



# **STATE OF THE UNION REPORT: A ROAD MAP ADDRESSING REFORM POSSIBILITIES BASED UPON A COMPARATIVE ANALYSIS OF THE LEGAL REGULATION OF HATE SPEECH AND HATE CRIME**

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*The Daphne III programme aims to contribute to the protection of children, young people and women against all forms of violence and attain a high level of health protection, well-being and social cohesion.*

*Its specific objective is to contribute to the prevention of, and the fight against all forms of violence occurring in the public or the private domain, including sexual exploitation and trafficking of human beings.*

*It aims to take preventive measures and provide support and protection for victims and groups at risk.*

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## **Introduction**

This report provides a "State of the Union" account detailing the current legal, political and policy position relevant to EU member states. It expressly recognises that this is a field where analysis of law cannot be abstracted from the policy implications of its application, and a variety of constitutional and political debates concerning the limits and scope of state power.<sup>1</sup> Hate crime laws are thrust into a field of tension, sometimes conflict, between competing constitutional and political values, where policy cannot be analysed in purely technocratic and depoliticised terms.<sup>2</sup> Indeed, legal analysis confronts aspects of "identity politics" involving contests between different groups for enhanced recognition of hate crimes committed against those identified as "their" specific members.<sup>3</sup> In addition, there are real technical issues concerning the difficulties with both identifying and enhancing the punishment of hate crime offenders by reference to an after-the-fact interpretation of the nature of their discriminatory "motivation" located within the elusive inner recesses of their subjectivity (as opposed to demonstrable or assumed harm identifiable from a "third person" perspective).<sup>4</sup>

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<sup>1</sup> McPhail, B. (2000) 'Hate: policy implications of hate crime legislation,' *Social Service Review*, 635-653.

<sup>2</sup> McLaughlin, E. (2002), 'Rocks and hard places: the politics of hate crime,' *Theoretical Criminology*, 6 (4), 493-498.

<sup>3</sup> Jacobs, J., & Potter, K. (1998), *Hate crimes: Criminal law and identity politics*, New York: Oxford University Press.

<sup>4</sup> Clearly questions of selective perception are vital here. See Macnamara, B. S. (2003), 'New York's hate crime act of 2000: problematic and redundant legislation aimed at subjective motivation,' *Albany Law Review*, 66, 519-545; Lyons,

Chapter One summarises existing international and EU-wide provisions on hate crime, including various applicable human rights treaties to which all EU states are signatories. Chapter Two focuses upon the EU's and the Council of Europe's legal responses to hate crime. To help analysis and to identify transnational patterns and differences, the results of our research are summarised in Appendix One. The next chapter addresses the various articles of the Council of Europe's European Convention on Human Rights (ECHR), which are actually or potentially relevant to the legal regulation of hate crime and hate speech, in terms of how they have been judicially interpreted and applied.

Chapters Four, Five and Six comprise three far more detailed case studies taken as exemplars of wider generic tendencies and, perhaps, alternate models for law reform possibilities. For reasons that are explained, these case studies consist of Rwanda, Germany, and the UK. Rwanda, whose legal and constitutional systems are civil law based and reflect the legacy of European colonisation by France and Belgium, has been included to provide a geographically extra-European point of comparison. Rwanda is especially instructive because it is located at one extreme end of a broad spectrum between liberal ultra-permissiveness to hate speech on the one hand, and an illiberal democratic policy of the repression of such speech on the other.

In short, this "State of the Union" report examines a number of different ways in which hate crime, including hate speech, taking place within Europe, has been regulated through domestic, EU-wide, COE and transnational legal measures. It also identifies various advantages, challenges and criticisms these have provoked both generally and in relation to specific national traditions, before considering the lessons to be learned for the

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Ch. (2007), 'Individual perceptions and the social construction of hate crimes: A factorial survey,' *The Social Science Journal*, 107-131.

future direction of EU regulation of this topic.

The methodology underpinning the present report is committed to the idea that, in principle, contextual forms of comparative law analysis are capable of generating insights of relevance to both domestic and transnational European-wide levels. They can do so by means of prompting dialogue, self-critical reflections upon taken for granted ideological assumptions, discursive processes of justification and mutual learning experiences. In turn, these activities may help open up discussions of the advantages, relevance and disadvantages of a range of alternative possibilities and contextual factors, which determine their potential appropriateness in any given domestic or regional legal, constitutional and political culture.<sup>5</sup> Each of the three comparator states we have selected, Britain, Germany and Rwanda, have signed up to the key international law provisions but - as we will show - have interpreted and give effect to their obligations under these measures rather differently.

The choice of appropriate comparator legal systems is, however, always a vital issue for this type of research, and the three selected states have been selected precisely because of the very different ways in which they define and regulate hate crime in general and hate speech in particular.<sup>6</sup> Both Germany and Rwanda are civil law states whose populations have suffered from the practice and effects of genocide including within their own borders. Not surprisingly, their current constitutional and legal systems reflect this historical trauma. On the other hand, Germany is surrounded by relatively stable constitutional

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<sup>5</sup> For examples of broadly similar contextualist work to that promoted here, see Marloes Van Noorloos, *Hate Speech Revisited: A Comparative And Historical Perspective On Hate Speech Law In The Netherlands And England & Wales* (2011); Michael Rosenfeld, 'Hate Speech in Constitutional Jurisprudence: A Comparative Analysis,' in *The Content and Context of Hate Speech: Rethinking Regulation and Responses*. 242 (Michael Herz and Peter Molnar eds. 2012).

<sup>6</sup> Louis Greenspan & Cyril Levitt eds., *Under The Shadow Of Weimar: Democracy, Law, And Racial Incitement In Six Countries* (1992); Mari J. Matsuda, 'Public Response to Racist Speech: Considering the Victim's Story,' 87 *Mich. L. Rev.* 2320 (1989) (comparing the USA, UK and Canada); Richard Delgado & David H. Yun, 'The Speech We Hate': First Amendment Totalitarianism, The ACLU, And the Principle of Dialogic Politics,' 27 *Ariz. St. L.J.* 1281 (1995) (comparing Sweden, Italy, the UK, and Canada).

democracies, and - despite terrorist issues during the 1970's and 80's - has enjoyed a period of over 70 years of relative peace and political stability. This central European state is also "locked into" a wider EU framework of law and policy promoting fundamental rights, including "freedom from discrimination," that prohibits different forms of hate crime as inconsistent with these rights.

Rwanda, by contrast, is located within an unstable region, and has no long-standing tradition and political culture respectful of democratic and liberal constitutional rights. In addition, and unlike modern Germany, in this society perpetrators and victims and their families still live side by side, and memories of sectarian genocide remain all too fresh. Unlike modern Germany where Nazism has never regained significant electoral popular support, within Rwanda the threat of a repetition of ethnic violence with the potential to escalate into genocide still remains present. In contrast, to both Rwanda and Germany, the UK has never experienced genocide on its home soil.<sup>7</sup> Rwandan hate crimes laws remain the most powerful, some would say "extreme," of any modern state, and therefore offers a concrete, if controversial, model of the further development of hate crime laws in a more emphatic and far-reaching fashion.

Despite terrorist campaigns and short-lived periods of industrial strife and single issue forms of political unrest, the UK has generally been characterised by long-standing and comparative political stability. From the mid-19th century at least, there has, during peacetime, been widespread acceptance of multi-party democratic traditions generally tolerant of dissenting views within certain broad limits. In addition, the political and constitutional culture of England and Wales operates with an individualistic rights-based

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<sup>7</sup> As a former colonial and imperialist power, Britain was guilty of various atrocities overseas, and experienced periods of industrial unrest in the late 1970's.

"common law" legal system that also exhibits a conservative/communitarian emphasis upon continuity and incremental organic forms of development characterised by pragmatism. This culture contrasts markedly with the civil law traditions of both Germany and - to some extent - Rwanda. Although part of the EU, Britain is culturally, as well as geographically, distant from its centre, often treating the Anglo-American ties, grounded in part upon a shared common law legal system, as more important strategically than those associated with a Pan-European identity.

On the other hand, Britain does not share the constitutional religion of the USA, where "First Amendment" absolutism leads to a liberal fundamentalist orientation towards "freedom of speech" as a self-evidently supreme value overpowering arguments for hate speech prohibitions in particular.<sup>8</sup> Here, this freedom is defined as fundamental inalienable "natural right" that both precedes and transcends the general concerns and interests of civil society. Legal and constitutional rights are interpreted in Lockean individualistic terms as "freedoms from" state censorship, and as existing independent of any nexus responsibilities to others, including particularly the collective honour, reputation and dignity of social groups attacked by hate crimes for example.<sup>9</sup> This fundamentalist approach, which contrasts markedly with the position in Germany and much of international law,<sup>10</sup> suggests, or at least implies, that legal restrictions on hate speech are illegitimate in *all*

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<sup>8</sup> See Erik Bleich, *The Freedom To Be Racist? How The United States And Europe Struggle to Preserve Freedom and Combat Racism* 17-36 (2012); Samuel Walker, *Hate Speech: a History of An American Controversy* 14-16 (2004); Robert Post, 'Hate Speech,' in *Extremist Speech And Democracy* 122, 137 (James Weinstein and Ivan Hare eds. 2009); Roger P. Alford, 'Free Speech and the Case for Constitutional Exceptionalism,' 106 *Mich. L. R.* 1071, (2008); Peter Teachout, *Making Holocaust Denial a Crime, Reflections on European Anti-Negationist Laws from the Perspective from the Perspective of US Constitutional Experience*, 30 *Vt. L. Rev.* 690-91 (2005).

<sup>9</sup> For a wider critical analysis, see Kahan, D. M. (2001), 'Two liberal fallacies in the hate crime debate,' *Law and Philosophy*, 20, 175–193. Cf. Jenness, V. (2001). 'The hate crime canon and beyond: a critical assessment,' *Law and Critique*, 12, 279–308.

<sup>10</sup> Roland Krotoszynski, Jr., 'A Comparative Perspective on the First Amendment: Free Speech, Militant Democracy, and the Primacy of Dignity as a Preferred Constitutional Value in Germany,' 78 *Tul. L. Rev.* 1549 (2004); Friedrich Kubler, 'How much Freedom for Racist Speech?: Transnational Aspects of a Conflict of Human Rights,' 27 *Hofstra L. Rev.* 335.

democracies, regardless of temporal context or specific circumstances. Hate speech regulations are assumed to undermine the structure of public discourse by restricting the scope of personal identity and orientation of citizens, and such "restriction" is unacceptable in a "true democracy" of which America alone is often taken as the ideal exemplar.

This fundamentalist position ignores the fact that, until about 1940, American restrictions on speech were far more restrictive than they are today. There was a general proliferation of speech restrictions including bans on anti-slavery pamphlets, and restrictions on both "obscenity" and "seditious libel." And yet this historical point is rarely taken as challenging the claims that the USA fully embodies a "democratic tradition" notwithstanding restrictive voting rights and institutionally racist segregation in the South prior to the Civil Rights movement of the 1950s and 60s.

The adoption of a policy stance of liberal fundamentalism also leads to essentially abstract discussions of hate crime generally, and hate speech in particular, which are based on supposedly invariant axioms. The problem here is that these ignore the historically contingent ways in which issues concerning hate crime and their surrounding circumstances have altered markedly over time. Such fundamentalism also promotes a policy stance that, for instance, claims that it is European laws against genocide denial, rather than the activity of denial itself, which is the proper object of policy critique, and that such laws themselves constitute "hate speech."<sup>11</sup>

A key contradiction here stems from combining the absolutism of a constitutional principle of "freedom of expression" reinterpreted as a universal entitlement, with an equal extreme relativism regarding statements embodying claims to knowledge. The latter

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<sup>11</sup> Cf. Robert A. Kahn, 'Holocaust Denial and Hate Speech,' in *Genocide Denials and the Law*, at 77-108, Ludovic Hennebel & Thomas Hochmann eds. 2011.



reinterprets statements of genocide denial in formalistic terms - as if all they signified was a simple "disagreement" with others who affirm the existence of a historically proven genocide. The liberal ideological presumption here is that all "factual" statements about such events are simply matters of private choice, individual opinion and subjective taste within an overarching "market place of ideas." There is, it is presumed that it is never possible to formulate objective criterion for right or wrong to identify and differentiate the empirical correctness of recognising historical genocides for what they really were, with what both historians and judges have long recognised as the falsification their denial.<sup>12</sup>

In addition, the value system here is predicated upon an extreme private / public dichotomy. Here, a Holocaust denier is taken in the public sphere as merely exercising a "lawful freedom" with respect to "constitutionally protected speech. Yet, this exercise of public law rights could - on contractual grounds - nevertheless result in her dismissal from private sector employment and housing without any legal remedy whatsoever. Such "negative" consequence for this individual within the private sphere are redefined in terms of "freedom of contract" - the right of employers and landlords to rely on the terms of contracts which they themselves have written notwithstanding the conflict with constitutional guarantees of freedom of expression. Here we have an obvious contradiction stemming from how "freedom" is being interpreted and applied within the public and private spheres, which is largely alien to the European tradition.

Such a contradictory mixture of equally extremist absolutism with cognitive relativism, itself linked to the liberal contractualist ideology of the "marketplace of ideas," does not inform the British, German or Rwandan legislative provisions. The European tradition,

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<sup>12</sup> On the other hand, there are occasional vestiges of constitutional fundamentalism within Europe. In 2012, the French Government enacted a law banning the denial of the Armenian genocide but it was struck down by the Constitutional Court. See 'French genocide law "unconstitutional" rules court,' *France 24*, Feb. 28, 2012.

embodied for example in the ECHR, is more accustomed to the pragmatic balancing of competing liberal and social democratic policy agendas. Here, issues are rarely addressed in an either/or and “all or nothing” manner – as if “freedom of expression” is either an unqualified basic right meriting protection under all circumstances, or under none whatsoever. Indeed, the US liberal fundamentalist stance is so out of kilter with the European tradition as to fall outside the scope of any meaningful and relevant comparative analysis. It follows that whatever possible and realistic reforms are worth discussing exclude those based on the Americanisation of European criminal law. It could be that those of Rwanda, shaped in part by the European civil law tradition, have more to offer to our debate than the apparently more “obvious” choice of the USA as a non-European comparator.

Although each of the three comparator states exhibit constitutional commitments to “democracy,” it has to be recognised that there is no single correct definition of what this means. Defenders of the USA’s liberal fundamentalist constitutional regime on hate speech can certainly appeal to “democracy” as a ground justifying a permissive stance.<sup>13</sup> But then so too can supporters of Germany’s strict regulatory controls and criminal prohibitions, which – as will be shown below – are expressly justified constitutionally by reference to the self-defence imperatives of “militant democracy.”<sup>14</sup> Of course, the point is not enter into a debate for or against “democracy” as a general criteria because undemocratic forms of

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<sup>13</sup> James Weinstein, ‘Participatory Democracy as the Central Value of American Free Speech Doctrine,’ 91 *Va. L. Rev.* 492 (2011); Robert Post, ‘Religion and Freedom of Speech: Portraits of Muhammad,’ 14 *Constellations* 72 (2007).

<sup>14</sup> Central to the militant democracy position is the idea that a democratic state can and must take specific steps against internal movements that threaten to destroy it without losing its overall democratic legitimacy. Such measures include restrictions on extremist political parties, bans on pro-Nazi activities including symbolism and hate speech, and the surveillance of extremist groups. For a thoughtful analysis of these issues, see Martin Klamt, ‘Militant Democracy and the Democratic Dilemma: Different Ways of Protecting Democratic Constitutions,’ in *Militant Democracy*, at 133-58 (Andras Sajó ed. 2004); Jeremy Waldron, *The Harm in Hate Speech*, (2012).

governance, such as theocratic, fascistic or monarchical modes of governing society, cannot hope to legitimate themselves successfully within a late modern European context. Nor is it a question of merely asserting that legally unregulated "freedom of expression" is somehow the precondition for democratic ways of life and political cultures: as if modern Germany falls outside the definition of a "true democracy" because of its broad hate crime laws.

Given the many different versions of democracy as a constitutional brand, as well as the essentially rhetorical, prejudicial and partisan nature of contrasting supposedly "essentially true" from "necessarily false" notions of democracy, the question is rather inevitably contextual. Which particular and necessarily selective interpretations of "democratic values" can be shown to be most appropriate (or least objectionable and clearly inappropriate) to current debates over the available policy options for European-wide reform of hate crime laws, given the legacies of historical experience and political culture(s) of Europe itself?

Is it a certain kind of hate speech, including xenophobic denials of historical genocides, which is most threatening to democracy, such that its legal prohibition and suppression is, as the ECHR asserts: "necessary in a democratic society."<sup>15</sup> Alternatively, does this type of state response threaten "the democratic dialogue" over issues that citizens could possibly vote upon, and therefore undermine democracy itself, as US liberal fundamentalists assert with equal vigour, if not necessarily intellectual rigor?<sup>16</sup>

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<sup>15</sup> This Schmittian argument against liberal fundamentalism and in favour of illiberal democratic self-defence was articulated impressively and with considerable foresight by the German-Jewish émigré Karl Loewenstein, 'Militant Democracy and Fundamental Rights I,' 31 *Amer. Pol. Sci. Rev.* 417, 417 (1937); Karl Loewenstein, 'Militant Democracy and Fundamental Rights II,' 31 *Amer. Pol. Sci. Rev.* 638 (1937); Karl Loewenstein, 'Legislative Control of Political Extremism in European Democracies,' 38 *Columbia L. Rev.* 725 (1937).

<sup>16</sup> Robert Post, 'Racist Speech, Democracy and the First Amendment,' 32 *Wm & Mary L. Rev.* 267, (1991). Post insists that for a democracy to be legitimate, citizens must be able to express themselves fully on all public subjects (i.e. issues

In short, the three countries subject to this road map comparison exhibit interesting points of both contrast as well as comparison of overlapping features. And it is by means of this contrast, together with the assumption that these differences are not so extreme as to prevent any possible learning process relevant to the debate over the direction of EU-wide law reform.

At the constitutional and policy levels, the challenge this study responds to is examine whether the principles of "freedom of expression" and "freedom from discrimination" can be balanced in ways that suggest that these are not incompatible and mutually exclusive doctrines.<sup>17</sup> This tension has been neatly summarised in a study on German hate speech laws:

'One strong argument for very broad protections of hate speech is that such freedom of speech has traditionally been important to minorities wishing to express opinions seen by the majority as absurd or offensive. Voltaire, a prominent representative of the French Enlightenment, considered protection of offensive speech to be a moral duty. His oft-cited philosophy was, "I might disapprove of what you say, but I will defend to the death your right to say it." This would seem to be an argument supporting a permissive attitude toward hate speech. However, by arguing in favor of limiting hate speech, one could also deny freedom of speech to those who would use this right to abolish the rights of others. This view would mean that one could not freely use speech to silence another. Therefore, plausible arguments regarding the proper level of protection to afford hate speech range from advocating full and strong protection to advocating no protection at all.'<sup>18</sup>

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members of society could conceivably vote on). Hate speech laws violate this principle by restricting a type of commentary on public issues – for example, those inspired by theories of racial inferiority. Of course, not all American based scholars subscribe to this view. Alex Tsesis, for example, has written sympathetically about the need for pluralist democracies to legally regulate hate speech 'Dignity and Speech, The Regulation of Hate Speech in a Democracy,' 44 *Wake Forest, L. Rev.* 497 (2009). Critical race theorists Richard Delgado and Jean Stefancic have devoted a chapter of *Must We Defend Nazis? Hate Speech, Pornography, and the New First Amendment* (1997) 122-31 to recognising that since other democratic countries, especially in Europe, have enacted hate speech laws, Americans could have them as well without jettisoning their democratic values.

<sup>17</sup> Coliver, Sandra, ed., *Striking a Balance: Hate Speech, Freedom of Expression and Non-Discrimination*, 1992.

<sup>18</sup> Winfried Brugger, 'The Treatment of Hate Speech in German Constitutional Law (Part I),' 3 *German Law Journal*, 2002: [www.germanlawjournal.com/article.php%3Fid%3D212](http://www.germanlawjournal.com/article.php%3Fid%3D212).

# **CHAPTER ONE:**

## **INTERNATIONAL / TRANSNATIONAL LAWS**

### **GENERALLY APPLICABLE TO EU MEMBER STATES<sup>19</sup>**

This chapter summarises existing international and EU-wide provisions on hate crime, including various applicable human rights treaties. There is no global consensus on the legal status of hate crime in general or hate speech in particular, not even that extreme form of hate speech exhibited in genocide denial deployed in the service of genocidal ideologies and associated political programmes.<sup>20</sup> International law neither consistently permits nor prohibits hate speech, and is riven by at least two contrasting tendencies.<sup>21</sup> There are also divergent theoretical and ideological underpinnings to transnational debates, as well as commitments stemming from shared legacies of particular historical experiences.<sup>22</sup>

One of these opposed tendencies is embodied in a group of states, most prominently the USA, that give absolute priority to "freedom of speech" over most countervailing interests, including the protection of hate crime victims from linguistic abuse encouraging or justifying discriminatory actions against them.<sup>23</sup> The opposing tendency, shared by the

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<sup>19</sup> This chapter was drafted by Dr. Kim McGuire and Dr Michael Salter.

<sup>20</sup> Fogo-Sshcensul Credence, 'More Than a River in Egypt: Holocaust Denial, the Internet, and International Freedom of Expression Norms,' 33 *Gonzaga Law Review* 241 (1997-98).

<sup>21</sup> Friedrich Kübler, 'How Much Freedom for Racist Speech?: Transnational Aspects of a Conflict of Human Rights,' 27 *Hofstra L. Rev.* 335 (1999).

<sup>22</sup> Stephanie Farriors, 'Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech,' 14 *Berkeley J. Int'l L.* 1 (1996).

<sup>23</sup> Weinstein James, 'Hate Speech, Viewpoint Neutrality, and the American Concept of Democracy,' in: Thomas R. Hensley, ed., *The Boundaries of Freedom of Expression and Order in American Democracy*, 2001, 146 ff.; Appleman, Bradley A., 'Hate Speech: A Comparison of the Approaches Taken by the United States and Germany,' 14 *Wisconsin International Law Journal* 422 (1996); Douglas-Scott- Sionaidh, 'The Hatefulness of Protected Speech: A Comparison of the American and European Approaches,' 7 *William and Mary Bill of Rights Journal* 305 (1999).

member states of the Council of Europe, Canada and international law more generally, interprets bias-motivated hate speech as forfeiting either some or all of its legal protection under "freedom of expression" constitutional and human rights provisions.<sup>24</sup> This group of states assign a higher priority to the presumed "dignity" or "equal rights" of those who are on the receiving end of hate speech than to the claimed rights to "freedom of speech" of those who originally express and reiterate such statements.<sup>25</sup> Here, not only does hate speech lack legal protection but it is also often expressly prohibited under domestic or transnational criminal and other laws, which allows victims to prevail in court proceedings.<sup>26</sup>

There is an established legal, human rights and constitutional literature debating the issues separating these two contrasting tendencies. A key question is whether criminal laws prohibiting genocide denial amount to legitimate exercises of state power, or an excessive deployment of such power seeking in vain to impose orthodoxy in a field where such denial is better responded to by open dialogue, education and the publication of credible forms of historical research.<sup>27</sup> It is now necessary to examine specifically human rights issues first at the international law level.

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<sup>24</sup> Nier, Charles Lewis, 'Racial Hatred: A Comparative Analysis of the Hate Crime Laws of the United States and Germany,' 13 *Dickinson Journal of International Law* 241 (1995).

<sup>25</sup> Kreszmer, David/Hazan, Francine Kershan, eds., *Freedom of Speech and Incitement Against Democracy*, 2000.

<sup>26</sup> Greenspan, Lous/Levitt, Cyril, eds., *Under the Shadow of Weimar. Democracy, Law, and Racial Incitement in Six Countries*, 1993.

<sup>27</sup> Lawrence R. Douglas, 'Policing the Past: Holocaust Denial and the Law,' in *Censorship and Silencing: Practices of Cultural Regulation*, Robert C. Post, ed., Getty Research Institute Press, 1998; and also Douglas's "The Memory of Judgment: The Law, the Holocaust, and Denial," *History and Memory*, Vol. 7, No. 2, Fall/Winter 1996; John C. Knechtle, 'When to Regulate Hate Speech,' 110 *Penn St. L. Rev.* 539, 552 (2006); Viktor Mayer-Schönberger and Teree E. Foster, 'A Regulatory Web: Free Speech and the Global Information Infrastructure,' 3 *Mich. Telecomm. Tech. L. Rev.* 45 (1997) available at: <http://www.mtlr.org/volthree/foster.pdf>.

## 1.1 International law measures allowing hate crimes regulation as "exceptions" to "freedom of expression"

The position taken by a large and expanding body of transnational, regional and interpretation law measures is that of straightforward condemnation of almost all types of racist hate crime, including cyber-hate and incitement to genocide. The position on other categories of hate crime, such as those involving sexuality, gender and religion, is less categorical and varies considerably between states. Such variation mirrors the position in the domestic laws of EU states.

The Preamble to the 1965 International Convention on the Elimination of all Forms of Racial Discrimination states unequivocally that theories of racial difference are: '...scientifically false, morally condemnable, socially unjust and dangerous, and ... there is no justification for racial discrimination, in theory or in practice anywhere.'<sup>28</sup> At both the cognitive and policy levels, transnational measures relevant to hate crimes that have been endorsed by significant proportion of states provide *minimum* standards for national criminal legislation laws on racist behaviour. These are standards to which EU states should expect to be judged both internally and by a range of external bodies. In many cases, what could be identified as best international practice of relevance to EU-wide policy and law reform will *exceed* these standards.

The content, scope and domestic legal status of the growing body of transnational, regional and international measures relevant to hate crime varies considerably. The 1948 Universal Declaration on Human Rights promotes human rights in general, including "freedom from discrimination," at a truly international level; while others, such as the 2008

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<sup>28</sup> Adopted and opened for signature and ratification by General Assembly Resolution 2106 (XX) of 21 December 1965 entry into force 4 January 1969, in accordance with Article 19: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>.

EU Framework Decision on Combating Racism and Xenophobia, are far more focused and restricted to EU states alone. Council of Europe Conventions are binding in international law only upon those who sign and ratify them, including non-EU states, such as a Canada.

Furthermore, for every EU state, it is necessary to identify and distinguish those transnational measures that are legally binding in international law only without giving rise to rights or obligations that citizens are able to enforce in domestic courts (unless they have been specifically incorporated into national law through domestic legislation to that effect). This group includes the majority of international treaties, covenants, conventions and declarations.<sup>29</sup> Most EU states have specifically incorporated the ECHR into their domestic law. This category of relevant transnational measures binds EU States *externally* in their interactions with other states, and in their dealings within various international forum and committees, including the UN Committee on the Elimination of All Forms of Racial Discrimination.

A second category is made up of those measures relevant to hate crimes that citizens of EU states can *directly enforce* within their national courts. This smaller group includes the EC Treaty and the EC Directive implementing the principle of "equal treatment" between persons irrespective of racial or ethnic origin, and possibly the 2008 EU Framework Decisions on Combatting Racism and Xenophobia. The contents of measures that fall within this second category impose legally binding obligations on EU member states, while still reserving to these states the question of how best to implement the obligations within their own national legal systems. Once an EU framework decision is

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<sup>29</sup> Examples include the 1966 UN International Covenant on Civil and Political Rights (ICCPR); the 1966 UN International Covenant on Economic, Social and Cultural Rights; the 1965 UN International Convention on the Elimination of All Forms of Racial Discrimination; the 1978 UN Declaration on Race and Racial Prejudice; the 1950 European Convention on the Protection of Fundamental Rights and Freedoms (ECHR); the 1961 European Social Charter; the 1995 Framework Convention for the Protection of National Minorities; and the 1948 UN Declaration on Human Rights.



adopted, EU states become legally obliged to incorporate those parts that are mandatory so as to make them enforceable in domestic courts. If EU States decide to opt out of, or derogate from, *discretionary* aspects of an EU Framework Decision, citizens cannot enforce these rights and obligations.

A third category comprises those transnational instruments expressing general standards, principles and commitments that are merely aspirational, including policy statements. Such measures do not impose any particular legal obligations on states which are signatories to them. Examples of this category include: the UNESCO Call for a European Coalition of Cities against Racism; the Vienna Declaration and Programme of Action; the UN Model National Legislation for the Guidance of Governments in the Enactment of Further Legislation against Racial Discrimination; the ECRI General Policy Recommendations; and the EU Joint Action concerning action to combat racism and xenophobia. These examples represent internationally agreed standards that, although not enforceable legally, nevertheless reflect a more universal yet internal yardstick for critical evaluation of state practices.

In determining which transnational measures are particularly relevant to EU hate crime law and policy, it is necessary to further distinguish between legal obligations relating to anti-discrimination measures generally, and that sub-set that are specifically applicable to recognised and evolving categories of hate crime. For example, anti-discrimination laws applicable to racist hate crime identify "race" as but one characteristic which should be prohibited as a ground for discrimination, alongside sex, religion, ethnic or national origin, genetic features, language, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation. On the other hand,

and for good reason, no EU states have criminalised as hate crimes discriminatory practices or expressions relating to *all* of these categories. If they had then much political discussion concerning, for example, the distribution and redistribution of inherited property rights could potentially be criminalised as hate speech.

Other international instruments include a definition of racism relevant to racist types of hate crime. The 1967 UN Declaration on Race and Racial Prejudice provides a broad definition of racism when it refers to:

'... racist ideologies, prejudiced attitudes, discriminatory behaviour, structural arrangements and institutionalised practices resulting in racial inequality as well as the fallacious notion that discriminatory relations between groups are morally and scientifically justifiable; it is reflected in discriminatory provisions in legislation or regulations and discriminatory practices as well as in anti-social beliefs and acts; it hinders the development of its victims, perverts those who practise it, divides nations internally, impedes international co-operation and gives rise to political tensions between peoples; it is contrary to the fundamental principles of international law and, consequently seriously disturbs international peace and security.'

Mid-20th century provisions relating to the prohibition of hate speech and all forms of intolerance and discrimination on grounds such as race, religion and belief are to be found in numerous international instruments, for example: the 1945 United Nations Charter,<sup>30</sup> the 1948 Universal Declaration of Human Rights.<sup>31</sup>

Arguably, a key breakthrough in the recognition of the most extreme forms of hate crime, including their linguistic incitement in the form of hate speech, aiding and abetting and conspiracy, is contained in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).<sup>32</sup> This key measure was introduced,

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<sup>30</sup> Paragraph 2 of the Preamble, Article 1 § 3, Article 13 § 1 (b), Articles 55 (c) and 76 (c)).

<sup>31</sup> Articles 1, 2 and 7.

<sup>32</sup> Approved and proposed for signature and ratification or accession by General Assembly Resolution 260 A (III) of 9 December 1948, entry into force 12 January 1951, in accordance with article XIII UN General Assembly.

which certain formalistic accounts of transnational hate crime laws inexplicably discount,<sup>33</sup> was in part, as a response to the religiously-based discriminatory extermination of both the Armenians between 1915-22, and European Jewry 1942-45. This measure connects international criminal law to the rationale and ethical purpose of the UN. Its introductory paragraph provides:

'Having considered the declaration made by the General Assembly of the United Nations in its resolution 96 (I) dated 11 December 1946 that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world. Recognizing that at all periods of history genocide has inflicted great losses on humanity, and being convinced that, in order to liberate mankind from such an odious scourge, international co-operation ...'<sup>34</sup>

Article 1 of this Convention confirms that acts of genocide are offences whether committed in time of peace or in time of war which states: 'undertake to prevent and to punish.' Article 2 then provides a broad definition of genocide that covers non-fatal forms of discriminatory persecution including certain types of hate crime directed at members of entire groups of people that result in 'serious mental harm' and undermine their medium and long terms sustainability:

'any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.'<sup>35</sup>

In addition to acts of genocide understood as the primary offence, Article 3 also criminalises: 'b) Conspiracy to commit genocide; (c) Direct and public incitement to

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<sup>33</sup> Possible arguments here are that the investigation and prosecution of genocide involve different courts and processes than purely domestic law - but this argument is at best only partially true because many states have incorporated the offence of genocide into their domestic law as part of their ratification of the International Criminal Court allowing genocide charges to be brought at his national level

<sup>34</sup> <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CrimeOfGenocide.aspx>.

<sup>35</sup> Ibid.

commit genocide; (d ) Attempt to commit genocide; (e) Complicity in genocide. These related offences, particularly incitement, broadens the scope of genocide as a criminal offence to embrace hate speech that incites a discriminatory form of group violence directed against the protected groups, and removes traditional immunities from: 'constitutionally responsible rulers, public officials ...' Article 5 contains an obligation of states to take positive practical steps: 'to enact, in accordance with their respective Constitutions, the necessary legislation to ... provide effective penalties for persons guilty of genocide.' Arguably, the last article provides international law grounds for all EU states to introduce criminal measures against those forms of hate crime that overlap with the offence of genocide.

In addition, the Convention on the Elimination of All Forms of Racial Discrimination (1965) recognises that one of the key aims of the United Nations is to promote universal respect for, and observance of, fundamental freedoms for all, without discrimination as to race, sex, language or religion. According to Article 1, "Racial discrimination" in this Convention, means:

'... 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.'<sup>36</sup>

This relatively broad definition of "race" provides a possible basis for a transnational conception of racist hate crime covering groups such as "travellers" that a narrower definition would probably exclude.

More generally, most transnational human rights documents include anti-discrimination provisions stating that the particular rights set out, defined and

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<sup>36</sup> Available at [http://www.unhchr.ch/html/menu3/b/d\\_icerd.htm](http://www.unhchr.ch/html/menu3/b/d_icerd.htm).

protected under them must be capable of being exercised without any form of discrimination. Such measures are, of course, limited to forms of discrimination impeding only the would-be enjoyment of the specific rights set out in these documents. For example, Article 2 of the Universal Declaration of Human Rights states:

'Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

Similar statements are found in the European Social Charter, the International Covenant on Economic, Social and Cultural Rights, and article 14 of the ECHR. Protocol Number 12 to the ECHR reaffirms the position that this provision is limited to prohibiting discrimination in the enjoyment of the rights guaranteed by the Convention itself.

A related provision relevant to the type of discriminatory practice that is exhibited by hate crime and, in particular discriminatory incitement as a hate crime, is the requirement to ensure "equal protection" for all before the law contained in article 7 of the UN's Universal Declaration on Human Rights, 1948:

'All are equal before the law and are entitled without discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.'<sup>37</sup>

Several transnational legal instruments follow up on the Genocide Convention in that they too go beyond prohibiting discrimination in the exercise of other rights by directly prohibiting hate crimes as an unlawful form of racial discrimination. For instance, Article 21 of the EU Charter of Fundamental Rights, which is not directly obligatory on EU states, notes:

'Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion,

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<sup>37</sup> xxx

membership of a national minority, property, birth, disability age or sexual orientation shall be prohibited.'

In addition to this aspirational commitment, the EU has imposed specific legal obligations upon its member states. These include Article 12 (ex Article 6) of the Treaty on the European Communities (TEC):

'Within the scope of application of this Treaty, and without any prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. The Council, acting in accordance with the procedure referred to in Article 251, may adopt rules designed to prohibit such discrimination.'

Article 19 of the International Covenant on Civil and Political Rights, (ICCPR)<sup>38</sup> guarantees rights to freedom of "opinion" and "expression." That is, to seek, receive and express impart information and ideas of all kinds. Insofar as they have ratified the ICCPR, states are bound as a matter of international law by its provisions, but are also obliged to incorporate its measures through national legislation. However, and this is especially important to the development of legal prohibitions of hate speech and cyber-crime, this measure also allows state parties to impose limits on "freedom of expression" if these meet three the following criteria: 1/. proportionality, 2/. are provided for by law, and 3/. are clearly necessary to protect the rights of other citizens, including their right to be free from discrimination. Under Article 20(2) of the ICCPR, States are also required to prohibit advocacy of hate speech that constitutes incitement to violence and discrimination.<sup>39</sup> Any

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<sup>38</sup> G.A. res. 2200A. Article 19 of the ICCPR states:

1) Everyone shall have the right to hold opinions without interference.  
2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.  
3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:  
(a) For respect of the rights or reputations of others;  
(b) For the protection of national security or of public order (ordre public), or of public health or morals.

<sup>39</sup> Article 20 of the ICCPR states: '1) Any propaganda for war shall be prohibited by law.

2) Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law. International Covenant on Civil and Political Rights adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force 23

such prohibitions restricting "freedom of expression" must also comply with the three criteria listed above.

There has been an important decision on the relationship between article 19 and prohibitions of anti-Semitic hate speech brought before the European Court of Human Rights, *Faurisson v. France*. In that case, it was held that such prohibitions did not necessarily violate rights to freedom of expression, particularly where these measures served to re-affirm the right to live free of realistic fears of discriminatory persecution by means of such anti-Semitic expressions:

' To assess whether the restrictions placed on the author's freedom of expression by his criminal conviction were applied for the purposes provided for by the [International] Covenant [on Civil and Political Rights], the Committee begins by noting, as it did in its General Comment 10 that the rights for the protection of which restrictions on the freedom of expression are permitted by article 19, paragraph 3, may relate to the interests of other persons or to those of the community as a whole. Since the statements made by the author, read in their full context, were of a nature as to raise or strengthen anti-semitic feelings, the restriction served the respect of the Jewish community to live free from fear of an atmosphere of anti-semitism. The Committee therefore concludes that the restriction of the author's freedom of expression was permissible under article 19, paragraph 3(a), of the Covenant.'<sup>40</sup>

Similar provisions to Articles 19 and 20 of the ICCPR are also found in Articles 10 and 11 of the African (Banjul) Charter on Human and Peoples' Rights, adopted by the Organisation of African Unity on 17 June 1981, which entered into force on 21 October 1986.<sup>41</sup> However, this measure is qualified by the strongly expressed and broadly defined duties contained in Article 29, including obligations to promote the spirit of "tolerance," "unity" and communal and national "solidarity," which by implication requires expressions

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March 1976, in accordance with article 49 United Nations (UN) General Assembly.

<sup>40</sup> Para. 9.6: <http://www1.umn.edu/humanrts/undocs/html/VWS55058.htm>

<sup>41</sup> Article 9 provides: '1. Every individual shall have the right to receive information. 2. Every individual shall have the right to express and disseminate his opinions within the law. Article 10 states: '1. Every individual shall have the right to free association provided that he abides by the law. 2. Subject to the obligation of solidarity provided for in 29 no one may be compelled to join an association.' <http://www1.umn.edu/humanrts/instrtree/z1afchar.htm>.

that stir up sectarian ethnic, religious or nationalistic intolerance and hostilities to be qualified by law.<sup>42</sup> An interesting question, discussed later in a case study on the possible lessons that Rwandan hate crime laws might contain for pan-European reform, is whether such qualifications to "freedom of expression" are disproportionate or otherwise excessive?

There are also international provisions prohibiting discriminatory classification contained in articles 2 (1) of the International Convention on Economic and Social Rights, article 14 of the ECHR (discussed below), and article 2 of the Banjul Charter on Human Rights and the Rights of Peoples. Indeed, international law contains a positive duty to criminalise hate speech and racial discrimination under articles 2 and 4 of the U.N. Race Convention.

A recent tendency within international instruments combating racism is for these to impose ever more specific legal obligations, including those relating to the criminalisation of hate crime involving specified punishment of racist and other discriminatory forms of behaviour. This tendency began with measures obliging states to prohibit "incitement to discrimination" on racial grounds, although not always expressly requiring criminalisation. For instance, article 20(2) of the United Nations International Covenant on Civil and Political Rights states: 'Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be

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<sup>42</sup> These provide: 'The individual shall also have the duty: 1. to preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need; 2. To serve his national community by placing his physical and intellectual abilities at its service; 3. Not to compromise the security of the State whose national or resident he is; 4. To preserve and strengthen social and national solidarity, particularly when the latter is threatened; 5. To preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defence in accordance with the law; 6. To work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society; 7. to preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well-being of society; 8. To contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity.'



prohibited by law.' The key point here is that this human rights measure is not framed as a mere exception or limiting qualification to "freedom of expression" posited as a fundamental right. Instead, it establishes a specific free-standing legal obligation to respect the rights of citizens not to have to live in fear of suffering racial, nationalistic or religious hatred stirred up by hate crime in general and hate speech in particular.

The Convention on the Elimination of All Forms of Racial Discrimination (1965), is however even more direct. However, for instance, article 2(d) mandates States Parties to pursue by all appropriate means a policy of eliminating racial discrimination, and requires states to: 'prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organisation.' particularly relevant to hate speech is article 4 requiring States Parties to take immediate steps to eliminate incitement to, or acts of, racial discrimination, and:

- '(a) declare as 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) declare illegal and prohibit organizations, and also organised and all other propaganda activities which promote and incite racial discrimination, and shall recognise participation in such organisations or activities as an offence punishable by law;
- (c) shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.'

Here, we find a broad definition of racial discrimination encompassing discriminatory incitement to racial hatred or even religious and ethnic hatred where such insults to these are being used as a proxy for the incitement of racism.

This 1965 measure raises the constitutionally difficult issues of whether political, ethnic or religious organisations whose programme is wholly or partly devoted to actively

promoting sectarian divisions and hatred along racial, religious, nationalistic or ethnic lines likely to create violence should be legally banned, with membership alone constituting a criminal offence? On the one hand, it could be argued that if individual acts of, say, racist incitement require criminal prohibition, then the threat posed by individuals organising themselves into "direct action" groups devoted to this end surely represents a far greater danger to peaceful communal relations. If so, it would, perhaps, be inconsistent *not to* prohibit both such organisations and penalise voluntary membership of them. On the other hand, and considered in terms of harm reduction, it is arguable that the sheer fact that an individual has only subscribed to a racist organisation, or its newsletter, or bookmarked its web-site, is not itself analogous to expressing a racist insult, threat or act of incitement. Furthermore, the criminalisation of one organisation allows its membership to regroup under a different name, which in turn needs to be formally criminalised, and so on *ad infinitum*.

Another difficult issue raised by the 1965 Convention is whether it is sufficient for the purpose of full compliance for citizens, public officials and state institutions to do no more than avoid hate speech and hate crime more generally? Alternatively, do public authorities have a specific legally enforceable obligation to take "positive steps" to combat even unprohibited forms of discrimination through "affirmative" practices supportive of the pluralistic values of multi-faith and multi-culturalism as part of express integrationist policies? Article 2 indicates the latter option in that it requires States Parties to avoid providing any forms of active or passive support for racist practices, to review their activities to ensure that this obligation is being carried out, including through affirmative and integrationist "equal opportunities" policies. Parties:

- '(a) undertake to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;
- (b) undertake not to sponsor, defend or support racial discrimination by any persons or organisations;
- (c) take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;
- (d) undertake to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.'

Another measure that requires analysis is the International Convention on the Suppression and Punishment of the Crime of Apartheid.<sup>43</sup> Its Preamble emphasises the incompatibility of hate crime and hate speech with the overall trajectory of post-war human rights and associated provisions, including the UN Charter: 'in which all Members pledged themselves to take joint and separate action in co-operation with the Organization for the achievement of universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.' Other measures which the Preamble appeals to for support include that part of the Universal Declaration of Human Rights stating that all human beings are born free and equal in dignity and rights, and that everyone is entitled to all the rights and freedoms set forth in the Declaration, without distinction of any kind, such as race, colour or national origin, as well as the UN's Declaration on the Granting of Independence to Colonial Countries and Peoples affirming the need to put an end to colonialism and all practices of segregation and discrimination associated with it. This convention also makes reference to the 1948 Genocide Convention, which suggests that certain persecutory acts associated with apartheid could, when taken to an extreme, constitute the offence of genocide under international law. Continuing this

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<sup>43</sup> Adopted and opened for signature, ratification by General Assembly Resolution 3068 (XXVIII) of 30 November 1973, entry into force 18 July 1976, in accordance with article XV UN General Assembly.

international criminal law theme, the Preamble recalls that: 'in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, "inhuman acts resulting from the policy of apartheid" are qualified as crimes against humanity.' The Preamble continues:

'Convinced that an International Convention on the Suppression and Punishment of the Crime of Apartheid would make it possible to take more effective measures at the international and national levels with a view to the suppression and punishment of the crime of apartheid, Have agreed as follows:

Article I

1. The States Parties to the present Convention declare that apartheid is a crime against humanity and that inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination, as defined in article II of the Convention, are crimes violating the principles of international law, in particular the purposes and principles of the Charter of the United Nations, and constituting a serious threat to international peace and security.

Interestingly, this measure also ascribes criminal responsibility to organisations:

2. The States Parties to the present Convention declare criminal those organizations, institutions and individuals committing the crime of apartheid.

Article 2 treats South Africa as *but one example* of an institutionally racist society, such that other societies that institutionalise (or otherwise encourage by either act or omission) similarly oppressive forms of discriminatory treatment also commit crimes. What is particularly interesting is that this measure draws, in part, upon the categorical framework of international criminal law, including the 1948 Genocide Convention, as well as human rights concerns relating to discriminatory violations of both human dignity and participatory democratic rights:

'Article II: For the purpose of the present Convention, the term "the crime of apartheid", which shall include similar policies and practices of racial segregation and discrimination as practised in southern Africa, shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them:

(a) Denial to a member or members of a racial group or groups of the right to life and liberty of person:

(i) By murder of members of a racial group or groups;

(ii) By the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment;

(iii) By arbitrary arrest and illegal imprisonment of the members of a racial group or groups;

...d) Any measures including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups...'

What is especially far-reaching about this international measure is that Article 3 embraces the concept of imposing criminal responsibility for a range of discriminatory offences. This includes liability for those forms of hate crime that include incitement to group hatred and conspiracy, upon both organisations and private individuals:

'Article III - International criminal responsibility shall apply, irrespective of the motive involved, to individuals, members of organizations and institutions and representatives of the State, whether residing in the territory of the State in which the acts are perpetrated or in some other State, whenever they:

(a) Commit, participate in, directly incite or conspire in the commission of the acts mentioned in article II of the present Convention;

(b) Directly abet, encourage or co-operate in the commission of the crime of apartheid.'

Article 4 also pledges positive legislative action to 'suppress as well as prevent the encouragement' the identified forms of racial discrimination, and 'to punish persons guilty of that crime,' irrespective of questions of nationality and residence:

'(b) To adopt legislative, judicial and administrative measures to prosecute, bring to trial and punish in accordance with their jurisdiction persons responsible for, or accused of, the acts defined in article II of the present Convention, whether or not such persons reside in the territory of the State in which the acts are committed or are nationals of that State or of some other State or are stateless persons.'

Later, article 7 of the UNESCO Declaration on Race and Racial Prejudice of 27

November 1978 re-affirmed the idea that combating racist discrimination requires

legislation:

'In addition to political, economic and social measures, law is one of the principal means of ensuring equality in dignity and rights among individuals, and of curbing any propaganda, any form of organization or any practice which is based on ideas or theories referring to the alleged superiority of racial or ethnic groups or which seeks to justify or encourage racial hatred and discrimination in any form. States should adopt such legislation as is appropriate to this end and see that it is given effect and applied by all their services, with due regard to, the principles embodied in the Universal Declaration of Human Rights. Such legislation should form part of a political, economic and social framework conducive to its implementation. Individuals and other legal entities, both public and private, must conform with such legislation and use all appropriate means to help the population as a whole to understand and apply it.'<sup>44</sup>

In 1981, these ideas were re-affirmed and extended by the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.

International Instruments dealing more directly with the issue of “hate speech” are: Recommendation No. R (97) 20 (and its appendix) on “hate speech”, adopted on 30 October 1997 by the Committee of Ministers of the Council of Europe, and General Policy Recommendation No. 7 of the European Commission against Racism and Intolerance (ECRI) on national legislation to combat racism and racial discrimination. The COE's Recommendation originated in the Council of Europe's intent to take action against racism and intolerance and, in particular, against all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance. The Committee of Ministers recommended that Member States be guided by certain principles in their action to combat hate speech. The Appendix states that the term “hate speech” is to be: 'understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance...'.

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<sup>44</sup> UNESCO Declaration on Race and Racial Prejudice, 27 November 1978.

The recommendation also lays down guidelines designed to underpin governments' attempts to combat all hate speech by, for example, establishing an effective legal framework consisting of appropriate civil-, criminal- and administrative-law provisions for addressing the phenomenon. Among other measures, it proposes that community-service orders be added to the range of possible penal sanctions and that the possibilities under civil law be enhanced, for example by awarding compensation to victims of hate speech, affording them the right of reply, or ordering retraction of the offensive statement. On the other hand, domestic "freedom of expression" considerations mean that public authorities' restrictions must be narrowly circumscribed on the basis of objective criteria and subject to independent judicial control.

On 13 December 2002, the Council of Europe's ECRI adopted a recommendation on key components which should feature in the national legislation of Member States of the COE in order for racism and racial discrimination to be combated effectively. The relevant parts of which state:

I. Definitions

1. For the purposes of this Recommendation, the following definitions shall apply:
  - (a) 'racism' shall mean the belief that a ground such as race, colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons.
  - (b) 'direct racial discrimination' shall mean any differential treatment based on a ground such as race, colour, language, religion, nationality or national or ethnic origin, which has no objective and reasonable justification. Differential treatment has no objective and reasonable justification if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.
  - (c) 'indirect racial discrimination' shall mean cases where an apparently neutral factor such as a provision, criterion or practice cannot be as easily complied with by, or disadvantages, persons belonging to a group designated by a ground such as race, colour, language, religion, nationality or national or ethnic origin, unless this factor has an objective and reasonable justification. This latter would be the case if it pursues a legitimate aim and if there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

...

18. The law should penalise the following acts when committed intentionally:

- (a) public incitement to violence, hatred or discrimination,
- (b) public insults and defamation or
- (c) threats against a person or a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin;...

23. The law should provide for effective, proportionate and dissuasive sanctions for the offences set out in paragraphs 18, 19, 20 and 21. The law should also provide for ancillary or alternative sanctions.'

Among such instruments, Resolution No. 52/122 on the Elimination of all Forms of Religious Intolerance, adopted by the UN General Assembly on 12 December 1997, deals more specifically with the issue of religious intolerance.

The Vienna Declaration and Programme of Action, adopted on 9 October 1993 at the World Conference on Human Rights, sets out the UN's position on combating racism. This Declaration expresses alarm at the present resurgence of racism, xenophobia and anti-Semitism and the development of a climate of intolerance. It specifically requires signatory states to introduce *criminal measures* against racism and racial discrimination. Article 15 provides: 'The speedy and comprehensive elimination of all forms of racism and racial discrimination, xenophobia and related intolerance is a priority task for the international community.' The Declaration asserts that governments must take effective measures to combat these forms of discrimination.<sup>45</sup> Article 20 also states that the Conference commits itself to a position of taking positive interventionist measures: '... urges all Governments to take immediate measures and to develop strong policies to prevent and combat all forms and manifestations of racism, xenophobia or related intolerance, where necessary by enactment of appropriate legislation, including penal

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<sup>45</sup> From the Report of the Secretary-General on the follow-up to the World Conference on Human Rights to the General Assembly at its 49th session (A/49/668) taken from the Interim Report of the United Nations High Commissioner for Human Rights to the Commission on Human Rights E/CN.4/1998/104/;



measures, and by the establishment of national institutions to combat such phenomena.'

Arguably, this commitment includes introducing criminal legislation prohibiting any form of racist hate crime, including cyber-hate and hate speech more generally.

Following comparative analysis of 42 national systems, the Office of the High Commissioner for Human Rights has produced 'Model National Legislation for the Guidance of Governments in the Enactment of Further Legislation Against Racial Discrimination.'<sup>46</sup> Clearly, this demands attention when considering possible law reforms of European hate crime legislation. Section 4 of this model legislation states that racial discrimination is an offence under the proposed Act, which, by virtue of section 8, is subject to prosecution. Section 10 states that offences are to be punishable by imprisonment, fines, suspension of the right to be elected to a public office or community service.

Sections 9 and 11 provide that victims are entitled to restitution or compensation. Part III of the model legislation sets out the following specific offences:

- '1. the offence of racial discrimination committed in exercise of the freedom of opinion and expression;
2. acts of violence and incitement to racial violence;
3. racist organisations and activities;
4. offences committed by public officials or other servants of the State;
5. offences according to the field of activity; and,
6. "other offences" which are defined as acts of racial discrimination defined in section 1 for which no specific penalty has been established in Part III, and said nevertheless to be offences under the Act.'

Once again this promotes the controversial policy of prohibiting anything that could be classified as membership or even endorsement of an organisation judged to be partly or wholly racist or sectarian.

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<sup>46</sup> Available at <http://www.unhchr.ch/html/menu6/2/pub962.htm>. This Model Legislation is contained in Appendix A.

## **The Cyber-Crime Convention and its Additional Protocol<sup>47</sup>**

On 15 December 2000, the ECRI issued its 'General policy recommendation n° 6: Combating the Dissemination of Racist, Xenophobic and Anti-Semitic Materials via the Internet.' This re-affirmed a series of concerns over the growing use of the internet to distribute and promote racism, antisemitism and xenophobia and related forms of intolerance in ways that transcend national borders and the competence of individual states acting in isolation from each other. Its recommendations are geared specifically to combating this trend with a variety of transnational initiatives including enhanced cooperation between law enforcement agencies and criminal justice systems:

'Deeply concerned by the fact that the Internet is also used for disseminating racist, xenophobic and antisemitic material, by individuals and groups aiming to incite to intolerance or racial and ethnic hatred; Convinced of the determination of the member States of the Council of Europe to combat the phenomena of racism, xenophobia, antisemitism and intolerance which destroy democracy, and thus to act efficiently against the use of the Internet for racist, xenophobic and antisemitic aims; ... Recommends that the Governments of the member States: - include the issue of combating racism, xenophobia and antisemitism in all current and future work at international level aimed at the suppression of illegal content on the Internet; - reflect in this context on the preparation of a specific protocol to the future Convention on cyber-crime to combat racist, xenophobic and antisemitic offences committed via the Internet; - take the necessary measures for strengthening international co-operation and mutual assistance between law enforcement authorities across the world... - ensure that relevant national legislation applies also to racist, xenophobic and antisemitic offences committed via the Internet and prosecute those responsible for this kind of offences; ...<sup>48</sup>

In 2001, the World Conference against Racism held in Durban made it perfectly clear that the obligation that is specified in article 4 of the the U.N. Convention on the Elimination of

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Banks, James, 'European Regulation of Cross-Border Hate Speech in Cyberspace: The Limits of Legislation,' 19 *Eur. J. Crime Crim. L. & Crim. Just.* 1 (2011); Akdeniz, Y., 'Stocktaking on efforts to combat Racism on the Internet, background report for the High Level Seminar on Racism and the Internet, Intergovernmental Working Group on the Effective Implementation of the Durban Declaration and Programme of Action,' Fourth session, Geneva, 16-27 January 2006, E/CN.4/2006/WG.21/BP.1, published by the United Nations High Commissioner for Human Rights (UNHCHR) Office: Geneva, January 2006, at: [www.cyberrights.org/reports/ya\\_un\\_paper\\_int\\_06.pdf](http://www.cyberrights.org/reports/ya_un_paper_int_06.pdf)

<sup>48</sup> Ibid.

all Forms of Racial Discrimination should apply to the internet. Namely, that States Parties: ‘shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination ... 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.’<sup>49</sup> The World Conference concluded by noting the doubled-edged quality of internet-based forms of communication as both a possible cause as well as cure for discriminatory practices amounting to hate crimes and hate speech:

‘27. We express our concern that, beyond the fact that racism is gaining ground, contemporary forms and manifestations of racism and xenophobia are striving to regain political, moral and even legal recognition in many ways, including through the platforms of some political parties and organizations and the dissemination through modern communication technologies of ideas based on the notion of racial superiority; ... 91. We express deep concern about the use of new information technologies, such as the Internet, for purposes contrary to respect for human values, equality, non-discrimination, respect for others and tolerance, including to propagate racism, racial hatred, xenophobia, racial discrimination and related intolerance, and that, in particular, children and youth having access to this material could be negatively influenced by it; 92. We also recognize the need to promote the use of new information and communication technologies, including the Internet, to contribute to the fight against racism, racial discrimination, xenophobia and related intolerance; new technologies can assist the promotion of tolerance and respect for human dignity, and the principles of equality and non-discrimination;’<sup>50</sup>

This response recognises that the Internet allows fast dissemination of violently discriminatory beliefs and ideas, as well as the encouragement and glorification of specific violent hate crimes against, for example, those identified as immigrants.<sup>51</sup> In 1996, the

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<sup>49</sup> International Convention on the Elimination of All Forms of Racial Discrimination adopted and opened for signature and ratification by General Assembly Resolution 2106 (XX) of 21 December 1965, entry into force 4 January 1969, in accordance with article 19.

<sup>50</sup> World conference against racism, racial discrimination, xenophobia and related intolerance : [the Durban] Declaration and programme of action, Durban, 31 August - 8 September 2001.

<sup>51</sup> The term ‘discrimination’ requires careful handling in a legal context and has to be interpreted in the light of the ECHR (Article 14 and Protocol 12), and associated case-law, as well as of Article 1 of the CERD. The ECHR measure guarantees to everyone within the jurisdiction of a State Party equality in the enjoyment of the rights and freedoms protected by the ECHR itself. In particular, Article 14 provides for a general obligation for States, accessory to the rights

European Committee on Crime Problems (CDPC) decided to set up a committee of experts to deal with cybercrime. The following year, the Council of Europe's 'Recommendation on Hate Speech' called on Member States: 'to take appropriate steps to combat hate speech by ensuring that such steps form part of a comprehensive approach to the phenomenon which also targets its social, economic, political, cultural, and other root causes.'<sup>52</sup>

The COE's Cyber-crime Convention, which was originally aimed at internet crime such as virus attacks and hacking, was adopted in November 2000, ratified by 38 countries, and signed without ratification by 10 other states.<sup>53</sup> The committee drafting the Convention discussed the possibility of including other offences, including the distribution of racist propaganda through computer systems. However, it failed to reach consensus on such criminalisation, with opposition, mainly stemming from US delegates, driven by concerns about their impact upon constitutionally protected "freedom of expression." In response to these developments, this committee decided to refer the matter to the CDPC with a view to drawing up further measures.<sup>54</sup>

In August 2001, the Final Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance expressed concern about the use the Internet:

'for purposes contrary to respect for human values, equality, non-discrimination, respect for others and tolerance, including to propagate racism, racial hatred, xenophobia, racial discrimination and related intolerance, and that, in particular, children and youth having access to this material could be negatively influenced

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and freedoms provided for by the ECHR.

<sup>52</sup> Eur. Comm. of Ministers, Recommendation No. R(97)20 (1997), Oct. 30, 1997, available at <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=568168&SecMode=1&DocId=582600&Usage=2>.

<sup>53</sup> As of 9/1/2013. Available at:

<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=185&CM=&DF=&CL=ENG>

<sup>54</sup> In particular, its Committee of Experts on the Criminalisation of Acts of a Racist and xenophobic Nature committed through Computer Systems (PC-RX). They were charged with dealing with the following:

i. the definition and scope of elements of cybercrime to the investigation and prosecution of the offences to be defined under the additional Protocol.' See Explanatory Report, op cit, para.6.

by it.<sup>55</sup>

Among other significant recommendations, the report urged States to:

'implement legal sanctions, in accordance with relevant international human rights law, in respect of incitement to racial hatred through new information and communications technologies, including the Internet, and further urges them to apply all relevant human rights instruments to which they are parties, in particular the International Convention on the Elimination of All Forms of Racial Discrimination, to racism on the Internet.'<sup>56</sup>

In its Opinion 226(2001) on the Convention, the European Parliamentary Assembly also recommended immediately drawing up a new protocol under the title 'Broadening the scope of the convention to include new forms of offence.' The aim was to both define and criminalise the dissemination of racist propaganda over the internet. In 2003, new transnational offences were included in an Additional Protocol, the contents of which will now be discussed in some detail.<sup>57</sup>

The Additional Protocol was opened for signature in Strasbourg, on 28 January 2003. Since then over 30 member states have signed it (including the "external" supporters Canada, Montenegro, and South Africa). The Protocol entered into force following the initial five ratifications on 1 March, 2006.

This measure's stated purpose is twofold: (1) harmonising substantive criminal law in the fight against racism and xenophobia on the Internet by requiring member states to take certain measures tending to prohibit and criminalise acts of racism and xenophobia, and (2) improving international cooperation in this area.<sup>58</sup> In one sense, this measure complements

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<sup>55</sup> Report of the World Conference against Racism, Racial Discrimination, Xenophobia, and Related Intolerance, Durban, 31 August - 8 September 2001, A/CONF.189/12, GE.02-10005 (E) 100102, January 2002 para 91: at [http://www.un.org/WCAR/aconf189\\_12.pdf](http://www.un.org/WCAR/aconf189_12.pdf).

<sup>56</sup> Ibid, para 145.

<sup>57</sup> Eur. Parl. Ass'n, Add'l Protocol to the Convention on Cybercrime, concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed Through Computer Systems, E.T.S. No. 189, Jan. 28, 2003, available at <http://conventions.coe.int/treaty/en/Treaties/Html/189.htm>

<sup>58</sup> Explanatory Report, op cit, introduction, paras.3-4.

the United Nations International Convention on the Elimination of All Forms of Racial Discrimination (21 December 1965), which as we have already noted, also obliges State Parties to ensure that certain manifestations of racism and xenophobia are punishable under their domestic legislation. The latter point concerning transnational cooperation between states and criminal justice systems is vital given the international communication aspects of internet-based hate crime. As the Explanatory Report notes, Pan-European measures can yield a range of benefits in terms of practical legal responses, including extradition and enhanced possibilities for successful prosecution based, in part, upon pooling experiences and best practices.<sup>59</sup>

The preamble to the Additional Protocol makes it clear that this measure seeks to strike a viable and proper balance between competing European values. On the one hand, there is the key value of ensuring freedom from discrimination, including hate crimes and their incitement.<sup>60</sup> Whilst, on the other, there is the countervailing right to enjoy optimal "freedom of expression,"<sup>61</sup> including through the use of computer and internet systems and fora.<sup>62</sup> This freedom is claimed to be: 'one of the essential foundations of a democratic society,' as well as one of the basic conditions for its progress and for the 'development of every human being.'<sup>63</sup> Freedom from hate crime is defined as a re-affirmation of the

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<sup>59</sup> Ibid, para.3.

<sup>60</sup> More recently the Audiovisual Media Services Directive 2010/13/EU has prohibited any incitement to hatred based on grounds of race, sex, religion or nationality in all audiovisual media services (television broadcasts and on-demand services).

<sup>61</sup> Article 10(1) of the ECHR recognises the right to freedom of expression, which includes the freedom to hold opinions and to receive and impart information and ideas that others find offensive, and which shock or disturb others. The European Court of Human Rights have held that the State's actions to restrict the right to freedom of expression were justified under the restrictions of paragraph 2 of this Article when such expressions violated the rights of others. See the Handyside judgment of 7 December 1976, Series A, no. 24, p. 23, para. 49. The Explanatory Report notes: 'This Protocol, on the basis of national and international instruments, establishes the extent to which the dissemination of racist and xenophobic expressions and ideas violates the rights of others.' Explanatory Report, op cit, introduction, para.11.

<sup>62</sup> 'Mindful of the need to ensure a proper balance between freedom of expression and an effective fight against acts of a racist and xenophobic nature.'

<sup>63</sup> The preamble also states: 'Aware that computer systems offer an unprecedented means of facilitating freedom of expression and communication around the globe.'

natural law claim that: ‘all human beings are born free and equal in dignity and rights,’ and that this principle, together with a range of rights under positive European law, generates a: ‘need to secure a full and effective implementation of all human rights without any discrimination or distinction.’

This implicitly recognises the important point that general European and international anti-discriminatory principles and laws relevant to hate crimes, including racist and xenophobic propaganda committed through computer systems, can add a new dimension to citizen's experience of discrimination. The preamble also links racist hate crimes as a subset of ‘acts of a racist and xenophobic nature,’ not only to the ‘violation of human rights’ but also to a ‘threat’ to another classic liberal principle: that of ‘the rule of law.’<sup>64</sup>

A third element of such threat, which may reflect mid-20<sup>th</sup> century European history, is perceived as the undermining of ‘democratic stability.’ A fourth is recognition of the intra-European *constitutional issue* of striving to establish a viable balance between pre-existing national criminal legislation, which may reflect particular historical sensitivities and collective national experiences, with wider and overarching Pan-European measures aimed at ‘harmonisation.’ Furthermore, that European-wide measures in this field will, it suggests, themselves: ‘achieve a greater unity between its members’ and strengthen a united European front on these values.

In short, for the COE to take measures to combat hate crime and expressions supportive of such crime is thus interpreted by this Protocol as essential a *defensive measure* to protect both liberal values and, in addition, democratic modes of governance vulnerable to subversion by, for example, expressions of racist xenophobia.

A fifth dimension, recognised expressly in the explanatory material on the Protocol, is

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<sup>64</sup> The preamble op cit

the tension between the progressive dimensions of new technology to facilitate and encourage communication bringing together otherwise disconnected individuals and groups as part of globalisation more generally, and a countervailing tendency for the internet to be deployed to further the agendas of racial discrimination, xenophobia and other forms of intolerance.<sup>65</sup> As a result: 'Globalisation carries risks that can lead to exclusion and increased inequality, very often along racial and ethnic lines.'<sup>66</sup> Another aspect is that internet based hate crime, such as threats and racist public insults, raises practical institutional challenges in that the offender is often sat behind a laptop in one particular European state, whilst his or her targets for abuse are located in almost any other state. As the Explanatory Report notes:

'In particular, 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. In order to investigate and prosecute such persons, international co-operation is vital.'<sup>67</sup>

The Protocol can itself be interpreted from two perspectives. Firstly, as an extension of the scope of the original Convention's substantive, procedural and international cooperation provisions into a new sphere. Secondly, from the perspective of those concerned primarily with the use of distinctly legal measures to combat hate crime, as the provision of a new source of criminal law responses, including procedural and transnational cooperation provisions, to address offences of racist and xenophobic

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<sup>65</sup> On this see dimension of cyber-hate see Brophy, P., Craven, J. and Fisher, S. (1999) 'Extremism and the internet', *British Library Research and Innovation Report 145*, Centre for Research in Library and Information Management; Glassman, E. (2000) 'Cyber-hate: the discourse of intolerance in the new Europe', in Lengel, L. (Ed.): *Culture and Technology in the New Europe: Civic Discourse in Transformation in Post-communist Nations*, Ablex, Stamford, pp.145–164; Nemes, I. (2002) 'Regulating hate speech in cyberspace: issues of desirability and efficacy', *Information and Communication Technology Law*, Vol. 11, No. 3, pp.193–220; Zickmund, S (1997) 'Approaching the radical other: the discursive culture of cyberhate', in Jones, S. (Ed.): *Virtual Culture: Identity and Communication in Cybersociety*, Sage, Thousand Oaks, CA, pp.185–205.

<sup>66</sup> ET189: Explanatory Report, introduction: <http://conventions.coe.int/Treaty/en/reports/html/189.htm>

<sup>67</sup> Explanatory Report, ET 189, op cit, introduction, para.3.



propaganda interpreted as one subset of such crimes.<sup>68</sup>

The provisions of the Protocol are mandatory. This means that to meet their obligations, State Parties have not only to enact appropriate criminal legislation with a broad remit in principle but also to ensure that it is effectively enforced in practice.<sup>69</sup> This measure not only creates new offences but also extends possible liability to those who assist others commit the prohibited conduct in question. In particular, Article 7 of the Protocol mandates States Parties to adopt legislative measures to criminalise the act of ‘aiding or abetting’ the commission of any of the offenses it establishes. This catches situations where an offender is deliberately aided by another person who also intends that the crime be committed. The next sections discuss the new specific offences with the exception of genocide denial, which merits separate treatment in conjunction with other measures.

### **Making available racist and xenophobic material?**

Article 3 of the Protocol expressly requires member states to adopt legislative measures to criminalise, when committed intentionally and ‘without right,’ the distribution or ‘making available’ racist and xenophobic material through the use of computer systems. Examples of ‘making available to the public’ include exchanging racist and xenophobic material in chat rooms, posting similar messages in newsgroups or discussion fora, even when access requires a password. On the other hand, simply reading such material is not criminalised. ISPs can, therefore, plead that they cannot be held to be ‘making available’ materials their customers create or offer. However, once informed of racist and xenophobic material, it is likely an ISP would remove it, to stay clear of even the possibility of facing legal

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<sup>68</sup> Explanatory Report, ET 189, op cit, introduction, para.7.

<sup>69</sup> Ibid, para.9.

sanctions and resulting negative publicity.<sup>70</sup>

The Protocol's definition of 'racist and xenophobic material' is quite broad:

'any written material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or violence, against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors.'<sup>71</sup>

The offence requires a reference to group membership with hatred, discrimination or violence directed against any individual or group of individuals not as such, but only for the reason that they belong to one of the stated protected groups. As to the groups themselves, they do not coincide exactly with the grounds contained in other measures.<sup>72</sup> The idea of 'descent,' not to be confused with 'social origins,' and its link to ideas of 'race,' is far from straightforward both conceptually and, more importantly, in terms of practical application.<sup>73</sup> A similar point applies to the deployment of the category 'national origin,' which is intended to be given a broad and purposive definition, far wider than 'citizenship,' to cover, for example, stateless persons and even those whose 'nations' are not internationally recognised as states at all.<sup>74</sup> The initially surprising inclusion of the category of 'religion' in this context is explained by a policy of seeking to protect individuals from abuse where the overt reference to, say, Islam or the Jewish religion, is

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<sup>70</sup> David McMenemy, Alan Poulter and Sara O'Loan, 'A robust methodology for investigating Old Firm related sectarianism online,' *Int. J. Web Based Communities*, Vol. 1, No. 4, 2005, 488, 490.

<sup>71</sup> Additional Protocol, Art. 2(1)

<sup>72</sup> For instance, Article 1 of Protocol No. 12 to the ECHR contains categories which are alien to the categories of racism and/or xenophobia. A similar point applies to the categories of the CERD which deals with 'racial discrimination' in general and not 'racism' as such.

<sup>73</sup> The Explanatory Report states that: 'Descent' refers mainly to persons or groups of persons who descend from persons who could be identified by certain characteristics (such as race or colour), but not necessarily all of these characteristics still exist. In spite of that, because of their descent, such persons or groups of persons may be subject to hatred, discrimination or violence. 'Descent' does not refer to social origin.' *op cit*, para.18.

<sup>74</sup> Explanatory Report, *op cit*, notes: 'The notion of 'national origin' is to be understood in a broad factual sense. It may refer to individuals' histories, not only with regard to the nationality or origin of their ancestors but also to their own national belonging, irrespective of whether from a legal point of view they still possess it. When persons possess more than one nationality or are stateless, the broad interpretation of this notion intends to protect them if they are discriminated on any of these grounds. Moreover, the notion of 'national origin' may not only refer to the belonging to one of the countries that is internationally recognised as such, but also to minorities or other groups of persons, with similar characteristics.' para.20.

little more than a pretext, alibi or substitute for what are in essence racist abuse or threats.<sup>75</sup>

In this context, ‘written material’ clearly includes texts, books, magazines, statements, messages. Examples of criminalised ‘images’ could include pictures, photos, drawings, or any other representation of thoughts or theories whose nature is racist and xenophobic existing in a format allowing it to be stored, processed and transmitted by means of a computer system.<sup>76</sup> The term ‘violence’ is understood as the unlawful use of force;<sup>77</sup> whilst ‘discrimination’ here almost certainly has to be given a technical meaning<sup>78</sup> In the course of several judgments (such as the *Belgian Linguistic* case, the *Abdulaziz, Cabales and Balkandali* judgment) the European Court of Human Rights (ECtHR) has stated that a difference of treatment is discriminatory if it: ‘has no objective and reasonable justification’, that is, if it does not pursue a ‘legitimate aim,’ or if there is not a ‘reasonable relationship of proportionality between the means employed and the aim sought to be realised’. Whether the treatment is discriminatory or not has to be considered in the light of the specific circumstances of the case.<sup>79</sup>

Possibly to avoid the accusation of ‘thought crime’, the Protocol’s definition avoids any focus upon subjective feelings, beliefs and offence, and concentrates instead upon the possible *external impact* of the materials upon the conduct of others. This is in keeping with national and international criminal offences of incitement, which also have an uneasy

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<sup>75</sup> Explanatory Report, op cit, para.21.

<sup>76</sup> Ibid, para.12.

<sup>77</sup> The Explanatory Report states that: ‘Advocates’ refers to a plea in favour of hatred, discrimination or violence, ‘promotes’ refers to an encouragement to or advancing hatred, discrimination or violence and ‘incites’ refers to urging others to hatred, discrimination or violence. The term ‘hatred’ refers to intense dislike or enmity. Op cit, paras.14, 15.

<sup>78</sup> The term ‘discrimination,’ used in the Protocol, refers to a different unjustified treatment given to persons or to a group of persons on the basis of certain characteristics. Guidance for interpreting the term ‘discrimination’ can also be found in Article 1 of the CERD, where the term ‘racial discrimination’ means ‘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’.

<sup>79</sup> *Abdulaziz, Cabales and Balkandali*, judgment of 28 May 1985, Series A no. 94, p. 32, para. 62; *Belgian Linguistic* case, judgment of 23 July 1968, Series A no. 6, p. 34, para. 10.

relationship with broad definitions of ‘freedom of expression.’

At the national level, the Protocol requires the introduction by State Parties of legislation criminalising ‘dissemination’ of racist and xenophobic material through computer systems.<sup>80</sup> The COE's Additional Protocol is not strictly speaking a EU specific measure, although the majority of states ratifying it are in fact EU members.

### **‘Threats and Insults’**

Equally important, the Protocol also requires member states to adopt legislative and other measures to criminalise, when committed intentionally and without legal right, ‘threats and public insults’ transmitted through computer systems against (a) persons that belong to a certain group; (b) persons distinguished by race, colour, descent or national or ethnic origin, and religion; and (c) any group of persons distinguished by any of these characteristics.<sup>81</sup> The notion of ‘threat,’ which may be either by private or public communications, refers to the presence of a menace creating fear that the persons targeted, or their families will become the victim of a criminal offence defined as ‘serious’ by States Parties.<sup>82</sup>

With respects to the prohibition of racist or xenophobic public ‘insults’ under article 5, these must be directed toward a person, or a group of persons, because they either belong, or are thought to belong, to a group distinguished by specific characteristics. The notion of

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<sup>80</sup> Art. 3.

<sup>81</sup> Arts. 4-5. Art 4 seeks to criminalise: ‘threatening, through a computer system, with the commission of a serious criminal offence as defined under its domestic law, (i) persons for the reason that they belong to a group, distinguished by race, colour, descent or national or ethnic origin, as well as religion, if used as a pretext for any of these factors, or (ii) a group of persons which is distinguished by any of these characteristics. Article 5, which is directed against ‘Racist and xenophobic motivated’ public insults, repeats these definitions of protected groups. That is public insults of ‘(i) persons for the reason that they belong to a group distinguished by race, colour, descent or national or ethnic origin, as well as religion, if used as a pretext for any of these factors; or (ii) a group of persons which is distinguished by any of these characteristics.’

<sup>82</sup> Explanatory Report, op cit, paras. 34-35.

‘insult’ here refers to any offensive, contemptuous or invective expression, which prejudices the honour or the dignity of a person, and is directly connected with the insulted individual’s belonging to that group. Unlike the position on ‘threats’, where such insults are contained in purely private communications, this conduct falls outside the scope of this provision. The scope of this offence can be further restricted by allowing state parties to insert an additional requirement that the conduct must also have the effect that the victims not only potentially, but are also actually, exposed to hatred, contempt or ridicule.

### **Limits of the offences**

Having just addressed the nature and scope of mandated new offences, it is equally important for a balanced discussion to emphasise *the limits* of these particular measures, including the various exceptions. Member states are not required to criminalise racist or xenophobic acts that, whatever their subjective intent, *do not in fact* incite discrimination. The reservation possibility can also apply in circumstances where the material advocates, promotes or incites discrimination that is *not* associated with hatred or violence, provided that other effective civil or administrative remedies are still available.<sup>83</sup>

Also where because of the established principles of its legal system concerning freedom of expression, a State Party that provides for such remedies may reserve the right not to implement the incitement obligation under paragraph 1 of Article 3. The precondition is that it concerns only the advocating, promoting or inciting to a form of discrimination falling short of inciting to hatred or violence.<sup>84</sup> A State Party may further extend the scope of the exception by requiring proof that the act of discrimination must, for instance, be

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<sup>83</sup> Art. 3(2).

<sup>84</sup> Art. 3(2).

clearly insulting, degrading, or threatening to a group of persons. Article 12 specifies that the Parties may also make use of the reservation option to avoid implementing the offences contained in Articles 3 (dissemination) 5 (insult) and 6 (denial). *No other* reservation to the offences may be made. Yet, this only leaves the article 4 offence of ‘threat’ which cannot be reserved. To date, Norway and Finland are the only signatory states that have availed of all three of these reservations.<sup>85</sup>

What is more, the hosting of web pages containing racist or xenophobic materials that fall within the scope of the Protocol may escape legal sanction if they are based in the USA. This is because the right to "freedom of expression" under ECHR article 10, both in itself and as judicially applied, is less broad than the corresponding right to "free speech" granted by the First Amendment to the US Constitution. In contrast with Europe, the US position is borderline liberal fundamentalist in that it rejects any justification for restriction on racist ideas or expressions, even where these violate the rights of others by encouraging hate crimes. Hence, sites that want to escape COE legal controls can simply relocate to the USA.<sup>86</sup> For example, when a French court issued an order requiring Yahoo! to take measures to block French citizens' access to its auctions because of the availability of Nazi memorabilia, Yahoo! successfully appealed in a California federal district court, seeking a judgment against the enforcement of the French court order on the grounds that enforcement would violate the US Constitution's First Amendment.<sup>87</sup> If

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<sup>85</sup> on 20 May 2011 Finland's acceptance reserved the right not to apply Article 3, paragraph 1 Article 5, paragraph 1, and Article 6, paragraph 1: 'Notification of acceptance: Finland:' <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1854058&SecMode=1&DocId=1746972&Usage=2>

<sup>86</sup> COE itself recognises that its legislation might be futile since it produced a report noting that 2,500 out of 4,000 racist sites were located in the USA See Ramasastry, A. (2003) 'Can Europe block racist websites from its borders? And if so, will hatemongers seek the US's technological asylum?', *FindLaw's Legal Commentary*, <http://writ.news.findlaw.com/ramasastry/20030205.html>.

<sup>87</sup> Isenberg, D., 2001 'Struggling with the French Yahoo Nazi-Auction Decision', <http://www.gigalaw.com/articles/2001-all/isenberg-2001-01b-all.html>. For more details of the aftermath, see Akdeniz,

European authorities seek to apply the new protocol extraterritorially, to sites based in the USA that are accessible in Europe, they could well meet the same fate.

In one sense, from an anti-discrimination perspective, this measure gives with one hand but also, by means of the extensive reservations, takes away with the other.<sup>88</sup> Furthermore, there is an express requirement for each offence that the prohibited conduct is carried out ‘without right.’ This recognises that the conduct described may be legal or justified where classical legal defences apply, like consent or necessity, or where other recognised principles or interests, such as law enforcement or academic research, exclude criminal liability. Hence, the offences only cover acts carried out without legislative, executive, administrative, judicial, contractual or consensual authority. The precise details of such exemptions and their implementation are left to State Parties to determine within their own particular domestic legal systems.

In addition to national variations stemming from which package of exemptions State Parties decide to adopt, there is also variability permissible under the more general ECtHR principle of ‘margin appreciation.’ For example, on the one hand, The Explanatory Report states that ‘this Protocol, on the basis of national and international instruments, establishes the extent to which the dissemination of racist and xenophobic expressions and ideas violates the rights of others.’ On the other, the European Court of Human Rights has regularly determined that: ‘the Contracting States enjoy a certain margin of appreciation in assessing the need for an interference, but this margin goes hand in hand with European supervision, whose extent will vary according to the case.’<sup>89</sup>

Furthermore, and in addition to the specific requirements contained in the definition of

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Yaman, ‘Governing Racist Content on the Internet: National and International Responses,’ 56 U.N.B.L.J. 103 (2007).

<sup>88</sup> Art. 3(2).

<sup>89</sup> Autronic AG judgment of 22 May 1990, Series A No. 178, § 61

each offence, there is a more general requirement that all these offences must be committed ‘intentionally.’ The meaning of ‘intentionally’ is left to the legislative drafters of State Parties to define more precisely. It is reasonable to assume that the required intent is pitched one level above that of ‘negligence.’<sup>90</sup> This will, in practice, exempt internet service providers from liability from purely accidental and unintended examples of prohibited conduct, such as where they have hosted a website or newsgroup containing unlawful material. It follows that the ‘intent’ required for a successful prosecution cannot be simply inferred from evidence of a lack of effective and diligent monitoring of every example of web-page content. Furthermore principle 6 of the COE Declaration entitled Freedom of Communication on the Internet, adopted by the Committee of Ministers on 28 May 2003, discourages actively monitoring by ISPs on grounds of "freedom of expression," while also allowing prosecution under national laws if there is a failure to remove illegal material promptly once this is drawn to their attention.<sup>91</sup> On the other hand, the domestic implementation legislation of individual State Parties are not prevented from imposing a higher level duty to monitor such content enforced by court orders.<sup>92</sup>

Finally, and to comply with privacy rights under ECHR Article 8, the use of the term ‘to

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<sup>90</sup> The Explanatory Report states: ‘All the offences contained in the Protocol must be committed ‘intentionally’ for criminal liability to apply. In certain cases an additional specific intentional element forms part of the offence. The drafters of the Protocol, as those of the Convention, agreed that the exact meaning of ‘intentionally’ should be left to national interpretation.’ Para. 25.

<sup>91</sup> At the 840th meeting of the Ministers' Deputies and explanatory note, H/Inf (2003)7.

<sup>92</sup> Parliamentary Assembly, Committee on Legal Affairs and Human Rights Report on the Draft additional Protocol to the Convention on Cybercrime concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, Doc. 9538 5 September 2002 (Rapporteur: Mr Ignasi Guardans, Spain, Liberal, Democratic and Reformers' Group). There is no general obligation to monitor content. See Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’) OJ L 178 17 July 2000 p.1. See paragraph 47 and 48 of the preamble of the Directive on electronic commerce and article 15 of the Directive itself. See Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market: Official Journal of the European Communities, vol 43, OJ L 178 17 July 2000 p.1. Note also Common Position (EC) No. 22/2000 of 28 February 2000 adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to adopting a Directive on electronic commerce, Official Journal C 128, 08/05/2000 p. 0032 – 0050.



the public' in the Article 3 offence excludes 'private' communications or expressions transmitted through a computer system. This raises interpretive issues where racist or xenophobic messages are sent at the same time to more than one recipient.<sup>93</sup> In short, the Additional Protocol is an important measure giving effect through mandated criminal law provisions to international law principles related to group racial discrimination and xenophobic expressions communicated over the internet. On the other hand, this initiative is limited by the possibility of extensive "reservations" that in effect potentially dilute over two thirds of its provisions. The Protocol's specific provisions on genocide denial will be discussed later in a consolidated section.

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<sup>93</sup> Explanatory Report, *op cit*, paras. 29-30.

## **CHAPTER TWO:**

### **EU LEGAL RESPONSES TO HATE CRIME<sup>94</sup>**

Hate crime is increasingly recognised by European Union (EU) bodies as a persisting and growing problem across Europe, despite many efforts to combat and eradicate discrimination and intolerance that are typically identified as its main underlying causes.<sup>95</sup> The existing pan-European measures of the EU and Council of Europe (CoE) in this area are far from comprehensive in terms of the scope of substantive rules and their effective enforcement.<sup>96</sup> This is mostly due to the less than optimal coordination between those organisations, and a related problem of the different legal regimes of enforcement and their binding power of the rules at the national level.

Current policy is to remedy these difficulties through greater ‘harmonisation’ of the EU Member States' criminal laws covering hate crime. It would be a mistake, however, to assume an overall coherence to the EU's response - as if the system had ironed out all problems over time. This is because EU anti-discrimination legislation and policy remains both complex and fragmented. For instance, the EU Framework Decision, which will be discussed below, provides general, wide-sweeping approach that largely fails to take into

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<sup>94</sup> This chapter was drafted by Dr. Bogusia Puchalska.

<sup>95</sup> FRA, Making hate crime visible in the European Union: acknowledging victims' rights, 2012, available at: <http://fra.europa.eu/en/publication/2012/making-hate-crime-visible-european-union-acknowledging-victims-rights>.

<sup>96</sup> For a list and an overview of the main provisions of the current International and European Instruments see ‘*Hate Crime Laws: A Practical Guide*’ (2009) published by the OSCE Office for Democratic Institutions and Human Rights (ODIHR), available at: <http://www.osce.org/odihr/36426> (accessed 14/01/2013).

account the different historical trajectories of its Member States.<sup>97</sup>

### **The 2008 Framework Decision and its general consequences**

The Framework Decision 2008/913/JHA of 28 November 2008 on combating certain distinctly "public" forms and expressions of racism and xenophobia against specific groups by means of criminal law<sup>98</sup> defines criminal offences concerning racism and xenophobia. It aims to ensure that such behaviour will ultimately constitute an offence throughout the EU Member States. In other words, a key aim of the Decision is to harmonise MSs approaches to defining and penalising types of racist and xenophobic behaviour that should be considered as constituting an offence across EU Member States. In turn, this is intended to serve as a minimum standard for EU-wide harmonisation in this policy field.

In accordance with Article 1 of this measure: 'each Member State shall take the measures necessary to ensure that the following intentional conduct is punishable:'

- a/. publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin;
- b. the commission of an act referred to in point (a) by public dissemination or distribution of tracts, pictures or other material;
- c. publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group;
- d. publicly condoning, denying or grossly trivialising the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group.'

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<sup>97</sup> Compare with Knechtle 2009, 41.

<sup>98</sup> OJ L 328, 6.12.2008, p. 55.

Before analysing and critically evaluating each of the specific offences proposed and implemented by the Framework Decision,<sup>99</sup> it is first necessary to clarify some points about such decisions and their limitations that are rarely noted in the hate crimes literature to date. The Framework Decision is the only measure to date in the field of hate crime enacted by the EU. EU Framework Decisions are binding on Member States.<sup>100</sup> Citizens cannot enforce their provisions directly in domestic courts because currently such measures require a secondary act of incorporation into national law by national legislatures in order to be effective. Since the implementation was limited to legislative, rather than court action, their main objective was clearly to 'create uniformity without limiting the formal role of national parliaments.'<sup>101</sup> There is a planned review of the Decision's implementation due by 28 November 2013, which ought to detail progress to date on its domestic implementation within each EU state.

The Framework Decision is a major EU initiative.<sup>102</sup> Its immediate history lies in the Commission's Proposal to the Council of November 2001 to create a Europe-wide legislative framework that criminalises certain forms of racist and xenophobic speech.<sup>103</sup>

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<sup>99</sup> The provisions on genocide denial will be discussed under a distinct heading.

<sup>100</sup> The former Art. 31 (2) b EU stated: 'Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect.' However there have recently been contrary trends in terms of indirect effect. See Case C-105/03, Criminal Proceedings against Maria Pupino, 2005 E.C.R. I-5285; Stefan Lorenzmeier, 'The Legal Effect of Framework Decisions - A Case-Note on the Pupino Decision of the European Court of Justice,' 1 *Zeitschrift für Internationale Strafrechtsdogmatik* 583, (2006); Carl Lebeck, 'Sliding Towards Supranationalism? The Constitutional Status of EU Framework Decisions after Pupino,' 8 *Germ. L.J.* 501 (2007); Ester Herlin-Karnell, 'In the wake of Pupino: Advocaten voor der Wereld and Dell'Orto,' 8 *Germ. L.J.* 1147 (2007). Article 29, but also Articles 31 and 34(2)(b) TEU, referring to the competence of the Union to take framework decisions to promote judicial cooperation in criminal matters.

<sup>101</sup> Lebeck, *ibid*, p. 507.

<sup>102</sup> Council Framework Decision 2008/913/JHA of 28 November 2008 on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law, 2008 O.J. (L 328) 55. This measure emerged from 'Council Joint Action' of 15 July 1996: EUR-Lex - 31996F0443 - EN: 'for further approximation of law and regulations of Member States and for overcoming obstacles for efficient judicial cooperation which are mainly based on the divergence of legal approaches in the Member States.' This was followed by the European Commission submitting on 26 March 2002 a Draft Framework Decision to the European Council. After having received this Draft of the Commission, the European Council redrafted the received text but was delayed by the concerns of Italy. The process regained momentum only in 2007.

<sup>103</sup> Commission Proposal for a Council Framework Decision on Combating Racism and Xenophobia, at 2, COM (2001) 664 final (Nov. 28, 2001) available at [http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001\\_0664en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0664en01.pdf).

This proposal followed the recommendations of various agencies that demanded a clear and comprehensive EU response to what was perceived as the growing rise in racist attitudes and actions, including hate crimes.<sup>104</sup>

The Decision itself sets out a common EU-wide criminal law and criminal justice approach to combating hate crimes involving racism and xenophobia, whilst also perhaps indirectly prompting enhanced measures for other groups, such as LGBT and persons experiencing disability who are not expressly included. Its overall objective is to ensure that broadly similar abusive behaviour is consistently treated as a serious criminal offence across all EU Member States. In addition, these offences should carry with them sanctions that are effective, proportionate and sufficient to exert a deterrent effect upon actual or potential perpetrators of hate crimes against specified groups. In what follows, our analysis first describes the new proposed European-wide criminal offences, then discusses enforcement mechanisms.

The Decision provides for range of offences that member states are obliged to enact into their domestic law to ensure that there is a minimum core of measures prohibiting hate crimes applied across all EU states. This is especially vital with respect to those forms of ‘incitement’ to hate crimes that are carried out over the internet, or through written materials which are distributed across Europe. Here, the very existence of ‘safehaven’ within just one Member State would constitute the proverbial ‘weak link’ in an otherwise strong chain. Such a ‘safehaven’ could undermine the wider policy objective of combating racism and xenophobia across Europe through a united front of agreed measures.

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This proposal cited data collected in the 1999 Annual Report of the European Monitoring Centre (‘EUMC’) on Racism and Xenophobia and a series of country reports issued by the European Commission against Racism and Intolerance (‘ECRI’).

<sup>104</sup> During the early 1990s, the growth of racist violence and xenophobia throughout Europe in the wake of the implosion of the Soviet Empire, and growing migration and globalisation, gave rise to vast economic and political changes. In turn, these moved European politicians and NGOs to demand stronger measures to tackle such racism.

### **Aggravating circumstance or enhanced penalties?**

Article 4 of the Framework Decision provides the legislators of Member States with two alternatives when enacting or refining their criminalisation of hate crimes: ‘For offences other than those referred to in Articles 1 and 2, Member States shall take the necessary measures to ensure that racist and xenophobic motivation is considered an aggravating circumstance.’ A large group made up of Austria, Croatia, the Czech Republic, Denmark, Finland, France, Greece, Italy, Latvia, Lithuania, Malta, the Netherlands, Romania, Spain and Sweden have already decided to make racist and xenophobic motivation an ‘aggravating circumstance.’ In some of these states, there are also qualified criminal law definitions. The second main option is that: ‘such motivation may be taken into consideration by the courts in the determination of the penalties.’ This option creates enhanced penalties – either for all hate crimes or for those judged to be most relevant or serious, such as murder, physical injury, or vandalism. A limited number of EU Member States consisting of Belgium, Bulgaria, Czech Republic, Lithuania, Portugal, Slovakia and the UK, have chosen this option.

The second option is probably less effective both as a deterrent, and also as a factor that is unlikely to contribute to the greater visibility of hate crimes. That is because there is a danger of bias motivation being reduced to ‘mere aggravating circumstance among many others.’ In turn, this could mean that courts and police reports are less likely to consider bias in its own right, risking the bias motivation of the offender not being properly taken into account at all, which is then reflected into an unspecified increase in sentence length.

The use of enhanced penalties, on the other hand, is said to ‘make visible the difference

to the basic offence.’<sup>105</sup> This is arguably to contribute to a better visibility of the hate crime, and also to act as a more effective deterrent due to the more obvious nature of the harsher treatment of offenders.

## **Incitement**

Following the earlier Kahn Committee report recommendation,<sup>106</sup> the Framework Decision also requires the criminalisation of certain cases of incitement,’ which might take place prior to a hate crime attack. Article 1(a), requires EU Member States to introduce measures to punish ‘public incitement to violence or hatred’ where this is ‘directed against a group of persons or a member of such a group defined by reference to race, colour, religion,<sup>107</sup> descent or national or ethnic origin.’<sup>108</sup> To count as criminal acts, such acts of incitement must involve ‘public dissemination or distribution of tracts, pictures or other material.’<sup>109</sup>

This offence requires that the offender subjectively intends to incite to violence or hatred for racist motives. In the ECtHR case law, expressions inciting to hatred are not protected by Article 10 of the ECHR on ‘freedom of expression.’<sup>110</sup> This is because such

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<sup>105</sup> FRA report, p. 27

<sup>106</sup> The Kahn Committee advocated pan-European legislation to prohibit discrimination, and called for the explicit criminal offence of incitement to racial hatred to be created in the EU member States.

<sup>107</sup> The rationale for the inclusion of religion in the Framework Decision is: ‘intended to cover, at least, conduct which is a pretext for directing acts against a group of persons or a member of such a group defined by reference to race, colour, descent, or national or ethnic origin.’ Article 3.

<sup>108</sup> Article 1(a)

<sup>109</sup> Article 1(b)

<sup>110</sup> Based on the argument that racial and xenophobic expression does not fall within the right to freedom of expression under community law, and that all member states already prohibit racist incitement to some extent, the Council claimed that the framework decision would not affect the member states’ constitutions or their obligations to respect the fundamental principles of freedom of expression. Press Release, Council of the European Union, Framework Decision on Racism and xenophobia (Apr. 19, 2007), available at <http://register.consilium.europa.eu/pdf/en/07/st08/st08665.en07.pdf>. For examples of pre-existing exceptions to ‘freedom of expression,’ see the first clause of UK’s Antiterrorism Act of 2006 which criminalises ‘glorification’ of or ‘encouragement’ of ‘political violence;’ Terrorism Act, 2006, c. 11, § 1, available at [http://www.opsi.gov.uk/acts/acts2006/pdf/ukpga\\_20060011en.pdf](http://www.opsi.gov.uk/acts/acts2006/pdf/ukpga_20060011en.pdf). In Sweden, a law called ‘Hets mot folkgrupp’ (‘Agitation against an ethnic group’) prohibits promotion of racism and homophobia. See Sweden: International

expressions are typically directed against the values underlying the ECHR on the prohibition of ‘abuse of rights,’ which is addressed by Article 17 of that Convention (discussed in more detail below).<sup>111</sup> This holds in effect that no one can be legally allowed to appeal to convention rights as little more than an instrumental device for undermining the equally important rights of others without introducing contradictions into the system of rights itself.<sup>112</sup> However, the Decision also states that these incitement provisions are not binding on states whose constitutional "freedom of expression" (including "freedom of the press" and "freedom of association") measures contradict such provisions.<sup>113</sup> It recognises the force of European human rights measures in this area too.<sup>114</sup>

The Framework Decision also permits EU Member States to restrict legal prohibitions protecting hate crime victims to: ‘conduct which is either carried out in a manner likely to disturb public order or which is threatening, abusive or insulting.’<sup>115</sup> One way in which this "disturbance" may arise is where a public speech is made that provokes a violent reaction in the audience, or even sectarian or race riots. In effect, this possible restriction

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Religious Freedom Report 2006, <http://www.state.gov/g/drl/rls/irf/2006/71410.htm>. More generally see Susannah Vance, 'The Permissibility of Incitement to Religious Hatred Offenses under European Convention Principles,' 14 *Transnat'l L. & Contemp. Probs.* 201, 206-09 (2004).

<sup>111</sup> In the *Vejdeland* case, the ECtHR addressed a case of incitement to hatred under Article 10 of the ECHR, finding that national authorities could treat ‘interference’ with the applicants’ exercise of their qualified right to ‘freedom of expression’ as ‘necessary in a democratic society’ for the protection of the reputation and rights of others. ECtHR, *Vejdeland and Others v. Sweden*, No. 1813/07, 9 February 2012 paras. 47 – 60. See also Oetheimer, M. (2009), Weber (2009).

<sup>112</sup> ECtHR, *Pavel Ivanov v. Russia*, No. 35222/04, 20 February 2007.

<sup>113</sup> Article 7 provides: ‘Constitutional rules and fundamental principles 1. This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles, including freedom of expression and association, as enshrined in Article 6 of the Treaty on European Union. 2. This Framework Decision shall not have the effect of requiring Member States to take measures in contradiction to fundamental principles relating to freedom of association and freedom of expression, in particular freedom of the press and the freedom of expression in other media as they result from constitutional traditions or rules governing the rights and responsibilities of, and the procedural guarantees for, the press or other media where these rules relate to the determination or limitation of liability.’ See also the Recital (15) of the Framework Decision: ‘Considerations relating to freedom of association and freedom of expression, in particular freedom of the press and freedom of expression in other media have led in many Member States to procedural guarantees and to special rules in national law as to the determination or limitation of liability.’ It would, perhaps, be too cynical to dismiss freedom of the press as the freedom of whoever owns and/or controls the press.

<sup>114</sup> Recital 14 states: ‘This Framework Decision respects the fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, in particular Articles 10 and 11 thereof, and reflected in the Charter of Fundamental Rights of the European Union, and notably Chapters II and VI thereof.

<sup>115</sup> Article 1 (2).



leaves expressions involving severe forms of discrimination safeguarded in principle by Article 14 of the ECHR, but which cannot be proved to have this "public order" dimension, to fall outside the scope of criminal law protection. If someone from a racial minority personally witnesses public approval for a racist speech directed against individuals such as themselves, then the harm inflicted to that person may in fact be severe. It could even be higher than if that racist speaker had generated a hostile reaction among its audience actually or potentially threatening public disorder but which that individual could view as a welcome and reassuring show of much-needed public solidarity and support.

Despite objections from a European-wide human rights perspective concerned to deploy criminal law to bolster 'freedom from discrimination,' the national legislation of both Austria<sup>116</sup> and Germany<sup>117</sup> embodies this public order restriction. As noted in the FRA: 'In the final analysis, these definitions are primarily concerned with public order rather than with the fundamental rights of individuals.'<sup>118</sup>

### **Range of perpetrators and additional matters**

In addition to creating new substantive offences, Article 2 extends criminal liability to those involved in the 'aiding and abetting' of the offences of Article 1. The Decision further extends the range of possible perpetrators to institutions recognised as 'legal

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<sup>116</sup> Austria amended Article 283(1) of its criminal code on incitement to violence against a protected group or an individual of such a group, with this reform entering into force on 1 January 2012. This amendment broadened grounds of discrimination to embrace not only race, ethnicity and religion but also colour, language, ideology, sex, disability, age and sexual orientation. Yet this enhanced protection is limited to conduct likely to compromise public order (auf eine Weise, die geeignet ist, die öffentliche Ordnung zu gefährden). BGBl. I. Nr. 103/2011.

<sup>117</sup> On March 2011, the German legislator enacted legislation giving legal effect to both the Framework Decision and the Additional Protocol to the Convention on Cybercrime by amending Article 130 of the German criminal code entitled 'Incitement of the people' (Volksverhetzung). The new definitions under Article 130 (1) expressly relate to groups defined by criteria of nationality, race, religion or ethnic origin, as well as to members of these groups. As with Austria, such protection is confined to conduct capable of disturbing public peace (in einer Weise, die geeignet ist, den öffentlichen Frieden zu stören). Germany, Law for the transposition of the Framework Decision 2008/913/JI etc. and of the Additional Protocol of 28 January 2003 etc., BGBl. I Nr. 11.

<sup>118</sup> FRA Report, 'Making hate crime visible in the European Union: acknowledging victims' rights,' 2012, p.28: <http://fra.europa.eu/en/publication/2012/making-hate-crime-visible-european-union-acknowledging-victims-rights>.

persons,' such as corporations. Criminal liability will arise where these bodies effectively make it possible for a person 'under their authority' to commit any of the substantive offences for their benefit owing to this institution's 'lack of supervision or control.'<sup>119</sup> In this context, liability is limited to those individuals ('natural persons') who hold: 'a leading position within the legal person.'<sup>120</sup> However, the fact that prosecutions for institutional liability for the new offences are brought does not itself rule out purely individual liability for criminal proceedings against natural persons who are either perpetrators or accessories.<sup>121</sup>

### **Enforcement and Victim-related Provisions**

The Decision does not leave either the nature of the punishment of perpetrators, or the effectiveness of related measures of implementation and enforcement, to the discretion of the Member States. On the contrary, Article 3, entitled 'Criminal penalties,' provides:

1. Each Member State shall take the necessary measures to ensure that the conduct referred to in Articles 1 and 2 is punishable by effective, proportionate and dissuasive criminal penalties.
2. Each Member State shall take the necessary measures to ensure that the conduct referred to in Article 1 is punishable by criminal penalties of a maximum of at least between 1 and 3 years of imprisonment.

Article 10 of The Framework Decision also contains a strict time-table for Member States to implement their obligations, setting a deadline of 28 November 2010 for completion. Compliance is currently being monitored and, by 28 November 2013, will be

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<sup>119</sup> Article 5

<sup>120</sup> Article 5(1) This is based on: (a) a power of representation of the legal person; (b) an authority to take decisions on behalf of the legal person. (c) an authority to exercise control Within the legal person.' Unsurprisingly, this type of liability does not apply to 'States or other public bodies in the exercise of State authority and public international organisations.'

<sup>121</sup> Article 5(3).

assessed and reported on.<sup>122</sup> Any difficulties Member States experience in securing judicial cooperation from others will also be reported upon, possibly with the assistance of Eurojust: the European body responsible for ensuring judicial cooperation between Member States.<sup>123</sup>

The judicial interpretation and application of the various articles of this decision needs to be guided not by a literal reading, but rather by an effort to realise the purposes contained in these wider policy aims. The Framework Decision's clear emphasis upon practical effectiveness also draws attention to any obstacles to the realisation of the rights of hate crime victims. This emphasis is also in keeping with ECtHR case law, which insists: 'that the rights guaranteed by the Convention should not be theoretical or illusory but practical and effective'.<sup>124</sup> As the FRA recognise:

'Even the most comprehensive legislation does not guarantee effective implementation. Other powerful factors are: victims' rights awareness; victims' readiness to report to the police; effective support services available to victims; the responsiveness and ability of law enforcement agencies to understand and thoroughly investigate hate crime; and the extent to which court proceedings are shaped in line with the rights and needs of victims.'<sup>125</sup>

Nevertheless, and accepting these law in action points, it would be a mistake to dismiss or otherwise underestimate the potential benefits of the effective and consistent enforcement of a coherent package of criminal law sanctions. This is particularly the case

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<sup>122</sup> See Article 10: 'Implementation and review. 1. Member States shall take the necessary measures to comply with the provisions of this Framework Decision by 28 November 2010. 2. By the same date Member States shall transmit to the General Secretariat of the Council and to the Commission the text of the provisions transposing into their national law the obligations imposed on them under this Framework Decision. On the basis of a report established using this information by the Council and a written report from the Commission, the Council shall, by 28 November 2013, assess the extent to which Member States have complied with the provisions of this Framework Decision.'

<sup>123</sup> Article 10 (3). 'Before 28 November 2013, the Council shall review this Framework Decision. For the preparation of this review, the Council shall ask Member States whether they have experienced difficulties in judicial cooperation with regard to the conduct under Article 1(1). In addition, the Council may request Eurojust to submit a report, on whether differences between national legislations have resulted in any problems regarding judicial cooperation between the Member States in this area.'

<sup>124</sup> ECtHR, *Stanev v. Bulgaria*, No. 36760/06, 17 January 2012, para. 142.

<sup>125</sup> FRA Report 2012, 28. See also Garland, J. and Chakraborti, N. (2012), 'Divided by a common concept? Assessing the implications of different conceptualizations of hate crime in the European Union,' *European Journal of Criminology*, 9 (1), 38-51.

where these are applied in locally reported public trials as part of wider series of coordinated policy responses, each of which bears down upon this type of criminality. Whether or not the detailed measures promoted by the Framework Decision are, in fact, effective, self-consistent, and properly coordinated with a range of other initiatives still has to be decided.

The Framework Decision also includes measures concerned with the criminal investigation process both generally, and with respect to the provision of support for victims of hate crime. For example, Article 8 insists that:

‘Each Member State shall take the necessary measures to ensure that investigations into or prosecution of the conduct ... shall not be dependent on a report or an accusation made by a victim of the conduct, at least in the most serious cases where the conduct has been committed in its territory.’

This measure encourages prosecution of hate crime offenders even where the victim, who might be intimidated or have other understandable reasons of privacy for not wanting to ‘get involved,’ decides to refuse to cooperate with the police.

In contrast to Article 11 of the Trafficking Directive,<sup>126</sup> the Framework Decision *does not* require states to introduce a range of necessary support measures to identify and safeguard the rights of victims before, during or after criminal proceedings involving them. Instead, this issue is addressed only by the far weaker general provisions of Article 13 of the Framework Decision entitled: ‘Standing of Victims in Criminal Proceedings.’<sup>127</sup> This merely encourages the involvement of victim support systems in national criminal systems.<sup>128</sup>

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<sup>126</sup> Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, OJ 2011 L 101, p. 1.

<sup>127</sup> 2001/220/JHA of 15 March 2001

<sup>128</sup> Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, OJ 2001 L 82, p.1:  
[http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/judicial\\_cooperation\\_in\\_criminal\\_matters/jl0027\\_en](http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_criminal_matters/jl0027_en).

Although mandatory provisions for victim support are largely lacking from the Framework Decision, there is the voluntary or non-binding measures contained in the ‘Recommendation on measures to combat discrimination on grounds of sexual orientation or gender identity,’ which the Council of Europe’s Committee of Ministers adopted on March 2010. This recommendation encourages Member States to take measures to ensure that victims and other witnesses of hate crimes, or incidents related to either their sexual orientation or gender identity, to report these events to the national authorities. It also suggests that national law enforcement bodies, including the judiciary, be equipped with necessary knowledge and skills to identify such crimes and incidents and provide victims and witnesses with adequate support and assistance.

In short, the EU Framework Decision provides a model legislation on certain defined hate crimes, including various forms of hate speech, for Members States to implement through their domestic legislation. (Measures relating to genocide denial will be discussed in a later consolidated section) The availability of "opt outs" is likely to weaken the stated goal of EU-wide harmonisation of this aspect of criminal law doctrine and institutional practice, and it is likely that the victim-support measures will require further strengthening.

### **Art. 21 of the EU Charter of Fundamental Rights<sup>129</sup>**

This article extends the number of grounds of discrimination in relation to those in the Framework Decision, by including sex, and sexual orientation, genetic feature, language,

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<sup>129</sup> See the Commission Staff Working Document on the Application of the Charter of Fundamental Rights in 2011, Brussels, 16.4.2012, SWD(2012) 84 final.

political and other opinion, property, disability and age. The FRA (2012) report supports the widening of the criminal law provisions to include equally all grounds, and notes with approval that a number of EU Members States extended the definition of hate crime to a wide range of categories Austria, Belgium, Croatia, Finland, Latvia, Lithuania, Malta, the Netherlands, Romania and Spain. This report also recognises the danger of ‘bundling all forms of discrimination into one global and abstract category’ and advocates that each case should be considered from the point of view of concrete issues that it raises.<sup>130</sup>

Great deal of uncertainty remains over the relation between article 21 of the EUCFR and article 14 ECHR, as well as between the Charter more generally and the fundamental rights protection in national constitutions when those offer a higher standard of protection.

Arguably the provision of article 53 EUCFR should be interpreted as not allowing the higher national human rights standard to be pre-empted by a lower European standard. On the substantive relation with article 14 ECHR, the CJEU confirmed (following art. 52 (3) EUCFR)<sup>131</sup> that EUCFR rights that correspond to those in the ECHR ‘the meaning and the scope’ of the rights is the same as that of the ECHR.<sup>132</sup> The explanation to article 52(3) further clarify that the scope of EUCFR are determined not only by the text of the ECHR and the Protocols, but also by the case-law of the ECtHR. The overall aim of this article is to ensure that the level of protection afforded by the Charter may never be lower than that guaranteed by the ECHR.

The explanations to Article 21 further clarify this as follows:

‘Paragraph 1 draws on Article 13 of the EC Treaty, now replaced by Article 19 of the Treaty on the Functioning of the European Union, Article 14 of the ECHR

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<sup>130</sup> We do recognise the necessity and usefulness of abstract categories, but we want to warn of the dangers of their overuse which might lead to lessened sensitivity to specific circumstances of a particular case.

<sup>131</sup> ‘In so far as this Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the said Convention’.

<sup>132</sup> Case C-400/10 PPU *McB*, Judgement of 5 Oct.2012, para. 53.

and Article 11 of the Convention on Human Rights and Biomedicine as regards genetic heritage. In so far as this corresponds to Article 14 of the ECHR, it applies in compliance with it. There is no contradiction or incompatibility between paragraph 1 and Article 19 of the Treaty on the Functioning of the European Union which has a different scope and purpose: Article 19 confers power on the Union to adopt legislative acts, including harmonisation of the Member States' laws and regulations, to combat certain forms of discrimination, listed exhaustively in that Article. [...] In contrast, the provision in Article 21(1) does not create any power to enact anti-discrimination laws in these areas of Member State or private action, nor does it lay down a sweeping ban of discrimination in such wide-ranging areas. Instead, it only addresses discriminations by the institutions and bodies of the Union themselves, when exercising powers conferred under the Treaties, and by Member States only when they are implementing Union law.'

The EUCFR became legally binding after the entry into force of the Treaty of Lisbon in 2009. It applies to all actions taken by the EU institutions, but it only applied to the Member States when they implement the EU law.<sup>133</sup> Three countries secured opt-outs from the Charter – the UK, Poland<sup>134</sup> and the Czech Republic. As CoE members, these three states remain bound by the provisions of ECHR, as are all the other EU Member States. The binding power of the ECHR, under the classic international law, differs from that of the Charter, which is protected by the principle of supremacy within the limits of article 51. Once the EU accedes to the ECHR, the Convention will become binding on the MSs via the EU law. This will elevate the Convention status to above national constitutions<sup>135</sup> and render it applicable through the principle of supremacy of the EU law, with all the attendant consequences.

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<sup>133</sup> See art. 51 EUFR.

<sup>134</sup> See Protocol (No. 30) on the Application of the EUCFR to Poland and the UK.

<sup>135</sup> R. Schütze (2012) *European Constitutional Law*, CUP.

## **CHAPTER THREE: HATE CRIME AND HATE SPEECH REGULATION**

### **UNDER THE COUNCIL OF EUROPE: ECHR AND ECtHR<sup>136</sup>**

#### **Introduction**

This chapter addresses a range of Council of Europe (COE) measure actually or potentially relevant to hate crime, including hate speech. It examines the various articles of the European Convention on Human Rights (ECHR) both in general but, in far more detail, as these have been applied to cases involving hate crime. The articles regulating "freedom of expression," discrimination, freedom from inhuman and degrading treatment, and the right to effective remedies will be given particularly close attention. This is because these are the grounds that have become contentious in cases where COE states have sought to restrict or prohibit by means of criminal law certain examples of hate speech, and where applicants have challenged the compatibility of such measures with the rights defined by these ECHR articles. Challenges to convictions for Holocaust denial are perhaps the most extreme example that this chapter discusses. However, it will be shown that the European Court of Human Rights (ECtHR) has made decisions with respect to a far wider range of hate speech, including Neo-Nazi political extremism, anti-Semitism, religious intolerance, and homophobic statements. In addition to hate speech, this court has tackled cases of religious and disability-related hate crime involving violent physical attacks as well as verbal abuse, particularly in relation to claims that national states allegedly failed to provide "effective remedy." Where hate speech and hate crimes appear to be related to specific organisations, including those with a militant racist or religious agenda, then challenges before the

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<sup>136</sup> This chapter was drafted by Dr Kim McGuire, Dr Michael Salter.



ECtHR to the legality of restrictions or prohibitions inevitably raises specific human rights issues concerning the scope and limits of "freedom of association" as well as "freedom of expression."

Although most cases involve individual applicants challenging restrictions upon their freedom of expression, there are also challenges from journalists and others involved in mass media who have faced sanctions for broadcasting the hate speech of others stemming from letters to a newspaper or interviews. Here, difficult issues of the "freedom of the press" and the limits of this "freedom" to insult, denigrate and threaten victims of hate crime without legal accountability also arise.

Finally, although this section addresses mainly the case-law of the ECtHR, inevitably complex political and ethical issues of wider policy, together with conflicts between policy values, also force themselves onto our agenda, even within the express deliberations of judges deciding such cases. Among these values are those associated with the integrity of democratic practices and institutions, and their capacity of defend themselves from attack and subversion by, for example, Neo-Nazism and associated xenophobic and racist movements as well as certain types of religious fundamentalism. In this respect, it becomes vital to consider the nature and scope of ECHR article 17 designed to prevent the "abuse of rights," more specifically attempts to exploit existing convention rights, such as "freedom of expression," to promote an undemocratic political agenda that includes elements of racial or religious hatred.

### **Relevant ECHR articles**

There are a number of provisions in the ECHR that allow those who claim to have been the

victims of different types of hate incident that have not been responded to adequately by national authorities to bring legal complaints and, in principle, secure a measure of both vindication of their rights and material compensation in the form of a modest monetary award. Here, it is worth recalling that Article 10 provides a series of grounds for the qualification and restriction of "freedom of expression," that clearly cover many forms of hate crime. Paragraph 2 of this article included positive obligations on state authorities to regulate, even where necessary prohibit, such crime in circumstances where this amounts to:

- 1/. an unlawful form of discrimination;
- 2/. attack on the reputation of specific victim groups; and
- 3/. in cases of hate crime linked to political extremism, threat to democratic governance and society.

Article 10 provides:

- '1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...
2. The 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, ... for the protection of the reputation or rights of others, ...'

According to the Court's established case-law, "freedom of expression" constitutes one of the essential foundations of a democratic society as well as one of the basic conditions for its progress and for each individual's self-fulfilment. Subject article 10(2), this right is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. A measure of tolerance to such expressions forms one of the demands of that pluralism,

tolerance and broadmindedness, without which there is no “democratic society”.

This freedom is subject to exceptions that can be construed strictly, and the need for any restrictions upon it must be established convincingly with sufficient reasons. For example, the test of “necessity in a democratic society” requires the Court to determine whether the “interference” complained of corresponds to a “pressing social need”, whether it was proportionate to the “legitimate aim” being pursued by the restrictive measure, and whether the reasons given by the national authorities to justify it are both relevant and sufficient.<sup>137</sup> In assessing whether such a “need” exists and what measures should be adopted to deal with it, the national authorities are left a certain “margin of appreciation.” This power of appreciation is not, however, unlimited but goes hand in hand with a European supervision by the Court, whose task it is to give a final ruling on whether a restriction is reconcilable with “freedom of expression” as defined and protected by Article 10.<sup>138</sup>

The Court’s task in exercising its supervisory function is not to take the place of the national authorities but rather to review under Article 10, in the light of the case as a whole, the decisions they have taken pursuant to their power of appreciation.<sup>139</sup>

Although most of the case law to date has concerned racial and ethnic hate incidents, it is important to recognise that complaints relating to religion, sexual orientation and disability have more recently been successfully pursued. The general terms of the Convention, including its anti-discrimination provisions, do not provide any basis for giving priority to any type of recognised discriminatory type of violation of human rights over any other. In turn, this may provide a spur to the step-by-step judicial expansion of the comparatively restricted categories of recognised hate crimes within both national

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<sup>137</sup> See Sunday Times v. the United Kingdom (no. 1) judgment of 26 April 1979, Series A no. 30, para. 62.

<sup>138</sup> See Bladet Tromsø and Stensaas v. Norway [GC], no. 21980/93, para. 58, ECHR 1999-III.

<sup>139</sup> *Ibid.*, para. 60.

jurisdictions and EU criminal law measures, which has tended to prioritise racist instances.

In addition to article 10, there are other aspects of the ECHR that need to be clarified before it is possible to appreciate the detailed case-law. Article 1 of the ECHR places an obligation on State Parties to secure for everyone within their national jurisdiction all the rights and freedoms defined in the Convention. Taken together with articles 3 (freedom from inhuman and degrading treatment) and 13 (right to an effective remedy), article 1 requires States to take concrete and active measures designed to ensure that individuals within their jurisdiction are not subjected to ill-treatment, including certain hate crimes.<sup>140</sup> Here, it is worth noting that article 3 is one of the most fundamental provisions of the Convention enshrining core values of the democratic societies making up the Council of Europe.<sup>141</sup>

In contrast to the other provisions in the Convention, it is cast in absolute terms, without exception or proviso, or even the possibility of opt out, or "derogation," under Article 15 of the Convention.<sup>142</sup> Article 3 can also give rise to a positive obligation to conduct an official investigation even where the ill-treatment stems from the actions of a private individual or individuals.<sup>143</sup> The scope of this obligation requires states to take all reasonable steps available to them to secure the evidence concerning, say, a hate incident in a prompt manner.<sup>144</sup> In addition, in the case of a fatal hate incident, Article 2 (right to life) can also

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<sup>140</sup> See A. v. the United Kingdom, judgment of 23 September 1998, Reports of Judgments and Decisions 1998-VI, p. 2699, § 22; Z and Others v. the United Kingdom [GC], no. 29392/95, §§ 73-75, ECHR 2001-V; and E. and Others v. the United Kingdom, no. 33218/96, 26 November 2002; M.C. v. Bulgaria, no.39272/98, § 151, ECHR 2003, XII.

<sup>141</sup> Pretty v. the United Kingdom, no. 2346/02, § 49, ECHR 2002-III.

<sup>142</sup> See, Chahal v. the United Kingdom, judgment of 15 November 1996, § 79, Reports of Judgments and Decisions 1996-V)

<sup>143</sup> See Assenov and Others v. Bulgaria, judgment of 28 October 1998, Reports 1998-VIII, p. 3290, § 102.

<sup>144</sup> Menson v. the United Kingdom (dec.), no. 47916/99, ECHR 2003; Yaşa v. Turkey, judgment of 2 September 1998, Reports 1998 VI, p. 2439, §§ 102-104.

become relevant.<sup>145</sup> Another possibly relevant measure where there is undue delay or indifference to reports of hate incidents is Article 13, which provides: 'Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.'

The European Court of Human Rights jurisdiction on hate crime is also based, in part, on article 14 of the ECHR, which: 'The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.' This measure is not a free-standing right in that it needs to be shown that one or more other convention rights are at issue. On the other hand, in *Nachova and Others v Bulgaria* 2004 the court held that the prohibition of discrimination in general, and of racial and ethnic discrimination in particular, under Article 14: 'reflect basic values of the democratic societies that make up the Council of Europe. Acts motivated by ethnic hatred that lead to deprivation of life undermine the foundations of those societies and require particular vigilance and an effective response by the authorities.'<sup>146</sup>

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<sup>145</sup> Relevant parts of Article 2 of the Convention provides: "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

<sup>146</sup> *Nachova and others v. Bulgaria*, (Applications nos. 43577/98 and 43579/98) 26 February 2004, para.155.

### **Duty to unmask discriminatory overtones**

Under the ECtHR case-law, starting with *Nachova and Others v Bulgaria*, States have a duty to ‘unmask’ bias motives leading to crimes caught under this article by punishing hate crimes more severely – two objectives that overlap with those of the Framework Decision on Racism and Xenophobia, particularly article 4. Here, the applicants alleged that their respective close relatives, Mr Kuncho Angelov and Mr Kiril Petkov, who had been shot by military police trying to arrest them, were deprived of their lives in violation of Article 2 of the Convention, that the investigation into these events had been ineffective and thus in breach of both articles 2 and 13. They alleged that Bulgaria had failed in its obligation under the Convention to protect life by law, and that, furthermore, the events complained of were the result of discriminatory attitudes towards persons of Roma origin involving a violation of Article 14. In other words, the allegation was that that prejudice and hostile attitudes towards persons of Roma origin had played a decisive role not only in the events leading up to the deaths of Mr Angelov and Mr Petkov but also with respect to the fact that no meaningful investigation had been carried out.

The applicants referred to the fact that the victims' ethnic origin was known to the officers who tried to apprehend them. In their view, Major G., who had fired the fatal shots, would not have fired an automatic rifle in a populated area had he not been in the Roma part of the village. His discriminatory attitude towards Roma was confirmed by the offensive words he had used when addressing one of the neighbours, Mr M.M. In the applicants' view, allegedly grounded in their personal experience with law-enforcement and investigation authorities in Bulgaria, the victims' ethnic origin had been a decisive factor in

the killing. They further submitted that the wider context needed consideration: it had been documented that popular prejudice against Roma in Bulgaria was widespread and had frequently manifested itself in acts of racially motivated violence, to which the authorities generally responded with inadequate investigations that often resulted in impunity.

The Court gave a strong affirmation of the importance of state authorities acting upon any evidence of a discriminatory undertone to a serious crime, and, in keeping with respect for fundamental democratic rights, acting to uncover and respond strongly to its presence. Otherwise, these authorities would be placing hate crimes on a par with parallel offences lacking any such discriminatory overtones. In turn, this would violate an expansive interpretation of the meaning and scope of article 14, which is necessary to achieve the wider *integrationist policy* of anti-discrimination law and policy:

‘The Court reiterates that where there is suspicion that racial attitudes induced a violent act it is particularly important that the official investigation is pursued with vigour and impartiality, having regard to the need to reassert continuously society's condemnation of racism and ethnic hatred and to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence. Compliance with the State's positive obligations under Article 2 of the Convention requires that the domestic legal system must demonstrate its capacity to enforce criminal law against those who unlawfully took the life of another, irrespective of the victim's racial or ethnic origin ...

158. The Court considers that when investigating violent incidents and, in particular, deaths at the hands of State agents, State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events. Failing to do so and treating racially induced violence and brutality on equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. A failure to make a distinction in the way in which situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention. [...] Admittedly, proving racial motivation will often be extremely difficult in practice.’<sup>147</sup>

The Court found in favour of the applicant under article 14 partly because 'certain facts

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<sup>147</sup> *Nachova and Others v Bulgaria*, No. 43577/98 and 43579/98; chamber judgement of 26 February 2004, and judgement of the Grand Chamber of 6 July 2005, paras. 158 & 159.

which should have alerted the authorities and led them to be especially vigilant and investigate possible racist motives were not examined.' In particular, it was held that no attention was paid to the fact that Major G. had fired an automatic burst in a populated Roma neighbourhood against two unarmed, non-violent fugitives leading to one of the victims suffering fatal wounds to the chest, not the back (suggesting that he may have turned to surrender). The force used was, according to the Court, 'in any event disproportionate and unnecessary.' Indeed, as stated by one witness, immediately after the incident the other military police officers had started remonstrating with Major G. telling him that he should not have fired. Uncontradicted evidence by a neighbour of the victims that Major G. had shouted: 'You damn Gypsies' while pointing a gun at him moments after the shooting, was disregarded. In an important statement with respect to official responses to hate crime, the Court stated:

'162. The Court considers that any evidence of racist verbal abuse by law enforcement agents during an operation involving the use of force against persons from an ethnic or other minority is highly relevant to the question whether or not unlawful, hatred-induced violence has taken place. Where such evidence comes to light in the investigation, it must be verified and – if confirmed – trigger a thorough examination of all the facts in order to uncover any possible racist motives. This was not done in the present case.

163. On the basis of the above the Court finds that the authorities failed in their duty under Article 14 of the Convention, taken together with Article 2, to take all possible steps to establish whether or not discriminatory attitudes may have played a role in events.

164. The Court considers, furthermore, that the domestic authorities' failure to discharge that duty should have an incidence on its approach in the present case in the examination of the allegation of a “substantive” violation of Article 14.

165. In cases where it is alleged that a violent act was motivated by prejudice and hatred on the basis of ethnic origin – as here – an assessment is required of such subjective inner factors as intent and state of mind. However, the Court is particularly ill-equipped to play the role of a primary tribunal of fact for establishing intent or state of mind, which is better dealt with in the context of a criminal investigation. For these reasons, the duty of Contracting States under Articles 2 and 14 of the Convention, to investigate suspicious deaths and possible discriminatory motives takes on particular importance.'



The Court concluded that:

'having regard to the inferences of possible discrimination by Major G., the failure of the authorities to pursue lines of inquiry – in particular into possible racist motives – that were clearly warranted in their investigation, the general context and the fact that this is not the first case against Bulgaria in which Roma have been alleged to be the victims of racial violence at the hands of State agents, and noting that no satisfactory explanation for the events has been provided by the respondent Government, the Court finds that there has been a violation of Article 14, taken together with Article 2, of the Convention.'<sup>148</sup>

As already noted, the facts of this case involved a killing at the hands of state officials, and it remained unclear whether the principles relevant to evidence of discriminatory treatment would also apply to hate incidents perpetrated *only by private individuals*. What is clear from this case is that the ECtHR has established some *minimal standards* for how national legal systems should respond to hate crimes. In particular, the Court held that: 'in cases where the authorities have not pursued lines of inquiry that were clearly warranted in their investigation into acts of violence by State agents and have disregarded evidence of possible discrimination, it may, when examining complaints under Article 14 of the Convention, draw negative inferences or shift the burden of proof to the respondent Government.'<sup>149</sup>

In *Cobzaru vs Romania*, a case of alleged police brutality against a member of the Roma community, the ECtHRs reiterated this progressive position on the positive steps owed by legal authorities to victims of hate crime and their families:

'The Court noted that prosecutors made tendentious remarks in relation to the applicant's Roma origin throughout the investigation and that no justification was provided by the Government for those remarks. The Court recalled that it had already found that similar remarks made by the Romanian judicial authorities regarding an applicant's Roma origin were purely discriminatory. In the applicant's

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<sup>148</sup> Ibid, para. 175.

<sup>149</sup> Para.16.

case, the Court found that the tendentious remarks made by the prosecutors in relation to his Roma origin disclosed a general discriminatory attitude of the authorities, which reinforced the applicant's belief that any remedy in his case was purely illusory. ... The Court concluded that the failure of the law enforcement agents to investigate possible racial motives in the applicant's ill-treatment combined with their attitude during the investigation constituted discrimination in violation of Article 14 taken in conjunction with Articles 3 and 13.<sup>150</sup>

Given the doubts left over by the *Nachova* and *Cobzaru* cases concerning hate crimes by private individuals, it is also worth considering the implications of the later case *Angelova & Iliev vs Bulgaria*. This involved a racist murder in 1996 by seven teenagers of a 28 year old man of Roma origin. Mr. Angel Iliev died after being beaten and stabbed by these teenagers, who were arrested within hours of the attack. They confessed that they had been looking for members of the Roma community to attack, and expressed their hatred of Roma and other minorities. Five of the attackers were indicted for the purely generic offence: 'hooliganism of exceptional cynicism and impudence.' However, for the next nine years they were not prosecuted. The applicants complained under articles 2, 3, 13 and 14 claiming a violation of their right to life, freedom from torture, inhuman and degrading treatment, effective legal remedy and freedom from discrimination respectively. The essence of their claim was that the authorities failed to carry out a prompt, effective and impartial investigation capable of leading to the trial and conviction of the individuals responsible for the ill-treatment and death of their relative. They also complained that the domestic criminal legislation contained no specific provisions incriminating separate criminal offences where the latter were racially motivated, nor did it contain explicit penalty-enhancing provisions relating to racially motivated offences. Lastly, they complained that the Bulgarian authorities had even failed to apply the existing but similarly

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<sup>150</sup> ECtHR, *Cobzaru vs Romania*, judgement of 26 July 2007 (unreported), No. 48254/99: <https://wcd.coe.int/ViewDoc.jsp?id=1167529&Site=COE>.

inadequate provisions of the Criminal Code concerning racially motivated offences.

The ECtHR held that Bulgaria was in breach of its obligations to protect and prosecute human rights violations and that it was completely unacceptable that, being aware of the racist motives of the perpetrators, there had been a failure to bring the case to justice promptly, and that the responsible prosecution authority had delayed the preliminary investigation and prosecution of the assailants failing to charge them with any racially motivated offences despite their admissions. These delays had allowed the statute of limitation to intervene to make it impossible for the majority of these racist attackers to ever face prosecution. The ECtHR not only highlighted the failure of Bulgarian authorities to investigate and prosecute the specifically racist motivation behind the crime effectively, but also observed that Bulgarian law failed to provide effective criminal law remedies for victims of hate crimes.<sup>151</sup>

'104. As to whether the respondent State's legal system provided adequate protection against racially motivated offences, the Court observes that it did not separately criminalise racially motivated murder or serious bodily injury (Articles 115-135 of the Criminal Code), nor did it contain explicit penalty-enhancing provisions relating to such offences if they were motivated by racism (Articles 116 and 131 of the Criminal Code). However, the Court considers that other means may also be employed to attain the desired result of punishing perpetrators who have racist motives. It observes in this respect that the possibility existed in domestic legislation to impose a more severe sentence depending on, *inter alia*, the motive of the offender .... The Court further observes that the authorities charged the assailants with aggravated offences, which though failing to make a direct reference of the racist motives of the perpetrators provided for more severe sentences than those envisaged in domestic legislation for racial hatred offences ... Thus, it does not consider that domestic legislation and the lack of penalty-enhancing provisions for racist murder or serious bodily injury were responsible in the present case for hampering or constraining the authorities from conducting an effective investigation into the death of the applicants' relative and applying effectively the existing domestic legislation.'

This decision highlights the obligation of law makers under the ECHR to both enact and

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<sup>151</sup> ECtHR, Angelova and Iliev v. Bulgaria, Reports 2007-IX, No. 55523/00, 27 July 2007, para. 104.

enforce substantive criminal law provisions reflecting, as far as possible, the significant differences between hate crimes and other offences lacking the element of discriminatory bias. This failure constituted ‘unjustified treatment’ irreconcilable with Article 14 of the ECHR concerning freedom from discrimination, which the national authorities had therefore violated.<sup>152</sup>

'115. The Court reiterates that States have a general obligation under Article 2 of the Convention to conduct an effective investigation in cases of deprivation of life, which must be discharged without discrimination, as required by Article 14 of the Convention. Moreover, when investigating violent incidents State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events. Failing to do so and treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. A failure to make a distinction in the way in which situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention. Admittedly, proving racial motivation will often be extremely difficult in practice. The respondent State's obligation to investigate possible racist overtones to a violent act is an obligation to use best endeavours and not absolute; the authorities must do what is reasonable in the circumstances of the case ...'

This court also noted: 'the widespread prejudices and violence against Roma during the relevant period and the need to reassert continuously society's condemnation of racism and to maintain the confidence of minorities in the authorities' ability to protect them from the threat of racist violence.'<sup>153</sup> In upholding the applicant's case, the Court clearly extended this doctrine to hate crimes committed by private individuals, a developing extended by later case-law. For example, in *Šečić vs Croatia*, Mr. Šemso was collecting scrap metal in 1999 with two other individuals when two unidentified persons approached the group and began to beat Mr. Šečić with wooden planks while shouting racist abuse, which resulted in him suffering from multiple broken ribs, post-traumatic stress syndrome, characterized by

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<sup>152</sup> Ibid.

<sup>153</sup> para.116.

depression, anxiety, panic attacks, fears for his own safety and that of his family, nightmares, and underwent psychiatric treatment. Although the police considered that the attack had been committed by members of a "skinhead" group, who had been involved in similar previous incidents, they still failed to question members of the group, or otherwise investigate the case. This was despite the fact that, during a televised programme, a journalist interviewed a member of the skinhead group who referred to the attack against Mr. Šečić. The police never brought in for questioning any person belonging to this group of skinheads, nor pursued this information in any other way. In addition, they excluded one person who had been identified by one of the witnesses from the list of possible suspects without even questioning him about the attack.

The case was brought under articles 3, and 14 and 8 (right to privacy and family life). On that basis, the Court provided a clear rationale for a duty on state authorities, including all aspects of their criminal justice systems, to insist that discriminatory overtones have to be unmasked. It held that although only the case under article 3 was made out: '...State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the event.' Failing to do so and, '...treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights.' On the basis of this clear rationale, the Court held that Croatian state had failed in its obligation to take reasonable steps to investigate the racist motivation in the case. In other words, the ECtHR insisted that, when investigating violent incidents, State authorities are legally obliged to take all reasonable steps to 'unmask' any underlying racist or other bias motivations that

may have played a role in the attack.<sup>154</sup> The state lost this case as a claim under both Article 3 and 14 was held to have been made out, and compensation plus costs were awarded.

In short, The Court has thus established the standard that State authorities have a duty under different terms of the Convention, primarily Article 14, to investigate whether a bias motive has played a role in violence or crimes. If so, bias motivation should be clearly classed as such by the criminal justice systems of states as *an additional factor* in both the prosecution and sentencing of the accused justifying higher penalties than would otherwise have been deployed in the absence of proof of such motivation.

The core element on such ‘unmasking’, according to the ECtHR relates closely with the duty arising from article 14, and constitutes a right to effective investigations into, say, racist attitudes motivating an act of violence.<sup>155</sup> This ties up with a broader duty on the state to ‘reassert continuously society’s condemnation of racism’ by ensuring that where the crime is racially motivated, the investigation is pursued with vigour and impartiality.<sup>156</sup>

## **B/. Racist hate speech**

Although the previous section was primarily concerned to address the obligation under the ECHR to unmask discriminatory overtones, each of the cases involved racist or ethnic forms, as opposed to religious, gender, disability-related or homophobic types of hate crime. The details of these cases and the decisions, which have already been discussed, do not need to be reiterated here. There is, however, the particularly relevant case of *Féret v. Belgium*, 2009.<sup>157</sup> This involved a challenge to the conviction of the president of the “Front

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<sup>154</sup> ECtHR, *Secic vs Croatia*, judgement of 31 May 2007, Reports 2007-VI, No. 40116/02.

<sup>155</sup> *Ibid.*, paras 166-168.

<sup>156</sup> ECtHR, *Menson and Others v UK*, No. 47916/99, decision on admissibility.

<sup>157</sup> Judgment 16.7.2009, 15615/07.

National-Nationaal Front,” an extreme right-wing party, for inciting the public to acts of discrimination or racial hatred by means of posters and leaflets distributed during an electoral campaign. The applicant was also a member of the Belgian House of Representatives at the relevant time. These leaflets presented non-European immigrant communities as criminally-minded and keen to exploit the benefits they derived from living in Belgium, whilst also ridiculing members of these communities. Unsurprisingly, they led to complaints of incitation to hatred, discrimination and violence, together with the inevitable risk of arousing feelings of distrust, rejection or even hatred towards such foreigners. The applicant, who was both author and editor-in-chief of the offending leaflets and owner of a website which further distributed them. Following his conviction, the applicant was sentenced to 250 hours’ community service related to the integration of immigrants, together with a 10-month suspended prison sentence. He was also declared ineligible for public office for ten years. The Belgium criminal courts found that the applicant’s offending conduct had not fallen within his parliamentary activity, and that his leaflets contained passages that represented a clear and deliberate incitation to discrimination, segregation or hatred, and even violence, for reasons of race, colour or national or ethnic origin.

In this case, the ECtHR found that the applicant’s conviction was certainly an “interference” with his right to freedom of expression contained in article 10, but one which was expressly provided for by the general criminal law prohibiting such forms of on racism and xenophobia. Belgium restrictions had the "legitimate aims" of preventing disorder and protecting the rights of others, and so fell within the scope of article 10(2). The Court emphasised that it was of the utmost importance to combat racial discrimination in

all its forms and guises, and this policy had already been emphasised in the Council of Europe's various legal instruments. In an important extension of the previous law, the Court held that incitement to hatred was *not confined to calls for specific acts of violence or other offences*. Insults, ridicule or defamation aimed at specific population groups or incitement to discrimination, as in this case, was sufficient for the authorities to give priority to fighting hate speech when confronted by the "irresponsible use" - more precisely abuse - of freedom of expression which undermined people's dignity, or even their safety. Political speech that stirred hatred based on religious, ethnic or cultural prejudices amounted to a threat to social peace and political stability in democratic States.

The applicant's position as a Member of Parliament supposedly engaged in a process of democratic will-formation through an election was not considered a mitigating circumstance. Indeed, the Court stressed that it was vital for politicians, when expressing themselves in public, to avoid comments that might foster intolerance. It was their positive duty to defend democracy and its principles because their ultimate aim was to govern. Encouraging the exclusion of foreigners as a matter of state practice amounts to a fundamental attack on their rights, and everyone – including politicians – should exercise particular caution. The political party's leaflets had been handed out in an electoral campaign, with a view to reaching the whole population. Although within a democracy political parties must enjoy broad freedom of expression to canvass for votes and engage in sharp debates, there are clear limits to this where such expressions involve racist or xenophobic comments. Political parties had the right to defend their opinions in public, even if these offended, shocked or disturbed parts of the population. They could propose solutions to the problems linked to crime, migration and immigration. However, where



racist statements were made during an electoral context, this helped to inflame hatred and intolerance, and the impact of this type of hate speech could become even worse and more harmful, not least by triggering reactions incompatible with a peaceful social climate and without undermining people's confidence in the democratic institutions.

The Court decided that an examination of the offending texts revealed that the wording the applicant had deployed clearly amounted to an invitation to discrimination and racial hatred, which could not be disguised by the election campaign. The reasons given by the domestic courts to justify the restriction of the applicant's "freedom of expression" had been both pertinent and sufficient, considering the pressing social need to protect public order and the rights of others, namely, the immigrant community. Lastly, the appeal court sentence was proportionate to the legitimate aim being pursued, and thus met the requirement of being "necessary in a democratic society." By a four votes to three, the Court held that there had been no violation of the applicant's right to freedom of expression.

Interpreting this important case in the context of those previously discussed, it is clear that the case-law of the ECtHR had attached particular importance to combating racist and ethnic hate crime, including hate speech, and the obligation of states to expose racist overtones. It has formulated a broad view of the scope of incitement to race / ethnic hatred to cover racist hate speech that does not expressly urge its audience to commit immediate acts of violence. This is a significant development.

## **b/. ECHR and religious hate crime**

Judges at the ECtHR have sought to grapple with the cluster of issues raised by religious

hate speech.<sup>158</sup> The situation is complicated by the need for judges to take into account a range of other transnational human rights measures. Foremost is perhaps article 9 of the convention itself, which provides:

- '1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.'

The "limitations" are similar to those of article 10 already examined, and are generally afforded the same of similar meaning making it redundant to repeat our earlier analysis.

Other COE provisions include Parliamentary Assembly of the Council of Europe Resolution 1510 (2006) on freedom of expression and respect for religious beliefs, according to which "freedom of expression" should not be further restricted to meet increasing sensitivities of certain religious groups, but at the same time, hate speech against any religious group is stated to be incompatible with fundamental rights and freedoms. Then there is also Recommendation 1804 (2007)<sup>1</sup> on State, Religion, Secularity and Human Rights, which reiterated that "freedom of expression" could not be restricted out of deference to certain dogmas or the beliefs of a particular religious community. A further measure is Recommendation 1805 (2007)<sup>1</sup> on blasphemy, religious insults and hate speech against persons on grounds of their religion. This emphasises that religious and other groups must tolerate critical public statements and debate about their activities, teachings and beliefs. The proviso is that such criticism must not constitute any of the following: 1/.

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<sup>158</sup> See Case of Mouvement Raëlien Suisse v. Switzerland (Application no. 16354/06) 13 July 2012 especially the Dissenting Opinion of Judge Pinto De Albuquerque.

intentional and gratuitous insults; 2/. hate speech; 3/. an incitement to disturb the peace or to violence and discrimination against adherents to a particular religion. In addition to these European measures from of religious expression is recognised by all the major human rights treaties from Article 18 of the Universal Declaration of Human Rights 1948 onwards. This article states:

'Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.'<sup>159</sup>

The similar provisions of the International Covenant on Civil and Political Rights ratified to date by 148 nations is, unlike the Universal Declaration, mandatory for states that have ratified it. The 1966 Covenant prohibits religious discrimination, as stated in Article 2(1), 'without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.' Article 18 guarantees the same rights listed in Article 18 of the Universal Declaration, with the addition the right of parents to direct the religious education of their children. Article 20 is especially relevant for present purposes in that it prohibits incitement of hatred against others because of their religion. Moreover, the 1966 Covenant provides a broad definition of religion that embraces both theistic and nontheistic religions as well as rare and virtually unknown faiths.

More recently, on 25 November 1981 the UN General Assembly passed the: "Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief."<sup>160</sup> This declaration recognises freedom of religion as a basic human right in accordance with several other instruments of international law. However, this

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<sup>159</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948)

<sup>160</sup> G.A. Res. 55, U.N. GAOR, 36th Sess., Supp. No. 51, U.N. Doc. A/36/684 (1981).

measure falls short of being a binding legal instrument that universally guarantees the right to freedom of religion.

What is clear from the ECHR case law, which will now be examined in depth, is that freedom of expression allows for criticism of religion, churches, religious institutions and the clergy. The proviso is that such criticism must avoid any of the following: 1/. Deliberate and defamatory insults of persons and institutions; 2/. Hate speech that promotes hatred against any particular religious group, or 3/. "Blasphemous" speech that denigrates a religious doctrine or deities. As Judge Pinto De Albuquerque has stated, it is easier to state these distinctions in the abstract, than it is to apply them convincingly in particular real life cases. This difficulty arises not least because of the tension between the fundamentalist libertarian orientation of liberalism on the one hand, and a statist tendency towards an "official" majority religion on the other, and the damage to both approaches inflict upon the preconditions for democracy:

"The line between criticism in religious matters and blasphemy is a very thin one, as European history has shown. In drawing that line, the Court departs from a civil libertarian doctrine, according to which freedom of expression should always prevail over freedom of religion, as well as from an opposite State-centred view, which would defer to public authorities unlimited power to regulate expression in public space according to the religious sentiment of the majority. Neither one nor the other extreme view is in accordance with the spirit of tolerance which is a feature of a democratic society.'<sup>161</sup>

The same judge attempted to sum up the implications of this "spirit of tolerance" for the attitude of state authorities towards religious expression. He noted an obligation to maintain a stance of strict neutrality and impartiality on religious questions that avoids taking sides in the various controversies, including those involving secularism:

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<sup>161</sup> Ibid.

'Only an approach that seeks to balance free speech and the freedom of others to hold religious beliefs is compatible with the Convention. Indeed, the Court has frequently emphasised the State's fundamental role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, and has stated that this role is conducive to public order, religious harmony and tolerance in a democratic society. It also considers that the State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed. Thus, tolerance requires a content-neutral stance on the part of the State with regard to different forms of expression with a religious connotation.'<sup>162</sup>

Whatever its merits as a general doctrine, this principled (if perhaps one-sided) judicial stance is difficult to maintain when confronted with specific expressions of religious intolerance arising from deeply-held religious convictions whose toleration amounts to an endorsement of intolerance sometimes extending into the incitement towards religious hatred.

Religious based hate crimes can include both discrete forms of hate speech as well as others that overlap with racist hate speech, for example with respect to Nazi and other forms of anti-Semitism and certain types of xenophobia. On the other hand, within the article 10 case law generally questions of religious belief and expression have not always been treated as on a par with those of political belief and expression. This raises the question of possible different considerations arising in cases of religious-based hate crime, including hate speech. Does the state owe obligations to religious believers (and thus secularists) to protect them from serious insults and denigration arising not only from the activities of state officials, but also from those of private individuals and civil society institutions? Alternatively, and as liberal fundamentalism dictates, are human rights considerations to be judicially confined to merely limiting the scope of state actions, such as religious censorship or the enforcement of a single state-endorsed "official" religion,

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<sup>162</sup> Ibid.

including, perhaps, faith in secularism? If such disengaged neutrality is the appropriate stance, must state authorities endorse a permissive attitude to all forms of religious hate speech falling short of incitement to violence - as if this represented a welcome form of "freedom of expression"?

Such one-sided liberalism is clearly challenged by both the doctrine that states possess a wide margin of appreciation in religious affairs when assessing the sensitivities of its citizens. It is also challenged by the express wording of article 10(2) which imposes a clear duty to avoid engaging in expressions that can be interpreted as gratuitous linguistic abuse of other's deeply held religious beliefs, at least where such hurt is not significantly offset by a positive contributions to worthwhile and informed debate on matters of genuine public interest and controversy. Insofar as such an obligation arises based on a duty not to give needless offence, then does it also imply a "right" under the ECHR of both believers and non-believers not to have to suffer from experiencing such insulting abuse?

In *Otto-Preminger-Institut v. Austria*<sup>163</sup> the Court stated:

49... whoever exercises the rights and freedoms enshrined in the first paragraph of [Article 10] undertakes 'duties and responsibilities'. Amongst them – 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.'

In the same judgment, the Court concluded that protection of religious belief could, in addition, be further supported by reference to public order considerations, including presumably the avoidance of open and possibly violent sectarian conflict between different faith groups (including militant atheists): '56... In seizing the film, the Austrian authorities acted to ensure religious peace in that region and to prevent that some people should feel

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<sup>163</sup> Judgment of 20 September 1994, Series A no. 295-A, pp. 18-19, para. 49.

the object of attacks on their religious beliefs in an unwarranted and offensive manner ...'

Whether a case involving a film containing material that one particular faith would find offensive is a direct precedent for the legal regulation of hate speech remains an open question however. A similar point applies to ECHR case law suggesting that, because of the relativity of religious and other moral beliefs generally both within and between different cultural traditions and states, the ECtHR has to afford states a *particularly wide margin of appreciation* to states in assessing which types of sensitivities merit protection from what forms of perceived attacks and insults to specific religious convictions. This suggests judges need to possess an insider's cultural understanding of the religious convictions and sensitivities that prevail within the particular context in question. Without such a cultural-linguistic understanding, which is rarely possible for the majority of an international court, judges will not be able to properly identify either the nature and scope of the required "duties towards the rights of others" under article 10(2) which are relevant to religious forms of hate speech. For instance, in both *Müller and Others v. Switzerland*,<sup>164</sup> and *Wingrove v. the United Kingdom*,<sup>165</sup> the Court emphasised the implications of such presumed moral relativity to variable cultural and sub-cultural contexts, stating in the former case that:

'35 ... it is not possible to find ... a uniform European conception of morals ... By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" ...'

The ECtHR's decision in *Wingrove* was particularly emphatic concerning the State's margin of appreciation with regard to religious sensitivities:

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<sup>164</sup> Judgment of 24 May 1988, Series A no. 133.

<sup>165</sup> Judgment of 25 November 1996, *Reports of Judgments and Decisions* 1996-V).

'58 ... a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion ...'

In these judgments, the Court rejected the liberal commitment towards uncritical toleration of all forms of religious expression by upholding legal restrictions upon offensive and insulting expressions. It expressly rejected claims that these restrictions violated Article 10. The grounds were that the religious feelings and rights of believers had been violated in an unwarranted and offensive manner, and that the restrictions upon "freedom of expression" imposed by the national authorities to both protect such rights and avoid divisive religious conflict were consistent with the Convention.

This conclusion can be supported by a close textual and semantic analysis of the meaning of article 10. However, there is little doubt that it also involves a distinctly policy element involving judges seeking to strike a credible and contextually appropriate balance between competing values and standards, where both "freedom of expression" and the rights of faith groups not be gratuitously insulted are but particular elements of the overall policy mix. For instance, in *Otto-Preminger-Institut* and *Wingrove* protection of religious feelings was judged to, outweigh the applicant's interests in "freedom of expression." On the other hand, these were not hate crime cases, and the question still remains as to how the ECtHR will judge the *relative value* to be placed on these competing standards and values. In different contexts, what value should be afforded to the protection of religious belief, including the right to express belief through openly living a faith-based life free from threats of religious insult and denigration? What weight should be given to the countervailing right of all citizens to express strong criticisms of each and every religious (or secular) doctrine and institutional practice within a democratic context "free" from state censorship on religious



matters? As ever, any possible answer to these related questions, even provisional and contingent ones, cannot be derived from inspecting the meaning of the words and phrases of the ECHR in the abstract. Any such answer depends instead upon their practical interpretation and application in real life cases: the task of the remainder of this section.

The more recent case of *Milanović v. Serbia* (2010)<sup>166</sup> involving religious hate crime merits attention because it shows how such crimes can be judicially interpreted as falling within ECHR doctrine that was initially developed in the context of racism. This case involved the applicant Mr. Života Milanović, who was a leading member of the Vaishnava Hindu religious community, also known as Hare Krishna. He alleged he had suffered a series of discriminatory attacks between 2001 and 2007, which had begun as threats by telephone before escalating into five physical assaults, four of which involved a knife. Each of these attacks occurred just prior to, or immediately after, a major Serbian Orthodox religious holiday.

In an important development, the Court assimilated this case of religious hate crime into earlier doctrines devised in response to the policy imperative of "unmasking" racist hate crime. Indeed, the judges stated that, as in the case of: 'racially motivated attacks, when investigating violent incidents, State authorities have the additional duty to take all reasonable steps to unmask any religious motive and to establish whether or not religious hatred or prejudice may have played a role in the events.'<sup>167</sup> The police had in fact responded to each reported incident and carried out an investigation. However, they were not able to identify perpetrators, despite suggested leads from the applicant concerning an organised right-wing and extremist nationalist group.

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<sup>166</sup> *Milanović v. Serbia*, No. 44614/07, 14 December 2010.

<sup>167</sup> Para. 96-7.

The Court decided that the police officers' attitudes during the investigation, including their reference to the applicant's known religious beliefs and his "strange appearance," suggested that they did not take his case sufficiently seriously as article 3 requires. Also, given a clearly identifiable, and perhaps even predictable, pattern of attacks occurring near a major religious holiday, it was legally relevant that the police had taken no special preventative efforts or stake outs to protect Mr Milanović. The court also considered that it should have been obvious to the police that a member of a vulnerable religious minority such as the applicant was being systematically targeted in a pattern of ongoing abuse. It was equally apparent that future attacks were very likely to follow, particularly in June or July of each year in advance of, or shortly after, a major Serbian religious holiday. Yet, the authorities had failed even to attempt to prevent future attacks by, for instance, placing video or other surveillance in the vicinity of the flat where the incidents had occurred. No police stakeout was ever contemplated, and the applicant was never offered personal protection by a special security detail, which might have deterred future attackers:

'90. In view of the foregoing and while the respondent State's authorities took many steps and encountered significant objective difficulties, including the applicant's somewhat vague descriptions of the attackers as well as the apparent lack of eyewitnesses, the Court considers that they did not take all reasonable measures to conduct an adequate investigation. They have also failed to take any reasonable and effective steps in order to prevent the applicant's repeated ill-treatment, notwithstanding the fact that the continuing risk thereof was real, immediate and predictable.

91. In such circumstances, the Court cannot but find that there has been a breach of Article 3 of the Convention.'

The Court considered both the actions, reactions and inactions of the national authorities, and the practical difficulties they faced in actually proving the specifically discriminatory element of a case, even where there were suspicions of extremist

involvement and sectarian religious associations. It concluded that there had been a violation of article 14 when, taken in conjunction with the duty under article 3 to promptly investigate and unmask discriminatory overtones. However, they also recognised that this duty was not absolute, and can be enforced applied only insofar as it is reasonable possible in the circumstances of each particular case:

'96. The Court considers that, just like in respect of racially motivated attacks, when investigating violent incidents State authorities have the additional duty to take all reasonable steps to unmask any religious motive and to establish whether or not religious hatred or prejudice may have played a role in the events. Admittedly, proving such motivation may be difficult in practice. The respondent State's obligation to investigate possible religious overtones to a violent act is thus an obligation to use best endeavours and is not absolute; the authorities must do what is reasonable in the circumstances of the case ...'

In addition, this case had to provide an answer to the question of whether the state's role is limited to merely restraining itself from imposing religious or theocratic censorship? Alternatively, do human rights in this field transcend merely "negative rights against the state by requiring national authorities to take positive steps to establish appropriate legal sanctions upon examples of hate speech expressed by private citizens and other elements of civil society? A possible argument in favour of the latter option stems from the obligations applicable to the ECtHR itself under article 14 to avoid actions whose likely and predictable results would be to foster discrimination.

'97. The Court considers that the foregoing is also necessarily true in cases where the treatment contrary to Article 3 of the Convention is inflicted by private individuals. Treating religiously motivated violence and brutality on an equal footing with cases that have no such overtones would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. A failure to make a distinction in the way in which situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention ...'

Judges in this case also had to decide upon the implications for state authorities of the

source of such apparent hate crime, including the suspected involvement of members of extremist political groups intolerant of religious minorities. They also had to determine whether their insufficient response to reports of such hate crime is itself explicable in terms of possible discriminatory overtones:

'97. In the present case it is suspected that the applicant's attackers belonged to one or several far-right organisations which, by their very nature, were governed by an extremist ideology.

97. The Court further considers it unacceptable that, being aware that the attacks in question had most probably been motivated by religious hatred, the respondent State's authorities allowed the investigation to last for many years without taking adequate action with a view to identifying or prosecuting the perpetrators.' ...

98. Finally, though perhaps most importantly, it is noted that the police themselves referred to the applicant's well-known religious beliefs, as well as his "strange appearance", and apparently attached particular significance to "the fact" that most of the attacks against him had been reported before or after a major orthodox religious holiday, which incidents the applicant subsequently publicised through the mass media in the context of his own religious affiliation. ...

99. In view of the above, the Court considers that there has been a violation of Article 14 taken in conjunction with Article 3 of the Convention.'

In short, *Milanović v. Serbia* merits close attention because it provides admittedly contingent and provisional answers to some pressing issues concerning the regulation and investigation of suspected examples of religious hate crime committed by private individuals, including those driven by extremist ideologies.

It must be recognised, however, that other ECtHR's judgments on religious hate speech, including *Gündüz v. Turkey*, have taken a more cautious stance. Here, the ECtHRs was less willing to identify alleged religious hate crime where the expression itself took place in a media context deliberately designed to broadcast a diversity of strong and conflicting opinions on a topic of pre-existing public interest and controversy.

Here, an advocate of Sharia Law who openly asserted his faith's incompatibility with democracy made statements during a live broadcast that children borne within a marriage

legally constituted by a purely secular authority could only be considered illegitimate. He used the Turkish phrase "pic," which was commonly deployed and understood as a grave insult. The judges accepted that using this word during a public broadcast was particularly offensive to many secular and other Turks, and its deployment could rightly be classified as a form of hate speech. Furthermore, the court also endorsed the familiar position that the ECHR afforded national authorities a wide margin of appreciation in this area to take into account national and regional sensibilities:

'40. The present case is characterised, in particular, by the fact that the applicant was punished for statements classified by the domestic courts as "hate speech". Having regard to the relevant international instruments ... and to its own case-law, the Court would emphasise, in particular, that tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance), provided that any "formalities", "conditions", "restrictions" or "penalties" imposed are proportionate to the legitimate aim pursued (with regard to hate speech and the glorification of violence, .... Furthermore, ... there can be no doubt that concrete expressions constituting hate speech, which may be insulting to particular individuals or groups, are not protected by Article 10 of the Convention.

Each of these points could be taken as lending support to a finding that the cleric's conviction was justifiable because properly identified hate speech falls outside the protection of article 10. However, the remainder of the judgment contained interpretations of article 10 that tended in the opposite direction:

'42. The Court must consider the impugned "interference" in the light of the case as a whole, including the content of the comments in issue and the context in which they were broadcast, in order to determine whether it was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" ... Furthermore, the nature and severity of the penalties imposed are also factors to be taken into account when assessing the proportionality of the interference ...'

The judgment makes a series of points relating to the legal implications of the expression's

specific context, together with its likely reception as part of serious-minded and informative television debate on a topic of general public interest, which was already being widely debated within Turkish society. It also takes a relatively expansive view on the scope of the "supervision" by the Court of how Turkish authorities regulated instances of religious hate speech:

'43. The Court observes, firstly, that the programme in question was about a sect whose followers had attracted public attention. The applicant, who was regarded as the leader of the sect and whose views were already known to the public, was invited to take part in the programme for a particular purpose, namely to present the sect and its nonconformist views, including the notion that democratic values were incompatible with its conception of Islam. This topic was widely debated in the Turkish media and concerned a matter of general interest, a sphere in which restrictions on freedom of expression are to be strictly construed.

44. The Court further notes that the format of the programme was designed to encourage an exchange of views or even an argument, in such a way that the opinions expressed would counterbalance each other and the debate would hold the viewers' attention. It notes, as the domestic courts did, that in so far as the debate concerned the presentation of a sect and was limited to an exchange of views on the role of religion in a democratic society, it gave the impression of seeking to inform the public about a matter of great interest to Turkish society. It further points out that the applicant's conviction resulted not from his participation in a public discussion, but from comments which the domestic courts regarded as "hate speech" beyond the limits of acceptable criticism ...

45. The main issue is therefore whether the national authorities correctly exercised their discretion in convicting the applicant for having made the statements in question ....'

This way of setting up the issue downplayed the importance of respecting a wide "margin of appreciation" for national authorities deemed to be in a far better position to assess the impact of hate speech upon different sectors of the population. The Court appeared to both recognise the expression "pic" constituted a religious hate crime owing to its particularly offensive character, but then offset the implications of this recognition by treating the context of public expression within a media debate as having greater significance and weight:

'49. In Turkish, “piç” is a pejorative term referring to children born outside marriage and/or born of adultery and is used in everyday language as an insult designed to cause offence. Admittedly, the Court cannot overlook the fact that the Turkish people, being deeply attached to a secular way of life of which civil marriage is a part, may legitimately feel that they have been attacked in an unwarranted and offensive manner. It points out, however, that the applicant's statements were made orally during a live television broadcast, so that he had no possibility of reformulating, refining or retracting them before they were made public ... Similarly, the Court observes that the Turkish courts, which are in a better position than an international court to assess the impact of such comments, did not attach particular importance to that factor. Accordingly, the Court considers that, in balancing the interests of free speech and those of protecting the rights of others under the necessity test in Article 10 § 2 of the Convention, it is appropriate to attach greater weight than the national courts did, in their application of domestic law, to the fact that the applicant was actively participating in a lively public discussion ....'

In addition, the facts of this case also raised the question of whether the promotion of a particularly strict religion, which derives all legitimacy and legality from a divine source, can be considered to be subversive of democratic values, including those embedded in the ECHR, which article 17 expressly defends. If so, then how does this impact upon the status of legal restrictions upon those forms of hate speech that might arise during the course of the advocacy of such religious belief? Are article 17 issues forming part of "militant democracy" also invoked as they are in cases of right-wing extremist hate speech, and if so how? The Court's response was to resort to the distinction between "defending" one's faith in public (whatever its undemocratic and theocratic implications) and actively seeking to subvert democracy through the exercise of power:

'50. Lastly, the national courts sought to establish whether the applicant was campaigning for sharia. In that connection they held, in particular (see paragraph 15 above):

“Mr Bedri Baykam told Mr Gündüz that the aim of the latter's supporters was to 'destroy democracy and set up a regime based on sharia', and the defendant replied: 'Of course, that will happen, that will happen.' [Furthermore,] the defendant acknowledged before this Court that he had made those comments, and stated that the regime based on sharia would be established not by duress, force or weapons but by convincing and persuading the people.” The Turkish courts considered that the

means by which the applicant intended to set up a regime based on religious rules were not decisive.'

The Court had to make a judgment about whether the promotion of this militant version of Sharia Law amounted in itself to an attack upon democracy analogous to how the promotion of totalitarian values by neo-Nazism propaganda raises the question of the "abuse of rights" under article 17? The judges also had to respond to a number of the ECtHR's earlier decisions concerning prohibitions on militant Islamic political parties, including Refah Partisi (the Welfare Party) that had pointed in this direction. In this case, however, the Court opted for the more libertarian position supportive of "freedom of expression." On this liberal ideological basis, the judges sought to distinguish, and thereby avoid, the implications of these earlier cases that had upheld the legality of prohibitions upon anti-democratic religious parties:

'51. As regards the relationship between democracy and sharia, the Court reiterates that ... it was difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on sharia. It considered that sharia, which faithfully reflected the dogmas and divine rules laid down by religion, was stable and invariable and clearly diverged from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervened in all spheres of private and public life in accordance with religious precepts. The Court would point out, however, that Refah Partisi (the Welfare Party) and Others concerned the dissolution of a political party whose actions seemed to be aimed at introducing sharia in a State party to the Convention and which at the time of its dissolution had had the real potential to seize political power (*ibid.*, § 108). Such a situation is hardly comparable with the one in issue in the instant case. Admittedly, there is no doubt that, like any other remark directed against the Convention's underlying values, expressions that seek to spread, incite or justify hatred based on intolerance, including religious intolerance, do not enjoy the protection afforded by Article 10 of the Convention. However, the Court considers that the mere fact of defending sharia, without calling for violence to establish it, cannot be regarded as "hate speech". Moreover, the applicant's case should be seen in a very particular context. Firstly, as has already been noted (see paragraph 43 above), the aim of the programme in question was to present the sect of which the applicant was the leader; secondly, the applicant's extremist views were already known and had been discussed in the public arena and, in



particular, were counterbalanced by the intervention of the other participants in the programme; and lastly, they were expressed in the course of a pluralistic debate in which the applicant was actively taking part. Accordingly, the Court considers that in the instant case the need for the restriction in issue has not been established convincingly.'

The Court's conclusion was that the interference with the applicant's "freedom of expression" was not based on sufficient reasons for the purposes of Article 10, and his conviction accordingly infringed this Article of the Convention.

The fact that this judgment involves a selective and controversial balancing of conflicting values and alternative policy positions is clear from the reasoning of the dissenting judgment in this case. This reaffirmed that the position taken by Judge Pettiti in his concurring opinion in *Wingrove* that the protection of secular values and sensibilities must be recognised as on a par with those of religious faith, and expressed concern that this was not apparent in the majority's decision: 'Such a distinction, intentional or unintentional, is contrary to the letter and spirit of the Convention.' This minority judgment noted:

'In the present judgment the majority reached the conclusion that the conviction of the applicant by the Turkish courts infringed Article 10. However, they accepted that:

- (a) the word "piç" is hate speech and the applicant was convicted for hate speech and not for participating in a public debate (paragraph 44);
- (b) Contracting States enjoy a wide margin of appreciation in respect of offensive remarks in moral and especially religious fields (paragraph 37);
- (c) the word "piç" is an attack on the feelings of secular people in an unwarranted and offensive manner (paragraph 49).

Against all these findings, which might have been a convincing reasoning for finding no violation, the majority reached the conclusion of violation on one single ground: that the Turkish court in its decision of 1 April 1996 had not given enough weight to the word "piç". This is simply not correct. In the reasons for its decision, the court specifically mentions the applicant's statement regarding the children of those who are married by civil law being "piç". This sentence is one of the main elements in the decision that led to the applicant's conviction. It is true that the Turkish court also examined other statements by the applicant and came to the conclusion that the applicant's statements in their entirety constituted incitement to hatred.'

This dissenting judge endorsed the approach of Turkey's national courts because the applicant was speaking not as private citizen but with the added authority of a religious leader appealing to divine authority to insult those whose beliefs differed from his own. He was:

'speaking on the programme from the vantage point of a religious authority. He claimed that he was acting with the will of God. He asserted that his strong words against democracy and secularism and his advocacy of a regime based on sharia reflected God's wishes. Therefore, those who did not share his opinions and who defended democracy and secularism were depicted as ungodly. In my opinion, this is a good example of hate speech.'

In short, this case is relevant to our present concerns in that it addresses not only the limits of prohibitions upon religious hate speech but also the controversial question of assessing those faith systems that are judged to be especially hostile to the very democratic values that underpin the ECHR itself, which article 17 has been formulated to defend. It also touches upon the status of secularism as itself a legally protected faith system, as well as displays of extreme religious intolerance towards secularism manifested in the use of offensive insults, which is rooted in strong faith-based convictions. Finally, the majority's decision appears to be grounded in a problematic distinction between simply "defending" an openly undemocratic interpretation of Sharia law (interpreted as an expression of religious freedom within a pluralist context of a public debate in which various conflicting opinions balance each other out), and forms of hate speech aggressively inciting hatred towards either other faiths or secularism. The viability of this distinction, how it was drawn, and its consistency with racially insulting hate speech, all remain subject to later judicial re-interpretation and development.

### **c/. Disability related hate crime**

The judicial expansion of scope of hate crimes potentially falling within the scope of the ECHR beyond those relating to race/ethnic hate crimes was taken one step further in the case of *Dorđević v. Croatia*, 2012.<sup>168</sup> The applicants, mother and son Radmila and Dalibor Dordevic, are two Croatian nationals of Serbian ethnicity, living together in social housing provided by the Zagreb Municipality. Dalibor was born in 1977 and suffers from a combination of physical and intellectual impairments. His physical abilities are severely impaired: his eyesight is poor, his spine is painful, he suffers from severe foot deformation, and he needs assistance to perform basic tasks. He has been deprived of his legal capacity and placed under his mother's plenary guardianship.

Since 2006 the applicants suffered ongoing abuse and harassment from a group of local children and youths who attend the same school. Most harassment consisted of name-calling, spitting, lewd comments, yelling, insulting drawings on the pavement in front of the applicants' flat and causing damage to the applicants' balcony, windows and door, and occurred almost daily in the afternoon when children returned from school, in the evening, when they congregated around a bench situated in front of the applicants' ground floor flat and sometimes even during the night. The discriminatory aspect of such harassment is explicable in part because of Dalibor's disability as well as both applicants' ethnicity. Since 2009 this harassment occasionally escalated into more serious acts of physical violence against Dalibor, which occurred while he was walking outside alone, and included burning his hands with cigarettes, banging his head against a wall. He was also pushed against a fence, and fell down becoming unconscious and he was hit with a ball in the face. The seriousness of these incidents of disability related hate crime was greatly

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<sup>168</sup> Application no. 41526/10, 24 July 2012.

enhanced by his physical impairments.

The applicants complained about their plight since at least July 2008, regularly asking the authorities to identify and punish the perpetrators and to prevent further harassment, with the result that a wide range of authorities became aware of the situation and duty bound to support the family, including the police, the Public Prosecutor, the Disability Ombudsman, the local school, the local Centre for Social Welfare and the Municipality. However, the harassment continued unabated. The police remained largely passive to the applicants' predicament, downplaying at all times its seriousness, and failing altogether to take such basic steps as identifying the perpetrators.

This case involved a complaint that a pattern of disability related abuse including burning with cigarettes, had not been responded to appropriately by the Croatian authorities as article 3 requires, and that one of the results of this was a violation of an applicant's right to private family life contained in article 8.

This case presented the Court with an opportunity to clarify the obligations incumbent on public authorities in the particular context of disability hate crime, including early intervention, effective inter-institutional cooperation and measures to support the victims. The Court had to determine the contents of States' obligations in relation to discriminatory ill treatment perpetrated by private individuals motivated by a combination of factors including the disability of the victims. It is helpful to consider the nature of the claims the applicants made in this case in some detail. They maintained that ongoing harassment including acts of physical violence against the son and verbal abuse against both applicants, had disrupted their daily lives and caused them a significant level of constant stress and suffering, in particular in view of the first applicant's medical condition. They

argued that this ongoing pattern of harassment and abuse met the requisite standard of intensity under both Articles 3 and 8 of the Convention, and that Article 2 (right to life) was also applicable: 'given the escalation of violence against the first applicant in view of his extreme vulnerability and also in view of the likelihood, evidenced in research on disability hate crime, of low-level harassment if left unchecked turning into full-scale violence, possibly resulting in extreme circumstances in death or severe ill-treatment.'<sup>169</sup>

In addition, the applicants claimed that the Croatian domestic legal system: 'did not provide any remedies affording redress in respect of disability hate crime; this was supported by the fact that the Government had not submitted any relevant case-law to support their assertions as to the availability and efficiency of the remedies they relied on.'<sup>170</sup> They also contested the availability of appropriate civil law actions for damages against the parents of the children involved in the abuse by arguing that the ECtHRs had already held in cases against Croatia that effective deterrence against attacks on the physical integrity of a person required efficient criminal-law mechanisms that would have ensured adequate protection in that respect.<sup>171</sup> The applicants insisted that although minor-offences proceedings were available, they applied only to minor public order offences and that therefore such a remedy was clearly inadequate in respect of the harm done to the applicants' physical and psychological integrity.

This case is especially interesting in that it included the intervention of a NGO, European Disability Forum who, according to the report: 'viewed the issues in the present case through the lens of disability hate crime. It maintained that recognising a hate crime against persons with disabilities represented a challenge for many legal systems since the

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<sup>169</sup> Para. 84.

<sup>170</sup> Para.85.

<sup>171</sup> Para 87.

use of their vulnerability tended to prevent the law-enforcement agencies and courts from identifying the actions as a hate crime.' In addition, this body argued that:

'hostile behaviour towards persons with disabilities that provoked violent attacks was inherently discriminatory since the victims were chosen because of their visible disability ... The specific recognition of disability hate crime was a recent trend. Relying on Article 5 of the United Nations Convention on the Rights of Persons with Disabilities ... it submitted that that Article confirmed the entitlement of persons with disabilities to protection on an equal basis to others. For the State, this again meant the ability to recognise and address discrimination based on the victim's disability, and sufficient knowledge about disability to be able to apply the law with respect for the needs of persons with disabilities. In specific cases, observance of the non-discrimination principle might mean recognising the specific situation of persons with disabilities compared with their non-disabled peers. The second paragraph of Article 5 alluded to the obligation of the State to protect persons with disabilities against discrimination on all grounds. Again, meeting this obligation required extensive training of State agents.'<sup>172</sup>

The body also emphasised that the UN Convention obliged States Parties to 'take all legislative, administrative, judicial and other measures to prevent persons with disabilities' from being subjected to violence ... so far, disability hate crime had not received enough attention from law-makers and law-enforcement authorities.' They further claimed that:

'This had resulted in a failure to recognise disability hate crime as such, as well as in under-reporting and misunderstanding of that phenomenon. The response of the authorities to this problem should shift from reactive to proactive and be aimed at protecting persons with disabilities from all acts of violence.'<sup>173</sup>

The Court had to consider the position under each of the specific convention grounds. It decided that 'under both Articles 3 and 8 the State authorities had a positive obligation to protect the first applicant from the violent and abusive behaviour of the children involved. From the standpoint of the right not to be subjected to "inhuman and degrading treatment," the Court provided a helpful clarification of criteria relevant to such attacks. It reiterated that ill-treatment must attain a minimum level of severity if it is to fall within the scope of

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<sup>172</sup> Paras. 131-34.

<sup>173</sup> Paras. 135-6.

article 3, whose assessment is relative: 'it depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim.'<sup>174</sup>

'Treatment has been held by the Court to be “inhuman” because, inter alia, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering ... Treatment has been considered “degrading” when it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance ... The Court considers that the harassment of the first applicant – which on at least one occasion also caused him physical injuries, combined with feelings of fear and helplessness – was sufficiently serious to reach the level of severity required to fall within the scope of Article 3 of the Convention and thus make this provision applicable in the present case.'<sup>175</sup>

The second applicant, the first applicant's mother, had not been exposed to any form of violence affecting her physical integrity. However, she had been subject to the continuing harassment of the first applicant – her disabled son, for whom she has been taking care – and there were milder incidents of harassment directed towards her personally. This provided the basis for her claim under article 8 that her right to a private life had been violated through the lack of appropriate official response to pattern of disability-related hate incidents. The Court held that these:

'caused disruption to her daily life and her routines, which had an adverse effect on her private and family life. Indeed, the moral integrity of an individual is covered by the concept of private life. The concept of private life extends also to the sphere of the relations of individuals between themselves. ... It follows that Article 8 is applicable to the circumstances of the present case as regards the complaints concerning the second applicant.'<sup>176</sup>

The Court declared the complaints under Articles 3, 8 and 13 of the Convention had been established , and awarded both compensation and costs.

In doing so, the court articulated another important aspect of how criminal justice

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<sup>174</sup> Para.94.

<sup>175</sup> Paras. 95-6

<sup>176</sup> Paras. 97-8

systems are required to respond to hate crimes: the need to recognise a pragmatic dimension effecting decision-making within such systems. Indeed, it expressed a level of understanding for the pragmatics and limitations of law enforcement, including restraints stemming from limited resources, the need to prioritise addressing serious risks over less likely ones, and even human rights law itself, such as measures guaranteeing due process and privacy limiting how various aspects of law enforcement can be conducted:

'139. Bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the scope of this positive obligation [under article 3] must, however, be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Not every claimed risk of ill-treatment, therefore, can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk of ill-treatment of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Article 8 of the Convention.'

In sum, the ECtHR declared in this case that the failure of the Croatian State to prevent the persistent harassment of a severely disabled young man amounted to a breach of: 1/. His Article 3 right not to be subjected to torture, inhuman or degrading treatment or punishment; 2/. A breach of his mother's Article 8 ECHR right to respect for her family and private life; and 3/. A breach of the applicant's right to an effective remedy in the domestic courts in breach of Article 13. This is an important judgment on the protection from harassment that the State must ensure for disabled people and their families. In short, a number of ECtHR case decisions have developed a series of progressive principles



concerning a positive duty on national authorities to properly investigate racist, religious and disability hate incidents in a timely manner. Such authorities are obliged to seek, as a matter of policy, to unmask evidence of a specifically discriminatory dimension, whose presence would aggravate the nature of the offence, and that failure to do so will result in a financial compensation as well as a potentially embarrassing public reprimand.

### **c/. Homophobic hate crime**

In addition to race, ethnicity and more recently disability, categories and possible remedies stemming from the ECHR are increasingly being drawn upon in the context of homophobic hate incidents. In a general context, the ECtHR has repeatedly held that discrimination based on sexual orientation is as serious as discrimination based on race, gender, and has found incompatible with the Convention national laws concerning same-sex conduct, the age of consent, military service, adoption, child custody and inheritance that discriminate on the basis of sexual orientation.<sup>177</sup> However, this general stance against discrimination based upon sexual orientation has only recently had to grasp with the specific challenges posed by homophobic forms of hate speech.

For example, in *Vejdeland v. Sweden*,<sup>178</sup> the ECtHR had to interpret a hate incident in which members of "National Youth" subjected upper secondary school children to anti-gay propaganda by distributing approximately 100 leaflets placed inside the school in and around the student's lockers. The contents of these leaflets raised, in highly prejudicial and insulting terms, concerns about how teachers were presenting homosexuality in affirmative

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<sup>177</sup> See *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 97, ECHR 1999, VI.

<sup>178</sup> *Vejdeland v. Sweden*, 9 February 2012, Application no. 1813/07.

anti-discriminatory terms. They included the following statements encouraging students to contest such positive anti-discriminatory interpretations in favour of arguments supporting a return to a more traditional and prejudicial orientations allegedly characteristic of the "national character" and more in keeping with Sweden's cultural tradition:

'In the course of a few decades society has swung from rejection of homosexuality and other sexual deviances (avarter) to embracing this deviant sexual proclivity (böjelse). Your anti-Swedish teachers know very well that homosexuality has a morally destructive effect on the substance of society (folkkroppen) and will willingly try to put it forward as something normal and good.

- Tell them that HIV and AIDS appeared early with the homosexuals and that their promiscuous lifestyle was one of the main reasons for this modern-day plague gaining a foothold.

- Tell them that homosexual lobby organisations are also trying to play down (avdramatisera) paedophilia, and ask if this sexual deviation (sexuella avart) should be legalised.'

This case merits close attention both for its specific topic as well as how it addressed the classic tension between "freedom of expression" guaranteed by article 10 of the ECHR, and both national and transnational measures designed to combat the damage stemming from discriminatory hate speech which necessarily restricts this problematic type of expression. In this case, questions arose in a concrete way concerning the meaning and scope of restrictions upon hate speech, and whether their "interference" with the applicant's "freedom of expression" was deemed "proportionate to a legitimate aim" of protecting a group from discriminatory abuse as ECHR doctrine requires.

The applicants alleged that the Swedish Supreme Court judgment of 6 July 2006 affirming their convictions for hate speech ("agitation against a national or ethnic group (*hets mot folkgrupp*"), under domestic law constituted a violation of their "freedom of expression" under Article 10 of the Convention. The details of the offence for which the applicants were convicted are contained in Chapter 16, Article 8 of the Swedish Penal Code

(Brottsbalken, SFS 1962: 700), which provides that a person who, in a disseminated statement or communication, threatens or expresses contempt for a national, ethnic or other such group of persons with allusion to race, colour, national or ethnic origin, religious beliefs or sexual orientation, should be convicted of agitation against a national or ethnic group. This offence carries a penalty of up to two years' imprisonment, which, if considered "aggravated," can be enhanced by a supplementary period of imprisonment for between six months and four years. The applicants submitted that, because of the lack of clarity of the offence of agitation, they had been punished without proper "due process of law" in violation of Article 7 of the Convention,<sup>179</sup> the punishments being suspended sentences for three of the applicants combined with fines ranging from SEK 1,800 (approximately 200 euros (EUR)) to SEK 19,000 (approximately EUR 2,000) with a fourth applicant sentenced only to probation.

Unsurprisingly, and as we have already seen in line with the arguments of other perpetrators of hate speech, the applicants adopted the defence that they had merely been seeking to start and contribute to a public debate about the claimed lack of objectivity in the education dispensed in Swedish schools. Such an activity is, they claimed, an entirely legitimate contribution to public debate and "necessary in a democratic society." As such their actions fell within the protection of expressions afforded by article 10, a stance that had previously prevailed in the Swedish Court of Appeal before later being overturned by the judges of the Swedish Supreme Court by a narrow 3 to 2 majority. Furthermore, they disputed that the content of the leaflets was in fact disparaging, contemptuous or insulting to homosexuals (as Swedish criminal law required for their conviction). The applicants

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<sup>179</sup> Article 7 provides: 'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. ...'

claimed that, in any event, they had not subjectively intended to express contempt for homosexuals as an entire group, or to incite others to commit discriminatory acts against them. Once again, such arguments sought in effect to take their propaganda actions outside the scope of Sweden's hate crime law.

A particularly interesting part of this case is that the Court allowed the NGOs Interights (the International Centre for the Legal Protection of Human Rights) and the International Commission of Jurists, to make third party interventions in relation to hate crime. These were designed to promote an expansive judicial interpretation of the scope of legal protection for victims of types of homophobic hate speech that are degrading, insulting or inciting of group hatred, such that these are brought up to the same level as that already afforded to, say, racist hate speech. This harmonisation is needed, these NGO's claimed, because of the likely damage to personal, as well as group, identity and sense of group belonging is likely to be analogous:

'44 ... The present case provides an opportunity for the Court to consolidate an approach to hate speech directed against a person or class of persons because of their sexual orientation that is elaborated in such a way so as to ensure that they are protected from the harmful effects of such expression. A clear analogy can be drawn between racism and xenophobia – which have been the subject matter of much of the Court's jurisprudence – and sexual orientation.

45. Sexual orientation should be treated in the same way as categories such as race, ethnicity and religion which are commonly covered by hate-speech and hate-crime laws, because sexual orientation is a characteristic that is fundamental to a person's sense of self. It is, moreover, used as a marker of group identity.

46. When a particular group is singled out for victimisation and discrimination, hate-speech laws should protect those characteristics that are essential to a person's identity and that are used as evidence of belonging to a particular group. Restrictions on freedom of expression must therefore be permissible in instances where the aim of the speech is to degrade, insult or incite hatred against persons or a class of person on account of their sexual orientation, so long as such restrictions are in accordance with the Court's well-established principles.'

To resolve the interpretive issues raised before it, the Court had to apply a series of tests

derived from articles 10 and 7. Sweden's hate crime law restricting expression would not infringe the Convention if they can be shown to meet the requirements of Article 10(2). In other words, the judges had to determine whether these restrictions were “prescribed by law”, whether they pursued one or more of the "legitimate aims" set out in that paragraph, and whether they were “necessary in a democratic society” in order to achieve those policy aims. Concerning the first test, 'Lawfulness and legitimate aim,' the Court considered that the impugned interference of expression rights by the Penal Code was in fact sufficiently clear and foreseeable, and thus “prescribed by law” within the meaning of article 7. The Court further determined that the restriction on expression for the sake of protecting endangered groups vulnerable to discrimination and abuse served a "legitimate aim;" namely “the protection of the reputation and rights of others” within the meaning of Article 10(2). On the second requirement, whether the restriction has to be recognised as “necessary in a democratic society,” this required the Court to determine whether it corresponded to the existence of a “pressing social need”. In turn, this is an issue on which Contracting States enjoy a wide "margin of appreciation," albeit subject to "European supervision" embracing both the legislation and its institutional and judicial application in practice.<sup>180</sup> This question require consideration not only of the particular content of the statements but also the particular context in which they were made. The Court also had to determine whether the criminal law restrictions at issue were “proportionate” to the legitimate aim pursued, and whether the reasons adduced by them to justify them are both “relevant and sufficient.”<sup>181</sup> In this case, the judges re-affirmed earlier ECHR doctrine that "freedom of expression" remains applicable even to information or ideas that 'offend,

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<sup>180</sup> Paras. 51-2.

<sup>181</sup> Para., 52.

shock or disturb,' and that restrictions must be construed strictly, and the need for any restrictions must be established convincingly.<sup>182</sup>

The Court accepted that making a genuine and worthwhile contribution to a policy debate can in law amount to an acceptable purpose in principle. However, in this particular case the wording of the leaflets cast doubt on the applicant's claim in that it portrayed homosexuality as “a deviant sexual proclivity” that had “a morally destructive effect on the substance of society”. These amounted to 'serious and prejudicial allegations.' To constitute a permissible type of restriction on free expression, incitement to hatred does not necessarily entail a call for act of violence, or other criminal acts. Instead, it can include: 'insulting, holding up to ridicule or slandering specific groups of the population.'<sup>183</sup> Such acts of hate speech:

'can be sufficient for the authorities to favour combating racist speech in the face of freedom of expression exercised in an irresponsible manner. (see *Féret v. Belgium*, no. 15615/07, § 73, 16 July 2009). In this regard, the Court stresses that discrimination based on sexual orientation is as serious as discrimination based on “race, origin or colour” (see, inter alia, *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 97, ECHR 1999, VI).

On the question of proportionality, the size and nature of the intended audience, as well as the question of whether the context allows them to refuse the communications, can all be relevant factors:

'56. The Court also takes into consideration that the leaflets were left in the lockers of young people who were at an impressionable and sensitive age and who had no possibility to decline to accept them (see, *mutatis mutandis*, *Handyside v. the United Kingdom*, 7 December 1976, § 52, Series A no. 24). Moreover, the distribution of the leaflets took place at a school which none of the applicants attended and to which they did not have free access.'

On the question of whether a “pressing social need” existed, and the reasons the authorities

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<sup>182</sup> Para. 53.

<sup>183</sup> Para. 55.

gave to justify the restriction, the Court noted that: 'along with freedoms and rights people also have obligations; one such obligation being, as far as possible, to avoid statements that are unwarrantably offensive to others, constituting an assault on their rights.'<sup>184</sup> When assessing the "proportionality" of these restrictions with freedom of expression it is relevant to consider: 'the nature and severity of the penalties imposed.' Given the merely suspended sentences of imprisonment for offences that carry a maximum of four years imprisonment, the Court did not find these penalties excessive and thus disproportionate in the circumstances to the legitimate aim pursued, and that the reasons given by the Supreme Court in justification of those measures were relevant and sufficient could therefore reasonably be regarded by the national authorities as necessary in a democratic society for the protection of the reputation and rights of others.'<sup>185</sup> For these reasons, the Court concluded that the Swedish government's case met the three-stage test that the application does not reveal a violation of Article 10 of the Convention, which in turn affirms the legitimacy of these criminal laws in the context of homophobic hate speech.

This case is particularly important in extending the scope to sexual orientation of the earlier decision in *Féret v. Belgium*, that "inciting to hatred" does not necessarily entail a call for an act of violence, or other criminal acts, and that attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favour combating hate speech in the face of freedom of expression exercised in an irresponsible manner.'<sup>186</sup> The ECtHR had previously held that 'abuse of freedom of expression is incompatible with democracy and human rights and

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<sup>184</sup> Para. 57.

<sup>185</sup> Paras. 58-59.

<sup>186</sup> *Féret v. Belgium*, no. 15615/07, 16 July 2009.

infringes the rights of others.<sup>187</sup> On the other hand, the Court also failed to consider whether, by virtue of Article 17, homophobic “hate speech,” properly defined, already falls outside the protection of Article 10 because of its quality as an “abuse of rights.” Article 17 will be discussed below.

In some respects, the minority but concurrent judgment of one of the judges, Judge Yudkivska (Joined by Judge Villiger) merits close analysis. This is because compared with the more legalistic approach of the majority, it pays more attention to the Article 17 dimension, as well as the overall policy dimension, including the militant democracy position of actively defending European values from their subversion by political extremists and racist ideologies that has learned the lessons of the mid-20th Century experience, where such ideologies incited up genocide possibilities against religious, racial, ethnic and sexuality minority groups that were barely imaginable beforehand:

‘cases like the present one should not be viewed merely as a balancing exercise between the applicants’ freedom of speech and the targeted group’s right to protect their reputation. Hate speech is destructive for democratic society as a whole, since “prejudicial messages will gain some credence, with the attendant result of discrimination, and perhaps even violence, against minority groups”, and therefore it should not be protected. ... Linking the whole group in the present case to the “plague of the twentieth century” should not be granted the protection of Article 10 either.

11. Our tragic experience in the last century demonstrates that racist and extremist opinions can bring much more harm than restrictions on freedom of expression. Statistics on hate crimes show that hate propaganda always inflicts harm, be it immediate or potential. It is not necessary to wait until hate speech becomes a real and imminent danger for democratic society.

12. In the words of the prominent US constitutionalist Alexander Bickel: “... This sort of speech constitutes an assault. More, and equally important, it may create a climate, an environment in which conduct and actions that were not possible before become possible ... Where nothing is unspeakable, nothing is undoable.”

Having retraced how different types of hate crime, including hate speech, ranging from

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<sup>187</sup> Witzsch v. Germany (dec.), no. 4785/03, 13 December 2005.



racist through to disability-related have become subject to legal regulation through articles 3, 10 and 14 of the Convention, it is now possible to examine the position of journalists, editors and owners of media outlets. In particular, it is now appropriate to examine which considerations can and have been applied by the ECtHR to determine the extent to which such individuals can be subjected to lawful restrictions on their "freedom of expression," including, in extreme cases, criminal convictions under national hate speech legislation.

### **Countering Hate Speech that Subverts Democratic Rights under Article 17 ECHR**

During the analysis carried out over the previous subsections, we have had good reason to mention aspects of article 17, albeit in passing. At this stage of our investigation, it is now both possible and timely to address the meaning, scope and implications of this article within the context of hate crime cases as a topic in its own right. For its part, article 17 of the Convention states:

'nothing in [the] 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.'

The scope is clearly broad - "nothing in ...any right" could not be more extensive. Clearly, it covers all the possible ECHR based arguments that those defending an attribution of hate crime, including hate speech might choose to make to defend the legality of their actions. These include "freedom of speech" under article 10 and "freedom of religion" under article 9. The key phrase demanding interpretation is "aimed at the destruction ... or their limitation." In other words, where any person, group or state seeks to justify hate crime by reference to one or more of the convention rights, and where this justification refers to an activity, such as hate crime, with discriminatory implications limiting the capacity of other

citizens to enjoy any their other convention rights, then article 17 can come into play. Where this occurs, then the ECtHR can refuse to accept such would-be "justifications" whatever their other merits because to do so would be to destroy or limit the enjoyment by others of their convention rights.

This measure operates almost as a form of estoppel in that it is designed to combat the hypocritical exploitation of any of the convention rights, most commonly freedom of expression, religion and political association, to negate or limit the rights of others to enjoy the benefits of any of these rights. *Lawless v. Ireland*, held that the purpose of Article 17:

'in so far as it refers to ... individuals is to make it impossible for them to derive from the Convention a right to engage in any activity or perform any act aimed at destroying any of the rights and freedoms set forth in the Convention; ... no person may be able to take advantage of the provisions of the Convention to perform acts aimed at destroying the aforesaid rights and freedoms''<sup>188</sup>

Article 17 does not mean that those to whom it is applied are stripped of their convention rights either generally, or with respect to the particular right that is at issue in the immediate case. Instead, its acceptance by the Court merely acts to block the assertion of that right only in a particular case where to do otherwise would prove counterproductive to the sum total of human rights because it would result in the abuse of the rights of others. It is, therefore, best interpreted as a *defensive measure* - akin to those endorsed by supporters of "militant democracy" - to safeguard the integrity of the framework of values embedded in the ECHR, notably tolerance, political pluralism, democracy, social peace and non-discrimination. Invoking article 17 provides a way of defending these from cynical exploitation by perpetrators of hate crime or hate speech in contexts where they are pursuing discriminatory or other undemocratic aims that are destructive of the values and

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<sup>188</sup> judgment of 1 July 1961, Series A no. 3, para.7.

aims of the Convention as a whole.

This measure has been used, albeit not always consistently, by the ECtHR to justify the application of national prohibitions of hate speech without having to go through the extensive and incremental "balancing exercise" demanded by the "freedom of expression" provisions and their so-called "limitations" contained in article 10. As already noted, these demand that the general principle of such expression be restricted where specific conditions are shown to be met with relevant and sufficient reasons and justifications, and subject to a margin of appreciation supervised by the Court itself. It is important to clarify how article 17 is being used in hate speech cases because it can be deployed to justify restrictions and prohibitions on such speech as an "abuse of rights" in contexts where the outcome of the application of article 10 would, perhaps, be far more uncertain.

The difficulty here though lies in ascertaining the relative priority of articles 17 relative to, say articles 9 and 10. It is by no means clear that despite its wording article 17 issues are being considered first, with the other claims considered if but only if a claim is shown not to involve the abuse of convention rights. Arguably, this is approach that the an emphatic interpretation of the wording of article 17 demands. However, the fact that in some of the cases we have already discussed, particularly *Vejdeland v. Sweden* and *Gündüz v. Turkey*, issues in relation to hate crime and hate speech were "resolved" by the majority without any reference to this article, even though it was potentially relevant. In turn, this suggests that this is an area in which ECtHR judges have carved out for themselves a broad range of judicial discretion. In some cases, as we will see, article 17 can be treated as almost an entrenched constitutional clause that has relative priority, whereas in others reference to it is optional, and then sometimes only as an afterthought once the issue has already been

settled by reference to the tests contained in one of the other articles. At the same time, *the limited scope* of article 17 must also be appreciated because there are some situations where the regulation, restriction or prohibition of hate speech can only be justified under article 10.

An early example of the judges deploying of article 17 in a context that is especially relevant to hate crime and hate speech is found in the case of *J. Glimmerveen And J. Hagenbeek v The Netherlands*.<sup>189</sup> This involved a challenge to the applicant's conviction under Art. 137 of the Dutch Criminal Code prohibiting the: 'expression of views that may be offensive for a group of people by reason of their race, religion or other conviction or that incite to hatred against or discrimination on of or violent behaviour towards people by reason of their race, religion or other conviction unless these views are expressed for the purpose of imparting information.' The leaflet from an organisation called the NVU, which led to the applicants' original conviction under this law, was expressly addressed to the "white Dutch people." It contained a series of statements advocating the forced removal of "foreigners" from the Netherlands, stating:

'that the N . V . U . will continue its battle for the white people of the Netherlands until political power of (certain political parties) and other related parties will have been definitely broken. As soon as the Nederlandse Volks Unie 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 . . '

In this case, the ECtHR judges invoked article 17 in ways that clarified its purpose and effects, and hence the range of situations where judges are entitled to draw upon it. Our earlier point concerning the estoppel-like nature of its effect, namely a temporary and context-specific blocking of the assertion of rights, was fully recognised:

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<sup>189</sup> Decision of 11 October 1979, On the Admissibility of the Applications.

'The general purpose of Article 17 is to prevent totalitarian groups from exploiting in their own interests the principles enunciated by the Convention. To achieve that purpose, it is not necessary to take away every one of the rights and freedoms guaranteed from persons found to be engaged in activities aimed at the destruction of any of those rights and freedoms. Article 17 covers essentially those rights which, if invoked, 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. It is with the above considerations in mind that the Commission examined the applicants' complaints.'<sup>190</sup>

The Commission held that the policy advocated by the applicants is inspired by the overall aim of removing 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.' The Commission also considered that: 'this policy is clearly containing elements of racial discrimination which is prohibited under the Convention and other international agreements.' The Commission made the interesting argument that, in addition to other considerations, given its international law obligations under anti-discrimination measures, the Netherlands' government was actually obliged to prohibit such expressions, and any failure to do so would have generated liability for this omission:

'Indeed, the Government have drawn the attention of the Commission in particular in the light of Article 60 of the Convention, to the Netherlands' international obligations under the International Convention on the Elimination of all Forms of Racial Discrimination of 1965, to which the Netherlands acceded in 1971. The Netherlands' authorities, in allowing the applicants to proclaim freely and without penalty their ideas would certainly encourage the discrimination prohibited by the provisions of the European Convention on Human Rights referred to above and the above Convention of New York of 1965. The Commission holds the view that the expression of the political ideas of the applicants clearly constitutes an activity within the meaning of Article 17 of the Convention. The applicants are essentially seeking to use Article 10 to provide a basis under the Convention for a right to engage in these activities which are, as shown above, contrary to the text and spirit of the Convention and

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<sup>190</sup> The case-law cited was "Lawless" Case (Merits), Judgment of 1 July 1961, para. 6.

which right, if granted, would contribute to the destruction of the rights and freedoms referred to above. Consequently, the Commission finds that the applicants cannot, by reason of the provisions of Article 17 of the Convention, rely on Article 10 of the Convention.'

In this case, article 17 was deployed almost as an estoppel type remedy to neutralise only the application of a convention right in a specific case justified by reference to the self-defence of conventional values but without, in any other respect, negating that right more generally. The applicants were not able to rely upon article 10 in the context in question. However, had the authorities gone on to impose a blanket ban on the applicants engaging in *any form* of political expression not destructive of the rights of others, then their article 10 rights would still be available to challenge the lawfulness of this overly-wide ban.

Another early case was '*B.H., M.W., H.P. and G.K. v. Austria*, involving a challenge to a conviction under Austria's National Socialism Prohibition Act (Verbotsgesetz).<sup>191</sup> This states:

'Whoever performs activities inspired by National Socialist ideas in a manner not coming within the scope of Sections 3a to 3f shall be liable to punishment by a prison sentence between 5 and 10 years, and if the offender or his activity is particularly dangerous, by a prison sentence of up to 20 years, unless the act is punishable under a different provision stipulating a more serious sanction. The court may also pronounce the forfeiture of property.'

The applicants were punished for their membership and leading functions within two right wing political organisations: "Aktion Neue Rechte" (ANR) and "Nationalistischer Bund Nordland" (NBN). These were held to constitute activities inspired by National Socialist ideas. For example, these included the preparation and promotion of publications pamphlets suggesting that the killing of six million Jews by the Nazis was a lie. In addition,

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<sup>191</sup> *B.H., M.W., H.P. and G.K. v. Austria*, no. 12774/87, Commission decision of 12 October 1989, DR 62;

the ANR's party programme was based on an ideology including the alleged biological differences between individuals, peoples and races.

The applicants claimed that Section 3g, as applied in their case, wrongly interfered with their "freedom of expression" guaranteed by Article 10 because it provided a "disproportionate" sanction for the expression of certain opinions, on particular on historical facts which should be discussed freely in a democratic society. They also complained of discrimination contrary to Article 14 on account of their being Austrians attached to German nationalism, and state that similar sanctions are not provided for those who deny, minimize or defend communist crimes or war crimes of the Allied Powers. Finally, they invoked Article 18 claiming that the restrictions of their "freedom of expression" were applied for purposes other than those authorised by the Convention, namely in order to suppress German nationalist thinking and publications which were not in fact forbidden.

The Commission rejected each of these contentions in emphatic terms that set both the scene and tone for later judgments. A particularly interesting feature is the reference to the particular historical context and background of extreme right-wing German nationalism as a justification for a wide prohibition of a certain type of political hate crime that, in another context, might be interpreted as excessive. Another feature is how article 17 was deployed, in classic "militant democracy" fashion, to reject the grossly hypocritical argument that the Austrian prohibition was, in itself, discriminatory and partisan in that it lacked political "neutrality":

However, the Commission finds no indication of a violation of these provisions. The prohibition against activities involving expression of National Socialist ideas is both lawful in Austria and, in view of the historical past forming the immediate background of the Convention itself, can be justified as being

necessary in a democratic society in the interests of national security and territorial integrity as well as for the prevention of crime. It is therefore covered by Article 10 para. 2 (Art. 10-2) of the Convention. Insofar as National Socialist activities are treated differently in Section 3g from those of other political groups, this has an objective and reasonable justification in the historical experience of Austria during the National Socialist era, her treaty obligations, and the danger which activities based on National Socialist thinking may constitute for the Austrian society.'

This reasoning confined itself to article 10 considerations which may have been given a certain priority as they were addressed first. However the judges then went on to address the article 17 points to dismiss the claim that the differential treatment of Nazi propaganda relative to that of other ideologies amounted to an unlawful form of discrimination under article 14:

'The Commission also refers to Article 17 (Art. 17) of the Convention The Commission notes that National Socialism is a totalitarian doctrine incompatible with democracy and human rights and that its adherents undoubtedly pursue aims of the kind referred to in Article 17 (Art. 17). There is therefore no appearance of discrimination contrary to Article 14 (Art. 14) of the Convention. ... The applicants' complaints based on Articles 10, 14 and 18 (Art. 10, 14, 18) of the Convention are therefore manifestly ill-founded.'

This case referred to another instances in the same year where the Commission deployed article 17 to justify the legal suppression of extremist hate speech as a form of incitement to discrimination. In *Michael Kühnen v. The Federal Republic of Germany* 1988,<sup>192</sup> The European Commission of Human Rights sitting in private decided that by advocating National Socialism, the applicant aimed at impairing the basic order of freedom and democracy. The Commission also recognised that Neo-Nazi ideology includes both racist and religious forms of hate speech. Indeed, it considered that the applicant's published hate speech ran counter to one of the *basic values* underlying both the text and overall spirit of the Convention, as expressed in its fifth preambular paragraph, namely that

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<sup>192</sup>12 May 1988, Application No. 12194/86.



the fundamental freedoms enshrined in the Convention 'are best maintained... by an effective political democracy.'

'The Frankfurt Regional Court also found that the applicant's publications could revive antisemitic sentiments, *inter alia*, as they depreciated Zionism and emphasised pride of race. The Commission accordingly considers that the applicant's policy clearly contains elements of racial and religious discrimination. As a result, the Commission finds that the applicant is essentially seeking to use the freedom of information enshrined in Article 10 (Art. 10) of the Convention as a basis for activities which are, as shown above, contrary to the text and spirit of the Convention and which, if admitted, would contribute to the destruction of the rights and freedoms set forth in the Convention. Under these circumstances the Commission concludes that the interference at issue was "necessary in a democratic society" within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention. It follows that this part of the application is manifestly ill-founded ...'

This judgment is curious in that it cites the wording of article 17 without referring to it expressly, and does so almost as if this represented just another additional ground for justifying the "interference" with the applicant's "freedom of expression" under article 10(2). This is questionable because the wording of article 17 is clearly designed to be a freestanding measure whose application is to potentially render irrelevant the drawn out process of judges striking a balance between article 10(1) as against 10(2).

Another useful illustration, arising from a different historical context but also involving a merger of racist and religious hate speech as part of political extremism, is the case of *Mark Anthony Norwood v. the United Kingdom*.<sup>193</sup> Norwood, the applicant, was a Regional Organiser for the British National Party ("BNP": often regarded as an extreme right wing political party). Between November 2001 and 9 January 2002, he had displayed in the window of his first-floor flat a large poster supplied by the BNP. This included a photograph of the Twin Towers in flames, with the words: 'Islam out of Britain – Protect the British People' and a symbol of a crescent and star in a prohibition sign.

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<sup>193</sup> Mark Anthony Norwood against the United Kingdom, Application no. 23131/03

The police removed this poster following a complaint from a member of the public. The following day, a police officer contacted the applicant by telephone and invited him to attend the local police station for an interview. Norwood, however, refused to attend. He was then charged with an "aggravated offence" under section 5 of the UK's Public Order Act 1986 of displaying, with 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. Pleading not guilty, he argued in his defence that the poster referred only to Islamic extremism not Islam generally, and was not in itself either abusive or insulting, and that to convict him of this offence would be to infringe his right to enjoy "freedom of expression" under Article 10. On 13 December 2002 he was convicted at Oswestry Magistrates' Court, and fined £ 300. The applicant appealed to the High Court, which dismissed his appeal on 3 July 2003, with the judge deciding that the poster was: 'a public expression of attack on all Muslims in this country, urging all who might read it that followers of the Islamic religion here should be removed from it and warning that their presence here was a threat or a danger to the British people.'

The ECtHR rejected the admissibility of Norwood's challenge in part by reference to Article 17 of the Convention whose 'general purpose' was determined to be:

'to prevent individuals or groups with totalitarian aims from exploiting in their own interests the principles enunciated by the Convention. The Court, and previously, the European Commission of Human Rights, has found in particular that the freedom of expression guaranteed under Article 10 of the Convention may not be invoked in a sense contrary to Article 17.'<sup>194</sup>

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<sup>194</sup> The precedents cited were W.P. and Others v. Poland, (dec.), no. 42264/98, 2 September 2004; Garaudy v. France, (dec.), no. 65831/01, 24 June 2003; Schimanek v. Austria, (dec.) no. 32307/96, 1 February 2000; and Glimmerveen and Hagenbeek v. the Netherlands, nos. 8348/78 and 8406/78, Commission decision of 11 October 1979, Decisions and

In essence, the ECtHR accepted the analysis of the British courts that the display of the poster represented an example of hate speech prohibited by UK legislation, and that such prohibition was in itself compatible with the ECHR both in terms of the latter's specific provisions, including articles 10 and 17, and the values that inform its letter and spirit:

'The Court notes and agrees with the assessment made by the domestic courts, namely that the words and images on the poster amounted to a public expression of attack on all Muslims in the United Kingdom. Such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination. The applicant's display of the poster in his window constituted an act within the meaning of Article 17, which did not, therefore, enjoy the protection of Articles 10 or 14 ... It follows that the application must be rejected as being incompatible *ratione materiae* with the provisions of the Convention, pursuant to Article 35 §§ 3 and 4. For these reasons, the Court unanimously Declares the application inadmissible.'

The Norwood case addressed the racist hate speech of someone who was also a member of a right-wing organisation, rather than organisational membership itself. It was the act of displaying offensive material whose prosecution and conviction was expressly upheld by the ECtHR, independent of his extremist political affiliations. However, other cases where the ECtHR has invoked article 17 have included such a membership dimension. For example, the case of in *P. and Others against Poland*<sup>195</sup> addressed an effort on 20 January 1998 to establish an openly anti-Semitic extreme nationalist organisation *The National and Patriotic Association of Polish Victims of Bolshevism and Zionism*, which the Polish authorities then prohibited. They submitted a copy of the memorandum of association, which listed the following objectives:

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Reports 18, p. 187.

<sup>195</sup> *W.P. and Others v. Poland*, (dec.), no. 42264/98, 2 September 2004 decision as to admissibility.

'1. Allowing association of Polish victims of Bolshevism/Bolsheviks and Zionism/Zionists.

6. Taking action aimed at equality between ethnic Poles and citizens of Jewish origin by striving to abolish the privileges of ethnic Jews and by striving to end the persecution of ethnic Poles.

12. Taking action aimed at improving the living conditions of Polish victims of Bolshevism/Bolsheviks and Zionism/Zionists.

15. Claiming veteran benefits for Polish victims of Bolshevism/Bolsheviks and Zionism/Zionists.'

The applicants complained under Article 14, taken together with Article 11 (freedom of association), that: 'the judiciary of the so-called Third Republic of Poland controlled by Jewish interests' prohibited the formation of associations by ethnic Poles.

In this case the ECtHR invoked article 17 as grounds for rejecting the claim that the applicant's convention rights had been violated:

'The Court observes that the general purpose of Article 17 is to prevent totalitarian groups from exploiting in their own interests the principles enunciated by the Convention. To achieve that purpose, it is not necessary to take away every one of the rights and freedoms guaranteed from persons found to be engaged in activities aimed at the destruction of any of those rights and freedoms. Article 17 covers essentially those rights which, if invoked, 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.'<sup>196</sup>

The Court noted that the would-be organisation's memorandum of association included problematic statements alleging the persecution of Poles by the Jewish minority and the existence of inequality between them, which in turn, can be interpreted as inciting anti-Semitism.<sup>197</sup>

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<sup>196</sup> Citing *J. Glimmerveen and J. Hagenbeek v. the Netherlands*, nos. 8348/78 and 8406/78, Commission decision of 11 October 1979, Decisions and Reports 18, p. 187; *Roger Garaudy v. France* (dec.), no. 65831/01, 24 June 2003).

<sup>197</sup> Citing *United Communist Party of Turkey and Others v. Turkey*, judgment of 30 January 1998, Reports of Judgments and Decisions 1998-I, § 60.

'The Court agrees with the Government that these ideas can be seen as reviving anti-Semitism. The applicants' racist attitudes also transpire from the anti-Semitic tenor of some of their submissions made before the Court. It is therefore satisfied that the evidence in the present case justifies the need to bring Article 17 into play ... The applicants essentially seek to employ Article 11 as a basis under the Convention for a right to engage in activities which are contrary to the text and spirit of the Convention and which right, if granted, would contribute to the destruction of the rights and freedoms set forth in the Convention. Consequently, the Court finds that, by reason of the provisions of Article 17 of the Convention, the applicants cannot rely on Article 11 of the Convention to challenge the prohibition of the formation of the National and Patriotic Association of Polish Victims of Bolshevism and Zionism.'

Article 17 has proved its worth most emphatically in cases involving genocide / atrocity denial. A key legal question here, considered by the ECtHR, is whether deliberate negations of: 'clearly established historical facts – such as the Holocaust – [are ...] removed from the protection of Article 10 by Article 17 of the ECHR.<sup>198</sup> That is, the latter's provision rejecting the (mis)use of human rights arguments to justify the denial of such rights to others, including the right to life protected by the criminalisation of both genocide and expressions of genocide-denial? As already noted, the general purpose of Article 17 is to prevent individuals or groups with totalitarian-fascistic aims that are incompatible with recognition of one or more of the convention rights of others, from exploiting the principles enunciated by the Convention, such as "freedom of expression," for their own purely tactical reasons and interests.<sup>199</sup> It was recently held that:

'a general, vehement attack against a religious group ... is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination. The applicant's display of the [racist] poster in his window constituted an act within the meaning of Article 17, which did not,

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<sup>198</sup> This was the decision in *Lehideux v. France*, 1998-VII Eur. Ct. H.R. 2864, para. 47; see also *X. v. Federal Republic of Germany*, European Commission of Human Rights 16 (July 1982); *Faurisson v France*, 2 BHRC UN Doc. CCPR/C/58/D/550/1993, 1 (United Nations Human Rights Committee 1996); Hannes Canni, Dirk Voorhoof, 'The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection,' 29 *Neth. Q. Hum. Rts.* 54 (2011).

<sup>199</sup> *Norwood v United Kingdom* (2005) 40 E.H.R.R. SE11 at 12

therefore, enjoy the protection of Articles 10 or 14.<sup>200</sup>

As our case law analysis below will illustrate in some detail, the ECtHR has regularly held that Holocaust denial, together with pro-Nazi / anti-Semitic propaganda more generally, *falls outside* the scope of article 10 protection in part because of the implications of article 17.<sup>201</sup>

As previously discussed, related issues arise in relation to international law protections of "freedom of expression" under article 19 of the 1966 International Agreement on Civil and Political Rights (discussed in more general terms below). Here, the legal repression of genocide denial to combat anti-Semitism has been recognised as a legitimate restriction.<sup>202</sup> Of course, there remains the question of the relationship between such repression and other familiar and legally recognised restrictions upon the scope of the right to "freedom of speech." These restrictions include the "protection of honor," "dignity" and "reputation," "preservation of memory," the defense of both "peace" and "national security" more generally within democratic societies, and the "elimination of racism."

The case of *Lehideux and Isorni v. France* involved the applicant's conviction under France's section 24(3) of the Freedom of the Press Act of 29 July 1881 for "public defence of war crimes or the crimes of collaboration." This conviction followed the appearance in a national daily newspaper of an advertisement presenting in a positive light certain acts of Philippe Pétain, the former head of state under the Nazi collaborationist Vichy government. Sections 23 and 24 of the Freedom of the Press Act of 29 July 1881 state:

'23 Where a crime or major offence is committed, anyone who, by uttering speeches, cries or threats in a public place or assembly, or by means of a written

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<sup>200</sup> Ibid.

<sup>201</sup> See, e.g. *Chauvy v France* (2005) 41 E.H.R.R. 29; *Lehideux v France* (2000) 30 E.H.R.R. 665; *Witzsch v Germany* (App. No.41448/98, April 20, 1999; Cooper and Marshall-Williams, 'Hate Speech, Holocaust Denial and International Human Rights,' [1999] *E.H.R.L.R.* 693.

<sup>202</sup> Human Rights Committee (HRC), Comm'n No. 550/1993: *Faurisson v. France*, paras. 2.1, 2.5–3.1, 9.6–9.7.

or printed text, drawing, engraving, painting, emblem, image, or any other written, spoken or pictorial item sold or distributed, offered for sale or exhibited in a public place or assembly, or by means of a placard or notice exhibited in a place where it can be seen by the public, has directly and successfully incited another or others to commit the said crime or major offence shall be punished as an accomplice thereto.”

24. Anyone who, by one of the means set out in section 23, has made a public defence of ... the crimes of collaboration with the enemy was to be liable to one to five years' imprisonment and a fine of from three hundred to three hundred thousand francs.'

Law no. 90-615 of 13 July 1990 (“the loi Gayssot”) added to the Freedom of the Press Act a new section 24 bis. This creates liability to one year’s imprisonment and a fine of 300,000 French francs, or one of those penalties only, for those who:

'deny the existence of one or more crimes against humanity as defined in Article 6 of the Statute of the International Military Tribunal annexed to the London agreement of 8 August 1945 which have been committed either by the members of an organisation declared criminal pursuant to Article 9 of the Statute or by a person found guilty of such crimes by a French or international court.'

The ECtHR noted that this conviction amounted to a violation of article 10 because the purpose was to contribute to historical debate over the role of a former French head of state within the Nazi era, and to do so in a way that expressly recognised the reality of Nazi war crimes:

'47. The first technique had been used in the passage concerning Philippe Pétain’s policy at Montoire. By describing this policy in the text as “supremely skilful”, the applicants had lent credence to the so-called “double game” theory, even though they knew that by 1984 all historians, both French and non-French, refuted that theory. The Court considers that 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. In the present case, it does not appear that the applicants attempted to deny or revise what they themselves referred to in their publication as “Nazi atrocities and persecutions” or “German omnipotence and barbarism”. In describing Philippe Pétain’s policy as “supremely skilful”, the authors of the text were rather supporting one of the conflicting theories in the debate about the role of the head of the Vichy government, the so-called “double game” theory.'

The Court also re-affirmed earlier case law recognising that article 17 could be used to prevent neo-Nazi statements expressing genocide denial from being protected as examples of "freedom of expression" under article 10:

'53. There is no doubt that, like any other remark directed against the Convention's underlying values ... the justification of a pro-Nazi policy could not be allowed to enjoy the protection afforded by Article 10. In the present case, however, the applicants explicitly stated their disapproval of "Nazi atrocities and persecutions" and of "German omnipotence and barbarism". Thus they were not so much praising a policy as a man, and doing so for a purpose – namely securing revision of Philippe Pétain's conviction – whose pertinence and legitimacy at least, if not the means employed to achieve it, were recognised by the Court of Appeal.'

A particularly interesting aspect of this case concerns the legal significance of an alleged "failure" to mention the details of a genocide, or other atrocity, in this case the Holocaust and Nazi crimes against humanity. This alleged failure took place within a context where it would be morally and historically appropriate to refer to the Holocaust, namely, the assessment of Petain's collaboration with Hitler and its implications for French Jews. Does such a "failure" fall within the scope of articles 10(2) or 17 sufficient to justify a criminal conviction for an expression that would otherwise be protected under article 10? Here, the court suggested that such a "failure" and "omission" did not have this effect:

'54. As to the omissions for which the authors of the text were criticised, the Court does not intend to rule on them in the abstract. These were not omissions about facts of no consequence but about events directly linked with the Holocaust. Admittedly, the authors of the text did refer to "Nazi barbarism", but without indicating that Philippe Pétain had knowingly contributed to it, particularly through his responsibility for the persecution and deportation to the death camps of tens of thousands of Jews in France. The gravity of these facts, which constitute crimes against humanity, increases the gravity of any attempt to draw a veil over them. Although it is morally reprehensible, however, the fact that the text made no mention of them must be assessed in the light of a number of other circumstances of the case.'



The Court also noted controversially that the passage of a long period of time between current expressions about the Nazi era and the actual historical events to which they refer, cannot be ignored when assessing Convention limitations upon "freedom of expression:"

'55. ... The Court further notes that the events referred to in the publication in issue had occurred more than forty years before. Even though remarks like those the applicants made are always likely to reopen the controversy and bring back memories of past sufferings, the lapse of time makes it inappropriate to deal with such remarks, forty years on, with the same severity as ten or twenty years previously. That forms part of the efforts that every country must make to debate its own history openly and dispassionately. The Court reiterates ... freedom of expression is applicable ... To those [ideas] that offend, shock or disturb; such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society"<sup>203</sup>

Furthermore, if an organisation devoted to promoting a particular interpretation, in this claim the reconsideration of Petain's reputation as a war leader, is not in itself unlawful under domestic law, then it would be contradictory to prohibit the expression of the very standpoint that constitutes the rationale of this organisation:

56. Furthermore, the publication in issue corresponds directly to the object of the associations which produced it, the Association for the Defence of the Memory of Marshal Pétain and the National Pétain-Verdun Association. These associations are legally constituted and no proceedings have been brought against them, either before or after 1984, for pursuing their objects.'

This implies that domestic authorities concerned with genocide denial would need to take measures to prescribe any organisation whose rationale includes the promotions of ideologies that include such denial as an integral part.

Finally, the Court noted that in this context criminal conviction was disproportionate to the harm involved, not least because of the availability of less severe ways of contesting problematic historical interpretations:

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<sup>203</sup> The Court cited as authorities, the Open Door and Dublin Well Woman v. Ireland judgment of 29 October 1992, Series A no. 246-A, p. 30, § 71, and the Vogt v. Germany judgment of 26 September 1995, Series A no. 323, p. 25, § 52.

'57. Lastly, the Court notes the seriousness of a criminal conviction for publicly defending the crimes of collaboration, having regard to the existence of other means of intervention and rebuttal, particularly through civil remedies.

Given these points, the decision that the applicants' criminal conviction was "disproportionate" and, as such, unnecessary in a democratic society - and thus a breach of article 10, followed naturally. For present purposes, what is especially interesting is that the Court then stated:

'58. ... Having reached that conclusion, the Court considers that it is not appropriate to apply Article 17.' In one sense this is disappointing, and suggests a diluted interpretation of this measure's scope as a mere fall back provision.'

On the other hand, the concurring opinion of Judge Jambrek provided a fuller discussion of the key issues, particularly in relation to the scope of article 17. The implications of this article were spelled out in detail, and in ways that are relevant to hate crimes issues involving the promotion of discriminatory hatred:

'2. In order that Article 17 may be applied, the aim of the offending actions must be to spread violence or hatred, to resort to illegal or undemocratic methods, to encourage the use of violence, to undermine the nation's democratic and pluralist political system, or to pursue objectives that are racist or likely to destroy the rights and freedoms of others ....<sup>204</sup> Therefore, the requirements of Article 17 are strictly scrutinised, and rightly so.'

This judgment then sets out the balance between the support that the practical exercise of "freedom of expression" provides for the well-being of democratic societies, including their self-immunisation against dictatorships, as opposed to arguments that are also grounded in mid-20th Century European history:

... 'the requirements of Article 17 also reflect concern for the defence of democratic society and its institutions. The European Convention was drafted as a response to the experience of world-wide, and especially European, totalitarian regimes prior to and during the Second World War. One of its tasks ... Was to "sound the alarm at their resurgence" ... It could be assumed that this original aim also corresponds to the

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<sup>204</sup> This judge cited as authority the United Communist Party of Turkey and Others v. Turkey judgment of 30 January 1998, Reports of Judgments and Decisions 1998-I, p. 16, § 23.

more recent dangers to the European principles of democracy and the rule of law. The Court recognised quite early in its jurisprudence that both the historical context in which the Convention was concluded and new developments ... compromise between the requirements for defending democratic society and individual rights is inherent in the system of the Convention”, referring also to the Preamble to the Convention statement that “Fundamental Freedoms ... are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which [the Contracting States] depend” (in the *Klass and Others v. Germany* judgment of 6 September 1978, Series A no. 28, p. 28, § 59)'

What is especially interesting is how this judge expressly linked the rationale for article 17 to the vital principle of "militant democracy capable of protecting itself," which in turn provides one of the grounds for prohibiting certain types of hate speech and associated forms of political expression including racist and Nazi symbols and emblems:

'3 ... It is also noteworthy that the Court within the same context gave credence to the principle of a “democracy capable of defending itself” (*wehrhafte Demokratie*). In this connection the Court took into account “Germany’s experience under the Weimar Republic and during the bitter period that followed the collapse of that regime up to the adoption of the Basic Law in 1949. Germany wished to avoid a repetition of those experiences by founding its new State on the idea that it should be a ‘democracy capable of defending itself’” (in the *Vogt v. Germany* judgment of 26 September 1995, Series A no. 323, p. 28, § 59).

4. In conclusion, while I would firmly agree that the requirements of Article 17 of the Convention should be applied with strict scrutiny, the spirit in which that Article was drafted should be respected, and its relevance upheld.'

It is useful to contrast this case with that of the *Roger Garaudy* case, which had to address an express and overt form of genocide denial.<sup>205</sup> The book that gave rise to this applicant's criminal convictions under French criminal law for Holocaust denial made a series of "revisionist" analyses of a number of historical events relating to the Second World War, such as the persecution of the Jews by the Nazi regime, the Holocaust and the Nuremberg Trials. These problematic re-interpretations questioned the already established historical reality, extent and seriousness of these events that, the Court noted, are not

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<sup>205</sup> <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-23829>

otherwise subject to debate between legitimate historians, but – on the contrary – are already clearly established beyond any credible doubt. Far from confining himself to calls for: 'a public and academic debate on the historical events in question' as this applicant alleged in order to bring his case within the scope of article 10, his writings actually subscribed to these revisionist or negationist theories that systematically deny the crimes against humanity perpetrated by the Nazis against the Jewish community. This deceptive strategy contains a defamatory attack on the rights of others, specifically the Jewish victims of Nazi persecution and genocide, together with an incitement to racial hatred, which is expressly prohibited by article 17. The Court held that the latter measure is to be interpreted as *an expression of militant democracy* concerned to prevent acts that undermine European democratic values:

'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.'

In this case, the Court considered that the main content and general tenor of the applicant's book, and thus its aim, were markedly revisionist running counter to the fundamental values of the Convention expressed in its Preamble, namely: 'justice and peace:

'It considers that the applicant attempts to deflect Article 10 of the Convention from its real purpose by using his right to 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. Accordingly, the Court considers that, in accordance with Article 17 of the Convention, the applicant cannot rely on the provisions of Article 10 of the Convention regarding his conviction for denying crimes against humanity. It follows that this part of the complaint is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected pursuant to Article 35 § 4.'

Here, and in contrast with other case-law on article 17, the ECtHR appears to have attributed an almost constitutional status to this article, suggesting that the applicability of this article must first be considered, and - if it applies - then thus precludes any need to consider the grounds for an application, such as article 10:

'Article 10 ... has to be interpreted in the light of the provisions of Article 17 of that Convention, according to which none of its provisions may be interpreted as implying any right to engage in any activity or perform any act aimed at the destruction of the rights and freedoms set forth in the Convention. Firstly, section 24 bis falls within "the measures necessary in a democratic State" for the protection of the rights of others, provided for in Article 10, as it concerns the protection of the rights of the Nazis' victims in terms of ensuring and safeguarding the respect due to their memory. Moreover, a witness, Mr Finkelkraut, referred to 'the offensiveness of denying the survivors the true reasons for their suffering and the dead the true reasons for their death'. Secondly, section 24 bis of the Act of 29 July 1881 is aimed at preventing or punishing the public denial of facts that have been the subject of a final ruling by the Nuremberg International Military Tribunal and relate to events that are totally incompatible with the values of the Convention for the purposes of Article 17.'

Clearly this, and related decisions, attempt to strike a defensible balance between the "rights of others" - namely, the defamed victims of genocide and crimes against humanity accused of falsifying their own extermination and persecution, and generic rights of "freedom of expression," but in a way that *overlay the exceptions to article 10 itself*.

On the other hand, in *Chauvy v. France*, the ECtHR discussed the difficulties for a criminal court to decide upon genuinely contested historical issues where genuine historical research into events associated with genocide could reach different conclusions.

There is an important distinction between acts of *outright denial* of judicially-determined facts of genocide, and the activity of debating the significance and implications of specific pieces of evidence relating to that genocide that form a familiar part of debates between academic historians. In this case, the Court insisted that:

‘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 shape opinion as to the events which took place and their interpretation. As such, and regardless of the doubts one might have as to the probative value or otherwise of the document known as ‘Barbie's written submission’ or the ‘Barbie testament’, the issue does not belong to the category of clearly established historical facts - such as the holocaust whose negation or revision is removed from the protection of Article 10 by Article 17 of the Convention.’<sup>206</sup>

Whilst the ECtHR has deployed article 17 in contexts of outright genocide / atrocity denial, its wording clearly covers a wider range of possible abuses of rights. These, include those that involve an affirmation of an essentially totalitarian ideology and politics that is associated with persecution. For instance, the case of *Hans Jorg Schimnek against Austria*,<sup>207</sup> witnessed an applicant challenging his conviction on 31 March 1995 under Section 3a (2) of Austria's Prohibition Act (*Verbotsgesetz*) and his sentence of fifteen years’ imprisonment for his leadership of Neo-Nazi organisation, VAPO. This offence prohibits the founding or leading of groups which aim at undermining public order or the autonomy or independence of the Austrian Republic through its members’ activities inspired by National Socialist ideas.

VAPO was found to have actively recruited new members, developed paramilitary training, organised special events where the members of the association were familiarised with a historical view glorifying Hitler's Third Reich, its army, the SA and the SS, whilst

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<sup>206</sup> *Chauvy vs France case* (Application no: 64915/01, Judgement of 29 June 2004), para.60.

<sup>207</sup> Application no. 32307/96

denying the systematic killing of Jews and others by use of toxic gas. In this way, the organisation had been transmitting Nazi ideology to its members as well as organising the distribution of pamphlets with a similar content. The aims of the VAPO included the seizure of power in Austria and the simultaneous incorporation of Austria into an Enlarged Germany (*Grossdeutschland*).

The ECtHR recognised that the applicant's conviction constituted an interference with his right to "freedom of expression." However, the relevant criminal law was sufficiently precise for this conviction to be recognised as "prescribed by law" as article 10 requires. Furthermore, the measure served a "legitimate aim" and constituted a "necessity." The Court's decision to reject the admissibility of the applicants' challenge under article 10 relied on earlier case-law *B.H., M.W., H.P. and G.K. against Austria*,<sup>208</sup> discussed above.

In one sense, this aspect of the case is somewhat predictable in that it constitutes an extreme example of precisely the type of context that the qualifications to "freedom of expression" contained in 10(2) were designed to cover, with the government's case being successful made out on each of the possible grounds. What is, perhaps, far more interesting is how the Court broadly interpreted and deployed earlier Article 17 case-law.<sup>209</sup> In particular, it decided that article 17: 'covers essentially those rights of the Convention 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.' This suggests this article had a greater depth and weight than the other convention rights. The freedom of expression guaranteed under Article 10: 'may not be

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<sup>208</sup> Application No. 12774/87

<sup>209</sup> The Court cited the *Lawless v. Ireland* judgment of 1 July 1961 (*merits*), Series A no. 3, pp. 45-46, § 7, and the *United Communist Party of Turkey and Others v. Turkey* judgment of 30 January 1998, Reports of Judgments and Decisions 1998-I, p. 27, § 60; see also no. 12194/86, Dec. 12.5.88, D.R. 56, p. 205; no. 21128/92, Dec. 11.1.95, D.R. 80, p. 94).

invoked in a sense contrary to Article 17.' This appears to give article 17 a higher status than article 10, in that any conflict between them has to be resolved in favour of the former:

'As regards section 3a (2) of the Prohibition Act, under which the applicant was convicted, the Court notes that ... National Socialism is a totalitarian doctrine incompatible with democracy and human rights and its adherents undoubtedly pursue aims of the kind referred to in Article 17 of the Convention. In these circumstances, the Court concludes that it derives from Article 17 that the applicant's conviction was necessary in a democratic society within the meaning of the second paragraph of Article 10.'

This interpretation is somewhat different in that it appears to interpret the criteria of article 17 as *an interpretive guide* for applying 10(2). These two interpretations are not necessarily incompatible however.

### **Liability of media for broadcasting hate speech**

Interesting interpretive issues arise concerning the liability of those who own or control the editorial content of publications containing different types of hate speech but who did not personally compose or even knew that such speech about to be published. In the case of *Sürek v. Turkey (no. 1)*, 1999, the Court held that someone in this controlling position could nevertheless be liable for hate speech within, for example, a letters page, even without an act of positively subscribing to it:

'63. While it is true that the applicant did not personally associate himself with the views contained in the letters, he nevertheless provided their writers with an outlet for stirring up violence and hatred. The Court does not accept his argument that he should be exonerated from any criminal liability for the content of the letters on account of the fact that he only has a commercial and not an editorial relationship with the review. He was an owner and as such had the power to shape the editorial direction of the review. For that reason, he was vicariously subject to the "duties and responsibilities" which the review's editorial and journalistic staff undertake in the collection and dissemination of information to the public and which assume an even greater importance in situations of conflict and tension.'

The fact that the offensive statements were made in the circumstances of an ongoing



"secessionist" internal armed conflict within Turkey involving an ethnic dimension, and involved inflammatory and sectarian statements that judges identified as hate speech, may have been a decisive contextual factor in this case. An interesting feature here is that the dissenting judgments sought to rely on US case law, founded implicitly on liberal presumptions, giving wider scope to "freedom of expression" than the majority.

A more thorough consideration of a cluster of related issues appears in *Jersild v Denmark*. This case involved an application from a journalist who had been convicted under hate speech laws in Denmark's criminal Courts for broadcasting interviews with a group of young and disaffected racists known as the Greenjackets on a current affairs programme, for which he received a fine. The interviewees, who had made extremely insulting and degrading statements denying a human status to foreigners, were also convicted of the primary offence whilst the applicant was convicted for assisting them. At the relevant time, their legal position was governed by Article 266 (b) of Denmark's Penal Code, which addressed hate crimes by means of the following measure:

'Any person who, publicly or with the intention of disseminating it to a wide circle ("videre kreds") of people, makes a statement, or other communication, threatening, insulting or degrading a group of persons on account of their race, colour, national or ethnic origin or belief shall be liable to a fine or to simple detention or to imprisonment for a term not exceeding two years.'

In addition, Article 23, paragraph 1, states:

'A provision establishing a criminal offence shall apply to any person who has assisted the commission of the offence by instigation, advice or action. The punishment may be reduced if the person in question only intended to give assistance of minor importance or to strengthen an intent already resolved or if the offence has not been completed or an intended assistance failed.'

The arguments in this case were finely balanced. On the one hand, the applicant and the Human Rights Commission emphasised that, taken in the context of the television broadcast as a whole, the offending remarks had the effect of ridiculing their authors, as

opposed to promoting their racist views. The overall message and aim of the programme was to draw attention to a matter of great public concern, namely the presence of what was then believed to be a new phenomenon of extreme racism and xenophobia among a disaffected sector of the population. The applicant had deliberately included the offensive statements in the programme, not with the aim of disseminating racist opinions, but in order to counter them through exposure and analysis whilst explaining to his viewers a new phenomenon in Denmark at the time, that of violent racism practiced by inarticulate and socially disadvantaged youths. Joined by the Commission, the applicant considered that the broadcast could not have had sufficient detrimental effects on the "reputation or rights of others" sufficient to bring article 10(2) into play. The interests in protecting such rights were, therefore, outweighed by those of protecting the applicant's "freedom of expression."<sup>210</sup>

On the other hand, the Danish Government contended that the applicant had edited the Greenjackets item in a sensationalist not an informative manner, and that its actual news or information value was, in fact, minimal. The Court needed to recognise that television was a particularly powerful and far-reaching type of media, and that a majority of Danes normally viewed the news programme in which the item was broadcast. Yet the applicant, knowing that his interviewees would incur criminal liability, had actively encouraged the Greenjackets to make extreme racist statements without countering them in the programme. Given this, it was unrealistic to imagine that at least some viewers would not take these extreme and dehumanising racist remarks at face value and react negatively to their insulting and degrading content. The small number of complaints was not a relevant factor as this could be explained by many factors, not least fear of reprisals by violent

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<sup>210</sup> Para. 28.

racists.

Given these points, the Danish government argued that the applicant had failed to fulfil the "duties and responsibilities" incumbent on him as a television journalist under article 10(2). The fine imposed upon him was "proportionate" in that it was at the lower end of the scale of sanctions applicable to Article 266 (b) offences. Hence, in pursuing a legitimate aim it was unlikely to deter journalists from contributing to public discussion on racism and xenophobia. Indeed, the conviction represented a public reminder that such racist expressions are to be taken seriously and cannot be tolerated.<sup>211</sup>

For its part, the Court highlighted the complex of factors that had to be balanced out in this case, including: 'the manner in which the Greenjackets feature was prepared, its contents, the context in which it was broadcast and the purpose of the programme.'<sup>212</sup> In addition, the international law context could not be disregarded in that Denmark possessed specific obligations under various international instruments to take effective measures to eliminate all forms of racial discrimination and to both prevent and combat racist doctrines and practices. Whilst recognising a range of factors, these judges gave priority to the question of the deliberate aim and purpose of the programme itself as opposed to its possible impact upon the viewers, including those insulted and degraded by the interviewees racist statements. They stated: 'an important factor in the Court's evaluation will be whether the item in question, when considered as a whole, appeared from an objective point of view to have had as its purpose the propagation of racist views and ideas.'<sup>213</sup> The Court accepted as relevant to article 10(2) aspects of the reasoning of the national courts including their emphasis on the fact that the applicant had himself taken the

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<sup>211</sup> Para. 30.

<sup>212</sup> Para. 31.

<sup>213</sup> Para. 31.

initiative of preparing the Greenjackets feature knowing in advance that racist statements were likely to be made during the interview, which he had also encouraged. He had edited the programme to include the offensive assertions, whilst excluding less extreme statements. Without his active role, these assertions would not have been disseminated to a wide circle of people.

The Court then made a series of counter-arguments concerning the context and aims of the programme, and the role that it fulfilled in promoting debate on a matter of public interest, to which these judges attached far greater weight, and considered decisive:

'33. On the other hand, as to the contents of the Greenjackets item, it should be noted that the TV presenter's introduction started by a reference to recent public discussion and press comments on racism in Denmark, thus inviting the viewer to see the programme in that context. He went on to announce that the object of the programme was to address aspects of the problem, by identifying certain racist individuals and by portraying their mentality and social background. There is no reason to doubt that the ensuing interviews fulfilled that aim. Taken as a whole, the feature could not objectively have appeared to have as its purpose the propagation of racist views and ideas. On the contrary, it clearly sought - by means of an interview - to expose, analyse and explain this particular group of youths, limited and frustrated by their social situation, with criminal records and violent attitudes, thus dealing with specific aspects of a matter that already then was of great public concern.'

The Court emphasised that the item was broadcast as part of a serious Danish news programme, intended for a well-informed audience, and there were some features that counterbalanced the extremist views expressed. Although there was no express precautionary and critical remarks highlighting the immorality, dangers and criminality of the promotion of racial hatred and ideas of racial superiority, both the TV presenter's introduction and the applicant's conduct during the interviews: 'clearly dissociated him from the persons interviewed.' The presenter had, for example described them as members of "a group of extremist youths" who supported the Ku Klux Klan, and: 'by referring to the criminal records of some of them.' The judges gave this TV presenter crediting for

rebutting at least some of the racist statements, and for showing that these formed part of the Greenjackets' more general anti-social, even criminal, orientation.<sup>214</sup>

In addition, the judges insisted that current affairs news reporting needed to include live and edited interviews in order to fulfil its function of promoting public debate within the context of democratic will-formation and accountability:

'35. News reporting based on interviews, whether edited or not, 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 assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so. In this regard the Court does not accept the Government's argument that the limited nature of the fine is relevant; what matters is that the journalist was convicted. ... it has not been shown that, considered as a whole, the feature was such as to justify also his conviction of, and punishment for, a criminal offence under the Penal Code.'

36. It is moreover undisputed that the purpose of the applicant in compiling the broadcast in question was not racist. ...'

The Court concluded that the reasons provided in support of the applicant's conviction and sentence were insufficient to establish convincingly that the interference with his right to "freedom of expression" was "necessary in a democratic society." The means employed were held to be "disproportionate" to the aim of protecting "the reputation or rights of others" under Article 10(2). On this basis, the majority decided that the applicant's conviction amounted to a breach of article 10.

On the other hand, it is arguable that this was a borderline decision involving finely balanced policy decisions. There were a number of dissenting judicial opinions that made a strong case for holding that the conviction was justified under article 10(2). The Joint Dissenting Opinion of Judges Gölcüklü, Russo And Valticos placed far greater weight upon Denmark's international law obligations under both general human rights measures

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<sup>214</sup> Para. 34.

and the 1965 Convention on the Elimination of All Forms of Racial Discrimination. These required Denmark to prohibit any defence of racial hatred, which forms one of the restrictions authorised by article 10(2). This opinion states that:

'That Convention manifestly cannot be ignored when the European Convention is being implemented. It is, moreover, binding on Denmark. It must also guide the European Court of Human Rights in its decisions, in particular as regards the scope it confers on the terms of the European Convention and on the exceptions which the Convention lays down in general terms.'

This dissent states that the interviewees' statements had been 'made and willingly reproduced in the relevant broadcast on Danish television, without any significant reaction on the part of the commentator.' They did indeed amount to 'incitement to contempt not only of foreigners in general but more particularly of black people, described as belonging to an inferior, subhuman race ...' With respect to freedom of expression, these judges suggested that the majority had struck the balance in a way that did not give sufficient weight to the positive obligation to combat racial hatred and expressly signal disapproval of any examples of hate speech that are broadcast, or to the potentially negative effects among some listeners:

'We cannot accept that this freedom should extend to encouraging racial hatred, contempt for races other than the one to which we belong, and defending violence against those who belong to the races in question. It has been sought to defend the broadcast on the ground that it would provoke a healthy reaction of rejection among the viewers. That is to display an optimism, which to say the least, is belied by experience. Large numbers of young people today, and even of the population at large, finding themselves overwhelmed by the difficulties of life, unemployment and poverty, are only too willing to seek scapegoats who are held up to them without any real word of caution; for - and this is an important point - the journalist responsible for the broadcast in question made no real attempt to challenge the points of view he was presenting, which was necessary if their impact was to be counterbalanced, at least for the viewers. That being so, we consider that by taking criminal measures - which were, moreover, moderate ones - the Danish judicial institutions in no way infringed Article 10 (art. 10) of the Convention.'

The Joint Dissenting Opinion of Judges Ryssdal, Bernhardt, Spielmann And Loizou made

some additional points in favour of the legality of the applicant's conviction under the ECHR. This opinion emphasises the presenter's failure to subject these extreme racist statements to express form of critical analysis sufficient to satisfy a broadcaster's legal obligations to protect its audience from the effects of hate speech. The subjective intentions and ultimate goals of broadcasters are of less importance than the likely practical effect of allowing hate speech to be publically expressed in the mass media, especially the expression has been actively encouraged and not edited out:

'2. We agree with the majority (paragraph 35 of the judgment) that the Greenjackets themselves "did not enjoy the protection of Article 10 (art. 10)". The same must be true of journalists who disseminate such remarks with supporting comments or with their approval. This can clearly not be said of the applicant. Therefore it is admittedly difficult to strike the right balance between the freedom of the press and the protection of others. But the majority attributes much more weight to the freedom of the journalist than to the protection of those who have to suffer from racist hatred.'

These judges insisted that the applicant should have expressly made it clear that the racist remarks of the Greenjackets: 'are intolerable in a society based on respect for human rights.'

Given that the most extreme remarks were included and less extreme ones edited out:

'it was absolutely necessary to add at least a clear statement of disapproval. ... Nobody can exclude that certain parts of the public found in the television spot support for their racist prejudices. And what must be the feelings of those whose human dignity has been attacked, or even denied, by the Greenjackets? Can they get the impression that seen in context the television broadcast contributes to their protection? A journalist's good intentions are not enough in such a situation, especially in a case in which he has himself provoked the racist statements. ...The protection of racial minorities cannot have less weight than the right to impart information.'

In short, this borderline decision is important for its emphasis upon the need to counter-balance criminal forms of hate speech from interviewees, and for its interpretation of what may count as a sufficient form of critical commentary to avoid article 10(2)

justifying a conviction of the journalists involved. It shows how the prosecution of interviewees for hate crimes is not sufficient, in itself, to justify that of journalists, providing there is no implicit or express endorsement of these statements, and that these interviews contribute to public debate. This case also illustrates how the definition of what counts as an appropriate width for a national state's "margin of appreciation" is open to contrasting judicial assessments. The same point applies to interpretations of the relative weight to be given to "freedom of expression" when this comes into conflict with the human rights imperative to combat hate speech. The dissenting opinions display greater concern with the concrete policy consequences and impact of allowing such broadcasts, particularly for those who were likely to have been insulted and degraded by the dehumanising hate speech in question. By contrast, the majority insisted on applying a more formal type of analysis that imposed a very high legal threshold upon any state authorities seeking under article 10(2) to justify the prosecution and conviction of broadcasters for even the most extreme forms of hate speech in any situation where they are not themselves actively endorsing and promoting such speech.

### **Anti-discrimination Initiatives relevant to Disability-related hate crimes**

The various transnational and international measures already discussed including the European Convention on Human Rights protect all people, including those with disabilities. However, there are additional more specific measures relevant to disability-related hate crimes that need to be discussed. These include Article 15 of the revised European Social Charter (ETS No. 163), which explicitly guarantees people with disabilities the effective exercise of the right to independence, social integration and



participation in the life of the community.

More recently, the UN's Convention on the Rights of Persons with Disabilities, came into force with effect from 3 May 2008.<sup>215</sup> It reinforces the rights of persons with disability within an expressly human rights framework. Parties to the Convention are required to promote, protect, and ensure the full enjoyment of human rights by persons with disabilities, prevent discrimination, and ensure that they enjoy full equality under the law. Indeed, Article 17 - Protecting the Integrity of the Person - states: 'Every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.' As of March 2013, it has 155 signatories and 130 parties, including the EU (which ratified it on 23 December 2010 to the extent responsibilities of the member states were transferred to the European Union). This measure is monitored by the Committee on the Rights of Persons with Disabilities.

Article 1 defines the purpose of the Convention: 'to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.' Articles 2 and 3 provide definitions and general principles, including in relation to communication, reasonable accommodation and universal design. Articles 4 - 32 define the rights of persons with disabilities and the obligations of states parties towards them. Although many of these mirror rights already affirmed in general transnational human rights measures, there are a number of additional more specific obligations seeking to ensure that these measure can be fully realised by persons with disabilities - rights to accessibility including information technology, to independent living and social inclusion (Article 19), to personal mobility

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<sup>215</sup> The text was adopted by the United Nations General Assembly on 13 December 2006, and opened for signature on 30 March 2007. Following ratification by the 20th party, it came into force on 3 May 2008.

(article 20), participation in political and public life, and cultural life, recreation and sport (Articles 29 and 30).

For present purposes related to hate incidents and crime, article 8 "Prevention of Discrimination" is especially relevant; it stresses that awareness-raising is needed to foster respect for the rights and dignity against discrimination. This article also contains a specific commitment to combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life, including encouraging all organs of the mass media to portray persons with disabilities in a manner consistent with the purpose of the Convention. Also relevant is article 12: Recognition before the law and legal capacity, which: 'affirms the equal recognition before law and legal capacity of the persons with disabilities.' It requires States Parties to: reaffirm that persons with disabilities have the right to recognition everywhere as a person before the law; recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life; take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity; ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law.... Equally pertinent is article 13: access to justice, which affirms the effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as a direct and indirect participants, including as witnesses, in all legal proceeding, including at investigative and other preliminary stages. In order to help to ensure effective access to justice for persons with disabilities, states Parties shall promote appropriate

training for those working in the field of administration of justice, including police and prison staff.

Other measures that cover disability related hate incidents and crime include articles 15-17, which merit more extensive analysis. Article 15 provides

'Article 15 - Freedom from torture or cruel, inhuman or degrading treatment or punishment ...

2. States Parties shall take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment.'

This is important as it is possible for victims of disability related hate crimes that have not been taken sufficiently seriously by national criminal justice systems to claim that these authorities have failed to secure this right. Section 16 imposes potentially widely ranging obligations, whose application must be independently monitored, to protect persons with disabilities from both private and public forms of abuse, including violent hate crimes:

'Article 16 - Freedom from exploitation, violence and abuse

“1. States Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects.

2. States Parties shall also take all appropriate measures to prevent all forms of exploitation, violence and abuse by ensuring, inter alia, appropriate forms of gender- and age-sensitive assistance and support for persons with disabilities and their families and caregivers, including through the provision of information and education on how to avoid, recognize and report instances of exploitation, violence and abuse. States Parties shall ensure that protection services are age-, gender- and disability-sensitive.

3. In order to prevent the occurrence of all forms of exploitation, violence and abuse, States Parties shall ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities.

4. States Parties shall take all appropriate measures to promote the physical, cognitive and psychological recovery, rehabilitation and social reintegration of persons with disabilities who become victims of any form of exploitation, violence or abuse, including through the provision of protection services. Such recovery and reintegration shall take place in an environment that fosters the health, welfare, self-respect, dignity and autonomy of the person and takes into account gender- and age-specific needs.

5. States Parties shall put in place effective legislation and policies, including women- and child-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted.”

### **Council of Europe Measures relevant to Disability-related Hate Crime**

There are a number of relevant documents and decisions, including Recommendations of the Committee of Ministers. This body has created Recommendation Rec(2004)10 concerning the protection of the human rights and dignity of persons with mental disorder (adopted by the Committee of Ministers on 22 September 2004 at the 896th meeting of the Ministers’ Deputies):

#### **'Article 3 – Non-discrimination**

1. Any form of discrimination on grounds of mental disorder should be prohibited.
2. Member states should take appropriate measures to eliminate discrimination on grounds of mental disorder.

#### **Article 4 – Civil and political rights**

1. Persons with mental disorder should be entitled to exercise all their civil and political rights.
2. Any restrictions to the exercise of those rights should be in conformity with the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms and should not be based on the mere fact that a person has a mental disorder.

...

#### **Article 7 – Protection of vulnerable persons with mental disorders**

1. Member states should ensure that there are mechanisms to protect vulnerable persons with mental disorders, in particular those who do not have the capacity to consent or who may not be able to resist infringements of their human rights.
2. The law should provide measures to protect, where appropriate, the economic interests of persons with mental disorder....'

Later, in 2006, this committee formulated Recommendation Rec(2006)5 on the Council of Europe Action Plan to promote the rights and full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006-2015. It was adopted by the Committee of Ministers on 5 April 2006 at the 961st meeting of the

Ministers' Deputies. It includes the following statements relevant to disability related hate crime

'People with disabilities have the right to recognition everywhere as persons before the law. When assistance is needed to exercise that legal capacity, member states must ensure that this is appropriately safeguarded by law.

Persons with disabilities constitute a varied population group, but all have in common, to a greater or lesser extent, the need for additional safeguards in order to enjoy their rights to the full and to participate in society on an equal basis with other members.

#### 3.13.1. Introduction

Acts of abuse or violence against any person are unacceptable and society has a duty to ensure that individuals, particularly the most vulnerable, are protected against such abuse. ... While governments cannot guarantee that abuse will not happen they must do their utmost to establish protection and the strongest possible safeguards.

Prevention can be assisted in many ways, particularly through education to appreciate the rights of individuals to protection and to recognise and reduce the risk of abuse. Persons with disabilities who experience abuse or violence should have access to appropriate supports. They must have a system in which they can have sufficient confidence to report abuse and expect follow-up action, including individual support. Such systems require personnel who are skilled and qualified to detect and respond to situations of abuse.

#### 3.13.2. Objectives

- i. To work within anti-discriminatory and human rights frameworks towards safeguarding people with disabilities against all forms of violence and abuse;
- ii. to ensure access for people with disabilities to services and support systems for victims of violence and abuse.

#### 3.13.3. Specific actions by member states

- i. To establish safeguards to protect people with disabilities from violence and abuse through the effective implementation of policies and legislation, where necessary;
- ii. to promote the availability of and access to training courses for people with disabilities to reduce the risk of violence and abuse, for example courses in self-confidence and empowerment;
- iii. to develop processes, measures and protocols adapted to people with disabilities, to improve detection of violence and abuse, and to ensure that the necessary action is taken against perpetrators, including redress and adequate professional counselling in case of emotional problems;
- iv. to ensure that disabled victims of violence and abuse, including domestic, have access to the relevant support services, including redress;
- ...

ix. to train police and judicial authorities so that they can receive testimony from disabled people and treat instances of abuse seriously;

x. to provide people with disabilities with information on how to avoid the occurrence of violence and abuse, how to recognise it, and how to report it;

xi. to take effective legislative, administrative, judicial or other measures with strong sanctions in a transparent manner and to allow for independent review by civil society in order to prevent all forms of physical or mental violence, injury or abuse, neglect and negligent treatment, maltreatment, exploitation or abduction of people with disabilities;'

On 2 February 2005, the Committee adopted Resolution ResAP(2005)1 on safeguarding adults and children with disabilities against abuse. It contains some useful clarifications of the term abuse and the various forms it can take that are particularly relevant to the identification of disability related hate crime:

'I. Definition of abuse

1. In this Resolution abuse is defined as any act, or failure to act, which results in a breach of a vulnerable person's human rights, civil liberties, physical and mental integrity, dignity or general well-being, whether intended or through negligence, including sexual relationships or financial transactions to which the person does not or cannot validly consent, or which are deliberately exploitative. At a basic level abuse may take a variety of forms:

*a.* physical violence, including corporal punishment, incarceration – including being locked in one's home or not allowed out –, over- or misuse of medication, medical experimentation or involvement in invasive research without consent, and unlawful detention of psychiatric patients;

*b.* sexual abuse and exploitation, including rape, sexual aggression, indecent assault, indecent exposure, forced involvement in pornography and prostitution;

*c.* psychological threats and harm, usually consisting of verbal abuse, constraints, isolation, rejection, intimidation, harassment, humiliation or threats of punishment or abandonment, emotional blackmail, arbitrariness, denial of adult status and infantilising disabled persons, and the denial of individuality, sexuality, education and training, leisure and sport;'

This Resolution also makes a series of policy recommendations involving the criminal justice system and support services that seek to balance a series of competing interests, including the right of persons with disability to make decisions that others may not regard as in their best interests:

'3. These abuses require a proportional response – one which does not cut across legitimate choices made by individuals with disabilities but one which recognises vulnerability and exploitation. The term “abuse” therefore refers to matters across a

wide spectrum, which includes criminal acts, breaches of professional ethics, practices falling outside agreed guidelines or seriously inadequate care. As a consequence, measures to prevent and respond to abuse involve a broad range of authorities and actors, including the police, the criminal justice system, the government bodies regulating service provision and professions, advocacy organisations, user networks and patient councils, as well as service providers and planners.'

This resolution expressly frames abuse in terms of human rights and fundamental freedoms, rather than a purely medical context. This places positive obligations upon state authorities to actively promote and safeguard such rights and freedoms, including those of dignity and equal opportunity. For example, it sets out the following principles:

'II. Principles and measures to safeguard adults and children with disabilities against abuse

1. Protection of human rights

Member states have a duty to protect the human rights and fundamental freedoms of all their citizens. They should ensure that people with disabilities are protected at least to the same extent as other citizens.

Member states should recognise that abuse is a violation of human rights. People with disabilities should be safeguarded against deliberate and/or avoidable harm at least to the same extent as other citizens. Where people with disabilities are especially vulnerable, additional measures should be put in place to assure their safety.

2. Inclusion of people with disabilities

Member states should acknowledge that safeguarding the rights of people with disabilities as citizens of their country is a state responsibility.

They should combat discrimination against people with disabilities, promote active measures to counter it and ensure their inclusion in the socio-economic life of their communities.

They should recognise that all people with disabilities are entitled to dignity, equal opportunity, their own income, education, employment, acceptance and integration in social life, including accessibility, health care as well as medical and functional rehabilitation.

They should guarantee that people with disabilities are ensured protection – to at least the same extent as other citizens – in their use of services of all kinds.'

There are active steps that states need to take to translate this framework into a reality that reduces the prospect of forms of abuse amounting to disability related hate crimes:

'3. Prevention of abuse

... They should encourage cooperation between authorities and organisations in finding measures to prevent abuse, to improve detection and reporting of abuse, and to support the victims.

They should create, implement and monitor legislation concerning the standards and regulation of professionals and care settings, in order to make abuse of people with disabilities less likely through action taken or through failure to act.

#### 4. Legal protection

Member states should ensure access to the criminal justice system and provision of redress and/or compensation to people with disabilities who have been victims of abuse at least to the same extent as other citizens. Where necessary additional assistance should be provided to remove physical and other barriers for people with disabilities.

People with disabilities are applicants under civil law whose rights should be safeguarded. Member states should therefore ensure that professionals working within the criminal justice system treat people with disabilities without discrimination and in such a way as to guarantee them equality of opportunity in the exercise of their rights as citizens.'

Further sources of principles relevant to disability related hate incidents and crime, which are admissible as guidance by court, are the resolutions of the European Parliamentary Assembly. Particularly relevant here is Resolution 1642 (2009) on access to rights for people with disabilities and their full and active participation in society (adopted on 26 January 2009), which states:

' ... 3. The Assembly notes that, in practice, the access of people with physical or mental disabilities to their rights on an equal basis with those of people without disabilities frequently remains wishful thinking and proves inadequate.

...

18. Whereas the attitude of society, prejudice and fixed mindsets remain the main obstacle to the access to rights for people with disabilities and their full and active participation in society, the Assembly invites member states to: ...

18.2. take legal action against and penalise discriminatory practices and unacceptable attitudes towards people with disabilities, especially abuse, committed either by isolated individuals or in health-care establishments;'

In short, both the COE and large sectors of the "international community" more generally have adopted a range of measures that are admissible for the guidance of courts



relevant to how authorities should respond to disability related hate crime. These are largely grounded in a fundamental freedoms and rights framework, centred on freedom from discrimination and the active promotion of equal rights, which re-affirms the importance of legally enforceable protections for persons with disabilities.

## **Transnational and European Criminalisations of Genocide Denial: Denial, Gross Minimisation, Approval or Justification of Genocide or Crimes Against Humanity**

Arguably, expressing genocide denial merits classification as the dissemination of racist and xenophobic material, and a number of European states had already enacted general criminal prohibitions on at least some types of such denial.<sup>216</sup> In addition to the provisions of international criminal law, there are two main transnational criminal law sources applicable within European States: The 2003 Cyber Crime Convention Additional Protocol, and the EU Framework Decision 2008. Each of these will be now be discussed.

The Additional Protocol's Article 6 prohibits expressions of genocide denial and associated conduct.<sup>217</sup> It requires the criminalisation of the following conduct:

'distributing or otherwise making available, through a computer system to the public, material which denies, grossly minimises, approves or justifies acts constituting genocide or crimes against humanity, as defined by international law and recognised as such by final and binding decisions of the International Military Tribunal, established by the London Agreement of 8 August 1945, or of any other international court established by relevant international instruments and whose jurisdiction is recognised by that Party.'

This provision is arguably an important measure, given 20<sup>th</sup> Century European history and the connection between far right political movements that seek to recuperate fascism by denying or minimising its prior crimes, and violent hate crime attacks by members or

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<sup>216</sup> Within the Council of Europe, France, Germany, Belgium, Switzerland, and Austria have laws criminalising the denial of crimes against humanity. Germany, Belgium, and Austria have limited this to the denial of genocide committed by the Nazis. See European Commission against Racism and Intolerance (ECRI), Legal Instruments to combat racism on the Internet, report prepared by the Swiss Institute of Comparative Law (Lausanne), CRI (2000), Strasbourg, 27 August 2000.

<sup>217</sup> Art. 6. This article orders member states to criminalise when committed intentionally and without legal right, the act of distributing or making available through a computer system material that: 'denies, grossly minimizes, approves or justifies acts constituting genocide or crimes against humanity, as defined by international law. and recognised as such by final and binding decisions of the International Military Tribunal, established by the London Agreement of 8 August 1945, or of any other international court established by relevant international instruments and whose jurisdiction is recognised by that Party.'

associates of such groups.<sup>218</sup> The Explanatory Report clarifies that this measure is mainly directed against the practice of Holocaust denial, whose real aim is supporting and promoting the political motivations which first gave rise to this genocide. Such expressions:

'have also inspired or, even, stimulated and encouraged, racist and xenophobic groups in their action, including through computer systems. The expression of such ideas insults (the memory of) those persons who have been victims of such evil, as well as their relatives. Finally, it threatens the dignity of the human community.'<sup>219</sup>

Although the Nazi genocide is clearly predominant, the drafters of the Protocol recognise that, since then other cases of genocide and crimes against humanity have been carried out strongly motivated by racist and xenophobic theories and ideas. These have been addressed by the final decisions of International Criminal Tribunals for the former Yugoslavia, for Rwanda and the International Criminal Court.<sup>220</sup> Paragraph 2 of Article 6 allows a Party to *either*

'(a) require that the denial or the gross minimisation referred to in paragraph 1 of this article is committed with the intent to incite hatred, discrimination or violence against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors, or otherwise [*or*]  
(b) reserve the right not to apply, in whole or in part, paragraph 1 of this article.'

In these respects, the practical effect of article 6 may be limited or otherwise weakened by such qualifications. This is despite the fact the ECtHR has clearly recognised that freedom of expression stops in situations involving the incitement to violence. Whilst this

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<sup>218</sup> It also gives effect to a recommendation by the European Commission against Racism and Intolerance General Policy Recommendation on National Legislation to combat Racism and Race Discrimination, 13 December 2002.

<sup>219</sup> Explanatory Report op cit, para. 39.

<sup>220</sup> Clearly 'freedom of expression issues arise under the ECHR. However, The European Court of Human Rights has made it clear that the denial or revision of 'clearly established historical facts – such as the Holocaust – [...] would be removed from the protection of Article 10 by Article 17' of the ECHR - see the Lehideux and Isorni judgment of 23 September 1998, Reports 1998-VII, para. 47.

court has generally safeguarded expressions of political opinion and debate of matters of public interest, even those expressions which are disturbing, shocking, or offensive,<sup>221</sup> it also held that criminalisation of speech which incites violence against, for example, a particular sector of the population is compatible with Article 10 of the ECHR. In such cases, State authorities enjoy a wider 'margin of appreciation' when addressing the need for an interference with their citizens' "freedom of expression."<sup>222</sup> Here, it is worth citing Judge Jambrek's judgement in Lehideux and Isorni:

'in order that Article 17 may be applied, the aim of the offending actions must be to spread violence or hatred, to resort to illegal or undemocratic methods, to encourage the use of violence, to undermine the nation's democratic and pluralist political system, or to pursue objectives that are racist or likely to destroy the rights and freedoms of others.'<sup>223</sup>

Competent European state authorities can, therefore, adopt criminal and other legal measures that are intended to react appropriately to such expressions.<sup>224</sup> More troublesome than the inclusion of an additional burden on prosecutors by this requirement to prove specific intent, is the alternative option of allowing a Party to reserve the right simply not to apply this article in whole or part.

At the level of international criminal law doctrine as established by the ICC statute, Article 25(3)(e) holds criminally responsible a person who, '[i]n respect of the crime of genocide, directly and publicly incites others to commit genocide.' This provision is taken from the 1948 Genocide Convention, and - like "conspiracy" to commit genocide and

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<sup>221</sup> Castells v. Spain, App. no.11798/85, Ser.A vol.236, (1992) 14 EHRR 445, § 42. Lingens v Austria, App. no.9815/82, Ser. A vol.103, (1986) 8 EHRR 407; Demicoli v Malta, App. no.13057/87, Ser.A vol.210, (1992) 14 EHRR 47; Oberschlick v Austria App. no.11662/85, Ser.A vol.204, (1995) 19 EHRR 389; Jersild v Denmark, App. no.15890/88, Ser. A vol.298, (1995) 19 EHRR 1.

<sup>222</sup> ECtHR, Erdogdu and Ince v. Turkey, 8 July 1999, Application Nos. 25067/94 and 25068/94

<sup>223</sup> Judgment of 23 September 1998; See also United Communist Party of Turkey and Others v. Turkey judgment of 30 January 1998, Reports of Judgments and Decisions 1998-I, p. 16, § 23.

<sup>224</sup> ECtHR Surek and Ozdemir v. Turkey, 8 July 1999, Application Nos. 23927/94 & 24277/94; ECtHR, Sener v. Turkey, 18 July 2000, Application No. 26680/95.

"attempt" to commit genocide - establishes a strictly "inchoate" offence.<sup>225</sup> In other words, the incited genocide need be neither carried out, nor even attempted.

In term of subjective intent, a perpetrator must intend to incite his or her listeners to commit an act of genocide against members of a protected group, with the "specific intent" to destroy that particular group in whole or in part, as distinct from a more general, non-specific intent to kill people in that location indiscriminately.<sup>226</sup> In other words, the prosecution must demonstrate intent that the audience are, in fact, incited to commit acts that amount to genocide, as opposed to a lesser offence with more general requirements for intent, such as "crimes against humanity." What is less clear is whether, at international criminal law, perpetrators themselves must also possess that specific intent as most national criminal codes require?<sup>227</sup> Of course, in practice, it would be rare for someone to broadcast hate speech that incites genocide who does not possess an intention to accomplish precisely that. But in principle it is possible to at least imagine such a situation of a naive broadcaster who, during an election campaign, deliberately uses inciting words derogatory of an unpopular group, and who intends them to stir up a genocidal orientation against this group alone, but without subjectively wanting this to be acted upon. It is therefore difficult but not impossible to conceive of a context where a perpetrator who does not have genocidal intent intentionally seeks to incite that intent in others. If this were ever to arise, there could be a legally well-founded conviction because, unlike "aiding and abetting" for example, international criminal law does not expressly require specific intent

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<sup>225</sup> Gerhard Werle, *Principles of International Criminal Law* The Hague: T. M. C. Asser Press, 2005, 24; Per Saland, "International Criminal Law Principles," in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* The Hague: Kluwer Law International, 1999, 214; Albin Eser, "Mental Elements— Mistake of Fact and Mistake of Law," in Antonio Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, (2002).

<sup>226</sup> Eser, 2002 op cit, 805-6.

<sup>227</sup> Werle, 2005 op cit, 972.

for direct and public incitement to genocide.<sup>228</sup>

In terms of the material criminal activity itself, the key terms of this offence require clarification. A perpetrator incites *publicly* by 'communicating the call for criminal action to a number of individuals in a public place or to members of the general public at large,' which can involve the media of newspapers, radio, and television.<sup>229</sup> A perpetrator incites in a "direct" manner by: 'specifically urging another individual to take immediate criminal action rather than making a vague or indirect suggestion.'<sup>230</sup> Here, the distinction between "incitement" and other forms of liability for being an accessory to a crime is blurred, such as "inducement," is rendered ambiguous, and there may be considerable overlap between these.

In addition to the internet specific measures contained in the Additional Protocol, EU member states are obliged to comply with the broader more general provisions contained in the Framework Decision, which of course is not limited to internet based expression. Under this measure, the denial of recognised international crimes is defined as an offence. Article 1, paragraphs 1 (c) and (d) require States to introduce provisions punishing any conduct: 'publicly condoning, denying or grossly trivialising' crimes of genocide, crimes against humanity and war crimes as defined by either the Nuremberg Charter of 1945,<sup>231</sup> or the corresponding provisions of the statute of the International Criminal Court.<sup>232</sup> Article 1 (d) 4 of the Framework Decision states: 'Any Member State may, on adoption of this Framework Decision or later, make a statement that it will make punishable the act of

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<sup>228</sup> Eser, 2002 op cit, 806.

<sup>229</sup> Ibid, 805.

<sup>230</sup> Ibid, 806.

<sup>231</sup> More precisely, 'Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945.' - Framework Decision Article 1(d)

<sup>232</sup> Again more exactly, 'Articles 6, 7 and 8 of the Statute of the International Criminal Court' - Framework Decision Article 1(c).

denying or grossly trivialising the crimes referred to in paragraph 1(c) and/or (d) only if the crimes referred to in these paragraphs have been established by a final decision of a national court of this Member State and/or an international court, or by a final decision of an international court only.’

While ‘condoning’, ‘denial’ and ‘trivialisation’ of a legally established genocide are characterised as punishable acts in paragraphs 1(c) and 1(d), a different approach is adopted in the Article 1(4). Here, possibly by accident or omission, the word "condoning," whose inclusion substantially widens the scope of this measure as defined by the expressions "denial and "trivialisation," does not appear. A further qualifying legal requirement is that the activity in question must be: ‘carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin.’

Before the Framework Decision was adopted, institutional competence for the legal recognition of acts of genocide as proven offences was entrusted only to these *international* criminal courts which had been established for the specific task of addressing such questions, or to the criminal courts of the country where the crime was committed. However, later with the Framework Decision, this competence was further extended to *all national* courts of EU Member States. Any Member State are able to make a statement, on adoption of this Framework Decision or later, ‘that it will make punishable the act of denying the crimes defined in the Rome Statute only if this crime has been established a final decision of a national court of this Member State.’<sup>233</sup> After this ‘statement,’ Member States are entitled to enact a law that criminalises the denial of, say, genocide subject to the timetable of preparations and monitoring set out in Article 10.

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<sup>233</sup> Article 1 (4).

EU policy debate cannot ignore those "freedom of expression" considerations that arise with respect to this form of hate crime, or the countervailing policy agendas requiring a qualification of this type of human rights. In all national contexts governed by the European Convention of Human Rights, there is the question of whether any future criminal prohibitions of genocide denial can be rescued from challenge on the human rights ground that they are: "necessary in a democratic society" - and therefore potentially compliant with ECHR Article 10 regulating "freedom of expression." However, article 10(2), the qualifying section, affirms that "freedom of expression" is not an absolute human right in that "exceptions" include: 'the prevention of disorder or crime' and 'the protection of the reputation or rights of others.'<sup>234</sup>

### **Issues within the Judicial Interpretation and Application of Laws on Hate Speech**

At the outset and for present purposes, it is important to recognise that general legal principles, doctrines and rules only mean whatever they are interpreted to mean within the specific circumstances of their application to concrete situations, and that generalisation from one specific judicial application to another is a fraught and speculative exercise. Here, as elsewhere, the key legal issue is not what the law regulating hate crimes actually says but rather who determines what are its particular implications with respect to the specific context of a given, if selectively interpreted, factual situation. In other words, the meaning of international laws regulating hate speech and hate crimes more generally needs to recognise ongoing and self-revising judicial interpretation (as well as judicial re-interpretations of earlier judicial interpretations and so forth) as one of the primary

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<sup>234</sup> Cf. Marais; Keegstra; R. v. Krymowski [2005] 1 S.C.R. 101; R. v. Zundel [1992] 2 S.C.R. 731; Lehideux v. France (case no. 55/1997/839/1045, application no. 24662/94, Publication 1998-VII, no. 92; Garaudy v. France, 2003-IX Eur. Ct. H.R. 333, 339-41.



sources of law.

This point leads to another related one concerning whether these laws are treated as "positive norms" in their own right, akin to how theft is related to positive norms of the recognition of property, or "exceptions" ("qualifications," "limits," or "restrictions") to supposedly more general norms concerning "freedom of expression." If the second conceptualisation prevails with respect to hate speech, then judges may often be expected to apply a step by step methodology when selectively interpreting and applying them.

The first likely question here concerns the question of the definitional coverage of the right to freedom of expression, and whether it covers the factual sphere "threatened" by any instance of the legal prohibition on, say, hate speech. In a hate speech context, this generates the doctrinal question of whether such speech falls inside or outside the scope of a prevailing judicial interpretation of the definition of protected speech? If the answer is that it falls inside, then the speech will be presumed to be a lawful activity unless subsequent judicial analysis forces an overthrow of this presumption. In other words, if subject to judicial review, the issue becomes a technical-semantic one of whether existing legal prohibitions on hate speech violate the "right" to exercise "protected speech," and, if so, whether that is still permissible because of an express or implicit limitation, qualification or restriction limiting this right, perhaps based upon a countervailing right or constitutional principle.

If such regulation of hate speech is deemed permissible in principle, then courts are likely to subject such regulations to further quasi-constitutional scrutiny in terms of whether what could, in principle, be a legally permissible "encroachment" of freedom of expression norms is to be upheld as "proportionate" to the policy issue in question. This can

involve judges considering three elements: (i) are the legal devices deployed, such as administrative regulation, or general criminal law prohibition, suitable means to realise a legitimate policy objective? (ii) are there equally (or more effective) but less restrictive means available to achieve the same policy goal (exploring whether the hate crimes prohibitions are "disproportionate"?); and (iii) is there an appropriate, defensible relationship between the importance of the public good to be achieved by such prohibition and the intrusion upon an otherwise constitutionally protected right to freedom of expression?

How any particular court will react to a specific issues concerning the balance of rights in general, and that between hate speech and "freedom of expression" in particular, cannot be entirely predicted in advance. Much depends on how judges apply an initial value-judgment concerning the *relative value* to be attached to the competing norms as in the light of their interpretation of the relevant and specific facts of the case. Another factor is the judge's interpretation of the specific policy implications of deciding the case in different possible, that is "legally permissible," ways. When assessing hate speech, courts typically have the rhetorical choice of opting for a narrow definitional coverage of the primary norm of "freedom of expression" so as to expel such speech from the realm of constitutionally protected speech altogether. This has been the judicial response to Holocaust denial in Germany.<sup>235</sup>

Judges also have the alternative option of considering hate speech as falling inside the category of "protected speech" but then applying a looser and more permissive "proportionality test" to the state's prohibitions of it. This more openly policy oriented approach, purchased at the cost to positivist notions of strict legality, allows judges to give

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<sup>235</sup> BVerfGE 90, 241, 247, Decision of 13 April 1994, Auschwitz Lie Case (Holocaust Denial Case), Decision 620 at 625.

priority to the competing rights-claims of victims of this type of hate crime, insofar as their legally recognised rights to "dignity" and "equal treatment" has been attacked by such speech.<sup>236</sup> It can also allow wider policy arguments concerning the value of, for example, "public order," "community relations," and "social cohesion" to come to the fore and operate as decisive determinants. In this context, judges may even implicitly reverse the burden of proof, by requiring those responsible for hate speech to demonstrate the benefit of permitting such expressions outweighs the presumed benefits of limiting or prohibiting it. In a context when ethnic forms of sectarianism appear to have contributed to a genocidal programme of mass killing, judges may be tempted to consider as evidence of "incitement" a broad range of discriminatory statements by defendants in effect placing the burden on the defence to show that these were lawful.<sup>237</sup>

### **Hate speech as "direct and public incitement to genocide"?**

In terms of the case law of the *ad hoc* international criminal tribunals applying equivalent provisions to the incitement provisions of the Genocide Conventions and the Rome Statute of the ICC, there are a number of cases to consider for clarification of how hate crime is identified as such, and then prosecuted under international criminal law. Under article two of the Genocide Convention 1948 incitement must be committed: 'with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such ...' and one distinct subcategory of this offence is "public and direct incitement."

Difficult issues of interpretation arise concerning the legal implications of identified differences between statements of, say, racist opinion, those of fact, and apparently

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<sup>236</sup> Cf. John C. Knechtle, 'Holocaust Denial and the Concept of Dignity in the European Union,' 36 *Fla. St. U. L. Rev.* 41 (2008).

<sup>237</sup> Arguably this was the case with the Rwandan Media Trials discussed below.

"indirect" and implicit suggestions for sectarian violence contained in euphemisms and "coded" expressions. Other interpretive issues concern the legal significance of direct calls for violence against an ethically-based rebel group, their supporters and families that do not expressly attack this group more generally, which are not directed against "the group as such" as the definition of genocide requires, and expressions urging persecution amounting to "crimes against humanity" yet falling short of "genocide." There are also interpretive questions of what are the required levels of subjective intent for incitement to genocide, and how - with respect to any particular instance of hate speech - this is to be legally identified from both words and surrounding circumstances? Furthermore, what are the differences between "incitement" to genocide and other forms of liability for this international crime, especially "complicity" and "conspiracy?" In the context where acts of genocide have taken place, there is the question of whether prosecutors have to establish a "causal relationship" between inciting hate speech and physical acts allegedly stemming from them, or whether the offence of incitement is fully complete the moment when the defendant first expressed the words in question irrespective of whatever happened later? Finally, what is the potential liability ("command responsibility?") for the owners of media which published or broadcast "inciting words," which they have not personally written or approved but failed to suppress?

The ICTR's first trial, that of Jean-Paul Akayesu, included his charge and conviction for "public and direct incitement to genocide" following a public address to an armed militia. His indictment claimed that he had: 'urged the population to eliminate the accomplices of the RPF [the Tutsi-dominated invading force], which was understood by those present to mean Tutsi.' Here, the term "incitement" was given a general meaning of an act of

encouragement or persuasion to commit an offence, which is in keeping with established principles of criminal law found within common law system.<sup>238</sup> This court endorsed the International Law Commission's understanding of the meaning and scope of "direct" and "public," namely: 'specifically urging another individual to take immediate criminal action rather than merely making a vague or indirect suggestion. The ... element of public incitement requires communicating the call for criminal action to a number of individuals in a public place or to members of the general public at large ... Such as by radio or television.'<sup>239</sup>

On the difficult question of from which interpretive perspective and through the lens of whose cultural framework allegedly inciting words are to be judicially interpreted, the ICTR judges decided that it was that of their *immediate audience*, rather than a hypothetical general audience. The legal issue concerning "directness" was interpreted as: what were these words' specific 'cultural and linguistic content' as understood by Akayesu's immediate audience equipped with their particular way of interpreting particular expressions. This included understanding the meaning and implications of coded and implicit expressions, as well as euphemisms and other rhetorical figures of speech. The Court held that if 'the persons for whom the message was intended immediately grasped the implication' without having to weigh up a range of possible meanings, then that was sufficiently "direct."<sup>240</sup> It is irrelevant that, on a literal translation of that phrase into, say, English would not carry with it the same murderous implication.

This legal "test" for identifying the "directness" of public and direct incitement to genocide means that the same sentence could be understood by an audience as a

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<sup>238</sup> *Akayesu* TC, 555.

<sup>239</sup> *Ibid*, 556-7 citing para. 16 of the ILC Draft Code of Crimes.

<sup>240</sup> *Ibid*, 558.

sufficiently "direct" form of incitement to commit genocide in one cultural-linguistic context, but at most only an "indirect" call in other circumstances.<sup>241</sup> In other words, if a specific phrase is used, such as "eliminate RPF collaborators," that is widely known and understood by both that speaker and audience to be a coded and non-literal way of identifying "Tutsis in general," then, although in one sense implicit, this example of hate speech still remains a sufficiently "direct" form of public incitement to merit a conviction. This is because members of its specific audience accustomed to how this expression is used and generally understood would have been left in little doubt that they were being urged to immediately kill members of that group as such, irrespective of their relationship with the RPF. Needless to say, this broad judicial approach is permissive of judicial expansionism and quasi-legislative activity in ways that challenge notions of "strict legality" and the typical presumption that criminal statutes will be interpreted narrowly with ambiguities interpreted against prosecutors.

It follows from this case that those using hate speech to express murderous calls to others to commit genocide cannot avoid legal accountability by resorting to a rhetoric made up of implicit or coded phrases. For example, in a later ICTR case, Kajelijeli, judges held that calling Tutsis "snakes," with the implication that this ethnic group constitutes a deadly threat meriting destruction as an act of collective self-defense, was sufficiently clear, direct and unambiguous to merit a conviction for incitement to genocide.<sup>242</sup> Hence, the term "indirect" can no more be equated with "implicit," than "direct" can be treated as the same as "express." On the other hand, if the relevant audience would, given its cultural-linguistic frame of reference most likely interpret the meaning and implications of an allegedly

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<sup>241</sup> Ibid, 557.

<sup>242</sup> Kajelijeli, TJ., 850-61.

inciting phrase as genuinely ambiguous, then a conviction would presumably not be justified. Here, we can envisage a situation where an example of hate speech is taken as meaning no more than a call to repel a specific and clearly defined paramilitary invading force made up of individuals who just happen to be mainly ethnic-Tutsi, as well as those who are working as their agents and supporters. A similar point applies to general patterns of ideological manipulation that create a widespread atmosphere supportive of discrimination but where there is no direct call for genocidal actions.

*Akayesu* also clarified the level of subjective intention required for a conviction for "public and direct incitement." Here we need to recall that under article two of the Genocide Convention 1948 incitement must be committed: 'with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such ...' *Akayesu* stated that perpetrators must intend that genocide itself to result from their hate speech by creating or encouraging the required a genocidal 'state of mind' among the audience necessary to motivate them to carry out genocidal deeds.<sup>243</sup> In keeping with the general definition of genocide contained in the 1948 Genocide Convention reiterated in the ICTR and ICTY statutes, these deeds can include not only killing but also acts causing "serious physical or mental harm," including sexual assaults. It is not an offence if the overall evidence suggests that a speaker or writer of such hate speech was not *aware* that his or her words *could possibly be* construed as an incitement to commit genocide.<sup>244</sup> This raises difficult questions concerning the liability of someone who makes an impromptu racist outburst on live radio or television whose linguistic content is capable of inciting genocide. Here we have a situation where an individual makes a racist remark which objectively has the

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<sup>243</sup> *Akayesu*, T.J., 560, cf. 674.

<sup>244</sup> *Ibid*, 361, 673.

quality of incitement but whose practical implications he or she never subjectively considered. In this situation, and in the absence of any wider pattern of incitement by that individual, it is unlikely that prosecutors could demonstrate sufficient intent. In other words, prosecutors need to prove both subjective intent to encourage genocide as well as the facts that an accused is responsible for a sufficiently "direct" and "public" form of incitement to genocide.

Prosecutors do not need to show that other genocidal activity has actually takes place. In this sense, incitement to genocide is an "inchoate" offence, in contrast with "complicity." Confusingly, the Akayesu case raised the question of whether there needs to be evidence of a *causal link* between words and deed, but this suggestion was later rejected.<sup>245</sup>

It is now necessary to examine in detail the leading ICTR judgment by the Trial and Appeals Chambers in *Nahimana*, also known as the "Media Trials." This is because here incitement lay at the very heart of the prosecutors' case, and resulted in a court judgment spread over 1,110 paragraphs. To properly grasp the issues it is first necessary to provide some historical background. Sectarian violence in Rwanda erupted on 7 April following the killing of Rwanda's President, and lasted 3 months and ten days. During this period, the rebel invaders of the Tutsi-dominated RPF organisation who had invaded Rwanda from Uganda replaced the previous Hutu-dominated regime. This took place in a context where ethnic-Hutus made up by far the largest proportion of the population, with the Tutsis comprising around 8%. The facts as interpreted by the Trial Chamber merit analysis as a classic case where examples of hate speech overlapped with incitement to genocide.

After a trial lasting three years, in December 2003 the ICTR held that the weekly sectarian newspaper *Kangura* (published by Ngeze with a low circulation of under 3000 in

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<sup>245</sup> Ibid, 362, 675, rejected by *Nahimana* TJ., 1015.



a country of c. 8 million), and the far more popular private Radio-Television organisation "Libre des Milles Collines" (RTL) to be little more than the media puppets for the propaganda of the Coalition pour la Defense de la Republique's (CDR). This Court decided that three senior individuals involved with these organisations were guilty of, among other offences, "direct and public incitement to genocide" with respect to published or broadcast ethnic hate speech. Each received a life sentence.

The CDR was a militant ethnically Hutu organisation linking politics with ethnicity. Its goal was to mobilise the historically subordinated Hutu majority against the historically dominant Tutsi ethnic minority population of Rwanda. These propaganda sources encouraged a self-identification of the Hutu tribal members as ethnically superior to the despised Tutsi group. Furthermore, it is arguable that on occasions this propaganda equated the Rwandan Patriotic Front (RPF), which was largely a Tutsi paramilitary force engaged in armed struggle, with Tutsis in general such. As a result, calls for the killing of the RPF overlapped with incitement to ethnic genocide insofar as *all* members of the Tutsi ethnic group became defined as the collective enemy of *all* Hutus. *Kangura* engaged in various forms of hate speech, including publishing hit lists of identified Tutsis, death warrants, ethnically abusive and misogynist cartoons, and inflammatory letters and editorials. The Tribunal held that *Kangura* characterised the Tutsi people as a whole as thieves, hypocrites, and killers driven by evil malice as well as dishonesty, and were portrayed as snakes or cockroaches. By contrast, editorials portrayed the Hutu group as essentially generous but naïve, thereby setting up a stark opposition between supposed essential ethnic differences.

The hate speech of *Kangura* also singled out individual Tutsis who would then often

lose their jobs or suffer sometimes fatal physical attacks. There was evidence that this newspaper's message of prejudicial hate speech and fear, which on occasion urged direct sectarian actions, was connected to real acts of violence in that a published statement of an imminent attack by Tutsi militants expressed in violent language often triggered the preemptive slaughter of Tutsis with no connection to the RPF. In general, the hate speech of *Kangura* was deemed to have "poisoned the minds" of the Hutu readers. On the other hand, and despite a considerable number of extracts entered into evidence both the prosecutors and the court struggled to identify a single example of a direct and unambiguous urging of the readers to single out and kill Tutsis as a group.

In Rwanda, radio was considered to be a mass medium of communication, and RTLM broadcasts exploited the fear of armed attack among Hutus to mobilise members of this group into a climate of fear, ethnic stereotyping and violent hatred against both the Tutsi as a whole and moderate Hutus who resisted such hate speech and ethnic sectarianism. The RTLM earned the ominous title "Radio Machete." As with *Kangura*, the prosecutors claimed that RTLM broadcasts deliberately stereotyped Tutsi as a despised and hatred internal enemy, and - within the hostile atmosphere this contributed to - then called on its audience to attack and ultimately kill them. Such messages were found to have incited the youth wing and other Hutu militia at roadblocks to engage in acts of killing. In addition to stirring up widespread sectarianism, RTLM broadcasts also operated as a causal factor in the genocide itself. They initiated and ordered attacks on specific named individuals, who were then regularly hunted down and killed.<sup>246</sup> The court held that such propaganda intentionally provoked an intensely divisive and discriminatory form of sectarianism

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<sup>246</sup> TJ., 1026.

among the the Hutu population, directed in part against Hutu women, which helped prepare the ground for acts of sexual assault amounting to genocide.<sup>247</sup>

The first defendant was Ferdinand Nahimana, an academic who founded and was the major player in RTLM. The second accused was Hassan Ngeze, *Kangura's* founder, owner, and editor-in-chief. Both defendants were sentenced to life imprisonment. The third defendant, Jean-Bosco Barayagwiza, was a RTLM executive as well as a CDR leader. He received a sentence of 35 years, reduced from a life sentence because of procedural problems within his treatment. These defendants' hate speech was held to have helped to both develop and maintain an extremely sectarian Hutu orientation and ideological mind-set in which ethnic hatred became almost normalised. The Tribunal's focus fell not only upon what the three defendants personally said and did but also what they encouraged others to say and do, together with the concrete results of such incitement. From the findings of fact already mentioned, the Tribunal judged the newspaper editorials and radio broadcasts to be genocidal and to exhibit evidence of defendants' subjective intent to systematically kill all Tutsi. There was no need to show personal involvement in the killings themselves because criminal accountability attached to those responsible for the communications that contained such direct and public incitement. The judges used the metaphor of broadcasting hate speech as equivalent to putting bullets in the gun that triggered the actual programme of genocide. Because the gun was already loaded with a genocidal sectarian mind-set stemming from the ideological messages of incitement, the "trigger" was able to exert its lethal effect. RTLM, *Kangura*, and CDR more generally had clearly and efficiently disseminated hate speech that incited ethnic violence, and on

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<sup>247</sup> Nahimana, TJ., 177.

occasions instigated the killing of specific named Tutsi civilians.

The Tribunal separately convicted each of the three defendants for "direct and public incitement to commit genocide." Ngeze was found to have deployed the hate speech contained in *Kangura* to inspire hatred, encourage fear, and stir up genocide. Barayagwiza, the leader of CDR, used hate speech containing genocidal ideology and failed to prevent his assistants from urging the extermination of Tutsis. Both Nahimana and Barayagwiza were held to have encouraged the mass murder of Tutsis through indoctrination via the rhetorical power of radio, which "poisoned the minds" of its large audience. Through such incitement, Nahimana was held to have caused the deaths of thousands of innocent victims.

The Tribunal also considered that, under Barayagwiza's leadership, there had been an alliance between the defendants and their media, a common murderous purpose, which amounted to a "conspiracy" to commit genocide against the Tutsi people.<sup>248</sup> The existence of such a conspiracy can be reasonably inferred from conduct based on the totality of the evidence. This is the case even where there is no evidence of face to face meetings between those responsible for publishing or broadcasting hate speech provided there is clear evidence of an express or at least an implied agreement to participate in a shared, concerted or coordinated programme.<sup>249</sup>

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<sup>248</sup> In this context, conspiracy is defined in Article 2(3)(b) of the ICTY Statute as an agreement between two or more persons to commit the crime of genocide made up of two elements, which must be pleaded in the indictment: (i) an agreement between individuals aimed at the commission of genocide; and (ii) the fact that the individuals taking part in the agreement possessed the intent to destroy in whole or in part, a national, ethnical, racial or religious group, as such. The existence of such an agreement between individuals to commit genocide (or "concerted agreement to act") comprises its material element or *actus reus*; whilst individuals involved in the agreement must also possess the specific intent to destroy in whole or in part a national, ethnical, racial or religious group as such, *mens rea*. See Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze, v. The Prosecutor, case no. ICTR-99-52-a, Judgement, 28 November 2007: para. 894. More generally on the ICTR's jurisdiction on conspiracy to incite genocide, see Ntagerura et al. AJ, para. 92; Kajelijeli TJ, paras. 787-788; Niyitegeka TJ, para. 423; Musema TJ., para. 191.

<sup>249</sup> Kajelijeli TJ., paras. 434-453, 787-788, 794; Niyitegeka TJ, paras. 423-429; Ntakirutimana TJ., paras. 799-800.

The Tribunal also considered the defendant's hate speech to amount to an aggressive programme of dehumanisation that violated vital principles of human dignity and freedom from discriminatory treatment. Hate speech accomplishes this effect by creating a lesser status for the targeted group in both its own the eyes and the perceptions of others. At the initial trial chamber stage, this case built on the Nuremberg cases, including the Streicher conviction, which remarkably were the nearest similar precedents in time, on inciting words as a form of ideological conditioning of an entire population. As such, and the use of hate speech constituted not only a provocation to cause harm but was *in itself* damaging. As a result, and following the Nuremberg precedent, the Tribunal convicted each defendant for using hate speech as a form of "persecution on political grounds," itself a sub-set of the international offence of "crimes against humanity," a theme discussed more fully in a later section.

The Media Trials before the ICTR were the first since the Nuremberg trials of Streicher and Fritzsche to *directly* address the legal responsibility of the media, including newspaper editors and broadcast executives, for both the content and social effects of its words under international criminal justice principles of incitement to genocide. Hate speech was given a broad analysis that embraced a variety of effects from targeting specific victims on a discriminatory basis, conditioning perpetrators, and spreading a genocidal mind-set within Rwandan society more generally. A key part of the conviction for violation of international criminal law of the newspaper editor and a broadcast executive was based on the quality of such hate speech. Legal accountability attached both to what the hate speech contained in terms of its content but also for what was alleged to be its concrete effects in terms of inciting genocidal acts against Tutsis during April and May 1994.

For present purposes, a significance of these trials is the Tribunal's decision that these media themselves committed genocide through incitement allowing media leaders to be held legally accountable and successfully prosecuted for their involvement in particularly extreme forms of hate speech.

Another key point concerns the ICTR's methods of analysing the legal implications of *different forms* of hate speech and other expressions of a similar kind but which are legally protected on human rights grounds. Here, the Tribunal had to assess a wide range of evidence presented by the prosecution requiring a distinction between incitement to genocide and other "discriminatory" expressions concerned only to celebrate and promote positive ethnic pride and self-affirmation among a specific group. The latter does not entail dehumanising others through the production of hate speech involving ethnic hatred, negative stereotyping and denigration. In other words, not all forms of ethnic stereotyping and prejudice constitute prohibited forms of hate speech. In other words, at international criminal law ethnically "biased" advocacy of a distinctive ethnic consciousness, historical information and political analysis, all of which lack objectivity and balance, are still protected by principles of "freedom of expression."

When assessing the legal implication of the content of written and oral communications in question, the Tribunal addressed not only the content of what was expressed but also contextual factors. These included the positioning, timing, composition, context and implications of visual images, such as the machetes on the cover of *Kangura* as an answer to the question: "What weapons shall we use to conquer the *Inyenzi* once and for all?" In addition, the ICTR deployed contextual interpretation to make sense of encoded

expressions and innuendo, which of course could - on one interpretation - be defined as insufficiently "direct" expressions. The Tribunal assessed both the intent and consequences of the materials in a broadly contextual manner that recognised the various types of potential relationships between words and specific deeds, including the alleged causal impact of hate speech, including gender specific stereotyping, as identified by the perceptions of witnesses, participants, and observers. The ICTR's decision suggests that any person or group that, through hate speech, plans, instigates, orders, commits, or otherwise aids and abets in the planning, preparation, or execution of genocide is responsible for that crime possibly under both incitement and "aiding and abetting provisions" of international criminal law. Barayagwiza and Ngeze were also found guilty of the latter category of genocide because they knew or had good reason to know of the actions of their subordinates within their media bodies, and failed to take reasonable measures to prevent incitement. This decision considered that a person may be convicted of the incitement offence if he or she directly and publicly incited the commission of genocide and had the intent directly and publicly to incite others to commit genocide. Later the Appeal Chamber:

'692 ... there is a difference between hate speech in general (or inciting discrimination or violence) and direct and public incitement to commit genocide. Direct incitement to commit genocide assumes that the speech is a direct appeal to commit an act referred to in Article 2(2) of the [ICTR] Statute; it has to be more than a mere vague or indirect suggestion. In most cases, direct and public incitement to commit genocide can be preceded or accompanied by hate speech, but only direct and public incitement to commit genocide is prohibited under Article 2(3)(c) of the Statute. This conclusion is corroborated by the *travaux préparatoires* to the Genocide Convention.'

In this case, the ICTR Appeals Chamber contended that the scope of Article III(c) of the Genocide Convention does not apply to hate speech that falls short of directly calling for

the commission of genocide. On the other hand, it also held that the immediate and specific context is a relevant factor when deciding whether or not alleged hate speech constitutes "direct incitement" to commit genocide. The Chamber re-affirmed that this offence is an "inchoate offence," (which displaces the "causal connection" between words and deeds issue), and thus punishable even where no actual act of genocide has resulted from the hate speech in question. Finally, the hate speech must be clearly identified as such.

The initial convictions raise some difficult issues concerning the distinction between statements of "opinion" lacking any blatantly direct inciting qualities calling upon an audience to act, e.g., that the minority population were "committing mass suicide" by their support for the RPF rebels and would "end up disappearing as a result," and rhetoric expressly urging violent action. However, taken as a whole, the later Appeals Chamber decision in this case provided a concise clarification of the key legal categories and distinctions relevant to hate speech, and confirmed those responsible for inciting genocide through hate speech must themselves have specific intent:

'677. A person may be found guilty of the crime specified in Article 2(3)(c) of the Statute if he or she directly and publicly incited the commission of genocide (the material element or *actus reus*) and had the intent directly and publicly to incite others to commit genocide (the intentional element or *mens rea*). Such intent in itself presupposes a genocidal intent.'

In addition, the Chamber distinguished incitement, which as an inchoate offence does not require the conduct incited to come to fruition, from "instigation," which clearly does need to contribute to the actual commission of a crime (although the act of instigation need be neither public nor direct):

'678. The Appeals Chamber considers that a distinction must be made between instigation under Article 6(1) of the [ICTR] Statute and public and direct incitement to commit genocide under Article 2(3)(c) of the Statute. In the first place, instigation under Article 6(1) of the Statute is a mode of responsibility; an



accused will incur criminal responsibility only if the instigation in fact substantially contributed to the commission of one of the crimes under Articles 2 to 4 of the Statute. By contrast, direct and public incitement to commit genocide under Article 2(3)(c) is itself a crime, and it is not necessary to demonstrate that it in fact substantially contributed to the commission of acts of genocide. In other words, the crime of direct and public incitement to commit genocide is an inchoate offence, punishable even if no act of genocide has resulted therefrom. This is confirmed by the *travaux préparatoires* to the Genocide Convention, from which it can be concluded that the drafters of the Convention intended to punish direct and public incitement to commit genocide, even if no act of genocide was committed, the aim being to forestall the occurrence of such acts. The Appeals Chamber further observes — even if this is not decisive for the determination of the state of customary international law in 1994 — that the Statute of the International Criminal Court also appears to provide that an accused incurs criminal responsibility for direct and public incitement to commit genocide, even if this is not followed by acts of genocide.<sup>250</sup>

679. The second difference is that Article 2(3)(c) of the Statute requires that the incitement to commit genocide must have been direct and public, while [instigation under] Article 6(1) does not so require.'

In addition, the Appeals Chamber built upon the Trial Chambers efforts to provide a principled distinction between hate speech in general, even those forms that incite discriminatory violence, and that sub-set that falls under the scope of the rules, principles and policies of international criminal laws against incitement to genocide. To constitute the latter, there must be a direct and clear urging of others to commit genocide, as opposed to a vague and indirect suggestion or inference, and that the general principles of the civil, human rights and criminal laws regulating hate speech cannot be directly applied:

'692. The Appeals Chamber considers that there is a difference between hate speech in general (or inciting discrimination or violence) and direct and public incitement to commit genocide. Direct incitement to commit genocide assumes that the speech is a direct appeal to commit an act referred to in Article 2(2) of the Statute; it has to be more than a mere vague or indirect suggestion.<sup>251</sup> In

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<sup>250</sup> Indeed, Article 25(3)(b) of the Statute of the International Criminal Court provides that any person who “orders, solicits or induces” the commission of a crime falling under the jurisdiction of the Court shall be individually responsible for such a crime “which in fact occurs or is attempted”. However, Article 25(3)(e) of the Statute of the International Criminal Court provides that a person may incur criminal responsibility for direct and public incitement to commit genocide and it does not require the “commission or attempted commission of such a crime”.

<sup>251</sup> *Kajelijeli* TJ., para. 852; *Akayesu* TJ, para. 557; *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005) 2 S.C.R. 100, 2005 SCC 40, para. 87. See also Comments of the International Law Commission on the Draft

most cases, direct and public incitement to commit genocide can be preceded or accompanied by hate speech, but only direct and public incitement to commit genocide is prohibited under Article 2(3)(c) of the Statute. This conclusion is corroborated by the *travaux préparatoires* to the Genocide Convention.<sup>252</sup>

693. The Appeals Chamber therefore concludes that when a defendant is indicted pursuant to Article 2(3)(c) of Statute, he cannot be held accountable for hate speech that does not directly call for the commission of genocide. The Appeals Chamber is also of the opinion that, to the extent that not all hate speeches constitute direct incitement to commit genocide, the jurisprudence on incitement to hatred, discrimination and violence is not directly applicable in determining what constitutes direct incitement to commit genocide. [...]

Following the *Akayesu* Trial Judgement, the Appeals Chamber also affirmed the importance of interpreting hate speech in the specific cultural context from which it arose and the likely interpretation the words used would be given by the intended audience. This requires a careful contextual analysis of the particular culture and linguistic conventions in question, which of course can only be carried out on a case by case basis by those who are aware of the various nuances in play within the circumstances in question.<sup>253</sup> Such contextual analysis may be able to resolve what, to outsiders, appears as phrases that are too ambiguous to count beyond reasonable doubt as "direct" types of incitement:

'688. ... it was necessary to take account of Rwanda's culture and language in determining whether a speech constituted direct incitement to commit genocide. ... The Chamber will therefore consider on a case-by-case basis whether, in light of the culture of Rwanda and the specific circumstances of the instant case, acts of incitement can be viewed as direct or not, by focusing mainly on the issue of whether the persons for whom the message was intended immediately grasped the implication thereof. ...

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Code of Crimes Against the Peace and Security of Mankind, p. 22: "The element of direct incitement requires specifically urging another individual to take immediate criminal action rather than merely making a vague or indirect suggestion."

<sup>252</sup> Articles 2(2) and (3) of the ICTR Statute reproduce Articles 2 and 3 of the Genocide Convention. The *travaux préparatoires* of that Convention can therefore shed light on the interpretation of Articles 2(2) and (3) of the Statute by demonstrating that Article 3(c) (Article 2(3)(c) of the Statute of the Tribunal) is intended to criminalise only *direct appeals* to commit acts of genocide, and not all forms of incitement to hatred.

<sup>253</sup> In *Leon Mugeseru v Minister of Citizenship and Immigration*, [2004] 1 FCR 3, Canada's Federal Court of Appeal held that to constitute direct and public incitement to genocide, the whole of the speech or writing must be considered and within its specific contexts of both expression and reception, such that the test concerns the "ordinary way" in which these particular words would at the time have been made sense of by that particular audience.

700. The Appeals Chamber agrees that the culture, including the nuances of the Kinyarwanda language, should be considered in determining what constitutes direct and public incitement to commit genocide in Rwanda. For this reason, it may be helpful to examine how a speech was understood by its intended audience in order to determine its true message.<sup>254</sup>

701. The principal consideration is thus the meaning of the words used in the specific context: it does not matter that the message may appear ambiguous to another audience or in another context. On the other hand, if the discourse is still ambiguous even when considered in its context, it cannot be found beyond reasonable doubt to constitute direct and public incitement to commit genocide.'

In terms of identifying the required levels of subjective intent, the Appeals Chamber - largely following the Trial Chamber - located evidence of intent not in the inner subjective recesses of the author's mind at the time, which remain forever inaccessible, but in the purposes manifested in how the words themselves were deployed to achieve certain effects. The idea of a "failed attempt" to incite genocide where the "failure" stems not from the lack of required intent but from an ill-advised choice of words resulting in only in a unanimous public ridicule of the speaker, is legally conceivable owing to the absence of the *actus reus*:

'709. It is apparent from Paragraph 1001 of the Trial Judgement that the Trial Chamber employed the term "intent" with reference to the purpose of the speech, as evidenced, *inter alia*, by the language used, and not to the intent of its author. The Appeals Chamber is of the opinion that the purpose of the speech is indisputably a factor in determining whether there is direct and public incitement to commit genocide, and it can see no error in this respect on the part of the Trial Chamber. It is plain that the Trial Chamber did not find that a speech constitutes direct and public incitement to commit genocide simply because its author had criminal intent.'

Finally, the Appeals Chamber rejected the Trial Chamber's view that hate speech inciting genocide was not an offence unless and until a genocide itself took place. In other words, they re-affirmed the idea that incitement is an "inchoate offence."

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<sup>254</sup> In this respect, while it is not necessary to prove that the pronouncements in question had actual effects, the fact that there is clear evidence that they did influence an audience to participate in a genocidal programme can be an indication that the receivers of the message understood them as direct incitement to commit genocide.

'723. The Appeals Chamber considers that the crime of direct and public incitement to commit genocide is completed as soon as the discourse in question is uttered or published, even though the effects of incitement may extend in time.'

The difficulties of the Media Trials as a precedent for the prosecution of hate speech are also readily apparent. First, the trials illustrated the danger of judges interpreting discriminatory statements based on poor translations where determination of questions of guilt or innocence for "implicit" calls for genocidal action rests upon a carefully grounded linguistic analysis. Secondly, there was an exaggerated judicial interpretation of some of the broadcasts where these comprised of complaints that the RPF had itself committed war crimes by recruiting child soldiers. However biased or inaccurate, it is surely excessive to interpret allegations of such war criminality by a rebel group as themselves evidence of incitements to genocide. The implication of such claims is the RPF officials and their accomplices and supporters merit not genocidal extermination but arrest, trial and punishment.<sup>255</sup> Thirdly, even if one were to consider the statements that the prosecution selected as particularly incriminating examples of hate speech involving incitement to genocide, then nearly all of those more closely resemble those of Hans Fritzche than Julius Streicher's direct urgings of mass racist murder.

### **Hate Speech as "Persecution"?<sup>256</sup>**

In cases where it is not possible to satisfy the strict requirements of "direct and public incitement," prosecutors may also have to consider the alternative of charging those responsible for hate speech with the international criminal offence of "persecution on

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<sup>255</sup> Nahimana, TJ., 413.

<sup>256</sup> William J. Fenrick, 'The Crime Against Humanity of Persecution in the Jurisprudence of the ICTY', 32 *Netherlands Yearbook of Int'l L.* 89, 89 (2001).

political, racial or religious grounds ... whether or not in violation of the domestic law of the country where perpetrated.' This offence category originates in Article 6 of the Charter of the IMT, which provided the legal basis for the Nuremberg Trials 1945-46. This measure broke new ground in that it permitted prosecutions for atrocities committed by state officials against its own citizens within its own national borders, even where there was no domestic law specifically criminalising persecution through hate speech for example.<sup>257</sup>

There currently is a lack of consensus at the international level about what types of legal protection should be afforded to hate speech understood as a form of "persecution" infringing upon the right to human dignity. This is especially the case where such statements contribute to the power of propaganda to incite hostility against a group of civilians in situations of extended discrimination. The Nuremberg and related case law on Nazi "persecution" identified various types of discriminatory legal treatment and various status deprivations, including the enactment and enforcement of racist and anti-Semitic laws.<sup>258</sup>

The grounds for legal recognised discrimination amounting to "persecution" as a subset of "crimes against humanity" have altered markedly over the past 80 years, and it might well be foolish to consider that this process of development to have now ceased. The one consistent feature in all the legally recognised cases to date, which cannot be considered to be in any sense exhaustive, is that it is necessary only to make a case under one of the legal recognised grounds (e.g., racial or religious) because they are expressed out as alternative headings. As the ICTY's review of precedents in the *Tadic* case made

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<sup>257</sup> See Charter of the International Military Tribunal art. 6, 59 Stat. 1546, 1547 defining crimes against humanity as: 'murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.'

<sup>258</sup> *Alstotter et al* (1947) 3 TWC 954, 1063-4; *Trial of Hans Albin Rauter* (1948) 14 LRTWC 89, 92-3.

clear: 'it is sufficient if one discriminatory basis is present.'<sup>259</sup>

Under the Nuremberg Charter race, religion or politics were each recognised as sufficient grounds, and this was repeated in the follow up German law of Control Council Law No. 10.<sup>260</sup> These were clearly drafted to address the immediate post-war European context. By contrast, the Tokyo Charter concerned with Japanese war crimes excluded religion as a basis for "persecution" because of its apparent irrelevance to Japanese war criminality within the Pacific theatre of operation.<sup>261</sup> However three years later the Convention on the Prevention and Punishment of the Crime of Genocide added "ethnicity" to this list of grounds of legally recognised persecution, which is repeated in the 1991 and 1996 versions of the I.L.C. Draft Code.<sup>262</sup> The original 1954 Draft Code had also included "culture."<sup>263</sup> By contrast, the ICTY and ICTR statutes embodied a more restrictive approach limited to persecutions undertaken on the basis of race, religion and politics alone.

Originally, in the Nuremberg case law, any act of persecution on political, racial or religious grounds had to be associated with illegal warfare. However, subsequent war crimes case-law relaxed, and then ultimately removed, this requirement for a "nexus" to armed conflict. On the other hand, and for reasons the next paragraphs will explain, only extreme cases of hate speech, are likely to meet the legal requirements of this offence.

The key conceptual question is whether any type of hate speech can amount to persecution, which of course depends on the meaning and scope given to this category. M. Cherif Bassiouni has sought to define this term:

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<sup>259</sup> Para. 712.

<sup>260</sup> Control Council Law No. 10, Art. 2(c).

<sup>261</sup> The Tokyo Charter, Art. 5(c). and the Nürnberg Principles, Principle IV.c.

<sup>262</sup> The 1996 I.L.C. Draft Code, Art. 18(e).

<sup>263</sup> I.L.C. Draft Code of Crimes against the Peace and Security of Mankind, Ybk ILC, 1954, Vol. II, 150-152, U.N. Doc. A/2673.

'Throughout history . . . the terms "persecute" and "persecution" have come to be understood to refer to discriminatory practice resulting in physical or mental harm, economic harm, or all of the above. . . . The words "persecute" and the act of "persecution" have come to acquire a universally accepted meaning for which a proposed definition is: State Action or Policy leading to the infliction upon an individual of harassment, torment, oppression, or discriminatory measures, designed to or likely to produce physical or mental suffering or economic harm, because of the victim's beliefs, views, or membership in a given identifiable group (religious, social, ethnic, linguistic etc.), or simply because the perpetrator sought to single out a given category of victims for reasons peculiar to the perpetrator.'<sup>264</sup>

Another possible definition of persecution was originally offered for crimes against humanity in general has been given by M. Le Gunehec of the *Cour de Cassation* in the Barbie case:

'above all these crimes offend the fundamental rights of mankind; the right to equality, without distinctions of race, colour or nationality, and the right to hold one's own political and religious opinions. Such crimes not only inflict wounds or death, but are aggravated by the voluntary, deliberate and gratuitous violation of the dignity of all men and women: these are victimised only because they belong to a group other than that of their persecutors, or do not accept their dominion.'<sup>265</sup>

After a period of nearly 50 years of stagnation brought about by a lack of prosecutions during the Cold War period, this offence became deployed in the ICTY and ICTR, receiving greater clarification and development.<sup>266</sup> The crime of "persecution" was addressed in 1994 by the ICTY in the Tadic case, the Tribunal's first case, where the Trial Chamber recognised that, until 1994, this offence had never been clearly defined in international criminal law, nor did it form part of the world's major criminal justice systems.<sup>267</sup> A key finding of the Tadic case states:

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<sup>264</sup> M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*. Martinus Nijhoff: Dordrecht, 1992, 317.

<sup>265</sup> Report of Counsellor Le Gunehec, 24, quoted in Antonio Cassese, *Violence and Law in the Modern Age*, 112.

<sup>266</sup> Ken Roberts, 'Striving for Definition: The Law of Persecution from its Origins to the ICTY,' in *The Dynamics of International Criminal Justice*, Hiram Abtahi & Gideon Boas eds., 2006, 257, 269-70.

<sup>267</sup> *Prosecutor v. Tadic*, Case No. IT-94-I-T, Opinion and Judgment (May 7, 1997), para. 694, available at <http://www.icty.org/x/cases/tadic/tjug/en/tad-ts70507JT2-e.pdf>.

'697. From the above it is evident that what is necessary is some form of discrimination that is intended to be and results in an infringement of an individual's fundamental rights. Additionally, this discrimination must be on specific grounds, namely race, religion or politics. Because the "persecution type" is separate from the "murder type" of crimes against humanity it is not necessary to have a separate act of an inhumane nature to constitute persecution; the discrimination itself makes the act inhumane. The commentary to the I.L.C. Draft Code speaks of a denial of human rights and fundamental freedoms to which individuals are entitled without distinction, and refers to articles of the Charter of the United Nations and the International Covenant on Civil and Political Rights which address the right to non-discrimination. It also discusses the relationship between the crime of "persecution on political, racial, religious or ethnic grounds" and that of "institutionalized discrimination on racial, ethnic, or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population", noting that they both involve "the denial of the human rights and fundamental freedoms of individuals based on an unjustifiable discriminatory criterion", although in the case of the latter the discriminatory plan or policy must be institutionalised. It is the violation of the right to equality in some serious fashion that infringes on the enjoyment of a basic or fundamental right that constitutes persecution, although the discrimination must be on one of the listed grounds to constitute persecution under the Statute.'

This definition, which equates hate speech expressing a discriminatory intent with an "inhumane act," entails a broadening of earlier conceptions of persecution, including those stemming from the Nuremberg jurisprudence. It criminalises relatively "peripheral" acts of persecution through words alone where these are grounded in a discriminatory intent but not necessarily linked to acts of murder, extermination, enslavement or deportation - the other specific headings of "crimes against humanity."

In addition, this judgment specifically referred to how hate speech could amount to persecution despite lacking any element of physical or economic harm, and turned to the Julius Streicher case before the IMT as authority for this proposition:

'708. In addition to economic measures a variety of other acts can constitute persecution if one with the requisite discriminatory intent. The Nürnberg Tribunal's decision regarding defendant Streicher is useful in considering the varying manifestations of persecutory acts. Streicher was convicted of crimes against humanity because through his speaking, writing and preaching hatred of the Jews he



“infected the German mind with the virus of anti-Semitism, and incited the German people to active persecution” in Germany as well as elsewhere. Thus his “incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds in connection with War Crimes as defined in the Charter and constitutes a Crime Against Humanity.”

This judgment noted that: 'the crime of persecution encompasses a variety of acts, ... that violate an individual's right to the equal enjoyment of his basic rights.' (para. 710) On this definition, "hate speech," which by its nature exhibits a discriminatory motivation and effect that is contrary to a "right to equal treatment," falls within the category of "persecution."

The Nuremberg Charter definition has been re-affirmed in slightly modified ways in subsequent measures such as the statutes authorising the Rwandan and former-Yugoslavia war crimes tribunals.<sup>268</sup> The ICC Statute is the most recent codification of crimes against humanity.<sup>269</sup> Article 7 defines this offence as:

For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

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<sup>268</sup> See Art. 5 of the ICTY statute: "...the power to prosecute persons... committed in armed conflict,... national or international..., civilian population" ... "murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial and religious grounds, other inhumane acts." The same wording is found in the ICTR statute with the exception that there is no equivalent armed conflict provision.

<sup>269</sup> Rome Statute of the International Criminal Court, entered into force July 1, 2002, A/CONF.183/9, available at [http://untreaty.un.org/cod/icc/statute/english/rome\\_statute\(e\).pdf](http://untreaty.un.org/cod/icc/statute/english/rome_statute(e).pdf).

- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health;

For the purpose of regulating hate speech is is 7(h) that is especially relevant, possibly deployed in conjunction with the more widely defined 7(k). This measure needs to be interpreted in the light of the explanatory commentary contained in the "Elements of the Crimes" guide.<sup>270</sup>

Article 7 (1) (h) of the ICC Statute requires prosecutors to demonstrate that the perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights, and targeted them by reason of the identity of a group or collectivity or targeted the group or collectivity as such. Such targeting must be shown to be based on political, racial, national, ethnic, cultural, religious, gender, as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognised as impermissible under international law. The act of persecution must be committed in connection with any of the acts mentioned in article 7, paragraph 1 of the Statute or any crime within the jurisdiction of the Court. As with the other categories, "persecution" must be committed as part of a "widespread or systematic attack directed against a civilian population." In terms of intent, the perpetrator must have known that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

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<sup>270</sup> <http://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>

This measure reiterates the earlier list of acts amounting to crimes against humanity, with minor variations, that recognised by the ICTY and ICTR Statutes. It expressly defines persecution as “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.” What the ICC Statute adds, however, is the requirement that this provision only applies if the perpetrator engages in a course of conduct involving the *multiple commission* of covered acts while pursuing or furthering “a State or organizational policy to commit” an attack against a civilian population.<sup>271</sup> This restricts existing customary international law. The discriminatory grounds listed by the ICC Statute Art. 7 (1)(h) represent an expansion in that they are no longer limited to political, racial, or religious grounds, as is the case with the ICTY and ICTR statutes, but also include national, ethnic, cultural, gender, and “other grounds that are universally recognized as impermissible under international law.” These additions are open-ended and may generate interpretative issues in their application. They are permissive of creative lawyering and expansive judicial interpretations, including with respect to hate speech.

The other key departure of the ICC Statute from the earlier definitions is more restrictive, at least in principle. Persecution must now be committed in connection with "other acts or crimes within the jurisdiction of the ICC."<sup>272</sup> On the face of it, this seems to amount to a return to the Nuremberg Charter where, as already noted, persecutory acts had to be committed in connection with other acts or crimes within that Court’s jurisdiction. If so, this could mean that hate speech which is not specifically linked to war crimes, genocide, or other types of crimes against humanity could fall outside the

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<sup>271</sup> Art. 7(2)(g) and art. 7(2)(a).

<sup>272</sup> Art. 7(1)(h).

statutory definition, and therefore go unpunished. On the other hand, Art. 21(1) of the ICC Statute also provides that the Court shall apply: 'where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict.' This includes customary international law, where there is no requirement of a link between persecution and other crimes. This would allow the ICC to decide that it is able to follow the current developments in international customary law together with the Statute.

In short, to succeed in prosecuting for hate speech as a form of persecution, prosecutors must show the the perpetrator severely deprived, contrary to international law, one or more persons, who have been singled out by reason of their group identity, of their fundamental rights. Such discriminatory targeting must be based on political, national, racial, ethnic, cultural, religious or gender grounds, or other grounds universally recognised as impermissible under international law. Hate speech must also been expressed in connection with one or more of the acts referred to in article 7 para 1, or any crime within the jurisdiction of the ICC Court.

If a case is to made under the "other inhumane acts" category, perhaps in conjunction with "persecution," then prosecutors would have to establish that those responsible for hate speech inflicted great suffering, or serious injury to body or to mental or physical health by means of these expressions, and that this was of similar character to any other act referred to in Art 7 para 1 of the ICC statute. In short, the *actus reus* of the crime consists of an underlying act which discriminates in fact and must deny a fundamental human right laid down in international law. There is little doubt that certain instances of hate speech can meet this legal test. The *mens rea* of persecution is intentional discrimination on one of

the listed grounds which the prosecuting authorities have to prove beyond a reasonable doubt. It must also be shown that a perpetrator was aware of the factual circumstances that established the character of the expression.

Before hate speech could be held to cross the threshold of "crimes against humanity," it needs to form part of a widespread programme, as opposed to isolated or sporadic acts, and involve a number of offenders working together in actions that are directed systematically against a sector of the population. These actions must have caused serious physical or mental suffering. In terms of subjective intent, prosecutors must show that perpetrators of hate speech possessed intent and knowledge of the wider context in which the offence takes place. The persecutory act must be intended to cause, and result in, an infringement on an individual's enjoyment of a basic or fundamental right.<sup>273</sup>

Where hate speech can be shown to be an intentional, gross, or blatant denial, on any one of other discriminatory grounds listed of a fundamental right laid down in international customary or treaty law, then there is the prospect of a successful prosecution. The fact that hate speech is not as such included within the various partial codifications such as the ICTY and ICTR and ICC statutes is not fatal but this offence is broadly defined to encompass other acts in violation of a fundamental right, such as human dignity, human security and freedom from discriminatory treatment.

"Persecution" can consist of the deprivation of a wide variety of fundamental rights, including hate speech endorsing and forming part of wider attacks on political, economic, and social rights, as well as expressions amounting to acts of harassment, humiliation, and psychological abuse. A key issue in determining whether a hate crime expression

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<sup>273</sup> Tadic op cit, para. 715.

involving harassment or humiliation constitutes "persecution" is not its relative and apparent level of cruelty considered in isolation, but rather the overall and cumulative discriminatory effect such expression seeks to encourage among its audience. Of course, defence lawyers will argue that hate speech rarely, if ever, reaches the same "level of gravity" as other crimes against humanity, such as murder, extermination, enslavement, deportation, imprisonment, and torture. However, and at least when framed in these broad terms, this argument has not been judicially accepted.

The ICTR Appeals Chamber in the Media Cases has provided a reasonably comprehensive clarification of the current international criminal law on that sub-set of "crimes against humanity" consisting of "persecution" on racial, religious, political or national grounds.<sup>274</sup> Interestingly, it related this branch of international law regulating hate speech to aspects of "human rights" law concerned with the violation of norms of "human dignity," "security," and freedom from "discrimination." In its judgment, the Appeals Chamber clarified that "hate speech" that violates the right to security and human dignity is capable of, under certain circumstances, of constituting a "persecutory act" rising to the level of "required gravity" to constitute a crime against humanity. This can apply when such speech is considered either on its own, or together with other similar infringements. Where hate speech targets a population on one of the prohibited discriminatory grounds violates the right to respect for human dignity of the members of that group, it amounts to "discrimination in fact." Where hate speech, as in the *Media Case* itself, is also accompanied by "incitement to commit genocide" and contributes to a widespread and systematic campaign of other discriminatory acts, including acts of physical violence, then the Chambers held that the speech itself rises to the required level of gravity

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<sup>274</sup> Nahimana v. Prosecutor, Case No. ICTR-99-52-A, Judgement (Nov. 28, 2007).

sufficient to constitute "persecution."

986. The Appeals Chamber considers that hate speech targeting a population on the basis of ethnicity, or any other discriminatory ground, violates the right to respect for the dignity of the members of the targeted group as human beings, and therefore constitutes "actual discrimination". In addition, the Appeals Chamber is of the view that speech inciting to violence against a population on the basis of ethnicity, or any other discriminatory ground, violates the right to security<sup>275</sup> of the members of the targeted group and therefore constitutes "actual discrimination".

This Court was not, however, convinced that: 'hate speech alone,' that is without an express urging of others to commit genocide, will necessarily amount to a violation of the rights to life, freedom and physical integrity of the human being, which underpin crimes against humanity: 'Thus other persons need to intervene before such violations can occur; a speech cannot, in itself, directly kill members of a group, imprison or physically injure them.'

(para.986)

And yet the same court also refused to accept the argument that words alone could not, in principle, constitute a "crime against humanity" because hate speech in principle were of a lower level of gravity than the other behaviour identified as examples of this offence, such as murder and physical ill-treatment. Instead both contextual factors and the 'cumulative effect' of a sustained programme of hate speech might be able to result in convictions on this ground alone:

'986. On the contrary, it is not necessary that every individual act underlying the crime of persecution should be of a gravity corresponding to other crimes against humanity: underlying acts of persecution can be considered together. It is the cumulative effect of all the underlying acts of the crime of persecution which must reach a level of gravity equivalent to that for other crimes against humanity. Furthermore, the context in which these underlying acts take place is particularly important for the purpose of assessing their gravity.'

Clearly, this court was mindful of the possibility of international courts having to address

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<sup>275</sup> On the right to security, see for example Article 3 of the Universal Declaration on Human Rights ("Everyone has the right to life, liberty and security of person").

extended programmes of particularly damaging and intense forms of "hate speech" crossing the threshold of persecution because their gravity is on a par with the gravity of other recognised headings of "crimes against humanity."

It was argued in partly dissenting judgments that the idea of certain types of hate speech being legally defined as persecution is problematic because it conflates such speech with incitement to violent crimes, as well as making legally protected speech an element of the crime of persecution.<sup>276</sup>

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<sup>276</sup> *Nahimana*, Partly Dissenting Opinion of Judge Theodor Meron para. 13; *Nahimana*, Partly Dissenting Opinion of Judge Fausto Pocar para. 3.



## **CHAPTER FOUR**

### **RWANDA HATE SPEECH LAWS<sup>277</sup>**

Rwanda is a signatory to core international human rights treaties previously discussed that purport to guarantee freedom of expression, with this state acceding to the ICCPR on 16 April 1975 and ratifying the African Charter on 15 July 1983.

In the early months of 1994, over eight hundred thousand people, mainly ethnic Tutsis, were systemically killed often with machetes and knives. It is widely recognised, including by international criminal law jurisprudence of the International Criminal Tribunal for Rwanda (ICTR) that certain media played a vital role in creating the preconditions for this genocide as well as specifically inciting it through, for example, broadcasting hate speech. Three media executives, Ferdinand Nahimana, Jean-Boso Barayagwiza and Hassan Ngeze, were found guilty by the ICTR in the so-called "Media Trials" of "conspiracy" and "incitement" to commit genocide, genocide itself, and the crimes of persecution and extermination.

The horrific and intensive genocidal massacre of Tutsi and moderate Hutus by militant Hutu militias and others during 1994, incited and encouraged in part by radio and other sectarian media, provided the context for the creation of a succession of legislation and constitutional restrictions of varieties of hate speech. The broad way in which these have been defined and some of the the particular targets of their application have generated controversy from liberal human rights groups and NGOs, which will be discussed in a later sub-section before the constitutional and criminal law dimensions of the legal regulation of

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<sup>277</sup> This chapter was drafted by Dr Kim McGuire, Dr Michael Salter.

hate speech have been tackled in the next two sections.

### **The Rwandan Constitution**

The preamble to the 2003 Rwandan constitution includes an emphatic historical reference when it states “[i]n the wake of the genocide that was organized and supervised by unworthy leaders and other perpetrators and that decimated more than a million sons and daughters of Rwanda resolves: 'to fight the ideology of genocide and all its manifestations and to eradicate ethnic, regional and any other form of divisions.’<sup>278</sup> The Preamble also affirms the establishment of the "gacaca" jurisdictions, that is, community-based local courts, created in 2001, to provide a fast and informal way to resolve a backlog of cases involving many thousands of alleged perpetrators of genocide ("genocidaires").

Article 1 states that the purpose of the State's anti-genocide ideology measures, discussed below, is to both prevent and punish the crime of genocide ideology. The final paragraph of the preamble asserts a causal connection between the existence of this law and the elimination of future threats of genocide, stating that: 'it is necessary to prevent and punish genocide ideology in order not for genocide to be committed again in the country.' These provisions introduce the constitution's preamble and place the particular historical context of genocide at the core of the Rwanda's new constitutional order, suggesting it is a historically specific response to the 1994 genocide concerned to preempt its repetition.

The RPF government's stated policy is to establish and stabilise a regime of governance and civil society in which there would be both legal accountability for past atrocities and the prevention of future genocidal acts based on ethnic killings.

The Rwandan constitution displays a structure similar to many European ones in that it

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<sup>278</sup> Pmbl. para. 2.

recognises various freedoms, including freedom of expression,<sup>279</sup> although placing limits on them in the name of social order and stability within the historically specific context of an immediate post-genocide situation. Article 34 states that: “[f]reedom of the press and freedom of information are recognized and guaranteed by the State [but that f]reedom of speech and freedom of information shall not prejudice public order and good morals, the right of every citizen to honour, good reputation and the privacy of personal and family life.” Similarly, this measure provides that: “[f]reedom of association is guaranteed and shall not require prior authorization [but s]uch freedom shall be exercised under conditions determined by law.’

In short, the Rwandan constitution sets its face against what is termed the “ideology of genocide” (“Ibengabyitekerezo bya jenocide”) - literally the ideas that lead to genocide, and does so by emphasising the presumed and projected "unity" of the country (“one Rwanda”) and its people. The practical realisation of this commitment is a legal ban on ethnic classifications (dating back to Belgium colonialism), discussions of the country’s ethnic differences that could promote sectarian division. Many provisions of the Rwandan constitution reflect concerns for the “eradication of ethnic, regional and other divisions and promotion of national unity” (Art. 9, paragraph 3). Article 9 also states that the “fighting the ideology of genocide and all its manifestations” are among the fundamental principles of the Rwandan state. The emphasis is upon “national" not ethnic culture” (Arts. 50 and 51), and there is a prohibition of basing political parties upon on ethnicity, tribe, clan or other forms of sectarianism which could give rise to discrimination” (Art. 54; Art. 77, paragraph 3).

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<sup>279</sup> Article 34 of the 2003 Rwandan Constitution ensures freedom of association, assembly, opinion and the press. Constitution of the Republic of Rwanda, Official Gazette No. Special, 4 June 2003

The Rwandan Senate is specifically responsible for supervising the observance these constitutional principles (Art. 87). There is an emphasis on the resolution of conflicts between political parties through a "Party Forum" operating on the principle of consensus (Art. 56). This constitution also requires a multiparty government by restricting the majority party to no more than 50% of the cabinet (Art. 116, paragraph 5), and insists that the State President and the President of the Chamber of Deputies must be members of different political parties (Art. 58).

In addition to consensus-oriented obligations upon politicians, citizens are also positively obliged to promote the value of national solidarity: "Every citizen has the duty to relate to other persons without discrimination and to maintain relations conducive to safeguarding, promoting and reinforcing mutual respect, solidarity and tolerance" (Art. 46). For instance, Article 13 specifies that that: "[r]evisionism, negationism [i.e., genocide denial] and trivialisation of genocide are punishable by the law."<sup>280</sup> "Negationism" usually refers to the denial of the genocide against the Tutsi together with various contextual factors concerning its implementation. This includes making claims that there was "double genocide" and other "crimes against humanity" committed during the war launched by the RPF, including acts of revenge against Hutus after the 1994 100 days genocide.

"Revisionism" typically refers to any attempts to deny an "established fact or ideology". Article 33 states that all ethnic, regionalist, and racial propaganda, and any propaganda based on any other form of division, are also punishable by criminal law. Other laws that impact upon possible hate speech include the recently reformed 2002 Press Law,<sup>281</sup> and the

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<sup>280</sup> Const. of the Republic of Rwanda, 2003, art. 13.

<sup>281</sup> Law No. 18/2002 of 11 May 2002 Governing the Press, Official Gazette of the Republic of Rwanda, July 1, 2002, art. 85. For a discussion of the deployment of divisionism charges against the press, see Enrique Armijo, 'Building Open Societies: Freedom of the Press in Jordan and Rwanda,' 2 *J. Int'l Media & Ent. L.* 105, 122–23 (2008).

2008 Organic Law on Nongovernmental Organizations,<sup>282</sup>

### **Specific criminal offences**

The criminal law of Rwanda clearly gives direct expression to the interrelationship between the government's wider goal of post-genocide reconciliation pursued through the prohibition of sectarianism ("division"), and broadly defined "genocide ideology." At the core of constraints upon alleged hate speech and related forms of association is the Rwandan government's stated commitment to eradicate all forms of divisionism and genocide ideology.

The Rwandan law on divisionism criminalises: "any speech, written statement or action that causes conflict that causes an uprising that may degenerate into strife among people."<sup>283</sup> Persons guilty of "divisionism" are liable to imprisonment for up to five years and to loss of their civil rights. The 2001 divisionism law was the first of the laws the Government enacted as part of its reconciliation policy, and forms part of an overall attempt, reflected as already noted in the constitution, to build up a non-ethnic Rwanda. Legal scholars have suggested it has been used to outlaw the identification and classification of Hutu, Tutsi, or Twa ethnic groups in favour of a single Rwandan ethnicity. This can mean that criminal charges can be brought against anyone for using terms of collective identity other than Banyarwanda, or "the people of Rwanda").<sup>284</sup> The stated rationale for the law is to prevent "discrimination" by focusing on speech, including hate speech: "that may degenerate into strife."<sup>285</sup> The preamble reinforces this focus, specifying

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<sup>282</sup> Organic Law No. 55/2008 of 9 October 2008, art. 4.

<sup>283</sup> Law No. 47/2001 of 18 December 2001, art. 3.

<sup>284</sup> See Eugenia Zorbas, 'Reconciliation in Post-Genocide Rwanda,' 1 *Afr. J. Legal Stud.* 29, 43–44 (2004)

<sup>285</sup>

that the law's motivation was the fact: 'that no one has ever been prosecuted and punished for sowing divisions and discrimination among citizens, but this practice was instead encouraged until it was abused by those who prepared and perpetrated the genocide and massacres, which befell the country in 1994.'<sup>286</sup>

The legal details of relevant provisions also include a 2003 law prohibiting "negationism" or hate speech involving genocide denial, gross minimisation, and any attempt to justify or approve of genocide, as well as any destruction of evidence of the genocide (Article 4), which carries with it a 10 to 20-year sentence.<sup>287</sup> This law extends earlier related antidiscrimination measures from 2001.<sup>288</sup> Neither the Rwandan Constitution, nor the 2003 law provides specific definitions of the key terms "revisionism", "denial" or "gross minimisation."

The 2003 law criminalising "negationism" is part of the law on the crimes of genocide, war crimes, and crimes against humanity. The relevant part states:

'Shall be sentenced to an imprisonment of ten (10) to twenty (20) years, any person who will have publicly shown, by his or her words, writings, images, or by any other means, that he or she has negated the genocide committed, rudely minimised it or attempted to justify or approve its grounds, or any person who will have hidden or destroyed its evidence. Where the crimes mentioned in the preceding paragraph are committed by an association or a political party, its dissolution shall be pronounced.'<sup>289</sup>

As with the German Holocaust denial laws, discussed later, the combating of "negationism" is justified in terms of both the protection of "the dignity" of genocide survivors and a policy of seeking social stability. By including negationism as part of the

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<sup>286</sup> Pmbl.

<sup>287</sup> See Law No. 33 bis/2003 of 6 September 2003 Repressing the Crime of Genocide, Crimes Against Humanity and War Crimes, art.4: *Official Gazette of the Republic of Rwanda*, Nov. 1, 2003.

<sup>288</sup> Law No. 47/2001, Article 1, paragraph 2 and Article 3, paragraph 2, Articles 5 and 15. This law criminalises discrimination generally and then defines sectarianism in reference to that discrimination. See Law No. 47/2001 of 18 December 2001 (defining sectarianism as actions likely to cause: 'an uprising which might degenerate into strife among people based on discrimination mentioned in article one.'

<sup>289</sup> Law No. 33 bis/2003 of 6 September 2003, art. 4.

criminalisation of genocide, the Rwandan government has linked the prohibition of genocide denial with the need to promote political stability and prevent future genocides.

Following the enactment of the 2003 law, the Rwandan government began to focus increasingly on "genocide ideology."<sup>290</sup> Since then, this category has been applied to conduct that not only includes "negationism" and "sectarianism generally" but has also been used a "catch all" to cover various types of activities that transcend the direct incitement or promotion of genocide.<sup>291</sup>

More recently, on 23 July 2008 the Rwandan Parliament enacted a law relating to the "Punishment of the Crime of Genocide Ideology," which provides for a 10 to 25-year sentence as well as large fines.<sup>292</sup> This measure prohibits expressions and actions of hate speech the accuser perceives as inciting or promoting the extermination of individuals according to their membership of groups based upon nationality, ethnic origin, religion, skin colour, physical appearance, sexuality, gender, language or political opinion among others. There is no requirement for such hate speech to be connected even indirectly with any form of civil conflict or be associated with actual acts of individual, group-on-group violence, or any type of war.

"Genocide ideology" is defined in broad terms by article 2 of the 2008 measure as: 'an aggregate of thoughts characterized by conduct, speeches, documents and other acts aiming at exterminating or inciting others to exterminate people based on ethnic group, origin, nationality, region colour, physical appearance, sex, language, religion or political opinion, committed in normal periods or during war.' Article 3 of this 2008 law prohibits

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<sup>290</sup> See Waldorf, op cit 109; Law and Reality, op cit, 34–35.

<sup>291</sup> Ibid: see also Human Rights Watch, "Rwanda," in World Report, 2010 148, 150: <http://www.hrw.org/world-report-2010>; Law and Reality, op cit, 38; 98. Cf. Kezio-Musoke David, 'MPs in Bid to Stamp Out 'Genocide Ideology,' *The Nation*, Jan. 18, 2008.

<sup>292</sup> Law No. 18 of 23 July 2008 Relating to the Punishment of the Crime of Genocide Ideology, *Official Gazette of the Republic of Rwanda*, Oct. 1, 2008.

behaviour that, as a matter of fact, manifest an aim to dehumanise a person or group of persons with share characteristics in any of the following ways:

- '1. Threatening, intimidating, degrading through diffamatory (sic) speeches, documents or actions which aim at propounding wickedness or inciting hatred;
2. Marginalizing, laughing at a person's misfortune, defaming, mocking, boasting, despising, degrading, creating confusion aiming at negating the genocide which occurred, stirring up ill feelings, taking revenge, altering testimony or evidence for the genocide which occurred.'
3. Killing, planning to kill or attempting to kill someone for purposes of furthering genocide ideology.'

Lars Waldorf suggests that the government began reporting and prosecuting cases of "genocide ideology" in this sense much earlier than 2008 under the earlier law 2001 law relating to the punishment of sectarianism and discrimination.<sup>293</sup>

Both organisations, such as schools, churches, broadcasters and NGO's,<sup>294</sup> as well as individual citizens fall within the scope of this law. In addition to severe penalties for adults of 20-25 years under Article 8, with enhanced penalties for repeat offenders under Article 4, the 2008 law also provides punishment for children and their parents are found to have spread "genocide ideology."<sup>295</sup> Children under 12 who are found guilty of genocide ideology may be sent to "rehabilitation centres" for a maximum of one year, whilst those between twelve and eighteen are subject to half the penalties normally applied to adults for a similar level of offence.<sup>296</sup> Those involved in educating children who are convicted of this offence face sentences of 15 to 25 years imprisonment under Article 11.

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<sup>293</sup> Article 3; Lars Waldorf, 'Revisiting Hotel Rwanda: genocide ideology, reconciliation, and rescuers', in *Journal of Genocide Research* 11: 1 (2009): 109. According to a 2007 – 2008 government report on justice in Rwanda, there were 1,034 trials connected to 'genocide ideology' prosecuted as acts of murder, assassination, poisoning, arson, aggravated assault, damage to goods and cattle, discrimination, negationism, revisionism and threats. These prosecutions resulted in eight convictions to life in prison, two convictions to over 20 years in prison, 36 between 10 and 20 years in prison, 96 between 5 and 10 years, 91 to under five years imprisonment, as well as 102 acquittals.' " Summarised in Amnesty International (31 August 2010) 'Safer to Stay Silent: The Chilling Effect of Rwanda's Laws on "Genocide Ideology" and "Sectarianism."' (31 August 2010): <http://www.unhcr.org/refworld/pdfid/4c7c90552.pdf>

<sup>294</sup> Article 7 states that convicted NGO's face a fine of 5 to 10 million Rwandan Francs as well as dissolution.

<sup>295</sup> Human Rights Watch, 2008 op cit, 42.

<sup>296</sup> Art 9.



## Controversy

Controversy has arisen mainly with respect to "freedom of expression" and "political association" grounds, including the alleged legal repression of political dissent and political opposition even where this is not connected even indirectly to the promotion of genocide.<sup>297</sup> Other sources of controversy stem from wider concerns concerning the relative "indeterminacy" of the definitions of both freedom of expression and the various exceptions made for hate speech, assuming the former to be operating as the norm as opposed to the exception.<sup>298</sup> Another is the criticism that the solidification of the post-genocide political order in ways that pass over in silence government sectarian atrocities committed in retaliation, which effectively receive immunity. In addition, there is criticism that the Gacaca jurisdictions of informal local courts is that they represent an exception to the constitutional guarantee of a right to legal representation.<sup>299</sup>

Like the negationism and genocide ideology laws, Rwanda's 2001 law against divisionism has been questioned as a method for repressing dissent and maintaining the RPF's political control.<sup>300</sup> There have been allegations by, for instance, Amnesty

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<sup>297</sup> Article 19 (September 2009) 'Comment on the Law Relating to the Punishment of the Crime of Genocide Ideology of Rwanda; [http://hungryoftruth.blogspot.co.uk/2009\\_09\\_01\\_archive.html](http://hungryoftruth.blogspot.co.uk/2009_09_01_archive.html); Beswick, D. (2010) 'Managing Dissent in a Post Genocide Environment: The Challenge of Political Space in Rwanda, Development and Change,' 41 (2), pp. 225-251; Clark, Phil (2010) 'The Gacaca Courts and Post-Genocide Justice and Reconciliation in Rwanda: Justice without Lawyers,' Cambridge : Cambridge University Press; Human Rights Watch (2008) *Law and Reality: Progress in Judicial Reform in Rwanda*. New York: Human Rights Watch; Reyntjens, F. (2004) 'Rwanda, Ten Years On: From Genocide to Dictatorship,' *African Affairs*, 103 (411), pp. 177-210; Reyntjens, F. (2010) 'Constructing the Truth, Dealing with Dissent, Domesticating the World: Governance in Post-Genocide Rwanda,' *African Affairs*, 110; Lars Waldorf, 'Censorship and propaganda in post-genocide Rwanda, in *The Media and the Rwanda Genocide*,' 404, 407 (Allan Thompson ed., 2007). 249.

<sup>298</sup> See Gerry J. Simpson, 'Is International Law Fair?,' 17 *Mich. J. Int'l L.* 615, 629 (1996) "The incoherence of [international] free speech [doctrine] stems from the extremely open-textured and heavily qualified nature of the right as laid out in Article 19 of the International Covenant on Civil and Political Rights."); Donna E. Arzt, Nuremberg, Denazification and Democracy: The Hate Speech Problem at the International Military Tribunal, 12 *N.Y.L. Sch. J. Hum. Rts.* 689, 752 (1995)

<sup>299</sup> Human Rights Watch (25 July 2008) *Law and Reality*, op cit, 78.

<sup>300</sup> See Lars Waldorf, 'Revisiting Hotel Rwanda: Genocide Ideology, Reconciliation, and Rescuers,' 11 *J. Genocide Res.* 101, 118 (2009) ("[A]ny criticism of government policy is interpreted as an attack on its platform of 'unity

International and Human Rights Watch of the Rwandan government's intimidation and violence toward media, NGO and other critics of its policies, even Rwandan genocide survivors, practices condemned ).<sup>301</sup> Criticisms includes accusations of hate speech allegedly taking the form of "genocide ideology" were made against high-profile members of opposition parties. These included Victoire Ingabire, controversial leader of FDU-Inkingi, who attempted to register for the 2010 Rwandan Presidential election, and - given her "sectarian" pro-Hutu stance - was charged with practising "genocide ideology, "minimising the genocide and collaborating with a terrorist group."<sup>302</sup> Charges were also brought against Bernard Ntaganda, the leader of opposition party PS-Imberakuri, who was convicted on 11 February 2011 and started a four-year sentence for crimes of 'divisionism', including publicly criticising the government in speeches, breaching state security and attempting to plan an 'unauthorised demonstration'.<sup>303</sup> A recent article from *The New Times* summarises developments in 2012:

'Since the beginning of this year, at least 22 people have been arrested for promoting or exhibiting the genocide ideology. According to police statistics, 19 of the cases were registered in April, the beginning of the commemoration period in remembrance of the 1994 Genocide against the Tutsi. Police spokesperson, Theos Badege, said the recent and most notorious case involves a man who threatened and attempted to behead a Genocide survivor in Ngoma District.'<sup>304</sup>

In addition, an investigation, by the Commonwealth Human Rights Initiative concluded

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and reconciliation' and hence an expression of divisionism and/or genocide ideology.'").

<sup>301</sup> See Karol C. Boudreaux & Puja Ahluwalia, 'Cautiously Optimistic: Economic Liberalization and Reconciliation in Rwanda's Coffee Sector,' 37 *Dev.J. Int'l L. & Pol'y* 147, 172-73 (2009); Human Rights Watch, 'Law and Reality: Progress in Judicial Reform in Rwanda,' (25 July 2008).

<sup>302</sup> "Rwanda's Democratic Credentials under Fire," *The Independent* (London, England), March 15, 2010; Amnesty International, "Safer to Stay Silent: The Chilling Effect of Rwanda's Laws on 'Genocide Ideology' and 'Sectarianism,'" London: AI Publications, 2010: 21. "Human Rights Concerns Raised as Rwanda Set to Join Commonwealth," *The Independent* (London, England), November 23, 2009; Scott Baldauf, "Rwanda Crackdown: Human Rights Watch Researcher Denied Visa," *The Christian Science Monitor*, April 25, 2010; Daniel Howden, "Facing Life in Jail, the Woman Who Dared to Take on Paul Kagame," *The Independent* (London, England), August 7, 2010.

<sup>303</sup> 18 Amnesty International (June 2011): 4; [www.amnesty.org/en/library/info/AFR47/005/2010](http://www.amnesty.org/en/library/info/AFR47/005/2010) (accessed 10 Jan. 2013).

<sup>304</sup> 'Rwanda: Over 20 Genocide Ideology Cases Reported,' *The New Times*, 3 May 2012.

that laws against "genocide ideology" have been used to suppress freedom of speech and "create a climate of fear in civil society". It said Kagame was using his power to give immunity to suspected human rights abusers and endorsed allegations that Rwanda is: 'an army within a state.'<sup>305</sup>

'But many critics allege that this superstructure hides the reality of the way in which state power is exercised—that the prohibition of ethnic discrimination and the disregard of ethnic factors is a ruse to build and maintain the dominance of the Tutsi. They argue that political and legal prohibition of "genocide ideology" is used to suppress public discussion and criticism of the past and present conduct of the RPF, particularly the violence that led to its capture of state power and in its continuing hold on power—the violence, which is still manifested nationally and in its armed excursions into neighbouring states. They say power sharing is a means of co-opting opposition parties, as is the emphasis on consensus, and that goals and strategies of reconciliation are geared towards entrenching the power of the RPF.'<sup>306</sup>

This report in particular focuses on the broad way in which the key terms of the 2008 laws have been defined, which allows for their political abuse because of the extensive range of oppositional activity and that even providing support for Hutu defendants can be captured by their net, particularly where judges are themselves reluctant to balance this measure against human rights norms:

'Its vagueness induces extreme caution on the part of both, even when their work is the investigation of the violation of rights or the integrity of state agencies, understandably because the judiciary has failed to balance the charges against the freedom of expression and other rights. Politically motivated accusations of divisionism have been used to attack civil society organisations, the press and individuals. Accusations of divisionism or "genocidal ideology" are among the most effective tools for silencing critics of the government. What this says about the prospects of "one Rwanda" for the future is uncertain, but using genocide ideology to exclude any question or debate around the deaths of Hutus as the result of retaliation by RPF's armed forces does not bode well for reconciliation, the coming to terms with the past, and the development of a national identity—all

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<sup>305</sup> Ian Birrell, "The Dark Shadows That Stain the New Darling of Africa," *The Independent* (London, England), November 27, 2009

<sup>306</sup> Commonwealth Human Rights Initiative: "Rwanda's Application for Membership of the Commonwealth Report and Recommendations of the Commonwealth Human Rights Initiative," 2009  
[http://www.humanrightsinitiative.org/publications/hradvocacy/rwanda's\\_application\\_for\\_membership\\_of\\_the\\_commonwealth.pdf](http://www.humanrightsinitiative.org/publications/hradvocacy/rwanda's_application_for_membership_of_the_commonwealth.pdf)

claimed by the regime as its principal objectives. Criminal proceedings are used to emphasise the victimhood of the Tutsi and the “wickedness” of the Hutus as a community. At the same time, it protects the RPF from an examination of its own brutalities; it is a very effective gag on the freedom of expression.<sup>307</sup>

Article 19 have taken a particularly severe view of these genocide ideology laws as "fatally flawed" because of its broad definition and scope that is more extensive than corresponding international measure on hate speech, and imposes severe penalties including upon children. This NGO has claimed that:

'Rwandan authorities have used prosecution, or the threat of prosecution under the law to trample opposition, including calls for justice for war crimes committed by the ruling Rwandan Patriotic Front (RPF). A range of Rwandan and foreign individuals and media organisations have been caught as actual or potential violators of the Genocide Ideology Law. Most notoriously the BBC's local language radio service was suspended in the country following the station's feature of its weekly of a programme that was to include a debate on forgiveness among Rwandans after the genocide.'<sup>308</sup>

This body has produced a close critical analysis of the Genocide Ideology Law, which it has claimed fails to meet the international legal requirements to which Rwanda has signed up to, and its own "progressive interpretation" of international principles relevant to freedom of expression, "Camden Principles." Unsurprisingly, the latter contain a restrictive view of the scope of incitement to genocide that fails to recognise the type of national differences that stem from the exercise of democratic rights of national self-determination:

'The Genocide Ideology Law clearly fails to meet the standards in Article 20 of the ICCPR and Principle 12 of The Camden Principles: Article 3 does not spell out the requirement for an intention to promote hatred publicly or an imminent risk of discrimination, hostility or violence. Also, the criminalisation of “confusion aiming at negating the genocide which occurred, stirring up ill feelings, taking revenge, altering testimony or evidence ...” is clearly at odds with Principle 12.2 of The Camden Principles.'<sup>309</sup>

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<sup>307</sup> Ibid., 3.

<sup>308</sup> Article 19, op cit, para. 8.

<sup>309</sup> Ibid, para. 20.

In its recent 'Concluding Observations on Rwanda,' the UN Human Rights Committee, echoed concerns that the hate speech laws were being deployed to pressurise and intimidate media discussions of government policies:

'While taking note of the State party's explanations with regard to the role of the press in the 1994 events, the Committee notes with concern reports that journalists who have criticized the Government are currently subjected to intimidation or to acts of aggression by authorities of the State party and that some have been charged with "divisionism". International press agencies are reported to be under threat of losing their licences by employing certain journalists (art. 19 of the Covenant).'<sup>310</sup>

The Rwandan government released a 2004 report setting out what it regarded as the extent of genocide ideology in Rwanda.<sup>311</sup> It links expressly links genocide ideology with political dissent, stating that negationists: "are characterized by dissatisfaction and do not admire the achievements of the government of Rwanda."<sup>312</sup> The report denounced the BBC and accused international organizations including as Care International, Norwegian People's Aid, and the Irish Catholic Church's development body of creating division within the Rwandan Population. This 2004 report provoked considerable criticism from the groups accused, and the European Union also released a statement in which it expressing concern: "at the liberal use of the terms 'ideology of genocide' and 'divisionism' and impress[ed] upon the government the need to clarify the definition of these terms and how they relate to the laws on discrimination and sectarianism and to the freedom of speech in general."<sup>313</sup>

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<sup>310</sup> [www2.ohchr.org/english/bodies/hrc/docs/.../CCPR-C-RWA-CO3.doc](http://www2.ohchr.org/english/bodies/hrc/docs/.../CCPR-C-RWA-CO3.doc)

<sup>311</sup> Commission Parlementaire, *La Ou L'Ideologie Genocidaire Se Fait Observer Au Rwanda* [Where Genocide Ideology is Observed in Rwanda] (2004) HRW, *Law and Reality*, op cit at 38.

<sup>312</sup> Commission Parlementaire, op cit 139.

<sup>313</sup> Declaration, Presidency of the Council of the European Union, Declaration by the Presidency on Behalf of the European Union on the Statement of the Rwandan Government to the Parliamentary Report on Genocidal Ideology (Oct. 6, 2004), available at [http://www.eu-un.europa.eu/articles/fr/article\\_3869\\_fr.htm](http://www.eu-un.europa.eu/articles/fr/article_3869_fr.htm)

During the debate over the 2008 criminal law, a number of organisations attacked this measure for its alleged use of vague and wide categories. For example, the Joint Governance Assessment, which has been a joint project between various international partners, including states and NGOs, and the Rwandan government, stated:

'It is doubtful whether [the genocide ideology and sectarianism laws] fulfil the requirements of legal certainty . . . . The absence of a requirement of intentionality . . . in the provisions adds to the problem of vagueness and leaves the provisions open to abuse and less effective in tackling the problem that they are designed for. . . . Other problems with the proposed legislation are the rigid specification of penalties that do not leave any judicial discretion in sentencing to reflect the facts of each case, and provisions on the sentencing of children.'<sup>314</sup>

On the other side of the debate, equally controversial are criticisms from the Rwandan government that Western liberal critics apply double standards subjecting their regimes' prohibitions to higher standard and a less sympathetic interpretation of the particular contextual situation that Rwanda faces in relation to this more recent genocide.<sup>315</sup>

### **Paradoxes of the criminalisation of hate speech within Rwanda?**

G rard Prunier has argued that the politics of memory, within which prohibitions of hate speech both intervenes and exemplifies, contains a paradox that risks making

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<sup>314</sup> Gov't of Rwanda, Joint Governance Assessment Report 34 (2008), available at [http://www.minaloc.gov.rw/IMG/pdf\\_JGA\\_PGF\\_23-09-08.pdf](http://www.minaloc.gov.rw/IMG/pdf_JGA_PGF_23-09-08.pdf).

<sup>315</sup> US Secretary of State Hillary Clinton admonished the Rwandan government on June 14 for its legal prosecution of "opposition figures" and "lawyers," which she called political actions that should be reversed. Regarding denial of the Rwandan genocide, Minister of Justice Tharcisse Karugarama has argued that "[a]nyone who denies the occurrence of the Holocaust is severely punished, yet those who deny the Rwandan genocide are simply said to be exercising their rights to freedom of expression . . . ." Rwandan Minister Accuses West of Supporting Genocide Deniers, *African Press Int'l* (May 15, 2008), <http://africanpress.wordpress.com/2008/05/15/rwandan-minister-accuses-west-of-supporting-genocide-deniers/>. A similar criticism is found within some Western media in reaction to US criticism of Rwanda's deployment of genocide denial laws against individuals with close connections to the militantly ethnic Hutu movement that perpetrated the 1994 genocide: "To my knowledge, the US never admonished Germany for banning the Nazi-like "Socialist Reich Party" in 1952, or for prosecuting Holocaust deniers, or for banning the two dozen right-wing hate groups it has shut down over the past 18 years. We should treat Rwanda with the same understanding and respect." Richard Johnson, "Rwanda Takes a Strict Line on Genocide Denial. the US Should Support That," *The Christian Science Monitor*, June 28, 2010.

criminalisation and prosecution are able to become counterproductive by actually perpetuating a particularly divisive and ethnically-charged awareness of responsibilities for the 1994 genocide:

“the memory of the genocide which weighs on everybody’s soul like a heavy stone contributes to keeping the chasm wide open. The Tutsi keep it open by constant reminders, while the Hutu tend to deny it in order to extricate themselves from collective guilt. Of course their denial (often taking the shape of allusions to vague and unfocussed ‘violences’, the better to confuse an already confused matter) only confirms the opinion of the Tutsi that they feel no repentance and cannot be trusted in the future.”<sup>316</sup>

Such widely defined laws contained amorphous, indeterminate and easily-manipulatable categories, offer the opportunity for the government to exploit the legacy of the genocide for current political advantage, even where this very material advantage has ramifications along ethnic lines. Such exploitation can include over-estimating the number of Hutus actual involved in the 1994 genocide.<sup>317</sup> In addition, the aim of healing wounds stemming from genocide does I assume require an open study of the factors that led up to it in order to identify lessons. Yet, that goal may prove difficult if even the mention of ethnic identities, such as Tutsis and Hutus, is legally prohibited.<sup>318</sup>

In addition, in contexts such as Rwanda where atrocities have been committed on both sides of ethnic divides, including retaliation by government party members, Rwandan genocide ideology laws can actually frustrate their even handed investigation, even by outside international bodies.<sup>319</sup> In February 2008, a Spanish judge issued arrest warrants

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<sup>316</sup> Gérard Prunier, *The Rwanda Crisis: History of a Genocide*, Kampala: Fountain Press, 1999, 2<sup>nd</sup> Ed. p. 371.

<sup>317</sup> Straus, Scott, “How many perpetrators were there in the Rwandan Patriotic Front? An Estimate”, *Journal of Genocide Research*, vol. 6, no. 1, 85-98 (2004).

<sup>318</sup> Because any mention of the word “Tutsi” or “Hutu” is strictly forbidden by law: “[t]his means that any lucid examination of the relationship between Tutsi and Hutu before, during and after the genocide is now impossible. [...] Rwanda is now locked into an ideological straitjacket providing a relentless and official interpretation of history from which all shades of meaning have been sanitised.” Gérard Prunier, “Rwanda – Pain of a Nation” BBC: Focus on Africa, April-June 2009.

<sup>319</sup> The commonwealth human rights report on Rwanda refers to the efforts of how the 'RPF, now and in the past, to prevent an examination of its own conduct, and to frustrate any attempt at the trial of its members. We describe later the

under universal jurisdiction for 40 RDF officers for war crimes and crimes against humanity allegedly carried out against Rwandan, Spanish, and Congolese citizens in the 1990s. The Rwandan authorities' response was to mobilise African governments against such judicial action, classifying it as "neo-colonialist." 2006 saw Rwanda break off relations with France after a French judge issued arrest warrants against nine RDF officers. In November 2008, Germany arrested Rose Kabuye, one of the nine, on a French warrant. Rwanda then immediately expelled the German ambassador and organised protest demonstrations both in Rwanda and abroad.<sup>320</sup> Article 19 also suggest that the anti-hate speech measures adopted by Rwanda are at least potentially self-defeating, and that, in any event, their stated rationale is open to question:

Moreover, we also question whether the claim – that a law on genocide ideology must be adopted to ensure that there will never again be a genocide – can be really substantiated. We believe that if such really were the best method of prevention, surely the international community would have agreed to include a requirement on states to adopt such a law within the Genocide Convention itself. Consider also the vast majority of states which neither have legislation resembling the Genocide Ideology Law nor have suffered genocide as suffered by Rwanda in 1994. Whilst it is difficult to claim that the adoption of any legislation can serve as an absolute guarantee against genocide, it may be argued with considerable support that it is the adoption and implementation of human rights guarantees, including protections of freedom of expression, by a state are the best protection against genocide.<sup>321</sup>

This last point is itself open to challenge both in principle and with respect to historical precedents. Germany's Weimar Republic had progressive basic rights guarantees, together

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numerous ways in which the RPF has prevented the entry of journalists, human rights NGOs, and international committees and investigators in areas where traces of its brutalities could be detected. It has excluded a review of these atrocities from the jurisdiction of the wide network of Gacaca courts (discussed later) and prevented the International Criminal Tribunal on Rwanda (ICTR) from any indictments against its members. It was only too ready to criticise the ICTR for "softness" towards the accused Hutu, but took every step to protect its own members (even though the jurisdiction of the Tribunal covered only one year—1994, immunising numerous RPF atrocities after that period), including reading the mail of the Chief Prosecutor, Louise Arbour. Arbour has said that she was afraid to investigate crimes by the RPF fearing that the investigator would be killed' op cit, 32. See also Carloff Off, *The Lion, the Fox, and the Eagle: A Story of generals and injustice in Rwanda and Yugoslavia*, Random House, Canada, 2000, 331-2 on the frustration even of the ICTR's efforts. Cf. Peter Robinson and Golriz Ghahraman, "Can Rwandan President Kagame be held responsible at the ICTR for the Killing of President Habyarimana?" *J Int Criminal Justice*, 2008; 6: 981-994.

<sup>320</sup> Human Rights Watch, 2009.

<sup>321</sup> Article 19 op cit, para.11.



with a comparatively well-developed constitutional system and independent judiciary. In addition, it is factually incorrect to state that international law lacks incitement to genocide measure as there are specific measures criminalising direct and public incitement to genocide. Furthermore, some, but not all, of the activities covered by Rwanda's Genocide Ideology law could still be criminalised under the "aiding and abetting," "complicity" and "conspiracy" provisions of the 1948 Genocide Convention.<sup>322</sup>

These and other incidents suggest that efforts to depoliticise ethnic identities and the historical context of genocide by means of criminal law can prove paradoxical and contradictory. They can themselves involve an intense politicisation of the practice of criminal law, including with respect to international as well as domestic law and politics. Article 19 insist that the measures regulating hate speech should be entirely repealed because they risk turning counterproductive: 'the Genocide Ideology Law is counterproductive to its apparent objectives. Its current application suggests that it presents a catalyst for, rather than a barrier against, future human rights atrocities in Rwanda.'<sup>323</sup>

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<sup>322</sup> Article 3 covers not only genocide but also: 'b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide.

<sup>323</sup> Article 19, op cit, summary statement.

## CHAPTER FIVE:

### GERMANY'S HATE CRIME LAWS <sup>324</sup>

For our purposes, there is an interesting and instructive contrast between Rwanda and German hate crime laws, which brings into play various important issues relevant to the further development of EU initiatives, including the difficult issues of how best to strike a viable and legitimate balance between competing policy imperatives.<sup>325</sup>

In this section, the aim is develop analysis of both the distinctive and more general issues tackled by how German constitutional and criminal law have responded to the challenge of hate speech, and hate crime more generally.<sup>326</sup> When considering German law on hate crimes, it is also important to recognise that, unlike the position in the USA, the German legal and constitutional system recognises an overlay of "external" treaty-insured political rights, most emphatically those guaranteed to all Europeans by the Convention for the Protection of Human Rights and Fundamental Freedoms, as well as various international human rights treaties. Such recognition may prevent the full enforcement of domestic German regulations, albeit in ways that are still unsettled.

Does German law succeed in regulating *the content* of expressions while maintaining a constitutional commitment to freedom of expression as a key but not overriding constitutional principle, particularly as a component of "deliberative democracy" requiring contestation between a diversity of opinions, some of which will be perceived as offensive,

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<sup>324</sup> This chapter was drafted by Dr Kim McGuire, Dr Michael Salter.

<sup>325</sup> Rainer Hofmann, 'Incitement to National and Racial Hatred: The Legal Situation in Germany,' in *Striking a Balance: Hate Speech, Freedom of Expression and Non-Discrimination* 159, 170 (Sandra Coliver et al. eds., 1992).

<sup>326</sup> Winfried Brugger, 'The Treatment of Hate Speech in German Constitutional Law (Part I),' 4 *German L.J.* 1, 2–3 (2003), available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=212>.

racist, sexist and homophobic etc.? To what extent and how does German criminal law strongly protect the personal reputation and dignity of victims of hate speech? Is it ready to ban certain categories of political communications altogether where these threaten, or risk threatening, the well-being of democracy itself, and thus amount to an abuse of rights? In other words, in what respects if any does the current German position merit recognition as a clear case of "militant democracy"? Can its measures be justified as including a political philosophy of "fighting fire with fire," as part of a historical awareness that models of democracy have to alter over time as different patterns of threats emerge, and that an "illiberal," or "disciplined," form of constitutional democracy does not shirk from taking "authoritarian" measures of self-defence. Such a militant democracy refuses to be intimidated by the glib charge of liberal fundamentalism that the cure of hate speech prohibitions is worse than the disease.<sup>327</sup>

### **Constitutional Dimensions**

For over 70 years, German constitutional law has afforded extensive protection to values of "human dignity," "personal honour," and "the right to personality." As a result, restrictions and prohibition of certain kinds of expression, including those relating to categories of hate crime, can and have been judicially endorsed as constitutionally justified, even required for the defence of democracy in general.

Following World War II, the German Parliamentary Council developed the *Grundgesetz* or "Basic Law":<sup>328</sup> "to avoid what they saw as 'the serious structural

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<sup>327</sup> Kübler, Friedrich, 'How Much Freedom for Racist Speech? Transnational Aspects of a Conflict of Human Rights,' 27 *Hofstra Law Review* 335 (1998).

<sup>328</sup> Grundgesetz für die Bundesrepublik Deutschland [GG] [Basic Law] May 1949.

mistakes' of the Weimar Constitution."<sup>329</sup> The constitutional values of the Basic Law are entrenched insofar as under the principle of "reciprocal effect" the German Civil Code cannot overrule constitutional provisions in a manner that goes against the "objective values" of this law itself.<sup>330</sup> Efforts to forestall a revival of Nazism and Neo-Nazism clearly loom large in German constitutional and criminal law measures, including those relevant to hate speech and hate crimes,<sup>331</sup> and lessons have been learnt from how the pre-war Weimar constitutional order allowed Hitler to secure power and then abolish constitutional governance itself by largely legal and constitutional means. The Federal Republic of Germany was formed following the ending of WW11 to differentiate the new government and constitutional order from that of Hitler's regime, which of course had been characterised not only by its vicious hate speech but also by its genocidal hate crimes against Jews and others.<sup>332</sup>

Germany's Basic Law comprised a proto-constitution; it was drafted by a group of elder statespersons, several of whom had themselves been victims of the Nazi state. This measure, together with the achievements of the German Federal Constitutional Court, has exhibited the position adopted by most European countries and by international law. That is, that legally recognised forms of hate speech associated with threats to democracy and public order must be prohibited legally and eliminated, albeit within a constitutional framework generally supportive of principles of "freedom of expression" where these are

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<sup>329</sup> Inga Markovits, 'Constitution Making After National Catastrophes: Germany in 1949 and 1990,' 49 *Wm. & Mary L. Rev.* 1307, 1310 (2008).

<sup>330</sup> See Pawel Lutomski, 'Private Citizens and Public Discourse: Defamation Law as a Limit to the Right of Free Expression in the U.S. and Germany,' 24 *German Stud. L. Rev.* 571, 583 (2001)

<sup>331</sup> Weiss, David, 'Note: Striking a Difficult Balance: Combatting the Threat of Neo-Nazism in Germany while Preserving Individual Liberties,' 27 *Vanderbilt Journal of Transnational Law* 899 (1994); Wetzel, Juliane, 'The Judicial Treatment of Incitement Against Ethnic Groups and of the Denial of the National Socialist Mass Murder in the Federal Republic of Germany,' in: Greenspan, Louis & Levitt, Cyril, eds., *Under the Shadow of Weimar*, 83 ff.; Zimmer, Anja, *Hate Speech im Völkerrecht*, 2001.

<sup>332</sup> For an argument that German sensitivity toward Holocaust encouraged Germany's adoption of its 1960 hate speech law, see Kahn, *Holocaust Denial And The Law a Comparative Study* 66-69 (2004).

consistent with related values of "human dignity." Art. 1 (1) BL, requires the German government to respect the human dignity of speakers, as well as that of addressees who, for example, may be insulted or defamed by the speaker's racist hate speech.<sup>333</sup> Judges have on occasion given emphatic interpretations of freedom of expression, but again where this can be developed and realised not as an absolute value in itself but in harmony with, and a condition of, related values such as democratic will-formation. In the Lüth case, the Federal Constitutional Court held that:

'The fundamental right to free expression of opinion is, as the most direct expression of human personality in society, one of the foremost human rights of all. . . For a free democratic State system, it is nothing other than constitutive, for it is only through it that the constant intellectual debate, the clash of opinions that is its vital element is made possible. . . It is in a certain sense the basis of every freedom whatsoever, "the matrix, the indispensable condition of nearly every other form of freedom."<sup>334</sup>

By protecting public discourses involving the exchange of opinions over the direction of legitimate public policy, Germany's legal and constitutional systems are facilitating other democratic rights, including the right to freely develop and realise one's own personality, as well as the overall democratic framework itself. By implication, where certain types of expression, including forms of hate speech such as genocide denial and the incitement to discriminatory conduct, abuse these values, undermine democratic forms of will-formation and subvert well-informed policy debate, then they place themselves outside the umbrella of constitutional protection.

Later in the Schmid-Spiegel, the Federal Constitutional Court followed this line of constitutional interpretation when it held that, given the high value to be afforded to public communication, the range of freedoms related to this must be afforded strong legal

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<sup>333</sup> More generally, see Tettinger, Peter J., 'Protection of Freedom of Expression in German Constitutional and Civil Law,' in: Rudolf Bernhardt/Ulrich Beyerlin, eds., *Reports on German Public Law*, 1991, 115 ff.

<sup>334</sup> BVerfGE, January 15, 1958, 7.

protection, even where they involve a clash of negative even offensive statements and similarly harsh replies:

'Only a free public discussion over all matters of general significance guarantees the free building of public opinion that is necessary to a free democratic state. This dialogue necessarily occurs pluralistically involving contrasting views arising from contrasting motives, freely disseminated. Above all, it consists of speech versus counterspeech. Every citizen is guaranteed the right through Article 5 to take part in this public discussion.'<sup>335</sup>

On the other hand, this Court initiated the doctrine that false statements of fact, as opposed to those involving a matter of opinion containing a value judgments, constitute a limit upon protected forms of public discourse.<sup>336</sup> In turn, this doctrine involves an illiberal commitment to establishing borders for the constitutional protection of public discourse where judges decide there can be no public interest in the topic itself, such as debates over the existence of an already legally recognised and historically confirmed genocide, or where a clearly false statement gratuitously undermines the dignity and reputation of either the living or the dead.<sup>337</sup>

A specifically legal concern with hate crimes made its appearance in the quasi constitution of the 1949 Basic Law in immediate response to the Nazi regime and the Holocaust. Article 79(3) confirms the textual primacy by rendering Article 1, guaranteeing "human dignity" unamendable, resulting in this becoming a permanent and fixed part of the postwar German constitutional order. Indeed, making such dignity rights the first article is itself striking, and contrasts with liberal regimes which reserve this honour for "freedom of expression." In addition, Article 3, which is one of a series of articles guaranteeing basic human rights, states that no one may be discriminated against

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<sup>335</sup> BVerfGE January 25, 1961, 12 *Entscheidungen des Bundesverfassungsgericht* 113, 125

<sup>336</sup> *Ibid.*

<sup>337</sup> See the Mephisto case, BVerfGE February 24, 1971, 30 *Entscheidungen des Bundesverfassungsgericht*, 173, 193

or favoured because of the person's sex, parentage, race, language, homeland and origin, faith, or religious or political opinions.

The *Grundgesetz* certainly guarantees both freedom of speech and freedom of association. Article 5 states "[e]very person shall have the right freely to express and disseminate his opinions in speech, writing and pictures, and to inform himself without hindrance from generally accessible sources." (art. 5(1)). However, the rights to free speech: "find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honour." (Art. 5(2)). This limitation linked to "honour" is guided by Article 1(1)'s assertion that "[h]uman dignity shall be inviolable," and that these dignity rights lead to the "inviolable and inalienable human rights [at] the basis of every community . . . ." (Art 1(2)). Germany's Federal Constitutional Court has held that Article 5 rights are subordinate to the rights to "human dignity" and the "development of personality" protected in Articles 1 and 2 of the Basic Law.<sup>338</sup> German constitutionalism permits personal dignity, honour, and reputation to outweigh "freedom of expression." German law also permits private individuals to enforce this right against other private parties.

The basic law does not give the right to freedom of expression a higher status than the rights to "dignity," "free personality," and "honour." Furthermore for understandable historical reasons the German state is particularly concerned to protect against all manner of threats to "human dignity" and "equal status" of all human beings posed by, for example, various types of racist and anti-Semitic hate crime. In addition, and with some exceptions, Germany is not as committed as the USA to the neo-liberal ideology of a

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<sup>338</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct 10, 1995, 93 Entscheidungen des Bundesverfassungsgerichts [BverfGE] 266 (F.R.G.) (Tucholsky, the "soldiers are murderers" case).

"free market of ideas" that is hostile in principle state-sponsored civil and scientific discourse.

The definitional coverage of "opinion" in Art. 5 (1) comprises *all* value judgements, even those that are aggressive, based on negative views and stereotypes concerning, say, race, disability, sexuality or gender, or are plainly damaging to the well-being of individuals targeted by them. In this respect, hate speech falls under the protection of Art. 5(1). This constitutional protection extends to cases where value judgments are linked integrally to problematic assertions of fact, such as those associated with genocide denial, trivialisation or minimisation. Such combinations of fact and opinion remain constitutionally protected as "opinion" in the sense of Art. 5 (1). So if an example of a hate speech takes the form of expressing a normative judgment that, for example, all members of a certain group "morally deserve" severe discriminatory treatment because of this historical role, or that such treatment would be "a good ideal politically," then under Art 5(1) this would in principle be "protected speech" because it meets the requirement of being an opinion or evaluation. Germany's Constitutional Court has held that: 'Utterances concerning guilt and responsibility for historical events are always complex evaluations that cannot be reduced to factual assertions, whereas denial of an event itself normally will have the character of a factual assertion.'<sup>339</sup>

Any hate crimes laws that prohibited such expressions, and the German state has enacted a number of legal provisions in criminal, administrative, and civil law that regulate or criminalise hate crimes, are required to justifying themselves by reference to a pertinent limitation clause or any implicit constitutional principle.

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<sup>339</sup> Holocaust Denial case, BVerfGE 90, Decision of 13 April 1994, Auschwitz Lie Case (Holocaust Denial Case) = Decisions 620, at 627; 'Historical Falsification Case' of the Federal Constitutional Court, BVerfGE 90, 1, Decision of 11 January 1994 = Decisions 570.



On the other hand, such protection can be lost where the value judgment component can be separated out from the assertion of facts underlying without disrupting the overall sense of the message itself. On this basis, the German Federal Constitutional Court has decided that Holocaust denial *does not* fall under the protection of Art. 5 (1) because it self-evidently involves a falsification of settled historical fact. Such a claim has been held not to be protected as an "opinion," or even as an assertion of fact for the purpose of arriving at an opinion.<sup>340</sup>

Instead, such claims are regulated under the broad provision of Art. 2 (1) concerning the "right to the free development of one's personality" and the various limitations of that right.<sup>341</sup> In this denial case, the Court held that:

[Factual] assertions are not, strictly speaking, expressions of opinion. Unlike such expressions, most prominent in factual assertions is the objective relationship between the utterance and reality. To this extent their truth or falsity also can be reviewed. But this does not mean that they lie outside the protective scope of Art. 5 (1), first sentence. Since opinions usually rest on factual assumptions or comment on factual relationships, the basic right protects them in any event to the extent that they are a prerequisite for the formation of opinion, which Art. 5 as a whole guarantees .... Consequently, protection of factual assertions ends only where such representations cannot contribute anything to the constitutionally presupposed formation of opinion. Viewed from this angle, incorrect information is not an interest that merits protection. The Federal Constitutional Court has consistently ruled, therefore, that protection of freedom of expression does not encompass a factual assertion that the utterer knows is, or that has been proven to be, untrue ...The prohibited utterance, that there was no persecution of the Jews during the Third Reich, is a factual assertion that has been proven untrue according to innumerable eyewitness accounts and documents, to court findings in numerous criminal cases, and to historians' conclusions. Taken on its own, therefore, a statement having this content does not enjoy the protection of freedom of

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<sup>340</sup> Wetzel, Juliane, 'The Judicial Treatment of Incitement Against Ethnic Groups and of the Denial of the National Socialist Mass Murder in the Federal Republic of Germany,' in: Greenspan, Louis/Levitt, Cyril, eds., *Under the Shadow of Weimar*, pp. 83 ff.

<sup>341</sup> The German courts typically interpret the Holocaust as a judicially known fact, which is beyond contest. This means that motions by defendants in Holocaust denial cases to present witnesses supporting their negationist claims will be flatly denied. The courts will not allow their proceedings to be exploited as platforms for "debate" on this topic because the factual issue in question is taken to have already been long settled. See Wandres, Thomas, *Die Strafbarkeit des Auschwitz-Leugnens*, 2000, 87, 105, 189; Stein Eric, 'History Against Free Speech: The New German Law Against the "Auschwitz" – And Other – "Lies",' 85 *Michigan Law Review* 277 (1986) 290 f.

expression.<sup>342</sup>

The German constitutional court has also recognised that general norms of freedom of expression sometimes need to give way to countervailing collective needs, and that these can include restrictions on this norm. : '[General laws are] to be seen as meaning all laws that do not prohibit an opinion as such, are not directed against the utterance of the opinion as such, but instead serve to protect an object of legal protection that is to be protected as such, without regard to a particular opinion, to protect a communal value taking priority over the exercise of the freedom of opinion....'<sup>343</sup>

The Basic Law imposes limits on rights where these are abused to endanger human rights or basic principles of democracy. For example, article 9(2) limits the right to free association if goals or activities of these associations offend against criminal law or are directed against the constitutional order or against the idea of reconciliation and respect between peoples. Further, according to article 21(2), political parties seeking to harm or abolish the democratic order of the German Federal Republic can be outlawed.

Arguably, the constitutional limitation on freedom of expression and association reflects aspects of the collective the memory of the Weimar Republic whose demise of and the victory of Nazism stemmed from a perceived failure of a democratic order that had left itself defenceless against the cynical abuses of rights by its extremist enemies. The response was the creation of a *wehrhafte Demokratie*, that is, a democratic constitutional order equipped with the means of self-defence that is willing to limit political rights in particular situations where failure to do so could risk undermining the

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<sup>342</sup> BVerfGE 90, 241, 247, Decision of 13 April 1994, Auschwitz Lie Case (Holocaust Denial Case) = Decisions 620, at 625, 627

<sup>343</sup> BVerfGE 7, 198, 209, Decision of 15 January 1958, Lüth = Decisions 1, at 7 f. See also more generally Ulrich Karpen, 'Freedom of Expression,' in: Ulrich Karpen, ed., *The Constitution of the Federal Republic of Germany*, 1988, pp. 91 ff.

democratic order. Article 21(2) is also potentially relevant. It states that: “[p]arties that, by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court shall rule on the question of unconstitutionality.” Article 18 insists that persons who abuse the freedoms granted under the *Grundgesetz*: “in order to combat the free democratic basic order shall forfeit these basic rights. This forfeiture and its extent shall be declared by the Federal Constitutional Court.” This allows those who defend their hate speech as an instance of freedom of expression can therefore be challenged with the forfeiture of such “freedom” owing to its abuse to deny comparable democratic freedom to others.<sup>344</sup>

The main limitation imposed on freedom of expression by Art. 21 (2) is grounded in the principle of Germany as a free and democratic state based on the rule of law. This concept is based on the possibility and historical lessons from the Nazi era that freedom of any kind, even constitutionally-protected freedom of expression, is open to being abused for the purpose of abolishing constitutional freedoms in general in favour of a genocidal dictatorship. The framers of the *Grundgesetz* wanted to prevent that from recurring in Germany by enabling government to use criminal laws to protect the foundations of a democratic political order. The provisions in Articles 18 and 21 are the basis for what the Federal Constitutional Court, in the Communist Party Case,<sup>345</sup> termed “militant democracy” (*Streitbare Demokratie*), ensuring that the democratic principles of the Basic Law provide no resources for the enemies of democracy itself. Where anti-democratic forces are working against an established democratic order they have no right to gain

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<sup>344</sup> Kretzmer, David/Hazan, Francine Kershman, eds., *Freedom of Speech and Incitement Against Democracy*, 2000.

<sup>345</sup> Communist Party Case, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Aug. 17, 1956, 5 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 86 (Ger.).

benefits from it where these are used as to advocate the abolition of this existing constitutional order. From this perspective, it is necessary to avoid allowing democratic tolerance to be used for the destruction of democracy itself. Hence, the use of illiberal measures to repress incitement to racism, Nazism, genocide denial and xenophobia in order to preserve democracy is justified because established democracies can tolerate this partial compromise of principle (more precisely a balancing of competing principles) as a sometimes necessary act of institutional self-defence.

For example, in the Holocaust Denial Case,<sup>346</sup> the Federal Constitutional Court, drawing on the dignity rights of Article 1 of the *Grundgesetz*, found that Holocaust denial constituted: “a serious violation” of Jewish “personality” because it denied their persecution.<sup>347</sup> Although this denial law may limit freedom of expression and may also be of particular concern to Germans due to their experiences in World War II, it is judicially rationalised in terms of group dignity rights,<sup>348</sup> rather than more explicitly on the stability of the new political order.

According to article 25, general rules of international law are part of federal law. They supersede federal law and immediately constitute rights and duties for residents of the Federal Republic. Clearly, the collective memory of the members of the Parliamentary Council, in combination with constraints set by the occupying powers, shaped the Basic Law’s central provisions regarding individual rights and the state’s remedies against extremism and hate crime.

The remaining subsections address a range of criminal and administrative measures

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<sup>346</sup> Holocaust Denial Case, Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court], Apr. 13, 1994, 90 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 241 (Ger.).

<sup>347</sup> Id. at 252

<sup>348</sup> The Court further distinguished between curtailing speech based on opinion while “[a]ssertions of facts proved to be incorrect are not an interest worthy of protection.” Id. at 247. See also Huster, Stefan, ‘Das Verbot der “Auschwitzlüge”, die Meinungsfreiheit und das Bundesverfassungsgericht,’ *Neue Juristische Wochenschrift* 1996, pp. 487 ff.

which fall within the constitutional exemptions of certain types of hate crime, particularly hate speech, from otherwise general principles of freedom of expression. Before examining the details of these, it is useful to consider the specifically constitutional issues apply to them.

According to the Federal Constitutional Court, a wide range of penal, administrative law, and Civil Code measures prohibiting or restricting hate crime amount to constitutionally legitimate limitations on the liberties articulated by Arts. 4, 5(1), 5(3), 8, 9, and 21 of the Basic Law. These are justified by either express types of constitutional limitation relating, for example, to personal reputation, protection of youth, and general laws in Art. 5(2) BL, or by other less specific collective values protected by the Basic Law. The latter include a duty on state officials to respect and protect the right to human dignity (Art. 1(1) BL), the citizen's right to the free development of his or her personality (Art. 2(1) BL), the right to the inviolability of one's person (Art. 2 (2) BL), and the right to equality before the law (Art 3(1) BL).

These justifications receive additional support from how Arts, 9(2) and 26 of the German Constitution recognise norms stemming from international human rights (Art. 1(2) BL) and international understanding. A particular issue is that most restrictions within general German laws are content and standpoint neutral in that they are not directed against particular expression of opinions or beliefs, however offensive or hateful, and can be valid providing that they are proportionate to the objective in question. However, laws prohibiting or restricting hate crime, particularly hate speech, are deliberately targeting specific discriminatory viewpoints held by citizens, and thus can be termed "content-based restrictions." However, the German Courts have held that even these can fall under the

concept of "general laws" pursuant to the limitation expressed by Art. 5(2) of the Basic Law. This is justified where the prohibitions and regulations in question provide protection for constitutional interests and values that are interpreted as at least as important as the right to freedom of expression, such as rights to "dignity," "equality", "reputation" and the protection of youth.

In short, German constitutionalism permits values of personal dignity, honour, and reputation that are violated by, for instance, certain types of hate crime to outweigh rights of free expression, even to the point of permitting private individuals to enforce this constitutional right against other private parties.<sup>349</sup> The next question is the extent to which these broad principles are specified in specific legal measures, including criminal law prohibitions.

### **Criminal Offences under the German Criminal Code**

The German Criminal Code does not have specific hate crime legislation in a strict sense of this term. Yet its criminal code criminalises hate speech under a variety of different laws, including "Volksverhetzung."

In addition, the subjective aspect of intent and motivation that plays such a central role in the hate crimes legislation of England and Wales plays a far lesser role in the German criminal justice system, and is not central to the identification of the offence as such. This aspect features instead within the sentencing procedure as a determinant of punishment.

Section 46 of the German Criminal Code states that "the motives and aims of the perpetrator; the state of mind reflected in the act and the wilfulness involved in its

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<sup>349</sup> Ronald J. Krotoszynski, Jr., 'A Comparative Perspective on the First Amendment: Free Speech, Militant Democracy, and the Primacy of Dignity as a Preferred Constitutional Value in Germany,' 78 *Tul. L. Rev.* 1549, 1578 (2004).

commission." are potentially relevant factors for a judge to consider when determining punishment.<sup>350</sup> In practice, this provision has allowed enhanced sentences or a sentencing uplift for hate and bias.<sup>351</sup>

On the other hand, one disadvantage with this form of legal response is that a German court's decision to enhance the penalty on the basis of a bias motive might not be recorded as part of the public record. In turn, this means that an accused's criminal history cannot be used to determine whether he or she has a past history of bias motivated crimes.<sup>352</sup> The FRA identifies Germany as one of the EU states where there is a good level of police recording of bias motivation.<sup>353</sup>

As previously noted, Germany has a number of criminal law measures regulating hate crime in general and hate speech in particular. Under the German Criminal Code, "defamation" can be pursued as "*Beleidigung*" (an insult) made in a person's presence, "*Ullbe Nachrede*" (slander or factual claims that damage a person's reputation - the maker of the statement must prove the truth of it to avoid prosecution), or "*Verleumdung*" (malicious defamation).<sup>354</sup> It is Part 14, §§ 185 to 200 of the German Federal Penal Code

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<sup>350</sup> Section 46 Principles for Determining Punishment: (1) The guilt of the perpetrator is the foundation for determining punishment. ... (2) ... consideration shall be given in particular to: the motives and aims of the perpetrator; the state of mind reflected in the act and the willfulness involved in its commission;

<http://www.iuscomp.org/gla/statutes/StGB.htm#46>

<sup>351</sup> Marc Coester (2008): *Das Konzept der Hate Crimes aus den USA unter besonderer Berücksichtigung des Rechtsextremismus in Deutschland*. Peter Lang: Frankfurt/Berlin/Bern/Bruxelles/New York/Oxford/Wien.

<sup>352</sup> OSCE, *Hate Crimes Laws: A Practical Guide*, 2007, 36.

<sup>353</sup> FRA, *Making Hate Crime Visible*, 2012, 8. 'Official data collection mechanisms in Germany record the incidence of politically motivated crimes inspired by left-wing considerations (*Politisch motivierte Kriminalität – links*), right-wing considerations (*Politisch motivierte Kriminalität – rechts*), or when committed by foreigners (*Politisch motivierte Ausländerkriminalität*). The Ministry of Interior (*Bundesministerium des Innern*) publishes information on these crimes in its annual report on the protection of the constitution (*Verfassungsschutzbericht*), which also provides detailed breakdowns of extremist crimes (*Extremistische Straftaten*) committed by left- and rightwing sympathisers and by foreigners. ... Violent crimes with an extremist background (*Gewalttaten mit extremistischem Hintergrund*) are further broken down into: xenophobic violence; antisemitic violence; violence against (presumed) left- or right-wing extremists; violence against other political opponents. ... Data on other forms of hate crime motivated by a person's homelessness, sexual orientation or disability were published as a one off in April 2009, in answer to a parliamentary question relating to German police recording of crimes motivated by hate in the period 2001–2008 (*Polizeiliche Erfassung hassmotivierter Delikte seit 2001*).'

<sup>354</sup> For a comparative analysis, see Maryann McMahon, 'Defamation Claims in Europe: A Survey of the Legal Armory,' 19 *WTR Comm. Law*, 24, 31 (2002); Jones, Thomas David: *Human Rights: Group Defamation, Freedom of Expression*

(*Strafgesetzbuch* or StGB) which contains provisions punishing individual and collective "defamation" or "insult" (*Beleidigungsdelikte* or *Delikte gegen die persönliche Ehre*).<sup>355</sup> "Insult" and "defamation" here can be given a broad meaning to embrace all offences against "honour."

Constitutionally, types of hate crime can be interpreted as falling under § 185 ff prohibiting defamatory degradations of a citizen's right to enjoy recognition of his or her human dignity even where this is directed against their group as well as purely individual identity, i.e., group defamation. According to Germany's Federal Constitutional Court, hate speech involving group defamation can be a crime where attacks on identity related to "a delimitable, graspable group."<sup>356</sup> Furthermore, the prohibition concerns not every feature attributed to group identity, but only those identity features that define the core identity itself, which are necessarily shared by all members such that a defamatory attack diminishes the personal honour of each of them.<sup>357</sup> Hence, a slur against a welfare claimant for being an "Italian cheat" could be a borderline case because, if interpreted literally, most Italians are not claimants, and therefore it is not Italians as an entire minority group that is being defamed. On the other hand, if the phrase was taken to mean that 'X cheats because, as an Italian living in Germany, he is fulfilling his essential nature as such,' which implies the general claim "all Italians are by nature dishonest," then judges could interpret this statement as crossing the legal threshold into a case of "group defamation."

However, the larger the scale of the group, the weaker is deemed to be the damage

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and *The Law of Nations*, 1998.

<sup>355</sup> Zuleeg, Manfred, 'Group Defamation in West Germany,' 13 *Cleveland-Marshall Law Review* 52 (1964). The American notion of defamation is narrower than the broad German notions of insult or defamation.

<sup>356</sup> BVerfGE 93, 266, 300, Decision of 10 October 1995, Soldiers are Murderers = Decisions 659, at 685.

<sup>357</sup> Id., 300 f. = Decisions, at 685.



caused to the personal honour of each of its members. Hence hate speech attacks on all "Westerners" or "Asians" or "Africans" would probably be excluded even where each category was recognised as forming a clearly identifiable group. By contrast, a racist slur against "all Budapest Roma" could qualify because the minority group abused is sufficiently specific and defined by qualities that are not freely chosen that every member could be taken to be personally involved in, and concerned, for its reputation and honour, and thus individually diminished by such abuse. The strongest example would be where a clearly identifiable minority group is attacked by racist hate speech for allegedly being essentially racially inferior and morally flawed, and where membership of the minority in question is not a matter of life style choice, such as individuals choosing to exhibit a certain "Goth" identity through their choice of clothing, make up etc. The weakest possible case would be where the identity of the group itself is ambiguous and diffuse, it forms a statistical majority within the area in question and where membership is exclusively a matter of individual choice, rather than external ascription.<sup>358</sup> Hate speech involving slurs against "typical skinheads" would, therefore, probably not be interpreted as instances of group defamation in part because individuals have freely chosen to identify themselves with that group knowing it already possesses a poor public reputation.

Another borderline case was propaganda accusing all soldiers of being murderers. Here, initial criminal convictions for group defamation were later set aside on the grounds that this attack was direct against a diffuse and ill-defined group, and that it also represented a contribution to legitimate political debate on the proper role of military forces that merit protection on freedom of expression grounds. The fact that it may have been subjectively directed against only German soldiers on active duty, and was subjectively understood by

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<sup>358</sup> Id., 304 = Decisions, at 687

this sub-group as degrading to their honour and dignity was not decisive because the court itself needed to produce a more objective interpretation of the meaning of this statement relative to the requirements of existing legal criteria.<sup>359</sup>

In its narrower sense, "insult" refers only to the provision of § 185, whereas § 186 covers "calumny" and § 187 addresses "defamation." The idea of "insult" amounts to: "an illegal attack on the honour of another person by intentionally showing disrespect or no respect at all."<sup>360</sup> According to §185 of the Penal Code: "Insult will be punished by imprisonment not exceeding one year or by a fine...." This provision applies to contexts where negative value judgments amounting to an "insult" involving a loss of esteem are levelled against a victim in the presence of other persons. In cases where the offender purposely disseminates *untrue facts*, § 187 of the Penal Code (Defamation) applies. If the "insult" further involves defamatory assertions of facts attacking the honour of a person where third parties were also made aware of the statement, then additional liability can also be ascribed under §§ 186 ("Calumny").<sup>361</sup>

In short, even hate speech directed against lone individuals is still punishable under German criminal law where it meets the definition of insult contained in § 185 of the Penal Code. Furthermore, if this "insult" is made in public and involves assertions of fact that damage "the honour" of that person, then additional offences contained in §§ 186 and 187 of this Code could also apply.

In this context, the category of "honour" refers to the status of a person who rightly

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<sup>359</sup> BVerfGE 93, 266, 295, Decision of 10 October 1995, Soldiers are Murderers (Tucholsky Case) = Decisions 659, at 681-2.

<sup>360</sup> Reichsgericht, Entscheidung in Strafsachen (RGSt), Volume 40, 416.

<sup>361</sup> § 186 of the Penal Code (Calumny) states: "Whoever in relation to others asserts or disseminates a fact likely to cause him to be held in contempt or to suffer loss in public esteem, if this fact is not probably true, [will] be punished by imprisonment not exceeding one year or by a fine...." 187 provides: "Whoever, contrary to better knowledge, asserts or disseminates in regard to another an untrue fact likely to cause him to be held in contempt, to suffer loss in public esteem or to endanger his credit, will be punished by imprisonment not exceeding five years or by a fine." (45)

possesses equal rights and is entitled to be treated by others with a measure of respect and dignity as a fellow member of society and human being regardless of his or her individual accomplishments (or lack of them).<sup>362</sup> Hate crimes are also "honour crimes" where they involve attributions to racial inferiority or subhuman status to all members of a specific group. The category of "honour" also includes the enforcement of public and outward displays of minimum standards of mutual respect in public, understood as a constitutional entitlement under Art. 2 (1) BL to have one's "personality" protected, notwithstanding an individual's subjective feelings about their character or conduct.

Hate speech consisting of insults attributing moral "degeneracy" to all members of a specific group, or to a specific individual based primarily on their group membership would generally be covered by the offence of criminal defamation under § 192. Reprimanding through critical judgments about a individual who is a member of X ethnic group for being lazy at work, or for delivering a poor commercial, scientific or artistic performance would be protected under § 193. However, this protection of a right to enjoy a justified public reputation as a key part of a wider entitlement to dignity and respect would be lost if the critical attack was a form of hate speech framed as: "Karl performs his work badly but since he is a member of X group, what else can one expect?" In addition, hate speech consisting of collective "insults" to, say, a clearly identifiable religious, or racial or ethnic group also falls under these criminal provisions providing it is clear that these intentionally target each individual member of that group, e.g., ascribing a negative stereotype to every member of that group.

Most of the violations of honour stemming from hate crimes fall under §§ 186 and 187 of the Penal Code and are grounded constitutionally on the right to "the free

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<sup>362</sup> Here, the Penal Code gives specific effect to Art. 1 (1) BL.

development of the personality" contained in Art. 2 (1) BL and the meaning of "honour" in Art. 5(2) BL.

Furthermore, forms of hate crime that include the public display of, for example, Nazi propaganda symbols and emblems associated with unconstitutional organisations whose political programmes and ambitions are deemed to amount to "threats to the Democratic Constitutional State" are also criminalised under §§ 84 to 91.<sup>363</sup> These are prohibited as symbolic forms of hate speech. In addition, Germany's broad ranging public order provisions (§§ 123 to 145 d) includes § 130 which prohibits "incitement" to hatred and violence against minority groups.<sup>364</sup> Furthermore, Section 220 a of the Penal Code criminalises all forms of genocide as defined by the 1948 Genocide Convention, including hate crimes involving its "incitement," "conspiracy" and "aiding and abetting."

Although these amount to a wide-ranging system of regulation, it is important to emphasise the limits. Even the recently reformed German criminal law limits hate crime prosecutions to contexts where the action "disturbs public order."<sup>365</sup> This means that hate crimes that take place in a context which cannot be proven to be capable of disturbing the public peace cannot be prosecuted. One exception is Holocaust denial which is a violation of German Penal Code sections 130 and 131 - a topic discussed below.

In March 2011, the German parliament introduced new legislation to implement EU measures: the Framework Decision and the Additional Protocol to the Convention on

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<sup>363</sup> Cf. Basic Law Art. 21(2); StGB § 86a. See also Andreas Stegbauer, 'The Ban of Right-Wing Extremist Symbols According to Section 86a of the German Criminal Code,' 8 *German L.J.* 173 (2007). This ban extends to their deployment in material critical of a particular group, for example, the Nazi party. See Von Antonia Gotsch, 'Vor Gericht Wegen eines Anti-Nazi-Symbols,' *Spiegel Online*, Mar. 23, 2006, <http://www.spiegel.de/unispiegel/wunderbar/0,1518,407112,00.html>.

<sup>364</sup> Hofman, Rainer, 'Incitement to National and Racial Hatred: The Legal Situation in Germany,' in: Coliver, op cit, 159 ff.

<sup>365</sup> FRA, *Making Hate Crime Visible*, 2012, 27.

Cybercrime.<sup>366</sup> This reform took is contained in a revised Article 130 of the German criminal code entitled “incitement of the people” (*Volksverhetzung*). Such “incitement” is a concept in German criminal law that bans the incitement of hatred against a segment of the population. It often applies in, although is not limited to, trials relating to Holocaust denial in Germany.<sup>367</sup>

For instance, The Holocaust Denial case heard by the Federal Constitutional Court in 1994 had to consider legal prohibitions directed towards a public demonstration held by the extreme right-wing National Democratic Party (Nationaldemokratische Partei Deutschlands, NPD) at which a Holocaust revisionist was to be the main speaker. Local authorities in Munich imposed restrictions that no denial be allowed under threat of criminal charges of under sections 130 and 185 of the Penal Code if the NPD failed to comply, which were upheld by both lower administrative courts and the Federal Administrative Court.

The NPD appealed these decisions to the Constitutional Court but lost its case on the basis that such denial of basic questions of historical “fact” (as opposed to expressions of “opinion” concerning the responsibility of states for an outbreak of a war for example where legitimate differences of judgment are inevitable) that have already been historically established fell outside the constitutionally protected category of speech under Article 5 BL. This is because such denials of already demonstrated facts can contribute nothing positive to ongoing public debates.<sup>368</sup> The laws cited to suppress such denial were held to be constitutional and properly invoked because Holocaust denial massively attacks and

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<sup>366</sup> Germany, Law for the transposition of the Framework Decision 2008/913/JI etc. and of the Additional Protocol of 28 January 2003 etc., BGBl. I Nr. 11.

<sup>367</sup> Günther, Klaus, 'The Denial of the Holocaust: Employing Criminal Law to Combat Anti-Semitism in Germany,' 15 *Tel Aviv University Studies in Law* 51 (2000).

<sup>368</sup> BVerfGE Apr. 13, 1994, 90 *Entscheidungen des Bundesverfassungsgericht*, 241-45; Wandres, Thomas, *Die Strafbarkeit des Auschwitz-Leugnens*, 2000

defames the current dignity and equality of German Jews, a clearly identifiable social group.<sup>369</sup>

The definitions under Article 130 (1) expressly relate to groups defined by criteria of nationality, race, religion or ethnic origin (defined by "folk customs"), as well as to members of these groups. The details of this measure are worth examining in detail:

- (1) Whoever, in a manner that is capable of disturbing the public peace:
  1. incites hatred against segments of the population or calls for violent or arbitrary measures against them; or
  2. assaults the human dignity of others by insulting, maliciously maligning, or defaming segments of the population, shall be punished with imprisonment from three months to five years.
- (2) Whoever:
  1. with respect to writings (Section 11 subsection (3)), which incite hatred against segments of the population or a national, racial or religious group, or one characterized by its folk customs, which call for violent or arbitrary measures against them, or which assault the human dignity of others by insulting, maliciously maligning or defaming segments of the population or a previously indicated group:
    - a) disseminates them;
    - b) publicly displays, posts, presents, or otherwise makes them accessible;
    - c) offers, gives or makes accessible to a person under eighteen years; or
    - d) produces, obtains, supplies, stocks, offers, announces, commends, undertakes to import or export them, in order to use them or copies obtained from them within the meaning of numbers a through c or facilitate such use by another; or
  2. disseminates a presentation of the content indicated in number 1 by radio, shall be punished with imprisonment for not more than three years or a fine.
- (3) Whoever publicly or in a meeting approves of, denies or renders harmless an act committed under the rule of National Socialism of the type indicated in Section 220a subsection (1), *in a manner capable of disturbing the public peace* shall be punished with imprisonment for not more than five years or a fine....<sup>370</sup>

§ 130 punishes hate crimes that constitute a "collective insult" where there are discriminatory attacks on "sections of the population," as identified in paragraph 2. This measure aims to pre-empt the incitement of a general ideological climate by means of verbal attacks on entire groups even where this falls short of statements involving more

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<sup>369</sup> Ibid, 250-4.

<sup>370</sup> <http://www.iuscomp.org/gla/statutes/StGB.htm#130>

concrete incitement to a specific offence. Prosecutors do not need to show that hate speech resulted in an immediate greater danger to members of a specific minority. It is sufficient if they are held to contribute to heightening the general danger of disruption of public order, including through violations of the dignity and honour of minority groups.<sup>371</sup>

The penal law thus applies to "domestic distribution" or "public use" of certain types of hate speech such material, and - in the case of genocide denial and similar hate speech materials - the German judiciary have interpreted these terms broadly in favour of the prosecution.<sup>372</sup> Even password-protected cyber hate materials accessible to only particular individuals by computer are illegal. One author has even suggested that that banned images, symbols, and propaganda on a foreign-based Internet site "would be prosecuted if the web site was retrieved in Germany."<sup>373</sup>

An interesting example was the prosecution of the writer of a poem entitled *The Fraudulent Asylum-Seeker*, which was held to include exaggerated assertions about the abuse of the right to asylum by asylum seekers. Writing and publishing poems is generally protected under the "freedom of the arts" provisions of Art. 5 (1) and (3) BL. Nevertheless, the courts interpreted the creation and distribution of this poem as "an incitement to hatred" as defined by § 130. The Court decided that this hate speech attacked the human dignity of all asylum seekers: 'because the people concerned are generally and therefore without justification accused of spreading AIDS; of seducing

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<sup>371</sup> Bundesgerichtshof (BGH), Decision of 12 December 2000, in *Neue Juristische Wochenschrift*, 2001, p. 624.

<sup>372</sup> OLG Frankfurt am Main, NStZ 356 (1999)).

<sup>373</sup> Andreas Stegbauer, *The Ban of Right-Wing Extremist Symbols According to Section 86a of the German Criminal Code*, 8 *German L.J.* 173 (2007), 181-2. See also Bundesgerichtshof [BGH] [Federal Court of Justice] Dec 12, 2000, 1 Str 184/00 (F.R.G.). In 1996, Germany blocked Canadian Ernst Zindel's website under Section 131 for Holocaust denial. After extradition, Zindel was convicted in Germany of incitement in 2007. See *Ernst Zindel Sentenced to 5 Years for Holocaust Denial*, CBC News, Feb. 15, 2007, <http://www.cbc.ca/world/story/2007/02/15/zindel-germany.html>. Zindel's site is based in the U.S. in Tennessee. However, it provides a translated page in German indicating an intent to reach a German audience.

children into taking drugs; of being particularly despicable, ungrateful parasites; and of, morally speaking, not even reaching the lowest level of human existence.<sup>374</sup>

It would, under German Law, been equally possible to interpret this poem as protected and as a contribution to legitimate political debate, and to have doubted whether the vilification was directed to each and every asylum seeker. This case is best treated as a borderline one that shows the interpretive flexibility of the relevant "tests." A similar conclusion resulted from the distribution of abusive racist printed materials belonging to the right-wing National Democratic Party of Germany that had been directed against "foreigners" and asylum seekers accused of dominating drug dealing and crime more generally.<sup>375</sup> Again, in law this is an interesting case in that the wording did not state that every foreigner in Germany was a criminal by virtue of their group identity as such, which would have been a clear case of incitement, and the racist materials were clearly issued by a political party as a contribution to a political debate over the direction, popularity and validity of state immigration policies.

These two cases can be usefully contrasted with The Federal Constitutional Court's ruling in the Historical Falsification Case. Here, the principle of freedom of opinion was given a higher value as exerting the power of enlightenment within a self-correcting "marketplace of ideas" in which dubious beliefs could over time be challenged, exposed as such and displaced by more credible and compelling ones: "As a rule, the democratic state trusts that an open debate between varying opinions will result in a multifaceted picture, against which one-sided views based on a falsification of facts generally cannot

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<sup>374</sup> Bayerisches Oberstes Landesgericht (BayObLG), Decision of 31 January 1994, *Neue Juristische Wochenschrift* 1994, pp. 952, 953.

<sup>375</sup> Verwaltungsgericht (VG) Frankfurt, Decision of 22 February 1993, *Neue Juristische Wochenschrift* 1993, p. 2067. The Court supported its decision by reference to Arts. 1 and 4 of the *International Convention on the Elimination of all Forms of Racial Discrimination*, which Was judged to forbid such acts of verbal hostility against foreigners.



win out.”<sup>376</sup>

However, the protection against hate crime granted by this revised provision is still restricted to conduct by perpetrators *capable of disturbing public order*.<sup>377</sup> German hate crime legislation thus remains primarily concerned with the public order dimension of hate crimes, as opposed to deploying criminal law to enforce the fundamental rights of individuals not to be the victims of various kinds of unlawful discrimination and discriminatory abuse and violence.

Both flat out Holocaust denial and variations of this theme are punishable as criminal offence under § 130 (3), and §§ 130 and 185 ff. respectively. The Federal Constitutional Court has held that these provisions to be justified limitations of the freedom of expression because such denial falls outside the category of speech protected by Art.5 (1) BL: “...a factual assertion that the utterer knows is, or that has been proven to be, untrue [is not covered by the freedom of opinion].”<sup>378</sup> The judicial reasoning was that the State’s general interest in promoting the scientific discovery of truth is impeded by permitting the spread of clearly false statements such as those contained in examples of Holocaust denial. Such denial was taken as a collective defamation and incitement to hatred against Jews as a group, not a sub-group of those affected by the Nazis' racist extermination programmes:

The historical fact alone that human beings were singled out according to the criteria of the “Nuremberg Acts” and robbed of their individuality with the goal of exterminating them puts the Jews who live in the Federal Republic of Germany into a special relationship vis-à-vis their fellow citizens; the past is still present in this relationship today. It is part of their personal self-perception and their dignity that

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<sup>376</sup> BVerfGE 90, 1 = Decisions 570, at 585.. For similar judicial interpretations, see see First Chamber of the First Senate rulings dated 24 March 2001, 7 April 2001, 12 April 2001, and 1 May 2001 in *Neue Juristische Wochenschrift* 2001, pp. 2069 ff..

<sup>377</sup> “In einer Weise, die geeignet ist, den öffentlichen Frieden zu stören).

<sup>378</sup> BVerfGE 90 241, 247, Decision of 13 April 1994, Holocaust Denial Case = Decisions 620, at 625.

they are comprehended as belonging to a group of people who stand out by virtue of their fate, and in relation to whom all others have a special moral responsibility. Indeed, respect for this self-perception is for each of them one of the guarantees against a repetition of such discrimination, and it forms a basic condition for their life in the Federal Republic. Whoever seeks to deny these events denies to each one of them the personal worth to which they are entitled. For the person affected this means the continuation of the discrimination against the group to which he belongs as well as against himself... [Nor is anything changed] when one considers that Germany's attitude to its Nazi past and the political consequences thereof... is a question of essential concern to the public. It is true that in that case a presumption exists in favour of free speech. But this presumption does not apply if the utterance constitutes a formal criminal insult or vilification, of if the offensive utterance is based on factual assertions that have been proven untrue.<sup>379</sup>

It follows that anyone who denies, minimises, trivialises or condones the Holocaust is taken to have violated the constitutionally protected dignity and honour of all Jews living in Germany, and to have committed offences under §§ 185 ff. and § 130 of the Penal Code. This policy brings German Penal Law into line with relevant international standards, with the many other states which have criminalised genocide denial. These offences do not require proof of a threat to public order.

Even where the authors of hate speech involving Holocaust denial for example cannot be prosecuted for jurisdictional reasons, German authorities have displayed a willingness to enforce incitement laws on Internet service providers and hosts. For example, in 2002, Disseldorf's District Government President ordered ISPs in North Rhine-Westphalia to block user access to certain U.S. based neo-Nazi sites.<sup>380</sup> Liability of hosts for content placed on the Internet by others is regulated by the EU E-Commerce Directive, now incorporated into German law.<sup>381</sup> However, German Lander (states) possess regulatory authority over media content. The Regional Court of Hamburg have held the moderator of

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<sup>379</sup> Id., 254 = Decisions, at 630.

<sup>380</sup> Bezirksregierung Dusseldorf, Sperrungsverfugung, Feb. 6, 2002 ("Blocking Order").

<sup>381</sup> E-Commerce Directive 2000/31, art. 14(1), 2000 O.J. (L178) 1 (EC) - implemented in Germany by Teledienstegesetz [TDG] [Teleservices Act] § 8 (F.R.G.).

an Internet forum responsible for prohibited speech content posted by others even though this individual was not aware of its particular content.<sup>382</sup> German courts will exercise jurisdiction over Internet expressions even in contexts where the speaker is outside Germany. For instance, the Federal Court of Justice held that a Holocaust-denier's statements on an Australian webpage were subject to German criminal laws because the "place of offense" where the hate crime exerted its impact was within Germany.<sup>383</sup> On the other hand, when Yahoo! was prosecuted for offering copies of Hitler's *Mein Kampf* on its auction sites, a German court concluded that it would *not* be liable for the content of auction items offered by individuals through Yahoo!<sup>384</sup>

Another part of the German criminal codes is also potentially relevant to the prosecution of that form of hate crime which takes the form of genocide denial: § 189 Disparagement of the Memory of Deceased Persons (1985, amendments of 1992). This states that: 'Whoever disparages the memory of a deceased person shall be punished with imprisonment for not more than two years or a fine.'<sup>385</sup>

Those seeking legal redress from Germany's criminal justice system for public forms of hate speech containing, for example, anti-Semitic insults including genocide denial, could also resort to § 194 of the German criminal code entitled "Application for Criminal Prosecution:"

(1) An insult shall be prosecuted only upon complaint. If the act was committed through dissemination of writings (Section 11 subsection (3)) or making them

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<sup>382</sup> Landgericht [LG] [Trial Court] Sep 20, 2005, 7 U 50/06 [324 0 721/05] (F.R.G.) (Universal Boards GmbH & Co. KG v. Heise). Julia Meuser, 'Germany: Electronic Commerce-ISP Liability-Provider Liability for Internet Chat Rooms,' C.T.L.R. 2006, 12(7), 169-170; Eric T. Eberwine, Note, 'Sound and Fury Signifying Nothing?: Jürgen Bussow's Battle Against Hate Speech on the Internet,' 1 *N.Y.L. Sch. L. Rev.* 353 (2004).

<sup>383</sup> Federal Court of Justice (BGH) Convicts Foreigner for Internet Posted Incitement to Racial Hatred,' 2(8) *German L. J.* (2001), available at <http://www.germanlawjournal.com/print.php?id=67>; - citing "Place of Offense" with respect to Strafgesetzbuch [StGB] [Penal Code] § 9).

<sup>384</sup> Jay Lyman, *German Court Rules Yahoo! Not Liable for Nazi Auctions*, Mar. 28, 2001: <http://www.newsfactor.com/perl/story/8500.html>

<sup>385</sup> <http://www.iuscomp.org/gla/statutes/StGB.htm#189>

publicly accessible in a meeting or through a presentation by radio, then a complaint is not required if the aggrieved party was persecuted as a member of a group under the National Socialist or another rule by force and decree, this group is a part of the population and the insult is connected with this persecution. The act may not, however, be prosecuted ex officio if the aggrieved party objects. The objection may not be withdrawn. If the aggrieved party dies, then the right to file a complaint and the right to object pass to the relatives indicated in Section 77 subsection (2). (2) If the memory of a deceased person has been disparaged, then the relatives indicated in Section 77, par. 2, are entitled to file a complaint. If the act was committed through dissemination of writings (Section 11 subsection (3)) or making them publicly accessible in a meeting or through a presentation by radio, then a complaint is not required if the deceased person lost his life as a victim of the National Socialist or another rule by force and decree and the disparagement is connected therewith. The act may not, however, be prosecuted ex officio if a person entitled to file a complaint objects. The objection may not be withdrawn....'

In sum, these provisions of Germany's Penal Code establish a broad criminalisation of hate crime, especially hate speech, that is directed against individuals and groups. These are justified primarily by reference to general norms protecting public order and a democratic constitutional order. Arguably, these measures meet Germany's obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination*.

### **Other legal regulations of hate crime**

Germany's administrative law also includes prohibitions of certain types of hate crime and speech where for example an extremist political movement that Federal Constitutional Court, acting under the Basic Law's Art. 21 (2) on account of their use of hate speech is deemed "unconstitutional" (such as Neo-Nazi groups) is legally prevented from holding a mass rally with planned propaganda speeches.<sup>386</sup> Such assemblies may be prohibited if authorities reasonably suspect that they will include hate speech.<sup>387</sup> In addition, movements whose actions and propaganda violate the prohibitions on "incitement to

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<sup>386</sup> See § 1 (1), No. 2 and 3, of the Public Meetings Act (*Versammlungsgesetz*).

<sup>387</sup> Under § 5, No. 4, of the Public Meetings Act.

hatred" can also be banned under Art. 9 (2) of the Basic Law. Under Germany's commercial law, hate speech and other forms of, say, racial discrimination taking place within a business context may allow the authorities to suspend the owner's business license.<sup>388</sup> There is also partial censorship measures designed to protect minors from morally endangering writings. These specifically cover hate crimes involving the incitements of violent acts or racial hatred more generally.<sup>389</sup> Similar provisions apply under German broadcasting law regulating radio and television companies, where racist expressions and other forms of hate speech are judged to violate a the right to dignity.<sup>390</sup>

Specific state institutions may also have specific internal administrative or professional prohibitions that have legal status. A decision of the Federal Administrative Court held that: "A member of the Armed Services who propagates statements against foreigners or advocates violent acts inspired by Nazi ideology demonstrates a lack of loyalty toward the State and its constitutional organs and impairs the function of the Armed Services without being able to claim his right to free speech pursuant to Art. 5 (1). Such a neglect of duty calls for the most severe punishment possible under considerations of general prevention."<sup>391</sup>

The German Civil Code (*Bürgerliches Gesetzbuch*) also contains a number of norms relevant to hate crime, especially hate speech. Where criminal law provisions against "insult" and "defamation" have been successfully applied, then additional civil liability for

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<sup>388</sup> (§ 4 (1), No. 1, of the Restaurant Licensing Act, or *Gaststättengesetz*, and Art. 35 (1) of the Trade and Industry Act, or *Gewerbeordnung*).

<sup>389</sup> See § 1 of the Act Concerning the Dissemination of Publications that Endanger Youths (*Jugendschutzgesetz*) 86 (3); 86 a (3); 130 (5); 130 a (3); and 193 of the German Penal Code and Decisions 570, at 571.

<sup>390</sup> Art. 3 (1) of the 1991 Broadcasting Interstate Agreement (*Rundfunkstaatsvertrag*), as amended by all federal states concerned, bans programs: "which incite hatred against parts of the population or against a group which is determined by nationality, race, religion, or ethnic origin, or which propagate violence and discrimination against such parts or groups, or which attack the human dignity of others by insulting, maliciously ridiculing or defaming parts of the population."

<sup>391</sup> See the ruling by the Bundesverwaltungsgericht (BVerwG) of 22 January 1997, reported in *Neue Juristische Wochenschrift* 1997, p. 2338.

compensation and/or retraction of false statements can also be established,<sup>392</sup> including compensation for pain and suffering under § 847.

## **Conclusion**

Germany's regulation of hate speech develops a contextual approach that reflects the experiences, lessons and legacies of the Nazi period, not least by giving emphatic priority to the protection to the dignity and equality interests of German Jews and possibly, although this is less clear, other victims of genocide and persecution, by limiting the scope of otherwise applicable "freedom of expression" principles in cases of genocide denial. Given the European-wide problem of right-wing extremism and xenophobia, the minimal interest there can be in preserving genocide-denial, and the fact that existing European and International Law provisions are broadly in line with the German provisions, these can in principle be considered a potential basis for future EU-wide reform in this area.

In one respect, the German Basic Law articulates a reasonable balance between fullest possible application of "freedom of expression" as an integral part of a democratic ordering and the need to repress hate speech that undermines democratic values of equal treatment and respect for the free development of individual personality. Of course, there is scope for reasonable criticism of how judges have struck this balance in particular cases as going too far in one direction or the other. Yet, that scope of contestation and the public debate that follows from it is itself healthy, even instructive, in the context of a democratic society. Similar points apply to the overall thrust of civil and criminal group measures on group defamation and insult. In each of these respects, the German position gives a clear

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<sup>392</sup> Under § 823 (2) of the Civil Code, possibly in combination with §§ 185 ff. of the Penal Code, or by relying on § 823 (1) of the Civil Code.

articulation of values central to the EU project as a whole, including those affirmed by the ECHR as interpreted and applied by the ECtHR.

On the other hand, the conceptualisation of certain dimensions of hate crime in terms of public order, even incitement to hatred, does appear overly narrow. It allows for the possibility of perverse defence arguments that racist and xenophobic speech directed towards an audience which shares these prejudices is not capable of resulting a breach of public order, and is therefore legally permissible. Also this is objectionable in principle in that the harm caused by hate crime cannot be reduced to disturbances to public order, even indirect and potential ones.

Furthermore, the German provisions do appear excessively narrow in that hate crimes directed against individuals on the basis of their sexuality, disability and gender identity lack legal recognition, and in this sense such victims are the "poor relations" of others who suffer racist, religious or ethnic based hate crime.<sup>393</sup> Yet, any discrimination between different categories of hate crime appears hard to justify in the light of the Basic Law's firm commitment to protecting the "dignity," "honour" and "equality" of all citizens without group-based discrimination. Whereas the historical context renders such differentiations legitimate in the very specific area of genocide denial, this surely cannot be held to apply more generally.

Finally, the German penal system does not identify a specific measure of enhanced or aggravated penalty when determining sentences, which means that any measure of such enhancement goes unreported and unrecorded. In turn, this undermines the public educative value of the media reporting of such offences in combating hate crime itself.

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<sup>393</sup> This is not to suggest that it is possible to resolve all issues concerning the typology of hate crimes. See Phillips, N. D. (2009), 'The prosecution of hate crimes: the limitations of the hate crime typology,' *Journal of Interpersonal Violence*, 24, 883–905.

## **CHAPTER SIX:**

### **BRITISH HATE CRIME LAWS<sup>394</sup>**

To facilitate comparative analysis, this chapter generally follows the lead of the other case studies in terms of themes. It first considers the specifically constitutional dimensions of Britain's legislative initiatives on hate crime related issues, before considering the specific measures themselves. Given the *ad hoc* jumble of provisions varying from one protected group to the next within a hierarchy of concerns for the welfare and priority of different groups, these will need to be discussed under specific headings, such as race, religion, sexual orientation etc.

#### **Constitutional Dimensions**

Britain does not have a written constitution comparable to that of Germany or Rwanda, and it does not have the tradition of "constitutional review" of hate crime or other legislation on grounds of its relative compliance with entrenched constitutional principles watched over by a separate constitutional Court. Although Courts can judicially review specific government decisions in terms of how these were made, such "procedural review" does not extend to striking down legislation, not least because of the emphasis Britain's constitutional tradition places upon parliamentary sovereignty as a legally unconstrained source of law.

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<sup>394</sup> This chapter was drafted by Dr Kim McGuire, Dr Michael Salter.



On the other hand, British law-making does have to reckon with specific quasi-constitutional dimensions, including the 1998 Human Rights Act, giving the ECHR direct applicability and governing the actions, policies and omissions of public bodies, including Courts, law reform and law enforcement agencies. In turn, this allows for a wide range of government actions to be judicially reviewed in terms of their claimed compliance or violation of the ECHR. As already noted, this Convention includes a range of measures relevant to the restriction of hate crime, including rights not be discriminated against under Article 14. Hence, it is meaningful to refer, in a qualified sense, to judicial constitutional challenges to the actions of the British state relating to hate crimes issues. The fact that citizens can ultimately appeal to the ECtHR to challenge the British state for alleged failure to comply with its Convention obligations remains an important factor.

In addition, within Britain there is a long-established politics of sexuality and the organisation of civil society campaigns around the abolition of legal discrimination involving homosexuality, and pressure of prosecute homophobic hate crime.<sup>395</sup> So too are debates over the interpretive dimensions of law enforcement, both generally and specifically in relation to hate crime.<sup>396</sup> In recent years there has been growing recognition of the need within the UK to protect the rights of the disabled, although currently only the Criminal Justice Act 2003 offers sentence enhancement for such hate crimes. Indeed, those with a disability are often overlooked in historical analyses of discrimination, including genocide studies. However, not only are these groups, and in particular those with a mental disability, often specifically targeted, their suffering may also increase due to the

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<sup>395</sup> Stonewall (2008), 'Homophobic Hate Crime: The Gay British Crime Survey,' [stonewall.org.uk](http://stonewall.org.uk)

<sup>396</sup> More generally, see Hall, N. (2010), 'Law enforcement and hate crime: Theoretical complexities of policing "hatred"'. In N. Chakraborti (Ed.), 2010, *Hate crime: Concepts, policy, future directions*, 149-68

effects of conflict and ‘unsuccessful’ genocide.<sup>397</sup> Discriminatory attitudes towards those with a disability are not confined to under-developed countries.<sup>398</sup>

Unlike many continental Europe States, Britain does not have bespoke offences for dealing with genocide denial as a form of provocative hate speech.<sup>399</sup> By "genocide denial" I understand expressions of ideas, beliefs and theories aiming to deny, grossly minimise, or otherwise trivialise acts of genocide in ways that are reasonable perceived as insulting to the memory of the victims of such gross international criminality.<sup>400</sup> According to Article 11 of the United Nation’s Genocide Convention of 1948, the term ‘genocide’ means a major action “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:” killing members of the group’ is one action which qualifies under the Convention.<sup>401</sup>

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<sup>397</sup> Pascal Mutabizi, ‘Focus on Deaf People in Rwanda’, Disability International 1998, ‘People with Disabilities (PWDs) and Genocide: The Case of Rwanda’ by Art Blaser, in *Disability Studies Quarterly*, Summer 2002, Vol 22 No 3.

<sup>398</sup> ‘People with Disabilities (PWDs) and Genocide: The Case of Rwanda’ by Art Blaser, in *Disability Studies Quarterly*, Summer 2002, Vol 22 No 3.

<sup>399</sup> Denial is expressly or implicitly illegal in the following countries: Austria (National Socialism Prohibition Law (1945, Amendments of 1992) §3g), Belgium (Negationism Law (March 23, 1995, as Amended 1999); Czech Republic (Law Against Support and Dissemination of Movements Oppressing Human Rights and Freedoms (2001) §260-61); France (Gayssot Act July 13, 1990: Law No. 90-615 Law to repress acts of racism, anti-Semitism and xenophobia arts 9 and 13); Germany (*Volksverhetzung* ("incitement of the people") under the German criminal code §130 "Public Incitement (1985, Revised 1992, 2002, 2005, §131, §194); Hungary, (Holocaust denial law of March 3, 2010) Israel (Denial of Holocaust (Prohibition) Law, 5746-1986, July 8, 1986; Liechtenstein (criminal code, § 283 "Race discrimination"); Luxembourg (Criminal Code Articles 457-3, 19 July 1997); Poland, Act of 18 December 1998 on the Institute of National Remembrance - Commission for the Prosecution of Crimes against the Polish Nation Article 55); Portugal, (Criminal code, Article 240: "Religious, racial, or sexual discrimination"); Romania (Emergency Ordinance No. 31 of March 13, 2002 ratified on May 6, 2006, articles 3-6); and Switzerland (SR 311.0 Swiss Penal Code, Article 261 "Racial Discrimination"). Slovakia effectively criminalised denial of fascist crimes in general in late 2001 whilst in May 2005, the term "Holocaust" was explicitly adopted by their penal code, and in 2009, and it became an offence to deny any act regarded by an international criminal court as genocide.

<sup>400</sup> For an extended helpful discussion, see Pascale Bloch, 'Response to Professor Fronza's The punishment of Negationism' 30 VT. L. REV. 627, (2006). For a survey of the extent, see Rafael Medoff and Alex Grobman, 'Holocaust Denial: A Global Survey,' 2006, Wyman Institute for Holocaust Studies, available at <http://www.wymaninstitute.org/articles/HolocaustDenial2006.pdf>.

<sup>401</sup> Convention on the Punishment and Prevention of the Crime of Genocide 1948, **Article II** ‘In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:(a) Killing members of the group;(b) Causing serious bodily or mental harm to members of the group;(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;(d) Imposing measures intended to prevent births within the group;(e) Forcibly transferring children of the group to another group.’

## Holocaust denial

As was stated in the appeal hearing of the *Irving v Penguin Books* defamation case:

'Holocaust denial means not necessarily a blank refusal to acknowledge a Nazi policy of mass murder of Jews and other minorities but a systematic endeavour, by marginalising and excusing what happened, to accuse those who insist upon it of being Zionist propagandists.'<sup>402</sup>

States as well as groups, organisations and individuals can be perpetrators.<sup>403</sup> Here, the underlying political motivation behind such expressions is often similar to that which first motivated previous acts of genocide. Genocide denial mainly but not exclusively consists of Holocaust denial.<sup>404</sup> Such denial includes specific claims that, notwithstanding well-established historical facts to the contrary,<sup>405</sup> the Nazis did not murder c. six million Jews, the notion of murderous gas chambers is a myth, and any deaths of Jews occurring under the Nazis took place only because of wartime privations.<sup>406</sup> Such denial persists despite the fact that this genocide is one of the best documented instances, with a broad range of mutually corroborating and compelling evidence re-affirming its various elements.<sup>407</sup>

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<sup>402</sup> [2001] EWCA Civ 1197, 95 - quoting from Sedley LJ's earlier refusal of leave of 18 December 2000. See also the definition of Prof. Evans in his expert report for the earlier High Court hearing summarised at 2000 WL 362478 para.8.4. See also Richard Evans, *Lying About Hitler* (Basic Books, 2001); Deborah E. Lipstadt, 2005, *History on Trial: My Day in Court with David Irving* (2005); Robert Jan van Pelt, 2002, *The Case for Auschwitz: Evidence from the Irving Trial* (2002); Jean-Claude Pressac, 1989 *Auschwitz: Technique and Operation of the Gas Chambers*; Laurence Rees, 2005, *Auschwitz: The Nazis and the 'Final Solution'*; Michael Shermer and Alex Grobman, 2000 *Denying History: Who says the Holocaust never happened and why do they say it?* (2000)

<sup>403</sup> Turkey still denies the Armenian genocide and criminalises its affirmation as an "insult to Turkishness." Only in 1995 did France publicly admit responsibility for deporting almost 70,000 Jews to Nazi death camps—only 2,800 of whom returned. See Gail Russell Chaddock, 'Cleric's Comments Ignite the Fury of French Media,' *Christian Sci. Monitor*, July 25, 1996, 5.

<sup>404</sup> Berel Lang, "Six questions on (or about) Holocaust Denial," *History and Theory* 49 (May 2010), 157-168; 162.

<sup>405</sup> For a web-site containing an impressive array of evidence re-affirming the reality of the Holocaust including original Nazi documentation, courts records and academic articles, see <http://www.holocaust-history.org/>

<sup>406</sup> For a fuller summary Deborah Lipstadt, 1993, *Denying the Holocaust: The Growing Assault on Truth and Memory*.

<sup>407</sup> Ibid. See also Richard Evans, 2001, *Lying About Hitler*; Deborah E Lipstadt, *History on Trial: My Day in Court with David Irving* (2005); Robert Jan van Pelt, *The Case for Auschwitz: Evidence from the Irving Trial* Indiana University

In the UK, genocide denial can be prosecuted under s. 5 of the Public Order Act 1986. This measure criminalises; 'threatening, abusive or insulting words'; whilst Sections 17-19 and 23 of this Act create offences of publishing, possessing or distributing racially inflammatory material and also criminalise acting in a manner intended to or likely to stir up racial hatred. "Racial hatred" can cover at least some instances of genocide denial in that it is defined to mean: 'hatred against a group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins.'<sup>408</sup>

It is clear that 'religion', sexual orientation or disability have throughout history been used as pretexts for extermination. Religion is included in the UN Convention definition of genocide. The Public Order Act 1986 addresses, in part, religion and genocide, for it further criminalises incitement based upon religion and sexual orientation (but not disability). However, with regard to these groups, 'intent' is specifically necessary, (not just *likely* to stir up hatred but *intended* to do this), and the material must be recognised as threatening, abusive or insulting.

### Specific Offences

The UK responds to hate crime through racial and religious aggravated offences in the Crime and Disorder Act 1998;<sup>409</sup> offences of intending to stir up hatred towards race, religion, sexual orientation in the Public Order Act of 1986,<sup>410</sup> and enhanced sentences via

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Press, 2002); Jean-Claude Pressac; *Auschwitz: Technique and Operation of the Gas Chambers* Beate Klarsfeld Foundation, 1989; Laurence Rees, *Auschwitz: The Nazis and the 'Final Solution'* BBC Books, 2005; Michael Shermer and Alex Grobman, *Denying History: Who says the Holocaust never happened and why do they say it?* University of California Press, 2000

<sup>408</sup> Douglas, 2001, op cit; U.S. Fed News, 'Top Academics, Political Leaders, Seek 'Incitement to Genocide' Charges Against Iran, President Ahmadinejad,' Dec. 12, 2006.

<sup>409</sup> Crime & Disorder Act 1998, (CDA 1998) as amended by Anti-terrorism, Crime and Security Act 2001, to include religiously aggravated offences.

<sup>410</sup> The Public Order Act 1986 originally protected against racial hatred only, in ss. 18-23. The Racial and Religious Hatred Act 2006 inserted 'religious hatred' into the Public Order Act 1986 creating ss 29A –G, which cover similar

the Criminal Justice Act 2003,<sup>411</sup> for those who demonstrated hostility or were motivated by hostility towards the victim's membership of certain groups.<sup>412</sup> There is the additional offence of engaging or taking part in indecent/racist chanting at a designated football match contained in the Football Offences Act 1991 s.3.<sup>413</sup>

Legislation that is not specifically aimed at 'hate crime' but which nevertheless prosecutors can deploy in this context include the Communications Act 2003 s. 127. This covers the sending, or causing to be sent, material that is grossly offensive or of an indecent, obscene or menacing character. Equally, there is the possibility of prosecutors using the Malicious Communications Act 1988 s1, which covers sending, delivering or transmitting an article to another that is considered indecent or grossly offensive, or which conveys a threat, or which is false. There is a requirement for there to be evidence of intent to cause distress or anxiety to the recipient. There is no requirement for the article to actually reach the intended recipient.

As can be seen above, Britain, more precisely England and Wales, has a patchwork of criminal provisions relating to different types of hate crime, and the regional organisation of policing raises specific issues of the priorities that are reflected in different law enforcement practices.<sup>414</sup> These have been introduced not as part of a comprehensive codification of criminal law based on first principles, but rather in response to the historical

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offences as the racial, but with differences in level of proof. Section 74 and schedule 16 of the Criminal Justice & Immigration Act 2008 inserted incitement to hatred based upon sexual orientation into the Public Order Act, with the same provisions as for incitement to religious hatred.

<sup>411</sup> S. 145 refers to enhancements for racial and religious, s. 146 to initially sexual orientation and disability, and amended by The Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 to include transgender.

<sup>412</sup> In the UK these are : race, religion, sexual orientation, disability, transgender.

<sup>413</sup> S.3 (amended by s.9 Football (Offences and Disorder) Act 1999).

<sup>414</sup> Kielinger, V., & Patterson, S. (2007). 'Policing hate crime in London,' *American Behavioral Scientist*, 2, 196–203.

emergence of politically-defined "social issues" concerning, for example, racism and race relations.<sup>415</sup>

For purposes of analysis, the different headings of hate crimes within the *ad hoc* patchwork of British provisions will be discussed individually, beginning with race.

### **Racist hate crime**

Arguably the first of these was enacted in 1965 with the Race Relations Act. This created a new criminal offence of "inciting racial hatred." However, even this innovation was not entirely unprecedented. Indeed, it built upon common law antecedents of criminal laws against both sedition and public mischief. Stephen's *A Digest of the Criminal Law*<sup>416</sup> included the following definition of "sedition:" '(A)n intention ... to raise discontent or disaffection amongst Her Majesty's subjects, or to promote feelings of ill-will and hostility between different classes of such subjects.'

This offence expresses in archaic language a number of the sentiments and value-commitments contained in the Rwandan hate crime laws against "division" already discussed. Conduct prosecuted under this offence would today be redefined as: "incitement to racial or religious hatred.' The common law offence of "public mischief" was broadly and vaguely defined to include: 'all offences of a public nature, that is, all such acts or attempts as tend to the prejudice of the community.' Once again, the broad terms of Rwanda's genocide ideology law receive an echo from this relatively indeterminate and

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<sup>415</sup> However, as noted by the NCCRI prohibition of Incitement to Hatred Act 1989: A Review Available at <http://www.nccri.ie/submissions/01AugLegislation.pdf> one of the earliest recorded cases concerning incitement to hatred took place in 1732 in the case of R v Osborne (1732) 2 Swnast 503 where newspaper material was ruled to be "seditious" given how its comments and allegations against Portuguese Jews had led to violence and disorder.

<sup>416</sup> James Fitzjames Stephen, 1894, *A Digest of the Criminal Law*, 38.

archaic British offence, and parallels of a conceptual kind can also be identified in many European penal codes.

Section 6 of The Race Relations Act 1965 (UK) focuses on prohibiting *incitement to racial violence*, not on racially motivated crimes in general. Indeed, the latter were to be dealt with by existing legislation. Under this measure, "threatening, abusive, or insulting speech or behaviour intended to stir up racial hatred" became punishable by imprisonment. This remains a current part of British Law. This Act represented the first incitement to hatred provisions in England and Wales. However, under the section it was necessary to prove intent to stir up hatred, and due to the high level of proof required, it was accepted that the legislation was not working successfully. It was then replaced by section 70 of the Race Relations Act 1976, which inserted a new section 5A into the Public Order Act 1936. Here, the need to show subjective intention was replaced by a test of *likelihood* to stir up racial hatred in the circumstances.

In other words, the 1976 Act relaxed the need for prosecutors to prove subjective intention, and this offence was later transferred to the provisions of §§ 17-29 of the Public Order Act 1986. Part III of the Public Order Act 1986 created new offences consisting of certain forms of behaviour which were intended to stir up racial hatred. They concern the display or publication of racially offensive material. "Racial hatred" was originally defined as: 'hatred against a group of persons in Great Britain defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins.' However, reference to

'Great Britain' was removed by the Anti-Terrorism, Crime and Security Act 2001.<sup>417</sup>

This offence covers:

- deliberately provoking hatred of a racial group
- distributing racist material to the public
- making inflammatory public speeches
- creating racist websites on the Internet
- inciting inflammatory rumours about an individual or an ethnic group, with the aim of spreading racial discontent.

This measure embraces both oral or written words, as well as behaviour. Prosecutions require the consent of the Attorney General. Genocide denial falls outside this legislation.

Part III of the Public Order Act 1986 introduced specific race crimes into the criminal law, each of which has 'racial hatred' at their core component. Although the term "hatred" is not itself specifically defined, "racial hatred is defined in section 17 as: 'hatred against a group of persons ... defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins.' This definition is at least partly indeterminate with respect to both the nature and scope of the offences, and resort to the very strong term "hatred" (as opposed to displays of "ridicule," "mockery," or "contempt") could explain the relatively few convictions under this Act.<sup>418</sup> Indeed, perhaps it has been taken as suggesting that only the most extreme forms of racial abuse are criminalised because the term implies a

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<sup>417</sup> Anti-Terrorism, Crime and Security Act 2001, Part 4 'Race and Religion' amends Public Order Act 1986 (c.64)

<sup>418</sup> [www.coe.int/t/e/human\\_rights/ecri/1-ecri/3-general\\_themes/3-legal\\_research/1-national\\_legal\\_measures/united\\_kingdom/united\\_kingdom%20sr.asp#P320\\_39689](http://www.coe.int/t/e/human_rights/ecri/1-ecri/3-general_themes/3-legal_research/1-national_legal_measures/united_kingdom/united_kingdom%20sr.asp#P320_39689); See also Rogers, 'Punishing Racially Aggravated Crime: The UK Experience,' Conference Paper given at conference "Combating Racism and Promoting Equality through Legislation" Dublin 2004 available at: <http://www.amnesty.ie/content/download/1503/8437/file/Sheila%20Rogers%20paper.pdf>



comparatively high legal threshold. This means that those inciting racism can avoid prosecution simply by avoiding the more emphatic forms of racism hostility.<sup>29</sup>

There are interpretive issues raised by the specific requirements for each of the offences, which will now be discussed in turn,

1/. Use of offensive words or display of offensive material: The most general offence is found in section 18 which states: 'A person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an offence if –

(a) he intends thereby to stir up racial hatred; or

(b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.'

The conduct (as distinct from the mental) element of the offence can take one of two forms. The first is where a person uses threatening, abusive or insulting words or behaviour. This relates directly to the spoken words or physical gestures of the person concerned.

The Race Relations Board and its later successor - the Commission for Racial Equality (CRE) - reported many examples of grossly inflammatory racist material. However, it appears that there was a general reluctance among the authorities to prosecute, either for fear of failure and thus damaging race relations, or conversely, because this response could prove counter-productive: with the risk that those accused might become seen as "martyrs" attracting public sympathy. Lawrence argues that the Joint Committee Against Racism, which reported on racial violence to the Home Secretary in 1981, probably marked the starting point of British hate crime law. Similarly, Gadd argues that the Home Office

publication *Racial Attacks* represented: 'a noteworthy starting point ... (in) the history of criminological research on racially motivated crime...' <sup>419</sup>

Within Britain, incurring prosecution or encouraging expansive judicial interpretations of unlawful types of hate speech may be problematic because of quasi-constitutional concerns for violations of legally recognised human rights regarding "freedom of expression". Furthermore, and in contrast with the German and Rwandan positions, convictions for racial incitement rely on the decisions of juries, not judges. For example, in 2006 a jury failed to convict leaders of the British National Party for inflammatory statements made in a quasi-private meeting against Islam, which had been secretly recorded by a BBC journalist.

1991 saw the introduction of penalty enhancement in Part 1 of the Criminal Justice Act 1991 sections 3(3) and 7(1)1. The incitement offences were supplemented with Part II of Chapter 37 of the Crime and Disorder Act 1998 which introduced the concept of "racially aggravated offences," <sup>420</sup> These consist of a number of offences already known to the law, with the additional aggravating element of being "motivated by racial hostility." <sup>421</sup> The presence of this additional aggravating factor means that *higher penalties* are available to punish offenders on conviction. The availability of such aggravated sentences for racially-biased crime was further developed by the Criminal Justice Act 2003. Chapter 1 of Part 12 of this Act makes provision for an increase in the severity of sentences for racially aggravated offences not already covered by the 1998 Act. The Act is also distinctive in that

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<sup>419</sup> Gadd, op cit., 755

<sup>420</sup> Aggravated wounding; aggravated actual bodily harm; aggravated common assault; aggravated damage; aggravated fear/provocation of violence; aggravated intentional harassment/alarm/distress; aggravated harassment/alarm/distress; aggravated harassment/stalking without violence; aggravated harassment/stalking with fear of violence

<sup>421</sup> Amended to include religion by the Anti-terrorism, Crime and Security Act 2001

if the court finds that the offence was either racially or religiously aggravated, then it must treat that as an aggravating factor, making a positive statement to that effect and handing down a more severe penalty than it would otherwise have given.

Evidence is provided according to the Act if,

‘the offender demonstrates towards the victim of the offence hostility based on the victim’s membership (or presumed membership) of a racial group; or the offence is motivated (wholly or partly) by hostility towards members of a racial groups based on their membership of that group.’

"Racial group" is defined in terms of ‘race, colour, nationality (including citizenship) or ethnic or national origins.’

The Crime and Disorder Act 1998 amounted to the UK’s first hate crime law, which included provisions concerning racially motivated crimes, including enhanced penal sanctions for crimes ‘racially aggravated.’ Iganski, a prominent academic on hate crime legislation, writing from a sociological perspective, states that the Crime and Disorder Act is a ‘radical intervention ... designed to promote justice by attempting to mould the collective conscience.’<sup>422</sup> However, analysing the language of this Act makes it clear that this is insufficiently unambiguous to enable consistent interpretations to be made.

The Crown Prosecution Service has, therefore, given definitional and operational guidance:

‘A...demonstrating hostility is not defined by the Act. The ordinary dictionary definition of hostile includes simply being "unfriendly". Proving this limb of the offence requires evidence of words or actions which show hostility toward the victim. However, this hostility may be totally unconnected with the "basic" offence which may have been committed for other, non-racially or religiously motivated reasons. For example, an assault which takes place because of an

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<sup>422</sup> Iganski 2008 op cit, 94. See also D. Gadd, op cit, 757.

argument over a parking place,<sup>423</sup> but where the offender then utters racial abuse to the victim of the assault would come within the scope of this part of section 28.<sup>424</sup>

'B. Moreover, the CPS notes that in the absence of verbal statements, section 28 1 (b) Crime and Disorder Act 1998, requiring evidence of 'motivated by hostility', 'may prove more difficult than 28 1 (a)) in practice.' In the absence of a clear statement by the accused that his/her actions were motivated by his hostility to his victim based on his race or religious belief,- for example, an admission under caution, the CPS suggests methods of interpreting motive: 'In some cases, background evidence could well be important, ... for example, evidence of membership of, or association with, a racist group, or evidence of expressed racist views in the past might, depending on the facts, be admissible in evidence.'<sup>425</sup>

UK case law are given as examples by the CPS, where, in *RG & LT v DPP*, May LJ said that section 28(1)(a) is:

'not so much to indicate the offender's state of mind as to prove what he said so as to demonstrate racial hostility towards the victim. Often the demonstration will be by words or shouting. It may equally be possible to demonstrate racial hostility by means of doing something other than literally by means of words as, for instance, holding up a banner with racially offensive language on it.'<sup>426</sup>

By contrast, section 28(1)(b) is concerned with the offender's motivation, requiring proof that the substantive offence was wholly or partly motivated by racial hostility. May LJ said that: "motive, in my judgment, is at least capable of being established by evidence relating to what the defendant may have said or done on another or other occasions".<sup>427</sup>

Burney and Rose argue that the courts have been inconsistent in their treatment of cases, with the issue of 'hostility' needed to prove racial aggravation, for example, being an issue.<sup>428</sup> These writers cite magistrates' courts expressing some sympathy for 'normal

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<sup>423</sup> This refers to *DPP v McFarlane* [2002] EWHC 485 (Admin)

<sup>424</sup> [http://www.cps.gov.uk/legal/p\\_to\\_r/racist\\_and\\_religious\\_crime/#a01](http://www.cps.gov.uk/legal/p_to_r/racist_and_religious_crime/#a01)

<sup>425</sup> *Ibid.*

<sup>426</sup> *RG v DPP* [2004] EWHC 183

<sup>427</sup> *ibid*

<sup>428</sup> E. Burney and G. Rose, 2002, 'Racist Offenders: How is the Law Working?' Home Office Research Study 244, Home

working class mayhem,' in which words uttered were seen as part of their normal vocabulary, not evidence of innate racial hostility. Imagined cultural sympathies therefore affect interpretation. However, Burney and Rose, with unacknowledged reference to policy decisions, have argued that: 'any reference to the victim's ethnicity ... proves the necessary element of racial aggravation ... [because]... anything less condones racism'.<sup>429</sup>

In short, from 1965 Britain has introduced and progressively extended various criminal law measures dealing with racist forms of hate crime, including hate speech, with variable requirements particularly in relation to "proof of intent."

## **Religion**

British criminal measures concerning *religious* hate crimes and incitement to religious hatred were unsuccessfully attempted at the time of the passage of the 1936 Public Order Bill. Later, but equally abortive, attempts were made to add "religious incitement" to "racial hatred" during the drafting of the 1965 Act, the Criminal Justice and Public Order Act 1994,<sup>430</sup> the Anti-Terrorism, Crime and Security Bill 2001-2002, the private members Religious Offences Bill 2001-2002, and the Serious Organised Crime and Police Bill of 2004-5.

International concerns may have been seen as influential following the aftermath of the September 11 2001 attack upon the US. In November 2001, the UK Parliament's Human Rights Committee recommended additional measures concerning religious hate crime to the UK: 'in the light of the increase in hostility towards Muslims since September 11

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Office. D. Gadd, *op cit*, 758.

<sup>429</sup> Burney and Rose, *op cit*.

<sup>430</sup> Hare, *op cit.*, 2.

2001.<sup>431</sup> The changes introduced via the Anti-Terrorism, Crime and Security Act 2001 enhanced the sentencing penalty for both religiously and racially motivated crime.

In 2004, David Blunkett, the then Home Secretary, argued for:

‘... offering the same protection to followers of religion as we do to racial minorities. That is, making it illegal to stir up hatred against people because of their religious beliefs. ... I believe those who oppose this provision would be dismayed if they understood the current limits and loopholes of the present laws. For example, how can a modern society say Jews are protected (rightly, because they are covered by race laws, rather than religion), yet Muslims and Christians are not? Can it be right that hatred based on deliberate and provocative untruths about a person's religion remains unchallenged?’<sup>432</sup>

However, he was careful to highlight that:

‘The offence only covers hatred stirred up against people deliberately targeted because of religious beliefs or lack of them. It is not simple dislike or hatred of their beliefs; it's not a new blasphemy law by the back door. Nor is it an assault on people's right to disapprove of beliefs, teachings or practices of a religion. It's about tackling people who set out to whip up hatred, not about stopping people telling jokes - however offensive. The Attorney General will have to approve each prosecution; courts confronted by such cases must remember their obligations under the European Convention on Human Rights so that free speech and freedom of religion are preserved.’<sup>433</sup>

The subsequent Racial and Religious Hatred Act 2006, applicable to England and Wales only, inserts a new Part 3A (ss 29A to 29N) to the Public Order Act 1986, (amending section. 64) creating a new substantive law of stirring up hatred against persons on religious grounds.<sup>434</sup> To be identified as a crime, a hate incident must meet the definitions of the Act for both criminal act and subjective intent. Unlike racial hatred, the act itself is

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<sup>431</sup> Concluding Observation of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland (November 5, 2001) CCPR/CO/73/UK, CCPR/CO/73/UKPT, para.14.

<sup>432</sup> D. Blunkett, ‘Religious Hatred is no Laughing Matter: why we’ll outlaw the persecution of belief,’ *The Observer*, December 12 2004.

<sup>433</sup> D. Blunkett, *ibid*.

<sup>434</sup> Goodall, ‘Incitement to Religious Hatred: All Talk and No Substance?’, (2007) 70(1) *MLR* 89.

confined to "threatening", as opposed to merely abusive or insulting, words or behaviour. Furthermore, unlike racial hatred, it is insufficient that religious hatred is likely to be stirred up. In addition, prosecutors must show that this must also be the perpetrator's subjective intention. The Act inserts into the 1986 Public Order Act the following requirements:

- 1/. An act directed against a group.
- 2/. Words, behaviour, material or images which are threatening, in circumstances which do not amount to merely exercising freedom of expression taking the form of discussion, criticism or even ridicule or abuse or insult of religions or beliefs or practices of religious adherents.
- 3/. An intention to stir up 'religious hatred' as defined in the new section 29A of the Public Order Act 1986, that is to say, 'hatred against a group of persons defined by reference to religious belief or lack of religious belief.'

Section 29(B) states that: 'a person who uses threatening words or behaviour, or displays any written material which is threatening, is guilty of an offence if he intends thereby to stir up religious hatred.' However, 29J also specifies that:

'nothing in this Part shall be read or given an effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.'

In other words, the offence under the 2006 Act is subject to the wider "freedom of expression" defence of the 1986 Act.<sup>435</sup>

Attempts to include religious protection within existing legislation had been promoted by the then Labour government on the grounds that, although 'not commonplace' incitement to religious hatred does exist and has:

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<sup>435</sup> M. Whine, 'Expanding Holocaust Denial and Legislation Against It' (2008) 13(3) *Comms Law* 86; K. Goodall, 'Incitement to religious hatred: All talk and no substance,' (2007) 70 *MLR* 79. Offensive speech has been successfully prosecuted: *Abdul v DPP* [2011] EWHC 247 (Admin); [2011] *Crim. L.R.* 553; The CPS Legal Guidance (November 1, 2010) on prosecuting s.5 offences is at: [http://www.cps.gov.uk/legal/p\\_to\\_r/public\\_order\\_offences/#Section\\_5](http://www.cps.gov.uk/legal/p_to_r/public_order_offences/#Section_5;);

‘a disproportionate and corrosive effect on communities...creating barriers between different groups and encouraging mistrust and suspicion. At an individual level this can lead to fear and intimidation and a sense of isolation. It can also indirectly lead to discrimination, abuse, harassment and ultimately crimes of violence against members of our communities. It is legitimate for the criminal law to protect citizens from such behaviour.’<sup>436</sup>

Blunkett argued for the introduction of protections on the grounds of consistency with related measures and the avoidance of anomalies, which includes the fact that previous criminal law only protected certain religious faiths and their adherents and was therefore itself discriminatory:<sup>437</sup> ‘The common law offence of blasphemy, for example, only protected the doctrine of the Church of England and did not extend to other faiths or even other strands of Christianity.’<sup>438</sup> He also argued that:

‘certain religious groups, including Jews and Sikhs were protected against incitement to religious hatred already through the definition of “ethnic origins” under the Race Relations Act 1976. On the other hand, Christians, Muslims and Hindus are not, owing to their more diverse ethnic and geographical origins.’<sup>439</sup>

On May 8, 2008, the Criminal Justice and Immigration Act abolished the common-law offences of blasphemy and blasphemous libel in England and Wales, with effect from 8 July 2008.<sup>440</sup>

The Racial and Religious Hatred Act's long title states that its purpose is: 'to make provision about offences involving stirring up hatred against persons on racial or religious

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<sup>436</sup> Para.69 of the letter from Caroline Flint M.P., Parliamentary Under Secretary of State for the Home Office (February 3, 2005) in response to the Joint Committee on Human Rights' Fourth Report, *First Progress Report* (2004-05 HL 26/HC 224) and annexed in App.2a of the Committee's Eighth Report (2004-2005 HL 60/HC 388). See further, B. Parekh, “Group Libel and Freedom of Expression: Thoughts on the Rushdie Affair,” in S. Coliver, ed., *Striking a Balance: Hate Speech, Freedom of Expression and Non-Discrimination* (Art.19, Essex, 1992) and M. Matsuda: “Public Response to Racist Speech: Considering the Victim's Story” (1989) 87 *Michigan Law Review* 2320.

<sup>437</sup> See, e.g. M. Mahzer Idriss, “Religion and the Anti-Terrorism, Crime and Security Act 2001” [2002] *Crim.L.R.* 890.

<sup>438</sup> *R. v Chief Metropolitan Stipendiary Magistrate, Ex p. Choudhary* [1991] Q.B. 429 and *R. v Director of Public Prosecutions, Ex p. Merton LBC* CO/3019/98, March 1, 1999.

<sup>439</sup> Idriss, op cit.

<sup>440</sup> Ruth Geller, ‘Goodbye to Blasphemy in Britain,’ Institute for Humanist Studies.

<http://web.archive.org/web/20080607204857/http://humaniststudies.org/enews/?id=348&article=0> Accessed 2/05/2013.



grounds.' In other words, this measure aims to ensure that the criminal law protects all groups of persons defined by their religious beliefs (or lack of them) from having religious hatred intentionally stirred up against them in a range of situations that the Act itself specifies. As a result, British law now includes specific "incitement to religious hatred provisions" over and above those that could have applied by default under hate crime laws against the promotion of racism already discussed.<sup>441</sup>

The new offences are similar to those for racial incitement contained in the Public Order Act 1986, with crucial differences. As with racial incitement, they refer to the use of words or behaviour or display of "written material" (29B);<sup>442</sup> publishing or distributing written material to the public or a section of the public (29C);<sup>443</sup> the public performance of a play (29D);<sup>444</sup> distributing, showing or playing a recording (29E);<sup>445</sup> broadcasting or including a programme in a programme service (29F),<sup>446</sup> and the possession of written materials or

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<sup>441</sup> *DPP v Collins* [2006] UKHL 40; [2007] 1 Cr. App. R. 5. See CPS Guidance on Racist and Religious Crime (June 23, 2010): [http://www.cps.gov.uk/legal/p\\_to\\_r/racist\\_and\\_religious\\_crime/#Racist](http://www.cps.gov.uk/legal/p_to_r/racist_and_religious_crime/#Racist); This Act also amends section 24A of the Police and Criminal Evidence Act 1984 so that the powers of citizens arrest do not apply to its new offences, and creates a new Part 3A of the 1986 Public Order Act.

<sup>442</sup> Under section 29N. "Written material" includes any sign or other visible representation."

<sup>443</sup> **29C: Publishing or distributing written material:** (1) A person who publishes or distributes written material which is threatening is guilty of an offence if he intends thereby to stir up religious hatred; (2) References in this Part to the publication or distribution of written material are to its publication or distribution to the public or a section of the public.

<sup>444</sup> **29D: Public performance of play:** (1) If a public performance of a play is given which involves the use of threatening words or behaviour, any person who presents or directs the performance is guilty of an offence if he intends thereby to stir up religious hatred. (2) This section does not apply to a performance given solely or primarily for one or more of the following purposes—

(a) rehearsal; (b) making a recording of the performance, or (c) enabling the performance to be included in a programme service; but if it is proved that the performance was attended by persons other than those directly connected with the giving of the performance or the doing in relation to it of the things mentioned in paragraph (b) or (c), the performance shall, unless the contrary is shown, be taken not to have been given solely or primarily for the purpose mentioned above ...

<sup>445</sup> **29E: Distributing, showing or playing a recording:** (1) A person who distributes, or shows or plays, a recording of visual images or sounds which are threatening is guilty of an offence if he intends thereby to stir up religious hatred. (2) In this Part "recording" means any record from which visual images or sounds may, by any means, be reproduced; and references to the distribution, showing or playing of a recording are to its distribution, showing or playing to the public or a section of the public; (3) This section does not apply to the showing or playing of a recording solely for the purpose of enabling the recording to be included in a programme service.

<sup>446</sup> **29 F: Broadcasting or including programme in programme service:** (1) If a programme involving threatening visual images or sounds is included in a programme service, each of the persons mentioned in subsection (2) is guilty of an offence if he intends thereby to stir up religious hatred. (2) The persons are — (a) the person providing the programme service, (b) any person by whom the programme is produced or directed, and (c) any person by whom offending words or behaviour are used.

recordings with a view to display, publication, distribution or inclusion in a programme service (29G).<sup>447</sup> However, as already noted, the Public Order Act prohibits only “threatening” words and behaviour with intent in respect of religious incitement. It does not cover insulting or abusive behaviour or words or those *likely to* incite hatred (unlike for incitement of racial hatred.)

In response to "freedom of expression" concerns and quasi-constitutional requirements, Section 29J provides that the offences of stirring up religious hatred are not intended to restrict, or otherwise limit, discussion, criticism or expressions of antipathy, dislike, ridicule or insult or abuse of particular religions or belief systems or lack of religion, or of the beliefs and practices of those who hold such beliefs or to apply to promote their religion by "converting" individuals into a particular religious belief or to cease holding a belief. Section 29K also makes it clear that the Act does not apply to fair and accurate reports of anything said or done in the UK or Scottish Parliaments, or to the fair and accurate contemporaneous reports of judicial proceedings.

Section 29A is vital in that it defines the meaning of the key term "religious hatred." it states: 'hatred against a group of persons defined by reference to religious belief or lack of religious belief.' This definition is designed to cover hatred against a group of persons defined by their religious belief or lack of religious belief (as with Atheists and Humanists), *but without attempting to legally define and spell out what is deemed to constitute a*

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<sup>447</sup> **29G: Possession of inflammatory material:** (1) A person who has in his possession written material which is threatening, or a recording of visual images or sounds which are threatening, with a view to— (a) in the case of written material, its being displayed, published, distributed, or included in a programme service whether by himself or another, or (b) in the case of a recording, its being distributed, shown, played, or included in a programme service, whether by himself or another, is guilty of an offence if he intends religious hatred to be stirred up thereby. (2) For this purpose regard shall be had to such display, publication, distribution, showing, playing, or inclusion in a programme service as he has, or it may reasonably be inferred that he has, in view.

"religion" or a "religious belief." Resolving these interpretive issues is reserved for the British courts to determine in the light of the specific circumstances of individual cases. However, the commentary provided by the official "explanatory notes" states, in para. 12, that this formal definition is: 'in line with the freedom of religion guaranteed by Article 9 of the ECHR. It includes, although this list is not definitive, those religions widely recognised in this country such as Christianity, Islam, Hinduism, Judaism, Buddhism, Sikhism, Rastafarianism, Baha'ism, Zoroastrianism and Jainism. Equally, branches or sects within a religion can be considered as religions or religious beliefs in their own right.'<sup>448</sup>

Section 29B also requires closer analysis. It states: '(1) A person who uses threatening words or behaviour, or displays any written material which is threatening, is guilty of an offence if he intends thereby to stir up religious hatred.' In general, this law does not recognise a sharp private / public distinction. However, where these words or behaviour are used or displayed inside a *private dwelling*,<sup>449</sup> and there is no reason to believe that they can be heard or seen by anyone outside that or any other private dwelling, then they fall outside this definition: 29B(2) provides:

'(2) An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the written material is displayed, by a person inside a dwelling and are not heard or seen except by other persons in that or another dwelling.'

Under the 2006 Act, the prosecution do not have to show that perpetrators possess a subjective hatred of the victim's particular religious belief or lack of it, or even that they

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<sup>448</sup> <http://www.legislation.gov.uk/ukpga/2006/1/notes/division/5>

<sup>449</sup> Under 29N, "dwelling" means any structure or part of a structure occupied as a person's home or other living accommodation (whether the occupation is separate or shared with others) but does not include any part not so occupied, and for this purpose "structure" includes a tent, caravan, vehicle, vessel or other temporary or movable structure.

have correctly identified what this is. The wording of these offences include hatred against a group where the hatred is based on the fact that the group do not share the particular religious beliefs of the perpetrator, and are therefore perceived negatively as, for example, "heathen," "infidels" or "pagans." In other words, the new offences cover those perpetrators of hate crime who intend to stir up hatred against anyone whose religious orientation differs from their own even though they have no specific objection against that particular victim's orientation or membership. This wording effectively removes the possibility of an accused claiming that he or she had misidentified the victim's religious orientation and, therefore, lacked the required form of subjective intent to be guilty of an offence under the 2006 Act.

Most of the Act came into force on 1 October 2007. In terms of its enforcement, section 2 amends section 24A of the Police and Criminal Evidence Act 1984 to exempt the offences of stirring up racial or religious hatred from the power of citizens' arrest. Hence, only police constables have the power to arrest persons for these offences. A constable may arrest without warrant anyone she or he: "reasonably suspects is committing an offence under this section.' (29B(3) In addition, section 29L states that no prosecution for these offences shall go forward without the express consent of the Attorney General. Subsection 29L(3) states that the maximum penalty for a conviction for an offence of stirring up religious hatred is seven years in prison. In addition section 29I allows a court by or before which a person is convicted of offences under section 29B, 29C, 29E or 29G, has the 'power to order forfeiture'. Forfeiture can be applied to any written material or recording produced to the court to which the offence relates.

In the recent legislative history in relation to the 2006 Act, the criminalisation of religious hate crimes proved controversial. During parliamentary debate, two amendments made in the House of Lords to this measure which the Government opposed failed to be overturned when the amended Bill was returned to the House of Commons. In its initial drafting, there was no need to prove any "specific intent" to stir up religious hatred, thereby potentially criminalising subjectively "innocent" statements, or even the repetition of sections of classic religious texts or prayers containing negative statements about other faiths (or atheists or humanists). There was also the possibility of criminalising the works of comedians, satirists and writers.

During the public and parliamentary controversy over its introduction, comedian Rowan Atkinson claimed: "I appreciate that this measure is an attempt to provide comfort and protection to them but unfortunately it is a wholly inappropriate response far more likely to promote tension between communities than tolerance."<sup>450</sup> Religious leaders, as well as representatives from non-religious groups, opposed this version of the Bill. Those who supported it placed their faith in the quasi-constitutional status of the 1998 Human Rights Act, suggesting that this measure would have to be interpreted and judicially applied in ways that were consistent with its freedom of expression and religion provisions. The Upper House of Parliament, the House of Lords, amended the Bill on 25 October 2005 by adding limitations to the legislation requiring a specific intent. Hence: a "person who uses threatening words or behaviour, or displays any written material which is threatening... if he intends thereby to stir up religious hatred". For each of the specific

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<sup>450</sup> See "Atkinson takes fight with religious hatred bill to Parliament, *The Independent*, London, 7 Dec. 2004: <http://www.independent.co.uk/news/uk/politics/atkinson-takes-fight-with-religious-hatred-bill-to-parliament-6156421.html>.

offences the words, behaviour, written material, recordings or programmes must be proven to be objectively "threatening" and subjectively intended to "stir up religious hatred." This amendment removed the "abusive and insulting" requirement and strengthened the need to prove subjective intention. The Government's attempt to overturn these amendments and reinstate the original draft was defeated by the House of Commons votes on 31 January 2006.

The Communications Act 2003 <sup>451</sup> has increasingly been used to prosecute those who send, or cause to be sent, '... by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character.' Debate has centred upon the definitions, resolved in *Chambers v DPP* [2012]<sup>452</sup> where the Divisional Court held that because a message sent by Twitter is accessible to all who have access to the internet, it is a message sent via a "public electronic communications network". The Crown Prosecution Service has given guidance that s127 of the Act can be used *as an alternative offence to hate crime (including race, religion, disability, homophobic, sexual orientation, and transphobic crime), hacking offences, cyber bullying, cyber stalking, amongst others.*<sup>453</sup> However, a number of controversial prosecutions, and potentially the sheer numbers that might be brought within the remit of

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<sup>451</sup> There is also the Malicious Communications Act 1988 which covers material sent that is 'indecent or grossly offensive, or which conveys a threat, or which is false, provided there is an *intent* to cause distress or anxiety to the recipient'.

<sup>452</sup> *Chambers v DPP* [2012] EWHC 2157 (Admin).

<sup>453</sup> [http://www.cps.gov.uk/legal/a\\_to\\_c/communications\\_offences/](http://www.cps.gov.uk/legal/a_to_c/communications_offences/)

s127, have resulted in the Crown Prosecution Service drawing up guidelines seeking to limit the cases brought under Section 127.<sup>454</sup>

The Director of Public Prosecutions 'interim guidelines' (December 2012) for social media prosecutions include the use of Section 127, and attempted to limit its usage to cases which go beyond those which are "offensive, shocking or disturbing; or satirical, iconoclastic or rude; or the expression of unpopular; or unfashionable opinion about serious or trivial matters, or banter or humour, even if distasteful to some or painful to those subjected to it."<sup>455</sup>

The guidelines themselves include reference to Lord Chief Justice in *Chambers v DPP* [2012]<sup>456</sup> where he said: '... a message which does not create fear or apprehension in those to whom it is communicated, or may reasonably be expected to see it, falls outside [section 127(i)(a)], for the simple reason that the message lacks menace.'

The CPS advise that 'As a general rule, threats which are not credible should not be prosecuted, unless they form part of a campaign of harassment specifically targeting an individual within the meaning of the Protection from Harassment Act 1997. Where there is evidence of discrimination, prosecutors should pay particular regard to the provisions of section 28-32 of the Crime and Disorder Act 1998 and section 145 of the Criminal Justice Act 2003 (increase in sentences for racial and religious aggravation) and section 146 of the Criminal Justice Act 2003 (increase in sentences for aggravation related to disability,

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<sup>454</sup> Director Public Prosecutions, CPS 'Interim guidelines on prosecuting cases involving communications sent via social media' <http://adam1cor.files.wordpress.com/2012/12/117342720-social-media-dpp.pdf> stated to use cautions, since, taking into account, Facebook, Twitter, LinkedIn and YouTube, 'there are likely to be millions of communications each month.' P.8.

<sup>455</sup> Director Public Prosecutions, CPS 'Interim guidelines on prosecuting cases involving communications sent via social media' <http://adam1cor.files.wordpress.com/2012/12/117342720-social-media-dpp.pdf>

<sup>456</sup> *Chambers v DPP* [2012] EWH2 2157 (Admin) (Paragraph 30)

sexual orientation or transgender identity). The European Court of Human Rights has made clear that Article 10 protects not only speech which is well-received and popular, but also speech which is offensive, shocking or disturbing, for example in *Sunday Times v UK* <sup>457</sup>

“Freedom of expression constitutes one of the essential foundations of a democratic society...it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also as to those that offend, shock or disturb. ”

The homophobic ‘tweet’ regarding Olympic swimmer Tom Daley became the first instance when the Director of Public Prosecutions Kier Starmer intervened to clarify the use of s127 Communications Act. Starmer stated that

“The distinction [between "offensive" and "grossly offensive"] is an important one and not easily made. Context and circumstances are highly relevant and as the European Court of Human Rights observed in the case of *Handyside v UK* (1976), the right to freedom of expression includes the right to say things or express opinions “...that offend, shock or disturb the state or any sector of the population”. <sup>458</sup>

The DPP later stated that the decision not to prosecute was made "in part because he had only around a hundred followers". The context of numbers of potential followers as an issue in prosecution was noted by the Press.<sup>459</sup> However, the number of followers was but one consideration.

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<sup>457</sup> *Sunday Times v UK* (No2) [1992] 14 EHRR 123)

<sup>458</sup> See ‘SCL The Law Community,’ DPP’s Guidance on Social Media Prosecutions;  
<http://www.scl.org/site.aspx?i=ne27760>

<sup>459</sup> *The Telegraph*, ‘Unpopular twitter accounts could escape prosecution for ‘grossly offensive’ tweets’.  
<http://www.telegraph.co.uk/technology/twitter/9675548/Unpopular-Twitter-accounts-could-escape-prosecution-for-grossly-offensive-tweets.html>



## Sexual orientation.

If we recognise a hierarchy or totem pole of protected groups and grounds, then race would be at the top in terms of historical recognition. Far lower down this hierarchy is sexual orientation. Section 146 of the Criminal Justice Act 2003 implemented in April 2005, included provision for *enhanced sentencing* for crimes motivated by the victim's sexual orientation, (subjective standard of guilt). This did not take the form of specific offences related to, say, 'homophobically aggravated offence' akin to the racially or religiously aggravated' ones. The provisions of the Act require that,

‘At the time of committing the offence or immediately before or after doing so, the offender demonstrated towards the victim of the offence hostility based on the sexual orientation (or presumed sexual orientation) of the victim’ or ‘the offence was motivated (wholly or partly) by hostility towards person who are of a particular sexual orientation.’<sup>460</sup>

To constitute an offence, the required hostility can be displayed either ‘at the time of committing the offence, or immediately before or after doing so.’<sup>461</sup> Because it is the demonstration of hostility that constitutes the offence, prosecutors have no obligation to demonstrate any specific form of subjective intent or motivation, and the presence of homophobic or other forms of discriminatory intent is irrelevant to the enhancement provisions if bias towards sexuality is evident.<sup>462</sup> The day this measure came into force, Thomas Pickford and Scott Walker were sentenced for the murder of Jody Dobrowski. Unlike the racial killing of Stephen Lawrence, the District Crown Prosecutor at the Old Bailey Trials Unit stated:

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<sup>460</sup> Crown Prosecution Service, *Guidance on Prosecuting Cases of Homophobic and Transphobic Crime* (2007, Crown Prosecution Service, London) 10.

<sup>461</sup> Association of Chief Police Officers, *Hate Crime: Delivering a Quality Service – Good Practice and Tactical Guidance*, Home Office Police Standards Unit, London, 2000, 13

<sup>462</sup> N. Hall, 2005, *Hate Crime*.

'The Crown Prosecution service treated this case as a homophobic killing from the beginning ... both men received sentences enhanced to 28 years through the provisions contained in s146 of the Criminal Justice Act 2003. (the usual sentence for murder is 15 years).'<sup>463</sup>

In 2006, The Equality Act dissolved the Commission for Racial Equality, the Disability Rights Commission and the Equal Opportunity Commission, and established a single umbrella organisation: The Commission for Equality and Human Rights. The following year, the Equality Act (Sexual Orientation) Regulations 2007 made discrimination against lesbians and gay men in the provision of goods and services illegal. S 74 of the Criminal Justice and Immigration Act of 2008 amended Part 3A of the Public Order Act 1986 (hatred against persons on religious grounds) to include a new offence of inciting hatred based upon sexual orientation, it requires a similar threshold to that of the racial and religious act. Therefore, neither abusive or insulting language, nor homophobic humour is criminalised. What is unlawful is behaviour or expressions that are *threatening*. In that sense, and in keeping with the general position in Germany, homophobic hate crime falls under *public order legislation*.

The human rights issue concerning "freedom of speech," and its qualifications, remains as relevant here as it is to the religious provision in the Public Order Act 1986. The Criminal Justice and Immigration Act reinforced this concern not to restrict discussion of a wider range of opinions, beliefs and attitudes in relation to gay sexuality by inserting section 29J 'Protection of Freedom of Expression (Sexual Orientation).' This states: 'for the avoidance of doubt, the discussion of criticism of sexual conduct or practices or the urging of persons to refrain from or modify such conduct or practices shall not be taken of itself to

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<sup>463</sup> N. Chakraborti & J. Garland, 2009, *Hate crime, Impact, Causes, and Responses*, p.65.

be threatening or intended to stir up hatred'.<sup>464</sup> Subject to certain exclusions, The Equality Act 2010, outlawed discrimination on the grounds of sexual orientation. In the same year the coalition Government published the first ever LGBT policy programme, committing it to working towards greater LGBT equality.

## **Transgender**

In 2012, section 65 of The Legal Aid, Sentencing and Punishment of Offenders Act 2012 amended s146 of the Criminal Justice Act 2003, to include transgender victims of transgender hate crimes are now afforded measures of statutory protection with this amendment. However, the Crime and Disorder Act 1998 only relates to crimes motivated by homophobic, racist, disablist or religious hostility.

According to the CPS, courts possess: 'a general power and discretion to increase sentences that are aggravated by transphobic hostility.'<sup>465</sup> However, there is no mandatory statutory duty to do so. Section 74 of the Criminal Justice and Immigration Act 2008 similarly makes no reference to transgender as a ground for criminal liability, but only to incitement of hatred based upon sexual orientation. Similar to the gay movement, however, it is argued by activists that developments have been encouraged or developed through case studies in court. Indeed, Whittle et al argue that: 'every legal gain made by the UK trans community has been through the courts rather than through the good will of a government pledged to equalities for all.'<sup>466</sup> Legislation currently does not address the perceived

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<sup>464</sup> Office of Public Sector Information (2008) 'Schedule 16 Hatred on the Grounds of Sexual Orientation', at [http://www.opsi.gov.uk/acts/acts2008/ukpga\\_20080004\\_en\\_33#sch16](http://www.opsi.gov.uk/acts/acts2008/ukpga_20080004_en_33#sch16)

<sup>465</sup> Crown Prosecution Service, 2007, *Policy for Prosecuting Cases of Homophobic and Transphobic Crime*, (Crown Prosecution Service, 20

<sup>466</sup> S.Whittle, L.Turner, and M.Alami, 2007, *Engendered Penalties:Transgender and Transexual People's Experiences of Inequality and Discrimination*, 10.

differences nor the intersection of different facets of identity; sexuality, age, disability, ethnicity.<sup>467</sup>

The first prosecution for stirring up hatred on the grounds of sexual orientation was in 2011, and related to the distribution of a leaflet, entitled ‘The Death Penalty?’, outside the Jamia Mosque in Derby in July 2010 and through letterboxes during the same month. A variety of charges were brought against the five men responsible.<sup>468</sup>

## **Disability**

Many would argue that *disability-related* hate crime is very much a late-comer to the legal recognition of hate crime, a poor relation when compared with race in particular. Certainly, legal protection for those with a disability is particularly recent. In 1995, the Disability Discrimination Act outlaws discrimination, and was also strengthened by Disability Rights Commission Act 1999, Special Educational Needs and Disability Act 2001 and the Disability Discrimination Act 2005. These are not hate crime specific measures but instead contain positive rights to prevent discrimination in general, and cover a variety of areas, including employment, education, access to services and facilities.

Sir Ken Macdonald, QC, the then Director of Public Prosecutions for England and Wales stated in a speech to the Bar Council in October 2008 that:

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<sup>467</sup> B.Spalek, 2008, *Communities, Identities and Crime*. L. J. Moran and A. N. Sharpe, ‘Violence, identity and policing : the case of violence against transgender people’, *Criminal Justice*, (4) 395-417, 400.

<sup>468</sup> Ali, Hussain and Umar Javed appeared at Derby Magistrates' Court having been charged with three counts each of an offence of sending letters, etc, with intent to cause distress or anxiety under section 1 of the Malicious Communications Act 1988. Ihjaz Ali was also charged in December with three offences, contrary to section 5 (b) of the Public Order 1986 in relation to the distribution of leaflets outside the Jamia Mosque. Ihjaz Ali was charged with four counts of distributing threatening written material intending to stir up hatred on the grounds of sexual orientation, contrary to section 29C (1) of the Public Order Act 1986. Mehboob Hussain was also charged with two counts contrary to section 29C (1) of the Public Order Act 1986. Umar Javed was also charged with two counts contrary to section 29C (1) of the Public Order Act 1986. Razwan Javed was charged yesterday with one count contrary to section 29C (1) of the Public Order Act 1986. Kabir Ahmed was charged yesterday with one count contrary to section 29C (1) of the Public Order Act 1986.

I am on record as saying that it is my sense that disability hate crime is very widespread. I have said that it is my view that at the lower end of the spectrum there is a vast amount not being picked up. I have also expressed the view that the more serious disability hate crimes are not always being prosecuted as they should be. This is a scar on the conscience of criminal justice. And all bodies and all institutions involved in the delivery of justice, including my own, share the responsibility.<sup>469</sup>

As discussed above, the Crime and Disorder Act 1998 contains provision for enhanced sentencing for racially aggravated offences, and was later amended by Anti-Terrorism, Crime and Security Act 2001 to include religiously aggravated hate crimes. Section 146 of The Criminal Justice Act 2003 afforded disabled people similar protection by providing that: ‘hostility based on victim’s actual or perceived disability can be an aggravating factor, justifying an enhanced sentence. However, as with sexual orientation and transgender, there are no crimes of ‘disability aggravated crimes’. The CPS Guidance on Prosecuting Cases of Disability Crime provides grounds to identify: ‘serious aggravating factors,’ such as ‘deliberately setting the victim up for the purposes of humiliation or to be offensive,’ ‘if the victim was particularly vulnerable’, and ‘if particular distress was caused to the victim or the victim’s family.’<sup>470</sup>

In practice, it has been argued that these guidelines are insufficient to protect the disabled, and to ensure cases are seen as hate crimes. Chakraborti cites the well-publicised case of Brent Martin, and the fact that his murderers were not sentenced with the s146 provision for enhancement, despite the ‘three serious aggravating factors’ being present.<sup>471</sup> Quarmby reviewed 50 disability related crimes in the 2000s and noted they were not identified as hate crimes.<sup>472</sup> She considers that this may be because offences against

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<sup>469</sup> [http://www.cps.gov.uk/legal/d\\_to\\_g/disability\\_hate\\_crime\\_/#a16](http://www.cps.gov.uk/legal/d_to_g/disability_hate_crime_/#a16)

<sup>470</sup> Ibid.

<sup>471</sup> Chakraborti op cit, p.96.

<sup>472</sup> K.Quarmby, 2008, *Getting Away With Murder: Disabled People’s Experiences of Hate Crime in the UK*, 24.

disabled people can already be punishable by enhanced sentencing via the Sentences Guidelines Council Advice for crimes against vulnerable groups. Section 146 requires proof of evidence of the acts, and of hostility to disability, or motivation, and may prove a more difficult route for prosecutors to utilise. However, Quarmby argues that if this proves to be case, then it would limit the number of recorded hate crimes against the disabled. The Law Commission is currently considering whether disability and sexual orientation should have aggravated offences.

Similarly, many argue that perceptions of hate crime as ‘stranger danger’ has particular difficulties for assessing hate crime and the disabled.<sup>473</sup> For instance, many perpetrators are known to the victims, and can include carers and those who "befriend" the victim for ulterior ends.<sup>474</sup> Quarmby similarly suggests a reluctance of many officials to believe that the disabled can ever be victims of hate crime, leading to comparative under-prioritisation and collation of hate crime data relative to other higher-status types. The CPS published its first disability hate crime data in December 2008. In the year ended March 2008, 187 cases were prosecuted. However in total, for all hate crimes, over 78,000 were prosecuted. There is no offence of incitement of hatred against those with a disability.

However, government advisers are currently reviewing the current legislation. The Law Commission will look at two possible changes, both mentioned in the government’s hate crime action plan in March, but will not report until the spring of 2014. The first change may include extending the prosecution of crimes such as assault or criminal damage currently prosecuted as “aggravated” offences with higher sentences – under the Crime and

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<sup>473</sup> M.Sherry, 2003, *Don’t Ask, Tell or Respond; Silent Acceptance of Disability Hate Crimes*.

<sup>474</sup> M.Sherry, 2011, *Disability Hate Crimes: Does Anyone Really Hate Disabled People?*.

Disorder Act 1988 – if motivated by racial or religious hostility, to include disability, sexual orientation or transgender identity.

The second change concerns the current protection given under the Public Order Act 1986 – against publication of material intended to stir up hatred against people on the grounds of their race, religion or sexual orientation: recommendations may include extending this to cover disability and transgender identity.

# APPENDIX ONE

## EXISTING HATE CRIME LEGISLATION WITHIN EUROPE<sup>475</sup>

Our analysis, set out below, considers the legislation pertaining to ‘hate crime’ throughout the 27 EU Member States as of May 2013. The legislation includes ‘hate speech’ although not all states recognise this, Holocaust denial, incitement to genocide and Cybercrime. The main legislation from the EU regarding Racism and xenophobia, and Holocaust denial and genocide is given first, with brief commentary on the latter (Part One). The actual legislative provision is then summarised in categories below (Part Two). The main report (Part Three) lists each country alphabetically by country code, with actual Holocaust denial legislation (if it exists) given first, then other legislative provisions governing bias crimes, and finally country specific commentaries taken from a variety of sources.

### PART ONE

#### **EU Legislation.**

#### **European Union Framework Decision for Combating Racism and Xenophobia (2007)**

On July 15, 1996, the Council of the European Union adopted the Joint action/96/443/JHA concerning action to combat racism and xenophobia. The European Union's Executive

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<sup>475</sup> As of May 2013.



Commission 2001 proposal for a European Union-wide anti-racism xenophobia law in 2001, which included the criminalization of Holocaust denial was blocked by the United Kingdom and the Nordic countries because of the need to balance freedom of expression. As a result a compromise was reached: the EU has not prohibited Holocaust denial outright, but a maximum term of three years in jail is optionally available to all member nations for "denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes."

The EU extradition policy regarding Holocaust denial was tested in the UK during the 2008 failed extradition case brought against the suspected Holocaust denier Frederick Toben by the German government. The UK does not have a specific crime of Holocaust denial, and the unsuccessful extradition request was made on the grounds of racial and xenophobic crimes.

**The European Union Framework Decision for Combating Racism and Xenophobia (2007) establishes that the following intentional conduct will be punishable in all EU Member States:**

- Publicly inciting to violence or hatred , even by dissemination or distribution of tracts, pictures or other material, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin.
- Publicly condoning, denying or grossly trivialising
- crimes of genocide, crimes against humanity and war crimes as defined in the Statute of the International Criminal Court (Articles 6, 7 and 8) directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin, and

- crimes defined by the Tribunal of Nuremberg (Article 6 of the Charter of the International Military Tribunal, London Agreement of 1945) directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin.

Member States may choose to punish only conduct which is either carried out in a manner likely to disturb public order or which is threatening, abusive or insulting.

The reference to religion is intended to cover, at least, conduct which is a pretext for directing acts against a group of persons or a member of such a group defined by reference to race, colour, descent, or national or ethnic origin. Member States will ensure that these conducts are punishable by criminal penalties of a maximum of at least between 1 and 3 years of imprisonment.

#### **Laws against Holocaust denial:**

Holocaust denial, the denial of the systematic genocidal killing of millions of Jews by Nazi Germany in the 1930s and 1940s, is illegal in a number of European countries. Many have laws that criminalise genocide denial in other contexts. The following European countries have some legislation criminalizing the Nazi message, including denial of the Holocaust: Austria, Belgium, the Czech Republic, France, Germany, Hungary, Lithuania, the Netherlands, Poland, Portugal, Romania, and Spain. Some States also have legislation banning other elements associated with Nazism, such as Nazi symbols. However, it has been claimed that pro-Nazi ideology is now being spread via music (particularly free downloads), and the internet.

#### **Genocide denial.**

Under the Framework Decision, all EU Member States are now under the legal obligation

to criminalize genocide denial when it is carried out either “in a manner likely to incite to violence or hatred” or “in a manner likely to disturb public order or which is threatening, abusive or insulting.” However, each Member State has the right to not apply this jurisprudence and punish genocide denial “only” where genocide deniers directly incite to violence or hatred.

### **Hate speech.**

Countries that specifically ban Holocaust denial generally have legal systems that limit speech in other ways, such as banning hate speech. It is arguable that this can be related to the difference between the common law countries of the United States, Ireland and many British Commonwealth countries and the civil law countries of continental Europe and Scotland. In civil law countries, the law is generally more proscriptive: the judge acts more as an inquisitor, gathering and presenting evidence as well as interpreting it. However, it has been argued that Holocaust denial can inspire violence against Jews, and that their rights are best protected in open and tolerant democracies that actively prosecute all forms of racial and religious hatred.

The EU Network of Independent Experts on Fundamental Rights Report on Combating Racism and Xenophobia through Criminal Legislation similarly distinguishes between countries with specific criminal provisions incriminating Holocaust denial and countries where general criminal provisions can be used to sanction this conduct. Countries utilising general criminal provisions for maintaining public peace or using statements and behaviours motivated by racist intent: Finland, Hungary, Italy, Ireland, Latvia, Greece, Malta, Poland the Netherlands, Sweden and the United Kingdom. The UK lacks specific

legislation denying the Holocaust, but prosecution may be possible if 'it is done in a manner that also constitutes incitement to racial hatred as defined under British law.

**Holocaust denial when it amounts to insult or defamation of Jews.**

Potential conflict with 'freedom of speech' is a crucial issue. Human rights groups, and in particular, TASZ, argue that Holocaust deniers should be protected by a universal right to free speech. However, the argument that laws punishing Holocaust denial are incompatible with the European Convention on Human Rights and the Universal Declaration of Human Rights have been rejected by institutions of the Council of Europe (the European Commission of Human Rights, the European Court of Human Rights and also by the United Nations Human Rights Committee.

A separate legal issue relates to the posting of material via the internet, from a host such as the US, which guarantees 'freedom of speech'. In 1974, Zündel published a booklet penned by a British Holocaust denier entitled *Did Six Million Really Die?* This potentially reached a wide audience, through the Zundel website, which used a US-based internet service provider. However, in January 2002, the Canadian Human Rights Tribunal delivered a ruling in a complaint involving his website, in which it was found to be contravening the Canadian Human Rights Act. The Court ordered Zündel to cease communicating hate messages. Arrested in 2003 by the American authorities in Tennessee, USA, on an immigration violation matter, Zündel was returned to Canada, where he tried to gain refugee status. Zündel was imprisoned until March 1, 2005, when he was deported to Germany and prosecuted for disseminating hate propaganda. On February 15, 2007, Zündel was convicted on 14 counts of incitement under Germany's *Volksverhetzung* law, which bans the incitement of hatred against a portion of the population, and given the

maximum sentence of five years in prison.<sup>476</sup>

Historians who oppose Holocaust denial laws include Raul Hilberg. Other prominent opponents of the laws have been Timothy Garton Ash, Peter Singer, and Noam Chomsky. The laws have also been criticized on the grounds that education is more effective than legislation at combating Holocaust denial, and that the laws will make martyrs out of those imprisoned for their violation.

A multilateral human rights treaty to which 160 countries are parties, the International Covenant on Civil and Political Rights, obliges member nations to pass domestic legislation prohibiting advocacy of national, racial or religious hatred. As a result, countries that do not specifically criminalize denial of the Holocaust do prosecute individuals who promote hate speech. The line dividing these two types of conduct – Holocaust denial and hate speech – is vague and individuals engaging in Holocaust denial usually do so in the context of making Jew-hating statements. These individuals may then be prosecuted for violating hate speech prohibitions. The United Kingdom has twice rejected Holocaust denial laws. Denmark and Sweden have also rejected such legislation.

**European Court Human Rights, European Convention on Human Rights and ‘hate speech’.**

The European Court of Human Rights has identified a number of forms of expression which are to be considered offensive and contrary to the European Convention on Human Rights (including racism, xenophobia, anti-Semitism, aggressive nationalism and discrimination against minorities and immigrants)<sup>477</sup> The Court excludes hate speech from protection by means of two approaches provided for by the Convention:

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<sup>476</sup> ^ Canadian Press (February 15, 2007). "German court sentences Ernst Zundel to 5 years in prison for Holocaust denial". canada.com. Retrieved February 15, 2007

<sup>477</sup> Recommendation No. R 97 (20) of the Committee of Ministers of the Council of Europe on "hate speech"

- by applying Article 17 (Prohibition of abuse of rights<sup>478</sup>) where the comments in question amount to hate speech and negate the fundamental values of the Convention; or
- by applying the limitations provided for in the second paragraph of Article 10 and Article 11<sup>479</sup> (this approach is adopted where the speech in question, although it is hate speech, is not apt to destroy the fundamental values of the Convention).

Under the Framework Decision on racism and xenophobia especially Art 4 – courts must consider an aggravated circumstance and take this into consideration when sentencing.

Policy decisions behind the above include the perception that hate speech is ‘destructive for democratic society as a whole ‘prejudicial messages will gain some credence, with the attendant result of discrimination, and perhaps even violence against minority groups.’

Judge Yudkivska in *Feret v Belgium*. Member states failing to comply with the above risk cases being referred to the ECtHR.

## PART TWO

1. Member States are listed in the main report (Part Three) alphabetically by country code. This introduction identifies the States according to the following categories:

### **States with Legislation regarding Holocaust Denial**

Explicit: AT (Austria), BE (Belgium), CZ (the Czech Republic), DE (Germany), ES

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<sup>478</sup> This provision is aimed at preventing persons from inferring from the Convention any right to engage in activities or perform acts aimed at the destruction of any of the rights and freedoms set forth in the Convention

<sup>479</sup> Restrictions deemed necessary in the interests of national security, public safety, the prevention of disorder or crime, the protection of health or morals and the protection of the rights and freedoms of others.

(Spain), FR (France), HU (Hungary), LT (Lithuania), LU (Luxembourg), LV (Latvia), NL (the Netherlands), PL (Poland), PT (Portugal), RO (Romania), SL (Slovakia).

**States using general criminal provisions for maintaining public peace or criminalising statements and behaviours motivated by racist intent:**

FI Finland, HU Hungary, IT Italy, IE Ireland, LV Latvia, EL Greece, MT Malta, PL Poland, NL the Netherlands, SE Sweden and the UK United Kingdom. The UK lacks specific legislation denying the Holocaust, but prosecution may be possible if it is carried out in a manner that also constitutes incitement to racial hatred as defined under British law.

**Specific legislation relating to Genocide**

DE Germany, ES Spain, LU Luxembourg, LV Latvia, MT Malta,

**Communist crime denial.**

PL Poland, Czech Republic

**Fascist crime denial**

SL Slovakia.

**Specific legislation relating to ‘Hate Speech/Incitement’**

DE Germany, EE Estonia, IE Ireland, LU Luxembourg (incitement to violence  
-Discrimination is an any distinction between individuals is due to their origin, the colour of their skin, their gender, sexual orientation, marital status, their age, their health status,

disability, their manners, their political or philosophical opinions, their union activities), LV Latvia – (Incitement racial hatred only), MT Malta, NL Netherlands (incites hatred or discrimination against men or violence against person or property on the grounds of their race, religion or beliefs, their gender, their heterosexual or homosexual orientation or their physical, psychological or mental), SE Sweden, SL Slovenia (ethnic, racial, religious or other hatred, strife or intolerance, or provokes any other inequality on the basis of physical or mental deficiencies or sexual orientation), SK Slovakia (publicly incite violence or hatred against a group of people or individuals for their membership of any race, nation, nationality, colour, ethnicity, origin, gender or their religion, if it is a pretext for threatening racial groups) UK United Kingdom, (race, religion, sexual orientation.

**Specific legislation relating to racial and religious bias crimes.**

EE Estonia, PL Poland, UK United Kingdom.

**Specific legislation under ‘Principle of Equality’**

SI Slovenia – Criminal Code 2008, Murder in violation of the principle of equality  
-(ethnicity, race, colour, religion, ethnicity, sex, language, or a different political belief, sexual orientation, life situation, birth, genetic heritage, education, social status or any other circumstance)-

**Specific legislation relating to other bias groups.**

CZ Czech Republic Incitement to Hatred, curtailment of rights and freedoms,(potentially



wide range of groups), EE Estonia (Incitement of Hatred), SK Slovakia (publicly incite violence or hatred against a group of people or individuals for their membership of any race, nation, nationality, colour, ethnicity, origin, gender or their religion, if it is a pretext for threatening...) UK Incitement to hatred sexual orientation.

### **Sentence enhancements racial and religious bias crimes**

AT Austria, DK Denmark. EL Greece (in criminal code), ES Spain, FR France (Criminal Code), IT Italy (Criminal Code), LT Lithuania, LU Luxembourg (Criminal Code), LV Latvia race only, PT Portugal (specific crimes), MT Malta, RO Romania, SE Sweden, SK Slovakia (national, ethnic or racial hatred or hatred because of skin colour, specific crimes), UK United Kingdom

### **Sentence enhancements other bias groups.**

BE Belgium, DK Denmark Sexual orientation ‘or similar’, EL Greece (sexual orientation), ES Spain -racist, anti-Semitic, or other discriminatory grounds related to the victim’s ideology, religion, or beliefs or his/her belonging to an ethnic group, race, nation, gender or sexual orientation or his/her suffering from an illness or handicap, FR France (sexual orientation), age, sex, sexual orientation, disability, race, nationality, language, descent, social status, religion, convictions or views), LT Lithuania, LV Latvia victim under 15 years old, MT Malta (Gender identity, sexual orientation, and disability), PT Portugal (sexual orientation, specific crimes), RO Romania (nationality, ethnicity, language, sex, sexual orientation, opinion, political belonging, convictions, wealth, social origin, age, disability, chronic diseases or HIV/AIDS), SE Sweden (colour, national or ethnic origin, religious belief or other similar circumstance, sexual orientation), UK United Kingdom

(sexual orientation, transgender, disability).

### **Criminal code provision - racial and religious**

BG Bulgaria, CY Cyprus, CZ Czech Republic, DK Denmark. EL Greece (expressly states), ES Spain, FR France, HU Hungary, IT Italy, LT Lithuania, LU Luxembourg, LV Latvia (race only), MT Malta, PL Poland, RO Romania, SE Sweden, SK Slovakia (national, ethnic or racial hatred or hatred because of skin colour refers to specific crimes – note this differs from incitement which covers a wider range), SK Slovakia (publicly incite violence or hatred against a group of people or individuals for their membership of any race, nation, nationality, colour, ethnicity, origin, gender or their religion, if it is a pretext for threatening...)

### **Criminal code provision other bias groups**

BG Bulgaria (political), CZ Czech Republic (political), DK Denmark (sexual orientation ‘or similar’), ES Spain, FR France (sexual orientation), Hungary (‘certain groups of the population’ may cover sexual orientation), LT Lithuania, LV Latvia (under 15 years), MT Malta (Gender identity, sexual orientation, disability), RO Romania (nationality, ethnicity, language, sex, sexual orientation, opinion, political belonging, convictions, wealth, social origin, age, disability, chronic diseases or HIV/AIDS), SE Sweden (colour, national or ethnic origin, religious belief or other similar circumstance, sexual orientation), SK Slovakia – but only Incitement (publicly incite violence or hatred against a group of people or individuals for their membership of any nation, nationality, colour, ethnicity, origin, gender or their religion, if it is a pretext for threatening...)

**Criminal Code Provision ‘motive’ considered in general:**

DE Germany – no specific mention of groups, but ‘motives and aims’ are to be considered for enhancement- (Hate crimes are usually considered under ‘political’).EE Estonia ‘base motive’, PT Portugal (crimes in general), SI Slovenia (aggravating circumstances)

**Discrimination as basis for sentencing enhancement.**

BE Belgium has the Anti Discrimination Act 2003, which states “hatred against, contempt for, or hostility to a person on the grounds of his so-called race, colour, descent, national or ethnic origin, sex, sexual orientation, marital status, birth, fortune, age, beliefs or philosophy of life, current and future state of health, a disability or physical characteristic” are aggravating circumstances in respect of a certain number of offences.

NL The Netherlands has no legislation covering hate crimes, other than incitement, which is hate or discrimination, but a Discrimination Directive entered into force on December 1, 2007 stating that ‘hate’ motivation should be taken into account, and sentences enhanced.

## PART THREE

### Actual Member State Legislation with commentaries.

#### AT Austria

In Austria, the Verbotsgesetz 1947 provided the legal framework for the process of denazification in Austria and suppression of any potential revival of Nazism. In 1992, it was amended to prohibit the denial or gross minimisation of the Holocaust.

National Socialism Prohibition Law (1947, amendments of 1992)

§ 3g. He who operates in a manner characterized other than that in § § 3a – 3f will be punished (revitalising of the NSDAP or identification with), with imprisonment from one to up to ten years, and in cases of particularly dangerous suspects or activity, be punished with up to twenty years imprisonment.

§ 3h. As an amendment to § 3 g., whoever denies, grossly plays down, approves or tries to excuse the National Socialist genocide or other National Socialist crimes against humanity in a print publication, in broadcast or other media.

**AT Austria.** (Other ‘hate crime’ legislation)

Criminal Code 1974, amended 2005 (excerpts) :

- Aggravating circumstances. Article 33:

An aggravating circumstance is especially when the perpetrator (...) has acted out of a racist, xenophobic or other particularly reprehensible motive; (...)

- Incitement to violence. Article 283 (1):

"In a manner likely to jeopardize public order, incites to hostile action against a church or

religious community established in the country or a group defined by their affiliation to such a church or religious community or to a race, nation, ethnic group or state is punishable with up to two years imprisonment; (...)

### **COMMENTARIES:**

Austria encompasses the prohibition of Holocaust denial in its constitution. The Criminal Code (last amended in 2005) expressly enables xenophobic or racist bias motives of the offender to be taken into account by the courts as an aggravating circumstance when sentencing, thus offering further protection against hatred driven crimes and in criminalising holocaust denial. To enhance visibility of hate crimes and the related fundamental rights violations by them, the European Commission against Racism and Intolerance (ECRI) recommended that Austria's official statistics "cover the use made by the courts of Article 33 of the Criminal Code."

In September 2012, FRA (European Union Agency for Fundamental Rights) reported that Austria has been classified as providing "good data" the criteria being "A range of bias motivations are recorded" and "Data are generally published" In 2010, Austria registered the following official data on hate crime by bias motivation: 64 cases motivated by racism/xenophobia, 27 anti-Semitism cases, 335 extremism cases, 8 Islamophobia and 146 other/unspecified . Politically motivated crimes: committed offences and cases reported to the Court, are recorded by the Ministry of Interior, Federal Agency for State Protection and Counter-terrorism. See Annual reports on the protection of the Constitution.

## BE Belgium

Holocaust denial was made illegal in [Belgium](#) in 1995.

Negationism Law (1995, amendments of 1999)

Article 1 Whoever, in the circumstances given in article 444 of the Penal Code denies, grossly minimises, attempts to justify, or approves the genocide committed by the German National Socialist Regime during the Second World War shall be punished by a prison sentence of eight days to one year, and by a fine of twenty six francs to five thousand francs. For the application of the previous paragraph, the term genocide is meant in the sense of article 2 of the International Treaty of 9 December 1948 on preventing and combating genocide. In the event of repetitions, the guilty party may in addition have his civic rights suspended in accordance with article 33 of the Penal Code.

Art.2 In the event of a conviction on account of a violation under this Act, it may be ordered that the judgement, in its entity or an excerpt of it, is published in one of more newspapers, and is displayed, to the charge of the guilty party.

Art.3. Chapter VII of the First Book of the Penal Code and Article 85 of the same Code are also applicable to this Act.

Art. 4. The Centre for Equal Opportunities and Opposition to Racism, as well as any association that at the time of the facts had a legal personality for at least five years, and which, on the grounds of its statutes, has the objective of defending moral interests and the honour of the resistance or the deported, may act in law in all legal disputes arising from the application of this Act.

**BE Belgium.** (Other ‘hate crime’ legislation).

Belgium : penalty-enhancement for crimes involving discrimination on the basis of sex, supposed race, colour, descent, national or ethnic origin, sexual orientation, civil status, birth, fortune, age, religious or philosophical beliefs, current or future state of health and handicap or physical features.

Criminal Code (1999) (excerpts)

- Art. 377 bis. Enacted by: L 2007-05-10/35, art. 33, 064

— In the cases stipulated in this chapter [INDECENT ASSUALT AND RAPE], the minimum punishments stipulated in these articles shall be doubled in the case of a prison sentence, and increased by two years in case incarceration when one of the motives of the crime or offence is hatred against, contempt for or hostility to a person on the grounds of his so-called race, colour, descent, national or ethnic origin, sex, sexual orientation, marital status, birth, fortune, age, beliefs or philosophy of life, current and future state of health, a disability or physical characteristic.

- Art. 405 quater. Enacted by: L 2007-05-10/35, art. 33, 064

— In the cases stipulated in Article 393 to 405bis [MANSLAUGHTER AND INTENTIONAL INJURY] the minimum punishments stipulated in this articles shall be doubled in the case of correctional punishment, and increased by two years in case incarceration when one of the motives of the crime or offence is hatred against, contempt for or hostility to a person on the grounds of his so-called race, colour, descent, national or ethnic origin, sex, sexual orientation, marital status, birth, fortune, age, religion or belief, current and future state of health, a disability or physical characteristic.

- Art. 422 quater. Enacted by : L 2007-05-10/35, art. 33, 064

— In the cases stipulated in Articles 422bis and 422ter, [NON-ASSISTANCE TO A PERSON IN DANGER] the minimum correctional punishments stipulated in these articles can be doubled when one of the motives of the crime or offence is hatred against, contempt for or hostility to a person on the grounds of his so-called race, colour, descent, national or ethnic origin, sex, sexual orientation, marital status, birth, fortune, age, religion or belief, current and future state of health, a disability or physical characteristic.

- Art. 438 bis. Enacted by: L 2007-05-10/35, art. 36, 064

— In the cases stipulated in this article,[VIOLATION OF PERSONAL LIBERTY AND PERSONAL PROPERTY] the minimum punishments stipulated in these articles can be doubled in the case of correctional punishments and increased by two years in the case of incarceration, when one of the motives of the crime or offence is hatred against, contempt for or hostility to a person on the grounds of his so-called race, colour, descent, national or ethnic origin, sex, sexual orientation, marital status, birth, fortune, age, religion or belief, current and future state of health, a disability or physical characteristic.

- Art. 453 bis. Enacted by: L 2007-05-10/35, art. 38, 064

— In the cases stipulated in this article,[LIBEL] the minimum correctional punishments stipulated in this article can be doubled when one of the motives of the crime or offence is hatred against, contempt for or hostility to a person on the grounds of his so-called race, colour, descent, national or ethnic origin, sex, sexual orientation, marital status, birth, fortune, age, religion or belief, current and future state of health, a disability or physical characteristic.”

- Art. 514 bis. Enacted by: L 2007-05-10/35, art. 39, 064



— In the cases stipulated in Articles 510 to 514 [ARSON], the minimum punishments stipulated in these articles can be doubled in the case of correctional punishments and increased by two years in the case of incarceration, when one of the motives of the crime or offence is hatred against, contempt for or hostility to a person on the grounds of his so-called race, colour, descent, national or ethnic origin, sex, sexual orientation, marital status, birth, fortune, age, religion or belief, current and future state of health, a disability or physical characteristic.

- Art. 532 bis. Enacted by: L 2007-05-10/35, art. 41, 064

— In the cases stipulated in Articles 528 to 532,[DESTRUCTION OF PERSONAL POSSESSIONS OR PROPERTY] the minimum punishments stipulated in these articles can be doubled in the case of correctional punishments and increased by two years in the case of incarceration, when one of the motives of the crime or offence is hatred against, contempt for or hostility to a person on the grounds of his so-called race, colour, descent, national or ethnic origin, sex, sexual orientation, marital status, birth, fortune, age, religion or belief, current and future state of health, a disability or physical characteristic.

### **COMMENTARIES:**

Like Austria, Belgium has laws criminalizing Holocaust denial and with the above provisions of the Criminal code, Belgium has provision to include any motivation for crime as an aggravating factor and to be taken into consideration in sentencing. On the other hand, as per the Anti-discrimination Act 2003 of Belgium, “hatred against, contempt for, or hostility to a person on the grounds of his so-called race, colour, descent, national or ethnic origin, sex, sexual orientation, marital status, birth, fortune, age, beliefs or philosophy of life, current and future state of health, a disability or physical characteristic” are

aggravating circumstances in respect of a certain number of offences. Therefore, these articles in both pieces of legislations allow “a judge to double the minimum of a correctional sentence and impose an increase of two years to a prison sentence in cases where the crime was motivated by bias”.

Like Austria, Belgium has been classified as providing “good data” on Hate Crime statistics. In June 2012, Belgium registered a first murder officially treated as a homophobic hate crime by Belgian judicial authorities on the ground of sexual discrimination under new Anti-discrimination law. Belgium formed part of 19 States to collect data on crimes motivated by bias against LGBT people. Belgium also includes crimes against transgender people as a separate category. Belgium is one of the 13 OSCE participating States reported to also collect data on crimes and incidents motivated by bias against people with disabilities and other groups, in 2011.

The key laws to counter racial and anti-Semitic harassment are the Law Against Racism and Xenophobia (1981) (amended 1994), the Holocaust Denial Law (1995) and the General Anti-Discrimination Law 2003. As of 2004, there was no official monitoring system for anti-Semitic incidents. Data and information on complaints is available from the Centre for Equal Opportunities and Opposition to Racism.

## **BG Bulgaria.**

Criminal Code of Bulgaria (1968, amended 2010) (excerpts)

Article 162 (Last amendment, SG No. 27/2009)

(2) Who applies violence against another or damages his property because of his nationality, race, religion or his political convictions, shall be punished by imprisonment of

up to four years and by fine from five thousand to ten thousand leva and by public censure.  
or a group shall be punished by imprisonment of up to three years and by public reprobation.

Article 163 (Last amendment, SG No. 27/2009)

(1) The persons who participate in a crowd for attack on groups of the population, individual citizens or their property in connection with their national, ethnical or racial belonging shall be punished:

1. the instigators and leaders - by imprisonment of up to five years;
2. all the rest - by imprisonment of up to one year or corrective labour.

(2) If the crowd or some of the participants are armed the punishment shall be:

1. for the instigators and leaders - imprisonment of one to six years;
2. for all the rest - imprisonment of up to three years.

(3) If an attack is carried out and as a result of it a serious bodily harm or death has followed the instigators and the leaders shall be punished by imprisonment of three to fifteen years and all the rest - by imprisonment of up to five years, unless they are subject to a more  
Art. 165.

(3) For the acts under art. 163 committed against groups of the population, individual citizens or their property in connection with their religious belonging shall apply the punishments stipulated by it.

#### **COMMENTARIES:**

Amnesty International Annual Report 2012 – Bulgaria Publisher Amnesty International  
Publication Date 24 May 2012  
Amnesty International, Amnesty International Annual Report 2012 - Bulgaria, 24 May 2012, available at: <http://www.refworld.org/docid/4fbe394cc.html> [accessed 23 April 2013]

In July 2012, the UN Human Rights Committee expressed concerns over the ongoing widespread discrimination suffered by Roma in accessing justice. The Committee reminded the authorities of their obligation to prevent, investigate and punish acts of hate crime and harassment against minorities and religious communities, especially Roma and Muslims.

There was concern that attacks on other minorities are classified as 'hooliganism' rather than bias attacks, and this may be because of a lack of legislation – for example that covering sexual orientation.

### **Violent attacks against Roma:**

According to media reports, the Prosecutor General has responded to protests by NGOS on the failure to take necessary steps to stem violence against Roma, by sending instructions to regional prosecutors, reminding them of the need to respond to acts that may amount to violence on racial, religious and ethnic grounds. For example, following demonstrations in September 2012, a number of criminal proceedings against individuals arrested during and after the protests were reportedly concluded.

### **Violent attacks against Muslims**

On 20 May 2012, Muslims were assaulted while praying in front of the Banya Bashi Mosque in Sofia when a demonstration organized by supporters of the nationalist political party National Union Attack (Ataka) turned violent. Four Muslim men and a member of parliament from Ataka were reportedly injured. An investigation was opened, but the Bulgarian Helsinki Committee reported that the assaults were prosecuted as "hooliganism" rather than acts of discriminatory violence. The assault was noted with concern by the UN Human Rights Committee, which criticized the authorities for their poor enforcement of

existing anti-discrimination legislation.

### **Violent attacks against lesbian, gay, bisexual and transgender people**

On 18 June, following the Sofia Pride march, five Pride volunteers were attacked by a group of unknown individuals. The rights activists, three of whom suffered minor injuries, suspected that their attackers had followed them as they were leaving the march. They expressed their concern that the incident would be treated by the authorities as "hooliganism" rather than a hate crime because the Bulgarian Criminal Code does not recognize sexual orientation as a possible motive for such crimes. According to the Minister of Interior, the police investigation into the case was closed without the perpetrators being identified.

The 2012 FRA report stated that from 2011, judicial and law enforcement bodies collected data based upon classification of codes in the Criminal code, prior to this these crimes were treated as 'hooliganism'. However, the criminal code only refers to race, nationality, ethnicity, religion or political convictions.<sup>480</sup>

### **CY Cyprus.**

Criminal Code of Cyprus (Cap 154) 1960; (Amendment Law, 3 of 1962; Amendment Law, 15 of 1999) (excerpts)

Damage to religious property

Article 138

Any person who destroys, damages or defiles any place of worship or any object which is held sacred by any class of persons with the intention of thereby insulting the religion of any class of persons or with the knowledge that any class of persons is likely to consider such destruction, damage or defilement as an insult to their religion, is guilty of a

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<sup>480</sup> FRA 'Making Hate Crimes Visible in the European Union:acknowledging victims' rights'.

misdemeanor.

Law 28(III)/99 (Amendments to Ratification Law on the United Nations Convention on the Elimination of All Forms of Racial Discrimination) (excerpts)

Incitement to violence

Section 2A- Offences

(1) Any person who in public either orally or through the press or by means of any document or picture or by any other means, incites acts which are likely to cause discrimination, hatred or violence against any person or group or group of persons on account of their racial or ethnic origin or their religion is guilty of an offence and is liable to imprisonment not exceeding two years or to a fine not exceeding one thousand pounds or to both sentences.

#### **COMMENTARIES:**

Council of Europe: European Commission Against Racism and Intolerance (ECRI), ECRI Report on Cyprus (fourth monitoring cycle) : Adopted on 23 March 2011 , 31 May 2011, CRI(2011)20.<sup>481</sup>

The above report stated that criminal, civil and administrative law provisions against racism and racial discrimination are rarely applied. No records are kept on discrimination cases before the courts or their outcomes. The Office of the Commissioner for Administration (Ombudsman) lacks sufficient human and financial resources and does not enjoy the freedom to appoint its own staff. It is not well known by vulnerable groups. In their report the ECRI requested that the Cypriot authorities take further action in a number of areas; making a series of recommendations:

Data should be systematically collected on the application of the civil and administrative law provisions against racism and racial discrimination. The Crime Report

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<sup>481</sup> available at: <http://www.refworld.org/docid/513dc5492.html> [accessed 23 April 2013]

System should be developed further and the court archiving system should classify cases by subject matter and indicate racist elements. The authorities should pursue their goal of ensuring that new criminal legislation expressly states that the racist motivation for any offence constitutes an aggravating circumstance. Furthermore, the activities of extremist groups should be monitored and incitement to hatred should be punished: steps to prevent the Internet from being used to disseminate racist comments and material should be taken. All acts of racist violence should be thoroughly investigated with a view to prosecution and the perpetrators duly punished.

The Cypriot authorities should improve awareness of the provisions against racial discrimination contained in international legal instruments ratified by Cyprus among the legal community and the general public. Particular attention should be given to the ways in which these provisions complement and strengthen the protection against discrimination afforded by primary anti-discrimination legislation.

The Cypriot Constitution of 1960 contains an anti-discrimination provision corresponding to Article 14 of the European Convention on Human Rights (ECHR), but includes additionally the ground of belonging to either the Greek or the Turkish “community”. It also recognises three “religious groups”, the Latins, the Maronites and the Armenians, which were obliged to opt to belong to either of the two communities in order for their members to exercise their civil duties and enjoy their political rights. They all opted to belong to the Greek community. The Constitution does not recognise any groups as national minorities. The Roma are considered part of the Turkish community. ECRI notes that the Constitution continues to sustain the division of Cypriot citizens along ethnic lines.

In its third report, ECRI recommended that the Cypriot authorities take further steps to improve the application of existing criminal law provisions against racism<sup>482</sup> and racial discrimination<sup>483</sup>. It recommended in particular increased efforts to ensure that all those involved in the criminal justice system, from lawyers to the police, prosecuting authorities and the courts, are equipped with thorough knowledge of the provisions in force against racism and racial discrimination and fully aware of the need actively and thoroughly to counter all manifestations of these phenomena and, notably, racially-motivated offences.

The authorities assured ECRI that all those involved in the criminal justice system had thorough knowledge of the provisions in force against racism and racial discrimination, but as to why these criminal law provisions were rarely applied the potential conflict with freedom of expression, and the need for tolerance was suggested. It was also suggested that a general reluctance on the part of the Attorney General's Office to prosecute for racist related offences existed. However, in response to ECRI recommendations, the Law Committee of Parliament has concluded discussions on a draft law transposing EU Council Framework Decision 2008/913/JHA and including a provision expressly stating that the racist motivation for any offence constitutes an aggravating circumstance. The law is due to be adopted in February 2015.

ECRI recommended that the authorities pursue their goal of ensuring that new criminal legislation expressly states that racist motivation for any offence constitutes an aggravating

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<sup>482</sup> According to General Policy Recommendation No. 7, racism is the belief that a ground such as "race", colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons or the notion of superiority of a person or a group of persons.

<sup>483</sup> According to General Policy Recommendation No. 7, racial discrimination is any differential treatment based on a ground such as "race", colour, language, religion, nationality or national or ethnic origin, which has no objective and reasonable justification.



circumstance. According to the above report, there is no case law yet invoking the 2006 Additional Protocol to the Convention on Cybercrime this law. It was further suggested that the Crime Report System required further development to ensure that accurate data and statistics are collected and published on the number of racist and xenophobic incidents and offences that are reported to the police, on the number of cases that are prosecuted, on the reasons for not prosecuting and on the outcome of cases prosecuted, in accordance with its General Policy Recommendation No. 1 on combating racism, xenophobia, antisemitism and intolerance. Similarly, the court archiving system requires modification so that cases are classified by subject matter and clearly indicate racist elements

## **CZ Czech Republic**

In addition to Holocaust denial, denial of communist perpetrated atrocities is illegal in the Czech Republic.

Law Against Support and Dissemination of Movements Oppressing Human Rights and Freedoms (2001)

§ 260 (1) The person who supports or spreads movements oppressing human rights and freedoms or declares national, race, religious or class hatred or hatred against other group of persons will be punished by prison from 1 to 5 years. (2) The person will be imprisoned from 3 to 8 years if: a) he/she commits the crime mentioned in paragraph (1) in print, film, radio, television or other similarly effective manner, b) he/she commits the crime as a member of an organized group c) he/she commits the crime in a state of national emergency or state of war

§ 261 The person who publicly declares sympathies with such a movement mentioned in § 260, will be punished by prison from 6 months to 3 years.

§ 261a The person who publicly denies, puts in doubt, approves or tries to justify nazi or communist genocide or other crimes of Nazis or communists will be punished by prison of 6 months to 3 years.

**CZ Czech Republic.** Actual 'hate crime' Legislation

Criminal Code of the Czech Republic (Act No.40/2009 Coll) (excerpts)

S 196 Violence against a group of inhabitants and against individual

(1) A person who threatens to a group of inhabitants with killing, bodily harm or damage to a large extent shall be punished by a custodial sentence of up to one year.

(2) A person who uses violence against a group of inhabitants or an individual, or threatens them with bodily harm or damage to a large extent on the grounds of their political conviction, nationality, race, religion or belief, shall be punished by a custodial sentence of up to three years.

S 219 Murder

(1) Whoever intentionally kills another shall be punished by imprisonment ten to fifteen years.

(2) Imprisonment for twelve to fifteen years or an exceptional penalty will be imposed on a perpetrator who commits an act referred to in paragraph 1 (...)

(g) on another's race, ethnicity, nationality, political beliefs, religion or belief.

Physical assault

S 221

(1) Any person who intentionally injures another in health shall be sentenced imprisonment

for up to two years.

(2) imprisonment for one year up to five years will be imposed on a perpetrator who (...)

(b) commits such a crime in another for his race, membership of ethnic group, nationality, political belief, religion or belief (...)

#### S 222

(1) Whoever intentionally causes another severe injury, will punished by imprisonment for two to eight years.

(2) Imprisonment for three years to ten years will be imposed on a perpetrator (...)

(b) commits such a crime in another for his race, membership of ethnic group, nationality, political belief, religion or belief (...)

#### S 257 Criminal damage

(1) Whoever destroys, damages or make unusable foreign matter and the causes of foreign assets damage is not negligible, the punished by imprisonment of up to one year or prohibition or a fine or forfeiture of the item or other property values.

(2) Imprisonment for six months to three years will be imposed on the perpetrator who (...)

(b) commits such a crime in another for his race, membership of ethnic group, nationality, political belief, religion or belief.

### **COMMENTARIES:**

The Czech legislation has its constitutional basis in the principles of equality and non-discrimination contained in the Charter of Fundamental Rights and Basic Freedoms.

There are two means of enforcing action against hate-motivated incidents: one passes through criminal law, the other through civil law. Czech criminal legislation has

implications both for decisions about guilt (affecting the decision whether to find a defendant guilty or not guilty) and decisions concerning sentencing (affecting the extent of the punishment imposed). It has three levels, :

- a circumstance determining whether an act is a crime – hate motivation is included in the basic constituent elements. If hate motivation is not proven, conviction for a hate crime is not possible.
- a circumstance determining the imposition of a higher penalty – a hate motivation is included in the qualified constituent elements for some types of crimes (murder, bodily harm). If hate motivation is not proven, the penalty is imposed according to the scale specified for the basic constituent elements of the crime.
- general aggravating circumstance – the court is obligated to take the hate motivation into account as a general aggravating circumstance and determines the amount of penalty to impose. Nevertheless, it is not possible to add together a general aggravating circumstance and a circumstance determining the imposition of a higher penalty.

Current criminal legislation does not provide for special penalties bias crimes based upon sexual orientation, age or health status. However, there is the criminal offense of Incitement to hatred towards a group of persons or to the curtailment of their rights and freedoms, and general aggravating circumstances which include attacking a so-called different group of people. Such a group of people can then, of course, be also one defined by sexual orientation, age or health status. A certain disparity has thus been created between, on the one hand, those groups of people who are victimized by reason of their skin colour, faith, nationality, ethnicity or political persuasion and enjoy increased protection, and, on the other hand, those groups that are victimized by reason of their sexual orientation, age or health status and are not granted increased protection. This gap in protection against attacks motivated by the victim's sexual orientation, age or health status

cannot be successfully bridged by interpretation. Interpretation by analogy is inadmissible in criminal law, sanctionable motivations being exhaustively enumerated.

See also: Council of Europe: Commissioner for Human Rights, Report by Thomas Hammarberg Commissioner for Human Rights of the Council of Europe Following his visit to the Czech Republic from 17 to 19 November 2010, 3 March 2011, CommDH(2011)3.

In the above Report, the Commissioner focused on the following major issues: the need to fight extremist groups (Section I a); the legal and institutional framework against discrimination, racism and extremism (Section I b); general policy and action for promoting and protecting the human rights of Roma (Section II a); the need to combat anti-Gypsyism in political and public discourse (Section II b); violent hate crimes targeting Roma (Section II C).

Criminal law provisions aimed at combating racism, are contained in the new Criminal Code, adopted by the Czech Parliament in 2008 and which entered into force on 1 January 2010. It includes Section 42(b), which establishes that when offences are motivated by certain grounds (i.e. national, racial, ethnic, religious, class or other similar grounds) judges are required to take this motivation into account as an aggravating circumstance when sentencing. In addition, specific aggravating circumstances apply when a certain number of offences (including murder, bodily injury, torture, kidnapping and blackmail) are committed on a closed list of grounds: real or perceived race, ethnic affiliation, nationality, political persuasion, and religion or real or perceived lack of religious belief. However, sexual orientation and disability are neither covered by these specific aggravating circumstances nor included in an explicit manner in the general aggravating

circumstance provided for by Section 42(b) of the Criminal Code.

The Czech Republic has not yet ratified Protocol No. 12 to the European Convention on

Human Rights (ECHR) and the Additional Protocol to the Convention on Cybercrime.

The first is suggested to be related to potentially increased workload, the latter to the non-recognition of corporate criminal liability in Czech domestic legislation prevents ratification of the Cybercrime Convention.

## **DE Germany**

### **§ 130 Public incitement**

Volksverhetzung ("incitement of the people") is a concept in German Criminal law that bans the incitement of hatred against a segment of the population. It often applies in (although is not limited to) trials relating to Holocaust denial in Germany. In addition, Strafgesetzbuch § 86a \_ outlaws various symbols of "unconstitutional organisations", such as the [Swastika](#) and the [SS runes](#).

### **§ 130 Public Incitement (1985, Revised 1992, 2002, 2005)**

(1) Whoever, in a manner that is capable of disturbing the public peace:

1. incites hatred against segments of the population or calls for violent or arbitrary measures against them; or

2. assaults the human dignity of others by insulting, maliciously maligning, or defaming segments of the population,

shall be punished with imprisonment from three months to five years.

(...)

(3) Whoever publicly or in a meeting approves of, denies or belittles an act committed under the rule of National Socialism of the type indicated in Section 6 subsection (1) of the Code of Crimes against International Law, in a manner capable of disturbing the public peace shall be punished with imprisonment for not more than five years or a fine.

(4) Whoever publicly or in a meeting disturbs the public peace in a manner that assaults the human dignity of the victims by approving of, denying or rendering harmless the violent and arbitrary National Socialist rule shall be punished with imprisonment for not more than three years or a fine. (...)

The definition of section 6 of the [Code of Crimes against International Law](#) referenced in the above § 130 is as follows:

#### § 6 Genocide

(1) Whoever with the intent of destroying as such, in whole or in part, a national, racial, religious or ethnic group:

1. kills a member of the group,
2. causes serious bodily or mental harm to a member of the group, especially of the kind referred to in section 226 of the Criminal Code,
3. inflicts on the group conditions of life calculated to bring about their physical destruction in whole or in part,

4. imposes measures intended to prevent births within the group,
5. forcibly transfers a child of the group to another group, shall be punished with imprisonment for life. (...)

#### Other sections

The following sections of the [German criminal code](#) are also relevant:

#### § 189 Disparagement of the Memory of Deceased Persons (1985, amendments of 1992)

Whoever disparages the memory of a deceased person shall be punished with imprisonment for not more than two years or a fine.

#### § 194 Application for Criminal Prosecution

(1) An insult shall be prosecuted only upon complaint. If the act was committed through dissemination of writings (Section 11 subsection (3)) or making them publicly accessible in a meeting or through a presentation by radio, then a complaint is not required if the aggrieved party was persecuted as a member of a group under the National Socialist or another rule by force and decree, this group is a part of the population and the insult is connected with this persecution. The act may not, however, be prosecuted ex officio if the aggrieved party objects. When the aggrieved party deceases, the rights of complaint and of objection devolve on the relatives indicated in Section 77 subsection (2). The objection may not be withdrawn.

(2) If the memory of a deceased person has been disparaged, then the relatives indicated in Section 77 subsection (2), are entitled to file a complaint. If the act was committed through dissemination of writings (Section 11 subsection (3)) or making them publicly accessible in a meeting or through a presentation by radio, then a complaint is not required if the



deceased person lost his life as a victim of the National Socialist or another rule by force and decree and the disparagement is connected therewith. The act may not, however, be prosecuted ex officio if a person entitled to file a complaint objects. The objection may not be withdrawn. (...)

## **DE Germany**

The Criminal Code of Germany does not contain any general provisions that expressly enable the racist or other bias motives of the offender to be taken into account by the courts as an aggravating circumstance when sentencing.

Whilst the code does provide sentencing guidelines on mitigating and aggravating circumstances, there is no explicit mention of racist or other bias motives as a factor which would enhance the punishment. Under paragraph 2 of Section 46 (Principles for determining punishment), the court, in determining a sentence, “shall counterbalance the circumstances which speak for and against the perpetrator. In doing so, consideration shall be given in particular to:

- the motives and aims of the perpetrator;
- the state of mind reflected in the act and the willfulness involved in its commission;
- the extent of breach of any duties;
- the manner of execution and the culpable consequences of the act;
- the perpetrator’s prior history, his personal and financial circumstances;
- the perpetrator’s conduct after the act, particularly his/her efforts to make restitution for the harm caused as well as the perpetrator’s efforts to achieve mediation with the

aggrieved party.”<sup>484</sup>

The European Commission against Racism and Intolerance (ECRI) noted that the absence of a precise reference in the Criminal Code to racist motivations as an aggravating circumstance for ordinary offences may have contributed to crimes based on racist motivations not being investigated or prosecuted as such. Additionally, bias motivations are not explicitly taken into account as a specific aggravating circumstance in sentencing. ECRI continued to call for the adoption of specific provision in the criminal law for racist motivations for ordinary offences to constitute an aggravating circumstance.<sup>485</sup>

In the specific case of homicide, the Criminal Code of Germany defines a murder as a killing perpetrated with “base motives.” The Federal Supreme Court (Bundesgerichtshof) issued a decision in 1993 in which racist motives are considered base motives and are thus treated as an aggravating circumstance.<sup>486</sup> A number of other higher courts have subsequently upheld the principle found in subsection 1 of section 211 of the German criminal code, which deals with base motives in relation to murder cases, states that base motives may be considered as an aggravating factor in handing down a life sentence of murder to an offender, also applies to racist and similar motives.<sup>487</sup> If a court takes a racist motive into account it is explicitly stated in the decision but it does not appear on the record.<sup>488</sup>

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<sup>484</sup> Criminal Code (*Strafgesetzbuch, StGB*) as promulgated on November 13, 1998 (Federal Law Gazette I, p. 945, p. 3322), <http://www.iuscomp.org/gla/statutes/StGB.htm#46>

<sup>485</sup> European Commission against Racism and Intolerance, “Fourth Report on Germany,” CRI(2009)19, May 26, 2009, [http://hudoc.ecri.coe.int/XMLEcri/ENGLISH/Cycle\\_04/04\\_CbC\\_eng/DEU-CbC-IV-2009-019-ENG.pdf](http://hudoc.ecri.coe.int/XMLEcri/ENGLISH/Cycle_04/04_CbC_eng/DEU-CbC-IV-2009-019-ENG.pdf).

<sup>486</sup> Decision of the Federal Supreme Court, BGH 5 StR 359/93 from July 7, 1993.

<sup>487</sup> According to the German penal code, Section 211, a murderer is whoever kills a human being out of murderous lust, to satisfy his sexual desires, from greed or otherwise base motives, treacherously or cruelly or with means dangerous to the public or in order to make another crime possible or cover it up. Racism is considered a “base motive” which would allow the Public Prosecution Department to charge a criminal defendant with murder rather than with manslaughter.

<sup>488</sup> Information obtained from Dr. Andreas Stegbauer, Judge at the County Court of Eggenfelden in an email to Human Rights First on July 15, 2008. Dr. Stegbauer was a participant in the OSCE/ODIHR’s Expert Round Table addressing the Guideline on Hate Crime Legislation, Vienna.

## **Hate speech.**

The German Criminal Code does criminalize hate speech under a number of different laws, including Volksverhetzung. In the German legal framework motivation is not taken into account while identifying the element of the offence. However, within the sentencing procedure the judge can define certain principles for determining punishment. In section 46 of the German Criminal Code it is stated that "the motives and aims of the perpetrator; the state of mind reflected in the act and the wilfulness involved in its commission." can be taken into consideration when determining the punishment; under this statute, hate and bias have been taken into consideration in sentencing in past cases. Volksverhetzung is a concept in German criminal law that bans the incitement of hatred against a segment of the population. It often applies in, though it is not limited to, trials relating to Holocaust denial in Germany. The German penal code (Strafgesetzbuch) establishes that someone is guilty of Volksverhetzung if the person:

in a manner that is capable of disturbing the public peace:

1. incites hatred against segments of the population or calls for violent or arbitrary measures against them; or
2. assaults the human dignity of others by insulting, maliciously maligning, or defaming segments of the population

There are also special provisions for Holocaust denial (added in the 1990s) and speech justifying or glorifying the Nazi government 1933-1945 (recently added).

Although freedom of speech is mentioned by Article 5 of the Grundgesetz (Germany's constitution), this article protects any non-outlawed speech. Restrictions exist, e.g. against personal insults, use of symbols of unconstitutional organizations, or Volksverhetzung.

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Volksverhetzung does not necessarily include spreading of nazism, racism, or other discriminatory ideas. For any hate speech to be punishable as Volksverhetzung, the law requires that said speech be "qualified for disturbing public peace" either by inciting "hatred against parts of the populace" or calling for "acts of violence or despotism against them", or by attacking "the human dignity of others by reviling, maliciously making contemptible or slandering parts of the populace".

Volksverhetzung is a punishable offense under Section 130 of the Strafgesetzbuch (Germany's criminal code) and can lead to up to five years imprisonment. Volksverhetzung is punishable in Germany even if committed abroad and even if committed by non-German citizens, if the incitement of hatred takes effect on German territory—that is, the seditious sentiment was expressed in written or spoken German and disseminated in Germany (German criminal code's Principle of Ubiquity, Section 9 Paragraph 1 Alternatives 3 and 4 of the Strafgesetzbuch).

## **COMMENTARIES:**

UN Human Rights Council, Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Addendum : Mission to Germany , 22 February 2010, A/HRC/14/43/Add.2.<sup>489</sup>

At the invitation of the Government, the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance visited Germany (Berlin, Cologne, Karlsruhe, Heidelberg, Nuremberg, Leipzig, Crostwitz, Rostock and

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<sup>489</sup> available at: <http://www.refworld.org/docid/4c036cf72.html> [accessed 23 April 2013]

Hamburg) from 22 June to 1 July 2009. The Special Rapporteur made several recommendations, including:

- The Federal Anti-Discrimination Agency should be provided with the human and financial resources necessary for it to be present in all 16 Länder. In addition, its mandate should be made more robust, allowing it to investigate complaints brought to its attention and to bring proceedings before the courts.
- An explicit reference to racism as an aggravating circumstance in crimes should be added under section 46 of the Criminal Code. In addition, the Government should develop specific training for police officers, prosecutors and judges on the identification and characterization of hate crimes.
- The Government should continue to make use of sections 84 and 85 of the Criminal Code and article 4 (b) of the International Convention on the Elimination of All Forms of Racial Discrimination in order to declare illegal and prohibit organizations which promote and incite racial discrimination.

Criminal legislation on hate crimes is contained in section 46 of the Criminal Code, which provides for the consideration of the “motives and aims of the perpetrator” when investigating and adjudicating on criminal acts. The concept of racist hate crimes is thus not formally defined in the legislation. However, under a new classification system scheme that came into force in 2001, hate crimes are generally viewed through the lens of “politically motivated crimes.” The majority are narrowly considered as right-wing politically motivated crimes. Hence, less obvious manifestations of racism tend to be neglected as such in the criminal process: the perception is that only offenders who are

identifiably members or sympathizers of right-wing extremist groups are likely to be pinpointed in the criminal justice system as authors of racist acts, with the result that some racist offences are not recognised.<sup>490</sup>

Many other offences perpetrated by individuals who are not known to be right-wing extremists are not reported as hate crimes, but rather as bodily injuries.

The Special Rapporteur recommended that an explicit reference to racism as an “aggravating circumstance” in crimes be added under section 46 of the Criminal Code. In addition, the Government should develop additional training for police officers, prosecutors and judges on the identification and characterization of racist hate crimes, extending the existing training programmes provided by the German Judicial Academy.

## **DK Denmark**

Denmark: Criminal Code of the Kingdom of Denmark (LBK nr 1068 of 06/11/2008)  
Section 81 No. 6

“In determining the penalty it shall, as a general rule, be considered a circumstance in aggravation

6) that the offence stems from others’ ethnical origins, religious beliefs, sexual orientation or similar;

Section 81 No. 6 was adopted on 31 March 2004 by Act No. 218.

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<sup>490</sup> Information obtained from Dr. Andreas Stegbauer, Judge at the County Court of Eggenfelden in an email to Human Rights First on July 15, 2008. Dr. Stegbauer was a participant in the OSCE/ODIHR’s Expert Round Table addressing the Guideline on Hate Crime Legislation, Vienna (date).

## COMMENTARIES:

Council of Europe: European Commission Against Racism and Intolerance (ECRI), ECRI Report on Denmark (fourth monitoring cycle), 22 May 2012, CRI(2012)25<sup>491</sup> Adopted on 23 March 2012 : Published on 22 May 2012.

In its third report, ECRI urged the Danish authorities to take a more proactive approach in prosecuting anyone who makes racist statements, since Article 266 b) of the Criminal Code as interpreted by the Supreme Court does not appear to be adequate.

Article 266 b) of the Danish Criminal Code provides that:

- 1) Any person who, publicly or with the intention of wider dissemination, makes a statement or imparts other information by which a group of people are threatened, insulted or degraded on account of their race, colour, national or ethnic origin, religion or sexual inclination shall be liable to a fine or imprisonment for any term not exceeding two years;
- 2) when the sentence is meted out, the fact that the offence is in the nature of propaganda activities shall be considered an aggravating circumstance.

The Danish authorities stated that prosecution services make the final decision as to whether a case should be brought to court and that for a statement to fall under Article 266 b), it has to be made against a group of people and be widely disseminated. The authorities have also indicated to ECRI that the above-mentioned new instructions issued by the Director of Public Prosecutions include specific guidelines on when a statement can be

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<sup>491</sup> Available at: <http://www.refworld.org/docid/4fc8940a2.html> [accessed 23 April 2013]

considered to be in violation of Article 266 b).

Civil society actors have indicated that very few cases are brought to court under Article 266 b), although hate speech against Muslims in particular, especially by some politicians, has been a prevalent problem, those that have been successful have tended to incur a small fine. ECRI stressed that the law in this area should have the maximum clarity and that it should be seen to be firmly and consistently enforced: in particular, Article 266 b) of the Criminal Code.

According to Article 81 6) of the Criminal Code, a criminal offence based on, *inter alia*, the victim's ethnic origin, colour or religious beliefs should be considered an aggravating circumstance. However, evidence to the ECRI stated that Article 81 6) of the Criminal Code was very rarely invoked even in cases where the racist motivation of a criminal offence is apparent; the police do not take racist motivation seriously; as a result, the low numbers reported do not provide an accurate picture of the extent of hate crime.

The Danish Security and Intelligence Service (PET) administers a system whereby the police have to report criminal offences with potentially racist or religious motivation. Moreover, the authorities informed ECRI that the Director of Public Prosecutions is about to set up a monitoring system regarding the use of Article 81(6) by using data on criminal offences and incidents with a potentially racist or religious motive that the PET collects each year. Data concerning 2010 was being analysed to determine to what extent Article 81(6) had been invoked by the prosecution and applied by the courts at the date of this report. According to the above-mentioned 2011 instructions by the Director of Public Prosecutions, the prosecution is obliged to raise the racist motivation of a criminal offence in court; as a consequence, judges will have to be explicit about taking it into consideration



in their judgements or not.

The Danish authorities stated that information on the number of cases where Article 81(6) has been invoked or applied is based on a search carried out in Danish Weekly Law reports and that only a small number of the judgements issued each year are printed in this review. The latest data available from the PET (from December 2009) concern 175 hate motivated offences for 2008<sup>18</sup>; this represents an increase compared to 2007. Reports indicate that the police attributed the increase to a new definition used by the PET of what constitutes hate crime which was broadened to include criminal offences motivated by political issues, skin colour, nationality, ethnic origin, religious beliefs and sexual orientation. Moreover, for the first time, the PET combined its hate crime cases with those from the various regional and national police registries. According to the police, hate-crime victims included "Jews and people of an ethnic origin other than Danish" (mostly African or Middle Eastern ethnic groups).<sup>492</sup> However, ECRI stated that more efforts appeared necessary to increase prosecutions of the perpetrators. ECRI recommended that the Danish authorities ensure that Article 81 (6) is applied where relevant.

In its reports, ECRI recommended that the Danish authorities penalise the creation or leadership of a group which promotes racism, as well as support for such a group and participation in its activities. The creation or leadership of a group which promotes racism as well as support for such a group and participation in its activities is still not forbidden in Denmark although ECRI has been informed that there are White supremacist groups in the country. The authorities are aware of the existence of such groups as they are monitored by the PET.

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<sup>492</sup> These seem to include anti-immigrant (mainly Muslim and African) graffiti, desecration of Jewish gravesites and assaults on Muslims and Africans.

## **EE Estonia.**

Estonia: The Criminal Code of Estonia does not contain specific provisions that expressly enable the racist or other bias motives of the offender to be taken into account by the courts as an aggravating circumstance when sentencing.

The criminal code does contain provisions which define a “base motive” as an aggravating circumstance. In its Third Report on Estonia, the European Commission against Racism and Intolerance (ECRI) reported that the Estonian authorities maintain that “base motives” may include racist motives. The report further noted, however, that the “base motives” provisions had yet to ever be reflected in the actions of the courts.

Additionally, as noted by the European Network Against Racism in its 2007 report on racism in Estonia, the Interior Ministry indicated that there had been no special courses during the years of 2005 – 2007 aimed at training the police about racist crime. Similarly, the Academy of Internal Protection, an institution that provides education and training to young policemen, also reported not having any special courses regarding hate crime within their curriculum.

Penal Code 2004

### **§ 151. Incitement of hatred**

(1) Activities which publicly incite to hatred, violence or discrimination on the basis of nationality, race, colour, sex, language, origin, religion, sexual orientation, political opinion, or financial or social status if this results in danger to the life, health or property of a person are punishable by a fine of up to 300 fine units or by detention.

(2) Same act, if

- 1) it causes the death of a person or results in damage to health or other serious consequences, or
- 2) it was committed by a person who has previously been punished by such act, or
- 3) it was committed by a criminal organisation, - is punishable by pecuniary punishment or up to 3 years' imprisonment.
- (3) An act provided for in subsection (1) of this section, if committed by a legal person, is punishable by a fine of up to 50 000 kroons.
- (4) An act provided for in subsection (2) of this section, if committed by a legal person, is punishable by a pecuniary punishment.
- (14.06.2006 entered into force 16.07.2006 - RT I 2006, 31, 234 (2) The same act, if: 1) committed at least twice, or 2) significant damage is thereby caused to the rights or interests of another person protected by law or to public interests, is punishable by a pecuniary punishment or up to 3 years' imprisonment.
- (19.05.2004 entered into force 01.07.2004 - RT I 2004, 46, 329)

### **COMMENTARIES:**

There was concern that some television programmes may portray discriminatory images of the Roma community and that insufficient measures have been taken by the State party to address this situation (arts. 4 (a) and 7). The Committee recommends that the State party encourage the media to play an active role in combating prejudices and negative stereotypes which lead to racial discrimination and that it adopt all necessary measures to combat racism in the media, including through investigations and sanctions under article 151 of the Criminal Code for all those who incite racial hatred.

UN Human Rights Council, Summary: [Universal Periodic Review] : Estonia / prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1, 12 November 2010, A/HRC/WG.6/10/EST/3, available at: <http://www.refworld.org/docid/4d54f1a62.html> [accessed 29 April 2013]

### **Freedom of expression and right to participate in public and political life**

CoE-ECRI noted with concern that hate speech was only punishable where substantial damage had been caused to the victim's rights (resulting in danger to the life, health or property of person) and considered that the Criminal Code did not, in fact, punish hate speech independently of specific consequences.<sup>493</sup> According to CoE-ECRI, it appeared that no media had been prosecuted for incitement to racial hatred against Roma under the Criminal Code, although they were allegedly a vehicle for prejudices against Roma, associating them with various crimes and supporting their exclusion.<sup>494</sup>

Council of Europe: Secretariat of the Framework Convention for the Protection of National Minorities, Advisory Committee on the Framework Convention for the Protection of National Minorities - Third Opinion on Estonia adopted on 1 April 2011, 7 November 2011, ACFC/OP/III(2011)004:

### **Ethnically-motivated crime**

In the previous monitoring cycles, the Advisory Committee encouraged the Estonian authorities to ensure that ethnically-motivated crime is consistently categorised as such and prosecuted vigorously by law-enforcement bodies.

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<sup>493</sup> CoE-ECRI Report on Estonia Adopted on 15 December 2009, p. 17, para. 35.

<sup>494</sup> CoE-ECRI Report on Estonia Adopted on 15 December 2009, p. 36, para. 133

## **Present situation**

In the above report of 2011, the Advisory Committee noted that the number of ethnically-motivated incidents is still relatively low. At the same time, it noted with concern the amendments of the Criminal Code in 2006, limiting the applicability of Article 151, which covers cases of incitement to hatred on various grounds, to acts that result in danger to the life, health or property of a person. This development excluded the investigation into hate speech in the media or the Internet, unless serious consequences have ensued. Given the persistent use of the Internet as conveyor of ethnic agitation, the amendment risks placing acts of ethnically-motivated agitation beyond the reach of investigation and prosecution. It has, according to some observers, considerably affected the application of Article 151.

The Advisory Committee expressed concern that racist or ethnically-based motivation was not considered an aggravating factor in the perpetration of any crime. While the Estonian authorities maintained that ‘other base motives’ listed in Article 58.1 of the Criminal Code as an aggravating circumstance may include racism or ethnically-motivated crime, the Advisory Committee noted that, according to information at its disposal, no cases where racist or ethnically-based motivation was considered an aggravating factor, have ever been brought to court, possibly due to the fact that law enforcement agents and judges are not sufficiently aware of their responsibility to identify such motivation as an aggravating circumstance. The recommendation was to explicitly include racist or ethnically-based motivation in the list of aggravating circumstances contained in Article 58 of the Criminal Code.

The Advisory Committee urged the authorities to reconsider the limitation of the applicability of Article 151 which curtails the investigation and prosecution of hate crimes in

Estonia. It further strongly recommends to incriminate and punish expressly racist and ethnically-based motivation as an aggravating circumstance in any offence.

Training activities for law enforcement agents and members of the judiciary in order to ensure that they are aware of their responsibility to identify and sentence racist or ethnically-based motivation as an aggravating circumstance, were also seen as necessary.

## **EL Greece**

The Criminal Code of Greece contains provisions that expressly enable racist and other bias motives of the offender to be taken into account by the courts as an aggravating circumstance when sentencing.

Law 3719/2008, which entered into force in November 2008, provides that the commission of a crime on the basis of national, racial or religious hatred or hatred on the grounds of a different sexual orientation constitutes an aggravating circumstance.<sup>495</sup> Criminal Code of Greece (Act of Parliament 1492/1950) entered into force 1 January 1951 (excerpts)

### **Aggravating circumstances**

#### **Article 79 (Amended by Law 3719/2008)**

(...) commission of a crime on the basis of national, racial or religious hatred or hatred on the grounds of a different sexual orientation constitutes an aggravating circumstance.

(...)

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<sup>495</sup> Written Contribution by the Greek Delegation, OSCE Human Dimension Implementation Meeting, October 2008.

Greece: Article Law 927/1979 "Section 1,1 penalises incitement to discrimination, hatred or violence towards individuals or groups because of their racial, national or religious origin, through public written or oral expressions; Section 1,2 prohibits the establishment of, and membership in, organisations which organise propaganda and activities aimed at racial discrimination; Section 2 punishes public expression of offensive ideas; Section 3 penalises the act of refusing, in the exercise of one's occupation, to sell a commodity or to supply a service on racial grounds." Public prosecutors may press charges even if the victim does not file a complaint.

### **COMMENTARIES:**

Council of Europe: Commissioner for Human Rights, Report by Nils Muižnieks  
Commissioner for Human Rights of the Council of Europe following his visit to Greece from 28 January to 1 February 2013, 16 April 2013, CommDH(2013)6, available at: <http://www.refworld.org/docid/516e76bb4.html>

#### **Intolerance and hate crimes in Greece - the need for urgent action**

The Commissioner reported serious concern regarding the increase in racist and other hate crimes in Greece, which primarily targets migrants and poses a serious threat to the rule of law and democracy. A number of the reported attacks have been linked to members or supporters, including MPs, of the neo-Nazi political party "Golden Dawn" which won seats in parliament in June 2012. The Greek authorities have adopted new measures to combat racist violence, however, rhetoric stigmatising migrants is widely used in Greek politics and immigration control measures have led to the further stigmatisation of migrants. The Commissioner called on the authorities to condemn firmly and unequivocally all instances of hate speech and hate crime. Political parties and the parliament in particular need to adopt self-regulatory measures to effectively counter and sanction intolerance and hate speech on the part of politicians.

Far-reaching and systematic anti-racism and human rights awareness-raising campaigns should also be implemented; it was suggested, targeting particularly young people and schools. The completion and execution of a national human rights action plan that is envisaged by the authorities may play a catalytic role in this context.

**Combating the impunity of perpetrators of hate crimes; victims' access to justice and**

**Protection:**

The Commissioner urged the Greek authorities to be highly vigilant and use all available means to combat all forms of hate speech and hate crime and to end impunity for these crimes. International law, especially the International Convention on the Elimination of All Forms of Racial Discrimination and the European Convention on Human Rights, which are ratified and have a supra-statutory force in Greece, make possible the imposition of dissuasive, criminal and other sanctions and restrictions on the activities of individuals who advocate for and are involved in instances of racist and other hate crimes. The same holds true for such activities of political organisations, including parties such as the neo-Nazi “Golden Dawn”, on which it should be possible to impose effective penalties or prohibition, if necessary. Greek law, although insufficiently or completely unused so far, has the potential to curb and prevent manifestations of racial and other forms of discrimination by individuals and political organisations. The Commissioner urged continuous training and awareness-raising in antidiscrimination law and practice for all police and coast guard officials, prosecutors and judges.



As regards victims' access to justice and effective remedies, the authorities are urged to remedy the long-standing serious shortcomings concerning excessively lengthy judicial proceedings, notably by enhancing the human and material resources available to prosecutors and judges. The newly established post of the anti-racism prosecutor in Athens was stated to need reinforcement and expansion to other Greek regions so that anti-racism law is effectively applied throughout the country. Lastly, the state authorities are called on to reach out to victims of racist and other hate crimes and establish advice centres near the areas where they live, to clearly exempt them from criminal complaint fees, and to provide them with adequate legal aid, if necessary, as well as assistance.

The role of law enforcement authorities in combating racist and other hate crimes

The Commissioner as concerned by persistent reports of ill-treatment, including torture, committed by law enforcement officials notably against migrants and Roma. The Commissioner called on the authorities to ensure that the definition of torture contained in the criminal code is fully aligned with the definition in the UN Convention against Torture and that allegations of torture are effectively investigated and sanctioned. Ethnic profiling by the Greek police is also an issue of serious concern. In addition to strongly and publicly condemning all instances of abuse or misconduct by law enforcement officials, the Commissioner urges the Greek authorities to eliminate the institutional culture of impunity and establish an independent and well-functioning complaints mechanism covering all law enforcement officials, usefully drawing on the experiences of other Council of Europe member states. Law enforcement officials who are motivated by racism or act against democratic principles should be sanctioned and removed from their posts.

Additionally, the Commissioner stressed the need to reinforce the capacity of the

police to

respond adequately to incidents of racist and other hate crime, particularly to examine and record all evidence related to hate crime motivation. The 70 newly established anti-racist units and the hotline for reporting racist incidents are a welcome step forward. However, these units need to be adequately resourced and their staff, which should include persons with knowledge of languages spoken by the complainants, needs to be systematically and adequately trained in human rights and anti-discrimination. Moreover, the authorities are called on to expand the mandate of these units in order to include all forms of hate crime.

In the context of his visit, the Commissioner also took part in the Holocaust commemoration

event entitled “Does history give lessons?” which was organised by the Athens Jewish Community on 28 January. In his speech the Commissioner noted the particular significance

of commemorating the Holocaust in a country whose people have gravely suffered from Nazism and which is now faced with the surge of neo-Nazism and the rise of intolerance and

racism, and stressed the need for resolute action by the state and civil society

## **ES Spain**

Genocide denial was illegal in Spain until the Constitutional Court of Spain ruled that the words "deny or" were unconstitutional in its judgement of November 7, 2007. As a result, Holocaust denial is legal in Spain, although justifying the Holocaust or any other genocide is an offence punishable by imprisonment in accordance with the constitution.

PENAL CODE- BOOK II, TITLE XXIV Crimes against the International Community

Chapter II: Crimes of genocide - Article 6071.

1. Those who, with the intention to total or partially destroy a national, ethnic, racial or religious group, perpetrate the following acts, will be punished:

1) With the prison sentence of fifteen to twenty years, if they killed to some of its members.

If the fact two or more aggravating circumstances concurred in, the greater punishment in degree will prevail.

2) With the prison of fifteen to twenty years, if they sexually attacked to some of members [of the group] or produced some of the injuries anticipated in article 149.

3) With prison sentence of eight to fifteen years, if they subjected the group or anyone of its individuals to conditions of existence that put their lives in danger or seriously disturbed their health, or when they produced some to them of the injuries anticipated in article 150.

4) With the same punishment, if they carried out [unavoidable] displacements of the group or their members, they adopted any measurement that tend to prevent their sort of life or reproduction, or transferred by force individuals from a group to another one.

5) With imprisonment of four to eight years, if they produced any other injury different from the ones indicated in numbers 2) and 3) of this section.

2. The diffusion by any means of ideas or doctrines that justify the crimes in the previous section of this article, or tries the rehabilitation of regimes or institutions which they protect generating practices of such, will be punished with a prison sentence of one to two years.

## ES Spain

### Bias as an Express General Aggravating Factor

The Criminal Code of Spain contains general provisions that expressly enable the racist or other bias motives of the offender to be taken into account by the courts as an aggravating circumstance when sentencing. In particular, article 22.4 defines situations in which a crime is committed on racist, anti-Semitic, or other discriminatory grounds related to the victim's ideology, religion, or beliefs or his/her belonging to an ethnic group, race, nation, gender or sexual orientation or his/her suffering from an illness or handicap as aggravating circumstances.<sup>496</sup>

Criminal Code of Spain Excerpts from Criminal Code, Law 10/1995 of 23 November  
Aggravating circumstances Article 22

The following are aggravating circumstances:

(4) commission of the crime for racist, anti-Semitic or other discriminatory grounds related to the victim's ideology, religion or beliefs or his/ her belonging to an ethnic group, race, nation, gender or sexual orientation or his/her suffering from an illness or handicap. (...)

### COMMENTARIES:

In its Third Report on Spain, the European Commission against Racism and Intolerance (ECRI)<sup>497</sup> expressed concern that these criminal law provisions were rarely applied. ECRI reported that 'In particular, civil society organizations have expressed concern at the non-application of Article 22(4) of the criminal code even in cases when such motivation was reportedly easily detectable. It has been pointed out that problems in the

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<sup>496</sup>

OSCE/ODIHR, "Spain:HateCrimes," Legislationline

<http://www.legislationline.org/topics/country/2/topic/10/subtopic/37>.

<sup>497</sup> ECRI, "Third Report on Spain," adopted on June 25, 2005, and made public on February 21, 2006, para. 6

implementation of these provisions can be found at all stages of the criminal justice system: from the police, who reportedly sometimes fail to record the racist dimension of the offences reported to them by the alleged victims, to the prosecutors and judges.

There are no specialized units within the police and the Office of the Prosecutor to deal with racially motivated crime, incitement to racial discrimination, hatred and violence and associations promoting racism, as there are for other types of crimes. More generally, ECRI has not been made aware of particular initiatives undertaken by the Spanish authorities since its second report aimed at improving the implementation of the criminal provisions mentioned above, although it notes that some civil society organizations plan on training law enforcement officials on these issues. The Spanish authorities have also reported that specific training sessions on hate crimes are being introduced for professors and students at training centres for law enforcement officials.<sup>498</sup>

The European Network against Racism (ENAR)'s 2007 Shadow Report, "Racism in Spain" agreed with ECRI's findings.<sup>499</sup> ENAR stated that there is "a total lack of acknowledgement and recognition of the racist motivation in any judicial sentence. This lack of judicial response is related to the lack of social and legal concern and support of attorneys and judges." ENAR concludes that the lack of a national debate or training for attorneys and judges on this issue attributes to the lack of attention to racially motivated crime and aggravated circumstance application.

As a result, ECRI recommends that the Spanish authorities provide further training on this subject to all actors involved in the criminal justice system and raise awareness of the need to actively counter racially-motivated crime.

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<sup>498</sup> ECRI, "Third Report on Spain," para. 8.

<sup>499</sup> ENAR, "Racism in Spain", <http://cms.horus.be/files/99935/MediaArchive/pdf/en/Spain%20-%20SR%202007.pdf>.

In 2009, Article 22(4) was used in sentencing of Josué Estébanez. On October 19, the judges of the Madrid Provincial Court held that the lethal stabbing of 16-year-old antifascist Carlos Palomino by 25-year-old Josué Estébanez in November 2007 was provoked in part by Estébanez's neo-Nazi beliefs. The victim was an antiracist and antifascist. The perpetrator was sentenced to 26 years in prison. This was the first time that Madrid courts have considered ideology an aggravating factor in the case.<sup>500</sup>

Below is taken from : United States Department of State, 2011 Report on International Religious Freedom - Spain, 30 July 2012<sup>501</sup>

The Autonomous Region of Madrid and the regional government of Catalonia appointed a special prosecutor to monitor hate crimes, which include certain religiously motivated crimes. The country continued its membership in the Task Force for International Cooperation on Holocaust Education, Remembrance, and Research. Holocaust denial is permissible as freedom of speech; however, Holocaust denial for the justification or promotion of genocide is punishable by imprisonment.

Criminal offenses committed by neo-Nazi gangs may be investigated and prosecuted as "terrorist crimes." There were some reports of societal abuses and discrimination based on religious affiliation, belief, or practice. Authorities monitored Web sites for material containing hate speech and advocating anti-Semitism. At year's end the Barcelona court had several open investigations involving hate crimes on the Internet and one case against a music group for spreading neo-Nazi messages through their music.

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<sup>500</sup> diarodesevilla.es, "Asesinato por odio ideológico," Editorial Opinion, October 20, 2009, <http://www.diarodesevilla.es/article/opinion/543331/asesinato>

<sup>501</sup> available at: <http://www.refworld.org/docid/5021058378.html> [accessed 24 April 2013] covers period 1<sup>st</sup> January 2011-31<sup>st</sup> December 2011. Disclaimer: This is not a UNHCR publication. UNHCR is not responsible for, nor does it necessarily endorse, its content. Any views expressed are solely those of the author or publisher and do not necessarily reflect those of UNHCR, the United Nations or its Member States.

While violence against members of the Jewish community was rare, anti-Semitic incidents, including graffiti against Jewish institutions, continued. For example, at the International Seminar about Anti-Semitism, held in Madrid November 31-December 1, graffiti of a crossed-out Star of David and anti-Israel slogans appeared on the building where the event was being held. Some Jewish community groups expressed concern over perceived anti-Semitic cartoons in newspapers and anti-Semitic innuendo in some media. The Civil Network Against Anti-Semitism and other groups monitor this activity, while most media have suggested that their reporting focused on criticism of Israeli policies rather than anti-Semitic attacks.

In November Juan Carlos Fuentes Linares of the extreme right party Platform for Catalonia was sentenced to one-and-a-half years in jail for inciting hate, after distributing xenophobic campaign materials in 2007. The leader of the party, Josep Anglada, was found not guilty of the same charges. In November legal proceedings began against the head of the neo-Nazi political party Estado Nacional Europeo (National European State) and two collaborators for distributing materials that justified the Holocaust and for inciting hate, violence, and discrimination. Barcelona's hate crimes prosecutor sought a four-and-a-half year prison sentence against the party leader for inciting hate through a bimonthly magazine called Intemperie (Outdoor), and two-and-a-half year sentences for each collaborator. In addition to anti-Semitic writings, the group also wrote against homosexuals and immigrants. During his trial, the head of the party told the court "it's not racism, it's hate."

## **FI Finland**

Penal Code of the Republic of Finland (39/1889)

Chapter 6 Sentencing

Section 5 – Grounds increasing the punishment

(515/2003; entered into force on 1 January 2004)

The following are grounds for increasing the punishment:

[...]

(4) the offence has been directed at a person belonging to a national, racial, ethnic or other population group due to his/her membership in such a group;

Finland: Penal Code of the Republic of Finland (39/1889)

Finnish Criminal Code 515/2003 (enacted January 31, 2003) makes "committing a crime against a person, because of his national, racial, ethnical or equivalent group" an aggravating circumstance in sentencing. In addition, ethnic agitation (Finnish: *kiihotus kansanryhmää vastaan*) is criminalized and carries a fine or a prison sentence of not more than two years. The prosecution need not prove that an actual danger to an ethnic group is caused but only that malicious message is conveyed. A more aggravated hate crime, warmongering (Finnish: *sotaan yllyttäminen*), carries a prison sentence of one to ten years. However, in case of warmongering, the prosecution must prove an overt act that evidently increases the risk that Finland is involved in a war or becomes a target for a military operation. The act in question may consist of

- 1.illegal violence directed against foreign country or her citizens,
- 2.systematic dissemination of false information on Finnish foreign policy or defense
- 3.public influence on the public opinion towards a pro-war viewpoint or
- 4.public suggestion that a foreign country or Finland should engage in an aggressive act



Hate crime and racism are not recognized as criminal offences in Finland's criminal code.

## **COMMENTARIES:**

United States Department of State, 2010 Country Reports on Human Rights Practices - Finland, 8 April 2011 <sup>502</sup>

The Report on Human Rights Practices above comments upon hate crimes, and states that the constitution and law provide for freedom of speech and of the press, and the government generally respects these rights in practice. An independent press, an effective judiciary, and a functioning democratic political system combined to ensure freedom of speech and of the press. However, publishing hate material and public speech intended to incite discrimination or violence against any national, racial, religious, or ethnic group are crimes.

Courts can fine persons found guilty of inciting racial hatred on the Internet, and during the year there were reports of court decisions fining individuals for publishing and distributing hate material via the Internet.

On September 9, the prosecutor general's office charged a man who threatened Minister of Migration and Europe Astrid Thors by creating a group on the social

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<sup>502</sup> available at: <http://www.refworld.org/docid/4da56dc92.html> [accessed 24 April 2013] Disclaimer: This is not a UNHCR publication. UNHCR is not responsible for, nor does it necessarily endorse, its content. Any views expressed are solely those of the author or publisher and do not necessarily reflect those of UNHCR, the United Nations or its Member States.

networking Web site Facebook with the heading "I am prepared to do a few years for killing Astrid Thors." He was charged with illegal threats, aggravated defamation, public encouragement of crime, and incitement against a national group. He was convicted on December 8 and fined 640 euros (\$858); in addition his computer was confiscated. This was the country's first prosecution of a threat made on Facebook.

On April 16, the Helsinki Court of Appeals upheld the fine of 615 euros (\$824) against Olavi Maenpaa, a member of the Turku city council from the True Finns Party, for making derogatory and slanderous remarks against immigrants in an election debate held in 2007 and broadcast on national television and the Internet.

On June 3, the district court in Kymenlaakso found a 43-year-old man guilty of incitement of an ethnic group after he sold extremist white-power music on the Internet. The man was fined 420 euros (\$563), but did not receive a jail sentence.

On October 29, the Helsinki Court of Appeals upheld the district court's conviction of Jussi Halla-aho, a local politician and parliamentary candidate from the True Finns Party, for defaming religion and affirmed his fine of 330 euros (\$442). However, the appeals court found that Halla-aho's Internet writings on Somalis were within the bounds of lawful exaggeration and provocation and dismissed charges of inciting racial hatred.

On June 11, the Ita-Uusimaa district court found Francois Bazaramba, a Rwandan living in the country, guilty of committing genocide in Rwanda in 1994 and sentenced him to life in prison. The court found that Bazaramba, an ethnic Hutu, led attacks against Tutsis in southern Rwanda and gave orders and instructions that led to killings. In addition he was found to have disseminated anti-Tutsi propaganda, organized roadblocks, and distributed seized property. Bazaramba applied for asylum in the country in 2003. The Justice Ministry

denied the Rwandan government's extradition request and tried Bazaramba because it feared Rwanda would not be able to provide a fair trial.

There was some societal tension between ethnic Finns and minority groups, and there were reports of racist or xenophobic incidents. The most common reported race-related crime was assault. In 2009, the most recent year for which data are available, at the time of the Report, police received 1,007 reports of hate-crime-related crimes and misdemeanours. Approximately 85 percent of those reported crimes had indications of racist motives related to the victims' ethnic or national background. Religious and sexual motives counted for 11.5 percent of reported cases.

There were occasional reports of fighting between ethnic Finns and foreign-born youths of African and Middle Eastern descent, as well as fighting between rival ethnic immigrant groups. The law does not have a specific category for "race-related crimes" or "hate crimes." However, racism as a motive or party to another motive to any other criminalized act is a cause for aggravating the sentence. Nine persons were under investigation following a fight at Helsinki's Linnanmaki amusement park that led to its early closure during the park's 60th anniversary celebrations on June 6. Six of the suspects were women, and three were men. They were all between the ages of 16 and 27. According to police, the fight began after a heated exchange between Somalis and Kurds in a line for one of the rides. According to media reports, dozens of young persons with immigrant backgrounds took part in the incident.

According to the minority ombudsman, discrimination against the approximately 10,000 to 12,000 Roma in the country extended to all areas of life, resulting in their effective exclusion from society. Roma are classified as a "traditional ethnic minority" in

the ombudsman's report. The Romani minority was the most frequent target of racially motivated discrimination, followed by Russian-speakers, Somalis, Turks, Iraqis, Sami, and Thais. Ethnic Finns were also occasionally victims of racially motivated crimes for associating with members of minority communities.

On November 20, a group of approximately 15 persons wearing swastikas and brandishing Nazi symbols heckled an antiracism demonstration of 100 persons in Turku. Police held one of the hecklers overnight but did not arrest him.

The majority of hate crimes reported to police in Finland in 2011 were racially motivated, and the police reportedly recorded the highest number of racially motivated hate crimes in 2011 than at any other time in more than 10 years. Finland's hate crime statistics are published by the Police College of Finland and the Ministry of Interior's Police Department. The 108-page report revealed that in Finland, people are physically attacked on grounds of race, ethnicity, sexual orientation or disability. In the report, hate crime is defined as:

"... a crime against a person, group, somebody's property, institution, or a representative of these, motivated by prejudice or hostility towards the victim's real or perceived ethnic or national origin, religion or belief, sexual orientation, transgender identity or appearance, or disability."<sup>503</sup> However, only race and ethnic origin are protected by the legislation.

## **FR France**

In France, the Gayssot Act, voted for on July 13, 1990, makes it illegal to question the existence of crimes that fall in the category of crimes against humanity as defined in

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<sup>503</sup> Jenni Niemi & Iina Sahramäki · Poliisin tietoon tullut viharikollisuus Suomessa 2011  
[http://www.poliisiammattikorkeakoulu.fi/poliisi/poliisioppilaitos/home.nsf/files/99989817AF566D6EC2257AD00037641B/\\$file/Raportteja104\\_web.pdf](http://www.poliisiammattikorkeakoulu.fi/poliisi/poliisioppilaitos/home.nsf/files/99989817AF566D6EC2257AD00037641B/$file/Raportteja104_web.pdf)

the London Charter of 1945, on the basis of which Nazi leaders were convicted by the International Military Tribunal at Nuremberg in 1945-46. When the act was challenged by Robert Faurisson, the Human Rights Committee upheld it as a necessary means to counter possible anti-Semitism.

LAW No 90-615 to repress acts of racism, anti-semitism and xenophobia (1990)

MODIFICATIONS OF THE LAW OF JULY 29, 1881 ON THE FREEDOM OF THE PRESS Art 8. - Article 24 of the [Law on the Freedom of the Press of 29 July 1881](#) is supplemented by the following provisions: In the event of judgment for one of the facts envisaged by the preceding subparagraph, the court will be able moreover to order: Except when the responsibility for the author of the infringement is retained on the base for article 42 and the first subparagraph for article 43 for this law or the first three subparagraphs for article 93-3 for the law No 82-652 for July 29, 1982 on the audio-visual communication, the deprivation of the rights enumerated to the 2o and 3o of article 42 of the penal code for imprisonment of five years maximum;

Art 9. – As an amendment to Article 24 of the law of July 29, 1881 on the freedom of the press, article 24 (a) is as follows written: <<Art. 24 (a). - those who have disputed the existence of one or more crimes against humanity such as they are defined by Article 6 of the statute of the international tribunal military annexed in the agreement of London of August 8, 1945 and which were a carried out either by the members of an organization declared criminal pursuant to Article 9 of the aforementioned statute, or by a person found guilty such crimes by a French or international jurisdiction shall be punished by one month to one years imprisonment or a fine.

Art 13. - It is inserted, after article 48-1 of the law of July 29, 1881 on the freedom of the press, article 48-2 thus written: <<Art. 48-2. - publication or publicly expressed opinion encouraging those to whom it is addressed to pass a favourable moral judgment on one or more crimes against humanity and tending to justify these crimes (including collaboration) or vindicate their perpetrators shall be punished by one to five years imprisonment or a fine.

## **FR France**

Art. 132-76 Code Pénal

Criminal Code of France (excerpts)

### **DEFINITIONS**

#### **ARTICLE 132-76**

Where provided for by law, the penalties incurred for a felony or a misdemeanour are increased when the offence is committed because of the victim's actual or supposed membership or non-membership of a given ethnic group, nation, race or religion.

The aggravating circumstances defined in the first paragraph are established when the offence is preceded, accompanied or followed by written or spoken words, images, objects or actions of whatever nature which damage the honour or the reputation of the victim, or a group of persons to which the victim belongs, on account of their actual or supposed membership or non-membership of a given ethnic group, nation, race or religion.

#### **ARTICLE 132-77**

In the cases provided for by law, the penalties incurred for a felony or a misdemeanour are increased where the offence is committed because of the victim's sexual orientation.

The aggravating circumstances defined in the first paragraph are established when the offence is preceded, accompanied or followed by written or spoken words, images, objects or actions of whatever nature which damage the honour or the reputation of the victim, or a group of persons to which the victim belongs, on account of their actual or supposed sexual identity.

#### OFFENCES:

- Extortion: ARTICLE 312-2

Extortion is punished by ten years' imprisonment and a fine of €150,000: (...)

3° when it is committed because of the victim's membership or non-membership, true or supposed, of a given ethnic group, nation, race or religion, or his true or supposed sexual orientation.

- Threats:

#### ARTICLE 222-17

A threat to commit a felony or a misdemeanour against persons, the attempt to commit which is punishable, is punished by six months' imprisonment and a fine of €7,500, if it is repeated, or evidenced by a written document, picture or any other object. The penalty is increased to three years' imprisonment and to a fine of €45,000 where the threat is one of death.

#### ARTICLE 222-18

A threat to commit a felony or a misdemeanour against persons, made by any means, is punished by three years' imprisonment and a fine of €45,000 where the threat is made together with an order to fulfill a condition. The penalty is increased to five years' imprisonment and to a fine of €75,000 where the offence is a threat of death.

#### ARTICLE 222-18-1

Where threats contrary to the first paragraph of article 222-17 are committed because of the victim's membership or non-membership, true or supposed, of any given ethnic group, nation, race or religion, they are punishable by two years' imprisonment and by a fine of €30,000. Threats contrary to the second paragraph of that article or contrary to the first paragraph of article 222-18 [are punishable by five years' imprisonment and by a fine of €75,000, and those contrary to the second paragraph of article 222-18 are punishable by seven years' imprisonment and a by a fine of €100, 000. The same penalties are incurred where the threats were made because of the victim's true or supposed sexual orientation.

- Murder: ARTICLE 221-4

Murder is punished by criminal imprisonment for life where it is committed:

6° because of the victim's actual or supposed membership or non-membership of a given ethnic group, nation, race or religion;

7° because of the sexual orientation of the victim;

- Torture

#### ARTICLE 222-1

The subjection of a person to torture or to acts of barbarity is punished by fifteen years' criminal imprisonment. (...)

#### ARTICLE 222-2

The offence defined under article 222-1 is punished by criminal imprisonment for life where it precedes, accompanies or follows a felony other than murder or rape.

#### ARTICLE 222-3

The offence defined in article 222-1 is punished by twenty years' criminal imprisonment



where it is committed: (...)

5°bis because of the victim's actual or supposed membership or non-membership of a given ethnic group, nation, race or religion;

5°ter because of the sexual orientation of the victim; (...)

- Manslaughter

#### ARTICLE 222-7

Acts of violence causing an unintended death are punished by fifteen years' criminal imprisonment.

#### ARTICLE 222-8

The offence defined under article 222-7 is punished by twenty years' criminal imprisonment where it is committed: (...)

5°bis because of the victim's membership or non-membership of a given ethnic group, nation, race or religion;

5°ter because of the sexual orientation of the victim; (...)

- Physical Assault

#### ARTICLE 222-9

Acts of violence causing mutilation or permanent disability are punished by ten years' imprisonment and a fine of €150,000.

#### ARTICLE 222-10

The offence defined under Article 222-9 is punished by fifteen years' criminal imprisonment where it is committed: (...)

5°bis because of the victim's actual or supposed membership or non-membership of a given ethnic group, nation, race or religion;

5°ter because of the sexual orientation of the victim; (...)

#### ARTICLE 222-11

Acts of violence causing a total incapacity to work for more than eight days are punished by three years' imprisonment and a fine of €45,000.

#### ARTICLE 222-12

The offence defined under Article 222-11 is punished by five years' imprisonment and a fine of €75,000 where it is committed (...)

5°bis because of the victim's actual or supposed membership or non-membership of a given ethnic group, nation, race or religion;

5°ter because of the sexual orientation of the victim; (...)

#### ARTICLE 222-13

Acts of violence causing an incapacity to work of eight days or less or causing no incapacity to work are punished by three years' imprisonment and a fine of €45,000 where they are committed: (...)

5°bis because of the victim's actual or supposed membership or non-membership of a given ethnic group, nation, race or religion;

5°ter because of the sexual orientation of the victim; (...)

- Desecration of corpses and graves

#### ARTICLE 225-17

Any violation of the physical integrity of a corpse, by any means, is punished by one year's imprisonment and a fine of €15,000. The violation or desecration of tombs, burials grounds or monuments erected to the memory of the dead, committed by any means, is punished by one year's imprisonment and a fine of €15,000. The penalty is increased to two years'

imprisonment and to a fine of €30,000 where the offences defined under the previous paragraph were accompanied by a violation of the physical integrity of the corpse.

#### ARTICLE 225-18

Where the offences defined under the previous article were committed by reason of the membership or non-membership, true or supposed, of the deceased persons to any given ethnic group, nation, race or religion, penalties are increased to three years' imprisonment and to a fine of €45,000 in for the offences defined under the first two paragraphs of article 225-17 and to five years' imprisonment and to a fine of €75,000 in relation to the offence defined by the last paragraph of that article.

- Theft

#### ARTICLE 311-1

Theft is the fraudulent appropriation of a thing belonging to another person.

#### ARTICLE 311-2

Dishonest appropriation of energy to the prejudice of another person is assimilated to theft.

#### ARTICLE 311-3

Theft is punished by three years' imprisonment and a fine of €45,000.

#### ARTICLE 311-4

Theft is punished by five years' imprisonment and a fine of €75,000:

9° where it is committed because of the victim's membership or non-membership, true or supposed, of a given ethnic group, nation, race or religion, or his true or supposed sexual orientation. (...)

- Property damage

#### ARTICLE 322-1

Destroying, defacing or damaging property belonging to other persons is punished by two years' imprisonment and a fine of €30,000, except where only minor damage has ensued.

Drawing, without prior authorisation, inscriptions, signs or images on facades, vehicles, public highways or street furniture is punished by a fine of €3,750 and by community service where only minor damage has ensued.

#### ARTICLE 322-2

The offence under the first paragraph of article 322-1 is punished by three years' imprisonment and a fine of €45,000, and the offence under the second paragraph of article 322-1 by a fine of €7,500 and community service where the property destroyed, defaced or damaged is: (...)

Where the offence defined in the first paragraph of article 322-1 is committed because of the owner or user of the property's membership or non-membership, true or supposed, of a given ethnic group, nation, race or religion, the penalties incurred are also increased to 3 years' imprisonment and by a fine of €45, 000.

#### ARTICLE 322-6

Destroying, defacing or damaging property belonging to other persons by an explosive substance, a fire or any other means liable to create a danger to other persons is punished by ten years' imprisonment and a fine of €150,000.

Where this is a forest fire, or fire in woodland, heathland, bush, plantations, or land used for reforestation and belonging to another person, and takes place in conditions so as to expose people to bodily harm or to cause irreversible environmental damage, the penalties are increased to fifteen years' criminal imprisonment and to a fine of €150,000.

## ARTICLE 322-8

The offence defined by article 322-6 is punished by twenty years' criminal imprisonment and a fine of €150,000: (...)

3° where it is committed because of the owner or user of the property's membership or non-membership, true or supposed, of a given ethnic group, nation, race or religion.

### **COMMENTARIES:**

France has focused its “hatred” laws in the context of National-Socialism and Right-wing extremism. As per Thomas in ICR report in June 2004, the laws even extend to criminalisation of the denial of crimes against humanity “as tried at Nuremberg”. Addition to those found in common with a number of European States, measures France has taken include “the extension of the definition of acts of hatred to include the wearing of uniforms associated with perpetrators of crimes against humanity. Attacks against the person on grounds of race or religious reasons are protected, as too are attacks against property with the same motivation. Racial hatred and racial defamation are provided for. France prohibits denial of the holocaust and any form of “negationism”, including any denial of crimes against humanity as established at Nuremberg or being an apologist for crimes against humanity”.

France has been classified as providing “good data” by the FRA , that is “a range of bias motivations are recorded and data are generally published”. 886 racist/xenophobic, 466 cases of anti-Semitic, 127 cases of extremist and 100 cases islamophobic bias-motivated cases have been registered in France and published in 2010. Recorded data, according to the recording authority’s own definition, ‘Cases of racist, anti-religious and anti-Semitic crimes registered by tribunals; racist, xenophobic and anti-Semitic

incidents’.

Commentary below by ‘Article 19’:Article 19, France: No More "Memory Laws", 26 November 2008 <sup>504</sup>

A Report, commissioned by the French National Assembly, in 2008, as part of the work of a mission of inquiry (Mission d’information sur les questions mémorielles) headed by Bernard Accoyer, President of the National Assembly. All 32 members of the Mission adopted the report recommendations.

In November 2008, a group of world renowned historians and writers had published the “Appel de Blois” which maintained that it is not the business of any political authority to define historical truth and to restrict the liberty of historians by penal sanctions. The Appel called on politicians not to adopt, through legal means, “State-led truths” which undermine intellectual freedoms. Article 19 the independent human rights organization argued that the ‘Memory laws too often end up elevating history to dogma, thus preventing and punishing research and debate. They legally muzzle potentially dissenting or controversial research and publications, create taboos, and create or reinforce an overall atmosphere that effectively chills controversial research,” said Dr. Agnes Callamard, ARTICLE 19 Executive Director.

ARTICLE 19 expressed regret that the report did not also recommend that existing ‘memory laws’—including the 1990 Gayssot law on Holocaust denial and the January 2001 Armenian genocide denial law – should be repealed. The organization argued that laws which impose blanket prohibitions on the denial of genocide or of other crimes breach

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<sup>504</sup> available at: <http://www.refworld.org/docid/492e60b22.html> [accessed 24 April 2013] (ARTICLE 19 is an independent human rights organization that works around the world to protect and promote the right to freedom of expression. It takes its name from Article 19 of the Universal Declaration of Human Rights, which guarantees free speech.) Disclaimer: This is not a UNHCR publication. UNHCR is not responsible for, nor does it necessarily endorse, its content. Any views expressed are solely those of the author or publisher and do not necessarily reflect those of UNHCR, the United Nations or its Member States.

international guarantees of freedom of expression: It is inherently illegitimate for the State to impose a blanket ban on discussion of historical matters. Such laws are both unnecessary – since generic hate speech laws already prohibit incitement to hatred – and open to abuse to stifle legitimate historical debate and research’.

Below is from:

United States Department of State, 2010 Country Reports on Human Rights Practices - France, 8 April 2011 <sup>505</sup>

In the above Report it was stated that ‘societal violence and discrimination against the country's large immigrant population remained a problem. The problem continued to be particularly severe on the island of Corsica, where attacks caused some families to move to the mainland or to return to their countries of origin. During the year authorities reported 81 bombings or attempted bombings as well as 16 murders and 14 attempted murders in Corsica. The government publicly criticized and addressed incidents of violence against immigrants.’

### **Societal Abuses, Discrimination, and Acts of Violence Based on Sexual Orientation and Gender Identity**

The law prohibits discrimination on the basis of sexual orientation. Authorities pursued and punished perpetrators of violence against lesbians, gays, bisexuals, and transgender persons (LGBT). The NGO SOS Homophobia reported 1,259 homophobic acts in 2009. It reported that there were 88 instances of physical assault, a 33 percent decrease compared with 2008. After the NGO Inter-LGBT claimed that gay and lesbian minors were frequently targeted for violence, the Ministry of National Education, Youth, and

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<sup>505</sup> available at: <http://www.refworld.org/docid/4da56dc8c.html> [accessed 24 April 2013] Disclaimer: This is not a UNHCR publication. UNHCR is not responsible for, nor does it necessarily endorse, its content. Any views expressed are solely those of the author or publisher and do not necessarily reflect those of UNHCR, the United Nations or its Member States.

Community Life responded by asking schools to introduce lessons on tolerance and diversity.

During the year LGBT organizations held at least eight gay pride marches. The government authorized them and provided sufficient protection to marchers.

### **Other Societal Violence or Discrimination**

There was no societal violence or discrimination against persons with HIV/AIDS.

The constitution and law provide for freedom of speech and of the press, and the government generally respected these rights in practice. An independent press, an effective judiciary, and a functioning democratic political system combined to ensure freedom of speech and of the press.

There were some limitations of freedom of speech and of the press. Strict anti-defamation laws prohibit racially or religiously motivated verbal and physical abuse. Written or oral speech that incites racial or ethnic hatred as well as denial of the Holocaust and crimes against humanity are illegal. Authorities may deport a noncitizen for publicly using "hate speech" or constituting a threat of terrorism. On November 9, the government for the second time deported a "radical" imam, Ali Ibrahim el-Soudany, to Egypt for his hostile comments about the West. Interior Minister Hortefeux stated that government authorities had been following el-Soudany's increasingly "dangerous" preaching since 2008. He was previously deported in January but managed to re-enter the country.

On October 21, the NGO SOS Racism filed a lawsuit against perfumer Jean-Paul Guerlain following an October 15 national television interview about a new perfume he produced. During the interview he used a racial epithet for ethnic Africans.

On December 15, the Fort-de-France criminal court convicted businessman Alain



Huygues-Despointes for praising crimes against humanity. The conviction stemmed from a February 2009 television interview he gave where he said there were "positive aspects" of slavery and criticized mixed-race marriages because he said he wanted to "preserve" his race. The judge ordered him to pay a 7,500-euro (\$10,050) fine. His lawyers said that he would appeal the ruling.

## **HU Hungary**

The Parliament of Hungary declared the denial or trivialization of the Holocaust a crime punishable by up to three years imprisonment on February 23, 2010. The law was signed by the President of the Republic in March 2010. On June 8, 2010, the newly elected Fidesz-dominated parliament changed the formulation of the law to "punish those, who deny the genocides committed by national socialist or communist systems, or deny other facts of deeds against humanity". The word "Holocaust" is no longer in the law.

In 2011, the first man was charged with Holocaust denial in Budapest. The Court sentenced the man to 18 months in prison, suspended for three years, and probation. He also had to visit either Budapest's memorial museum, Auschwitz or Yad Vashem in Jerusalem. He chose his local Holocaust Memorial Centre and had to make three visits in total and record his observations.

## **HU Hungary**

A new criminal code is due to come into force on 1 July 2013, which will include provisions relating specifically to crimes motivated by sexual orientation or gender orientation.

Criminal Code of Hungary Excerpts from Act IV of 1978 on the Criminal Code (as of 18 August 2005)

Section 174 B Violence Against a Member of a National, Ethnic, Racial or Religious Group

(1) Any person who assaults another person for being part, whether in fact or under presumption, of a national, ethnic, racial, [or] religious group, or certain groups of the population, or compels him by applying coercion or duress to do, not to do, or to endure something, is guilty of a felony punishable by imprisonment for up to five years.

(2) The punishment shall be imprisonment between two to eight years if the act of crime is committed:

- (a) by force of arms;
- (b) with a deadly weapon;
- (c) causing a considerable injury of interest;
- (d) with the torment of the injured party;
- (e) in groups;
- (f) in criminal conspiracy.

(3) Any person who engages in preparations for violence against member of community is guilty of a misdemeanour punishable by imprisonment for up to two years.

In 2011 - The Hungarian Parliament adopted an amendment to the Criminal Code that penalizes intimidating behaviour towards ethnic, racial, religious groups or other groups of the society. The amendment was introduced to protect the Roma community from extreme right wing groups, but the general language of the legislation makes it possible to prosecute homophobic behaviour as well.

In response to the incidents that happened in a small village in Northern Hungary where tension between extreme right wing groups dressed in uniforms and the local Roma resulted in a violent clash, the Government announced that it would amend the Criminal Code to outlaw activities of these right wing groups by extending hate crimes legislation to include not only violent assaults, but also intimidating behaviour towards ethnic minorities. The amendment was adopted in a record 5 days by the Parliament, and supported by all parties except for the extreme right wing Jobbik (Hungarian radical nationalist political party. The party describes itself as "a principled, conservative and radically patriotic Christian party", whose "fundamental purpose" was the protection of "Hungarian values and interests." Jobbik has been described by scholars, different press outlets and its political opponents as fascist neo-fascist, Neo-Nazi, racist anti-Semitic, anti-Roma and homophobic. Measured according to its representation in the European Parliament and the National Assembly, it is Hungary's third largest party. The amendment uses a general language and refers to intimidation of ethnic, racial and religious groups, as well as any other group of the society, thus – in theory – can be used to prosecute anti-gay groups that harass people at Gay Pride Marches or in the vicinity of gay venues.

Hate crime legislation that covers homophobic violence was introduced in Hungary in 2009. While previously only racial, ethnic and religious groups had been protected, following the repeated attacks of the Gay Pride Marches in 2007 and 2008 a new crime ‘Violence against a member of a community’ was introduced in February 2009 to cover assaults and coercion that are motivated by the victim’s membership in a social group. Even though the legislation is in place, it has been rarely used by the police and courts: the bias motivation is disregarded in most cases by law enforcement agencies.

## COMMENTARIES:

Below is from:

Immigration and Refugee Board of Canada, Hungary: Situation and treatment of sexual minorities, including legislation, state protection, and support services, 27 June 2012, HUN104102.E<sup>506</sup>

According to the above, various sources report that sexual minorities in Hungary face discrimination from the general population (Freedom House 2011; ILGA-Europe 2012, 82; Takács et al. 2012, 81). The Hungarian Helsinki Committee, a Budapest-based human rights NGO founded in 1989 (n.d.), writes that the "general climate [towards sexual minorities] is clearly intolerant" (Jan. 2011, 6). In 2011, the Equal Treatment Authority (ETA),<sup>507</sup> an "independent administrative body" established to enforce and monitor the 2003 Equal Treatment Act (Hungary 16 Feb. 2011, para.13), conducted a study that is representative of the Hungarian population, in which over half of the respondents agreed with the statement that "homosexuality is a sickness" (Háttér 12 June 2012).<sup>508</sup>

### **Treatment of Sexual Minorities, Including Violence**

In a report on hate crimes published on 1 April 2011, Háttér indicated that research data and its own statistics suggest that "homophobic and transphobic hate crimes are on the rise in Hungary." Háttér's 2010 study showed that 16 percent of respondents had been subjected to violence based on sexual orientation, with 4 percent of incidents taking place in the preceding year (12 June 2012). Similarly, Takács et al. mention "intensifying violence in society" [against LGBT people] as one "negative development" that has taken place in the past decade (2012, 101). The US Department of State's Country Reports on Human Rights

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<sup>506</sup> available at: <http://www.refworld.org/docid/5035fcf7328.html> [accessed 24 April 2013] Disclaimer: This is not a UNHCR publication. UNHCR is not responsible for, nor does it necessarily endorse, its content. Any views expressed are solely those of the author or publisher and do not necessarily reflect those of UNHCR, the United Nations or its Member States.

<sup>507</sup> Equal Treatment Authority (ETA). N.d. "Cases of the Authority." [Accessed 12 June 2012]

<sup>508</sup> Hungarian Helsinki Committee. January 2011. "General Climate of Intolerance in Hungary." [Accessed 30 May 2012]

Practices for 2011 states that hate crimes were committed "sporadically" against LGBT people in 2011, and that "despite legal protections, LGBT people continued to be subject to physical abuse and attacks by right-wing extremists" (24 May 2012, Sec. 6). The Hungarian Helsinki Committee reports that same-sex couples holding hands "may face serious verbal or even physical attack" (Jan. 2011).<sup>509</sup>

According to the Country Reports on Human Rights Practices for 2010, approximately 1,000 people participated in the 2010 Budapest Pride March, during which counter-demonstrators shouted homophobic insults and the campaign slogan of Jobbik, an "openly antigay" political party <sup>510</sup>(US 8 Apr. 2011, Sec. 6). The report adds that two men were "briefly" detained by metro security after allegedly attacking a parade volunteer in the metro (ibid.). Country Reports 2011 states that the 2011 parade occurred "without incident" (ibid. 24 May 2012, Sec. 6). However, the International Lesbian, Gay, Bisexual, Trans and Intersex Association - Europe (ILGA-Europe), an international non-governmental umbrella organization of 359 European LGBT NGOs reports that participants were verbally attacked by "homophobic nationalists" and that several participants were "harassed and assaulted" after the march (2012, 83). In both 2011 and 2012, the Budapest police denied an LGBT organization permission to hold the pride march (HCLU 12 Apr. 2012; ILGA-Europe 2012, 83; Human Rights Watch 11 Apr. 2012), which, according to Human Rights Watch, was an attempt to curtail the rights of LGBT people (ibid.). The police decision was challenged and overturned by Budapest courts in 2011 (Human Rights Watch 18 Feb. 2011; HCLU 26 Feb. 2011) and in 2012 (ibid. 16 Apr. 2012; Pink News 16

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<sup>509</sup> Háttér Support Society for LGBT People. 12 June 2012. Correspondence sent from a representative to the Research Directorate.

<sup>510</sup> United States Department of State, 2010 Country Reports on Human Rights Practices - Finland, 8 April 2011, available at: <http://www.refworld.org/docid/4da56dc92.html> [accessed 29 April 2013]

Apr. 2012).<sup>511</sup>

## **2. State Protection**

According to a representative of Háttér, although there were several legislative and institutional advances in LGBT rights before 2010, the government led by the Fidesz party has taken no actions to protect or support sexual minorities and has adopted "legislation clearly limiting the rights of LGBT people" (12 June 2012). Takács et al. note that with the 2010 election to parliament of the Jobbik party, "directly racist and homophobic forms of public communication started to increase" and there has been a "lack of political support" for LGBT issues (2012, 90, 101).<sup>512</sup>

According to Country Reports 2011, the penal code prohibits hate speech, "inciting against a community" and "violence against a member of the community," although it does not explicitly prohibit hate crimes against sexual minorities (24 May 2012, Sec. 6). In its 2011 submission to the UN Human Rights Council, Hungary stated that violent hate crimes can be punished with prison terms of up to five years, while inciting hate crimes can lead to a sentence of up to three years (16 Feb. 2011, para. 32, 33). ILGA-Europe notes that hate crime legislation is interpreted to "implicitly" cover crimes based on sexual orientation or gender identity (2012, 82). This statement is corroborated by the representative of Háttér (12 June 2012).

## **Police and Judiciary**

According to the representative of Háttér, laws prohibiting hate crimes against LGBT

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<sup>511</sup> Human Rights Watch. 11 April 2012. "Hungary: Revoke Denial of Pride March Route." [Accessed 30 Nov 2012]: 18 February 2011. "Hungary: Ruling on Gay March a Human Rights Victory." [Accessed 30 Nov 2012] Hungarian Civil Liberties Union (HCLU). 16 April 2012. "Pride is Free, Court Puts Police Back in its Place." [Accessed 12 Jan 2013]

<sup>512</sup> 1 April 2011. Submission by Háttér Support Society for LGBT People in Hungary for the OSCE ODIHR 2010 Annual Report on Hate Crimes. [Accessed 30 May 2012]

people are "seldom enforced". Several sources mention that the police often treat alleged hate crimes as regular assaults, disregarding the discriminatory nature of the violence (Háttér 12 June 2012; US 24 May 2012, Sec. 6; Chance for Children et al. Nov. 2010, 1, 6). For example, ILGA-Europe reports that protesters planning to disrupt the 2011 pride march were investigated for possible incitement to hate crimes, but the police abandoned the investigation on the grounds that calling for the extermination of gays via signs containing drawings and symbols does not incite to active hatred, is not a clear violation of societal norms, and is thus not punishable under existing law. (2012, 82)

According to the Háttér representative, LGBT people subject to homophobic threats or violence have a "very varied" experience, with some police officers doing "good quality" and "sensitive" policing, and others using "discriminatory and harassing treatment" and ignoring reported incidents of crimes (12 June 2012). Sources indicate that police are not trained on investigating hate crimes and there are no protocols to guide them (Háttér 1 Apr. 2011; US 24 May 2012, Sec. 6).

The 2010 survey by Háttér and the Hungarian Academy of Sciences found that 13.4 percent of violent attacks against LGBT people were reported to the authorities (Háttér 12 June 2012). Fifty-two percent of respondents did not report because they did not believe that anything could be done, while forty-four percent did not trust the authorities to take action (ibid.). The fear of "secondary victimization" by the police and lack of awareness of the law were also identified as barriers to reporting hate crimes (ibid. 1 Apr. 2011). No data was supplied to the FRA for their report 'Making hate crime visible in the European Union: acknowledging victims' rights'.<sup>513</sup>

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<sup>513</sup> FRA 'Making hate crime visible in the European Union: acknowledging victims' rights 2012, Luxembourg, Publications office of the European Union.

According to the Háltér representative, no cases of violence against LGBT people have been prosecuted as hate crimes (12 June 2012). He added that even when the police have arrested a suspect for committing a hate crime, the prosecutor's office reduces the charge to "a less severe crime" (Háltér 12 June 2012). Corroborating information for this statement could not be found by the Research Directorate within the time constraints of this Response.<sup>514</sup>

Below is from: Amnesty International, Amnesty International Annual Report 2011 - Hungary, 13 May 2011 <sup>515</sup>

After a series of violent attacks against Romani communities which left six people dead in 2008 and 2009, Hungarian NGOs reported further attacks against Roma and criticized the lack of procedures within the criminal justice system to effectively address hate crimes (see Justice system below). In June, the OSCE noted that Roma were more susceptible to being made "scapegoats", blamed for the country's existing socio-economic problems, as a larger percentage of them depended on state support.

In June, the police completed the investigation into the series of attacks against Roma in 2008 and 2009. It concluded that four suspects should be charged with multiple co-ordinated homicide. In September, the Pest County Prosecutor submitted the indictment: three men were charged with multiple homicides for "base motivation" (as there is no specific provision in the criminal code for racially motivated crime) and the

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<sup>514</sup> Reports accessed for this commentary:

<sup>515</sup> available at: <http://www.refworld.org/docid/4dce156445.html> [accessed 24 April 2013] Disclaimer: This is not a UNHCR publication. UNHCR is not responsible for, nor does it necessarily endorse, its content. Any views expressed are solely those of the author or publisher and do not necessarily reflect those of UNHCR, the United Nations or its Member States.



fourth with abetting the crime of pre-meditated multiple homicides.

In September, the Council of Europe's Advisory Committee on the Framework Convention for the Protection of National Minorities expressed concerns about violent attacks against Roma, and noted that despite the arrests of the alleged perpetrators, there was still "a climate of fear". The Committee further expressed concerns that "intolerance and prejudice towards Roma are being fanned by the statements of certain extreme right-wing politicians." According to local NGOs, such statements were not firmly condemned by the government.

In the run-up to the municipal elections in October, national public radio and television refused to air a party-political advert by the Jobbik party, which referred to so-called "Gypsy crime" and claimed a link between crime and ethnicity. The National Elections Committee ruled that both media had violated electoral principles of equality of political parties and that the advert had complied with free speech regulations. In September, the Supreme Court upheld the decision.

### **Justice system**

Structural shortcomings of the Hungarian criminal justice system's response to hate crimes were revealed by international and local NGOs and international human rights monitoring bodies. These shortcomings included a lack of capacity to recognize and investigate hate crimes; no specialized training or specific guidelines for police and investigators; inadequate support to victims of hate crimes; and no effective measures to map the nature and scale of the issue, partly because of a lack of data which hampered the authorities' ability to identify trends and prepare relevant policy responses.

There were several documented cases which illustrated that law enforcement

authorities often failed to recognize the racial motivation in crimes. In their submission to the UN Universal Periodic Review, Hungarian NGOs also expressed concerns in November over a tendency to classify crimes as "common" crimes rather than hate crimes with a racially aggravated motive. As a result, reliable statistics were not publicly available on the real number of racially motivated crimes in Hungary. Hatred as an aggravated motive was also reportedly ignored in crimes committed against LGBT people or Jewish people.

Despite protests, the parliament adopted two new media acts in September and December 2011. The new legislation was criticized by local NGOs, media and the international community over its possible implications, including restrictions on media content, the lack of clear guidelines for journalists and editors and the strong powers of the new regulatory body, which all risk unfairly restricting freedom of expression. The National Media and Communications Authority was created, which can impose heavy fines on broadcast media for content it considers to run counter to the "public interest", "common morality" and "national order". Fines can also be imposed for "unbalanced" news reporting.

Human Rights Watch : The legislation of the Hungary does not contain any provisions that expressly enable the racist or other bias motives of the offender to be taken into account by the courts as an aggravating circumstance when sentencing.

In its Fourth Report on Hungary from 2009, the European Commission against Racism and Intolerance (ECRI) notes in this regard that:

Certain articles of the Criminal Code, such as those covering murder or grievous bodily harm, expressly grant judges discretion to take account in sentencing offenders of the latter's "base motivations", where these are averred, and the Supreme Court has given

guidance to judges on such matters. It is thus open to the judge in each such case to consider an offender's racist motivation as a form of base motivation and take it into account as an aggravating circumstance. Racist motivation is not, however, expressly listed in the relevant provisions as a form of base motivation, and no general provision exists in Hungarian law under which, for all ordinary criminal offences, racist motivation constitutes an express aggravating circumstance. ECRI observes that as a result, it is practically impossible to monitor the situation with respect to racially motivated offences in Hungary; moreover, the absence of such a provision may mean that ordinary offences committed with racist motivations are not systematically prosecuted or punished as such.

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### **Bias-motivated Violent Crime as a Specific Offense**

The Criminal Code defines one bias-motivated offense as a specific crime. Section 174/B comes under the heading of "Violence Against a Member of a Community" and punishes persons who assault somebody else because he belongs or is believed to belong to a national, ethnic, racial, religious, or other group.<sup>517</sup>

In its Third Report on Hungary, ECRI describes some positive steps taken, in particular efforts to train police officers, prosecutors and judges on the implementation of these criminal law provisions. ECRI also notes, however, "that numerous sources continue to report acts of violence, committed mainly against members of the Roma community, but

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<sup>516</sup> European Commission against Racism and Intolerance, "Fourth Report on Hungary," CRI(2009)3, June 20, 2008

<sup>517</sup> Legislationonline, Criminal Code of the Republic of Hungary, Chapter 12, Title 1: Crimes Against Life, Limbs, and Health, Article 170, OSCE/ODIHR, <http://www.legislationline.org/upload/legislations/15/ef/84d98ff3242b74e606dcb1da83aa.pdf>. This provision of the criminal code was amended in 2008. See [http://www.mfa.gov.hu/NR/rdonlyres/A9996FC8-D394-4FEC-9492-2FEB062C3380/0/roma\\_non\\_paper\\_final\\_0611.pdf](http://www.mfa.gov.hu/NR/rdonlyres/A9996FC8-D394-4FEC-9492-2FEB062C3380/0/roma_non_paper_final_0611.pdf).

also against members of other groups, such as non-citizens, by members of the majority population, and, most alarmingly, by police officers. It has been observed that the police and the prosecutors fail to take into account the racist motive of offences, preferring to consider such offences as common offences. In some cases, the police and the prosecutors encounter a difficulty in proving the racist motive of offences.”<sup>518</sup>

## **IE Ireland**

Prohibition of incitement to hatred Act, 1989

The term “hate crime” is not generally used to describe racist, xenophobic or anti-Semitic incidents. It is an offense to incite hatred against any group of persons on account of their race, colour, nationality, religion, sexual orientation, ethnic or national origins, or membership of the Traveller community, an indigenous minority group. The Criminal Code of Ireland does not contain provisions that expressly enable the racist or other bias motives of the offender to be taken into account by the courts as an aggravating circumstance when sentencing.

### **Hate Speech:**

Legislation provided:

Prohibition of incitement to hatred Act, 1989

Section 1 (1) – Interpretation – “hatred” means hatred against a group of persons in the State or elsewhere on account of their race, colour, nationality, religion, ethnic or national origins membership of the travelling community or sexual orientation.

Section 2 (1) – It shall be an offence for a person –

(a) to publish or distribute written material,

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<sup>518</sup> European Commission against Racism and Intolerance, “Third Report on Hungary,” CRI(2004)25, June 8, 2004, [http://hudoc.ecri.coe.int/XML/Ecri/ENGLISH/Cycle\\_03/03\\_CbC\\_eng/HUN-CbC-III-2004-25-ENG.pdf](http://hudoc.ecri.coe.int/XML/Ecri/ENGLISH/Cycle_03/03_CbC_eng/HUN-CbC-III-2004-25-ENG.pdf).

- (b) to use words, behave or display written material-
- (i) in any place other than inside a private residence, or
- (ii) inside a private residence so that the words, behaviour or material are heard of seen by persons outside the residence or
- (c ) to distribute, show or play a recording of visual images or sounds, if the written material, words, behaviour, visual images or sounds, as the case may be, are threatening, abusive or insulting and are intended or, having regard to all the circumstances, are likely to stir up hatred.

## **COMMENTARIES**

Below is from: Council of Europe: European Commission Against Racism and Intolerance (ECRI), ECRI Report on Ireland (fourth monitoring cycle) : Adopted on 5 December 2012, 19 February 2013, CRI(2013)1<sup>519</sup>

The Office of the Press Ombudsman and the Press Council were established in 2007 to provide a new system of independent regulation for the printed media; a new voluntary Code of Practice for Newspapers and Magazines, prohibiting inter alia the publication of material intended or likely to cause grave offence or stir up hatred on the basis of race, religion, nationality, colour, ethnic origin, membership of the travelling community, gender, sexual orientation, marital status, disability, illness, was adopted in 2007. Ireland has a good system for registering racist criminal offences. In its third report, ECRI recommended that the Irish authorities complete their review of the Prohibition of Incitement to Hatred Act 1989 as soon as possible. In its third report, ECRI underscored

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<sup>519</sup> available at: <http://www.refworld.org/docid/513d98592.html> [accessed 24 April 2013] Disclaimer: This is not a UNHCR publication. UNHCR is not responsible for, nor does it necessarily endorse, its content. Any views expressed are solely those of the author or publisher and do not necessarily reflect those of UNHCR, the United Nations or its Member States.

that, pending the review of the Prohibition of Incitement to Hatred Act 1989, the Irish authorities should ensure that the existing relevant criminal law provisions are implemented more vigorously against those who commit racially motivated crimes.

Any activity that incites racial hatred is a criminal offence in Irish law. It would be a matter for the court in any particular set of circumstances to decide whether the dissemination of ideas based upon racial superiority or hatred was an offence.

The authorities were confident that Ireland was in compliance with the Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law by virtue of the provisions in its existing criminal law - Prohibition of Incitement to Hatred Act 1989 and public order legislation.<sup>520</sup>

According to the European Union Agency for Fundamental Rights (FRA), Ireland has a good system for registering racist criminal offences;<sup>521</sup> a fact which was already acknowledged in ECRI's third report. According to the official statistics, 128 racist incidents were reported in 2009 and 122 were reported in 2010.<sup>522</sup> These statistics further indicate that the most common types of racist incidents are minor assault, public order offences and criminal damage. Since 2008, 45 cases have been brought under the Prohibition of Incitement to Hatred Act 1989.<sup>523</sup>

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<sup>520</sup> Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia, Office for the Promotion of Migrant Integration, Department of Justice, Equality and Law Reform, <http://www.integration.ie/website/omi/omiwebv6.nsf/page/RacismeudevelopmentsEUCouncilFrameworkDecisionCombatingRacism-en>.

<sup>521</sup> FRA Annual Report, 2010, p. 121, <http://fra.europa.eu/fraWebsite/attachments/annual-report-2011-chapter6.pdf>.

<sup>522</sup> Reported Racist Crime, Office for the Promotion of Migrant Integration, Department of Justice and Equality, <http://www.integration.ie/website/omi/omiwebv6.nsf/page/statistics-RacistIncidentsstatisticscrimeen>.

<sup>523</sup> Hate Crimes in the OSCE Region – Incidents and Responses, Annual Report For 2010, November 2011, p. 26.

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In 2009 the FRA analysed the experiences of discrimination in the everyday life of immigrant and ethnic minority groups in all EU member States. For Ireland, a sample of Sub-Saharan Africans was surveyed.<sup>524</sup> ECRI noted that 26% of the respondents considered that, in the previous 12 months, they had fallen victim to racially motivated crime of the following type: serious harassment, threat or assault. Such a high estimate suggests that the official statistics do not reflect correctly the reality of the number of racially motivated offences in Ireland.

ECRI strongly encouraged the Irish authorities to improve and to supplement the existing arrangements for collecting data on racist incidents and the follow-up given to them by the criminal justice system. In its third report, ECRI reiterated its recommendation that the Irish authorities include in the criminal legislation provisions which allow for the racist motivation of a criminal offence to be considered as an aggravating circumstance at sentencing and that they envisage providing that racist offences be defined as specific offences.

ECRI noted that there have been no changes to the criminal legislation and that there are no provisions in Irish criminal law defining common offences of a racist

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<sup>524</sup> European Union Minorities and Discrimination Survey (EU-MIDIS) - survey results, FRA, 2009.

or xenophobic nature as specific offences, nor is there any provision which provides for the racist motivation of a crime to be considered as an aggravating circumstance during the sentencing stage of a trial. The courts have the power to take any element, including racist motivation, into consideration. The fact that this power is discretionary and limited has been recognised by various stakeholders as a problem.

Racist acts may be combated under the Criminal Justice (Public Order) Act 1994, the Non-Fatal Offences against the Person Act 1997 and the Criminal Damage Act 1991. According to various sources, the racist motivation was not consistently taken into account by judges when sentencing. The authorities have informed ECRI that they were, however, advised not to introduce aggravated offences as the convictions may be more difficult to obtain because the act and motive have to be proven.

ECRI recommended that the Irish authorities assess the application of the criminal law provisions against racism in order to identify, including notably from recent case-law, any gaps that need closing or any improvements or clarifications that might be required, so that changes can then be made if necessary.

In 2007 the Office of the Press Ombudsman and the Press Council provided a new system of independent regulation for the printed media. The Press Council decides on appeals from decisions of the Press Ombudsman and may also decide on any significant or complex case which has been referred to it by the Press Ombudsman. The Press Ombudsman investigates and adjudicates complaints under a new voluntary Code of Practice for Newspapers and Magazines which the press industry signed up to in 2007. The Press



Ombudsman in the first instance attempts to resolve the matter by making direct contact with the editor of the publication concerned. If conciliation is not possible, the Ombudsman examines the case and makes a decision.

Principle 8 of the Code of Practice provides that: “Newspapers and magazines shall not publish material intended or likely to cause grave offence or stir up hatred against an individual or group on the basis of their race, religion, nationality, colour, ethnic origin, membership of the travelling community, gender, sexual orientation, marital status, disability, illness or age.” In 2010, the last year for which figures are available, Principle 8 was invoked in 36 cases. ECRI also notes that the Broadcasting Act 2009 consolidated the corpus of broadcasting legislation in Ireland and revised the law relating to broadcasting services and content generally. The Act established the Broadcasting Authority of Ireland as the regulator of broadcasting content. It is of particular importance that the Broadcasting Authority developed a range of codes governing programme and advertising content on radio and television under which the programme material shall not support or condone discrimination against any person or section of the community, in particular on the basis of age, gender, marital status, membership of the Traveller community, family status, sexual orientation, disability, race or religion.

ECRI recommended that the authorities evaluate whether the new voluntary Code of Practice for Newspapers and Magazines constitutes an effective means of combating racist and xenophobic discourse in the media and invited them to encourage the press industry to strengthen it if necessary. ECRI also invited the authorities to support any initiatives taken by the media to pursue awareness raising activities on human rights in general and on issues related to racism and racial discrimination in

particular.

## **IT Italy**

Italy: Criminal Code of Italy (excerpts)

Aggravating circumstances Section 3 of the Law N° 205/1993

It is a general aggravating circumstance for all offences committed with a view to discrimination on racial, ethnic, national or religious ground or in order to help organisations with such purposes. Any racially aggravated offence is prosecuted ex officio.

Incitement to violence/commission of violence Section 3(1) b. of Law N° 654/1975 as amended by Law N° 205/1993

Punishes the incitement to commit or the commission of violent acts or provocation on racial, ethnic, national or religious grounds.

## **COMMENTARIES:**

Below is taken from: Human Rights Watch, World Report 2012 - European Union: Italy, 22 January 2012,<sup>525</sup>

In July 2012, the lower house of parliament rejected draft legislation that would have extended hate crime provisions to protect LGBT persons.

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<sup>525</sup> available at: <http://www.refworld.org/docid/50618d9b2.html> [accessed 24 April 2013]

Comments: Adopted 9 Mar. 2012 after consideration of the 16th to 18th periodic reports of Italy (CERD/C/ITA/16-18)  
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The UN Committee on the Elimination of Discrimination against Women communicated in July its deep concern about a range of issues affecting women in Italy, including multiple forms of discrimination and vulnerability to violence facing migrant and Roma women in particular. In September Hammarberg expressed concern about racist and xenophobic political discourse, particularly targeting Roma and Sinti, and called on Italian authorities to improve their response to racist violence. He criticized ongoing emergency powers leading to serial evictions of Roma camps.

Below is taken from: UN Committee on the Elimination of Racial Discrimination (CERD), Consideration of reports submitted by States parties under article 9 of the Convention : concluding observations of the Committee on the Elimination of Racial Discrimination : Italy, 4 April 2012, CERD/C/ITA/CO/16-18

Italy ratified on 5 June 2008 of the Cybercrime Convention of the Council of Europe and the State party's declaration regarding the upcoming amendment of the Criminal Code to tackle hate speech on the Internet.

The Committee recommended that the State party amend article 61 of the Criminal Code so as to establish that an offence with racist motivation constitutes an aggravating circumstance, including in cases where there are mixed motives. It also recommended that the State party take the necessary measures to prosecute and punish cases of dissemination of ideas of racial superiority and of incitement to racist violence or crime, in accordance with the provisions of the law and with article 4 of the Convention.

The Committee expressed concern over the prevalence of racist discourse, stigmatization and stereotypes directed against Roma, Sinti, Camminanti and non-citizens. Few cases where politicians have been prosecuted for discriminatory statements have occurred, and in these, stays of execution have allowed those prosecuted to continue their

political activities and to stand for election. The Committee noted that the fundamental right to freedom of expression does not protect the dissemination of ideas of racial superiority or incitement to racial hatred.

The Committee is also concerned that racial discrimination is increasing in the media and on the Internet, particularly on the social networks (arts. 2 and 4).

The Committee stated that the fundamental right of freedom of expression should not subtract from the principles of equality and non-discrimination as the exercise of the right to freedom of expression carries with it special responsibilities, among which is the obligation not to disseminate ideas on racial superiority or hatred.

It was recommended that the mandate of the Authority which monitors the media to ensure that racist statements were prosecuted and victims granted reparations. The Committee recommended that the State party ensure that the media do not stigmatize, stereotype or negatively target non-citizens and ethnic minorities. It encouraged the State party to invite the media to strictly respect the Rome Charter in order to avoid racist, discriminatory or biased language. It also encouraged the State party to consider ratifying the Additional Protocol to the European Convention on Cybercrime concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems.

Awareness raising among media professionals of their responsibility not to disseminate prejudice and to avoid reporting incidents involving non-citizens, members of Roma and Sinti communities in a way that stigmatizes such communities as a whole, was seen to be necessary.

The Committee recommended that the State party ensure the security and integrity of

non-citizens, and of Roma and Sinti, without any discrimination, emphasising that political authorities do not enjoy de jure or de facto impunity. It also recommended that the State party systematically collect data on racist hate crimes.

## **LT Lithuania**

Lithuania prohibits approval and denial of Nazi or Soviet crimes.

170(2) Publicly condoning international crimes, crimes of the USSR or Nazi Germany against the Republic of Lithuania and her inhabitants, denial or belittling of such crimes.

## **LT Lithuania**

Criminal Code of Lithuania Excerpts from The Criminal Code of the Republic of Lithuania

26 September 2000 No VIII-1968(As last amended on 9 July 2009 – No XI-330)

Aggravating circumstances: Article 60 Aggravating Circumstances

[Aggravating circumstances include when a crime is]

(12) committed to express hatred towards a group of persons or a person belonging thereto on grounds of racial, ethnic, national or religious ground or in order to help organisations with such purposes Article 129 Murder

Article 135 Severe health impairment

[Severe health impairment is an aggravated offence when it is]

(13) committed to express hatred towards a group of persons or a person belonging thereto on grounds of age, sex, sexual orientation, disability, race, nationality, language, descent, social status, religion, convictions or views.

Article 138 Non-severe health impairment

[Non-severe health impairment is aggravated when it is]

(13) committed to express hatred towards a group of persons or a person belonging thereto on grounds of age, sex, sexual orientation, disability, race, nationality, language, descent, social status, religion, convictions or views.

#### Article 312 Desecration of a Grave or Another Place of Public Respect

1. A person who destroys or otherwise desecrates a grave or destroys a monument or desecrates another place of public respect shall be punished by community service or by restriction of liberty or by arrest or by imprisonment for a term of up to one year.

2. A person who carries out acts of vandalism in a cemetery or another place of public respect or desecrates a grave or another place of public respect for racist, nationalist or religious reasons shall be punished by community service or by a fine or by imprisonment for a term of up to three years.

#### **COMMENTARIES:**

Below is taken from: United States Department of State, 2011 Country Reports on Human Rights Practices - Lithuania, 24 May 2012 <sup>526</sup>

The constitutional definition of freedom of expression does not protect such "criminal acts" as incitement to national, racial, religious, or social hatred, violence and discrimination, and slander and disinformation.

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<sup>526</sup> available at: <http://www.refworld.org/docid/4fc75a8537.html> [accessed 24 April 2013]Disclaimer:This is not a UNHCR publication. UNHCR is not responsible for, nor does it necessarily endorse, its content. Any views expressed are solely those of the author or publisher and do not necessarily reflect those of UNHCR, the United Nations or its Member States.

The penal code criminalizes denial or "gross trivialization" of international crimes, of Soviet or Nazi German crimes against Lithuania or its citizens, or trivializing genocide, crimes against humanity, or war crimes. It is a crime to incite hatred against persons or groups. According to the Ministry of Interior, during the year authorities initiated 332 cases involving allegations of incitement to hatred and discrimination, most of them over the Internet, and sent 98 to the courts for trial. The courts decided 96 of these. A number of investigations and court cases from prior years continued. Most allegations of incitement of hatred involved homophobic, racist, or anti-Semitic expression.

**Freedom of Press:** While the independent media were active and expressed a wide variety of views, they were subject to the same laws that criminalize speech that grossly trivializes international and war crimes and prohibit "hate speech." Radio and television broadcasters included a mix of independent and public stations. International media generally operated without restriction.

**Censorship or Content Restrictions:** Although it continued to attract criticism from international human rights groups, the 2010 law prohibiting material "detrimental" to minors' "bodies or thought processes, information promoting the sexual abuse and harassment of minors or promoting sexual relations by minors or sexual relations in general" was not invoked during the year, and there were no reports that it adversely affected freedom of the media.

### **Internet Freedom**

There were no government restrictions on access to the Internet or credible reports that the government monitored e-mail or Internet chat rooms. Individuals and groups could generally engage in the expression of views via the Internet, including by e-mail.

Authorities prosecuted persons posting material they considered to be inciting hatred.

The government declared 2011 to be the Year of Remembrance for the Victims of the Holocaust in Lithuania. It sponsored several projects during the year, including events on September 23 commemorating the National Memorial Day for the Genocide of the Lithuanian Jews. In September President Grybauskaite awarded Life Saving Crosses to 55 Lithuanians who saved Jews during the Holocaust. Throughout the year the government and civil society worked together to promote Holocaust education in schools and preserve Vilnius' Jewish cemetery. The government finished preservation of part of the ancient Jewish Snipiskes cemetery and in June rededicated it.

There were reports of racially motivated violence during the year. The country's national day, February 16, continued to be an occasion for racist and xenophobic manifestations. In Kaunas youth wearing jackets and paraphernalia similar to those worn by skinheads attacked and beat a Pakistani national.

On March 11, the 20th anniversary of the reestablishment of Lithuania after Soviet rule, approximately 1,000 people participated in a march in downtown Vilnius. The event included some racist and xenophobic slogans, and the primary organizer was a nationalist movement widely criticized for its association with skinheads and neo-Nazis. Some marchers displayed slogans proclaiming "Lithuania for Lithuanians" and "Thank God I was born white." Senior leaders denounced the demonstration; some criticized the continuing willingness of the Vilnius city administration to provide permits for this annual event.

The law prohibits and penalizes discrimination based on race, gender, social status, ethnic background, age, sexual orientation, disability, and religion or beliefs. Despite



government programs and efforts at enforcement, discrimination against women and ethnic and sexual minorities persisted.

## **LU Luxembourg**

In Luxembourg, Article 457-3 of the Criminal Code, Act of 19 July 1997 outlaws Holocaust denial and denial of other genocides. The punishment is imprisonment for between 8 days and 6 months and/or a fine. The offence of "negationism and revisionism" applies to:

...anyone who has contested, minimised, justified or denied the existence of war crimes or crimes against humanity as defined in the statutes of the International Military Tribunal of 8 August 1945 or the existence of a genocide as defined by the Act of 8 August 1985. A complaint must be lodged by the person against whom the offence was committed (victim or association) in order for proceedings to be brought, Article 450 of the Criminal Code, Act of 19 July 1997.

## **LU Luxembourg**

Criminal Code of Luxembourg (Law of 16 June 1879) (excerpts)

Aggravating Circumstances

Article 453 (L. 19 July 1997)

Any violation of the integrity of a corpse, by any means whatsoever, shall be punished with imprisonment from one month to two years and a fine of 251 euros to 25,000 euros.

The violation or desecration by any means whatsoever, of tombs, graves or monuments erected to the memory of the dead, shall be punished with imprisonment from one month to two years and a fine of 251 euros 25,000 euros.

The penalty is increased to three years imprisonment and a fine of 37,500 euros when the offenses defined in the preceding paragraph have been accompanied by affecting the integrity of the corpse.

Article 457-2 (L. 19 July 1997)

When the offenses defined in section 453 were committed because of membership or non-membership, real or supposed, of the deceased person to a particular ethnic group, nation, race or religion, the penalties are six months to three years and a fine of 251 euros to 37,500 euros or one of those penalties.

Incitement to violence

Article 454 (L. 28 November 2006)

Discrimination is an any distinction between individuals is due to their origin, the color of their skin, their gender, sexual orientation, marital status, their age, their health status, disability, their manners, their political or philosophical opinions, their union activities, membership or non-membership, real or supposed, to an ethnic group, nation, race or religion.

It also constitutes discrimination when any distinction is made between legal persons, groups or communities of people, because of origin, skin color, gender, sexual orientation, family situation, their age , the state of health, disability, morals, political opinions or philosophical beliefs, trade union activities, membership or non-membership, real or supposed, to an ethnic group, nation, race, or a religion, members or some members of those corporations, groups or communities.

(...)

Article 457-1 (L. 19 July 1997)

The following shall be punished with imprisonment from eight days to two years and a fine of 251 euros to 25,000 euros or one of those penalties:

(1) any person, whether through speeches, shouting or threats uttered in public places or public meetings or by written or printed matter, drawings, engravings, paintings, emblems, pictures or any other medium of writing, speech or image sold or distributed, sold or exhibited in public places or public meetings or by posters or posters displayed in public, or by any means of audiovisual communication, incites to acts specified in Article 455 to hatred or violence in respect of a person or entity, group or community based on one of the items referred to in Article 454;

(...)

(3) anyone who prints or causes to be printed, manufactures, possesses, transports, imports, exports, manufacture, import, export or transport, put into circulation on the territory of Luxembourg, was sent from the territory of Luxembourg, presents a post or another professional responsible for mail delivery on the territory of Luxembourg, transits through the territory of Luxembourg, writings, printed matter, drawings, engravings, paintings, posters, photographs, cinematograph films, emblems, pictures or any other medium of writing, of speech or image, of a nature to incite acts provided for in section 455, to hatred or violence in respect of a person or entity, group or community , based on one of the items referred to in Article 454.

Confiscation of items listed above will be imposed in all cases.

The Criminal Code of Luxembourg does not contain any general provisions that expressly enable the racist or other bias motives of the offender to be taken into account by the courts as an aggravating circumstance when sentencing.

## Bias as an Aggravating Factor in Specific Common Crimes

Bias motivations can be considered aggravating circumstances in cases of desecration.

Article 453 punishes attacks on the integrity of a corpse or desecration of a tomb, and article 457(2) provides enhanced sanctions for such offences if committed on racial grounds

### **COMMENTARIES:**

In its 2003 “Second Report on Luxembourg “, the European Commission against Racism and Intolerance (ECRI) recommended Luxembourg adopt a “criminal law provision that racist motivation constitutes an aggravating circumstance for any offence.” ECRI’s 2006 “Third Report on Luxembourg”, indicated that no specific provisions were adopted.

Nonetheless, the government of Luxembourg reported that “racist motivation of criminal offenses has been considered in 22 cases, but that in some of these, the proceedings have been discontinued.”

Below is from:

Council of Europe: European Commission Against Racism and Intolerance (ECRI), ECRI Report on Luxembourg (fourth monitoring cycle) : Adopted on 8 December 2011 , 21 February 2012, CRI(2012)4 <sup>527</sup>

The Luxembourg press council adopted a code of ethics in which it is stated that the press Undertook to avoid and combat any discrimination on grounds of gender, race, nationality, language, religion, ideology, ethnic origin, culture, class or beliefs, while ensuring respect for the fundamental rights of the human being.

Protocol no. 12 to the European Convention on Human Rights, on 21 March 2006-

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<sup>527</sup> available at: <http://www.refworld.org/docid/513dacc52.html> [accessed 24 April 2013] Disclaimer: This is not a UNHCR publication. UNHCR is not responsible for, nor does it necessarily endorse, its content. Any views expressed are solely those of the author or publisher and do not necessarily reflect those of UNHCR, the United Nations or its Member States.

which lays down a general prohibition on racial discrimination, entered into force in the Grand Duchy on 1 July 2006.

Luxembourg has not ratified the Convention on Cybercrime or its Additional Protocol concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems.

In its third report, ECRI again recommended that the Luxembourg authorities include in the Penal Code a provision enabling judges, when determining a sentence, to consider the racist motivation of an ordinary offence as an aggravating circumstance. ECRI also reiterated its recommendation that the Luxembourg authorities incorporate into the Penal Code provisions prohibiting the creation or leadership of a group promoting racism, and support for such groups or participation in their activities. However, the Luxembourg authorities reported that there is no provision in the Luxembourg Penal Code enabling judges, when determining a sentence, to consider the racist motivation of an ordinary offence as an aggravating circumstance except in cases of profanation of graves, burial places and corpses.

The Luxembourg Penal Code does not contain any provision prohibiting the creation or leadership of a group promoting racism, and support for such groups or participation in their activities either. In its third report, ECRI also recommended that the Luxembourg authorities ensure that racist acts are punished in accordance with the relevant provisions of the Penal Code. It recommended that they conduct information campaigns on these provisions and the relevant procedure for the benefit of victims of racist acts and the judiciary and police. ECRI also recommended that they ensure that when a complaint of

racism is lodged, the victim is informed of all the choices available and has the assistance of a lawyer.

Little case-law exists in Luxembourg on racist crime; -the Luxembourg authorities consider that this can be explained by the small size of the country and the small number of racist crime committed therein. However, ECRI stated that research should be done to ascertain the reasons for this lack of case-law on racist crime in Luxembourg. This is all the more important as the Centre for Equal Treatment (CET)<sup>7</sup> has informed ECRI that it received 10 complaints of racist acts in 2010 and 6 in 2011, indicating that racist acts are committed in Luxembourg. No information campaigns for the benefit of victims of racist acts and the judiciary and police on the relevant provisions of the Penal Code have been organised since its third report was published. There are few reception facilities for victims of racism to inform them about all the options available.

## **LV Latvia**

Criminal Code of Latvia Excerpts from the Criminal Code (with Amendments from 18 May 2000; 22 January 2004; 12 October 2006; 1 June 2000; 12 February 2004; 14 December 2006; 20 June 2001; 29 April 2004; 21 June 2007; 25 April 2002; 20 May 2004; 8 November 2007; 20 June 2002; 27 May 2004; 13 December 2007; 17 October 2002; 16 December 2004; 13 December 2007; 31 October 2002; 28 April 2005; 30 October 2008; 10 April 2003; 5 May 2005; 21 May 2009; 12 June 2003; 28 September 2005; 16 June 2009; 11 December 2003; 6 October 2005; 18 December 2003; 2 November 2005; 15 January 2004; 16 February 2006.)

### **Section 48. Aggravating Circumstances**

(1) The following may be considered to be aggravating circumstances:

- 1) the criminal offence was committed repeatedly or constitutes recidivism of criminal offences;
- 2) the criminal offence was committed while in a group of persons;

- 3) the criminal offence was committed, taking advantage in bad faith of an official position or the trust of another person;
  - 4) the criminal offence has caused serious consequences;
  - 5) the criminal offence was committed against a woman, knowing her to be pregnant;
  - 6) the criminal offence was committed against a person who has not attained fifteen years of age or against a person taking advantage of his or her helpless condition or of infirmity due to old-age;
  - 7) the criminal offence was committed against a person taking advantage of his or her official, financial or other dependence on the offender;
  - 8) the criminal offence was committed especially cruelly or with humiliation of the victim;
  - 9) the criminal offence was committed taking advantage of the circumstances of a public disaster;
  - 10) the criminal offence was committed employing weapons or explosives, or in some other generally dangerous way;
  - 11) the criminal offence was committed out of a desire to acquire property;
  - 12) the criminal offence was committed under the influence of alcohol, narcotic, psychotropic, toxic or other intoxicating substances;
  - 13) the person committing the criminal offence, for purposes of having his or her sentence reduced, has knowingly provided false information regarding a criminal offence committed by another person;
  - 14) the criminal offence was committed due to racist motives.
- (2) A court, taking into account the character of the criminal offence, may decide not to consider any of the circumstances mentioned in Paragraph one of this Section as

aggravating.

(3) In determining sentence, the court may not consider such circumstances as aggravating which are not set out in this Law.

(4) A circumstance which is provided for in this Law as a constituent element of a criminal offence shall not be considered an aggravating circumstance. [Amendments on 27 May 2004; 12 October 2006]

### **COMMENTARIES:**

Below is taken from Council of Europe: European Commission Against Racism and Intolerance (ECRI), ECRI Report on Latvia (fourth monitoring cycle) : Adopted on 9 December 2011 , 21 February 2012, CRI(2012)3<sup>528</sup>

Latvia has introduced in its Criminal Code a new provision criminalising the justification or public glorification or public denial of genocide, crimes against humanity, crimes against peace and war crimes and has included ethnicity as one of the grounds on which incitement to hatred is prohibited. The grounds on which discrimination is prohibited in certain laws have also been broadened. Associations and foundations whose mandate includes advocacy of human rights are now authorised under the law to represent individuals before court with their consent. A few activities have been organised on monitoring hate speech on the Internet. Much effort has been invested in training the police on non-discrimination and combating hate crime.

Incitement to racial hatred is the only form of racist speech prohibited under criminal

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<sup>528</sup> available at: <http://www.refworld.org/docid/513dad812.html> [accessed 24 April 2013] Disclaimer: This is not a UNHCR publication. UNHCR is not responsible for, nor does it necessarily endorse, its content. Any views expressed are solely those of the author or publisher and do not necessarily reflect those of UNHCR, the United Nations or its Member States.



law. There are no specific provisions in the Criminal Code punishing the production, distribution, acquisition, transportation or storage of items that incite hatred on ethnic, racial or similar grounds or the creation of/support/leadership of/participation in a group which promotes racism. There is a low number of investigations and prosecutions of racially motivated offences and the article of the Criminal Code on racist motivation as an aggravating circumstance of an offence has never been applied. Incitement to hatred is interpreted narrowly. Civil and administrative anti-discrimination legislation remains deficient.

The Ombudsman's budget has been drastically cut and this has greatly impacted on the effectiveness and outreach capacity of this institution. The number of complaints lodged on grounds of racial, linguistic and religious discrimination has significantly decreased.

It was recommended that the criminal law legislation aimed at combating racism should be amended and should punish: racist speech (other than incitement to hatred which is already a criminal offence); the production, distribution, acquisition, transportation or storage of items that incite hatred on ethnic, racial or similar grounds; and the creation of/support/leadership/participation in a group which promotes racism.

All attempts to commemorate persons who fought in the Waffen SS and collaborated with the Nazis, should be condemned. Any gathering or march legitimising in any way Nazism should be banned.

In its third report, ECRI encouraged Latvian authorities to review and amend criminal law provisions aimed at combating racism, in particular with respect to racially motivated speech.

On 21 May 2009 a new Article 74(1) criminalising the justification/public glorification/public denial of genocide, crimes against humanity, crimes against peace and war crimes was introduced in the Criminal Code. Breach of this article is sanctioned with community service or a prison term of up to five years. ECRI also welcomes the amendment of Article 78, effective as of 17 July 2007, which included ethnicity as a prohibited ground of discrimination.

However, no specific provisions dealing with racist speech other than incitement to racial hatred have been introduced in the Criminal Code since ECRI's third report. ECRI notes that, given the absence of such provisions, certain cases of racist speech are exempt from punishment, including cases in respect of which direct intent to instigate national, ethnic or racial hatred is difficult to prove.

ECRI further noted that there are no specific provisions punishing the production, distribution, acquisition, transportation or storage of items that incite hatred on ethnic, racial or similar grounds or that contain otherwise manifestations of racist speech

The Latvian authorities have stated that Article 78 of the Criminal Code encompasses all activities which aim to instigate hate, including the distribution, production, acquisition, transportation and storage of items. They considered that spelling out the prohibited activities would limit the scope of application of this Article. However, ECRI stated that the wording of Article 78 of the Criminal Code is insufficiently broad; it does not cover the distribution, production, acquisition, transportation and storage of items that contain manifestations of racist speech that go beyond instigating, with direct intent, national,

ethnic or racial hatred.

There are no provisions prohibiting public insults, defamation or threats on grounds such as “race” and ethnic origin or sanctioning public expression with a racist aim of an ideology which claims the superiority of/depreciates/denigrates a group of persons on grounds such as race, or national/ethnic origin.

Furthermore, under Article 78 activities carried out by organisations aimed at discriminating or inciting hatred are sanctioned more vigorously than if carried out by an individual, Latvian criminal legislation does not sanction the creation of/support/leadership of/participation in a group which promotes racism. Latvian authorities state that Article 89 sentence 1 prohibits, in general, the setting up of a criminal organisation. ECRI is, in general, of the opinion that due to the insidious nature of racist crime, a specific provision targeting racist organisations should be included in criminal law. The case for doing so is particularly strong in a country such as Latvia where many instances of racist speech (as well as the production, distribution, acquisition, transportation or storage of items that incite hatred on ethnic, racial or similar grounds) do not constitute criminal offences.

ECRI strongly recommended that Latvian police and judicial authorities fully investigate and prosecute racially motivated offenses by acknowledging and taking into account the racist motivation of an offence.

As regards the application of the provisions against racism and racial discrimination between 2007 and 2011, ECRI noted a marked decrease in the number of investigations opened for breach of Article 78 (incitement to hatred).

During the same timeframe, no investigations were opened for breach of Article 149 of the Criminal Code (prohibition to discriminate), whereas two investigations were opened

for breach of Article 150 of the Criminal Code (incitement to religious hatred). Five investigations were opened for breach of Article 74(1) of the Criminal Code, since its entry in to force. Finally, racist motivation has never been found to constitute an aggravating factor. ECRI notes that the figures are negligible; but also that racist motivation is not always taken into account and point to persisting low awareness and sensitivity towards these types of offences.

The lack of consolidated case-law on Article 78 and the narrow interpretation given to incitement to hatred, contributes to hindering its application. In one case, in the course of an antifascist meeting, a neo-Nazi had stated that Jews and Roma are not human beings and should be exterminated. He was initially sentenced to imprisonment for breach of Article 78, which, prior to 17 July 2007, prohibited incitement to hatred only on national and racial grounds. The Senate of the Supreme Court finding that the incriminated action constituted incitement to hatred on ethnic grounds acquitted the defendant.

In a second case, the editor-in-chief and two journalists of a fringe newspaper<sup>10</sup> were charged with breach of Article 78 for, inter alia, anti-Russian statements made in articles published in 2004 and 2005 (stating, inter alia, that “occupiers” should be deported). Three experts were called in order to verify whether these statements were apt to incite hatred.

Certain experts concluded that the word “occupier” could not offend intellectually and linguistically advanced persons. The regional court accordingly ruled that these statements were covered by freedom of speech and that direct intent to incite hatred could not be proved. The Senate of the Supreme Court maintained the ruling. Both judgements indicate that incitement to hatred is interpreted in a very narrow manner. More specifically, the second judgement shows that, for an action to qualify as incitement to hatred, very

high evidence requirements are imposed.

Furthermore, in ECRI's view, the calling of experts to qualify an act as incitement to hatred also hinders the application of Article 78. Some sources have highlighted that the criteria for the selection of external experts are insufficiently developed and that, in this connection, the expertise of well known extreme right-wing activists have been sought in certain cases.

ECRI noted that racist motivation as an aggravating circumstance has never been applied even when the existence of such motive was self-evident. One egregious example is a case brought under Article 22812 of the Criminal Code concerning the desecration of graves in an old Jewish cemetery and of tombs of Soviet army soldiers (in Talsi). In this case, racist motivation was not applied as an aggravating circumstance even though the defendants had stated that they had been motivated by nationalist sentiment.

With the exception of few violent hate crimes which were punished with prison sentences, sanctions ordered for breach of provisions against racism and racial discrimination remain too lenient, consisting in most cases in suspended prison sentences or fines.

## **MT Malta**

International crimes Statute of the ICC has been enacted under the subheading: Genocide, Crimes against Humanity and War Crimes.

Press Act 1974, Article 6 states that whosoever by means of the publication or distribution in Malta of printed matter, or by means of any broadcast shall threaten, insult, or expose to hatred, persecution or contempt, a person or group of persons because of their race, creed,

colour, nationality, sex, disability or national or ethnic origin shall be liable on conviction to imprisonment for a term not exceeding three months and to a fine.

#### Incitement to hatred / Dissemination of racist ideas

§82A(1): whosoever uses any threatening, abusive or insulting words or behaviour, or displays any written or printed material which is threatening, abusive or insulting, or otherwise conducts himself in such a manner, with intent thereby to stir up racial hatred or whereby racial hatred is likely, having regard to all the circumstances, to be stirred up shall, on conviction, be liable to imprisonment for a term from six to eighteen months. Racial hatred is defined in (2) as hatred against a group of persons in Malta defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins, Defined by reference to colour, race, nationality, ethnic, national origins.

Relevant international crimes include genocide, apartheid, slavery and persecution.

1. Includes (public) incitement to racial discrimination, violence or hatred; (public) dissemination of ideas based on racial superiority or hatred; (public) insults and threats.

#### **MT Malta**

Malta : In specific crimes, Racial and Religious are included as aggravated circumstances since 2006: Gender identity, sexual orientation (from 2012) and disability are also covered.

#### Bias as an Aggravating Factor in Specific Common Crimes

The Criminal Code contains provisions that enable racist or other bias motives to be taken into account as an aggravating circumstance in the commission of a wide range of

specifically defined violent criminal acts.

In August 2006, the Parliament of Malta approved Act No. XVI, which amended article 222A.<sup>529</sup> The amendment stipulated punishments for certain crimes, stating that the article 222A “shall be increased by one to two degrees when the offense is racially or religiously aggravated.” Under this amendment:

An offense is racially or religiously aggravated if:

- a) at the time of committing the offense, or immediately before or after the commission of the offense, the offender demonstrates towards the victim of the offense hostility based on the victim’s membership (or presumed membership) of a racial or religious group; or
- b) the offense is motivated, wholly or partly, by hostility towards members of a racial group based on their membership of that group.

The article defines “racial group” as “a group of persons defined by reference to race, color, nationality (including citizenship) or ethnic or national origins. A “religious group” is defined as “a group of persons defined by reference to religious belief or lack of religious belief.”

This penalty enhancement amendment applies to a wide range of offenses including bodily harm, trafficking of human beings, threats, blackmail, arson and destruction of property

## COMMENTARIES

Below is from: United States Department of State, 2011 Country Reports on Human Rights Practices - Malta, 24 May 2012<sup>530</sup>

The constitution and law provide for freedom of speech and of the press, and the

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<sup>529</sup> ActNo.XVIof2006, August 8, 2006, <http://www.doi.gov.mt/EN/parliamentacts/2006/ActXVI.pdf>.

<sup>530</sup> available at: <http://www.refworld.org/docid/4fc75a802d.html> [accessed 24 April 2013] Disclaimer: This is not a UNHCR publication. UNHCR is not responsible for, nor does it necessarily endorse, its content. Any views expressed are solely those of the author or publisher and do not necessarily reflect those of UNHCR, the United Nations or its Member States.

government generally respected these rights in practice. An independent press and a functioning democratic political system combined to ensure freedom of speech and of the press.

The law prohibits "vilification" of or "giving offense" to the Roman Catholic Apostolic Religion, the country's official church. Also illegal, but carrying a lesser punishment, is vilification of or giving offense to any "cult tolerated by law." It is a criminal offense to utter publicly any obscene or indecent words, make obscene acts or gestures, or in any other way offend public morality, propriety, or decency. From January to July, there were 119 convictions for public blasphemy, compared with 225 convictions for the same period in 2010.

The independent media were active and expressed a wide variety of views without restriction. International media operated freely, and there was no indication of reprisals against individuals for either public or private criticism of the government.

### **Internet Freedom**

There were no government restrictions on access to the Internet or reports that the government monitored e-mail or Internet chat rooms. Individuals and groups could engage in the expression of views via the Internet, including by e-mail.

### **Academic Freedom and Cultural Events**

There were no government restrictions on academic freedom.

The law restricts cultural activities that publicly vilify the Catholic Church and other religions tolerated by law.

In September the UN Committee on the Elimination of Racial Discrimination noted with concern the "discriminatory discourse and hate speech" of some Maltese politicians, as



well as the "racial discourse" in certain media outlets.

Below is from: Amnesty International, Amnesty International Report 2007 - Malta , 23 May 2007 <sup>531</sup>

Overt racism continued to increase. The non-governmental coalition, the European Network Against Racism (ENAR), noted that debate in the news media and on the Internet was increasingly hostile towards immigrants and that racist attacks and hate speech were on the rise.

Arson attacks targeted individuals or organizations that actively worked to protect the human rights of migrants and refugees or denounced racist and discriminatory attitudes and actions in Maltese society. Racist speech and attacks appeared to find increasing legitimacy within Maltese society.

## **NL The Netherlands**

While Holocaust denial is not explicitly illegal in [The Netherlands](#), the courts consider it a form of spreading hatred and therefore an offence. According to the Dutch public prosecution office, offensive remarks are only punishable by Dutch law if they equate to discrimination against a particular group. The relevant laws of the Dutch penal code are as follows:

### **Article 137c**

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<sup>531</sup> available at: <http://www.refworld.org/docid/46558ed62.html> [accessed 24 April 2013] Disclaimer: This is not a UNHCR publication. UNHCR is not responsible for, nor does it necessarily endorse, its content. Any views expressed are solely those of the author or publisher and do not necessarily reflect those of UNHCR, the United Nations or its Member States.

1. He who in public, either verbally or in writing or image, deliberately offends a group of people because of their race, their religion or beliefs, their hetero- or homosexual orientation or their physical, psychological or mental handicap, shall be punished with imprisonment not exceeding one year or a fine of the third category.

#### Article 137d

1. He who in public, either verbally or in writing or image, incites hatred or discrimination against people or incites acts of violence towards people or property of people because of their race, their religion or beliefs, their gender, their hetero- or homosexual orientation or their physical, psychological or mental handicap, shall be punished with imprisonment not exceeding one year or a fine of the third category.

In the Netherlands, the bifurcated approach of the European instruments is followed. There is a distinction between statutory bias crimes and bias-motivated crimes. The first category consists of specifically defined behaviour that is considered to involve bias without requiring any proof of the offender's bias motives. These are included in the penal code as offences in their own right. They include incitement to hate (S. 137d Dutch Penal Code (DPC)), distributing hate speech (S. 137e DPC), financing or participating in organisations that discriminate against particular target groups (S. 137f DPC), and the discrimination against target groups in the course of professional activities (S. 137g DPC). The most prevalent statutory bias crime is bias speech (S. 137c DPC).<sup>4</sup> Bias speech is defined as intentionally insulting a target group through speech, writings or symbols,

expressed in public. The relevant target groups are those defined by race, religion and faith, sexual preference, and physical or mental handicap. The main difference with common, non-bias penal insults is that negative qualities are attributed to an individual, not a target group: calling somebody a ‘stupid Turk’ would amount to common insult, which carries a maximum penalty of 6 months imprisonment, or a fine (S. 267 DPC). However, if it is clear from the context that the author suggested that the whole group of Turkish people is stupid, the offence can be classified as bias speech with a maximum penalty of 1 year.

The second category of bias crimes is bias-motivated crimes. These consist of any sort of common, already defined crime (e.g. assault, murder or vandalism) that is committed with a bias motive. Although the Recommendation and Framework Decision recommends that a bias motive be included in the penal code as an aggravating circumstance, the Dutch legislature has opted for taking measures to ensure that courts take account of the bias motive when determining the sentence .

## **COMMENTARIES:**

The Netherlands form part of the EU States to have few measures to combat Hate Crime, with no laws relating to hatred but only to discrimination. Previously, only Article 1 of the constitution provided for equal treatment before the law. A new Discrimination Directive entered into force on December 1, 2007 by the Board of Procurators-General establishing guidelines for the investigation, prosecution, and sentencing of violations of laws involving acts of discrimination, including cases in which common crimes are committed with a discriminatory motive. Under the directive, sentences are to be enhanced by 25 per cent

where there is hate motivation, although data is unavailable to show that this is being applied. Further, in response to reports of sharp increases in hate crimes on the grounds of homosexuality, the Board sought to focus the attention of prosecutors on this. Hence, the guidelines for prosecutions involving discrimination have been brought again to the attention of all prosecutors' offices. The Public Prosecutor's Office has initiated discussions with a local NGO to consider whether further training on this issue is required. FRA's report classified Netherlands as providing "comprehensive data", that is, "A range of bias motivations, types of crimes and characteristics of incidents are recorded" and "Data are always published".

Below is from:

UN Human Rights Council, Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21 : Netherlands, 12 March 2012, A/HRC/WG.6/13/NLD/<sup>532</sup>

The above reported that racism, xenophobia, intolerance against Muslims and anti-Semitism remained areas of concern. Persons belonging to the Roma and Sinti minorities are reported to experience prejudice and discriminatory attitudes in a number of fields, and there was a reported increase use of racial profiling within the police.

The Equal Treatment Commission and the National Ombudsman of the Netherlands recommended that the Netherlands firmly and publicly reject discriminating policy proposals by public institutions and tackle Islamophobia by countering misrepresentation of facts by politicians: the Islamic Human Rights Commission (IHRC) mentioned the video produced by a Dutch parliamentarian and his statements which were described as inflammatory and an evident incitement to hatred. It stated that there are numerous examples where political and public figures, including media made discriminatory speech

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<sup>532</sup> 3 available at: <http://www.refworld.org/docid/4fcc972e2.html> [accessed 24 April 2013] Comments: Contributions for the Summary of Stakeholder's information

against Muslims and had not been punished. There were similar concerns regarding radical statements affecting ethnic minorities.

The need for the Netherlands to raise awareness within the legal professions and police to recognize aggravated circumstances specific to hate crimes and discrimination on all levels of prosecution and criminal procedures was stated. The Commissioner was concerned about the lack of official statistics on common criminal offences with a discriminatory motive despite the legal obligation to register these offences. Furthermore, very few cases of racially-motivated offences had been brought to courts. Despite the low number of complaints related to sexual orientation or gender identity received by anti-discrimination bodies, CoE-Commissioner stated that the number of LGBT persons being insulted, discriminated against or physically assaulted is reportedly growing.

Below is from:

United States Department of State, 2007 Country Reports on Human Rights Practices - Netherlands, The, 11 March 2008.<sup>533</sup>

### **Freedom of Speech and Press**

The law provides for freedom of speech and of the press, and the government generally respected these rights in practice. An independent press, an effective judiciary, and a functioning democratic political system combined to ensure freedom of speech and of the press.

It is a crime to engage in public speech that incites hatred, discrimination, or violence against persons because of their race, religion, convictions, gender, sexual orientation, or

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<sup>533</sup> available at: <http://www.refworld.org/docid/47d92c47c.html> [accessed 24 April 2013]

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handicap, and the government prosecuted several cases during the year. The prosecutor's office reviewed 46 cases on these grounds in 2006. The government urged prosecutors and police to give proper attention to incidents of discrimination.

### **Internet Freedom**

There were no government restrictions on access to the Internet. Individuals and groups could engage in the peaceful expression of views via the Internet, including by email. Over 85 percent of the population had access to the Internet. During the year authorities took measures to deal more effectively with incitement to discrimination on the Internet.

Intensified efforts by the National Discrimination Expertise Center (LECD) resulted in the arrest and conviction of 11 administrators of or participants in right-wing extremist sites for discrimination or incitement to hatred, and more arrests were expected.

### **PL Poland**

In addition to Holocaust denial, the denial of communist crimes is punishable by law in Poland.

Act of 18 December 1998 on the Institute of National Remembrance - Commission for the Prosecution of Crimes against the Polish Nation ([Dz.U.](#) 1998 nr 155 poz. 1016)

#### **Article 55**

He who publicly and contrary to facts contradicts the crimes mentioned in Article 1, clause 1 shall be subject to a fine or a penalty of deprivation of liberty of up to three years. The judgment shall be made publicly known.

#### **Article 1**

This Act shall govern:

1. the registration, collection, access, management and use of the documents of the organs of state security created and collected between 22 July 1944 and 31 December 1989, and the documents of the organs of security of the Third Reich and the Union of Soviet Socialist Republics concerning:

a) crimes perpetrated against persons of Polish nationality and Polish citizens of other ethnicity, nationalities in the period between 1 September 1939 and 31 December 1989:

- Nazi crimes,
- communist crimes,
- other crimes constituting crimes against peace, crimes against humanity or war crimes

b) other politically motivated repressive measures committed by functionaries of Polish prosecution bodies or the judiciary or persons acting upon their orders, and disclosed in the content of the rulings given pursuant to the Act of 23 February 1991 on the Acknowledgement as Null and Void Decisions Delivered on Persons Repressed for Activities for the Benefit of the Independent Polish State (Journal of Laws of 1993 No. 34, item 149, of 1995 No. 36, item 159, No. 28, item 143, and of 1998 No. 97, item 604),

2. the rules of procedure as regards the prosecution of crimes specified in point 1 letter a),

3. the protection of the personal data of grieved parties, and

4. the conduct of activities as regards public education.

## PL Poland

Criminal Code of the Republic of Poland Criminal Code of the Republic of Poland  
Excerpts from Criminal Code, Act of 6 June 1997 (Based on OJ 1997, No. 88, pos. 553,  
No.

128, pos. 840, 1999, No. 64, item. 729, No.83, pos. 931, 2000 No. 48, item. 548, No. 93,  
pos. 1027, No. 116, pos. 1216, 2001 No. 98, item. 1071, 2003, No. 111, item. 1061, No. 121,  
item. 1142, No. 179, item. 1750, No. 199, item. 1935, No. 228, item. 2255, 2004, No. 25,  
pos. 219, No. 69, item. 626, No. 93, item. 889, No. 243, pos. 2426, from 2005 No. 86, pos.  
732, No. 90, item. 757, No. 132, item. 1109th)

Human rights watch:

Poland's Criminal Code does not contain any general penalty enhancement provisions for crimes committed with bias motivations as an aggravating circumstance. In its Third Report, released in June 2005, the European Commission against racism and Intolerance (ECRI) strongly encouraged the Polish authorities to enact such legislation.<sup>534</sup>

### Bias-motivated Violent Crime as a Specific Offense

In Chapter 16 of the Criminal Code on "Offenses against peace, humanity, and war crimes," two articles of the Criminal Code treat bias-motivated violence as a separate offense.

Article 118(S1). Whoever, acting with an intent to destroy in full or in part, any ethnic, racial, political or religious group, or a group with a different perspective on life, commits homicide or causes a serious detriment to the health of a person belonging to such a group, shall be subject to the penalty of deprivation of liberty for a minimum term of 12 years, the penalty of deprivation of liberty for 25 years or the penalty of deprivation of liberty for life.

(S 2) The same punishment shall be imposed on anyone, who incites commission of the

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<sup>534</sup> European Commission against Racism and Intolerance, "Third Report on Poland," CRI(2005)25, December 17, 2004, [http://hudoc.ecri.coe.int/XMLEcri/ENGLISH/Cycle\\_03/03\\_CbC\\_eng/POL-CbC-III-2005-25-ENG.pdf](http://hudoc.ecri.coe.int/XMLEcri/ENGLISH/Cycle_03/03_CbC_eng/POL-CbC-III-2005-25-ENG.pdf).



offence specified under § 1.

Article 119(1). Whoever uses violence or makes unlawful threats toward a group of persons or a particular individual because of their national, ethnic, political, or religious affiliation, or because of their lack of religious beliefs, shall be subject to the penalty of the deprivation of liberty for a term of between 3 months and 5 years.<sup>535</sup>

Article 119.S 1.

Whoever uses violence or makes unlawful threat towards a group of persons or towards an individual, because of their national, ethnic, political or religious affiliation, or because of their lack of religious denomination, shall be subject to the penalty of deprivation of liberty for a term of between 3 months and 5 years.

According to ECRI's Third Report, crimes committed in breach of these articles are rarely prosecuted. "[S]ome 28 to 30 cases have been brought under articles 118, 119, 256 and 257."<sup>536</sup> According to the Ministry of Justice, in 2003, four cases were brought to court under article 119(1) (use of violence or threats) of the Criminal Code and one under 119(2) (incitement to violence or threats). All four cases resulted in convictions and imprisonment for the accused."<sup>537</sup>

## COMMENTARIES:

Below is from: Australia: Refugee Review Tribunal, Poland: 15 March 2011, POL38332

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<sup>535</sup> Criminal Code of Poland, Lexadin: The World Law Guide, [http://www.era.int/domains/corpus-juris/public\\_pdf/polish\\_penal\\_code2.pdf](http://www.era.int/domains/corpus-juris/public_pdf/polish_penal_code2.pdf).

<sup>536</sup> Articles 256 and 257 of the Criminal Code respectively punish incitement to racial hatred and the public insult of a group or a person on the basis of their national, ethnic, racial or religious origin.

<sup>537</sup> European Commission against Racism and Intolerance, "Third Report on Poland," CRI(2005)25, December 17, 2004, [http://hudoc.ecri.coe.int/XMLEcri/ENGLISH/Cycle\\_03/03\\_CbC\\_eng/POL-CbC-III-2005-25-ENG.pdf](http://hudoc.ecri.coe.int/XMLEcri/ENGLISH/Cycle_03/03_CbC_eng/POL-CbC-III-2005-25-ENG.pdf)

The Review Tribunal stated that several groups of private actors in Poland are hostile toward gay men. Acts of violence and harassment are usually perpetrated by extremist, right wing nationalist groups. The Warsaw Equality Parade in June 2010, was given as an example, where 30 members of the All Polands Youth and National Radical Camp staged a counterdemonstration in opposition to homosexuality,

The Catholic Church in Poland maintains a restrictive attitude towards homosexuality. Homosexuality is described as a “moral disorder,” and homosexual activities are condemned as contradictory to the procreative purpose of sex. In the Church’s opinion, sexual relations are morally right only in marriage. The Church also maintains that there are many ways to restrain a person from fulfilling his or her unnatural sexual desire. In addition to extremist groups a large part of the hostile treatment of gay men in Poland is the result of the stance taken by the Catholic Church. Poland is one of the “most Catholic” countries in Europe.<sup>539</sup>

In May 2009, the NGO Campaign Against Homophobia reported that the level of hate speech against homosexuals was still high. It called for revisions to the antidiscrimination law to include sexual orientation among the categories of punishable offences.

Below is from: Immigration and Refugee Board of Canada, Poland: Situation of Roma and state protection (January 2005 - February 2006), 7 February 2006, POL100814.E<sup>540</sup>

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<sup>538</sup> available at: <http://www.refworld.org/docid/4e2eb45d2.html> [accessed 24 April 2013] Disclaimer

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<sup>539</sup> Ireland, D. 2010, Warsaw’s Black Gay Winner”, Gay City News, 8 December

[http://www.gaycitynews.com/articles/2010/12/08/gay\\_city\\_news/news/doc4cfffdf4eaba6290373378.txt](http://www.gaycitynews.com/articles/2010/12/08/gay_city_news/news/doc4cfffdf4eaba6290373378.txt) – Accessed 8 March 2013.

<sup>540</sup> available at: <http://www.refworld.org/docid/45f1479834.html> [accessed 24 April 2013] Disclaimer: This is not a UNHCR publication. UNHCR is not responsible for, nor does it necessarily endorse, its content. Any views expressed are solely those of the author or publisher and do not necessarily reflect those of UNHCR, the United Nations or its Member States.

Several sources noted widespread societal racism against Roma in Poland. Societal discrimination against Roma, was widespread, and Country Reports 2004 noted cases of racially motivated violence perpetrated by skinheads against members of the Romani community.. According to a poll conducted by the Public Opinion Research Centre (CBOS) at the end of 2004, 56 per cent of surveyed Poles held negative views of Roma, the highest percentage of any ethnic group (Polityka 30 Apr. 2005).

## **PT Portugal**

Although denial of the Holocaust is not expressly illegal in Portugal, Portuguese law prohibits denial of war crimes if used to incite to discrimination.

Article 240: Racial, religious, or sexual discrimination

[...]

2 — Whoever in a public meeting, in writing intended for dissemination, or by any means of mass media or computer system whose purpose is to disseminate:

[...]

b) defames or slanders an individual or group of individuals because of race, colour, ethnic or national origin, or religion, particularly through the denial of war crimes or those against peace and humanity;

[...]

with intent to incite to racial, religious or sexual discrimination or to encourage it, shall be punished with imprisonment from six months to five years.

## **PT Portugal**

The Criminal Code of Portugal does not contain any general penalty enhancement provisions for crimes committed with bias motivations as an aggravating circumstance. Article 71(2)(c) is a general sentencing provision that allows for the aims and motivations of the offender to be considered in sentencing, although there is no explicit reference to racist or other bias motives.

### **Bias as an Aggravating Factor in Specific Common Crimes**

Articles of the Criminal Code relating to homicide, severe assault, and assault deal with bias motivations. Part 2(e) of Article 132 of the Criminal Code (aggravated homicide) stipulates that motives of racial, religious or political hatred are regarded as aggravating circumstances resulting in a heavier penalty.<sup>541</sup> As a result of amendments to the criminal code in September 2007, bias based on sexual orientation is now similarly considered an aggravating factor in those same crimes.<sup>542</sup> Whereas homicide is punishable by imprisonment for a period of between 8 to 16 years, aggravated homicide is punishable by imprisonment for a period of between 12 to 25 years.

Similarly, Article 146(2) makes reference to the same aggravating circumstances that can be applied to enhance the penalties in cases of assault (Article 143) and severe assault (Article 144). Whereas simple assault is punishable by fine or up to three years in prison, aggravated simple assault can be punished by up to four years in prison. Whereas severe assault is punishable by up to ten years in prison, aggravated severe assault can be punished

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<sup>541</sup> OSCE/ODIHR, "Portugal: Hate Crimes," Legislationline, available at: <http://www.legislationline.org/?tid=218&jid=38&less=false>; see also Criminal Code of Portugal, available at: <http://www.unifr.ch/derechopenal/legislacion/pt/CPPortugal.pdf>.

<sup>542</sup> FRA, "Thematic Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation (Portugal)," February 2008, [http://fra.europa.eu/fra/material/pub/comparativestudy/FRA-hdgso-NR\\_PT.pdf](http://fra.europa.eu/fra/material/pub/comparativestudy/FRA-hdgso-NR_PT.pdf).

by 3-12 years in prison.

Legislation.

Criminal Code of the Portuguese Republic Excerpts from Criminal Code (Law No. 59/2007 on 4 September 2007, Twenty-third amendment to the Penal Code, approved Decree-Law No. 400/82 of 23 September 2007)

Aggravating circumstances: Murder

Article 132 Qualified murder

1. When death is produced under circumstances that reveal a special censurability or perversity, the agent shall be punished with imprisonment from 12 to 25 years.
2. The following circumstances reveal the special censurability or perversity that is referred to in the previous paragraph, namely, the fact that the agent:

(...)

(f) is determined by racial, religious or political hatred or colour, ethnic or national origin, motivated hatred or is motivated by the sex or the sexual orientation of the victim;

(...)

Article 146 Assault qualified

1. If the offenses provided for in Articles 143, 144 or 145 (SIMPLE ASSUALT, SERIOUS ASSAULT OR ASSAULT RESULTING IN DEATH] are produced in circumstances that present a special agent's reprehensibility or perversity, this is punishable with the penalty for the their crime increased by one third in its minimum and maximum.
2. The circumstances described in paragraph 2 of Article 132 are likely to reveal the special agent's reprehensibility or perversity, among others.

## COMMENTARIES:

In its Third Report on Portugal (2007), the European Commission against Racism and Intolerance (ECRI) notes that provisions in Article 132(2)(e) and 142(2) have been used infrequently, explaining that this is partly due to the fact that “the police tend not to give sufficient emphasis to the racist nature of offences, in some cases because the victims themselves fail to draw their attention to it. There is also a view that the police sometimes refuse to consider the racist aspect of an offence even when the victim or witnesses insist that it was racially motivated. Prosecutors, for their part, are said to be insufficiently aware of the potentially racist aspect of certain offences and so fail to target their investigations accordingly.”<sup>543</sup>

Below is from UN Committee on the Elimination of Racial Discrimination (CERD), Reports submitted by States parties under article 9 of the Convention : International Convention on the Elimination of All Forms of Racial Discrimination : 12th to 14th periodic reports of States parties due in 2009 : Portugal, 13 September 2011, CERD/C/PRT/12-14, available at: <http://www.refworld.org/docid/50619f132.html> [accessed 25 April 2013]

An important change is the new wording of article 240 of the Criminal Code,<sup>544</sup> whereby the offence of discrimination now covers discrimination on grounds of gender and sexual orientation. Another important change is that article 246 of the Criminal Code now provides that a person convicted for discrimination (article 240) may be temporarily deprived of his/her active and/or passive electoral capacity.

Article 71 of the Criminal Code, concerns how to determine the measure of the penalty: this determination is made, within legally defined limits, on the basis of the offender’s guilt

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<sup>543</sup> ECRI, “Third Report on Portugal,” 30 June 2006 made public on 13 February 2007, para. 12.

<sup>544</sup> Introduced by Law No. 59/2007 of 4 September 2007.

and of prevention needs. According Article 71 (2) of the Criminal Code, when determining the extent of the penalty, the Court should take account of the circumstances that, though not part of the offence, may be favourable or unfavourable to the offender's status, namely feelings expressed when committing the offence, as well as the aims or the motivation having determined the offence. The judicial decision must clearly mention the reasons behind the extent of the penalty imposed. This approach is similar to that of a general aggravating circumstance in the case of a racist offence, to the sense that the racist purpose shall be taken into account by the judge in the case of offences such as defamation, when handing down the sentence or aggravating the sanction.

In addition to the Law on the extinction of fascist organizations and the prohibition of racist organizations by article 46 (4) of the Constitution, a constant work is carried out to discourage racism, racial discrimination and racist organizations. This work also takes place

in the field of Justice as regards court decisions, in particular those mentioned in the Portuguese reports to CERD.

Immigrant associations may become "assistants" (private prosecutors) in penal proceedings involving criminal liability for racist acts. Article 5 of Law 18/2004 grants these associations a special status, as they are able to act on behalf and support of the victims. Although not only addressed to racism but also to other grave forms of discrimination, changes introduced in the wording of article 240 of the Criminal Code by Law No. 59/2007 of 4 September 2007 have widened the scope of discrimination offences to include, in particular, sexual discrimination understood as discrimination on grounds of gender or of sexual orientation.

Below is from: United States Department of State, 2008 Country Reports on Human Rights Practices - Portugal, 25 February 2009, available at: <http://www.refworld.org/docid/49a8f160c.html> [accessed 25 April 201

On October 3, 2008, a Lisbon court convicted 31 of 36 defendants of racism and crimes of a racist nature. The court sentenced six defendants to prison terms of up to seven years; the others received suspended prison sentences, were charged fines, or were ordered to provide community service. The defendants had been active in the right-wing Hammerskin Nation organization. Charges against them included threats, harassment, physical attacks, kidnapping, illegal possession of weapons, and incitement to crime through the circulation of racist, xenophobic, and anti-Semitic messages. This was the first time that the country's courts handed down mandatory prison sentences for hate crimes.

#### Other Societal Abuses and Discrimination

There were no reports of societal violence or discrimination based on sexual orientation.

There were no reports of societal violence or discrimination against persons with HIV/AIDS.

#### **RO Romania**

In Romania, Emergency Ordinance No. 31 of March 13, 2002 prohibits Holocaust denial.

It was ratified on May 6, 2006. The law also prohibits racist, fascist, xenophobic symbols, uniforms and gestures: proliferation of which is punishable with imprisonment from between six months to five years.

Emergency Ordinance No. 31 of March 13, 2002



[...]

Article 3. – (1) Establishing a fascist, racist or xenophobic organisation is punishable by imprisonment from 5 to 15 years and the loss of certain rights.

[...]

Article 4. – (1) The dissemination, sale or manufacture of symbols either fascist, racist or xenophobic, and possession of such symbols is punished with imprisonment from 6 months to 5 years and the loss of certain rights.

[...]

Article 5. – Promoting the culture of persons guilty of committing a crime against peace and humanity or promoting fascist, racist or xenophobic ideology, through propaganda, committed by any means, in public, is punishable by imprisonment from 6 months to 5 years and the loss of certain rights.

Article 6. – Denial of the Holocaust in public, or to the effects thereof is punishable by imprisonment from 6 months to 5 years and the loss of certain rights.

## **RO Romania**

Criminal code of Romania Excerpts from Law no. 286.2009 of the Criminal Code, 24 July 2009

Aggravating circumstances Art 77 [Aggravating circumstances include:]

(h) commission of a crime by reason of race, nationality, ethnicity, language, religion, sex, sexual orientation, opinion, political belonging, convictions, wealth, social origin, age, disability, chronic diseases or HIV/AIDS.

Below is from: Amnesty International, Amnesty International Report 2008 - Romania, 28

May 2008, available at: <http://www.refworld.org/docid/483e27ab3a.html> [accessed 25 April 2013]<sup>545</sup>

On 1 January, 2007, Romania became a member state of the EU. In its progress report in June, the European Commission urged Romania to implement a more transparent and efficient judicial process. Hate speech and intolerance by the media and some public authorities continued. In May, 2007, President Traian Băsescu reportedly called a journalist a "dirty gypsy", but later apologized. The National Council for Combating Discrimination called for the President to explain himself.

### **LGBT people face widespread discrimination and hostility.**

In June 2007, at Bucharest GayFest parade, around 500 LGBT rights activists marched through the capital to demonstrate against discrimination and to call for the legalization of same-sex marriages. The march was opposed by the Orthodox Church and some politicians. Romanian riot police detained dozens of counter-demonstrators who tried to break up the march. Police fired tear gas to hold the counter-demonstrators at bay after some threw stones and attempted to break through protective cordons.

In July, 2007, the European Court of Human Rights issued its judgment in the case of Belmondo Cobzaru, a Romani man beaten in custody by police officers in Mangalia in 1997. The Court ruled that Romania was in breach of the prohibition of inhuman and degrading treatment, the right to an effective remedy, and the prohibition of discrimination.

Below is from: UN Human Rights Council, Compilation : [Universal Periodic Review] : Romania / prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, 9 November 2012, A/HRC/WG.6/15/ROU/2, available at: <http://www> (Compiles information contained in reports of treaty bodies, special procedures.)

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CERD was concerned about the excessive use of force, ill-treatment and abuse of authority by police and law enforcement officers against minority groups, particularly Roma. It encouraged Romania to enforce existing measures to combat excessive use of force, ill-treatment and abuse of authority by police against minority members; facilitate victims' access to remedies, guarantee the processing of complaints and ensure that such behaviour is prosecuted and punished by the judicial authorities.<sup>546</sup>

The Special Rapporteur on the independence of judges and lawyers took note of information indicating serious challenges in access to justice by victims of human trafficking, as well as persons of Roma origin.<sup>547</sup> CERD noted with concern that national minorities, particularly the Roma, were not always granted an opportunity to communicate in their own language at all stages of legal proceedings.<sup>548</sup> CERD was concerned that negative perceptions of minorities, particularly Roma, persisted among the general public. It was concerned at reports of racial stereotyping and hate speech against minorities, particularly Roma, by certain publications, media outlets, political parties and politicians. It recommended that Romania punish such publications, media outlets, political parties and politicians and promote tolerance among ethnic groups.<sup>549</sup>

CERD was concerned about the use of racial profiling by police officers and judicial officials.<sup>550</sup> CERD recommended that Romania foster an awareness of tolerance, interracial or inter-ethnic understanding and intercultural relations among law enforcement officials,

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<sup>546</sup> CERD/C/ROU/CO/16-19, para. 15.

<sup>547</sup> A/HRC/20/19/Add.1, para. 67.

<sup>548</sup> CERD/C/ROU/CO/16-19, para. 19.

<sup>549</sup> CERD/C/ROU/CO/16-19,., paras. 16 - 20.

<sup>550</sup> Ibid., para. 15.

lawyers and teachers and continue public education and awareness-raising initiatives on multicultural diversity, harmony and tolerance of minorities, particularly Roma.<sup>551</sup>

## **SE Sweden**

Sweden: Criminal Code of Sweden Excerpts from Criminal Code (1962, amended 2003)

Chapter 29 Section 2 (7) (excerpts)

In assessing penal value and circumstances tending to aggravate the offence, in addition to the provisions prescribed for each individual type of offence, special consideration shall be given to whether:

7. a motive of the offence was to insult a person, an ethnic group or another such group of people by reason of their race, skin colour, national or ethnic origin, creed, sexual orientation or other similar circumstance, Law (2003:408)

Human Rights First:

The Criminal Code of Sweden expressly enables the racist or other bias motives of the offender to be taken into account by the courts as an aggravating circumstance when sentencing. Section 2(7) of chapter 29 of the Criminal Code provides for the racist motives of offenders to be taken into account as an aggravating circumstance when sentencing and is applicable to all crimes.

The aggravating circumstance provisions apply when “a motive for the crime was to aggrieve a person, ethnic group or some other similar group of people by reason of race, color, national or ethnic origin, religious belief or other similar circumstance.” As of

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<sup>551</sup> Ibid., para. 20.

January 1, 2003, these provisions have been amended to include bias due to sexual orientation.<sup>552</sup>

However, according to the Office of the Ombudsman against Discrimination on grounds of sexual orientation, when judges use this provision in practice, they are under no obligation to state it in the sentence. This makes it problematic to track the use of this provision and to carry out any comparative studies throughout the Swedish national jurisdiction on the application of this provision.<sup>553</sup>

The Office of the Ombudsman against Discrimination on the grounds of sexual orientation has engaged in monitoring of cases in which enhanced penalties have been handed down on the basis of chapter 29, section 2(7) for crimes committed with a homophobic motive. The office posts examples on its web site of such cases when it comes across relevant judgements through its own research or when a court sends them a copy of the judgment. All courts are obliged to send the ombudsman all judgements in which a bias motive has been considered or applied as an aggravating circumstance. In practice however, courts rarely follow through on this obligation.<sup>554</sup>

## COMMENTARIES

Below is from: United States Department of State, 2011 Report on International Religious Freedom - Sweden, 30 July 2012,<sup>555</sup>

Hate speech laws prohibit threats or expressions of contempt for persons based on several factors, including religious belief. The Stockholm County police has a hate crime unit

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<sup>552</sup> OSCE/ODIHR, “Sweden: Hate Crimes,” Legislationline, <http://www.legislationline.org/?tid=218&jid=48&less=false>. Date: 1 July 2003 (into force)

<sup>553</sup> Information provided by The Office of the Ombudsman against Discrimination on grounds of sexual orientation to Human Rights First, December 18, 2007.

<sup>554</sup> Information provided by The Office of the Ombudsman against Discrimination on grounds of sexual orientation to Human Rights First, February 5, 2008.

<sup>555</sup> available at: <http://www.refworld.org/docid/502105818.html> [accessed 25 April 2013]

that trains police officers to detect, raise awareness of, and inform the public of hate crimes. A hate crime unit also exists in Malmo. Several local police authorities provide training and carry out projects aimed at detecting hate crimes when complaints are filed. Detecting and investigating hate crimes is included in the police academy training curriculum. Representatives from the hate crime unit visit high schools to raise awareness of hate crimes and how to report them, and, by their presence, encourage more victims to report abuse. Information for victims of hate crimes is available in several languages, and interpreters are provided to facilitate reporting. However, the unit noted that many victims chose not to report incidents due to privacy concerns.

The government is a member of the Task Force for International Cooperation on Holocaust Education, Remembrance, and Research. There were no reports of abuses of religious freedom.

In December 2011 the Swedish government launched the commemoration of the 100th anniversary of Raoul Wallenberg's birth. The government created an organizing committee earlier in the year and has used the anniversary events to fight religious intolerance and anti-Semitism by teaching the lessons of the Holocaust. The main agencies involved are the Swedish Institute, which is handling the work abroad, and the Living History Forum, which is handling the work in Sweden. A range of other national and international actors are also involved in the project and are offering a varied selection of activities.

In March 2011 the government tasked the Living History Forum to study anti-Semitic and anti-Islamic attitudes in the country and to summarize knowledge of Jewish and Muslim groups' vulnerability to these attitudes in order to identify methods to counteract anti-Islamic sentiment and anti-Semitism. The study, presented in August, found that racist

and xenophobic views were increasingly propagated over the Internet, that Jews and Muslims faced discrimination for outwardly professing their faith, and that conspiracy theories targeted Jews for alleged attempts at global, political, and financial domination.

There were some reports of societal abuses and discrimination based on religious affiliation, belief, or practice; however, prominent societal leaders took positive steps to promote religious freedom, and individuals were generally tolerant of diverse religious practices. Law enforcement authorities maintained statistics on hate crimes. Some Muslims expressed anti-Semitic views.

The Jewish communities in Stockholm and Malmo reported that many of the anti-Semitic hate crimes were perpetrated by two groups: youth of Middle Eastern origin and white supremacy groups. The National Council for Crime Prevention (NCCP) reported that most anti-Islamic hate crimes were harassment and discrimination in the labor market against veiled women.

Visiting Holocaust sites such as Auschwitz was a common educational tool in the Swedish school system. Students, regardless of their religious background, participated in these field trips. The Living History Forum estimated that 10 percent of all Swedish primary and secondary school students visit a Holocaust site as part of their education.

According to the Jewish community in Malmo, Jews have left the city due mainly to cultural and economic reasons, but possibly also anti-Semitism. They usually search for more active Jewish communities in Stockholm and abroad, including Israel.

The Swedish Civil Contingencies Agency cooperated with religious communities on a national level to promote dialogue and to prevent conflicts leading to anti-Islamic and anti-Semitic incidents.

In June the NCCP presented its annual study on hate crimes in 2010, including anti-Semitic, anti-Islamic, and other religion-related hate crimes. Nationwide, there was a decrease in anti-Semitic hate crimes, but an increase of 40 percent in anti-Islamic hate crimes. In 2010 there were 552 reports of hate crimes involving religion, of which 161 were anti-Semitic crimes (29 percent of religion-related hate crimes), down from 250 in 2009, and 272 were anti-Islamic crimes (49 percent of religion-related hate crimes), up from 159 in 2009. Of the hate crimes involving religion in 2010, 20 percent reportedly had a white supremacist motive, an increase of five percent from 2009. The police hate crime task force believed that incidents in the Middle East conflict, police resources, or fluctuations in the willingness to report could all be factors that influenced the statistical outcome.

The NCCP's report stated that crimes against persons and damage of property/graffiti were the most common offenses related to religion. The most frequent anti-Semitic and anti-Muslim crimes were crimes against persons, with 98 and 148 reported incidents in 2010, respectively; the second-most common crimes were agitation against an ethnic group, 34 and 80, respectively. According to the report, 19 percent of anti-Semitic crimes were ideologically motivated. Religious hate crimes more frequently occurred in religious locations or at an individual's home. The victim rarely knew the perpetrator, and the majority of both suspects and victims were men. By March 2011, police had investigated 50 percent of the hate crimes involving religion reported during 2009. A small part of these continued to be under investigation, while police dropped 44 percent of them for lack of evidence or failure to meet the standards of a hate crime. The reason given for the high



figure of unresolved crimes is that religious hate crimes often consisted of damage to property, e.g., graffiti, where there seldom were any leads for police to follow.

Although nationwide hate crime statistics for the year were not available, police from Skane, the region in southern Sweden where much of the anti-Semitic and anti-Islamic incidents occurred, reported an increase in anti-Semitic hate crimes for the year and a decrease of anti-Islamic hate crimes. Malmo police registered 67 anti-Semitic hate crimes for the year. The equivalent figures for 2010 were 34, and for 2009, 80. Anti-Islamic incidents decreased from 40 crimes in 2010 to 34 in 2011. The figure for 2009 was seven. Malmo police believed the fluctuations could be related to more police resources allocated to work on hate crimes, a rising tendency to report these types of crimes to the police, or an overall rise in hate crimes with anti-Semitic connections during the year. Anti-Semitic incidents included threats, verbal abuse, vandalism, graffiti, and harassment. Anti-Semitic and anti-Islamic statements in blogs and Internet fora also occurred. These incidents were often associated with events in and actions of Israel, and Swedish Jews were at times blamed for policies of the Israeli government. The government has taken the increase in anti-Semitic incidents in the southern part of the country very seriously.

The NCCP reported it did not see a rising trend in anti-Semitic or anti-Islamic hate crimes, but rather that these types of crimes increased in some years and decreased in other years without representing a broader trend in either direction. Swedish academic experts also claimed that reports of increased anti-Semitism in Malmo were not connected to religion but to ethnic conflicts and political tensions that stemmed from the Middle East conflict and xenophobic youths that have targeted Jewish symbols.

In August a man from Smaland was fined for making Nazi salutes and shouting "Heil Hitler." The 37-year-old man, who was under the influence of alcohol, admitted he made the gestures. He was found guilty of a hate crime and fined SEK 2,400 (\$340). In July a 16-year-old boy from Vastra Frolunda in southwest Sweden was found guilty of making Nazi gestures in a McDonald's restaurant in early April. He admitted to the hate crime charges and was sentenced to pay a fine. In April two Muslim men won a discrimination case against Western Union. The financial service company had refused to assist the two after confusing their Muslim names with names on international sanctions lists. The District Court sentenced Western Union for discrimination and the men received 10,000 SEK (\$1,400) and 5,000 SEK (\$700) in compensation.

In December 2010 the Simon Wiesenthal Centre issued a travel warning for Jews traveling in southern Sweden based on its assessment that Jews in Malmo were "subject to anti-Semitic taunts and harassment." It also cited "the outrageous remarks of Malmo Mayor Ilmar Reepalu, who blamed the Jewish community for failing to denounce Israel." The Jewish congregations in Stockholm and Malmo reported they did not agree with the travel warning. In March the Simon Wiesenthal Centre met with the local government and police in Malmo to discuss the situation but there was no significant result by year's end.

In July 2010 a small early morning explosion blackened the entrance to a synagogue in Malmo and broke three windows. According to media reports, a note with a bomb threat had been put on the synagogue door the day before. However, in 2011 the police investigation concluded that the explosion was not connected to the bomb threat reported by the media. The police bomb technicians found traces of firework-wrappers and classified the case as damage of property; no arrests were made due to lack of evidence. In

July 2010, according to media reports, a rabbi was walking home from Stockholm's central train station when four young men of apparent Middle Eastern descent yelled "you will die Israeli, killer – you will be beaten." The four men ran towards the rabbi, who escaped by jumping into a nearby taxi. Police made no arrests due to lack of evidence and closed the case during the year.

Below is from International Helsinki Federation for Human Rights (IHF), International Helsinki Federation Annual Report on Human Rights Violations (2004): Sweden, 23 June 2004.<sup>556</sup>

### **Intolerance, Xenophobia, Racial Discrimination and Hate Speech**

In the above report it was stated that Sweden had ratified the International Convention on the Elimination of all forms of Racial Discrimination but has yet to sign or ratify Optional Protocol No. 12 to the ECHR, which establishes a general prohibition against all forms of discrimination. Sweden did not have a comprehensive legal prohibition against discrimination, which could have been evoked before a court—something that article 27 of the International Covenant on Civil and Political Rights calls for. There were, however, a number of different pieces of legislation covering discrimination in society, mainly relating to the workplace.

### **Racial Agitation**

In 2003 Sweden continued to be one of the world's largest producers of White Power music and racist and xenophobic web sites. At the same time a large number of hate crimes continued to be reported to the police. Although not flawless, the most efficient weapon to fight racist propaganda was the 1948 provision criminalizing agitation against an ethnic

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<sup>556</sup> available at: <http://www.refworld.org/docid/469244710.html> [accessed 25 April 2013]

group. The provision was included in the Penal Code (chapter 16, section 8), in the constitutional Freedom of the Press Act (chapter 7, section 4) and the Fundamental Law on the Freedom of Expression (chapter 5, section 1). Due to difficulties in dealing with racist crimes on the Internet, in 2002 the Swedish government revised the Fundamental Law on the Freedom of Expression. The new legislation, however, failed to take into account the need to retain a balance between freedom of expression and hate speech.

The crime of racial agitation can be committed in different ways, e.g. through printed or technical media such as newspapers or compact discs, or through oral statements or by publicly carrying racist symbols such as the swastika. The prosecutor general handled the latter cases. However, if the crime was committed in printed or electronic media, the constitutional laws, with a specific procedural order, had to be applied. These laws prescribed that only the chancellor of justice can open preliminary investigations and prosecute. A certain chain of responsibility was specified where, for example, a publisher was fully responsible for any criminal content in a newspaper. Also, court proceedings were carried out with the participation of a jury consisting of nine elected members.

There is a considerable difference between racial agitation in established media and orally expressed racial hatred. The SHC compared international human rights law with national law and practice concerning hate speech and freedom of expression. In November 2003 the findings were published in the report Hate Speech – the Conflict Between Hate Propaganda and Freedom of Expression. The report focused on all reports sent to the chancellor of justice during the abovementioned period. One important conclusion that could be drawn from the investigation is that the chancellor of justice did not act in as many

cases as he was legally able to do, and that not enough cases were brought before court.

The main reason for this was said to be found in the structure of the Freedom of the Press Act, especially in chapter 1, section 4. According to the chancellor of justice, this provision gave him wide discretionary power to decide whether to prosecute or not. However, the SHC concluded that the mentioned paragraph has been interpreted too extensively and that more cases ought to have been tried in court. Another reason for the low number of court cases was the statute of limitations; a pre-trial investigation indictment had to be initiated within six months or one year depending on the type of media.

According to the 2003 Report, as a direct effect of so few indictments, Sweden was not in compliance with international requirements as, for example, stipulated in article 4 of the International Convention on the Elimination of all forms of Racial Discrimination. The article explicitly requires member states to criminalize the forming or participation in an organization based on racist ideas. There was no such prohibition in Swedish law. Instead, the Swedish government regarded the ban of hate speech as sufficient to prevent such organizations from functioning.

## **SI Slovenia**

### **CRIMINAL OFFENCES AGAINST PUBLIC ORDER AND PEACE**

#### **Public Incitement to Hatred, Violence or Intolerance**

##### **Article 297**

(1) Whoever publicly provokes or stirs up ethnic, racial, religious or other hatred, strife or intolerance, or provokes any other inequality on the basis of physical or mental deficiencies or sexual orientation, shall be punished by imprisonment of up to two years.

(2) The same sentence shall be imposed on a person who publicly disseminates ideas on the supremacy of one race over another, or provides aid in any manner for racist activity or denies, diminishes the significance of, approves, disregards, makes fun of, or advocates genocide, holocaust, crimes against humanity, war crime, aggression, or other criminal offences against humanity.

(3) If the offence under preceding paragraphs has been committed by publication in mass media, the editor or the person acting as the editor shall be sentenced to the punishment, by imposing the punishment referred to in paragraphs 1 or 2 of this Article, except if it was a live broadcast and he was not able to prevent the actions referred to in the preceding paragraphs.

(4) If the offence under paragraphs 1 or 2 of this Article has been committed by coercion, maltreatment, endangering of security, desecration of national, ethnic or religious symbols, damaging the movable property of another, desecration of monuments or memorial stones or graves, the perpetrator shall be punished by imprisonment of up to three years.

(5) If the acts under paragraphs 1 or 2 of this Article have been committed by an official by abusing their official position or rights, he shall be punished by imprisonment of up to five years.

(6) Material and objects bearing messages from paragraph 1 of this Article, and all devices intended for their manufacture, multiplication and distribution, shall be confiscated, or their use disabled in an appropriate manner.

Article 300 prohibits incitement to ethnic, racial and religious hatred or intolerance or spreading ideas concerning racial superiority. This offence is punishable with imprisonment for up to two years (paragraph 1). A qualified form of this basic criminal

offence is defined as including the use of force or ill-treatment, endangering safety, denigrating other nationalities or ethnic or religious symbols, damaging foreign property or desecrating monuments, memorials or graves. In these cases imprisonment can be imposed for up to five years.

There is no specific provision establishing that the racist motivation of the perpetrator constitutes a specific aggravating circumstance. However, e.g. Article 127 provides for more severe punishment for murder if the judge considers that an aggravating circumstance should be taken into account.

Human Rights First:

Slovenia: Bias as an Express General Aggravating Factor: The Slovenian Criminal Code does not expressly enable racist or other bias motives of the offender to be taken into account by the courts as an aggravating circumstance when sentencing.

Bias as an Aggravating Factor in Specific Common Crimes

In November 2008, a new Criminal Code came into force in Slovenia. Article 116 (3) prescribes a sentence of no less than 15 years in prison for murder carried out in violation of the principle of equality, which is defined in Article 131 as a violation motivated by “ethnicity, race, color, religion, ethnicity, sex, language, or a different political belief, sexual orientation, life situation, birth, genetic heritage, education, social status or any other circumstance.”

#### **COMMENTARIES:**

Before the new Criminal Code was enacted, a racist motive could still be considered by a judge in the determination of a sentence, although there was no express mention of any form of bias as an express aggravating circumstance. According to the September 2006

official response of the Slovenian government to Human Rights First's hate crime questionnaire, general provisions on aggravating circumstances, as stipulated in Article 41, could be applied to cases of bias-motivated violence. However, there is no express reference to such motives in those provisions.

The new Criminal Code's Article 49 contains similar provisions, allowing the perpetrator's "motives" to be considered during sentencing as an aggravating circumstance. Regardless of these provisions' possible usage, they have yet to be applied in cases of bias-motivated violence. In its Third Report on Slovenia, released in February 2007, the European Commission against Racism and Intolerance (ECRI) noted, "data on whether and to what extent racial motivation is taken into account by courts pursuant to Article 41 is not available at present." ECRI stated that since its last report, Slovenia provided limited information on the number of cases in which the criminal justice system dealt with racially-motivated offences, ECRI noted that Slovenian courts found none of the cases to be committed on racist grounds."

Instead of relying on these general provisions, ECRI recommends the introduction of provisions "establishing racist motivation as a specific aggravating circumstance in sentencing" on the grounds that such provisions "would not only allow for racist offences to be better recognized and punished, but also enable better monitoring of the response of the criminal justice to racially motivated crime."

Below is taken from: United States Department of State, 2010 Country Reports on Human Rights Practices - Slovenia, 8 April 2011,<sup>557</sup> Freedom House, Freedom in the World 2013 - Slovenia, 10 April 2013,<sup>558</sup> Freedoms of speech and the press are constitutionally guaranteed. However, laws that prohibit hate speech and criminalize defamation are in

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<sup>557</sup> Disclaimer: This is not a UNHCR publication. UNHCR is not responsible for, nor does it necessarily endorse, its content. Any views expressed are solely those of the author or publisher and do not necessarily reflect those of UNHCR, the United Nations or its Member States. available at: <http://www.refworld.org/docid/4da56d8aa0.html> [accessed 25 April 2013]

<sup>558</sup> available at: <http://www.refworld.org/docid/5171047a18.html> [accessed 25 April 2013]



effect.

The penal code criminalizes the promotion of "national, race, or religious discord or intolerance or the promotion of superiority of one race over others." There were no reports that anyone was charged. The law provides criminal penalties for defamation that harms a person's honour or name; there were no reports of any prosecutions for defamation during the year. In March there was one conviction issued by the Court of Ljubljana for defamation and the penalty was a fine of 5,000 euros (\$6,700). During the year the police investigated several cases of suspicion of defamation.

There are approximately 300 Jews in the country. Jewish community representatives reported some prejudice, ignorance, and false stereotypes of Jews propagated within society, largely through public discourse. There were no reports of anti-Semitic violence or overt discrimination.

The government promoted antibias and tolerance education in the primary and secondary schools, and the Holocaust is a mandatory topic in the contemporary history curriculum. On January 27, Prime Minister Pahor attended "Shoah – We Remember," a memorial held in the country's only synagogue, which is located in Maribor. On September 5, the Jewish community, with the support of local government officials, held the fifth annual European Day of Jewish Culture festival. President Turk was the honorary patron for the celebrations held in Ljubljana, Maribor, and Lendava.

The law prohibits discrimination based on sexual orientation; however, societal discrimination was claimed to be widespread, and isolated cases of violence against homosexual persons occurred. Recent data on the problem's scope was not available. The NGO Society for the Integration of Homosexuals also reported that the police did not

specify whether crimes were directed at homosexual persons, so hate crime data was unavailable.

On July 3, the 10th annual gay pride parade in Ljubljana took place with the support of local government officials, although there were reports that bystanders shouted homophobic slurs at participants and antigay graffiti and stickers were seen in various locations around the city. Organizers reported satisfactory police presence during the parade. One individual was assaulted prior to last year's gay pride parade, and in March three individuals were sentenced to 18 months in prison for the attack. At that sentencing, about 100 people in black masks gathered in front of the Ljubljana District Court to protest the "excessive punishment" of the attackers. The victim of the assault stated that the protesters were not friends of the accused, but rather associates of the extreme right.

#### Other Societal Violence or Discrimination

There were no reports of societal violence or discrimination against persons with HIV/AIDS.

### **SK Slovakia**

Summary: human rights first: Bias as an Aggravating Factor in Specific Common Crimes  
The Criminal Code of the Slovak Republic, which entered into force on January 1, 2006, contains provisions on aggravating circumstances in the commission of certain crimes determined by law.

Section 140 of the code deals with “special biases” and stipulates that crimes committed with such biases result in the imposition of higher penalties. Section 140(d) refers to motives based on “national, ethnic or racial hatred or hatred because of skin color.” These

special bias provisions apply to the following sections of the Criminal Code.

Section 144(2)(e) – premeditated murder;

Section 145(2)(d) – murder;

Section 147(2)(b) – manslaughter;

Section 155(2)(c) – serious bodily injury;

Section 156(2)(b) – moderate bodily injury;

Section 359 – violence against a group of inhabitants and against an individual. More specifically, this section deals with persons who threaten a group of inhabitants with death, serious bodily harm, or other serious harm or with causing of extensive damage, or who use violence against a group of inhabitants.

Section 360(2)(d) – serious threats. This section deals with persons who threaten others with death, serious bodily harm or other serious harm, or with causing extensive damage to an extent which may raise justifiable fears.

Section 365(2)(b) – desecration of a place of eternal rest. This section deal with persons who destroy, damage or desecrate a grave, an urn with the ashes of a deceased person, a memorial or a gravestone, or who destroy or damage a burial site or other place of eternal rest, or persons who commits other abusive or dishonoring, indecent act.

Section 366(2)(b) – Desecration of a dead body. This section deals with persons who abuse or desecrate a dead body, or without lawful authority carry out the exhumation of ashes, take ashes away from the burial site, or dispose with ashes against a generally binding legal act.

Legislation.

Criminal Code of Slovak Republic Excerpts from Criminal Code, Act No. 300/2005,

Effective 1 January 2006.

Aggravating circumstances

A special motive refers to a criminal offense (...)

(d) committed with the intention to publicly incite violence or hatred against a group of people or individuals for their membership of any race, nation, nationality, color, ethnicity, origin, gender or their religion, if it is a pretext for threatening, (...)

(f) based on national, ethnic or racial hatred or hatred based on skin color. (...)

Article 140 Special motives

Article 144 Pre-meditated Murder

(1) Whoever intentionally kills another with premeditation will be sentenced to imprisonment for twenty years to twenty-five years.

(2) The offender shall be punished to imprisonment for twenty-five years or imprisonment for life if he commits the act referred to in paragraph 1 (...)

(e) with a special motive, (...)

Article 145 Murder

(1) Whoever intentionally kills another shall be punished by imprisonment from fifteen years to twenty years.

(2) The offender shall be punished by imprisonment for twenty years to twenty-five years or imprisonment for life, if he commits the act referred to in paragraph 1 (...)

(d) with a special motive (...)

Article 147 Manslaughter

(1) Whoever has the intent to cause grievous bodily harm to another through negligence causing death shall be punished by imprisonment for seven years to ten years.

(2) The offender shall be punished imprisonment for nine years to twelve years if he commits the act referred to in paragraph 1 (...)

(b) with a special motive (...)

#### Article 155 Serious bodily harm

(1) Whoever intentionally causes grievous bodily harm shall be punished by imprisonment for four years to ten years.

(2) The offender shall be punished by imprisonment for five years to twelve years, if he commits the act referred to in paragraph 1

(c) a special motive (...)

#### Article 156 Moderate bodily injury

(1) Whoever intentionally hurts the health of an individual, shall be punished by imprisonment from six months to two years.

(2) The offender shall be punished imprisonment for one year to three years if he commits the act referred to in paragraph 1 (...)

(b) with a special motive.

#### Article 359 - Violence against a group of inhabitants, including death threats, serious bodily harm, extensive damage or violence

(1) Whoever threatens death or severe injury to health or other severe injury, or causing major damage, or who uses violence against a group of citizens, shall be punished by imprisonment of up to two years.

(2) The offender shall be punished imprisonment for six months to three years, if he commits the act referred to in paragraph 1

(a) with a special motive (...)

#### Article 360 - Dangerous threats to a person

(1) Whoever threatens another with death, severe injury to health or other severe injury in such a way that it can arouse concern shall be punished by imprisonment of up to one year.

(2) The offender shall be punished by imprisonment for six months to three years, if he commits the act referred to in paragraph 1 (...)

(d) a special motive, or (...)

#### Article 365 - Desecration, damage or destruction to graves or places or eternal rest

(1) Whoever destroys, damages or desecrates a grave, urn with human remains, headstones or memorial or equipment or destroys or damages a cemetery or other final resting place, or who commits another gross indecencies against a burial or other final resting place shall be punished by imprisonment up to two years.

(2) The offender shall be punished imprisonment for six months to three years, if he commits the act referred to in paragraph 1 (...)

(b) a special motive.

#### Threats/Incitement to violence

(1) Any person who threatens an individual or a group of people on grounds of their race, nation, nationality, colour of skin, ethnicity, origin or for their religion, if the pretext for threats based on previous grounds, by the commission of a crime, by restraining their rights and freedoms, or any person who committed such a restraint or incites to the restraint of rights and freedoms of a nation, nationality, race, or an ethnic group shall be liable to a term of imprisonment not exceeding three years.

#### Article 424: Incitement to national, racial and ethnic hatred

Article 424(a): Incitement, defamation and threats to persons on the grounds of their race,

nation, nationality, colour of skin, ethnicity or origin

(1) Any person who publicly

(a) Incites to violence or hatred against a group of people or an individual on the grounds of their race, nation, nationality or colour of their skin, ethnicity or origin or because of their religion, if it is a pretext for the incitement based on the previous grounds.

### **COMMENTARIES:**

Little was done to implement criminal code provisions concerning bias-motivated violence before 2006. In its Third Report on Slovakia, the European Commission against Racism and Intolerance (ECRI) describes a “problematic” situation of a consistently high level of violence and inertia in the criminal justice system.

Below is taken from: Immigration and Refugee Board of Canada, Slovak Republic: Treatment of Roma, including acts of violence, forced sterilization and state protection (2009 - June 2012), 6 July 2012, SVK104113.E,<sup>559</sup>

Several sources report on racially motivated attacks against Roma in the Slovak Republic (US 24 May 2012, 24; ERRC Mar. 2011, 25-26; Council of Europe 20 Dec. 2011, 2).

According to the US Department of State's *Country Reports on Human Rights Practices for 2011*, in 2011, Roma were "singled-out for violence" (24 May 2012, 24). The European Roma Rights Centre (ERRC), a Budapest-based NGO that combats anti-Romani racism in Europe (ERRC n.d.), indicates that there is an "increasingly racist climate" in Slovakia (15 Jan. 2012). The ERRC indicates that between January 2008 and December 2010, racially motivated attacks against Roma, as reported by the media or documented by the ERRC, resulted in two deaths and eight injuries (Mar. 2011, 5). The ERRC also states that

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<sup>559</sup> available at: <http://www.refworld.org/docid/5036023d2.html> [accessed 25 April 2013]

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between 2008 and February 2012, there were at least 13 attacks against Roma (16 Feb. 2012).

In correspondence with the Research Directorate, an official from the Embassy of the Slovak Republic in Ottawa stated that Roma "are not victims of systematic or regular violent attacks" (Slovak Republic 13 June 2012).

### **Treatment of Roma by Extremist Groups**

Sources indicate that there has been a rise of extremist groups in the Slovak Republic (ERRC 15 Jan. 2012; OSF 14 June 2012). In correspondence with the Research Directorate, a representative of the Open Society Foundation (OSF) in Bratislava stated that this increase has mainly occurred in the last two years (ibid.). The Council of Europe's Commissioner for Human Rights reports that attacks on Roma are usually committed by neo-Nazi or skinhead groups (20 Dec. 2011, 9). According to Freedom House, in 2011 there were "numerous displays of racist propaganda and physical violence against the Roma by neo-Nazi groups" (2011, 514).

Sources state that extremist groups have held demonstrations to intimidate Roma (OSF 14 June 2012; US 24 May 2012, 24-25). Sources indicate that these rallies often take place close to Roma settlements (OSF 14 June 2012), or in areas where there has been tension between Roma and non-Roma (US 24 May 2012, 25; ERRC 15 Jan. 2012), including villages where people have been attacked or killed (ibid.). The OSF representative said that the People's Party [also known as People's Party-Our Slovakia (LS-NS)] is an example of an ultra-right wing extremist group with an anti-Roma agenda (14 June 2012). *Country Reports 2011* states that LS-NS held 13 rallies throughout the Slovak Republic within the first nine months of 2011, including a protest against "gypsy extremists and gypsy parasitic



criminality" in Zilina in April 2011 (US 24 May 2012, 24-25).

The OSF indicates that in 2009, an extremist group called Slovenska Pospolitost, which means Slovak Community, organized several public rallies in Eastern Slovakia protesting "Roma criminality". The OSF reports that in 2009, after an incident in which two local Roma beat a non-Roma in the village of Šarkišké Michal'any, Slovenska Pospolitost held an "anti-Roma" rally, during which approximately 200 members and supporters of the group clashed with the police, causing bystanders to join the rally. Since then, extremists have organized more rallies and marches to protest "'Roma criminality'". OSF also indicates that public events held by extremist groups have been increasingly attended by local residents from all segments of society, including the elderly, women, and mothers with their children.

According to the Embassy of the Slovak Republic official, when attacks against Roma occur, they are handled through the application of Slovak national laws and the Constitution (Slovak Republic 13 June 2012). He also stated that "standard police procedures...are applied regardless of race, gender or nationality" (ibid.). The embassy official stated that the Slovak Republic has implemented an outreach initiative consisting of 231 "Police Roma specialists" who spend 70 percent of their time in Roma communities to build trust (ibid.). The Commissioner of Human Rights stated that 120 police officers have been trained on "policing in a multi-ethnic environment," particularly Roma areas, and noted that the government has committed to recruiting Roma police officers to the national police force and to the municipal police (Council of Europe 20 Dec. 2011, 11).

## **Police Treatment of Roma**

*Country Reports 2011* indicates that the investigation of racially motivated attacks against Roma in 2011 varied by jurisdiction, but also states that several people were detained for racially motivated attacks (US 24 May 2012, 24). The Slovak government is reportedly implementing a plan that includes a special police unit in charge of monitoring extremist activities (ibid., 27). The Commissioner for Human Rights states that police may fail to take testimony from a Romani witness or to thoroughly investigate a complaint (Council of Europe 20 Dec. 2011, 10). According to the OSF representative, some police officers are biased against Roma, particularly in Eastern Slovakia and in rural areas (14 June 2012). She noted that they may ignore complaints or fail to adequately deal with incidents against Roma (OSF 14 June 2012).

Sources report cases in which the racial motivation behind attacks against Roma is not recognized by law enforcement authorities (ERRC Mar. 2011, 25; Council of Europe 20 Dec. 2011, 9). According to the ERRC, although the Slovak criminal code defines racial motivation as an "aggravating factor" for all crimes, there is "no specific protocol or guidelines developed for police and prosecutors on how to investigate and prosecute hate crimes" (Mar. 2011, 25).

Several sources report on police mistreatment of Roma (Council of Europe Feb. 2012, 76; ERRC Mar. 2011, 28; UN 20 Apr. 2011, para. 8; US 24 May 2012, 2), including "racist attacks" by police (UN 20 Apr. 2011, para. 8) and abuse of Roma suspects "during arrest and while in custody" (US 24 May 2012, 2). The Council of Europe indicates that due to the Slovak Republic's data collection, it is not possible to disaggregate statistics on offenses

committed against Roma and monitor the follow-up by law enforcement authorities (20 Dec. 2011, 10).

Sources provide the 2009 example in which police officers in Košice detained six Romani boys, forced them to strip, hit and kiss each other, threatened them with loaded guns, unleashed police dogs on them, and yelled anti-Roma statements at them (ERRC Mar. 2011, 28; Council of Europe Feb. 2012, 77). Six police officers and four senior officials were reportedly dismissed following the incident (ibid.). The ERRC states that three officers were still employed by the police force at the time of the first court hearing on 26 August 2010 (Mar. 2011, 28). The court case against the police officers involved in the incident was reportedly pending at the end of 2011 (AI 2012; US 24 May 2012, 2).

*Country Reports 2011* states that in May 2010, a Romani man died in Tornala, allegedly due to the excessive use of pepper spray by police officers at the time of his arrest several days earlier (ibid., 1).

### **Prosecution of Violence Against Roma**

According to the ERRC, only a "limited number" of perpetrators are successfully prosecuted in cases of violence against Roma, and "[e]ven fewer" receive prison sentences (Mar 2011, 29). Similarly, the Council of Europe indicates that media sources report on "very mild sentences" for perpetrators of violence against Roma (Feb. 2012, 70).

According to the *Country Reports 2011*, judges reportedly lacked "sufficient training in relevant laws and court cases involving extremism and often did not handle cases properly" (US 24 May 2012, 27).

The Commissioner of Human Rights similarly stated that there are "shortcomings in the implementation of criminal law provisions against racially

motivated violence," particularly regarding the acknowledgement of racial motivation as an aggravating circumstance (Council of Europe 20 Dec. 2011, 2). For example, the ERRC reports of a 7 June 2009 incident in Zohor in which a 61-year-old Romani man was attacked while the perpetrator shouted Nazi slogans (ERRC Mar. 2011, 27). The same source indicates that the police did not consider the attack to be racially motivated and suspended the prosecution; the perpetrator received two years of probation (ibid.). The Council of Europe draws upon an example of mild sentences for anti-Roma violence (Feb. 2012, 70), from an article translated from news source Korzár by Prague-based news server Romea.cz (Romea.cz 16 June 2011). Romea.cz Prague-based news server Romea.cz reports that in 2011, the Košice district court approved a suspended sentence for a 31-year-old man who punched and kicked a 14-year-old Romani boy in the head, gave the Nazi salute, and shouted Nazi slogans (ibid.).

See also:

Amnesty International (AI). 2012. "Slovakia." *Amnesty International Annual Report 2012: The State of the World's Human Rights*. Council of Europe. February 2012. Commissioner for Human Rights. Human Rights of Roma and Travellers in Europe.

20 December 2011. Thomas Hammarberg. Commissioner for Human Rights. *Report by Thomas Hammarberg - Commissioner for Human Rights of the Council of Europe Following His Visit to Slovakia from 26 to 27 September 2011*. CommDH(2011)42. 8 November 2011. European Court of Human Rights. *Case of V.C. v. Slovakia*. ]

European Roma Rights Centre (ERRC). 25 June 2012. "Slovakia and Ukraine Must Investigate Attacks Against Roma

March 2011. *Imperfect Justice. Anti-Roma Violence and Impunity*. <http://www.errc.org/cms/upload/file/czech-hungary-slovakia-imperfect-justice-06-march-2011.pdf>> Human Rights Law Centre. [2011]. "V.C. v Slovakia [2011] ECHR 1888 (8 November 2011)." Open Society Foundation (OSF). United Nations (UN). 20 April 2011. Human Rights Committee. *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant*. (CCPR/C/SVK/CO/3). [Accessed 5 July 2012]

United States (US). 24 May 2012. Department of State. "Slovakia." *Country Reports on Human Rights Practices for 2011*. [Accessed 22 June 2012]

Below is from: Immigration and Refugee Board of Canada, Slovak Republic: Government response to neo-Nazi and extremist groups, including political parties and gangs (2009-June 2012), 12 July 2012, SVK104114.E,<sup>560</sup>

Sources indicate that the fight against extremism is primarily the responsibility of the Ministry of Interior and the police. According to the European Commission Against Racism and Intolerance (ECRI), the police are responsible for the investigation of racially motivated crimes (ECRI 26 May 2009, para. 91). Two sources state that the Ministry of Interior and the police monitor neo-Nazi and right-wing extremist groups (US 24 May 2012, Sec. 6; Freedom House 2011, 514) and conduct preventive actions against them (ibid.).

Sources report that Slovakia adopted an anti-discrimination act in 2004 (UN 16 Mar. 2011; Council of Europe 20 Dec. 2011, para. 14; see also Slovakia 5 Mar. 2009, para. 26). The Act prohibits discrimination based on factors such as race, national or ethnic origin, colour and language (ibid.; Council of Europe 20 Dec. 2011, para. 14). However, the report of the Commissioner for Human Rights of the Council of Europe states that the Act has been "largely under-implemented, notably due to: a somewhat limited knowledge about the Act itself and discrimination issues generally among the legal profession, including judges; court proceedings lasting several years; and a reported reluctance to granting meaningful compensation" (ibid.). Sources indicate that the Slovak National Centre for Human Rights is responsible for monitoring the

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<sup>560</sup> available at: <http://www.refworld.org/docid/50533b412.html> [accessed 25 April 2013]

implementation of the Act (AI 2012; Council of Europe 26 May 2009, para. 28). The Centre also combats racism and provides legal assistance to victims of racial discrimination (ibid.). According to ECRI, the Centre had 26 employees in 2010 and 16 in 2011 (ibid., 21 Mar. 2012, 6).

Sources state that the Slovak government continued to implement its Action Plan for the Prevention of all Forms of Discrimination, Racism, Xenophobia and Other Expressions of Intolerance (UN 16 Mar. 2011; US 24 May 2012, Sec. 6; Slovakia 5 Mar. 2009, para. 29), which was initiated in 2000 (ibid., para. 81). The Action Plan focuses on strengthening tolerance among citizens, as well as on the activities that promote multiculturalism and non-discrimination (ibid.). Its priorities include the following: combating extremism through preparation and implementation of relevant legislation, more effective identification of and punishment for extremism-related criminal activities, systematic training and opinion-forming activities in relation to professionals and the general public, promotion of cultural and social scientific activities, and efforts to address the issues of disadvantaged (marginalised) population groups. (ibid.)

A report submitted in 2009 by the Slovak government to the UN Human Rights Council indicates that a committee was set up between the police, NGOs and individuals in order to coordinate activities with the goal of eliminating racially motivated crimes and extremism (Slovakia 5 Mar. 2009, para. 79). The committee also "gathers information on the occurrence of all forms of intolerance, xenophobia, extremism and racism" (ibid.). Although a new system for gathering statistics on racist crimes was introduced in 2006, the Commission for Human Rights of the Council of Europe points out shortcomings related to

the collection of data on racist incidents and the state response to such incidents (Council of Europe 20 Dec. 2011, para. 31).

The report of the Slovak government to the UN Human Rights Council states that the government adopted the "concept for combating extremism" in 2006, which was the first comprehensive document addressing this issue (Slovakia 5 Mar.2009, para. 80).

According to the report, "the document analyses the existing state of affairs in anti-extremism efforts and provides basic outlines for their further improvement" (ibid.). According to the official of the Embassy of the Slovak Republic in Ottawa, in June 2011, the government adopted the second concept for combating extremism for 2011-2014 (ibid. 25 June 2012).

The Commissioner for Human Rights of the Council of Europe indicates that there are no specific guidelines available for police and prosecutors in addressing racially motivated crimes (Council of Europe 20 Dec. 2011, para. 30). The US Department of State's *Country Reports on Human Rights Practices for 2011* notes that judges reportedly lacked "sufficient training in relevant laws and court cases involving extremism and often did not handle cases properly" (US 24 May 2012, Sec. 6). However, the report of the Permanent Mission of the Slovak Republic to the Office of the UN indicates that the Ministry of Interior, in cooperation with the Attorney General, drafted a procedure for the police force on how to deal with the issues of extremism and racially motivated criminal activities (Slovakia 28 Mar. 2012, 4). According to the Commissioner's report, the representatives of the Department of Human Rights and Equal Treatment of the government of Slovakia entered into negotiations with the Office for Democratic Institutions and Human Rights of the Organization for Co-Operation and Security in Europe (OSCE) in 2011 to implement

training programs for police officers and prosecutors in order to fight hate crimes (Council of Europe 20 Dec. 2011, 28). For instance, the Permanent Mission of the Slovak Republic to the Office of the UN notes that in 2011 the Slovak police force participated in an international conference related to the issues of hatred and extremism (Slovakia 28 Mar. 2012, 4).

## **Extremist Organizations**

Slovakia claims to prohibit extremist and racist organizations (Freedom House 2011, 514). *Country Reports 2011* states that, according to the Criminal Code, membership in an extremist group is punishable by two to six years imprisonment and by three to eight years for the production of extremist materials (US 24 May 2012, Sec. 6). However, right-wing organizations continue reportedly to operate as registered and unregistered civic associations, societies and movements (SITA 8 June 2011; Abbass et al. Dec. 2011, 3). *Country Reports 2011* indicates that there were approximately 500 active members of the neo-Nazi groups and several thousand sympathizers in Slovakia in 2010 (US 24 May 2012, Sec. 6). Sources name two far-right or extremist political parties and several extremist or neo-Nazi groups, including

- People's Party - Our Slovakia (SITA 28 Nov. 2010; ENAR Mar. 2011, 27; Slovakia 25 June 2012);
- Slovak National Party (ibid.; *PHW* 2011, 1271);
- Slovenska Pospolitost (Slovak Togetherness or Slovak Congregation) (Abbass et al. Dec. 2011, 3; SITA 10 Jan. 2012; Slovakia 25 June 2012);
- Oravska Straz (Orava Guard) (ENAR Mar. 2011, 22);



- Narodny Odpor (National Resistance) (ibid.);
- Nove Slobodne Slovensko (New Free Slovakia) (Slovakia 25 June 2012); and
- Slovenske Hnutie Obrody (Slovak Revival Movement) (ibid.).

According to a study entitled *Right-wing Extremism in Central Europe: An Overview*, published by the non-profit German "political foundation" Friedrich-Ebert-Stiftung (FES), which focuses on the advancement of public policy issues (FESn.d.), Slovenska Pospolitost (SP) is the "most significant manifestation of right-wing extremism" in the Slovak Republic (Abbass et al. Dec. 2011, 3). The study indicates that SP has been registered at the Ministry of Interior since 1995 as a civil association (Abbass et al., 4). The Ministry of Interior wanted to ban the organization in 2008, but the court overturned the decision (SITA 10 Jan. 2012). The organization also had a political party named Slovenska Pospolitost - Narodna Strana, which was disbanded in 2006 because its program contained Nazi elements (ibid.) and because of its "antidemocratic character" (Abbass et al. Dec. 2011, 4). According to the Abbass et al. study, the group's ideology is "based on nationalism, racism, anti-Semitism, neo-Fascism and also neo-Nazism," and the organization cooperates with other far-right groups in Slovakia and abroad (ibid.).

A report of the European Network Against Racism (ENAR), entitled *Racism and Discriminatory Practices in Slovakia*, indicates that People's Party - Our Slovakia, which is reportedly a "political branch" of the SP (Meseznikov 13 June 2012), is the "most active and best-known movement in Slovakia, whose members are connected with extremist crimes" (ENAR Mar. 2011, 22). The party obtained 1.33 percent of the vote in the 2010 parliamentary elections (Abbass et al. Dec. 2011, 4; Meseznikov 13 June 2012). The Embassy official indicated that in the 2011 parliamentary elections, the party obtained less

than 5 percent of the vote and they are not represented in the parliament (Slovakia 25 June 2012).

According to the ENAR report, leaders of People's Party - Our Slovakia have been accused several times of crimes of extremism, "but none of the cases went to court" (ENAR Mar. 2011, 22). However, according to the Slovak news agency Slovenska Tlacova Agentura (SITA), in 2011, the District Court and the Appellate Senate of the Regional Court in Banska Bystrica County acquitted Marian Kotleba, a former leader of the SP and a current leader of the People's Party - Our Slovakia, who was charged with a criminal offense of defaming a nation, race and confession (SITA 18 Jan. 2011). Kotleba was accused of distributing an election leaflet in 2009 stating "'eliminate unfair advantages for not only the Gypsy parasites'" when he ran for the office of Banska Bystrica County Chairman (ibid.). Both courts decided that "no criminal offense was committed by the contested statement" (ibid.).

### **Extremist Crimes**

According to a report by the European Commission Against Racism and Intolerance of the Council of Europe, authorities recorded 155 racially motivated crimes in 2007 and 158 in 2008 (26 May 2009, para. 90). ENAR reports that 132 of such crimes were registered in 2009 and 156 crimes in 2010 (Mar. 2012, 24).

In correspondence with the Research Directorate, an official of the Embassy of the Slovak Republic in Ottawa indicated that the criminal code of the Slovak Republic was amended in 2009 (Slovakia 25 June 2012). The amended criminal code is "punishing all forms of extremism, racism and xenophobia as well as other crimes committed of racial, religious or national motivation" (ibid.). According to Article 149(d) of the criminal code,

"racial motivation is an aggravating factor in respect of all crimes" (Council of Europe 20 Dec. 2011, para. 30). However, the Commissioner for Human Rights of the Council of Europe identifies a number of shortcomings in the implementation of this Article (ibid.). For instance, in a case where a man attacked a 61-year-old Romani man while shouting Nazi slogans, the police "ruled out racial motivation stating that it was a conflict between neighbours" (ibid.). The report does not indicate the date of the incident.

According to sources, the 2010 Rainbow Pride Parade in Bratislava was marked by violence (US 13 Feb. 2012; AI 2011, 290). Amnesty International indicated that police failed to provide adequate protection for the participants, two of whom were reportedly injured (ibid.). However, according to a report by the US Overseas Security Advisory Council (OSAC), the police were finally able to push back 50 "skinheads/neo-Nazis" (US 13 Feb. 2012). SITA reported that during the parade, police detained about 30 extremists (SITA 31 July 2010). The OSAC report adds that the 2011 Parade "was considered a success largely due to better preparation by the police and city government" (US 13 Feb. 2012).

*Country Reports 2011* states that criminal proceedings were initiated against a group of right-wing extremists who verbally and physically attacked a man of African descent in Bratislava in June 2011 (US 24 May 2012, Sec. 6). Further information on the results of the proceedings could not be found among the sources consulted by the Research Directorate.

The Slovak government reported to the Commissioner for Human Rights that the Office of the Deputy Prime Minister published in September 2011 its opinion on a suspended sentence of imprisonment for 7 months for disorderly conduct given to "one of the most famous figures of the neo-Nazi movement in Slovakia" (Council of Europe 20

Dec. 2011, 28). According to the report, the man was acquitted by the District Court Bratislava III of the accusation of promoting fascism (ibid.). The report further notes that the "result is not a positive signal for all victims of crimes whose motive is racial... religious or other hate and undermines the confidence of victims in the legal state and its instruments" (ibid.).

Sources state that the SP held anti-Roma marches, some of which resulted in "clashes" between SP sympathizers and the police (Abbass et al. Dec. 2011, 4; OSF n.d., 9). According to a representative of the Open Society Foundation (OSF) in Bratislava, when extremist groups demonstrate near settlements and harass Roma people, "Roma sometimes complain that police do not deal with such incidents" (OSF 14 June 2012). *Country Reports 2011* indicates that the investigation of racially motivated attacks against minorities in 2011 varied by jurisdiction, but also states that "numerous" people were detained for racially motivated attacks of Roma people (US 24 May 2012, Sec. 6). For information regarding anti-Roma marches and attacks that have been carried out against the Roma by ultra-right groups and extremists, please see Response to Information Request SVK104113 of 6 July 2012.

## **Response to Hate Speech**

According to *Country Reports 2011*, "the law prohibits the defamation of nationalities, punishable by up to three years in prison" (US 24 May 2012, Sec. 2). However, the report indicates that police enforced the law "only when other offenses, such as assault or destruction of property, were also committed" (ibid., Sec. 6).

There were instances of defamation of Roma and other minorities by public officials at every level in 2010 (Council of Europe 20 Dec. 2011, para. 22) and 2011 (ibid.; US 24 May

2012, Sec. 6). In a letter to government officials of the Slovak Republic, dated 15 February 2012, the European Roma Rights Centre (ERRC) and some of its Slovak partners expressed concern over the "election materials that negatively target Roma" (ERRC 15 Feb. 2012). The ERRC indicated that the election posters of the Slovak National Party made reference to the "'cost'" of supporting Roma" (ibid.). The ERRC is a Budapest-based NGO that combats anti-Romani racism in Europe (ibid., n.d).

According to the report adopted in May 2010 and published in January 2011 by the Advisory Committee on the Framework Convention for the Protection of National Minorities of the Council of Europe, there was an "increase" in hate speech and racism on the Internet (Council of Europe 18 Jan. 2011, para. 98). Act 421/2004 amending the criminal code criminalizes offences committed through the Internet (UN 10 Dec. 2004, para. 4). *Country Reports 2011* indicates that police monitored Internet sites posting hate speeches and reportedly "attempted" to arrest or fine the authors (US 24 May 2012, Sec. 2).

## **Complaint Mechanisms**

According to the Embassy official, a victim of extremist, neo-Nazi or a hate crime can submit a complaint to any police station or police department in person, in writing or electronically (Slovakia 25 June 2012). Thereafter, the complaint will be forwarded "immediately" for investigation to the Department for Combating Extremism created at the Regional Police Directorate (ibid.). Without providing further details, the official indicated that the Department for Combating Extremism is also "obliged" to follow and investigate anonymous complaints related to racist, extremist and hate crimes, as well as offences committed through the Internet (ibid.). Corroboration of the above-mentioned information

could not be found among the sources consulted by the Research Directorate within the time constraints of this Response.

### **UK United Kingdom**

In the UK a crime is recorded as a hate crime if the victim or anyone else believes it to have been motivated by hostility or prejudice based on a personal characteristic. The criminal justice agencies monitor hate crimes related to five main characteristics – disability, transgender identity, race, religion and sexual orientation. However, the actual legislation differs between these groups. Prosecution depends upon a crime being committed and a potential bias motivation.

The UK responds to hate crime through racial and religious aggravated offences in the Crime and Disorder Act 1998; offences of intending to stir up hatred towards race, religion, sexual orientation in the Public Order Act of 1986, and enhanced sentences via the Criminal Justice Act 2003, for those who demonstrated hostility or were motivated by hostility towards the victim's membership of the five groups above in paragraph one. There is the additional offence of engaging or taking part in indecent/racist chanting at a designated football match, the Football Offences Act 1991 s.3

Legislation that is not specifically aimed at 'hate crime' but which nevertheless can be so used is the Communications Act 2003 s127. This covers the sending, or causing to be sent, material that is grossly offensive or of an indecent, obscene or menacing character. Equally, there is the possibility of using the Malicious Communications Act 1988 s1, which covers sending, delivering or transmitting, an article to another which is indecent or grossly offensive, or which conveys a threat, or which is false, provided there is intent to

cause distress or anxiety to the recipient. There is no requirement for the article to reach the intended recipient.

The aggravated offences contained in Part II of the Crime and Disorder Act 1998 allow perpetrators of certain offences, such as assault and harassment, to be charged with a specific aggravated form of the offence where hostility is demonstrated on the basis of race or religion.

The law relating to the stirring up of hatred is contained in Parts III and IIIA of the Public Order Act 1986. The offences prohibit the stirring up of hatred on the grounds of race, religion and sexual orientation.

Legislation below given according to category:

**Racially or religiously aggravated offences –**

Crime and Disorder Act 1998(amended by Anti-terrorism, Crime and Security Act 2001)<sup>561</sup>

**Enhanced sentencing: Criminal Justice Act 2003 s145.**

Criminal Justice Act 2003 s 145 Increase in sentences for racial or religious aggravation

(1) This section applies where a court is considering the seriousness of an offence other than one under sections 29 to 32 of the Crime and Disorder Act 1998 (c. 37) (racially or religiously aggravated assaults, criminal damage, public order offences and harassment

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<sup>561</sup> CPS Guidance: [http://www.cps.gov.uk/news/latest\\_news/134\\_06/index.html](http://www.cps.gov.uk/news/latest_news/134_06/index.html) Racially/religiously aggravated

wounding (s.29(1)(a) CDA)Racially/religiously aggravated actual bodily harm (s.29(1)(b) CDA)

Racially/religiously aggravated common assault (s.29(1)(c) CDA)

Racially/religiously aggravated damage (s.30(1)(c) CDA)

Racially/religiously aggravated fear/provocation of violence (s.31(1)(a) CDA)

Racially/religiously aggravated intentional harassment/alarm/distress (s.31(1)(b) CDA)

Racially/religiously aggravated harassment/alarm/distress (s.31(1)(c) CDA)

Racially/religiously aggravated harassment/stalking without violence (s.32(1)(a) CDA)

Racially/religiously aggravated harassment/stalking with fear of violence (s.32(1)(b) CDA)

etc).

(2) If the offence was racially or religiously aggravated, the court-

(a) must treat that fact as an aggravating factor, and

(b) must state in open court that the offence was so aggravated.

(3) Section 28 of the Crime and Disorder Act 1998 (meaning of "racially or religiously aggravated") applies for the purposes of this section as it applies for the purposes of sections 29 to 32 of that Act.

**Enhanced Sentencing: Criminal Justice Act 2003 s145 and s 146 into effect from 4 April 2005.**

**S145** provides for courts to treat as an aggravating feature for sentence, hostility based upon race or religion (or presumed). This does not create new offences like the racially and religiously aggravated offences above, but it provides statutory backing for aggravating features to be taken into account for sentencing.

**S146.** Included sexual orientation and disability initially. Transgender identity was added by the The Legal Aid, Sentencing and Punishment of Offenders Act 2012 s65. S146 Criminal Justice Act 2003 requires a court to treat as an aggravating feature for sentence, hostility based on sexual orientation (or presumed), disability and transgender. Although this does not create new offences akin to Racially or Religiously Aggravated offences, it now provides a statutory backing for aggravating features of an offence to be reflected in the sentence. Prosecutors can now remind the court that they must take into account the aggravating feature, rather than requesting that they do so.

CJA s146 Increase in sentences for aggravation related to disability or sexual orientation (transgender and disability added by 2012 Legal Aid, Sentencing and



Punishment of Offenders Act)

(1) This section applies where the court is considering the seriousness of an offence committed in any of the circumstances mentioned in subsection (2).

(2) Those circumstances are—

(a) that, at the time of committing the offence, or immediately before or after doing so, the offender demonstrated towards the victim of the offence hostility based on—

(i) the sexual orientation (or presumed sexual orientation) or transgender (or presumed transgender) of the victim, or

(ii) a disability (or presumed disability) of the victim, or

(b) that the offence is motivated (wholly or partly)—

(i) by hostility towards persons who are of a particular sexual orientation, or transgender,

(ii) by hostility towards persons who have a disability or a particular disability.

(3) The court—

(a) must treat the fact that the offence was committed in any of those circumstances as an aggravating factor, and

(b) must state in open court that the offence was committed in such circumstances.

(4) It is immaterial for the purposes of paragraph (a) or (b) of subsection (2) whether or not the offender's hostility is also based, to any extent, on any other factor not mentioned in that paragraph.

(5) In this section "disability" means any physical or mental impairment.

References to transgender include references to being transsexual, or undergoing, proposing to undergo or having undergone a process or part of a process of gender reassignment."

## **2. Incitement to racial hatred - sections 17-29 Public Order Act 1986**

S17 In this Part “racial hatred” means hatred against a group of persons . . . defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins.

s.18 - using threatening/abusive/insulting words or behaviour or displaying written material with intent/likely to stir up racial hatred

Can only be prosecuted with consent of Attorney General. Referred to CPS Counter Terrorism Division to be dealt with by specialist prosecutor.

s.19 - publishing/distributing written material which is threatening/abusive/insulting with intent/likely to stir up racial hatred

Can only be prosecuted with consent of Attorney General. Referred to CPS Counter Terrorism Division to be dealt with by specialist prosecutor.

s.20 - public performance of a play involving threatening/abusive/insulting words/behaviour with intent/likely to stir up racial hatred

Can only be prosecuted with consent of Attorney General. Referred to CPS Counter Terrorism Division to be dealt with by specialist prosecutor.

s.21 - distributing/showing/playing a recording of visual images or sounds that are threatening/abusive/ insulting with intent/likely to stir up racial hatred

Can only be prosecuted with consent of Attorney General. Referred to CPS Counter Terrorism Division to be dealt with by specialist prosecutor.

s.22 - broadcasting or including programme in cable programme service involving threatening/abusive/insulting visual images or sounds with intent/likely to stir up racial hatred

Can only be prosecuted with consent of Attorney General. Referred to CPS Counter Terrorism Division to be dealt with by specialist prosecutor.

s.23 - possessing racially inflammatory material/material for display/publication distribution with intent/likely to stir up racial hatred

Can only be prosecuted with consent of Attorney General. Referred to CPS Counter Terrorism Division to be dealt with by specialist prosecutor.

4. Football Offences - s.3 Football Offences Act 1991 (amended by s.9 Football (Offences and Disorder) Act 1999)

Engaging in or taking part in indecent/racist chanting at a designated football match  
Court can impose a football banning order in addition to any other penalty. Breach of banning order carries up to 6 months imprisonment. Does not apply to religious chanting - BUT NB. Other offences (such as racially/religiously aggravated public order offences or assaults) may be more appropriate

### **3. Incitement to religious hatred - sections 29B-29G Public Order Act 1986**

S29A to 29G incitement to religious hatred, Inserted into the Public Order Act 1986, via the Racial and Religious hatred Act 2006. Whilst the offences appear similar, threat and 'intent' must be proven.

S29A Meaning of "religious hatred"

In this Part "religious hatred" means hatred against a group of persons defined by reference to religious belief or lack of religious belief.

29B Use of words or behaviour or display of written material

(1) A person who uses threatening words or behaviour, or displays any written material which is threatening, is guilty of an offence if he intends thereby to stir up religious hatred.

(2)An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the written material is displayed, by a person inside a dwelling and are not heard or seen except by other persons in that or another dwelling.

(3)A constable may arrest without warrant anyone he reasonably suspects is committing an offence under this section.

(4)In proceedings for an offence under this section it is a defence for the accused to prove that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the written material displayed, would be heard or seen by a person outside that or any other dwelling.

(5)This section does not apply to words or behaviour used, or written material displayed, solely for the purpose of being included in a programme service.

#### 29CPublishing or distributing written material

(1)A person who publishes or distributes written material which is threatening is guilty of an offence if he intends thereby to stir up religious hatred.

(2)References in this Part to the publication or distribution of written material are to its publication or distribution to the public or a section of the public.

#### 29DPublic performance of play

(1)If a public performance of a play is given which involves the use of threatening words or behaviour, any person who presents or directs the performance is guilty of an offence if he intends thereby to stir up religious hatred.

(2)This section does not apply to a performance given solely or primarily for one or more of the following purposes—

(a)rehearsal,

(b)making a recording of the performance, or

(c)enabling the performance to be included in a programme service;

but if it is proved that the performance was attended by persons other than those directly connected with the giving of the performance or the doing in relation to it of the things mentioned in paragraph (b) or (c), the performance shall, unless the contrary is shown, be taken not to have been given solely or primarily for the purpose mentioned above.

(3)For the purposes of this section—

(a)a person shall not be treated as presenting a performance of a play by reason only of his taking part in it as a performer,

(b)a person taking part as a performer in a performance directed by another shall be treated as a person who directed the performance if without reasonable excuse he performs otherwise than in accordance with that person's direction, and

(c)a person shall be taken to have directed a performance of a play given under his direction notwithstanding that he was not present during the performance;

and a person shall not be treated as aiding or abetting the commission of an offence under this section by reason only of his taking part in a performance as a performer.

(4)In this section “play” and “public performance” have the same meaning as in the Theatres Act 1968.

(5)The following provisions of the Theatres Act 1968 apply in relation to an offence under this section as they apply to an offence under section 2 of that Act—

- section 9 (script as evidence of what was performed),
- section 10 (power to make copies of script),

- section 15 (powers of entry and inspection).

#### 29E Distributing, showing or playing a recording

(1) A person who distributes, or shows or plays, a recording of visual images or sounds which are threatening is guilty of an offence if he intends thereby to stir up religious hatred.

(2) In this Part “recording” means any record from which visual images or sounds may, by any means, be reproduced; and references to the distribution, showing or playing of a recording are to its distribution, showing or playing to the public or a section of the public.

(3) This section does not apply to the showing or playing of a recording solely for the purpose of enabling the recording to be included in a programme service.

#### 29F Broadcasting or including programme in programme service

(1) If a programme involving threatening visual images or sounds is included in a programme service, each of the persons mentioned in subsection (2) is guilty of an offence if he intends thereby to stir up religious hatred.

(2) The persons are—

- (a) the person providing the programme service,
- (b) any person by whom the programme is produced or directed, and
- (c) any person by whom offending words or behaviour are used.

#### 29G Possession of inflammatory material

(1) A person who has in his possession written material which is threatening, or a recording of visual images or sounds which are threatening, with a view to—

- (a) in the case of written material, its being displayed, published, distributed, or included in a programme service whether by himself or another, or
- (b) in the case of a recording, its being distributed, shown, played, or included in a

programme service, whether by himself or another,

is guilty of an offence if he intends religious hatred to be stirred up thereby.

(2) For this purpose regard shall be had to such display, publication, distribution, showing, playing, or inclusion in a programme service as he has, or it may reasonably be inferred that he has, in view.

#### S29J Protection of freedom of expression

Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.

#### **Sexual Orientation.**

There is no statutory definition of a homophobic or transphobic incident. However, when prosecuting such cases, and to help us to apply our policy on dealing with cases with a homophobic element, the CPS adopts the following definition:

"Any incident which is perceived to be homophobic or transphobic by the victim or by any other person."

There are two pieces of legislation which refer and, unlike disability and transgender hate crime legislation, 'incitement' is included in the amendment to the Public Order Act 1986:

A) **Incitement.** The Criminal Justice and Immigration Act 2008 ("the 2008 Act")

received Royal Assent on 8 May 2008. Section 74 and schedule 16 of the 2008 Act amend part 3A of the Public Order Act 1986 ("the 1986 Act") so as to create offences of intentionally stirring up hatred on the grounds of sexual orientation. The provisions came

into force on 23 March 2010.

The new offences follow the same legal principles as the existing offence, under the 1986 Act, of intentionally stirring up hatred on religious grounds. They deal with conduct (either words or behaviour) or material which is threatening in nature, and which is intended to stir up hatred against a group of people who are defined by reference to sexual orientation. By contrast, the racial hatred offences cover a wider range of conduct or material including that which is threatening, abusive or insulting, and which is intended or likely to stir up hatred.

The term 'hatred on the grounds of sexual orientation' is defined in the new section 29AB of the 1986 Act and is expressly limited to orientation towards persons of the same sex, the opposite sex or both. It does not extend to orientation based on, for example, a preference for particular sexual acts or preferences.

The offence is committed if a person uses threatening words or behaviour, or displays any written material, which is threatening, if he intends thereby to stir up hatred on the grounds of sexual orientation. Threatening is the operative word, not abusive or insulting. Possession, publication or distribution of inflammatory material is also an offence.

The offence can be committed in a public or private place, but not within a dwelling, unless the offending words and behaviour were heard outside the dwelling, and were intended to be heard.

The defendant must intend to stir up hatred on the grounds of sexual orientation; recklessness is not enough; and the behaviour must be threatening. So using abusive or insulting behaviour intended to stir up hatred on the grounds of sexual orientation does not constitute an offence, nor does using threatening words likely to stir up hatred on the



grounds of sexual orientation.

Conduct or material which only stirs up ridicule or dislike, or which simply causes offence, would not meet the requisite threshold required by the Act, i.e. hatred. So, for example, the offences do not, and are not intended to extend per se to childish name calling, or the telling of jokes, or the preaching of religious doctrine, unless those activities are threatening or intended to stir up hatred.

This is reinforced by the freedom of expression defence contained in section 29JA, which confirms that "for the avoidance of doubt, the discussion or criticism of sexual conduct or the urging of persons to refrain from or modify such conduct or practices shall not be taken of itself to be threatening".

The offences extend to England and Wales.

Referral to Counter Terrorism Division (Note to the Public Order Offence sexual orientation )

‘ These types of allegations are by their very nature sensitive. For that reason, and to ensure a consistent approach, any allegation under this legislation must be referred to the Counter Terrorism Division.

When an Area becomes aware of such a case, it should be referred to the Counter Terrorism Division within seven days. As part of the referral, the Area must submit a report which is sufficient detailed to enable the Counter Terrorism Division and the Area to have an informed discussion about where the responsibility for the case should lie.

If it is decided that the case should be prosecuted as an offence of stirring up hatred on the grounds of sexual orientation, the Counter Terrorism Division will take over the conduct of the case from the Area. If the Counter Terrorism Division considers that it is

clearly a case where stirring up hatred on the grounds of sexual orientation does not apply, the case should be returned to the Area within seven days of that decision being made.

If the Counter Terrorism Division decides to deal with a case, the file is held there and dealt with there. Thereafter, cases can only proceed with the consent of the Attorney General.'

**B) Sentence Enhancement: Section 146 Criminal Justice Act 2003** came into effect from 4 April 2005. This section requires a court to treat as an aggravating feature for sentence, hostility based on sexual orientation (or presumed). Although this does not create new offences akin to Racially or Religiously Aggravated offences, it now provides a statutory backing for the way in which CPS policy had sought to ensure that the homophobic element of an offence was treated as an aggravating feature, and be reflected in the sentence. Prosecutors can now remind the court that they must treat it as an aggravating feature, rather than requesting that they do so.

### **Disability.**

There are no specific offences for disability hate crime. However, Section 146 Criminal Justice Act 2003 provides that where it has been proved that hostility based on a person's disability was demonstrated at the time the offence was committed, or immediately before or afterwards, or proved that the offence was motivated by hostility towards the disability, the court must declare this an aggravating factor at the sentencing stage.

### **Transgender.**

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 s65 referred specifically to Sentencing where there is aggravation related to transgender identity.

This Act amended s146 of The Criminal Justice Act 2003. Previously the Act included an increase in sentence for aggravation related to disability or sexual orientation, it now includes ‘...disability or sexual orientation or transgender identity’...

This Act focuses upon ‘the victim being (or being presumed to be) transgender, or’...by hostility towards persons who are transgender.”.

References to transgender include references to being transsexual, or undergoing, proposing to undergo or having undergone a process or part of a process of gender reassignment.”.

### **Crown Prosecution Services Guidance Summary:**

Racist or religious crime (general)

This is an offence where the prosecutor has to prove a racial or religious element as part of the offence itself, or where the law allows the prosecutor to put that evidence to the court when an offender is being sentenced.

There is no single criminal offence of racist crime or religious crime. There are a number of different offences where proof of a racial or religious element must be found before the accused person can be found guilty. An example of this is racist chanting at a football match.

Apart from the offences where proof of racial or religious element is necessary, the criminal courts have a duty to treat any offence as being more serious where there is evidence that the accused person demonstrated hostility, or was motivated by hostility towards the victim because of the victim's membership of a racial or religious group.

Racial group – this means any group of people who are defined by reference to their race, colour, nationality (including citizenship) or ethnic or national origin. This could include

Gypsies and Travellers, refugees, or asylum seekers or others from less visible minorities.

There has been a legal ruling that Jews and Sikhs are included in the definition of racial group.

Religious group - this means any group of people defined by reference to their religious belief or lack of religious belief. For example, this includes Muslims, Hindus and Christians, and different denominations and branches within those religions. It would also include people with no religious belief at all.

### **Racially or religiously aggravated offences**

For these offences it must be proven that the offender committed one of the basic offences and then that the offence was racially or religiously aggravated.

The basic offences that can be charged include offences of assault or wounding, harassment, damage and public order offences, such as causing people to fear violence or harassment. More severe sentences can be imposed when these offences are charged as specific racially or religiously aggravated offences.

Proof an offence is racially or religiously aggravated can be made by : Proof that the accused person:

either demonstrated hostility to the victim because the victim belonged to or was thought to belong to a particular racial or religious group – for example, using racist or religiously abusive language when assaulting someone;

or

was motivated by hostility towards the victim for the same reasons – for example, the accused admitting to the police that he threw a brick through an Asian shopkeeper's window because he disliked Asians.

Motive is always difficult to prove and most prosecutions will result from hostile acts by the accused towards the victim, but can be proven by reference to previous acts or words.

### **Incitement to racial hatred**

This offence is committed when the accused person says or does something which is threatening, abusive or insulting and, by doing so, either intends to stir up racial hatred, or makes it likely that racial hatred will be stirred up. This can include such things as making a speech, displaying a racist poster, publishing written material, performing a play or broadcasting something in the media. It must also be proven that the behaviour is threatening, abusive or insulting. These words are given their normal meaning but the courts have ruled that behaviour can be annoying, rude or even offensive without necessarily being insulting. It must also be considered whether the offender intended to stir up racial hatred or whether racial hatred was likely to result. Hatred is a very strong emotion. Stirring up racial tension, opposition, even hostility may not necessarily be enough to amount to an offence.

If it cannot be proven that someone intended to stir up racial hatred, it must be shown that, in all the circumstances, hatred was likely to be stirred up. 'Likely' does not mean that racial hatred was simply possible, context is crucial, and the likely audience will be highly relevant.

These offences appear in the Public Order Act 1986, which is generally designed to prevent acts of violence, disorder, harm or threats. Although it will often be present, the risk of commission of a criminal act of this nature is not essential to prove the commission of an offence of stirring up hatred on the grounds of race.

Justification for the Acts above is given by the Crown Prosecution as:

When people hate others because of race, such hatred may become manifest in the commission of crimes motivated by hate, or in abuse, discrimination or prejudice. Such reactions will vary from person to person, but all hatred has a detrimental effect on both individual victims and society, and this is a relevant factor to take into account when considering whether a prosecution is appropriate.

The UK subscribes to the concept that it is essential in a free, democratic and tolerant society that people are able robustly to exchange views, even when these may cause offence. However, there is a perceived need for a balance between the rights of the individual to freedom of expression against the duty of the state to act proportionately in the interests of public safety, to prevent disorder and crime, and to protect the rights of others. As these decisions involve questions of public policy, a specialist team of lawyers based at CPS Headquarters reviews the police file in all such cases and decides whether there is enough evidence. In addition, a case of incitement to racial hatred cannot be brought without the permission of the Attorney General, who is the senior Law Officer for the Crown. The law only covers acts that are intended, or are likely to stir up, racial hatred. Whilst the definition of what constitutes “race” or “racial” is wide, it is clear that it does not cover “religious” hatred.

### **Incitement to religious hatred**

The religious hatred offence which came into force on 1 October 2007 is very different from the race hate law already on the statute books in that it only covers threatening words or behaviour (not insults or abuse) and only covers such words or behaviour that are intended to stir up religious hatred (not that likely to stir hatred). So abusive or insulting behaviour intended to stir up religious hatred is not an offence under the legislation, nor are

threatening words likely to stir up religious hatred. There is a freedom of expression defence enshrined in the new law that means it cannot be used to prohibit or restrict discussion, criticism, antipathy, dislike, ridicule, insult or abuse of a religion or its beliefs or practices. It is more difficult to prosecute for inciting religious hatred as opposed to racial hatred (for which the standard is already properly high).

Prosecutions for this offence require the consent of the Attorney General and will be dealt with under the same arrangements as offences of inciting racial hatred.

### **Racist chanting at football matches**

The offence of racist chanting is committed when a person or group of people repeatedly utter words or sounds of a racist nature at a designated football match defined as a match between teams from the Premier League, the Football League or the Conference League.

"Racist" means the same as racist.

If convicted, a person can be fined and, additionally, banned from attending football matches both in this country and abroad.

Although this offence is designed to deal with particular racist behaviour within football grounds, and does not apply specifically to chanting of a religious nature, there are other offences through which racist or religious football-related crimes might be dealt with more appropriately using other legislation, such as racially or religiously aggravated public order offences. For example:

- when the offence is committed outside the stadium at a designated football match;
- if a public order offence is committed where religious as opposed to racist hostility is demonstrated to the victim;
- at non-designated football matches, such as amateur games;

Racist or religious crimes committed in a football context are ‘carefully considered’ to make sure that the CPS prosecute an offence (or offences) that reflects most accurately the offender's behaviour and which allows the court to take account of any racist or religious hostility or motivation.

### **Other religious offences**

In addition to the religiously aggravated offences, there are other religious offences that can be prosecuted.

Blasphemy was an attack on the Christian religion, either orally or in writing, made in terms that were likely to shock or outrage the feelings of most Christian believers.

Nevertheless, people have always been free to express anti-religious views providing they did so in a reasonable manner. As a result, there were very few prosecutions in recent years, and an Act of Parliament abolished the offence entirely with effect from 8 July 2008.

### **Other religious offences that can be prosecuted include:**

- violent or indecent behaviour in places of worship;
- assaulting ministers or preventing them from officiating at religious services;
- causing disturbances in cemeteries; and
- disrupting or obstructing burials.

Most of these offences are contained in very old Acts of Parliament and are rarely used because the criminal behaviour they cover can be dealt with by charging other offences that are more familiar and also have higher penalties. Unlike blasphemy, the offences listed above can be committed against all faiths and their places of worship or burial.

### **Other religious offences**

Taking into account the racial or religious element in all other offences



When an offence is not charged as a specific racially or religiously aggravated offence or as one of the other offences described above, it does not mean that the racial or religious element will be overlooked. The court must take account of evidence of racial or religious aggravation in any case which is not charged as a racially or religiously aggravated offence in its own right.

For example, if someone jumps out of a taxi driven by an Asian taxi driver and runs off without paying, that person commits the offence of "making off without payment". If that person at the same time makes remarks about Asians that suggests there was a racial motive for not paying the fare, the offence cannot be charged as a racially aggravated offence. This is because the offence of "making off without payment" is not one of the "basic" offences that the law allows us to charge as a specific racially aggravated offence.

However, this does not mean that the racist element is ignored. In this situation, the court is told about the remarks and the CPS will argue that as a result the offence was racially motivated. If the court accepts this, it would have to impose a higher penalty.

When an offender has been found guilty and the court is deciding on the sentence to be imposed, it should treat evidence of racial or religious aggravation as something that makes the offence more serious. The court must also state that fact openly so that everyone knows that the offence is being treated more seriously because of the racial or religious aggravation.

### **COMMENTARIES:**

A 2002 study of racially aggravated offences in the United Kingdom found that offenders often plead guilty to the base offence to avoid being found guilty of the racially aggravated offence. The study found that the structure of the legislation invited "pleas of not guilty to

the aggravated version of offences; and the offer of a guilty plea to the underlying substantive offence.” Prosecutors were sometimes “blamed for accepting these offers too easily.”<sup>562</sup>

Moreover, in a 2004 study of racist offenders in Greater Manchester, UK, the researchers found that although “racism certainly formed part of the motivation for the offence ... it was very rarely the sole motive, as it is in the classic version of racist violence as a type of hate crime.”<sup>563</sup> The UK allows for ‘mixed motive’ but, unlike the US, does not require evidence of substantial factor’ for a crime to be designated as a hate crime. Indeed, s146 Criminal Justice Act states that “It is immaterial whether or not the offender’s hostility is also based, to any extent, on any other factor...”

In the UK, Civil rights groups have expressed concerns over arrests for social media use. These included the arrest of a 17-year-old in July 2012 for sending an offensive homophobic Twitter message to British Olympic diver Tom Daley and the November arrest of a 19-year-old for posting a picture of a burning poppy on Facebook on Remembrance Day (the poppy is the symbol of remembrance for those who died in war). Police issued the 17-year-old a harassment warning, while the 19-year-old's case was continuing at the end of the year.

On December 19, 2012, to strike a balance between freedom of speech and criminality, the Director of Public Prosecutions issued guidelines, which came into effect immediately, clarifying that social messaging is eligible for prosecution under UK law, being ‘in public’. Communications that are credible threats of violence, harassment, or stalking (such as

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<sup>562</sup> Elizabeth Burney & Gerry Rose, “Racist offences – how is the law working? Implementation of the legislation on racially aggravated offences in the Crime and Disorder Act 1998”, Home Office Research Study 244, July 2002, p. 111.

<sup>563</sup> Larry Ray, David Smith, Liz Wastell, “Shame, Rage and Racist Violence”, British Journal of Criminology, Vol. 44, May 2004, at pp. 354-55.

aggressive Internet trolling), and posts that breach court orders (such as those protecting the identity of a victim of a sexual offense) can be prosecuted, unlike posts which are "grossly offensive, indecent, obscene, or false."

In March 2013 the UK government published Challenge it, Report it, Stop it, a new strategy to combat hate crime through more effective prevention, reporting, and response. The strategy commits departments across government to specific actions, including funding 2.1 million pounds (\$3.4 million dollars) over three years to organizations supporting hate crime victims, more robust training for police, and working with local authorities and communities to raise awareness of hate crime.

In Northern Ireland in March, the Policing Board published Human Rights Thematic Review: Policing with and for Lesbian, Gay, Bisexual, and Transgender Individuals. The report acknowledged that hate crime in Northern Ireland was underreported and included 18 specific recommendations to the PSNI. Hate incidents recorded by the PSNI from April 1, 2010, to March 31, 2012 (the most recent figures available) numbered 2,571 incidents. Of these, the PSNI considered 1,437 sectarian incidents, 842 based on racism, 211 on homophobia, 38 on disability, 22 on transphobia, and 21 incidents on faith or religion.

### **Anti-Semitism**

The UK Jewish population numbers approximately 280,000.

Types of recorded anti-Semitic incidents vary from year to year. The Community Security Trust (CST), a UK body that monitors anti-Semitism, reported that in 2011 there were 92 violent assaults, 63 incidents of damage and vandalism to Jewish property (down

24 percent from 2010), and 394 incidents of abusive behaviour, such as verbal abuse, hate mail, or anti-Semitic graffiti (up from 391 in 2010). The CST recorded 586 anti-Semitic incidents in 2011, the second successive year in which the number of recorded incidents fell, from the high of 929 in 2009. On May 1, vandals spray painted five swastikas on a Jewish woman's car in Brighton and deflated the tires.

During the year public figures made some statements which could be considered anti-Semitic. On March 1, former London mayor Ken Livingstone, running again for the position, told a group of Jewish leaders that the Jewish community would not vote for him because of its wealth, and used the words Zionist, Jewish, and Israeli interchangeably and "in a pejorative manner," in the words of a group of prominent Jewish Labour Party supporters. Livingstone apologized for his statements.

### **Disability Hate Crime.<sup>564</sup>**

A joint study by HM Inspectorate of Constabulary, the Crown Prosecution Service (CPS) and the National Probation Service, *Living in a Different World*, (March 21st 2013) argued that there is under-reporting of disability bias offences but acknowledged there is no "clear and uncomplicated definition" of what constitutes disability hate crime. The Report does not contain examples of the types of offences commonly associated with such crimes nor does it assess whether the problem is becoming more severe.

Michael Fuller, the chief inspector of the CPS, said the Law Commission had been asked to consider whether there should be a specific offence of disability hate crime. As noted above, Under section 146 of the Criminal Justice Act, which came into effect in 2005, courts can increase sentences for those found to have carried out an attack or crime that

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<sup>564</sup> O.Bowcott, Legal Affairs Correspondent, 'Disability hate crime victims being let down official report says.' <http://www.guardian.co.uk/society/2013/mar/21/disability-hate-crime-victims-report> accessed 23rd march 2013.

involved the aggravating factor of being a disability hate crime. Of 810 CPS files flagged as involving disability hate crime issues, however, only seven (0.86%) recorded that an offender's sentence had been increased on those grounds – suggesting the powers are being used insufficiently. (Every one of the judges interviewed for the report said they were only being asked by CPS lawyers to consider section 146 uplift on “a very exceptional basis”.)

A CPS spokesman said the figure of 0.86 per cent was a “concern”, although due to recording problems the true figure was probably much higher, while it was not always possible to collect enough evidence to prove an offence had been a hate crime.

(The probation service was particularly heavily criticised, with probation trusts described as viewing disability hate crime as “a very small part of their work and therefore not a priority”. The trusts were unable to provide inspectors with details of how many offenders they had supervised for committing disability hate crimes, because their IT systems did not allow them to collect this data.)

Broken down by region, the CPS files suggest that the north-west of England experiences almost three times as much disability hate crime as other areas of the country, with 174 cases. The report's authors, however, caution that such a disparity is more likely to be a reflection of different recording practices. Michael Fuller said he believed most forces now had systems in place to record when victims are being repeatedly targeted.

Among the recommendations the report makes are:

- Agreement on a "single, clear and uncomplicated definition of a disability hate crime that is communicated effectively to the public and staff".
- Increased reporting of disability hate crimes.

- Improved training for police officers, prosecutors and probation staff in dealing with disability hate crimes.

One difficulty, the report suggests, is that police officers are often reluctant or too embarrassed to ask members of the public whether they are disabled. Incidents may therefore be missed. Anecdotal evidence to the ‘When Law and Hate Collide’ Daphne 111 funded project, and recent case law evidence, suggests ‘vulnerability’ is the category used to enhance sentences in disability bias crimes, as this is easier to prove. The result is that the disability bias element is missed.

A plethora of nongovernmental hate crime reporting agencies exist in the UK, but these are disparate. A recent initiative (Third Party Recording Toolkit, March 2013) by Disability Rights UK aims to collate nationwide disability information centres and offers advice. In 2013 the Law Commission is preparing a report into the possibility of extending public order incitement offences to include disability and transgender, and aggravated crimes to include disability, transgender and sexual orientation.