideration by the courts in the determination of the penalties.

The Framework Decision explicitly states that it shall not have the effect of modifying the obligation to respect freedom of expression and association. Moreover, it shall not have the effect of requiring the adoption of measures contrary to the freedom of the press and other media and the rules governing their liability. In other words, member states must always balance the enforcement of offences that implement Article 1 in a particular case with the fundamental rights of freedom of expression and association and must not abridge the freedom of the media to disseminate expression.

5. The International Covenant on Civil and Political Rights (ICCPR)

The International Covenant on Civil and Political Rights (ICCPR) was adopted by the National Assembly of the United Nations in 1966. The UN Human Rights Committee (HRC) monitors the implementation of the Covenant articles, amongst others, by dealing with individual complaints of alleged violations of the articles. Its ‘communications’ are non-binding. The HRC publishes its interpretation of the Covenant articles in the form of General Comments that are considered to constitute authoritative legal analysis based on the HRC’s practice. Therefore, the general comment to the right to freedom of expression protected in the ICCPR can be regarded as an important source for the interpretation of the right. Freedom of opinion and expression is protected in Articles 19 (1-2) ICCPR (5.1), while Article 19 (3) determines the possible restrictions to this right (5.2). The obligation for states to prohibit by law ‘any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence’ of Article 20 (2) is compatible with and complements 19 (3) (5.3). The paragraph concludes with a synthesis of the state obligations with regard to the restriction of hate speech under the ICCPR in the light of the factors from the analytic framework (5.4).

580 Article 3 (2).
581 Article 8.
582 Article 4.
583 Article 7 (1). Similarly, an earlier draft mentioned that the exercise of these freedoms as secured by Articles 10 and 11 ECHR must be balanced with the prevention of disorder or crime and the protection of the reputation or rights of others. See: COM(2001) 664 final, Explanatory Memorandum, p. 7.
584 Article 7 (2).
585 Adopted by the UN General Assembly, 16 December 1966, entered into force on 23 March 1976.

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5.1 Articles 19 (1-2) ICCPR: freedom of opinion and expression

Freedom of expression and information was considered to be the ‘touchstone of all the freedoms to which the United Nations is consecrated’. Therefore, consensus existed within the UN on the inclusion of the right in the ICCPR. Freedom of opinion and expression is protected under Article 19 ICCPR.

Article 19 (1) protects ‘the right to hold opinions without interference’. This is an absolute right, to which the Convention permits no exception or restriction. Although 19 (1) initially included both freedom of opinion and expression, – other than for 10 ECHR– it was decided to separate these rights, because of their different characters; freedom of opinion was closely related to freedom of thought and formed a right without qualifiers.

New General Comment no. 34 on Article 19 (GC 34), adopted in 2011, notes that it includes the right to change one’s opinion, to be free from coercion of holding or not holding any opinion and from any impairment of rights under the Covenant on the basis of one’s actual, perceived or supposed opinions. Furthermore, 19 (1) protects all forms of opinion, including political, scientific, historic, moral or religious opinions; the criminalization of holding an opinion is incompatible with 19 (1).

Article 19 (2) protects the right to freedom of expression as the ‘freedom to seek receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice’. The words ‘of all kinds’ are not to be found in Article 10 ECHR. They are taken to signify that 19 (2) includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others; political discourse, commentary on public affairs, discussion of human rights, journalism, cultural and artistic expression,

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586 UN General Assembly Resolution 59 (1), 14 December 1946.
587 E/CN.4/SR.37, 120, 170, 171.
588 In 1948, The United Nations Conference on Freedom of Information met in Geneva and prepared several draft conventions. Initially, a specific draft convention on freedom of information was prepared. Therefore, the question raised whether the ICCPR should include an article on freedom of expression and information at all. This draft convention was, however, never adopted. See: Final Act, United Nations Conference on Freedom of Information, Geneva, Switzerland, 23 March - 21 April 1948. E/Conf.6/79.
589 New General Comment no. 34 on Article 19 notes in para. 5 that it can never become necessary to derogate from freedom of opinion during a state of emergency, even though the right is not listed as a non-derogatory right in Article 4 ICCPR.
592 General Comment no. 34, para. 9-10.
religious discourse and commercial advertising. It even embraces expression that is regarded as ‘deeply offensive’. 593

Furthermore, it equally protects all forms of expression and the means of their dissemination, including spoken, written and sign language and non-verbal expression such as images and objects of art, books, newspapers, posters, banners, pamphlets, dress and all audio-visual, electronic and internet-based modes of expression. 594 Unlike 10 ECHR, Article 19 lacks a reference to the protection of the right ‘without interference by public authority’. This has been explained as an emphasis on the horizontal application of the right and has been connected with the need to prevent control of all media, including modern mass media, in both the public and private sectors. 595

GC 34 stresses that a free, uncensored and unhindered press or other media is one of the cornerstones of a democratic society and essential in any society to ensure freedom of opinion and expression and the participation in public affairs. 596 Article 19 (2) therefore embraces – unlike in 10 ECHR – a general right of access to information held by public bodies, including a right whereby the media has access to information on public affairs and the right of the general public to receive media output. 597

5.2 Article 19 (3): restrictions on freedom of expression

Other than freedom of opinion, freedom of expression is not absolute, but may be restricted under the conditions set in Article 19 (3). Article 19 (3) stipulates that the exercise of freedom of expression carries with it ‘special duties and responsibilities’. The addition of the word ‘special’ in the ICCPR and not in the ECHR does not appear to be of particular importance. As in 10 ECHR, this reference does not constitute an inherent or implied restriction. 598

Restrictions may only be imposed when they are 1) provided by law; and are 2) necessary; for a limited list of purposes of interference, being 3a) for respect of the rights or reputation of others; and 3b) for the protection of national security or of public order (ordre public), or of public health or morals. To a certain extent, the restriction-system under 19 (3) is comparable to that under 10 (2) ECHR, but it also differs from it in several respects.

593 Ibid., para. 11.
594 Ibid., para. 12.
596 General Comment no. 34, para. 13-17; 20.
597 Ibid., para. 18-19. Furthermore, individuals must be able to ascertain which public authorities, private individuals or bodies control or may control their files containing personal data.

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Strictly speaking, unlike 10 (2), 19 (3) does not require restrictions to be necessary ‘in a democratic society’. However, in practice the HRC often invokes the role freedom of expression plays in ensuring a democratic society.\textsuperscript{599} Furthermore, 19 (3) cites a much more limited list of purposes of interference than 10 (2) ECHR that also mentions the grounds of the interests of territorial integrity or public safety, for the prevention of crime, for preventing the disclosure of information received in confidence and for maintaining the authority and impartiality of the judiciary.

In relation to the ground of the rights of others, ‘rights’ includes – but is not limited to – human rights and ‘others’ relates to other persons individually or as members of a community and thus may refer to individual members of a community defined by its religious faith or ethnicity.\textsuperscript{600} Unlike 10 (2) ECHR, which uses the narrow term of the prevention of ‘disorder’, 19 (3) uses the broader term of the protection of the ‘public order’. On the basis on the maintenance of public order, it may be permitted to restrict speech in particular public spaces or expression that amounts to contempt of court.\textsuperscript{601}

Importantly, the protection of ‘morals’ forms the only ground for which GC 34 elaborates a definition; ‘the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations... for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition. Any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination.’\textsuperscript{602} It thereby appears to aim to ensure the existence of a plurality of opinions, including in particular minority views.

In order to be deemed necessary, restrictions to freedom of expression must be proportional; they must be appropriate to achieve their protective function; the least intrusive instrument amongst those, which might achieve their protective function; and proportionate to the interest to be protected. GC 34 sets a particularly high threshold for restrictions and the burden to prove their necessity and proportionality is on the state, which must demonstrate the precise nature of the threat, and the necessity and proportionality of the specific action taken, ‘in particular by establishing a direct and immediate connection between the expression and the threat’ to the invoked restriction ground.\textsuperscript{603}

Unlike the ECtHR, the HRC, which has explicitly refused to categorize forms of expression and subject any form of expression to varying degrees of limitation with the result that some forms of expression, may suffer broader

\textsuperscript{599} O’Flaherty 2012, p. 639.

\textsuperscript{600} General Comment no. 34, para. 28.

\textsuperscript{601} ibid., para. 31.

\textsuperscript{602} ibid., para. 32.

\textsuperscript{603} ibid., para. 34-35.
restrictions than others.  

It has adopted the method of ‘ad hoc balancing’, i.e. presumptively treating all categories of expression the same and balancing the different interests at stake in an ad hoc fashion. 

Nevertheless, a primary area, in which only a limited scope of restrictions on freedom of expression exists under the ICCPR, is political discourse. GC 34 states, for example, ‘the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain’. It expresses concern regarding laws such as defamation of the head of state and public officials and the prohibition of criticism of institutions.  

Other than the ECHR, it advocates ‘the decriminalization of defamation’ in general. 

Strikingly, GC 34 stresses that for the determination of the necessity of restrictions in a particular situation by the HRC, the scope of this freedom is not to be assessed by reference to a ‘margin of appreciation’. In an early communication concerning a ban by a broadcaster of those parts of a program discussing homosexuality, the HRC still considered that the non-interference by the State did not violate 19 (3), because ‘public morals differ widely. There is no universally applicable common standard. Consequently, in this respect, a certain margin of appreciation must be accorded to the responsible national authorities’. This can be regarded as the ICCPR-counterpart of the margin of appreciation doctrine applied by the ECHR that however appears to have been abandoned. 

On the basis of GC 34, under the ICCPR the evaluation of restrictions to expression in the ‘subjective’ fields of morals and religion, such as alleged blasphemy and other religiously offensive speech, differs from that under the ECHR. In fact, GC 34 explicitly states: ‘Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant’, except when they meet the requirements of Article 20 (2), and such laws may not ‘discriminate in favour of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers’ nor ‘be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith’.  

Likewise, ‘Laws that criminalize the expression of opinions about historical facts’ are deemed incompatible with the Covenant that ‘does not permit general prohibition of expressions of an erroneous opinion or an

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  General Comment no. 34, para. 38.  
  605 Ibid., para. 47.  
  606 Ibid., para. 36.  
  608 General Comment no. 34, para. 48.  
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incorrect interpretation of past events'.\textsuperscript{610} It is argued that GC 34 hereby ‘overrules’ \textit{Faurisson v. France}, in which the HRC found the criminal conviction of Faurisson for having denied the Holocaust not to violate 19 (3), because Holocaust denial formed ‘the principal vehicle for anti-Semitism’. In that case, the HRC, however, did consider that the application of the ‘Gayssot Act’ under different conditions may lead to decisions or measures incompatible with the Covenant.\textsuperscript{611} On the basis of GC 34, the evaluation of restrictions to Holocaust denial under the ICCPR defers from that under the ECHR.

Overall, it can be said that Article 19, interpreted as in GC 34, aims to offer a robust protection of freedom of expression by affording the right a broad scope in 19 (2) and laying down strict conditions for its restriction in 19 (3). However, it has been pointed out that GC 34 sets standards (for blasphemy, Holocaust denial and defamation laws) to which many state parties do not comply and that are not necessarily grounded in the practice of the HRC – yet.\textsuperscript{612}

5.3 Article 20 (2): the prohibition of hate speech and relationship with Article 19

Article 20 (2) obliges state parties to prohibit by law ‘any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence’. The Article was drafted in response to the Nazi racial hatred campaigns; its rationale was to combat fascism, racism and National Socialism at their roots and to prevent the public incitement of racial hatred and violence within a state or against other states and peoples.\textsuperscript{613}

Its adoption was quite controversial; most Western States voted against it, arguing that Article 19 (3) was sufficient to prevent incitement to racial hatred and that provisions going beyond this would endanger freedom of expression. The Soviet representative held on the other hand that the experiences with manipulative power of modern propaganda called for far-reaching criminal prohibitions. The final Article reflects a middle course; it obliges a prohibition by law, but does not require a prohibition by criminal law, nor does it authorize prior censorship.\textsuperscript{614}

General Comment 11 on Article 20 (GC 20) stresses its mandatory character.\textsuperscript{615} Many states however made reservations to the Article. For example, The United Kingdom declared that Article 20 must be interpreted in conformity with the rights of political liberty in Articles 19-22 ICCPR and reserved the right not to enact any prohibitions going beyond the existing legislation.\textsuperscript{616}

\begin{itemize}
\item \textsuperscript{610} \textit{Ibid.}, para. 49.
\item \textsuperscript{611} \textit{Faurisson v. France}, (550/1993), CCPR/C/58/D/550/1993, para. 9.3; 9.6-9.7.
\item \textsuperscript{612} O’Flaherty 2012, p. 653.
\item \textsuperscript{613} Nowak 2005, p. 475.
\item \textsuperscript{614} Nowak 2005, p. 470.
\item \textsuperscript{615} UN Human Rights Committee, General Comment No. 11, adopted 29 July 1983.
\item \textsuperscript{616} Nowak 2005, p. 479.
\end{itemize}
It has been argued that Article 20 can be understood as placing a special duty on the state to ensure the rights to life, non-discrimination and equality guaranteed in Articles 6, 2 (1) and 26 ICCPR. To combat the systematic violation of these central articles, it was decided to create preventive prohibitions in the area of formation of public opinion. Thereby the prohibition of discrimination would be given a certain priority over the rights of political liberty.\footnote{Nowak 2005, p. 471.}

Although the Article equally applies to other rights in the ICCPR, it has a close nexus to freedom of expression. On the interrelationship between Articles 19 and 20, GC 34 states not only that they ‘are compatible with and complement each other’, but also that ‘a limitation that is justified on the basis of Article 20 must also comply with Article 19 (3)’. The distinction between the specific forms of expression indicated in Article 20 and other acts that may be subject to restriction under 19 (3) is that only with regard to the former are state parties obliged to have legal prohibitions. However, all restrictions to freedom of expression must be justifiable in strict conformity with Article 19.\footnote{General Comment no. 34, para. 50-52.}

This appears to settle a certain ambiguity in the approach by the HRC towards Articles 19 - 20. In fact, the HRC has only dealt with violations of Article 19 on the merits, not with Article 20 (2). In an early case concerning anti-Semitic expression, the HRC declared the complaint of a violation of Article 19 inadmissible by reference to 20 (2).\footnote{The complainant complained of a violation of Article 19, because he was prevented from disseminating anti-Semitic messages through the post and telephone system. His complaint was declared inadmissible, because the State had the obligation to prevent such advocacy of racial and religious hatred. \textit{J.R.T. and the W.G. Party v. Canada}, 104/1981, CCPR/C/OP/2 (1984), para. 8 (b).} In a case concerning hate speech against Roma’s, the HRC found the complaint of a violation of Article 20 (2) inadmissible, because the authors had insufficiently substantiated the facts. Thereby it avoided the question whether individuals may invoke Article 20 under the Optional Protocol.\footnote{By doing so the HRC avoided the question as to whether the expressions constituted prohibited hate speech. According to dissenting judge Anor, the HRC should have applied 20 and discussed this matter on the merits. \textit{Vassilari et al. v. Greece}, 1570/2007, CCPR/C/95/D/1570/2007 (2009).} In another case concerning anti-Semitic expression, \textit{Ross v. Canada}, the HRC adopted a middle course by using Article 20 as an additional argument in the interpretation of Article 19 (3).\footnote{\textit{Faurisson v. France}, 550/1993, CCPR/C/58/D/550/1993.}

This latter approach resembles the increasingly indirect application by the ECtHR of the prohibition of the abuse of rights in Article 17 ECHR. Although, under the ECHR it has not been established with so many words that

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a limitation that is justified on the basis of Article 17 must also comply with Article 10 (2) – yet. The ICCPR also has a prohibition of the abuse of rights in Article 5 ICCPR. However, GC 34 rather stresses that the function of this article as a tool to prevent excessive restrictions than as a justification for restrictions. It recalls the provision directly after stressing that restrictions on freedom of expression may not jeopardize the right itself and that the relation between right and restriction and between norm and exception must not be reversed. This supports the broad scope of Article 19. Other than in the ECHR, the HRC thus appears to object to the categorical exclusion of any expression, including Holocaust denial, from it on the basis of either Article 20 (2) and/ or 5.

Article 20 (2) only prohibits the ‘advocacy of hatred’ that constitutes ‘incitement to discrimination, hostility or violence’. During the drafting of Article 20 (2), it was pointed out that ‘incitement to violence’ was a legally valid concept, while ‘incitement to discrimination’ or ‘incitement to hostility’ was not. On the other hand, it was argued that to prohibit only incitement to violence would not represent progress in international legislation. Often it was hostility or discrimination that led to violence. Strictly speaking, the article requires a stricter connection between the expression (incitement) and subsequent actions (discrimination, violence) than the ECHR, whose notion of hate speech extends to ‘spreading and justifying hatred based on (religious) intolerance’, and ICERD that prohibits the ‘dissemination of ideas’ and the ‘incitement to hatred’ separate from discrimination or violence.

Some argue that Articles 19-20 ICCPR provide precise and coherent standards for prohibitions on hate speech. Although the question could be asked whether there is any scope under 19 (3) for restrictions which go beyond the requirements of 20 (2), there would be very little scope for this. Others stress that the exact interpretation of the terms in Article 20 (2) remains uncertain. Between 2008 and 2012, the Office of the High Commissioner for Human Rights (OHCHR) has held a series of expert seminars on Articles 19 and 20 ICCPR with regard to freedom of expression and incitement to hatred to clarify the scope of state obligations under 20 ICCPR. The outcome document, the Rabat Plan of Action, proposed a high threshold for the criminal prohibition of incitement to hatred. It was suggested that the domestic legal framework on incitement should be guided by express reference to Article 20 of the ICCPR and should

623 General Comment no. 34, para. 21.
625 Bossuyt 1987, p. 405; 408.
627 O'Flaherty 2012.
628 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 organized by OHCHR, in 2011, and adopted by experts in Rabat, Morocco on 5 October 2012.
consider including robust definitions of key terms like hatred, discrimination, violence, hostility, etc.\textsuperscript{629}

For the determination of criminal liability for incitement to hatred, a six part threshold test was proposed based on the factors: context; speaker; intent; content or form; extent of the speech; and likelihood, including imminence. The test provides clear but broad parameters that could form a guideline for a more consistent interpretation and application of national incitement offences by national judges. A similar but slightly adapted test has been proposed in the context of ICERD (para. 6.2 \textit{infra}). According to the test, Article 20 (2) ICCPR requires ‘advocacy’ and ‘incitement’ rather than mere distribution or circulation, thus ‘intent’ and not mere negligence and recklessness. As for the identification of the degree of risk of resulting harm, the courts must determine that there was ‘a reasonable probability that the speech would succeed in inciting actual action against the target group, recognizing that such causation should be rather direct’, thus a ‘likelihood, including imminence’.\textsuperscript{630}

Restrictions to expression that has such a direct connection with subsequent actions of discrimination or violence are certainly permissible under 19 (3). For example, in \textit{Ross v. Canada} the HRC found the removal of a teacher from his teaching position for having expressed anti-Semitic views in out-of-school activities permissible under Article 19 (3); although there was no direct evidence that the author’s off-duty conduct had impacted on the school district, it was reasonable to anticipate that there was a causal link between the expressions and the ‘poisoned school environment’ experienced by Jewish children in the School district through the ‘repeated and continual harassment in the form of derogatory name calling of Jewish students, carving of swastikas into desks of Jewish children, drawing of swastikas on blackboards and general intimidation of Jewish students’. The restriction was necessary to protect their right and freedom to have a school system ‘free from bias, prejudice and intolerance’.\textsuperscript{631}

Unlike the ICERD, Article 20 (2) ICCPR includes religion as a discriminatory ground. A highly controversial issue in the past has been the relationship between Articles 19 and 20 with regard to attacks on a particular religion and its distinction from attacks on religious adherents.\textsuperscript{632} Therefore, it will be interesting to see the communication of the HRC on the complaint of violation of Article 20 (2) ICCPR with regard to the acquittal of Dutch politician Geert Wilders with regard to his statements about Islam and Muslims in the context of the public debate on immigration and integration, filed by a group of

\textsuperscript{629} Legislation could draw, inter alia, from the guidance and definitions provided in the Camden Principles, Principle 12.
\textsuperscript{630} Outcome document, para. 22, p. 6.
\textsuperscript{632} Temperman, J., Blasphemy, Defamation of Religions and Human Rights Law, \textit{Netherlands Quarterly of Human Rights} 2008, 26/4, p. 517-545.
Dutch-Moroccan Muslims.\footnote{Communication of 15 November 2011, available at: http://www.prak kendoliveira.nl/user/file/complaint-ep-geanomiseerde-s60bw-11111712190.pdf} Firstly, it is not certain that the HRC will decide that individuals may invoke Article 20 under the Optional Protocol, but if so, it might for the first time directly deal with a case on the merits on the ground of Article 20 (2).

The question is whether the HRC will then address the question that was underexposed before the national court; whether Wilders’ critical statements about Islam and Muslims could not be regarded as mere criticism of a religion, because the statements, according to their context, could be interpreted as being directed against Arabs and immigrants on the basis of both their religion and national, ethnic background (see further para. 6.4). Even if the HRC assumes that this is the case, on the basis of the strict requirements developed for ‘incitement’ under Article 20 (2) during the previously discussed expert seminars, it is not certain that the HRC will decide that the acquittal in the Wilders case amounts to a violation of that article. This does not signify that, if Wilders would have been convicted and had filed a complaint of a violation of freedom of expression, his conviction could not be considered permissible under Article 19 (3).

5.4 Synthesis ICCPR

Article 20 (2) ICCPR obliges states to prohibit by law ‘advocacy of hatred’ only when it constitutes ‘incitement to discrimination, hostility or violence’, but not necessarily by criminal law. To date, the HRC has not directly dealt with cases concerning a violation of article 20 (2) ICCPR. Whether individuals may invoke 20 (2) ICCPR under the Optional Protocol remains undecided. Recent research into the state obligations to prohibit ‘hate speech’ under 20 (2) proposes high thresholds for the criminal prohibition of ‘incitement’, including: ‘intent’ and a ‘likelihood, including imminence’ that the speech would succeed in inciting actual action against the target group. This does not signify that article 20 (2) would be limited to literal incitements to concrete acts. But, on the basis of the proposed requirements, national acquittals or the refusal of a state to prosecute for a particular case of hate speech are not likely to amount to a violation of 20 (2) ICCPR. At the same time, convictions for these cases of hate speech may very well be permissible under Article 19 (3). Hence, under the ICCPR a certain margin of appreciation exists for states to counter ‘hate speech’, which has consequences for its effect on national law.

In any event, restrictions to hate speech must comply with 19 (3). For criminal restrictions, the HRC strictly holds on to the threshold of ‘incitement’; criminal offences of blasphemy, defamation or holocaust denial are incompatible with the ICCPR. This does not signify that in certain contexts extreme speech
about a religion, defamatory statements about a particular group or the denial of
the Holocaust cannot constitute an ‘incitement’, the restriction of which cannot
be permissible under 19 (3) or even be required under 20 (2). It is uncertain to
which extent 19 (3) would allow for civil prohibitions of statements about a
group that directly harm the dignity of the group members, separate from its
possible effect on third parties or the public order. It appears that for a
consistent determination of restrictions to hate speech under 20 (2) and 19 (3)
ICCPR the distinction between factual statements and value judgments or
between racial remarks and speech about religion could form important factors
when weighing the specific harmful effects of speech in question against the
interest of public debate.

6. The International Convention on the Elimination of All Forms of Racial
Discrimination (ICERD)

The International Convention on the Elimination of All Forms of Racial
Discrimination (ICERD) was adopted by the National Assembly of the United
Nations in 1965.634 The Committee on the Elimination of All Forms of Racial
Discrimination (CERD) monitors the implementation of the Convention articles,
amongst others, by dealing with individual complaints of alleged violations of
the articles. Its ‘communications’ are non-binding. ICERD prohibits all forms of
racial discrimination (6.1). More specifically, Article 4a ICERD obliges member
states to criminalize certain forms of hate speech on the basis of race (6.2), albeit
with due regard to the fundamental rights enumerated in Article 5 ICERD,
notably freedom of expression (6.3). The possible ‘intersectionality of race and
religion’ raised the question of whether under ICERD additional standards must
be developed for discrimination and hate speech on account of religion (6.4).

6.1 The prohibition of all forms of racial discrimination in ICERD

The ICERD is the primary binding international instrument that specifically
prohibits racial discrimination.635 It was adopted after the establishment of a –
non-binding – Declaration on racial discrimination in 1963.636 Parallel to the
Declaration and Convention on racial discrimination, a Draft Declaration and
Convention on religious intolerance and discrimination was prepared.637 The two

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634 General Assembly Resolution 2106 (XX), 21 December 1965.
635 Schwebel, E., The International Convention on the Elimination of All Forms of Racial
Discrimination, The International and Comparative Law Quarterly 1966, vol. 15, no. 4, p. 996-
1068.
636 Proclaimed by UN General Assembly Resolution 1904 (XVIII), 20 November 1963.
637 Lerner, N., The Nature and Minimum Standards of Freedom of Religion or Belief,
Brigham Young University Law Review 2000, p. 905-932; Sullivan, D.J., Advancing the
Freedom of Religion or Belief Through the UN Declaration on the Elimination of

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sets were conceived as ‘twin’ declarations and conventions; both rooted in an outbreak of anti-Semitic incidents around 1959 and 1960.\textsuperscript{638}

The decision to split the instruments of racial and religious discrimination was a compromise solution to overcome the opposition of mainly Arab countries eager to displace the issue of anti-Semitism and Communist representatives who did not consider religious discrimination to be an important matter.\textsuperscript{639} Consensus on the creation of norms in the field of religion, notably on definitions, proved particularly difficult and a binding Convention on Religious Intolerance did not come into being. After long deliberation, the non-binding Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief was adopted in 1981.\textsuperscript{640} It is therefore said that there are parallel unequal regimes for the elimination of racial and religious discrimination in international human rights law.\textsuperscript{641}

ICERD reasons from the premise underlying human rights law that human beings are born with a distinctive inheritance consisting of genetic and other characteristics that may not form a ground for discrimination. The Preamble of the Convention stresses the conviction that ‘any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination, in theory or in practice, anywhere’. State parties to the Convention therefore resolved ‘to adopt all necessary measures for speedily eliminating racial discrimination in all its forms and manifestations’.

Racial discrimination is defined in Article 1 (1) as ‘any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life’. Its prohibition in Article 2 is thus not confined to \textit{intentional} discrimination, but comprises discrimination in \textit{effect}, which is sometimes equated with \textit{indirect} discrimination.\textsuperscript{642}

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\textsuperscript{639} Lerner 1980, p. 2.
\textsuperscript{640} Proclaimed by UN General Assembly Resolution 36/55, 25 November 1981.
\textsuperscript{641} Keane, D., Addressing the aggravated meeting point of race and religion, \textit{University of Maryland Law Journal of Race, Religion, Gender & Class} 2006, p. 367.
\end{flushright}
The umbrella term for ICERD is not ‘race’ but ‘racial discrimination’. The scope of ICERD is broader than discrimination due to its biological characteristics and encompasses other aspects that make people different. Article 1 mentions five discriminatory grounds being ‘race, colour, descent, or national or ethnic origin’. The notion of racial discrimination is, however, more complex because the article excludes ‘distinctions, exclusions, restrictions or preferences between citizens and non-citizens’ and ‘special measures’ of positive discrimination.

Religion was deliberately excluded from the catalogue of discriminatory grounds and discrimination on the basis of religion therefore does not fall under the ambit of ICERD. Some authors, however, stress the impossibility of disentangling racial or ethnic characteristics from religious characteristics. Religion is often a central component of ethnic group identity and interwoven in the political, cultural and socio-economic life of the community. Religion thus might play a weighty role in xenophobia, racism and group hatred.

In fact, the Convention prohibits racial discrimination in the enjoyment of rights enumerated in its Article 5, including freedom of religion. Therefore, it has been argued that so-called ‘aggravated discrimination’, that is when racial discrimination is aggravated by religious discrimination, should fall under the scope of ICERD. The Committee on the Elimination of All Forms of Racial Discrimination (CERD) has explicitly recognized the ‘intersection between racial and religious discrimination’. CERD has notably also explored the overlap between race, ethnicity and religion in cases concerning hate speech.

6.2 Article 4 ICERD: the prohibition of hate speech

Article 4 ICERD obliges member states to criminalize forms of hate speech and reads:

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

646 Keane 2006.

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(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;
(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

Its drafters regarded Article 4 as central to the struggle against racial discrimination. At the time, there was a widespread fear of the revival of authoritarian ideologies. Nevertheless, the article evoked lively debates. This notably also applied to Article 4 (a) that cites four categories of offences:

1) Dissemination of ideas based on racial superiority or hatred;
2) Incitement to racial hatred;
3) All acts of violence against any race or group of persons of another colour or ethnic origin;
4) Incitement to such acts.

The proposal to prohibit incitement to violence met little opposition. Less consensus existed about the other categories. Many emphasized the connection between the propagation of racial hatred and the incitement to discrimination; ‘the fact of creating an atmosphere of racial hatred would inevitably lead indirectly to racial discrimination’. Others considered that states could not intervene before acts of violence are committed, or are likely to be committed. The criminalization of advocacy to racial discrimination and hatred would amount to punishing intentions or feelings. On the other hand, states could not wait until the unlimited right of expression and association reaches a stage of imminent violence against sectors of the population.

Strictly speaking, Article 4 (a) only obliges the criminalization of incitement to discrimination, but it may be read as including incitement to racial hatred. After all, the heading of Article 4 combines the promotion of ‘racial hatred and discrimination’. Moreover, the obligation to criminalize the ‘dissemination of ideas based on racial hatred’ appears to be even more far-reaching. It covers a variety of racist expressions that would not meet the

649 Ibid, para. 3.
651 Lerner 1980, p. 52.
threshold of Article 20 (2) ICCPR that prohibits any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

Although the preamble of the Convention rejects any doctrine of racial superiority, the actual prohibition of the ‘dissemination of ideas’ met strong opposition; the Convention should not be read as objecting to the dissemination of scientific ideas that deal with questions concerning race. The proposal not to prohibit the dissemination of racist theories at all, because in a democracy such opinions must be countered with the use of arguments and not by criminal law, was however rejected. CERD has continued to stress the compatibility of the prohibition with the right to freedom of opinion and expression.

In fact, in its general recommendation no. 35 on combatting racist hate speech, CERD considers that the prohibitions on dissemination of ideas of racial superiority are an important complement to the provisions on incitement. Whereas the provisions on dissemination of ideas attempt to discourage the flow of racist ideas ‘upstream’, those on incitement address their ‘downstream’ effects. As Article 4 is not self-executing, States parties must adopt legislation to combat legislation that falls within its scope. CERD has recommended States parties to declare and effectively sanction as offences punishable by law:

(a) All dissemination of ideas based on racial or ethnic superiority or hatred, by what ever means;
(b) Incitement to hatred, contempt or discrimination against members of a group on grounds of their race, colour, descent or national or ethnic origin;
(c) Threats or incitement to violence against persons or groups on the grounds in (b) above;
(d) Expression of insults, ridicule or slander of persons or groups or justification of hatred, contempt or discrimination on the grounds in (b) above, when it clearly amounts to incitement to hatred or discrimination;
(e) Participation in organizations and activities which promote and incite racial discrimination.

Furthermore, CERD has recommended that state parties declare as offences punishable by law ‘public denials or attempts to justify crimes of genocide and crimes against humanity, as defined by international law, provided that they clearly constitute incitement to racial violence or hatred.’ Contrarily, ‘the

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653 Lerner 1980, p. 46- 47.
655 General Recommendation no. 35, 26 September 2013, CERD/C/GC/35, para.11; 30.
656 Ibid., para. 13.
expression of opinions about historical facts’ should not be prohibited or punished.  

To a certain extent, the interpretation of Article 4 (a) by CERD matches the interpretation of 20 (2) ICCPR by the HRC in GC no. 34, to which CERD refers several times in recommendation no. 35. For the qualification of ‘dissemination’ and ‘incitement’ as offences punishable by law, CERD takes into account a number of contextual factors that are inspired by the six part threshold test developed for the determination of criminal liability for ‘incitement’ under 20 (2) ICCPR (para. 5.3 supra). 658 The factors concern: the content and form of the speech; the economic, social and political climate; the speaker; the reach of the speech; the objectives of the speech. These factors again provide clear but broad parameters that could form a guideline for a more consistent interpretation and application of national hate speech bans by national judges.

CERD specifies that ‘[r]acist hate speech can take many forms and is not confined to explicitly racial remarks. (…) speech attacking particular racial or ethnic groups may employ indirect language in order to disguise its targets and objectives.’ It emphasizes ‘the role of politicians and other public opinion-formers in contributing to the creation of a negative climate towards groups protected by the Convention’ and the extent of communication; ‘in particular when repetition suggests the existence of a deliberate strategy to engender hostility towards ethnic and racial groups’.

A distinction with the ICCPR remains, however, that it is only with regard to the incitement offences that, according to CERD, state parties should take into account as important elements the intention of the speaker and the imminent risk or likelihood that the conduct desired or intended by the speaker will result from the speech in question. In principle this does not apply to the offence of dissemination of ideas based on racial superiority or hatred, the threshold of which may thus be exceeded earlier. 659

6.3 Articles 4 and 5 ICERD: relationship between hate speech and freedom of expression

During the drafting, the ‘due regard clause’ was inserted into Article 4 ICERD, which requires that measures to eliminate incitement and discrimination must be made with due regard to the principles of the Universal Declaration of

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657 Ibid., para. 14.
658 Ibid., para. 15.
659 CERD has once stated that the mere acts of ‘dissemination’ and ‘incitement’ are criminalized, despite the lack of intention to commit an offence and irrespective of the consequences of such dissemination or incitement. However, it has been argued that, precisely given the non-self-executing nature of Article 4, state parties have a margin of appreciation in its application, which covers the actus reus and mens rea for the offence. See: CERD Study of 1983, para. 83; 96, UN Doc. A/CONF.119/10; Thornberry 2010, p. 109-110.
Human Rights (UDHR) and the rights enumerated in Article 5 ICERD, including freedom of expression: ‘In particular, this clause was intended to protect against overly broad limitations on the freedom of expression and association.’\(^{660}\) The due regard clause can be interpreted in different ways.\(^{661}\) It can signify firstly, that states are not allowed to take action that would impair the ‘freedoms’; secondly, that a balance must be struck between the freedoms and the duties under the Convention; and thirdly, that states may not invoke the protection of civil rights in order to avoid implementation of the Convention.

Many states, however, made reservations, declarations or interpretations to the Convention to the effect that they are only willing to adopt measures of implementation that are compatible with freedom of expression and association. For example, America made the following declaration: ‘The Constitution of the United States contains provisions for the protection of individual rights, such as the right of free speech, and nothing in the Convention shall be deemed to require or to authorize legislation or other action by the United States of America incompatible with the provisions of the Constitution of the United States of America.’\(^{662}\)

Nevertheless, CERD opines that during the drafting of the Convention the balance with the principle of freedom of expression has already been made;\(^{663}\) ‘it could not have been the intention of the drafters of the Convention to enable State parties to construe the phrase safeguarding the human rights in question as cancelling the obligations relating to the prohibition of the racist activities concerned.’\(^{664}\) With regard to the scope of national provisions implementing Article 4 (a), CERD has expressed its disapproval of the insertion of extra elements to the offences, such as the requirement that expression generates a disturbance of the public order or the risk of violence.\(^{665}\)\(^{666}\)

CERD considers, on the other hand, that the due regard clause does imply that, in the creation and application of offences, the principles of the UDHR and the rights in Article 5 ICERD, particularly freedom of expression, must be given appropriate weight in decision-making processes. For example, the expression of ideas and opinions made in the context of academic debates, political engagement or similar activity, and without incitement to hatred, contempt, violence or discrimination, should be regarded as legitimate exercises

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\(^{660}\) Lerner 1980, p. 48; Mahalic & Mahalic 1987, p. 89.


\(^{662}\) UN Doc. ST/LEG/SER.D/11, p. 98.


\(^{664}\) UN Doc. A/33/18 (1978), 112, cited by Meron 1985, p. 300-301.

\(^{665}\) Mahalic & Mahalic 1987, p. 98.

\(^{666}\) With the implementation of national legislation, however, many states have made their own further balance with freedom of expression. *Ibid.*, p. 93.
of the right to freedom of expression, even when such ideas are controversial.667

The right to freedom of opinion and expression also has a positive role in combating racial hatred. CERD stipulates that the protection of persons from racist hate speech is not simply one of opposition between the right to freedom of expression and its restriction for the benefit of protected groups; the latter also enjoy the right to freedom of expression. However, ‘racist hate speech potentially silences the free speech of its victims’. States parties should therefore adopt policies empowering all groups within the purview of ICERD to exercise their right to freedom of expression.668

6.4 Additional standards for discrimination and hate speech on the ground of religion?

CERD uses an extensive interpretation of the ‘grounds’ of discrimination in practice by addressing situations of ‘double’ or ‘multiple’ discrimination;669 when an element of ‘intersectionality’ between racial and religious discrimination can be established, CERD considers itself competent to deal with individual complaints.670 Contrarily, when the alleged discrimination or hate speech targets a particular religion or religious group alone, CERD considers itself not competent.

Hence, in an early case CERD found the conviction for the circulation of leaflets vilifying Islamic immigrants, Islam and the Norwegian immigration policy for Islamic foreign workers, to be in line with ICERD, because the leaflets ‘had treated the religious beliefs of the immigrants as the hallmark of their racial and ethnic identity and had explicitly invoked racial categories and racist attitudes’.671

Contrarily, in another case CERD declared a complaint concerning public statements of a politician against immigration and Muslims inadmissible, because ‘the impugned statements specifically referred to the Koran, to Islam and to Muslims in general without any reference whatsoever to race, colour, descent, or national or ethnic origin.’ Therefore ‘no specific national or ethnic groups were directly targeted as such’. According to CERD, ‘Muslims currently living in the State party are of heterogeneous origin’ and ‘Islam is not a religion practiced solely by a particular group’.672

For similar reasons, CERD declared a complaint concerning statements about Muslims in a political debate about the prohibition of corporal

667 General Recommendation no. 35, para. 19; 25.
669 On these definitions, see also: Vandenhole 2005, p. 36; 42-43.
punishment to be inadmissible. In both cases, CERD recognized ‘the importance of the interface between race and religion’ and its competence to consider a claim of ‘double’ discrimination. However, the *Travaux Préparatoires* of the Convention unquestionably revealed that ‘discrimination based exclusively on religious grounds was not intended to fall within the purview of the Convention’.  

The approach of CERD in individual complaints can be contrasted with its consideration of state reports, where it has stressed its concern about increasing ‘Islamophobia’ in certain countries, for example in the Netherlands. An examination on the elaboration of complementary standards to combat racism and discrimination within the UN, however, resulted in the conclusion, not that ICERD should be extended to cover discrimination and hate speech on the basis of religion, but that CERD adopts a General Recommendation on methodologies for multiple or aggravated discrimination.

It has been suggested that CERD should put more emphasis on the concepts of ‘discrimination in effect’ or ‘indirect discrimination’, because ‘[c]ases can arise where the hate speech discourse is careful to avoid direct racial or ethnic insult, and may have ‘switched’ its language from the racial/ethnic to the religious in relation to the same targeted community’. Furthermore, it has been argued that not only perpetrators of discrimination, but also Muslim immigrant communities identify themselves along both ethnic and religious lines. Discrimination against Muslims may thus disproportionately affect those belonging to an ethnic group and racism does not need to be aimed at one homogeneous ethnic group alone in order to constitute racism.

Controversy has equally arisen over the question of whether ICERD should cover attacks against a religion as such. After the affair of the Danish cartoons, despite the pressure of Islamic states, CERD has refused to adopt a general recommendation for state parties to prohibit blasphemy or ‘defamation of religions’. It is generally accepted that the Convention protects – vulnerable groups and individuals rather than – religious norms and practices.

677 Thornberry 2010, p. 104.
678 Berry 2011, p. 446-447.
It would be interesting to compare the success rates of a possible complaint about the acquittal of Dutch politician Geert Wilders on the grounds of group defamation and incitement to hatred and discrimination with regard to his statements about Islam and Muslims before the monitoring bodies of the three different international instruments: the ECHR/ ECHR (para. 1.6 supra), the HRC/ ICCPR (para. 5.3 supra) and CERD/ ICERD. Paradoxically, the success rate may be the highest before CERD, even though ICERD is strictly speaking limited to racial discrimination and hate speech. 681

6.5 Synthesis ICERD

Article 4a ICERD obliges states to prohibit by criminal law not only the ‘incitement to hatred, discrimination or violence’ on grounds of race, but also the much broader ‘dissemination of ideas based on racial or ethnic superiority or hatred’. Unlike the ECHR and the ICCPR, the ICERD thus actually obliges its member states to criminalize these forms of hate speech and to effectively enforce the prohibitions. In principle, these obligations for states are binding on them as to the result to be achieved, but they do not prescribe the implementation of exact uniform provisions. Hence, even under the ICERD a certain margin of appreciation exists for states to counter ‘hate speech’.

Nevertheless, member states may be expected to interpret and apply national hate speech bans intended to implement ICERD in conformity with the obligations arising from its article 4a, including CERD’s recommendations with respect thereto. With regard to the qualification of ‘incitement’, CERD has recommended that states take into account the intention of the speaker and the imminent risk or likelihood that the conduct desired or intended by the speaker will result from the speech in question. This does not apply to the qualification of ‘dissemination’, which covers a variety of racist opinions that would not meet the thresholds of the ICCPR (‘incitement’). This does not signify that the prohibition of ‘incitement’ would be limited to literal incitements to concrete acts. In fact, article 4a constitutes a multiform prohibition.

Furthermore, although ICERD concerns hate speech on grounds of race, in practice it extends to cases of ‘intersectionality between race and religion’. In certain contexts and under certain conditions extreme speech about

681 After all, out of all three treaties, the ICERD is the only treaty that actually obliges its member states to criminalize the dissemination of ideas based on hatred and the incitement to hatred and discrimination and to effectively enforce offences that criminalize such expression. In fact, the national offences on the basis of which Wilders was prosecuted were introduced in order to implement the ICERD into Dutch law. Furthermore, Wilders’ statements about Islam and Muslims in the context of a public debate on immigration and integration may form a pre-eminent case of an ‘intersectionality between race and religion’. Finally, in principle and generally speaking, under 4 (a) ICERD the required degree of probability that the speech would succeed in inciting actual action against the target group is in principle less strict than under 20 ICCPR. Therefore, the threshold for criminal liability for hate speech under the ICERD may be reached earlier. See further: Chapter 5 on The Netherlands.
a religion, defamatory statements about a particular racial group that are related to their religion or the denial of the Holocaust thus can all constitute a form of ‘incitement’ prohibited under ICERD. For a consistent determination of restrictions to hate speech under 4a ICERD the distinction between factual statements and value judgments and between racist remarks and speech about religion could then form important factors when weighing the specific harmful effects of speech in question against the interest of public debate.

7. Conclusion

This chapter analysed the obligations with regard to the restriction of hate speech in five selected international and European law instruments and how these must be interpreted. The analysis has shown that international and European human rights law provides a patchwork of standards on so-called hate speech. Not only do the different international and European legal instruments use different notions of hate speech, the systems also have different normative force in national legal orders. For this reason alone, international and European human rights law hardly functions as a coherent and consistent framework for setting restrictions to hate speech. Furthermore, obligations for states to prohibit by law specific forms of hate speech are binding on them in relation to the result to be achieved, but they do not prescribe the implementation of exact uniform provisions. Moreover, states are left a certain margin to imbed them in the principles of their national legal systems. This even applies to the instruments aimed at European harmonization of criminal law. The six-part threshold test for the determination of criminal liability for incitement offences in the Rabat Plan of Action may, however, develop into a standard guideline for a more consistent interpretation and application of national hate speech bans by national judges.

On the whole, complete consensus only appears to exist in relation to the prohibition of the actual incitement of third parties to undesirable or prohibited actions directed against an identifiable group or its members, thus expression that has a strict connection to subsequent actions. This requires ‘the activation of a triangular relationship between the object and subject of the speech as well as the audience’. The outer limit is constituted by the incitement to hatred/hostility or violence. Such expression may be prohibited under the ECHR and must be prohibited by law under the ICCPR, but not necessarily by criminal law. The criminalization of incitement to hatred or violence is required by ICERD, under the Additional Protocol to the Cybercrime Convention and by the EU Council Framework Decision that however allows for the insertion of the requirement of the likelihood of a disturbance of the public order. The criminalization of incitement to discrimination separate from incitement to violence or hatred or the requirement of a likelihood of a disturbance of the public order is more controversial and actually only required by ICERD. The ICCPR does require its prohibition by law.

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Up to now the HRC has not, however, dealt with cases about a violation of a positive state obligation to prevent incitement to hatred, discrimination or violence under 20 (2) ICCPR. The ECtHR has drawn the line with the failure of the state to take measures against actual violence. In fact, with regard to prohibitions of ‘incitement’, no uniform standard appears to exist for the determination of the probability that the expression would succeed in inciting actual action against the target group and/or produces broader effects on society at large. In first instance it remains up to national legislation and courts to determine the degree of risk of resulting harm and the likelihood, imminence or directness of such causation. The international and European instruments generally do demand that criminal offences of forms of hate speech are limited to public expression and require the intent of the author to incite. The exact meaning of ‘intent’ is, however, generally left to national interpretation and thus may vary from specific intent to mere recklessness.

The criminalization of the ‘dissemination of ideas based on racial hatred’ without any intent requirement or reference to the undesirable or prohibited effects of such dissemination, as is required by ICERD and recommended by ECI, is thus controversial. This offence covers a variety of expressions of racist opinions that would not meet the thresholds of the ICCPR (‘incitement’). Likewise, the Additional Protocol to the Cybercrime Convention and the EU Council Framework Decision only require the criminalization of dissemination of expression that constitutes an ‘incitement’. The criminalization of the ‘dissemination of racist ideas’ is on the other hand certainly permitted by the ECtHR, whose broad notion of hate speech includes any ‘spreading, incitement, promotion or justification of hatred based on intolerance’.

However, no single binding instrument obliges states to prohibit by law, let alone by criminal law, racist expression on the basis of its possible direct negative effects on the members of the target group, such as psychological harm, offence, or infringement of their dignity through invectives, abuse or negative imaging, separate from its possible effect on third parties or the public order. For example, the Additional Protocol to the Cybercrime Convention allows the insertion of the requirement of ‘exposure to hatred, contempt or ridicule’ for the offence of insult or defamation of a particular group or its members. The ECtHR permits both civil and criminal prohibitions of group defamation and insult, but states will only violate a positive obligation to take measures against such speech, when the negative stereotyping of a group takes a serious level. The HRC particularly objects to the criminalization of any form of defamation of individuals.

The regimes under the ECHR and the ICCPR differ on more points. Other than the ECtHR, the HRC has taken position against certain laws in abstracto. For criminal restrictions on expression, the HRC strictly holds on the threshold of ‘incitement’. Hence, the HRC considers laws that criminalize opinions about historical facts to be incompatible with the ICCPR. Likewise, the Additional Protocol to the Cybercrime Convention and the EU Council
Framework Decision only require the criminalization of the denial of grave crimes committed with the intent to or that is likely to incite to violence or hatred. Contrarily, the ECtHR generally considers criminal restrictions to Holocaust denial not to be in violation of freedom of expression, because it assumes that the denial as such constitutes not an opinion, but a false statement with a racist purport, thus a form of group defamation or incitement to hatred, discrimination or violence against Jews in itself and therefore an abuse of rights that is categorically excluded from the protection of Article 10 ECHR.

The ECtHR’s position on blasphemy is also exceptional. The ECtHR does not principally reject the criminalization of blasphemy and continues to regard the issue of religious offence as a direct conflict between freedom of expression and freedom of religion that would include the right of respect of religious feelings of others. The ECtHR increasingly distinguishes between attacks on a religion and attacks on religious adherents. States are allowed to prosecute expression that amounts to blasphemy and religious offence but have no duty to do so. The HRC on the other hand again considers laws penalizing blasphemy without the requirement of ‘incitement’ to be incompatible with the ICCPR. Likewise, different institutions of the Council of Europe have recommended the decriminalization of blasphemy, because such offences restrict opinions about religious matters and are discriminatory between religions and the confinement of criminal law to incitement to hatred, discrimination and violence on the basis of religion.

For the appreciation of the criminality of the different legal categories – group insult, defamation, ideas based on racial hatred, Holocaust denial and blasphemy – by the international and European instruments, the distinction between facts and value judgments appears to implicitly play an important role. The criminality of these legal categories appears to lie in fact that they are considered to constitute either false statements of fact or value judgments that lack a sufficient factual basis and not mere offensive but free opinions. For this reason, the legal categories are then considered to be prohibited either in themselves; because they aim to or are likely to incite to violence or hatred; or because they constitute a form of incitement hatred. The distinction between facts and value judgments is valued differently with regard to hate speech on the basis of race than with regard to hate speech on the basis of religion.

In international and European human rights law, the regimes for hate speech on the basis of religion and hate speech on the basis of race appear to differ. Religion does figure alongside race as a discriminatory ground in 20 (2) ICCPR. Likewise, restrictions to discourses that incite to hatred founded on religious prejudices are just as acceptable under the ECtHR as restrictions to hatred founded on racist prejudices. Contrarily, ICERD in principle concerns hate speech on the basis of race, although in practice it extends to cases of ‘intersectionality between race and religion’. Likewise, the Additional Protocol to the Cybercrime Convention and the EU Council Framework Decision only require the criminalization of forms of hate speech on the basis of religion, if
religion is used as a pretext for the factors race, colour, and national or ethnic origin. States are, however, free to create offences of hate speech on the basis of religion as an independent discriminatory ground.

ICERD, the Additional Protocol to the Cybercrime Convention and the EU Council Framework Decision that oblige states parties to criminalize particular forms of hate speech all refer to freedom of expression. This signifies that restrictions must be strictly construed and in their enforcement in concrete cases states must have due regard to freedom of expression. The HRC and the ECHR also balance the interest of particular restrictions with the interest of freedom of expression in the specific contexts of cases. The ECHR affords states a strikingly large margin to determine the restrictions to hate speech against a particular religious or ethnic group in the context of a public debate on their immigration and integration. On the whole, international and European human rights law appears to set broad frameworks, within which states have the option to set a variety of restrictions to hate speech. Such restrictions are therefore still first and foremost determined by national law and can be best comprehended against the background of the constitutional traditions of the respective national legal systems.