Manual on hate speech

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Foreword

The aim of the manual is to clarify the concept of hate speech and guide policy makers, experts and society as a whole on the criteria followed by the European Court of Human Rights in its case law relating to the right to freedom of expression.

The manual has been prepared within the framework of the Committee of Experts for the Development of Human Rights, under the authority of the Steering Committee for Human Rights, in connection with its work on the issue of *human rights in a multicultural society*. The author is human rights expert Anne Weber, who was commissioned by the Council of Euope for the drafting of this manual.

1 Introduction

In multicultural societies, which are characterised by a variety of cultures, religions and lifestyles, it is sometimes necessary to reconcile the right to freedom of expression with other rights, such as the right to freedom of thought, conscience and religion or the right to be free from discrimination. This reconciliation can become a source of problems, because these rights are all fundamental elements of a "democratic society".

The European Court of Human Rights (hereinafter the Court) has therefore affirmed that freedom of expression as guaranteed under article 10 of the European Convention on Human Rights (hereinafter the Convention or ECHR) "constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man."[1]

But however vast the scope of freedom of expression, some restrictions to the exercise of this right may in some circumstances be necessary. Unlike the right to freedom of thought (inner conviction or *forum internum*), the right to freedom of expression (external manifestation or *forum externum*) is not an absolute right. The exercise of this freedom carries with it certain duties and responsibilities and is subjected to certain restrictions as set out in article 10(2) of the ECHR, in particular those that concern the protection of the rights of others.

The European Court has always affirmed that "it is particularly conscious of the vital importance of combating racial discrimination in all its forms and manifestations."[2] Thus,

1 *Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A No. 24, para. 49.

2 *Jersild v. Denmark* [GC], judgment of 23 September 1994, Series A No. 298, para. 30. To emphasise this statement, the Court refers,

it has emphasised in various judgments "that tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance), provided that any "formalities", "conditions", "restrictions" or "penalties" imposed are proportionate to the legitimate aim pursued."[3]

The challenge that the authorities must face is therefore to find the correct balance between the conflicting rights and interests at stake.

Conflicting rights and interests

Several rights, equally protected by the Convention, can compete in this regard. The right to freedom of expression can thus be limited by the right to freedom of thought, conscience or religion. Confronted with attacks on religious beliefs the European Court of Human Rights has highlighted that the question involves "balancing the conflicting interest that result from exercising those two fundamental freedoms: on the one hand, the applicant's right to communicate his ideas on religious beliefs to the public, and, on the other hand, the right of other persons to respect of their right to freedom of thought, conscience and religion."[4] In some circumstances, freedom of expression can also be a threat to the right to respect of privacy. And, finally, there is the risk of conflict between freedom of expression and the interdiction of all forms of discrimination in those cases where exercising this freedom is used to incite hatred and shows the characteristics of "hate speech".

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in its decision *Seurot v. France* (dec.), No. 57383/00, 18 May 2004, to the ECRI's statute, more precisely to "the text of resolution Res(2002)8 of the Committee of Ministers on the statute of the European Commission against Racism and Intolerance (ECRI) which aims to reinforce the action of the ECRI, convinced of the need to take firm and sustained action at European level to combat the phenomena of racism, xenophobia, anti-Semitism and intolerance."

3 *Gündüz v. Turkey,* No. 35071/97, para. 40, CEDH 2003-XI, and *Erbakan v. Turkey*, No. 59405/00, para. 56, 6 July 2006.

4 *Aydın Tatlav v. Turkey*, No. 50692/99, para. 26, 2 May 2006.

The concept of "hate speech"

No universally accepted definition of the term "hate speech" exists, despite its frequent usage. Though most States have adopted legislation banning expressions amounting to "hate speech", definitions differ slightly when determining what is being banned. Only the Council of Europe's Committee of Ministers" Recommendation 97(20) on "hate speech" defined it as follows: "the term "hate speech" shall 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, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin." In this sense, "hate speech" covers comments which are necessarily directed against a person or a particular group of persons.

According to the Committee of Ministers, hate speech covers all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance.

The term is also found in European case-law, although the Court has never given a precise definition of it. The Court simply refers in some of its judgments to "all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance)."[5] It is important to note that this is an «autonomous» concept, insofar as the Court does not consider itself bound by the domestic courts" classification. As a result, it sometimes rebuts classifications adopted by national courts[6] or, on the contrary, classifies certain statements as "hate speech", even when domestic courts ruled out this classification.[7]

The concept of "hate speech" encompasses a multiplicity of situations:

5 *Gündüz v. Turkey*, op. cit, para. 40; *Erbakan v. Turkey*, op. cit., para. 56.

6 See, for example, *Gündüz v. Turkey*: unlike the domestic courts, which classified the applicant's statements as hate speech, the Court is of the opinion that the statements made cannot be regarded as such (op. cit., para. 43).

7 See to that effect, *Sürek v. Turkey* [GC], No. 26682/95, ECHR 1999-IV: the Court concluded in this instance that there had been hate speech, whereas the applicant had not been convicted of incitement to hatred but of separatist propaganda, since the domestic courts considered that there were no grounds for convicting him of incitement to hatred.

– firstly, incitement of racial hatred or in other words, hatred directed against persons or groups of persons on the grounds of belonging to a race;
– secondly, incitement to hatred on religious grounds, to which may be equated incitement to hatred on the basis of a distinction between believers and non-believers;
– and lastly, to use the wording of the Recommendation on "hate speech" of the Committee of Ministers of the Council of Europe, incitement to other forms of hatred based on intolerance "expressed by aggressive nationalism and ethnocentrism".

Although the Court has not yet dealt with this aspect, homophobic speech[8] also falls into what can be considered as a category of "hate speech".

The classification of certain statements as "hate speech" has several consequences. Thus, according to the Court "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."[9] On the other hand, according to recent judgments, the fact that certain expressions do not constitute "hate speech", is an essential element to be take into consideration in determining whether the infringements to the right of freedom of expression are justified in a democratic society.[10] The concept of "hate speech" therefore allows to draw a dividing line between those expressions that are excluded from Article 10 of the ECHR and are not covered by freedom of expression or are not justified with regard to the second paragraph of Article 10, and those which, as they are not considered as constituting "hate speech", consequently can be tolerated in a democratic society.

Insofar as "hate speech" is therefore an element that the Court takes into consideration, the question arises as to

8 See on this point the report "Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States Part I – Legal Analysis" (European Union Agency for Fundamental Rights), June 2008, and the White Paper on Intercultural Dialogue adopted at the 118st session of the Committee of Ministers, 7 May 2008, para. 133.

9 *Gündüz v. Turkey*, op. cit., para. 41.

10 *Ergin v. Turkey (No. 6)*, No. 47533/99, para. 34, 4 May 2006.

when an expression can be classified as "hate speech". And yet, in the absence of a precise definition, how can "hate speech" be identified?

Identification criteria

The identification of statements that could be classified as "hate speech" seems all the more difficult because this kind of speech does not necessarily manifest itself through expressions of "hatred" or emotions. "Hate speech" can be concealed in statements which at a first glance may seem to be rational or normal. Nevertheless, it is possible to distil from the applicable texts in this matter and from the principles found in the case-law of the European Court of Human Rights or other bodies, certain parameters for distinguishing expressions which, though they are of an insulting nature, are fully protected by the right to freedom of expression from those that do not enjoy such protection.

II Applicable instruments

(A) Treaties

(a) Treaties of the Council of Europe

Although the European Convention on Human Rights, and its Article 10 in particular which guarantees freedom of expression, remains the incontrovertible reference point, there are other non-binding texts, treaties or instruments which have been adopted by the Council of Europe and therefore merit to be mentioned. The European Social Charter, in the field of economic and social rights, and the Framework Convention for the protection of national minorities both contain measures aimed to protect against all forms of discrimination. The revised European Social Charter prohibits any discrimination on grounds such as race, colour, religion or national extraction in the enjoyment of the rights it recognizes. The States parties to the Framework Convention, which prohibits any discrimination on the basis of belonging to a national minority, undertake for their part to adopt adequate measures in order to promote full and effective equality between persons belonging to a national minority and those belonging to the majority. The State parties to the Framework Convention also undertake to encourage a spirit of tolerance and intercultural dialogue and to take effective measures to promote mutual respect and understanding and co-operation among all persons living on their territory, irrespective of those persons" ethnic, cultural, linguistic or religious identity.

The Additional Protocol to the Convention on cybercrime, related to the prosecution of acts of racist and xenophobic nature through computer systems, which was adopted on 28 January 2003 and entered into force on 1 March 2006, is of particular importance where it concerns the dissemination of messages of hatred through the Internet. The States parties to this Protocol are committed to adopt such legisla-

tive and other measures as may be necessary to establish the following acts as criminal offences under their domestic law, when committed intentionally and without right:

- distributing, or otherwise making available, racist and xenophobic material to the public through a computer system;
- 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;
- insulting publicly, through a computer system, (i) persons for the reason that they belong to a group distinguished by race, colour, descent or national or ethnic origin, as well as religion, if used as a pretext for any of these factors; or (ii) a group of persons which is distinguished by any of these characteristics;
- 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.

(b) Other treaties

Apart from the Council of Europe, there are other international or regional instruments concerning human rights that are directly relevant to the issue of "hate speech".[1]

Article 19 of the Universal Declaration of Human Rights covers freedom of expression. As this is a legally non-binding text, the right to freedom of expression has been set out again and clarified in Article 19 of the International Covenant on Civil and Political Rights. Article 19, paragraph 3 of the Convent specifies that this right may be subject to

1 The full text of these provisions can be found in Appendix I.

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."

Among the international and regional instruments relevant to human rights, only the International Covenant on Civil and Political Rights (Article 20, paragraph 2), at universal level, and the American Convention on Human Rights (Article 13, paragraph 5), at regional level, explicitly prohibit advocacy of national, racial or religious hatred.[2] Thus, Article 20 of the Covenant states that "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law" while Article 13 of the American Convention explicitly prohibits "any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin". As for Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination it declares illegal all propaganda activities which promote and incite racial discrimination.

(B) Recommendations and other instruments

(a) Council of Europe

In order to achieve greater unity in its Member States" legislation, the Council of Europe does not only have recourse to treaties but also to recommendations, being non-legally binding instruments, through which the Committee of Ministers can in fact define guidelines for the Member States" policies or legislation. The **Committee of Ministers** can thus recommend to States to adopt standards in their legal system which are inspired by the common rules described in a recommendation. The following recommendations are the most pertinent in this matter:

2 More specifically, Article 3 of the Convention on the Prevention and Punishment of the Crime of Genocide lists direct and public incitement to commit genocide as one of the punishable acts pursuant to the Convention.

- **Recommendation (97)20 on "hate speech"**, adopted by the Committee of Ministers on 30 October 1997, provides a definition of "hate speech",[3] condemning all forms of expression which incite racial hatred, xenophobia, anti-Semitism and all forms of intolerance. It is pointed out in this document that such forms of expression may have a greater and more damaging impact when disseminated through the media. However, it stated in the text that national law and practice should clearly make a distinction between the responsibility of the author of expressions of "hate speech" and that of the media for their dissemination as part of their mission to communicate information and ideas on matters of public interest (paragraph No. 6 of the Appendix).
- **Recommendation (97)21 on the Media and the Promotion of a Culture of Tolerance**, also adopted by the Committee of Ministers on 30 October 1997, points out that the media can make a positive contribution to the fight against intolerance, especially where they foster a culture of understanding between different ethnic, cultural and religious groups in society. This document is targeted at the different sectors of society that are in a position to promote a culture of tolerance.
- Lastly, the **Declaration of the Committee of Ministers on freedom of political debate in the media**, adopted on 12 February 2004, emphasises that freedom of political debate does not include freedom to express racist opinions or opinions which are an incitement to hatred, xenophobia, anti-Semitism and all forms of intolerance. It furthermore points out that defamation or insult by the media should not lead to imprisonment, unless this penalty is strictly necessary and proportional to the seriousness of the violation of the rights or reputation of others, in particular where other fundamental rights have been seriously violated through defamatory or insulting statements in the media, such as "hate speech".

The Parliamentary Assembly is the deliberating organ of the Council of Europe, composed of parliamentarians from the national parliaments of the organisation's Member States. It is the driving force behind many of the initiatives

3 Cf. *supra*.

with regard to incitement to hatred, which have resulted in the adoption of texts (recommendations or resolutions) that serve as guidelines for the Committee of Ministers, national governments and national parliaments.

- In its Resolution 1510(2006) on **Freedom of expression and respect for religious beliefs**, adopted on 28 June 2006, the Parliamentary Assembly considers that freedom of expression as protected under Article 10 of the European Convention on Human Rights should not be further restricted as a result of increasing sensitivities of certain religious groups. At the same time, the Assembly firmly recalls that "hate speech" against any religious group is not compatible with the fundamental rights and freedoms guaranteed by the European Convention on Human Rights and the case law of the European Court of Human Rights.
- In Recommendation 1805(2007) on **blasphemy, religious insults and "hate speech" against persons on grounds of their religion**, adopted on 29 June 2007, the Parliamentary Assembly reaffirms the need to penalise statements that call for a person or a group of persons to be subjected to hatred, discrimination or violence on religious grounds or otherwise. The Assembly considers that national law should only penalise expressions about religious matters which intentionally and severely disturb public order and call for a person or a group of persons to be subjected to hatred, discrimination or violence.

By request of the Parliamentary Assembly the **European Commission for Democracy through Law (Venice Commission)**, the Council of Europe's advisory body on constitutional matters, has prepared **a preliminary report on the national legislation in Europe concerning blasphemy, religious insults and inciting religious hatred**.[4] In this report the Commission considers that, in a democratic society, religious groups must tolerate, as other groups, critical public statements and debate about their activities, teachings and beliefs, provided that such criticisms neither constitute intentional and gratuitous insults nor an incitement to violence or public disorder and to the discrimination of adherents of a particular religion. The Commission

4 Report adopted by the Commission at its 70th plenary session (16-17 March 2007).

notes that in this respect practically all Council of Europe Member States have adopted laws combating incitement to hatred, which include hatred based on religious grounds, and concludes from this that these States have legislation potentially protecting both freedom of expression and the right to respect for religious beliefs.

In addition, the Council of Europe has established the **European Commission against Racism and Intolerance (ECRI)**, of which the mission is to combat racism and racial discrimination in greater Europe from the perspective of the protection of human rights. ECRI formulates notably general policy recommendations addressed to all Member States which provide guidelines for the development of national policies and strategies in various areas. ECRI also publishes country-by-country monitoring reports on national situations. In its General Policy Recommendation No. 7, ECRI defines racism as "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" and looks into the question of racist speech:

- **General policy recommendation No. 7 on national legislation to combat racism and racial discrimination** calls for the adoption by Council of Europe Member States of criminal law provisions combating various racist expressions. Such expressions concern public incitement to violence, hatred or discrimination, public insults and defamation or threats against a person or a group of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin. Public expression, with a racist aim, of an racist ideology or the public denial, with a racist aim, of crimes of genocide, or crimes against humanity or war crimes should also be penalised by law. Finally, public dissemination with a racist aim of material containing racist expression as such as the above, should also possibly be the object of criminal sanctions. ECRI insists on the fact that such criminal law provisions should provide for effective, proportionate and dissuasive sanctions as well as for ancillary or alternative penalties.

Moreover, ECRI's country-by-country reports clearly reveal that there is a consensus in Europe on the need to combat

racist expressions, notably through criminal provisions. However, ECRI has been increasingly confronted in the past few years with arguments invoking freedom of expression in an attempt to justify the lack of action, in particular through criminal measures, in combating racist expressions. ECRI holds that exercising the right of freedom of expression should be restricted in order to combat racism, in particular when relating to the rights and reputation of others and with the aim to protect the human dignity of the victims of racism. Such restrictions should respect the conditions set out in Article 10 of the European Convention on Human Rights as interpreted by the European Court of Human Rights. ECRI stresses, however, the importance of freedom of expression as one of the core foundations of democratic societies and the necessity to safeguard all human rights while eventually garanteeing a fair balance between conflicting rights.

Observing that racist speeches are far from diminishing and have in fact increased over the last years in particular in political discourse, ECRI adopted on 17 March 2005 a Declaration on the use of racist, antisemitic and xenophobic elements in political discourse: ECRI condemns the use of such elements in political discourse and considers such use as "ethically unacceptable". Lastly, ECRI published a Declaration on combating racism in football on 13 May 2008 on the occasion of the UEFA European Football Championship EURO 2008.

(b) United Nations

A number of provisions in the above treaties, in particular in the International Covenant on Civil and Political Rights and the Convention on the Elimination of All Forms of Racial Discrimination, have been clarified by the competent monitoring bodies, that is to say, the Human Rights Committee and the Committee on the Elimination of Racial Discrimination.

- **Human Rights Committee, General Comment No. 10**, adopted 29 June 1983, Article 19 – Freedom of expression, para. 4:

  "Paragraph 3 expressly stresses that the exercise of the right to freedom of expression carries with it special duties and

responsibilities and for this reason certain restrictions on the right are permitted which may relate either to the interests of other persons or to those of the community as a whole."

- **Human Rights Committee, General Comment No. 11**, adopted 29 July 1983, Article 20 – Prohibition of propaganda for war and inciting national, racial or religious hatred, para. 2 (about the relationship between articles 19 and 20):

  "Article 20 of the Covenant states that any propaganda for war and any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law. In the opinion of the Committee, these required prohibitions are fully compatible with the right of freedom of expression as contained in article 19, the exercise of which carries with it special duties and responsibilities. The prohibition under paragraph 1 extends to all forms of propaganda threatening or resulting in an act of aggression or breach of the peace contrary to the Charter of the United Nations, while paragraph 2 is directed against any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, whether such propaganda or advocacy has aims which are internal or external to the State concerned. ... For article 20 to become fully effective there ought to be a law making it clear that propaganda and advocacy as described therein are contrary to public policy and providing for an appropriate sanction in case of violation."

- **Committee on the Elimination of Racial Discrimination, General Recommendation XV**, adopted 23 March 1993, Organized violence based on ethnic origin (Article 4):

  "The Committee recalls its General Recommendation VII in which it explained that the provisions of article 4 are of a mandatory character. To satisfy these obligations, States parties have not only to enact appropriate legislation but also to ensure that it is effectively enforced. Because threats and acts of racial violence easily lead to other such acts and generate an atmosphere of hostility, only immediate intervention can meet the obligations of effective response." (para 2)

  "In the opinion of the Committee, the prohibition of the dissemination of all ideas based upon racial superiority or

hatred is compatible with the right to freedom of opinion and expression. This right is embodied in article 19 of the Universal Declaration of Human Rights and is recalled in article 5 (d) (viii) of the International Convention on the Elimination of All Forms of Racial Discrimination. Its relevance to article 4 is explained in the article itself. The citizen's exercise of this right carries special duties and responsibilities, specified in article 29, paragraph 2, of the Universal Declaration, among which the obligation not to disseminate racist ideas is of particular importance." (para 4)

- Committee on the Elimination of Racial Discrimination, General Recommendation XXX, adopted 1 October 2004, General Recommendation on Discrimination Against Non Citizens:

The Committee recommends that the States adopt various measures to provide protection against incitement to hatred and racial violence, in particular:

– take measures to combat xenophobic attitudes and behaviour towards non-citizens, in particular incitement to racial hatred and violence, and to promote a better understanding of the principle of non-discrimination in respect of the situation of non-citizens (para 11);
– take resolute action to counter any tendency to target, stigmatize, stereotype or profile, on the basis of race, colour, descent, and national or ethnic origin, members of "non-citizen" population groups, especially by politicians, officials, educators and the media, on the Internet and other electronic communications networks and in society at large (para 12).

(c) European Union

To reflect the European Convention on Human Rights, the Charter of Fundamental Rights of the European Union recognises freedom of expression (Article 11), as well as the right to non-discrimination (Article 21).

The fight against discrimination constitutes in effect one of the European Union's main areas of action. This is reflected in the Union's strategy in combating racism.

The Proposal for a council framework decision on combating racism and xenophobia, follows the Joint Action of 15 July 1996, adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning means to combat racism and xenophobia. In order to reinforce co-operation between judicial and other authorities of Member States regarding offences involving racism and xenophobia, Article 4 of the Proposal requires that Member States should consider the following intentional behaviours, committed by any means, as punishable criminal offence:

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

Moreover, the European Parliament underlines, notably, in its **Resolution on the right to freedom of expression and respect for religious beliefs**, adopted 16 February 2006, "that freedom of expression should always be exercised within the limits of the law and should coexist with responsibility and with respect for human rights, religious feelings and beliefs, whether they be connected with the Islamic, Christian, Jewish or any other religion."

(d) *The Organisation for Security and Co-operation in Europe*

Several commitments of the States participating in the Organisation for Security and Co-operation in Europe (OSCE) are directly relevant to the combat against "hate speech". While the participating States have recognised the primary character of the right to freedom of expression on numerous occasions,[5] they have also expressed their firm commitment against "hate speech" and other manifestations of aggressive nationalism, racism, chauvinism, xenophobia, anti-Semitism and violent extremism, as well as occurrences of discrimination on grounds of religion or belief, and have stressed that promoting tolerance and non-discrimination can contribute to eliminating the basis for "hate speech".[6]

5 See for example the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (Conference On Security and Co-operation In Europe), 29 June 1990.

6 Decision No. 6 on Tolerance and Non-discrimination, 10th meeting of the Ministerial Council, Porto, December 2002.

III Principles emerging from the case-law of the European Court of Human Rights

When faced with a conflict between the right to freedom of expression and another right guaranteed by the Convention, the European Court has two options. Firstly, the Court can decide to exclude the expression in question from the protection offered by the Convention, by applying Article 17 of the ECHR. But the Court can also asses whether a restriction of freedom of expression is legitimate by applying Article 10(2) of the ECHR. A measure that constitutes a "sanction" or "restriction" to freedom of expression does not in effect constitute a violation of the Convention merely by the fact that it infringes this freedom, since its practice may be restricted by the requirements of the second paragraph of Article 10.

The conflict of rights is therefore resolved either through denial, through the loss of the right to rely on Article 10, under Article 17 of the Convention, or by conciliation, in which case the Court proceeds to a balance of the interests involved.

Following a recall of the general principles stemming from the judgments of the Court concerning the right to freedom of expression, these two options should be explained.

(A) General principles relating to the right to freedom of expression (Article 10 of the ECHR)

Freedom of expression, enshrined in Article 10 of the European Convention, has a particular status compared to other rights which are garanteed by this text. Indeed, while freedom of expression is not only a consequence of democracy, it also stands as one of its roots and continuously fosters it . Without free debates and the freedom to express one's convictions, a democracy cannot progress or would simply not exist.

The prominent place of freedom of expression has been confirmed by the European Court in its judgment *Handyside*, in which it affirmed that "freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man" and according to a formulation which has been since then regularly used, that "subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society"."[1]

Freedom of expression, and in particular freedom of the press, has a prominent place in the European Convention on Human Rights. Exercising the right to freedom of expression however always carries with it duties and obligations.

The sphere of application of Article 10 of the Convention is very broad. Under the terms of Article 10, the right to freedom of expression applies to "everyone", physically and morally , and includes both freedom of opinion and the freedom to receive and impart information and ideas. The notion of "information" has been extensively interpretated, as it does not only cover hard facts and raw data or matters of public interest treated by the press, but also photos and radio or television programmes. In addition, the Court has considered that this right includes "freedom of artistic expression – notably within freedom to receive and impart information and ideas – which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds"[2] and the freedom to convey information of a commercial nature.[3] Furthermore, it does not only concern the content of information but also means of transmission and channeling, since "any restriction imposed on the means necessarily interferes with the right to receive and impart information."[4]

The Court has particularly stressed the importance of the role of the press in a democratic society, by pointing out that

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

2 *Müller and others v. Switzerland*, judgment of 24 May 1988, Series A No. 133, para. 27.

3 *Markt intern Verlag GmbH v. Germany*, judgment of 20 November 1989, Series A No. 165.

4 *Autronic AG v. Switzerland*, judgment of 22 May 1990, Series A No. 178, para. 47.

> "These principles are of particular importance as far as the press is concerned. Whilst it must not overstep the bounds set, inter alia, in the "interests of national security" or for "maintaining the authority of the judiciary", it is nevertheless incumbent on it to impart information and ideas on matters of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog"."[5]

The Court has added that

> "Freedom of the press furthermore affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention."[6]

According to the Court, the protection of journalistic sources is "one of the basic conditions for press freedom."[7] Without such protection, the ability of the press to provide accurate and reliable information could be adversely affected.

Lastly, the Court has specified the duties and obligations of those exercising their right to freedom of expression. In this connection, it considers that the right of journalists to impart information on matters of public interest is protected provided that they act in good faith, on an accurate factual basis and provide "reliable and precise" information in accordance with the ethics of journalism.[8]

5 Observer *and* Guardian *v. the United Kingdom*, judgement of 26 November 1991, Series A No. 216, para. 59. See also *Lingens v. Austria*, judgment of 8 July 1986, Series A No. 103, para. 41.

6 *Lingens v. Austria*, op. cit., para. 42.

7 *Goodwin v. the United Kingdom* [GC], judgment of 27 March 1996, Reports of Judgments and Decisions 1996-II, para. 39.

8 *Pedersen and Baadsgaard v. Denmark* [GC], No. 49017-99, para. 78, ECHR 2004-XI.

(B) Speech falling within the ambit of Article 17 of the ECHR

Article 17 of the ECHR is worded as follows:

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

This provision is not only addressed to States, but also to all groups or persons. It is not an additional restriction of the rights of the Convention; on the contrary, the aim of Article 17 is to guarantee the permanent maintaining of the system of democratic values underlying the Convention. This Article tends notably to prevent totalitarian groups from exploiting, in their own interests, principles set out by the Convention. To reach such goal, however, where it is noticed that individuals are engaged in activities aiming at the destruction of any of the rights and freedoms in the Convention, these individuals should not be deprived of all rights and freedoms. Article 17 essentially covers rights which would allow, if invoked, an attempt to derive from such rights the right, indeed, to engage in activities aiming at the destruction of the rights or freedoms recognised in the Convention.

Already in the *Lawless* case, the Court clearly explained the relationship between Article 17 and the other articles:

> "Whereas in the opinion of the Court the purpose of Article 17 (art. 17), insofar as it refers to groups or 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; whereas, therefore, 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; whereas this provision which is negative in scope cannot be construed *a contrario* as depriving a physical person of the fundamental individual rights guaranteed by Articles 5 and 6 (art. 5, art. 6) of the Convention; whereas, in the present instance G.R. Lawless has not relied on the Convention in order to justify or perform acts contrary to the rights and freedoms recognised therein but has complained

> of having been deprived of the guarantees granted in Articles 5 and 6 (art. 5, art. 6) of the Convention; whereas, accordingly, the Court cannot, on this ground, accept the submissions of the Irish Government." [9]

The purpose of this article is therefore to prevent the principles enshrined in the ECHR from being embezzled by applicants, at their own advantage, whose actions aim at destroying these same principles. In short, this is about preventing an abuse of a right. First and foremost, the Court will therefore check if Article 17 applies to the comments for which the Court is refered to, in which case they would be excluded from the protection of Article 10. As the Court underlined: "there is no doubt that any remarks directed against the values underlying the Convention would see themselves excluded from the protection of Article 10 by Article 17 (unofficial translation)."[10]

What type of statement can therefore be considered as "directed against the values underlying the Convention"? The use of Article 17 has varied over time. It was, at first, not very much exploited and only aiming at hypothetical situations of totalitarian doctrine perceived as contrary to the Convention, its potential is now fully exploited, especially when the Court finds itself confronted with a form of "hate speech" not covered by Article 10.

Certain statements, which incite for example to violence or racial hatred, may be excluded from the protection of Article 10 of the ECHR by applying Article 17.

◆ Condemnation of a totalitarian doctrine contrary to the Convention

The European Commission on Human Rights applied Article 17 for the first time – and in a broad interpretation – in the context of the Cold War, in its decision on *Communist Party (KPD) v. the Federal Republic of Germany*, considering that the establishment of "the communist social order by means of a proletarian revolution and the dictatorship of the proletariat (unofficial translation)" was contrary to the Convention. Although the political activities employed by this party at the time of its appeal were constitutional, the Commission concluded that it had not renounced its revolutionary goals.[11]

9 *Lawless v. Ireland*, 1 July 1961, Series A3, para. 7.

10 *Seurot v. France* (dec.), No. 57383/00, 18 May 2004.

11 *Communist Party (KPD) v. the Federal Republic of Germany*, decision of 20 July 1957, Yearbook 1, p. 222.

In the following decades, the supervising bodies in Strasbourg have had to face new challenges faced by democracies in Europe. The fear of the revival of National Socialism, as a totalitarian ideology contrary to the Convention, has notably led the Commission and the Court to apply Article 17 more often. The Commission has repeatedly affirmed 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." [12]

Accordingly, any activity inspired by national socialism will be considered incompatible with the Convention.

◈ Condemnation of negationism

Article 17 has also been applied to prevent freedom of expression from being used to promote revisionist or negationist statements. Negationism is a specific category of racist comments since it both constitutes a denial of crimes against humanity,meaning here the Nazi holocaust, and an incitement to hatred against the Jewish community.

This idea of condemning not only expressions which constitute a denial or justification of crimes but also expressions advocating racial and religious discrimination has gradually appeared. An example can be found in the European Commission's decision on *Honsik v. Austria*:

> "As regards the circumstances of the present case, the Commission particularly notes the findings of the Court of Assizes and the Supreme Court that the applicant's publications in a biased and polemical manner far from any scientific objectivity denied the systematic killing of Jews in National Socialist concentration camps by use of toxic gas. The Commission has previously held that statements of the kind the applicant made ran counter one of the basic ideas of the Convention, as expressed in its preambular, namely justice

12 *B.H., M.W., H.P. and G.K. v. Austria*, No. 12774/87, decision of the Commission of 12 October 1989; see also *Nachtmann v. Austria*, No. 36773/97, decision of the Commission of 9 September 1998, and *Schimanek v. Austria* (dec.), No. 32307/96, 1 February 2000.

> and peace, and further reflect racial and religious discrimination." [13]

On this subject, the European Court added in its judgment on *Lehideux and Isorni* 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."[14] Therefore, there exists a "category of clearly established historical facts – such as the Holocaust – whose negation or revision would be removed from the protection of Article 10 by Article 17."[15]

The *Garaudy* case constitutes a turning point in the use of Article 17, as the Court clearly applies here for the first time the principles outlined above to demonstrate the inadmissibility of an application, affirming that:

> "Denying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order. Such acts are incompatible with democracy and human rights because they infringe the rights of others. Its proponents indisputably have designs that fall into the category of aims prohibited by Article 17 of the Convention."

Interestingly, the Court, in its decision, associated the combat against racism and anti-Semitism with the fundamental values of the Convention and refers expressly to infringement to the rights of others. Considering that "the main content and general tenor of the applicant's book, and thus its aim, are markedly revisionist and therefore run counter to the fundamental values of the Convention", the Court

13 *Honsik v. Austria*, No. 25062/94, decision of the Commission of 18 October 1995, D.R. 83, pp. 77-85, also *Marais v. France*, No. 31159/96, decision of the Commission of 24 June 1996, D.R. 86, p. 184, concerning a publication in which the applicant's real aim, under cover of a scientific demonstration, was to call into question that gas chambers had existed or had been used to commit genocide.

14 *Lehideux and Isorni v. France* [GC], judgment of 23 September 1998, *Reports of Judgments and Decisions* 1998-VII, para. 53.

15 *Ibid*., para. 47.

concluded in this case that the applicant could not benefit from the protection of Article 10 of the Convention, on which he was relying to challenge the lawfulness of criminal convictions for denial of crimes against humanity.

◈ Condemnation of racial "hate speech"

The European Court also had recourse to Article 17 when the right to freedom of expression was invoked to incite hatred or racial discrimination that went beyond the assumptions of revisionism. First, the European Commission of Human Rights, followed by the European Court, have from the first stage of the admissibility of the appeal made use of Article 17 to oppose applicants which have made manifestly racist statements, constituting racial "hate speech".

In its decision on the inadmissibility of *Glimmerveen and Hagenbeek v. the Netherlands,*[16] the Commission has considered that applicants pursuing a policy that clearly included elements of racial discrimination could not rely on Article 10. In this case, the applicants had been convicted for possessing leaflets addressed to "White Dutch people", which tended to make sure notably that every one who was not white left the Netherlands.

The Court has used the opportunity of the merits of a number of judgments to firmly reiterate its position on the subject. In the *Jersild* judgment concerning statements made by a group called the Greenjackets, there was no doubt for the Court that "the remarks in respect of which the Greenjackets were convicted ... were more than insulting to members of the targeted groups and did not enjoy the protection of Article 10."[17] As the authors of these insults were however not party to the case before the European Court, it did not have to pronounce itself any further on the application of Article 17.

16 *Glimmerveen and Hagenbeek v. the Netherlands*, Nos. 8348/78 and 8406/78, decision of the Commission of 11 October 1979, D. R. 18, p. 187.

17 *Jersild v. Denmark*, op. cit., para. 35. The Court uses a more general formulation in the judgement of *Gündüz*, affirming that "concrete expressions constituting hate speech, which may be insulting to particular individuals or groups, are not protected by Article 10 of the Convention."(*Gündüz v. Turkey*, op. cit., para. 41).

In the case of *Norwood v. the United Kingdom*, the Court will apply Article 17 for the first time with regard to an attack directed at the Muslim community. The Court was confronted with the applicant's conviction for having displayed in his window a large poster of the BNP (British National Party), showing a photograph of the Twin Towers in flame, with the words "Islam out of Britain – Protect the British People" and the symbol of a crescent and star in a prohibition sign. The Court found that "such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination. 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." The application was consequently declared inadmissible by the Court because it was incompatible *ratione materiae* with the provisions of the Convention. In the case of *Pavel Ivanov v. Russia,*[18] the Court concluded that the applicant could not benefit from the protection of Article 10, as the publications of which he was the author, and which had led to his conviction by the domestic courts, were aimed to incite hatred towards the Jewish people and were therefore in contradiction with the Convention's underlying values of tolerance, social peace and non-discrimination.

Confronted with a clearly racist statement, the Court will therefore exclude it from the protection of Article 10 of the ECHR. Direct recourse to Article 17 nevertheless rare, since the Court sometimes prefers to use this provision indirectly as a "principle of interpretation" in order to assess whether restrictions on freedom of expression are necessary, in cases of comments which leave room for doubt. In such cases, "the Court will begin condering question of compliance with Article 10, whose requirements it will however assess in the light of Article 17."[19]

18 *Pavel Ivanov v. Russia* (dec.), No. 35222/04, decision of 20 February 2007.

19 *Lehideux and Isorni v. France,* op.cit., para. 38.

Case study No. 1

Facts

The State of Wonderland has been a member of the Council of Europe and party to the Convention of human rights and fundamental freedoms since 1994. It is home to an important community of foreigners that has lived there for several years and continues to grow.

T. and N., two citizens of Wonderland, are responsible for an initiative that aims at creating a "national and patriotic association for the defence of the people of Wonderland." On 9 December 2006 the imminent creation of this association was announced during a press conference held at Miracle-City, Wonderland's capital. During the press conference T. and N. explained the reason for its creation, claiming that the foreign minority constituted a threat and alleging repeatedly that there existed an inequality between the people of Wonderland and the immigrant community.

On 11 December 2006, two non-governmental organizations against racism reacted to these declarations by lodging a complaint and instituting a civil action for incitement to discrimination and racial hatred. On 16 January 2007 the public prosecutor asked for a judicial investigation to be opened. On 9 April 2007, the investigating judge of the Regional Court in the capital indicted T. and N, who where then sent to appear before the Criminal Court for provoking discrimination and racial hatred, and for insulting a group of persons of foreign origin on the basis of their race.

In its judgment of 10 September 2007, the Criminal Court concluded that the facts of discrimination and insult of which the defendants were accused did not fall within the strict framework of the proceedings such as detailed by the prosecutor's application for a judicial investigation. Consequently, T. and N. were acquitted. The NGO's lodged an appeal against this judgement.

In its judgment of 20 January 2008, the Court of Appeal in Miracle-City found that it had been presented with only one offence of incitement to racial hatred as prescribed in domestic law and declared the accused guilty, sentencing them to pay a fine of five thousand euros. T. and N. appealed on points of law. In its judgment of 7 May 2008, the Court of Cassation rejected the appeals. It concluded that the Court of Appeal had correctly defined the facts and motivated its decision to declare it a clear and intentional offence.

Consequently, on 9 May 2008 T. and N. lodged an application against the State of Wonderland with the European Court pursuant to Article 34 of the ECHR, claiming a violation of their right to freedom of expression as protected by Article 10 of the Convention.

Possible solution

This matter should be considered in the light of Article 17 of the ECHR.

The applicants" racist attitudes transpire clearly from the content of their statements, which claim that the community of foreign origin poses a threat and maintain that there exists an inequality between races. These ideas could open the door to xenophobia.

The elements of proof that are available in this case should consequently suffice to justify the use of Article 17 of the ECHR, since the applicants are essentially trying to use Article 10 to derive from the Convention a right to engage in activities that are contrary to the text and spirit of the Convention, a right that, if granted, would contribute to the destruction of the rights and freedoms set out in the Convention.

Conclusion

Accordingly, in view of Article 17 of the Convention the Court would without doubt conclude that the applicants cannot avail themselves of Article 10 in this case to contest their conviction.

Compare *W.P. and Others v. Poland* (dec.), No. 42264/98, 2 September 2004.

Seurot v. France (dec.) No. 57383/00, 18 May 2004.

(C) Restrictions to the freedom of expression (Article 10(2) of the ECHR)

(a) General comments

i General approach of the Court

When confronted with cases brought by applicants having been convicted on account of certain comments, or other forms of expression, and who allege a violation of Article 10 of the Convention, the Court first has to check if these comments fall within the ambit of Article 10, and it then has to verify the following four elements: the existence of an interference, which should be prescribed by law, pursue one or more of the legitimate aims set out in Article 10(2) and be necessary in a democratic society to achieve these aims.

When confronted with Article 10(2) of the Convention, the European Court will verify successively if an interference in the freedom of expression exists, if this interference is indeed prescribed by law and pursues a legitimate aim, and, finally, if it appears to be necessary in a democratic society, which implies that it should be proportionate to the aim pursued.

The second paragraph of Article 10 of the Convention makes provisions for the fact that the right to freedom of expression carries with it duties and responsibilities, and may be subject to such "formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary." The European Court has always recalled that freedom of expression, as set out in Article 10, goes hand in hand with exceptions calling for a strict interpretation, and the need to restrict this right must be determined in a convincing manner.

Once the existence of an interference with the ensured right has been established, the Court will proceed to a triple examination:

- **Is the interference prescribed by law?**

According to the Court, "the expression "in accordance with the law" ... requires firstly that the impugned measure should have some basis in domestic law; it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him, and compatible

with the rule of law[20]. The Court considers therefore that a "law", within the meaning of Article 10(2), is a legal rule formulated with sufficient precision to allow a citizen to model his conduct on it: he must be able to foresee, if need be with the appropriate advice, and to a degree that is reasonable in the circumstances, the consequences which a given action will entail. Those consequences do not need to be predictable with absolute certainty. This notion of predictability is to a great extent dependent on the contents of the text in question, of its scope and the number and position of the persons to whom it is addressed.

- **Does the interference pursue a legitimate aim?**

The interference must also pursue one or more of the legitimate aims referred to in Article 10(2). Three categories of restrictions to the exercise of freedom of expression are authorised in this respect: to protect the general interest (national security, territorial integrity or public safety, prevention of disorder or crime, protection of health or morals), to protect other individual rights (protection of the reputation or rights of others or prevention of the disclosure of information received in confidence), or, lastly, to maintain the authority and impartiality of the judiciary.

- **Is the interference "necessary in a democratic society"?**

While the first two conditions do not normally pose a problem, the assessment of what is "necessary in a democratic society" calls for a more detailed examination: according to the European case-law it amounts to determining whether the reasons adduced by the national authorities to justify the interference appear "relevant and sufficient", or in other words whether it corresponds to a "pressing social need", and whether the means used were proportionate to the legitimate aim pursued. For this purpose, the Court grants the national authorities a "margin of appreciation".

ii The "margin of appreciation" of the States and the supervision exerted by the Court

The European Court has established a "margin of appreciation" in accordance with the principle of subsidiarity of the Convention's human rights protection mechanism. Thus, in its *Handyside* judgment, the Court pointed out that by reason of their direct and continuous contact with the vital

forces of their countries, it is for the national authorities to make the first assessment of the reality of the "pressing social need" which the notion of "necessity" implies.[20] Consequently, "it is in no way the Court's task to take the place of the competent national courts but rather to review under Article 10 the decisions they delivered in the exercise of their power of appreciation."[21] The Court's examination of the restrictions" conformity to the Convention, and in particular of the appropriateness of the measures used to achieve the legitimate aim pursued, will be more or less strict, since the margin of appreciation that is accorded to the States fluctuates according to the case in question. However, this margin is not unlimited and "goes hand in hand with a European supervision."[22] The margin of appreciation of the States is all the more limited in case of extended supervision by the Court.

There are several factors that govern the scope of the margin of appreciation and, consequently, the intensity of the European supervision. On the whole, the Court's supervision is at its most strict when it concerns statements that constitute an incitement to hatred. Conversely, "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"[23] because of the absence of a uniform European conception of the requirements of the protection of the rights of others in relation to attacks on religious convictions. The Court was of the opinion that it is primarily the task of the national authorities to evaluate if there exists a pressing social need that justifies an interference in such cases, and to this end, they enjoy a margin of appreciation that is "wider" if this concerns freedom of expression in matters liable to offend intimate personal convictions relating to morals or religion.

In the absence of a uniform European consensus on certain issues, such as those relating to morals or religion, a wider margin of appreciation is granted to the States in their decisions to apply restrictions on freedom of expression.

20 *Handyside v. the United Kingdom*, op. cit., para. 48.

21 *Ibid.*, para. 50

22 *Ibid.*, para. 49

23 *Wingrove v. the United Kingdom*, judgment of 25 November 1996, *Reports of Judgments and Decisions* 1996-V, para. 58.

(b) *Elements taken into account by the Court*

The Court's task when faced with a restriction of the right to freedom of expression is to look at the impugned interference "in the light of the case as a whole". The Court will therefore always base its decision on the particular circumstances of the case. There exists, furthermore, not one decisive factor which could help drawing the dividing line between what is allowed and what is not: it is rather a set of variable elements, which must be combined on a case by case basis.

In order to determine if an expression can be considered as constituting hate speech, the European Court will examine the purpose pursued by the applicant as well as the content of the expression and the context in which it was disseminated.

The essential criterion used by the Court concerns the aim pursued by the applicant. This criterion nevertheless seems a delicate one to implement, because it is so difficult to determine an individual's inner state of mind. This explains why the Court refers, often in detail, to the content of the incriminating remarks and to the context in which they were disseminated.

i. The purpose pursued by the applicant

The fundamental question the Court asks is whether the applicant intended to disseminate racist ideas and opinions through the use of "hate speech" or whether he was trying to inform the public on a public interest matter. The answer to this question should enable to distinguish between forms of expressions, which, although shocking or offensive, are protection by Article 10, and expressions, which cannot not be tolerated in a democratic society.

Thus, in the *Jersild* judgment, the Court justified its finding of the violation of Article 10 on the ground that, unlike the "Greenjackets" who had been interviewed by the applicant and had made overtly racist remarks, the aim of the applicant, who was condemned for complicity in the broadcasting of racist statements, had been to expose "specific aspects of a matter that already then was of great public concern."[24] The Court therefore considered that "taken as a whole, the feature could not objectively have appeared to have as its purpose the propagation of racist views and ideas".[25] In creating the television programme in question, the applicant did therefore not pursue a racist objective, according to the Court. Consequently, his conviction did

The objective that is pursued is crucial: is it to disseminate racist ideas and opinions through hate speech or to inform the public on a question of public interest?

24 *Jersild v. Denmark*, op. cit., para. 33.

25 *Ibid.*

not appear "necessary in a democratic society". The absence of a racist intention in this case plays an important role in the Court's ruling of a violation of the right to freedom of expression.

Likewise, in its judgment of *Lehideux and Isorni*, the Court concluded that France had violated Article 10 of the Convention and condemned the applicants for their apology of crimes or other offences of collaboration, emphasising that "it does not appear that the applicants attempted to deny or revise what they themselves referred to in their publication as "Nazi atrocities and persecutions" or "German omnipotence and barbarism.""[26] According to the Court, the applicants were thus "not so much praising a policy as a man, and doing so for a purpose – namely securing revision of Philippe Pétain's conviction – whose pertinence and legitimacy at least, if not the means employed to achieve it, were recognised by the Court of Appeal."[27]

Conversely, in its decision on *Garaudy c. France*, the Court, examining the conviction of the applicants for racial defamation and incitement to hatred under Article 10(2), pointed out the "proven racist aim" of the remarks, which are not confined to criticism of the State of Israel, and concludes on the inadmissibility of the application. As regards the conviction for denying crimes against humanity, the Court emphasised that "the aim and the result of that approach are completely different, the real purpose being to rehabilitate the National-Socialist regime and, as a consequence, accuse the victims themselves of falsifying history".

In each case the Court therefore attempts to identify the applicant's intention: was he or she seeking to inform the public about a matter of general interest?[28] If so, the Court generally concludes that the impugned interference with the applicant's right was not "necessary in a democratic society". On the other hand, if the remarks in question are meant to incite to violence and hatred, "the national authorities enjoy a wider margin of appreciation when examining the need for an interference with the exercise of

26 *Lehideux and Isorni v. France*, op. cit., para. 47.

27 *Ibid*., para. 53.

28 In this sense, *Gündüz v. Turkey*, op. cit., para. 44

freedom of expression."[29] For example, in its judgment *Halis Doğan*, the Court considered that the newspaper articles in question could be regarded an incitement to the glorification of violence – noting that "the comments expressed in the text stirred up primal instincts and reinforced already anchored prejudices, that expressed themselves with a deadly violence (unofficial translation)"[30] – and held that there had been no violation of Article 10.

ii. Content of the expression in question

◆ **Political discourse or matters of public interest**

The Court attaches a particular importance to political discourse or matters of public interest, which are areas where Article 10(2) "little scope for restrictions on freedom of expression (unofficial translation)."[31] (unofficial translation, text only avaible in French). Wherever remarks can be classified as relating to public debate, the Court will be less inclined to consider the interference as necessary. Thus, the Court "attaches the highest importance to freedom of expression in the context of political debate and considers that political discourse should not be restricted without imperious reasons(unofficial translation)."[32] In the *Erbakan* case for example, the Court found that the sanction imposed on the applicant on account of a public speech made during the municipal elections campaign was in breach of Article 10(2) of the Convention.

The Court hardly allows restrictions on the freedom of expression in the sphere of political speech or matters of general public interest.

◆ **Speeches of a religious nature**

Speeches of a religious nature hold a special place in the European case-law since the Court traditionally grants States a wide margin of appreciation in this area.[33] The

29 *Gündüz v. Turkey*, op. cit., para. 61. *Contra*: see for example the judgment of *Incal v. Turquie*, in which the Court notes that the appeals to the population of Kurdish origin cannot, if "read in context, be taken as incitement to the use of violence, hostility or hatred between citizens." (*Incal v. Turquie*, judgment of 9 June 1998, Reports of Judgments and Decisions 1998-IV, para. 50).

30 *Halis Doğan v. Turkey (No. 3)*, No. 4119/02, para. 35, 10 October 2006.

31 See in particular *Erbakan v. Turkey*, op. cit., para. 55.

32 *Ibid.*

33 *Infra*.

European Court thus points out that "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."[34]

◈ Distinction between statements of fact and value judgments

A distinction needs to be made between statements of facts, the existence of which can be demonstrated, and value judgements, which, though they cannot be proved, need to be supported by a sufficient factual basis.

According to the Court, "a distinction needs to be made between statements of fact and value judgements in that, while the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10. ... However, even where a statement amounts to a value judgment, there must exist a sufficient factual basis to support it, failing which it will be excessive."[35]

Consequently, the Court attaches a particular importance to the truthfulness of the remarks in question. It thus distinguishes between matters that "are part of an ongoing debate among historians" and "clearly established historical facts."[36] Whereas the Court exercises a strict supervision in respect of the former, denying the truthfulness of the latter is in principle not protected by Article 10, since such a denial pursues aims prohibited by Article 17 of the Convention. In its decision in *Garaudy*, the Court underlined that "there can be no doubt that denying the reality of clearly established historical facts, such as the Holocaust, as the applicant does in his book, does not constitute historical research akin to a quest for the truth"; consequently, the applicant cannot rely on the provisions of Article 10. In contrast, in its judgment in *Incal* , the Court emphasised that the impugned leaflet exposed "actual events which were of some interest to the people"[37] namely certain administrative and municipal measures taken by authorities, in particular

34 *Gündüz v. Turkey*, op. cit, para. 37; also *Erbakan v. Turkey*, op. cit., para. 55.

35 *Pedersen and Baadsgaard v. Denmark*, op. cit., para. 76

36 *Lehideux and Isorni v. France*, op. cit., para. 47.

37 *Incal v. Turkey*, op. cit., para. 50.

against street traders of the city of İzmir. In this case the Court concluded that there had been a breach of Article 10 of the Convention.

iii. Context of the expression in question

The applicant's status/role in society

- **The applicant is a politician**

The States" margin of appreciation is significantly narrower when the applicant is a politician, because of the fundamental character of the free play of political debate in a democratic society. In the judgment of *Incal*, which concerns the criminal conviction of a member of the executive committee of the People's Labour Party because of his contribution to the preparation of leaflets which were seized on the grounds of separatist propaganda, the Court thus repeats that freedom of expression, which is "precious to all", is "particularly important for political parties and their active members ... They represent their electorate, draw attention to their preoccupations and defend their interests. Accordingly, interferences with the freedom of expression of a politician who is a member of an opposition party, like the applicant, call for the closest scrutiny on the Court's part."[38] However, this freedom is not absolute: the court emphasised that, as the fight against any form of intolerance is an integral part of the protection of human rights, "it is crucially important that politicians avoid disseminating comments in their public speeches which are likely to foster intolerance"[39] (unofficial translation). The Court therefore also submits politicians to a strict scrutiny and insists on their special responsibility in the fight against intolerance.

- **The applicant is a journalist or a member of the press in general**

It is suitable here to proceed to make a distinction between the applicant as the author of the impugned statements or as the person linked to their dissemination, a distinction that leads to variable consequences depending on the case. Applicants sometimes have been convicted by reason of their roles in and connections with the dissemination of

38 *Incal v. Turkey*, op. cit., para. 46.

39 *Erbakan v. Turkey*, op. cit., para. 64.

the remarks in question, as a journalist, publisher, editor or newspaper owner. In its *Jersild* judgment, the Court thus made a clear distinction between comments made by the "Greenjackets" and the role of the journalist, who was the author of the documentary on them. In the Court's view, "a significant feature of the present case is that the applicant did not make the objectionable statements himself but assisted in their dissemination in his capacity of television journalist responsible for a news programme."[40] On the basis of the applicant's journalist status, the Court applied the principles related to the freedom of the press, granting a limited margin of appreciation to national authorities. However, the Court did not attach the same weight to this distinction in the *Sürek* case, in which the applicant was convicted as the owner of a weekly review that had published two readers" letters, vehemently criticising the military actions of the authorities in south-east Turkey. In this judgment, the Court held that "while it is true that the applicant did not personally associate himself with the views contained in the letters, he nevertheless provided their writers with an outlet for stirring up violence and hatred."[41] According to the Court, the applicant had, as owner of the review, "the power to shape the editorial direction of the review" and was for that reason "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."[42]

The Court takes into account whether a journalist is the author of the objectionable statements or has been involved as an intermediary in their dissemination to determine to what extent the State is allowed to restrict their freedom of expression.

- **The applicant is a public official**

The Court grants States a substantial margin of appreciation when restrictions on the freedom of expression of public officials, or persons with a similar status. In the *Seurot* case, it paid special attention to the applicant's

40 *Jersild v. Denmark*, op. cit., para. 31.

41 *Sürek v. Turkey*, op. cit., para. 63. See also *Halis Doğan v. Turkey* (No. 3), op. cit , para. 36.

42 *Sürek v. Turkey*, op. cit., para. 63. In her partly dissenting opinion, Judge Palm on the contrary holds that the applicant is not directly responsible for the publication of the readers" letters and points out that "the applicant was only the major shareholder in the review and not the author of the impugned letters nor even the editor of the review responsible for selecting the material in question".

status of teacher – "and in fact a history teacher" (unofficial translation). – for facts where the applicant was the author of an insulting article towards North Africans and which was published in his school's newsletter. On this occasion, the Court recalled the "special duties and responsibilities" (unofficial translation) incumbent on teachers, since they "are figures of authority to their pupils in the educational field" (unofficial translation).[43] The Court used this occasion to add that "democratic citizenship education, which is essential to combat racism and xenophobia, implies the mobilization of responsible stakeholders, in particular teachers" (unofficial translation).[44]

Status of persons targeted by remarks at issue

The Court takes into account the status of the victim of the opinion expressed. In general, it considers that "the limits of acceptable criticism are accordingly wider as regards a **politician** as such than as regards a **private individual**. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance."[45] This is all the more true if the criticism target **governments**, in the sense that in a democratic system its "actions or omissions ... must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion. Furthermore, the dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media."[46]

43 *Seurot v. France*, op. cit.

44 *Ibid*. See on this point Recommendation (2002)12 of the Committee of Ministers on education for democratic citizenship, that declares that such an education, throughout a person's life and at all levels of the system (primary, secondary, higher and adult education) "is fundamental to the Council of Europe's primary task of promoting a free, tolerant and just society."

45 *Lingens v. Austria*, op. cit., para. 42.

46 *Castells v. Spain*, judgment of 23 April 1992, Series A, No. 236, para. 46.

On the other hand, the limits of acceptable criticism seem narrower if it targets **public officials**. In the case of *Pedersen et Baadsgaard*,[47] the Court thus considered that, although a high-ranking police officer should tolerate a higher level of criticism than any other individual, he cannot be treated on an equal footing with politicians when it comes to the public debates concerning his professional action.

The Court has also included in its evaluation **the behaviour** of the injured party prior to the expression of the opinion of which it was the victim. As an example, in *Nilsen and Johnsen*,[48] the Court considered that the plaintiff had gone beyond the exercise of duties as a government-appointed expert by participating in a public debate and by publishing a book voicing harsh criticism on the working methods of the police. The Court considered this to be an important element in the case.

Dissemination and potential impact of the remarks

The potential impact of the means of expression used is an important factor which is referenced in the case-law of the European Court. To measure the potential impact of a statement, the Court takes particular account of the form of the expression employed and of the medium used for its dissemination, but also of the context in which this dissemination took place.

- **Written press**

In view of the particular importance attached to the freedom of the press and the key role that its publications play in a democratic society, the Court exercises very strict supervision in this matter.

In the *Halis Doğan* judgment, the Court thus pointed out that "while the press must not overstep the boundaries set, *inter alia*, for the protection of the vital interests of the State, such as national security or territorial integrity, against the threat of terrorism, or in view of maintaining or-

47 *Pedersen and Baadsgaard v. Denmark*, op. cit., para. 80.

48 *Nilsen and Johnsen v. Norway* [GC], No. 23118/93, para. 52, ECHR 1999-VIII.

der or the prevention of crime, it is nevertheless incumbent on it to impart information and ideas on political issues, including divisive ones. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. The freedom to receive information or ideas provides the public with one of the best means of discovering and forming an opinion on the ideas and attitudes of their leaders" (unofficial translation).[49]

To evaluate the potential impact of an impugned statement, the Court first checks the medium used for its dissemination (written press, audiovisual media or works of art).

◈ Audiovisual media

Although the principles governing freedom of the press were formulated primarily with regard to the printed media, "these principles doubtlessly apply also to the audiovisual media".[50] The particular importance attached to the role of the press therefore increases still further where the audiovisual media are concerned.

In particular, the Court pointed out in the *Jersild* judgment that "the audiovisual media often have a much more immediate and powerful effect than the print media … The audiovisual media have means of conveying through images meanings which the print media are not able to impart".[51] When the audiovisual media are at issue, the Court will therefore consider the type of programme in which the impugned remarks were broadcast, in order to assess the probable impact of the subject of the programme on the audience. The Court thus noted that in the *Jersild* case, the item "was broadcast as part of a serious Danish news programme and was intended for a well-informed audience,"[52] and that it was preceded by an introduction by the programme's presenter, who referred to the recent public debate and press comments on racism in Denmark. The Court infered from this that "both the TV presenter's introduction and the applicant's conduct during the interviews clearly dissociated him from the persons interviewed."[53] However, the minority judges did not consider these precautions sufficient and criticised the fact that there

49 *Halis Doğan v. Turkey (No. 3)*, op, cit., para. 32.

50 *Jersild v. Denmark*, op. cit., para. 31.

51 *Ibid.*

52 *Ibid.*, para. 34.

53 *Ibid.*

had been no "clear statement of disapproval"[54] of the racist remarks made by the persons interviewed.

In the *Gündüz* judgement on the other hand, the Court emphasises that the applicant was taking an active part in a "lively public discussion": his statements were counterbalanced by the intervention of the other participants in the programme and his views were expressed as part of a pluralist debate. To justify a number of remarks made by the applicant which could be regarded as insulting, the Court noted 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".[55]

◈ Artistic forms of expression

According to the Court, forms of artistic expression such as **poetry** have a smaller potential impact than the mass media, since poetry by its very nature interests only a limited number of people. In the *Karataş* judgment, which concerns poems, the Court observed that "the medium used by the applicant was poetry, a form of artistic expression that appeals to only a minority of readers."[56] This "limited their potential impact on "national security", "[public] order" and "territorial integrity" to a substantial degree".[57] In this particular case the Court concluded that the applicant did not intend to call for an uprising, nor for the use of violence, but only wanted to express his deep distress in the face of a difficult political situation.

In addition, the Court pointed out that **satire** is a form of artistic expression and social commentary that, by means of exaggeration and distortion of reality, naturally aims to provoke and agitate. Accordingly, any interference with an artist's right to such expression must be examined with particular care.[58]

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54 Joint dissenting opinion of Judges Ryssdal, Bernhardt, Spielmann and Loizou, para. 3.

55 *Gündüz v. Turkey*, op. cit., para. 49.

56 *Karataş v. Turkey* [GC], No. 23168/94, para. 49, ECHR 1999-IV.

57 *Ibid*., para. 52.

58 *Vereinigung Bildender Künstler v. Austria*, No. 68354/01, para. 33, 25 January 2007.

◈ The place of dissemination

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

Nature and seriousness of the interference

According to the Court, the nature and severity of the penalties imposed are also factors to be taken into account in assessing whether the interference was proportionate to the aim pursued or not. However, it turns out that this criteria is not always decisive, but rather secondary, since the Court sometimes considers it unnecessary to examine it, or mentions it only briefly and partially, finding that there has been a violation on the basis of another aspects of the case. In the *Gündüz* judgment, for example, the Court held that the finding it has just made, namely that the interference with the applicant's freedom of expression was not based on sufficient reasons for the purposes of Article 10, makes it unnecessary for the Court "to pursue its examination in order to determine whether the two-year prison sentence imposed on the applicant – an extremely harsh penalty even taking account of the possibility of parole afforded by Turkish law – was proportionate to the aim pursued."[59] In the *Jersild* judgment, the limited nature of the fine imposed on the applicant is irrelevant: in the Court's view, "what matters is that the journalist was convicted."[60]

The nature and the severity of the imposed penalties are factors that the Court may take into account to assess whether the interference to the freedom of expression was proportionate to the aim pursued or not.

However, there are cases in which the Court regards the nature and seriousness of the interference as a decisive factor for its conclusion. It will consider that, although the restriction of the right to freedom of expression was necessary in principle, the imposed sanction is disproportionate and therefore entails a violation of Article 10 of the ECHR. There are several factors at play here.

59 *Gündüz v. Turkey*, op. cit., para. 54.

60 *Jersild v. Denmark*, op. cit., para. 35.

- **Nature of the sanctions**

In general, the Court takes into account the extent and the nature of the measures that constitute the interference to the freedom of expression. In the *Incal* judgment in particular, the fact that the applicant was sentenced to various penalties, including being excluded from the civil service and from certain activities in political organisations, associations and trade unions, when he was a member of the executive committee of an opposition party, was found to be disproportionate to the aim pursued and therefore not necessary in a democratic society. In contrast, the Court did not consider that the termination of the contract of a teacher in a private secondary school was disproportionate, in spite of its seriousness, in view of the other circumstances of that case.[61]

The Court carries out particularly strict supervision if a **sentence of imprisonment** is at issue. In the *Erbakan* judgment, the Court noted that besides being ordered to pay a fine, the applicant was sentenced to one year's imprisonment and banned from exercising several civil and political rights. The Court considered that ""these were undoubtedly very severe penalties for a well-known politician""[62] and added that "that it should in particular be noted that by its very nature, a penalty of this kind inevitably has a dissuasive effect, a conclusion which is not altered by the fact that the applicant did not serve his sentence (unofficial translation)".[63] Likewise, in the *Karataş* judgment, the Court was "struck by the severity of the penalty imposed on the applicant – particularly the fact that he was sentenced to more than 13 months" imprisonment – and the persistence of the prosecution's efforts to secure his conviction"[64], insofar as the fine imposed on the applicant was more than doubled after a new law came into force.

The Court can judge the penalty of the payment of a **fine** to be an excessive punishment, also where this is limited to a symbolic sum or payment of damages, if such a penalty acts as a deterrent to exercising freedom of expression.

61 *Seurot v. France*, op. cit.

62 *Erbakan v. Turkey*, op. cit., para. 69.

63 *Ibid.*

64 *Karataş v. Turkey*, op. cit., para. 53.

Lastly, a **prior restraint** calls for the most careful scrutiny on the part of the Court.[65] It considers such a restraint to be particularly dangerous in that it prohibits the transmission of information and ideas *ex ante*. The Court noted that "this is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest."[66]

◆ The existence of alternative means

In order to assess whether the penalty is proportionate, the Court can take account of the existence of other measures which would interfere to a lesser extent with freedom of expression. In the *Lehideux et Isorni* judgment, the Court, stressing "the seriousness of a criminal conviction for publicly defending the crimes of collaboration", refered to "the existence of other means of intervention and rebuttal, particularly through civil remedies".[67] It then finds that the criminal conviction of the applicants was disproportionate in view of the aims pursued. In a similar vein, the holds in the *Incal* judgment that since a request for authorisation was submitted to the provincial governor's office prior to distribution of the impugned leaflet, the authorities could have required changes to the leaflet before having recourse to a criminal penalty. Failing this, the Court noted the radical nature of the impugned interference and points out that "its preventive aspect by itself raises problems under Article 10."[68]

◆ The need for consistency in States" attitudes

The Court requires States to impose a certain consistency in their restrictions. The national authorities cannot sanction remarks or activities that they have previously authorised or at least tolerated. In the *Erbakan* case, the Court did

65 Observer *and* Guardian *v. the United Kingdom*, op. cit., para. 60.

66 *Ibid.*

67 *Lehideux and Isorni v. France*, op. cit., para. 57. In their joint dissenting opinion, Judges Foighel, Loizou and Sir John Freeland note on the question of proportionality that the penalty was limited to the requirement of a symbolic payment of one franc to the civil parties and the ordering of publication of excerpts from the conviction in *Le Monde* (para. 7).

68 *Incal v. Turkey*, op. cit., para. 56.

not therefore consider it acceptable that a prosecution was brought four years and five months after the dissemination of the impugned remarks; in this case criminal prosecution is not a means that is reasonably proportionate to the legitimate aims pursued. The Court thus appears to impose on the Contracting States a certain duty to proceed expeditiously in bringing prosecutions. Its line of reasoning in the *Lehideux and Isorni* judgment seems to follow the same idea, when it refers to the fact that the publication in question corresponded directly to the objective and the aim of the associations headed by the applicants; their associations had been legally constituted and no proceedings had ever been instigated against them for pursuing their objective.[69]

69 *Lehideux and Isorni v. France*, op. cit., para. 56.

Case study No. 2

Facts

The State of Amarland has been a member of the Council of Europe and party to the Convention of human rights and fundamental freedoms since 1990.

At the material time, Mr John Lagart, an Amarland national, was the editor of the local daily newspaper ***The voice of Amarland***, distributed in the North of the country with a circulation of around 10,000 copies. On 16 June 2006 he published on page 10 in issue 275 of this newspaper two cartoons that represented the ***amye*** minority community, present in the North. The cartoons criticised the Government's policy of integration in this region and described the way in which certain recent measures taken by the Government had the effect of "muzzling" the members of this minority, who were thought to make too many demands. The ***amye*** minority is well-known for its desire for independence, certain separatist groups having already taken recourse to or called for violence to defend their ideas.

By an act of 28 June 2006, the State Prosecutor attached to the Court of First Instance charged the applicant pursuant to the Amarland criminal code for incitement to hatred on the basis of a distinction founded on racial origin, following the publication of the two cartoons. In addition, as Mr Lagart did not reveal the identity of the cartoons" author, a rule of domestic law applied, stipulating that in case the identity of the author of an article or cartoon is unknown or not revealed by the editor, the responsibility for it lies with this editor, as if he himself were the author.

In a judgment of 6 December 2006, the Court of First Instance sentenced Mr Lagart to two years" imprisonment and a fine of 1,800 euros. It also ordered the newspaper to suspend its publication for a week. Mr Lagart appealed against his conviction, invoking Article 10 of the European Convention on Human Rights. In a judgment of 21 September 2007 the Court of Cassation dismissed the applicant's claim and upheld the first-instance judgment.

Consequently, on 18 October 2007 Mr Lagart lodged an application against the State of Amarland with the European Court under Article 34 of the ECHR.

Possible solution

In view of the case-law of the European Court of Human Rights and the general principles applicable to the freedom of expression, the impugned penalty amounts without a doubt to an interference to the applicant's right to freedom of expression as protected under Article 10(1). The interference was prescribed by law and pursued a legitimate aim: to protect public safety and public order (protection of territorial integrity) within the meaning of Article 10(2). But was it "necessary in a democratic society"?

Elements to take into consideration

Special attention has to be paid to the content of the cartoons as well as the context in which they were published. In this respect, the following needs to be taken into account:

- the content: hostile criticism certainly, but does it amount to "hate speech"? Does the expression in question incite to hatred towards a person, a group of persons or a section of the population? This is questionable. Certainly, a cartoon generally makes a stronger impact than a text, especially in the region concerned, but isn"t exaggeration inherent to cartoons?
- the circumstances of the case, in particular the "separatist" menace
- the applicant: editor-in-chief, and not the author of the cartoons
- the newspaper's circulation
- the sentence (nature and severity of the imposed penalties): imprisonment, fine and a week's suspension of the newspaper, which seems rather severe in this case.

Conclusion

Looking at this set of element, the sentencing seems disproportionate to the aim pursued and not necessary in a democratic society. Consequently, there has been a violation of Article 10 of the Convention.

Compare: *Ergin v. Turkey (No. 3)*, No. 50691/99, 16 June 2005.

(c) The special case of attacks on religious beliefs

The previously mentioned elements are not or only summarily taken into account in matters relating to expressing opinions of a religious nature.

The Court has repeatedly reiterated that "those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith."[70] However, the Court recognised that States may adopt measures restricting the freedom of expression in attacks that are judged to be offensive and concern matters that are sacred to the holders of a belief. In this respect, the Court considers that the religious beliefs of others amount without any doubt to "the rights of others" as referred to in Article 10(2).

With the following statement of principle, the Court takes a position in favour of granting a wide margin of appreciation to Contracting States where attacks on religious convictions are at issue:

> "The fact that there is no uniform European conception of the requirements of the protection of the rights of others in relation to attacks on their religious convictions means that the Contracting States have a wider margin of appreciation when regulating freedom of expression in connection with matters liable to offend intimate personal convictions within the sphere of morals or religion."[71]

The Court reiterated here the approach already adopted in the sphere of morals, where the absence of a "common denominator" prompted it to grant States a substantial margin of appreciation. In this case, the Court justified the exist-

70 *Otto-Preminger-Institut v. Austria,* judgment of 20 September 1994, Series A No. 295-A, para. 47.

71 This wording is used in several judgments, with a variant in the *Murphy v. Ireland* judgment, which specifies that "there appears to be no uniform conception of the requirements of the "protection of the rights of others" in the context of the legislative regulation of the broadcasting of religious advertising" (*Murphy v. Ireland*, No. 44179/98, para. 81, ECHR 2003-IX).

ence of a wide margin of appreciation by arguing that it is not possible "to arrive at a comprehensive definition of what constitutes a permissible interference with the exercise of the right to freedom of expression where such expression is directed against the religious feelings of others." The Court drew attention here to the wide variety of conceptions of religion,[72] which can even vary within a single country.[73]

This diversity factor explains why the Court attached little weight to the other aspects of the case and leaves the assessment of the general situation entirely to the respondent State. It considered that the national authorities "are in principle in a better position than the international judge to give an opinion on the exact content of these requirements".[74] This wide margin of appreciation led the Court to put the emphasis on the particular context of the cases brought before it.

Consequently, because of the very wide margin of appreciation granted to States in this matter, the Court found no violation of Article 10 in the majority of cases concerning attacks against religious convictions which are submitted to it, considering that the interference is necessary for the protection of the right of others. It has found that:

- the respect for the religious feelings of believers as guaranteed under Article 9 of the Convention could be violated by provocative portrayals of objects of religious veneration, adding that "such portrayals can be regarded as malicious violation of the spirit of tolerance, which must also be a feature of democratic society"[75];
- the high threshold of profanation that is included in the definition in the English law of blasphemy constitutes in itself a safeguard[76], the extent of insult to

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

73 *Otto-Preminger-Institut v. Austria*, op. cit., para. 50.

74 *Wingrove v. the United Kingdom*, op. cit., para. 58.

75 *Otto-Preminger-Institut v. Austria*, op. cit., para. 47.

76 *Wingrove v. the United Kingdom*, op. cit., para. 60.

religious feelings must be significant if it is to lead to a conviction for blasphemy;

- if the case concerns not only comments that offend or shock, or a "provocative" opinion, but also an abusive attack on the Prophet of Islam, believers may legitimately feel themselves to be the object of unwarranted and offensive attacks through criticism of religious doctrine.[77]

In contrast, States" margin of appreciation diminishes in certain cases, leading the Court to find that there has been a violation of Article 10 of the ECHR:

- in the *Giniewski* judgment, for example, the emphasis was put on the importance of freedom of the press and of debate on matters of public interest. Therefore, despite the fact that the impugned article challenged a number of principles of the Catholic religion, the Court did not consider the case from the perspective of attacks on religious convictions.[78] It rather held that the article was part of a view which the applicant wished to express as a journalist and historian, on a matter of indisputable public interest in a democratic society – namely the various possible reasons behind the extermination of the Jews in Europe. The Court moreover stressed that the applicant's article is not gratuitously offensive or insulting , and does not incite disrespect or hatred;[79]
- in the *Aydın Tatlav* judgment, the lack of consistency in the attitude of the State, which brought a prosecution when a book was reprinted for the fifth time although it had authorised the first four editions, seems to be sufficient for the Court to rule in favour of the applicant. Furthermore, the Court "did not perceive an insulting tone to the comments aimed directly at believers or an abusive attack against sacred symbols, in particular Muslims, who on reading the book could nonetheless feel offended by the caustic commentary on their religion" (unofficial translation);[80]

77 *I.A. v. Turkey*, No. 42571/98, para. 29, ECHR 2005-VIII.

78 *Giniewski v. France*, No. 64016/00, para. 51, 31 January 2006: "an analysis of the article in question shows that it does not contain attacks on religious beliefs as such."

79 *Giniewski v. France*, ibid., para. 52.

80 *Aydın Tatlav v. Turkey*, op. cit., para. 28.

- in the *Klein* judgment, the Court found that Slovakia violated Article 10 for having convicted a journalist, who in an article criticised an Archbishop following the latter's call in a TV broadcast for the withdrawal of both the film "*Larry Flint*" and the poster accompanying that film. The Court was of the opinion that the article "neither unduly interfered with the right of believers to express and exercise their religion, nor did it denigrate the content of their religious faith": the Court considered that the strongly worded pejorative opinion only concerned the archbishop and is not persuaded that the applicant through his article "discredited and disparaged a sector of the population on account of their Catholic faith", even if the journalist's criticism could have offended some believers;[81]
- finally, in the *Nur Radyo Ve Televizyon* judgment, the Court found that "although the comments might have been shocking and offensive" they should not be restricted as long as they "did not in any way incite to violence and were not liable to stir up hatred against people who were not members of the religious community in question",[82] and this in spite of the proselytising tone of the comments "likely to instil superstition, intolerance and obscurantism (unofficial translation)",[83] that attributed a religious significance to an earthquake.

Thus, even in the context of religious beliefs, the Court accepted that some expressions which might be "**shocking**" and "**offensive**" should not be restricted, provided, however, that:

- t**hese expressions are not gratuitously offensive;**
- **the insulting tone does not directly target specific believers;**
- t**hese expressions are insulting neither for believers nor with respect to sacred symbols;**
- **they do not attack believers" rights to express and practice their religion, and do not denigrate their religious faith;**
- **in particular, they do not incite disrespect, hatred or violence.**

81 *Klein v. Slovakia*, No. 208/01, para. 52 31 October 2006.

82 *Nur Radyo Ve Televizyon Yayıncılığı A.Ş. v. Turkey*, No. 6587/03, para. 30, 27 November 2007.

83 *Ibid.*

Case study No. 3

Facts

The State of Micronia has been a member of the Council of Europe and party to the Convention of human rights and fundamental freedoms since 1998.

The *Micronia Art Gallery* is one of the most famous independent art galleries in Micronia. It is located in a working-class district of the capital, which is home to a very religious community, and is devoted entirely to exhibitions of contemporary art. The gallery is managed by an association called *Micron"Art*.

Between 2 May and 21 June 2000, this association organised a retrospective art exhibition of Micronia's most famous painters, as part of its 10th anniversary celebrations. Among the works shown were paintings on loan from the painter Leonard D.

A number of these paintings had caused a great deal of controversy in Micronia, as certain erotic works of this painter – an important surrealist artist –were of a nature to shock the very religious community living in the popular district in which the art gallery was located. These paintings showed several religious figures in unequivocal sexual postures.

A neighbourhood association organised several demonstrations outside the gallery demanding the removal of these painting, without success. It considered these paintings "diabolical" and argued that it seemed misplaced to exhibit them in the *Micronia Art Gallery*, considering that a strongly religious community lived in the area.

On 15 June 2000 the neighbourhood association brought proceedings against *Micron"Art* on the basis of the national copyright legislation, seeking an injunction banning it from exhibiting the paintings in question. Whereas the Court of First Instance dismissed this action, the Court of Appeal considered that the paintings caused offence and issued an injunction against the association to prohibit the display of three of the paintings for the time of the gallery's exhibition. On 1 February 2006 *Micron"Art's appeal* was rejected.

Consequently, on 11 February 2006 *Micron"Art* lodged an application against Micronia with the European Court under Article 34 of the ECHR.

Possible solution

This case unquestionably touches upon the right of freedom of artistic expression as protected by Article 10 of the ECHR. The prohibition to exhibit the impugned paintings constitutes without a doubt an infringement to the right to freedom of expression for the applicant association. Furthermore, this infringement was "prescribed by law" and pursued the legitimate aim of the "protection of the right of others", more precisely the protection of the religious feelings of others.

As regards the necessity of the interference, several factors should be taken into account:

- the nature and seriousness of the interference: the injunction from the Micronian Court is limited in time and space. It only prohibits the association from exhibiting three impugned paintings in a given location, without any prejudice to their potential exhibition in the future.
- furthermore, in view of the context of religious beliefs in this case, it is likely that the Court will grant the respondent State a wide margin of appreciation: the paintings could constitute a seriously offensive attack on matters that are considered as sacred by believers.
- in addition, particular attention may be given to the context of the case: the religion portrayed in the impugned paintings is that of the vast majority of the district's inhabitants.

Conclusion

If the Court chooses to consider the case from the perspective of the protection of religious beliefs of others, and in view of the limited nature of the interference, it would probably conclude that the contested injunction was proportionate to the aim pursued and therefore necessary in a democratic society. Consequently, there would not have been a violation of Article 10 of the ECHR.

Compare: *Vereinigung Bildender Künstler v. Austria*, No. 68354/01, ECHR 2007-...

Wingrove v. the United Kingdom, judgement of 25 November 1996, Reports of Judgments and Decisions 1996-V

IV. Elements from other sources

Other international or regional bodies, in particular the Human Rights Committee, the Committee on the Elimination of Racial Discrimination and ECRI, have had to face the problem of the limits of the right to freedom of expression in matters concerning "hate speech" and have elaborated on certain elements identifying this type of speech.

Purpose of the expression

- In its *Faurisson v. France* decision, the Human Rights Committee concluded that the restriction of the freedom of expression of the author, convicted under the "Gayssot Act" for revisionist statements, was permissible under Article 19, paragraph 3 (a), of the International Covenant on Civil and Political Rights The Committee argued that "the statements made by the author, read in their full context, were **of a nature as to raise or strengthen anti-semitic feelings**", and that, as a consequence, "the restriction served the respect of the Jewish community to live free from fear of an atmosphere of anti-semitism."[84]
- This affirmation was repeated by the Human Rights Committee in the *Malcolm Ross v. Canada* case: after reiterating that "the rights or reputations of others for the protection of which restrictions may be permitted under article 19, may relate to other persons or to a community as a whole", the Committee reaffirms that "restrictions may be permitted on statements which are of a nature as to raise or strengthen anti-semitic feeling, in order to uphold the Jewish communities" right to be protected from religious hatred."[85]

The Human Rights Committee holds that restrictions of freedom of expression are authorised and even necessary if statements incite to racial or religious hatred.

Content of the expression

Any speech that constitutes an advocacy to hatred is unanimously condemned by the international supervising bodies and is not protected by freedom of expression. For example, in its decision on *J. R. T. and W. G. Party v. Canada*, the Human Rights Committee concludes that a communication

84 Human Rights Committee, *Faurisson v. France*, Communication No. 550/1993, 8 November 1996, para. 9.6.

85 Human Rights Committee, *Malcolm Ross v. Canada*, Communication No. 736/1997, 18 October 2000, para. 11.5.

concerning the dissemination of anti-semitic opinions by telephone is inadmissible because of incompatibility *ratione materiae* with the provisions of the International Covenant on Civil and Political Rights, based on the fact that "the opinions which Mr. T. seeks to disseminate through the telephone system clearly constitute **the advocacy of racial or religious hatred** which Canada has an obligation under article 20(2) of the Covenant to prohibit."[86]

The Committee on the Elimination of Racial Discrimination has also been confronted with the question as to which statements should be protected by the due regard clause of article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination. In the case of *Jewish Community of Oslo et al. v Norway*, it had to express its opinion on the subject of a speech given during a march in commemoration of the Nazi leader Rudolf Hess by a group called the Bootboys. On this occasion, the Committee noted that "the principle of freedom of speech has been afforded a lower level of protection in cases of racist and "hate speech" dealt with by other international bodies, and that the Committee's own General recommendation No 15 clearly states that the prohibition of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression."[87] In this particular case, the Committee concluded that the statements in question contained "ideas based upon racial superiority or hatred", and that "the deference to Hitler and his principles and "footsteps" must ... be taken as **incitement at least to racial discrimination, if not to violence**."[88] The Committee held that these remarks, given that they were of "exceptionally/manifestly offensive character", were not protected by the due regard clause, and that accordingly the acquittal of their maker by the Supreme Court of Norway gave rise to a violation of article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination.

86 Human Rights Committee, *J. R. T. and W. G. Party v. Canada*, Communication No. 104/1981, 6 April 1983, para. 8.

87 Committee on the Elimination of Racial Discrimination, *Jewish Community of Oslo et al. v Norway*, Communication No. 30/2003, 15 August 2005, para. 10.5.

88 *Ibid*., para. 10.4.

In general, the ECRI has held that the law should penalise the following acts when committed intentionally:[89]

- public incitement to violence, hatred or discrimination; public insults and defamation; or threats against a person or a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin;
- public expression, with a racist aim, of an ideology which claims the superiority of, or which depreciates or denigrates, a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin;
- the public denial, trivialisation, justification or condoning, with a racist aim, of crimes of genocide, crimes against humanity or war crimes.

According to ECRI, public incitement to violence, hatred or discrimination against a person or a grouping of persons on the grounds of , for example, their religion or ethnic origin should be offences punishable by law.

Context of the expression

- **The position of the author of the statement**

In its decision on *Malcolm Ross v. Canada* concerning a teacher that was removed from his teaching position because of his public discriminatory statements against persons of the Jewish faith and ancestry that in particular denigrated the faith and beliefs of Jews, the Human Rights Committee took into account the function of the author of the statements. It stressed that the special duties and responsibilities that the exercise of the right to freedom of expression entails "are of particular relevance within the school system, especially with regard to the teaching of young students"; … the influence exerted by **school teachers** may justify restraints in order to ensure that legitimacy is not given by the school system to the expression of views which are discriminatory."[90]

On the other hand, in the case of *Kamal Quereshi v. Denmark*, the Committee on the Elimination of Racial Discrimination drew "the attention of the State party to the need to balance freedom of expression with the requirements of the

89 ECRI general policy recommendation No. 7 on national legislation to combat racism and racial discrimination, adopted on 13 December 2002, part IV (Criminal law), point 18 (a) to (e).

90 Human Rights Committee, *Malcolm Ross v. Canada*, Communication No. 736/1997, 18 October 2000, para. 11.6.

Convention to prevent and eliminate all acts of racial discrimination, particularly in the context of statements made by **members of political parties**."[91]

The World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance underlined already in its Programme of Action adopted in 2001 "the key role that **politicians and political parties** can play in combating racism, racial discrimination, xenophobia and related intolerance and encourages political parties to take concrete steps to promote equality, solidarity and non-discrimination in society, inter alia by developing voluntary codes of conduct which include internal disciplinary measures for violations thereof, so their members refrain from public statements and actions that encourage or incite racism, racial discrimination, xenophobia and related intolerance."[92]

In a similar vein, ECRI has stressed that "**political parties** can play an essential role in combating racism, by shaping and guiding public opinion in a positive fashion" and calls on them "to formulate a clear political message in favour of diversity in European societies."[93]

- **The nature and seriousness of the interference**

To come back to the case *Malcolm Ross v. Canada*, the Human Rights Committee concluded that "the removal of the author from a teaching position can be considered a restriction necessary to protect the right and freedom of Jewish children to have a school system free from bias, prejudice and intolerance."[94] In this case, the author was re-

91 Committee on the Elimination of Racial Discrimination, *Kamal Quereshi v. Denmark*, Communication No. 27/2002, 19 August 2003, para. 9.

92 Programme of Action adopted on 8 September 2001 by the World Conference against Racism, Racial Discrimination, Xenophobia and related Intolerance in Durban (South Africa), para. 115.

93 ECRI Declaration on the use of racist, antisemitic and xenophobic elements in political discourse, adopted on 17 March 2005. See also on this point the Declaration on freedom of political debate in the media, adopted by the Committee of Ministers of the Council of Europe on 12 February 2004.

94 Human Rights Committee, *Malcolm Ross v. Canada*, Communication No. 736/1997, 18 October 2000, para. 11.6.

moved from his teaching position and put on leave without pay for one week before he was appointed to a non-teaching position. Taking this element of the case into account, the Committee notes that "the author was appointed to a non-teaching position after only a minimal period on leave without pay and that the restriction thus did not go any further than that which was necessary to achieve its protective functions[95] and accordingly concludes that the facts do not disclose a violation of Article 19 of the International Covenant on Civil and Political Rights.

95 *Ibid.*

Case study No. 4

RT1 is the most popular television channel in the State of Normanry. This State has been a member of the Council of Europe and party to the Convention for the Protection of Human Rights and Fundamental Freedoms since 2002.

One of RT1's most popular programmes is the weekly show "Get on your soapbox": it allows viewers to give their opinion on current events by sending a letter to the television channel. The hostess of the show then selects certain letters which are read out and commented on during a live broadcast.

In the spring of 2006, during a broadcast of "Get on your soapbox", the presenter of the programme cited a letter that had attracted her attention and was "troubling" her: in it, a viewer had expressed his "disgust" about the decision, widely discussed by the media, of the Normanrian government to receive Lowetian refugees fleeing the civil war in their country. This viewer stated explicitly that "they should stay where they are, they only get what they deserve!"

In June 2006, the Normanrian Radio and Television Commission decided to suspend the RT1 broadcasts for five days and to give a warning to the presenter. According to this decision, the content of the programme constituted an incitement to violence, hatred and racial discrimination. On 21 June 2006 the television channel company and the presenter were notified of the decision on the suspension and the warning.

On 22 June 2006, the company and the presenter appealed to the competent Administrative Court for an order to obtain the annulment of the decision. In its judgment, the Tribunal Court concluded that in citing the statements during the programme the company and the presenter had not respected the country's audiovisual legislation and upheld the decision.

On 4 July 2008, the company and the presenter appealed to the Council of State, which dismissed the application and confirmed the first-instance judgment.

Consequently, on 12 July 2008 the company and the presenter lodged an application against the State of Normanry with the European Court under Article 34 of the ECHR.

Possible solution

In view of the case-law of the European Court of Human Rights and the general principles applicable to the freedom of expression, the impugned sentence amounts without a doubt to an interference with the applicants" right to freedom of expression as protected under Article 10(1). This interference was prescribed by law and pursued a legitimate aim: to protect public safety and public order (protection of territorial integrity) according to Article 10(2). But was it "necessary in a democratic society"?

Elements to take into consideration

Special attention has to be paid to the words used in the offending programme and to the context in which they have been broadcast. In particular, the following factors need to be taken into account:

- the vital role the press plays in a democratic society: this does not only apply to the written press, but also to the audiovisual media;
- the content of the statements: these statements touched upon a widely debated matter of general interest and concerned a recent public discussion;
- the fact that the presenter had been diligent in explaining that she was quoting from a letter and that she had distanced herself from its contents;
- the nature of the interference: though the warning may not seem to be a very severe penalty, the suspension certainly seems to be disproportionate to the aim pursued.

Conclusion

Taking into account all these elements, it follows that the sentence does not seem necessary in a democratic society. In this case, the European Court would probably conclude that the State of Normandy has violated Article 10 of the ECHR.

Compare: *Özgür Radyo-Ses Radyo Televizyon Yayın Yapım Ve Tanıtım A.Ş. v. Turkey*, nos. 64178/00, 64179/00, 64181/00, 64183/00, 64184/00, 30 March 2006.

Appendices

Appendix I

Relevant applicable international and regional instruments

Relevant rights / *Instruments*	*Freedom of expression*	*Prohibition of discrimination*	*Freedom of religion and to manifest one's religion*	*Respect for private and family life*	*Prohibition of abuse of rights*	*Prohibition of advocacy of hatred or incitement to discrimination*
Universal Declaration of Human Rights	Article 19	– Article 1 – Article 2 – Article 7	– Article 18 – Article 29	Article 12		
International Covenant on Civil and Political Rights [1]	Article 19	– Article 2 § 1 – Article 26	– Article 18 – Article 27	Article 17	Article 5	Article 20
International Convention on the Elimination of All Forms of Racial Discrimination	Article 5 d) viii)	Article 1	Article 5 d) viii)			Article 4[2]
European Convention on Human Rights [3]	Article 10	– Article 14 – Article 1, Protocol Nr. 12	Article 9	Article 8	Article 17	
American Convention on Human Rights	Article 13	– Article 1(1) – Article 24	Article 12	Article 11		Article 13(5)
European Social Charter (revised) [4]		Article E				
Framework Convention for the Protection of National Minorities [5]	Article 9	Article 4	– Article 5 – Article 6 – Article 7 – Article 8		Article 21	
Charter of Fundamental Rights of the European Union	Article 11	Article 21	– Article 10 – Article 22	Article 7	Article 54	

1 The International Covenant on Civil and Political Rights is legally binding on all Member States.

2 Some Council of Europe Member States have made reservations and declarations concerning Article 4, which refer to the conciliation of the obligations imposed by this article with the right to freedom of expression and association. See in particular the reservations or declarations made by Austria, Belgium, Ireland, Italy and the United Kingdom, which emphasize the importance attached to the fact that Article 4 of the CERD provides that the measures laid down in subparagraphs (a), (b) and (c) should be adopted with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights that are expressly set forth in Article 5 of the Convention. These states therefore consider that the obligations imposed by Article 4 of the CERD must be reconciled with the right to freedom of opinion and expression and the right to freedom of peaceful assembly and association.

3 Protocol No. 1 to the ECHR has been ratified by all Member States except Andorra, Monaco and Switzerland. Protocol No. 12 to the ECHR has been ratified by the following Member States: Albania, Andorra, Armenia, Bosnia-Herzegovina, Croatia, Cyprus, Spain, Finland, Georgia, Luxembourg, Montenegro, Netherlands, Romania, San Marino, Serbia, «the former Yugoslav Republic of Macedonia», Ukraine.

4 The European Social Charter (revised) has been ratified by the following Member States: Albania, Andorra, Armenia, Azerbaijan, Belgium, Bulgaria, Cyprus, Estonia, Finland, France, Georgia, Ireland, Italy, Lithuania, Malta, Moldova, Norway, Netherlands, Portugal, Romania, Slovenia, Sweden, Turkey, Ukraine.

5 The Framework Convention on the Protection of National Minorities has been ratified by all Member States except the following states: Andorra, Belgium, France, Greece, Iceland, Luxembourg, Monaco and Turkey.

Universal Declaration of Human Rights

Article 1

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2

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.

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 7

All are equal before the law and are entitled without any 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.

Article 12

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 18

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.

Article 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 29

1. Everyone has duties to the community in which alone the free and full development of his personality is possible.
2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

International Covenant on Civil and Political Rights

Article 2 § 1

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, 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 5

1. Nothing in the present Covenant 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 recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.
2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recog-

nize such rights or that it recognizes them to a lesser extent.

Article 17

1. No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 19

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.

Article 20

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

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

International Convention on the Elimination of All Forms of Racial Discrimination

Article 1

1. In this Convention, the term "racial discrimination" shall mean 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.
2. This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.
3. Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties

concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.

4. Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

Article 4

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

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

Article 5

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake

to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

a) The right to equal treatment before the tribunals and all other organs administering justice;
b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;
c) Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;
d) Other civil rights, in particular:
    i) The right to freedom of movement and residence within the border of the State;
    ii) The right to leave any country, including one's own, and to return to one's country;
    iii) The right to nationality;
    iv) The right to marriage and choice of spouse;
    v) The right to own property alone as well as in association with others;
    vi) The right to inherit;
    vii) The right to freedom of thought, conscience and religion;
    viii) The right to freedom of opinion and expression;
    ix) The right to freedom of peaceful assembly and association;
e) Economic, social and cultural rights, in particular:
    i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;
    ii) The right to form and join trade unions;
    iii) The right to housing;
    iv) The right to public health, medical care, social security and social services;
    v) The right to education and training;
    vi) The right to equal participation in cultural activities;

f) The right of access to any place or service intended for use by the general public, such as transport hotels, restaurants, cafes, theatres and parks.

European Convention on Human Rights

Article 8 – Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 9 – Freedom of thought, conscience and religion

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 for the protection of the rights and freedoms of others.

Article 10 – Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial

integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 14 – Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this 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.

Article 17 – Prohibition of abuse of rights

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

Protocol No. 12 to the European Convention on Human Rights

Article 1 – General prohibition of discrimination

1. The enjoyment of any right set forth by law 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.
2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

American Convention on Human Rights

Article 1 – Obligation to Respect Rights

1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion,

national or social origin, economic status, birth, or any other social condition.
2. For the purposes of this Convention, "person" means every human being.

Article 11 – Right to Privacy

1. Everyone has the right to have his honor respected and his dignity recognized.
2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.
3. Everyone has the right to the protection of the law against such interference or attacks.

Article 12 – Freedom of Conscience and Religion

1. Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private.
2. No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs.
3. Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others.
4. Parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions.

Article 13 – Freedom of Thought and Expression

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
   a) respect for the rights or reputations of others; or

b) the protection of national security, public order, or public health or morals.

3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.
4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.
5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

Article 24 – Right to Equal Protection

All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

European Social Charter (revised)

Article E – Non-discrimination

The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status.

Framework Convention for the Protection of National Minorities

Article 4

The Parties undertake to guarantee to persons belonging to national minorities the right of equality before the law and

of equal protection of the law. In this respect, any discrimination based on belonging to a national minority shall be prohibited.

The Parties undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority. In this respect, they shall take due account of the specific conditions of the persons belonging to national minorities.

The measures adopted in accordance with paragraph 2 shall not be considered to be an act of discrimination.

Article 5

The Parties undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage.

Without prejudice to measures taken in pursuance of their general integration policy, the Parties shall refrain from policies or practices aimed at assimilation of persons belonging to national minorities against their will and shall protect these persons from any action aimed at such assimilation.

Article 6

1. The Parties shall encourage a spirit of tolerance and intercultural dialogue and take effective measures to promote mutual respect and understanding and cooperation among all persons living on their territory, irrespective of those persons" ethnic, cultural, linguistic or religious identity, in particular in the fields of education, culture and the media.
2. The Parties undertake to take appropriate measures to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity.

Article 7

The Parties shall ensure respect for the right of every person belonging to a national minority to freedom of peaceful

assembly, freedom of association, freedom of expression, and freedom of thought, conscience and religion.

Article 8

The Parties undertake to recognise that every person belonging to a national minority has the right to manifest his or her religion or belief and to establish religious institutions, organisations and associations.

Article 9

The Parties undertake to recognise that the right to freedom of expression of every person belonging to a national minority includes freedom to hold opinions and to receive and impart information and ideas in the minority language, without interference by public authorities and regardless of frontiers. The Parties shall ensure, within the framework of their legal systems, that persons belonging to a national minority are not discriminated against in their access to the media.

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

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

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

Article 21

Nothing in the present framework Convention shall be interpreted as implying any right to engage in any activity or perform any act contrary to the fundamental principles of

international law and in particular of the sovereign equality, territorial integrity and political independence of States.

Charter of Fundamental Rights of the European Union

Article 7 – Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications.

Article 10 – Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.
2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.

Article 11 – Freedom of expression and information

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The freedom and pluralism of the media shall be respected.

Article 21 – Non-discrimination

1. 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, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.

Article 22 – Cultural, religious and linguistic diversity

The Union shall respect cultural, religious and linguistic diversity.

Article 54 – Prohibition of abuse of rights

Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein.

Appendix II

Examples of national measures and initiatives

The following represents a selective list of practical initiatives aimed at preventing "hate speech" and promoting tolerance. The examples have been taken from the responses provided by the Member States in 2006.[96] The examples do not represent an exhaustive list of all initiatives taken by each Member State but rather serve to illustrate some typical actions that have been taken.

The summary of these national initiatives/best practices has been broken down into seven categories:

a) Action plans and programmes of action;
b) Data collection, recording and reporting;
c) Education;
d) Training and policy initiatives through law enforcement, judicial and other public officials;
e) Self-regulation and codes of conduct;
f) Media and Internet (other than codes of conduct);
g) Civil society and campaigns.

1. Action plans and programmes of action

The Durban Declaration and Programme of Action (the World Conference against Racism, Racial Discrimination, Xenophobia and related Intolerance of 31 August – 7 September 2001) urged States to "establish and implement without delay national policies and action plans to combat racism, racial discrimination, xenophobia and related intolerance, including their gender-based manifestations" (paragraph 66) and to "develop and implement policies and action plans, and to reinforce and implement preventive measures, in order to foster greater harmony and tolerance between migrants and host societies, with the aim

96 All replies are contained in the Council of Europe's document GT-DH-DEV A(2006)008 Addendum.

of eliminating manifestations of racism, racial discrimination, xenophobia and related intolerance, including acts of violence, perpetrated in many societies by individuals or groups" (paragraph 30 of the Declaration and Programme of Action). The Committee on the Elimination of Racial Discrimination (CERD) also regularly affirms the need for the States Parties to implement such plans.

Opinion No. 5-2005 of the EU Network of Independent Experts on Fundamental Rights gives a detailed overview of national action plans and their implementation in the E**uropean Union Member States**.

Among the non-EU Member States, **Croatia** has indicated several action plans and programmes:

- National plan of activities for the Roma (the Decade of Roma Inclusion 2005 – 2015);
- National plan of activities for the prevention of violence among children and youth (2004);
- National plan for the prevention of trafficking in children (2005 – 2007);
- National strategy of the unique policy for disabled persons (2003 – 2006);
- National policy to promote gender equality (2001);
- Action plan to promote gender equality (2001 – 2005);
- Programme for AIDS prevention;
- Programme to prevent behavioural disorders in children and youth;
- National strategy for the prevention of discrimination (under elaboration).

2. Data collection, recording and reporting

Several Member States collect statistics on hate crimes and violent incidents with potential racist motivation. For the **Member States of the European Union**, reference must be made to the European Union Agency for Fundamental Rights (FRA) which has succeeded the European Monitoring Centre on Racism and Xenophobia (EUMC) and the so-called European Information Network on Racism and Xenophobia (RAXEN), which also collects data and information on hate crimes.

3. Education

Andorra has taken several initiatives to raise awareness among young people of religious and cultural diversity and tolerance. There are projects aimed at conflict resolution through mediation, the promotion of children's rights and a campaign against domestic violence.

Belgium has initiated a "schools for Democracy" project focusing on the link between tolerance and respect. **Luxembourg** is also giving special emphasis to human rights education in schools. **San Marino** proposes training programmes on arguments related to multicultural education and respect for diversity for various professional categories, including teachers. Schools and colleges have implemented numerous intercultural and human rights projects.

Within the framework of the National Action Plan Regarding the Decade of Roma Inclusion (2005-2015), **Slovakia** is actively promoting educational programmes focusing on the marginalised Roma community.

4. Training and policy initiatives through law enforcement, judicial and other public officials

In **Austria**, police authorities are actively involved in awareness-raising measures aimed at young people. At least once every semester, they contact teachers, headmasters, regional school inspectors and other persons responsible in the field of education and assist them in their efforts to combat racist, xenophobic and anti-Semitic ideologies. Special attention is also paid to racism and xenophobia in the basic training of police officers. Moreover, an Internet project was initiated in 1996 by what was then the Intelligence Service (now Federal Office for Constitutional Protection and Combating Terrorism) with the aim of observing in particular web sites and discussion forums (newsgroups, mailing lists) in order to draw conclusions regarding tendencies of extremist groups. The information is collected and evaluated both centrally at the BVT and by the individual police authorities.

France has designated special magistrates (magistrats référents) in order to ensure coherence in local crime policy and to establish contacts with civil society (associations,

representatives of churches and religious groups). In 2004, special internships (stages de citoyenneté) were created, both as a preventive measure and a substitute for punishment. Their aim is to recall Republican values and respect for human dignity.

In **Norway**, the Directorate of Immigration and the Police University College have established a joint project to develop the methodology and content of a continuing education programme on cultural understanding, diversity and immigration law. During the period 2001-2004, methods, strategies and training programmes were developed to improve the attitude of public service employees towards minorities.

5. Self-regulation and codes of conduct

The International Federation of Journalists adopted a Declaration of Principles on the Conduct of Journalists124. Principle 7 states that: "The journalist shall be aware of the danger of discrimination being furthered by the media, and shall do the utmost to avoid facilitating such discrimination based on, among other things, race, sex, sexual orientation, language, religion, political or other opinions, and national or social origins."

The "Internet Service Providers Austria (ISPA)" have drawn up a Code of Conduct. ISPA Members must prevent illegal content as far as possible. In the case of illegal content the ISPA reports to the hotline and law enforcement units. ISPA has set up the website www.stopline.at which keeps a close watch over neo-Nazi content.

In **Cyprus**, the Commissioner for Administration prepares codes of practice, binding for both the private and public sectors, for, inter alia, eliminating discrimination on such grounds as religion, nationality or ethnic origin. He is also empowered to make surveys and statistics on these matters.

In **Finland**, netiquette guidelines have been published by the commercial internet operators. These guidelines forbid, among other things, racism and incitement to racism. There are also guidelines for journalists developed by the Council for Mass Media (see www.jsn.fi), which stipulate inter alia that: "The human dignity of every individual must

be respected. The ethnic origin, nationality, sex, sexual orientation, convictions or other similar personal characteristics may not be presented in an inappropriate or disparaging manner" (§ 26).

In **Hungary**, the ethical codes of several authorities, chambers, professional associations and big business organisations contain rules related to "hate speech".

In **Norway**, the Press Association has drawn up an ethical code of practice for the press (printed press, radio and television).

In **Switzerland**, point 8 "Declaration of Duties" in the Declaration of the Duties and Rights of a Journalist contains the following statement: "In respecting human dignity, the journalist must avoid any allusion by text, image or sound to a person's ethnic or national origin, religion, gender, sexual orientation as well as to any illness or physical or mental handicap that could be discriminatory in character. The reporting of war, acts of terrorism, accidents and catastrophes by means of text, image and sound should respect the victims" suffering and the feelings of their loved ones."

6. Media and Internet (other than codes of conduct)

In **Belgium**, CYBERHATE brings together public and private bodies such as FCCU (Federal Computer Crime Unit of the Federal Police), ISPA (Internet Service Providers Association Belgium) and public prosecutors. www.cyberhate.be receives and centralises complaints.

In **Greece**, Hellenic Radio and Television SA (ERT SA) broadcasts an increasing number of informational programmes relating to the protection of human rights (protection of minors, refugees issues, abuse of women/children, racism and xenophobia, human trafficking etc.), which proves the awareness not only of the media professionals in Greece, but also the increased interest of the public vis-à-vis these issues.

In **Latvia**, various initiatives of NGOs fight "hate speech" in Latvian cyberspace. The largest one is a new on–line library www.tolerance.lv (see: http://www.iecietiba.lv/index.php?lang=2). The library consists of various sub-themes re-

lated to different issues of tolerance. Another project, conducted by a group of cybermedia in Latvia, is dedicated to fighting "hate speech" on the Internet and is called "Internet – free of hate". Detailed information about the project can be downloaded at www.dialogi.lv.

7. Civil society and campaigns

Several Member States are financing civil society projects encouraging tolerance and understanding between minorities and the majority population (**Czech Republic, Denmark, Germany, the Netherlands,** and **Sweden**).

Denmark has created a prize for private companies that have made a special contribution to further diversity in the workplace. The campaign "Show Racism the Red Card" was launched in 2006 and is intended to go on for 3 years. The Danish campaign is inspired by similar campaigns in other European countries and will take off in the sphere of football. The Danish Campaign is, however, not just limited to racism connected to football, but will also include a range of initiatives directed towards schools and companies. The campaign is led by a secretariat but is also carried out by professional football players in Denmark who are assumed to carry a high degree of authority in the target group.

Germany has a series of initiatives aimed at preventing "hate speech", such as "Primary Prevention of Violence against Members of Groups – In particular Young People", a "Forum against Racism" for dialogue between state agencies and non-governmental organisations or "Young People for Tolerance and Democracy – against Right-Wing Extremism, Xenophobia and Anti-Semitism" launched by the "Alliance for Democracy and Tolerance – Against Extremism and Violence" which joins governmental and non-governmental initiatives.

In **Greece**, the Macedonian Press Agency has actively participated in the community initiative EQUAL-DREAM by promoting the idea of the programme, which fights against racism and xenophobia in the media.

The Icelandic Red Cross has implemented the programme "Diversity and Dialogue" for individuals, companies, organisations and local communities. Diversity and Dialogue is a

process-orientated programme based on group dynamics and aimed at awareness-raising. Its goal is to work against all forms of racial and ethnic intolerance, prejudice and discrimination, and to work for participation, representation and respect for all members of society. At the end of each seminar, the participants prepare a concrete action plan on how to combat racism in their everyday life in the local community, at work places, schools, churches etc.

In **Lithuania**, non-governmental organisations play a very valuable role in preventing "hate speech" and promoting tolerance. Examples are the Lithuanian Centre for Human Rights, which organised the seminar "Mapping capacity of civil society dealing with anti-discrimination" for representatives of NGOs and has published books in this field, and the research project "Prevention of Ethnic Hatred and Xenophobia. Civic Response in the Mass Media" by the Centre of Ethnic Studies of the Institute for Social Research.

In **the Netherlands**, the government has an active policy promoting tolerance and respect between different cultures. On a national level the "&-campaign" has been successful in stressing the added value of people from different cultural backgrounds working and living together. On a local level, the city council of Amsterdam organises several events and has founded networks directed at bridging gaps between the various groups of people living in Amsterdam. The overall project is called "Wij Amsterdammers" – We, the people of Amsterdam – and includes, among other projects, a biannual Day of Dialogue, a Jewish-Moroccan Network and many more activities.

In **Sweden**, the Government is contributing to the establishment of the non-profit organisation Centre against Racism. The Swedish Integration Board, with the overall responsibility for ensuring that the visions and goals of Sweden's integration policies have an impact in different areas of society, has granted funding to and will supervise the activities of the organisation. The overall goal for the organisation is to enhance and complement society's actions against racism, xenophobia, homophobia and discrimination. The Living History Forum which labours against anti-Semitism, Islamophobia and homophobia is another initiative by the Government. The Institute has, inter alia, performed a survey among students regarding their attitudes towards Muslims. Seminars for teachers, debates

for the public, youths, teachers and policy-making authorities have been held. Discussions and dialogues regarding the issues is an ongoing activity for the institution. Surveys regarding public opinions towards Jews and Muslims are also currently ongoing.

Switzerland has a project "Internet Streetworking" by Aktion Kinder des Holocaust (Action by Children of the Holocaust) which contacts the authors of pro-nazi or anti-Semitic statements.

In the **United Kingdom** the Government published in 2005 "Improving Opportunity, Strengthening Society", its strategy to increase race equality and community cohesion in Britain. It declares the Government's intention to give greater emphasis to promoting a sense of common belonging and cohesion among all groups, setting out a vision for an inclusive British society in which, among many other things, racism is seen as unacceptable. There are also numerous local initiatives such as a new pilot telephone hotline to enable people in Yorkshire and Humberside to report racist incidents at any time of the day or night.

Appendix III

List of judgments and decisions cited

(in alphabetical order)

The judgements and decisions of the European Court of Human Rights, as well as the decisions of the former European Commission of Human Rights, can be accessed at the following Internet site: www.echr.coe.int

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Appendix IV

Thematic index

Appendixx V

Glossary

European Convention on Human Rights

The full title is the "Convention for the Protection of Human Rights and Fundamental Freedoms", usually referred to as "the ECHR" or "the Convention". It was adopted in 1950 and entered into force in 1953. The full text of the Convention and its additional Protocols is available in 30 languages at http://www.echr.coe.int/. The chart of signatures and ratifications as well as the text of declarations and reservations made by State Parties can be consulted at http://conventions.coe.int.

European Court of Human Rights

The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights. Since 1 November 1998 it has sat as a full-time Court composed of an equal number of judges to that of the States party to the Convention. The Court examines the admissibility and merits of applications submitted to it. It sits in Chambers of 7 judges or, in exceptional cases, as a Grand Chamber of 17 judges. The Committee of Ministers of the Council of Europe supervises the execution of the Court's judgments.

"hate speech"

See the Introduction to this manual, "The Concept of hate speech".

Interference

Any instance where the enjoyment of a right set out in the Convention is limited. Not every interference will mean that there has been a violation of the right in question. Many interferences may be justified by the restrictions provided for in the Convention itself. Generally for an interference to be justified it must be in accordance with the law, pursue a legitimate aim and be proportionate to that aim. See also "Legitimate aim", "Prescribed by law", "Proportionality".

Fair balance

The Convention provides for the limitation of certain rights for the sake of the greater public interest. The European Court of Human Rights has held that when rights are restricted, there must be a fair balance between the public interest at stake and the right in question. The Court is the final arbiter on when this balance has been found. It does however give the states a margin of appreciation in assessing whether the public interest is strong enough to justify restrictions on certain human rights. See also "Margin of appreciation", "Public interest".

Margin of appreciation

The protection offered by the Convention with regard to certain rights is not absolute and provides for the possibility for States to restrict these rights to a certain extent. However, the measures which are taken by the authorities to restrict these rights should meet certain requirements: they should be prescribed by law, necessary in a democratic society and pursue a legitimate aim (such as the protection of health or the economic well-being of the country), they should also be proportionate to the aim pursued. Once it is established that these measures are prescribed by law and are necessary in a democratic society in pursuing a legitimate aim, it has to be examined whether the measures in question are proportionate to this legitimate aim. For this purpose, the Court weighs the interests of the individual against those of the community to decide which prevail in particular circumstances and to what extent the rights encompassed in the Convention could be curtailed in the interests of the community. It is in the context of this examination that the idea that the authorities enjoy a certain "margin of appreciation" has been developed. Indeed, the Court has established that authorities are given a certain scope for discretion, i.e. the "margin of appreciation", in determining the most appropriate measures to take in order to reach the legitimate aim sought. The reason why the Court decided that such leeway should be left to the authorities is that national authorities are often better placed to assess matters falling under the Articles concerned. The scope of this margin of appreciation varies according to the problem in question. However, in no way should this margin of appreciation be seen as absolute and preventing the Court from any critical assessment of the proportionality of the measures concerned.

Proportionate measures

By "proportionate measures" the Court means measures taken by authorities that strike a fair balance between the

interests of the community and the interests of an individual

Legitimate aim

This expression is used by the Court in connection with a number of Articles of the Convention: Article 8 (right to respect for private and family life and for home), Article 9 (freedom of thought, conscience and religion), Article 10 (freedom of expression), Article 11 (freedom of assembly and association). While the Convention seeks to safeguard these rights, it does recognise that, in certain specific circumstances, restrictions may be acceptable. However, the measures imposing such restrictions should meet a number of requirements for the Court not to find a violation of the right in question. One of them is that they should be necessary in a democratic society, which means that they should answer a pressing social need and pursue a legitimate aim. Article 10 lists the broad categories of aims which can be considered as legitimate to justify an interference with the right to freedom of expression: national security, territorial integrity or public safety, the prevention of disorder or crime, the protection of health or morals, the protection of the rights and freedoms of others.

Positive obligations

The Court's case-law in respect of a number of provisions of the Convention states that public authorities should not only refrain from interfering arbitrarily with individuals" rights as protected expressly by the Articles of the Convention, they should also take active steps to safeguard them. These additional obligations are usually referred to as positive obligations as the authorities are required to act so as to prevent violations of the rights encompassed in the Convention or punish those responsible.

Prescribed by law (in accordance with the law)

The term used in Article 8 paragraph 2 of the Convention is "in accordance with the law" but this is taken to mean the same as the term "prescribed by law" which is found in paragraphs 2 of Articles 9, 10 and 11. The Court has stated for a restriction to meet the requirement it should be adequately accessible and its effects should be foreseeable.

Applicant

Any person, non-governmental organisation or group of persons that brings a case before the European Court of Human Rights. The right to do so is guaranteed by Article 34 of the European Convention on Human Rights. It is subject to the conditions set out in Article 35 of the Convention.

Subsidiarity (principle of)

The principle of subsidiarity is one of the founding principles of the human rights protection mechanism of the Convention. According to this principle it should first and foremost be for national authorities to ensure that the rights enshrined in the Convention are not violated and to offer redress if ever they are. The Convention mechanism and the European Court of Human Rights should only be a last resort in cases where the protection or redress needed has not been offered at national level.

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