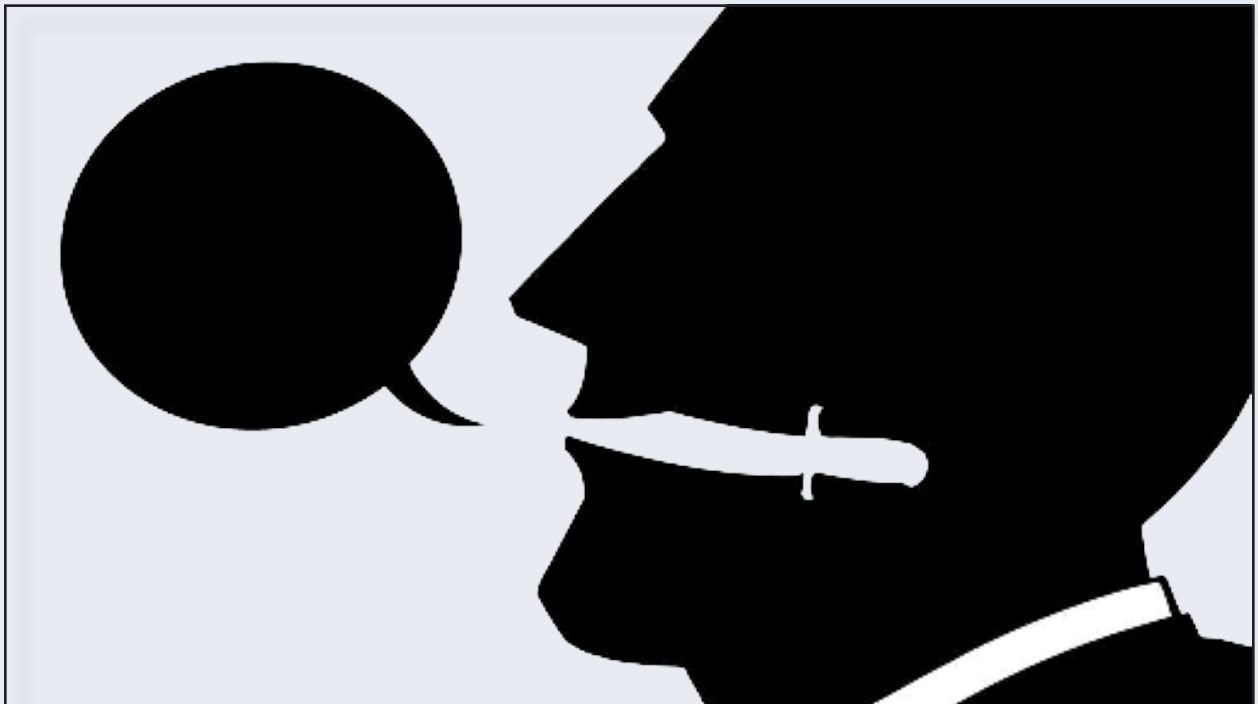


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SPECIAL COLLECTION OF THE CASE LAW ON FREEDOM OF EXPRESSION

Case law on Hate Speech:



The Enduring Question of Thresholds

Case law on Hate Speech: The Enduring Question of Thresholds

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Credits

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* The views and opinions expressed in this paper reflect only the position of its author and do not necessarily reflect the position of Columbia Global Freedom of Expression.

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I. Introduction

1 (i) Objectives, Scope and Limitations of Report

This report sets out the trends and practices across regional and international institutions in relation to their approach towards and handling of hate speech. To do so, it relies on the database of the [Global Freedom of Expression initiative at Columbia University](#) and the [database](#) of the [Future of Free Speech Project](#) (Justitia). It aims at constituting a guide for human rights defenders, scholars, lawyers and civil society organizations as well as members of the judiciary, the legislature and policy makers by setting out international, regional and some national standards and case-law on “hate speech.”

The report approaches the issue of hate speech through three thematic strands, namely genocide denial, ethnic and religious hatred and sexual orientation. It starts off with a conceptual framework, providing different definitions and conceptualizations of hate speech by regional/international institutions and experts. After briefly setting the semantical scene of hate speech, the report provides an overview of relevant international/regional legal standards *vis-à-vis* hate speech. These include, where relevant and applicable, the direct prohibition of such speech and restrictions of the freedom of expression through limitation grounds (such as the rights and reputations of others). The report looks at the United Nations (UN) as the only global (rather than regional) institution, assessing how freedom of expression is provided in its documents and setting out the specific restrictions to hate speech through Article 20(2) of the International Covenant on Civil and Political Rights (ICCPR) and Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). Whilst case-law of their respective monitoring committees is assessed in the section on jurisprudence, where basic principles and rules of interpretation of the articles themselves arise, information is provided in section 2 on international standards. This section also looks at other key documents such as the Rabat Plan of Action, critical issues such as modes of punishment or prohibition set out in the two central articles (Article 20(2) and Article 4) and discussions surrounding the free speech-hate speech debate at a UN level. It also makes references to both the American Convention on Human Rights and the Declaration on Principles of Freedom of Expression and Access to Information in Africa, due to their adoption of the Article 20(2) ICCPR paradigm in relation to prohibiting advocacy for hatred (and other woes). Section 3 deals with the European Union (EU). EU laws are transposed by its own 27 Member States. However, the so called “Brussels effect,”¹ which results in its impact extending beyond its own members renders an analysis of the EU indispensable for any cross-regional/international evaluation of legislative and judicial treatment of hate speech. Section 4 looks at the Council of Europe, and Article 10 of the European Convention on Human Rights (ECHR) (no Article 20(2) ICCPR parallel is found therein). It provides an overview of the key observations of the functioning and approach of the European Court of Human Rights as the regional court with the most hate speech decisions. It makes reference to a recommendation of the Council of Ministers as one of the few documents (albeit non-binding) that offers a definition of hate speech. After setting the regional/international scene, the report proceeds to a jurisprudential overview of hate speech by broadly defined themes, namely, genocide denial and antisemitism, ethnic and religious hate speech and sexual orientation.

This report focuses on international/regional norms and cases on hate speech but also includes two national case studies. The first is the United States Supreme Court, one that, as reflected in the section on jurisprudence, has been quoted by other courts such as the European Court of Human Rights. The main reason this country has been chosen as a national case study is due to its strict First Amendment obligations, which renders the judicial treatment of hate speech cases rather differently to other countries around the globe. Whilst it is not argued that this is the preferred approach to hate speech, ideas and values that may

1 Anu Bradford, ‘The Brussels Effect: How the European Union Rules the World’ (2020) Oxford University Press.

arise from such a level of free speech protection are indispensable in the discussion on a solid approach to the handling of hate speech by courts. The report also looks at one case from South Africa. This decision has been taken for several reasons. Firstly, the chosen case is a recent and significant case on homophobic speech which reached the country's highest court, secondly, South Africa has a provision prohibiting hate speech in its constitution as is noted below and thirdly, following extensive research within the framework of the Future of Free Speech Project, its Executive Director Jacob Mchangama and the report's author have argued that South Africa (specifically the higher courts of the judiciary) map "a more coherent way forward by seeking to fuse the essential values of freedom of expression and equality/dignity"² and give "clarity and transparency to what is to be prohibited and what is not."³ This can be noteworthy for users of this report seeking to make links between the different approaches and find a medium between themes that have often been presented as contrasting and conflicting. Whilst nothing is available in terms of jurisprudence from the Americas, reference will be made to one case involving genocide denial, heard before the African Court of Human and People's Rights.

The report closes with conclusions on trends of each assessed entity as well as responses to key questions:

- What is the approach of International Human Rights Law to hate speech?
- What are the convergences and divergences between regional/international/national courts?
- What good/bad practices can be identified in the overview provided *vis-à-vis* the handling of hate speech?

The report has limitations in terms of its scope. More particularly, although it does look at the United Nations, the European Framework (European Union and Council of Europe), the Americas and Africa in their regional human rights forms, it does not assess newer regional approaches such as those from the Association of Southeast Asian Nations (ASEAN) and the Organization of Islamic Cooperation (OIC).⁴ Note must also be made of a lacking unified Inter-Asian human rights system, that prevents further discussion in the particular context. Furthermore, the report does not delve into the issue of online hate speech as a separate issue. The reason for this is that the theme would best benefit from a report in itself, given recent national developments on the matter, such as the German Network Enforcement Act, the European Union's recent Digital Services Act, other documents such as the Council of Europe's Cybercrime Convention which has an Additional Protocol on Racist and Xenophobic material, Section 230 of the Communications Decency Act debates, deteriorating internet freedom across the globe, increased platform power on permissible speech and the terms of service/community standards/community guidelines of social media platforms themselves.

1 (ii) Hate Speech: Semantics and Notions

There is no universally accepted definition of hate speech.⁵ This is a result of two main reasons, these

² Jacob Mchangama & Natalie Alkiviadou 'South Africa the Model? A Comparative Analysis of Hate Speech Jurisprudence of South Africa and the European Court of Human Rights' (2022) *Journal of Free Speech Law*, <https://www.journaloffreespeechlaw.org/mchangamaalkiviadou.pdf>.

³ *Ibid.*

⁴ For an overview of these two please consult: Evelyn Aswad & David Kaye, 'Convergence and Conflict: Reflections on Global and Regional Human Rights Standards on Hate Speech' (2022) 20 *Northwestern Journal of Human Rights* 3, p. 209, <https://scholarlycommons.law.northwestern.edu/njihr/vol20/iss3/1/>.

⁵ General Recommendation 32 on The Meaning and Scope of Special Measures in the International Convention on the Elimination of Racial Discrimination (2009) CERD/C/GC/32, para. 9, <https://www.refworld.org/docid/4adc30382.html>.

being the varying interpretation of free speech, predominantly between countries or regions, and the inter-linked differentiations in the conceptualization of harm. As argued, hate speech lies “in a complex nexus with freedom of expression and group rights, as well as concepts of dignity, liberty and equality.”⁶ The closest we usually get is finding a definition in a non-binding policy document of a specialized committee or body. States and institutions adopt their own understanding of what hate speech entails⁷ without actually defining it.⁸ Determining what constitutes hate speech in the absence of such a formulation becomes even more difficult when considering that hate speech may be “concealed in statements which at a first glance may seem to be rational or normal”⁹ and does not necessarily manifest itself through the expression of hatred or emotions.¹⁰

As extensively discussed by Belavusau, on a national level, this phenomenon has been referred to in European criminal statutes following World War II, mostly under the heading of “incitement to hatred.”¹¹ In contrast, the constitutional doctrine of the first half of the 21st century tends to adopt a transposition of the American term “hate speech.”¹² In addition, some newer constitutions, for example in Latin America,¹³ Slovenia,¹⁴ and the South African Republic,¹⁵ include specific clauses meant to prohibit incitement to hatred. Moreover, the prohibition of hate speech initially occurred exclusively on the grounds of race and ethnicity, while in recent years it gradually began encompassing other non-discrimination grounds, such as sex, sexual orientation and disability.¹⁶

On an international level, one of the few documents, albeit non-binding, which has sought to elucidate the meaning of hate speech, is the Recommendation of the Council of Europe Committee of Ministers on hate speech.¹⁷ It provides that this term is to be “understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including intolerant expression by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.” Interestingly, the Recommendation incorporates the justification of hatred as well as its spreading, incitement and promotion, allowing for a broad spectrum of intentions to fall within its definition.

Other examples include the Fundamental Rights Agency of the European Union (FRA) which finds hate speech to be “the incitement and encouragement of hatred, discrimination or hostility towards an

6 Leandro Silva, Mainack Mondal, Denzil Correa, Fabricio Benevenuto, ‘Analyzing the Targets of Hate in Online Social Media’ Proceedings of the Tenth International AAAI (Association for the Advancement of Artificial Intelligence) Conference on Web and Social Media (2016) 688, <https://arxiv.org/abs/1603.07709>.

7 Council of Europe Committee of Experts for the Development of Human Rights Report (2007) Chapter IV, 123, para. 4.

8 Natalie Alkiviadou, ‘Regulating Hate Speech in the EU’ in Stavros Assimakopoulos, Fabienne H Baider & Sharon Millar (eds), ‘Online Hate Speech in the EU: A Discourse Analytical Perspective’ (1st edn. Springer Briefs in Linguistics 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3117294.

9 Anne Weber, ‘Manual on Hate Speech’ (1997) Council of Europe Publishing, 5, <https://book.coe.int/en/human-rights-and-democracy/4198-pdf-manual-on-hate-speech.html>.

10 Ibid.

11 Czech propagace hnuti, French incitation à la haine, German Volksverhetzung, Russian возбуждение ненависти and Swedish hets mot folkgrupp. See Natalie Alkiviadou & Uladzislau Belavusau, ‘Rien que de Mots: Counteracting Homophobic Speech in European and U.S Law’ (2021) 4 International Journal of Discrimination and the Law, p.394 <https://journals.sagepub.com/doi/abs/10.1177/13582291211043420>.

12 Ibid. Dutch *haatspraak*, French *discours de haine*, Italian *discorsi di odio* and Polish *mowa nienawisici*.

13 Ibid. [Constitution of Ecuador](#): 20 October 2009, Art. 19; [Constitution of the Bolivarian Republic of Venezuela](#): 15 December 1999, Art. 57.

14 Ibid. [Constitution of the Republic of Slovenia](#), Art. 63. For a full analysis see

15 Ibid. The Constitution of the Republic of South Africa (<https://www.gov.za/documents/constitution/chapter-2-bill-rights#16>) Chapter 2, Section 16.

16 Uladzislau Belavusau, ‘Hate Speech’ Max Planck Encyclopedia of Comparative Constitutional Law. (Oxford University Press 2017), <http://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e130>, para.17.

17 Council of Europe’s Committee of Ministers Recommendation 97 (20) on Hate Speech, https://www.coe.int/en/web/freedom-expression/committee-of-ministers-adopted-texts/-/asset_publisher/aDXmrol0vvsU/content/recommendation-no-r-97-20-of-the-committee-of-ministers-to-member-states-on-hate-speech->.

individual that is motivated by prejudice against that person because of a particular characteristic.”¹⁸ In a report on homophobia, the FRA held that the term hate speech, as used in that particular section, “includes a broader spectrum of verbal acts including disrespectful public discourse.”¹⁹

In the framework of academic commentary, a range of definitions has been put forth to describe hate speech. In exploring its different formulations, Belavusau notes that hate speech is “deeply rooted in the ideologies of racism, sexism, religious intolerance, xenophobia, and homophobia.”²⁰ In addition, he argues that pinpointing the grounds from which hate speech may arise is a tricky task and poses the question of where limits are to be drawn.²¹ According to Matsuda, hate speech that she perceives and conceptualizes solely as racist speech contains three central elements: namely that the message is “of racial inferiority, the message is directed against historically oppressed groups and the message is persecutory, hateful and degrading.”²² McGonagle offers a broad interpretation of hate speech in terms of threshold but not in terms of content and target groups, arguing that “virtually all racist and related declensions of noxious, identity-assailing expression could be brought within the wide embrace of the term.”²³ Smolla defines it as a “generic term that has come to embrace the use of speech attacks based on race, ethnicity, religion and sexual orientation or preference.”²⁴

Although some common elements can be discerned from these approaches to hate speech and the variations therein, it could be argued that “hate speech seems to be whatever people choose it to mean.”²⁵ What can be discerned from the various extrapolations of hate speech is that it “singles out minorities for abuse and harassment.”²⁶

2. INTERNATIONAL LEGAL STANDARDS: THE UNITED NATIONS

2.1 The Foundational Backdrop: Article 19 of the International Covenant on Civil and Political Rights: Freedom of Expression (and its Limitations)

Article 19 stipulates the following:

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, re-

18 Fundamental Rights Agency, 'Hate Speech and Hate Crimes against LGBT Persons' (2009) 1, https://fra.europa.eu/sites/default/files/fra_uploads/1226-Factsheet-homophobia-hate-speech-crime_EN.pdf.

19 Fundamental Rights Agency, 'Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II - The Social Situation' (2009) 44, https://fra.europa.eu/sites/default/files/fra_uploads/397-FRA_hdgs_report_part2_en.pdf.

20 Uladzislau Belavusau, 'Freedom of Speech: Importing European and US Constitutional Models in Transitional Democracies' (1st edn. Routledge, London 2013) 41, https://fra.europa.eu/sites/default/files/fra_uploads/397-FRA_hdgs_report_part2_en.pdf.

21 Ibid.

22 Mark Slagle, 'An Ethical Exploration of Free Expression and The Problem of Hate Speech' (2009) 24 *Journal of Mass Media Ethics* 4, pg. 242, <https://www.tandfonline.com/doi/abs/10.1080/08900520903320894>.

23 Tarlach McGonagle, 'Wrestling Racial Equality from Tolerance of Hate Speech' (2001) 23 *Dublin University Law Journal* 21, 4, <https://www.ivir.nl/publicaties/download/DULJhatespeech.pdf>.

24 Claudia E. Haupt, 'Regulating Hate Speech - Damned If You Do and Damned If You Don't: Lessons Learned from Comparing the German and U.S. Approaches' (2005) 23 *Boston University International Law Journal* 2, 304, <https://www.bu.edu/law/journals-archive/international/volume23n2/documents/299-336.pdf>.

25 Roger Kiska, 'Hate Speech: A Comparison Between The European Court of Human Rights and the United States Supreme Court Jurisprudence' (2012) 25 *Regent University Law Review* 1, 110, https://www.regent.edu/acad/schlaw/student_life/studentorgs/lawreview/docs/issues/v25n1/04Kiskavol.25.1.pdf.

26 Supra Note 22, pg. 238.

ceive 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.

Notwithstanding the central role held by the freedom of expression in the international legal framework, “this freedom does not enjoy such a position of primacy among rights that it trumps equality rights.”²⁷ Bearing this in mind, restrictions are not to be imposed lightly given that, as noted by General Comment 34, Article 19(2) of the ICCPR embraces “even expression that may be regarded as deeply offensive.”²⁸ In order to clarify the meaning and applicability of limitation clauses of the ICCPR and promote their legitimate implementation, the Siracusa Principles of the United Nations Economic and Social Council were construed by a group of experts in international law in an initiative led by a number of NGOs. Notwithstanding the non-binding nature of these principles, they are nevertheless pertinent to any discussion relating to the restriction of the freedoms and rights of the ICCPR, given that they constitute the only constructive expert effort to provide a uniform interpretation of limitation clauses of Article 19. The Principles stipulate that “the scope of a limitation referred to in the Covenant shall not be interpreted so as to jeopardize the essence of the right concerned.”²⁹ The restriction must be “provided for by law” which means that it must be formulated with adequate detail so as to enable citizens to conform to it.³⁰ It must be made accessible to the public³¹ and must not equip enforcement mechanisms with unregulated discretion to restrict freedom of expression.³² The Rabat Plan of Action discussed in the section on Article 20(2) underlines that restrictions to the freedom of expression are to be clearly defined without an overly broad scope, must respond to a pressing social need, must be the least intrusive measures available and be proportional to their goal.³³ The key process when determining whether speech should be prohibited is striking a proper balance between the aforementioned conflicting rights and freedoms. In relation to the ICCPR, it has been argued that it embraces a victim-centered approach when balancing free speech “against the listener’s right to have her inherent human dignity protected from hate speech injuries.”³⁴ Nevertheless, in imposing restrictions on this freedom, States must “not put in jeopardy the right itself.”³⁵ Moreover, Article 19(3) of the ICCPR must not

27 Stephanie Farrior, ‘Molding The Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech.’ (1996) 14 *Berkeley Journal of International Law* 1, 3, <https://heinonline.org/HOL/LandingPage?handle=hein.journals/berkjintl-w14&div=6&id=&page=>

28 HRC General Comment 34, ‘Article 19 – Freedom of Opinion and Expression’ (2011) CCPR/C/GC/34, para. 11.

29 United Nations, Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, E/CN.4/1985/4, Annex (1985), <https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf>.

30 Ibid.

31 Ibid.

32 HRC Concluding Observations: Lesotho (1999) CCPR/C/79/Add.106, para. 23, <https://www.refworld.org/docid/3df37b724.html>.

33 Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that constitutes Incitement to Discrimination, Hostility or Violence (2012) para. 18, <https://www.ohchr.org/en/documents/outcome-documents/rabat-plan-action>.

34 Nazila Ghanea, ‘Minorities and Hatred: Protections and Implications’ (2010) 17 *International Journal on Minority and Group Rights* 3, 433, <https://doi.org/10.1163/15718110X512151>.

35 HRC General Comment 18: ‘Non-Discrimination’ (1994) HRI/GEN/1/Rev.1 at 26, para. 12, <https://www.equalrightstrust.org/ertdocumentbank/Human%20Rights%20Committee,%20General%20Comment%2018.pdf>.

be interpreted as “license to prohibit unpopular speech.”³⁶ Thus, restricting expression is not a simple task, with an array of factors that must be taken into account in relation to the formulation and implementation of a restriction.

Whilst the right to hold opinions is absolute, the freedom of expression “carries with it special duties and responsibilities” and can be restricted if this is provided for by law and is necessary for respect of the rights or reputations of others or for the protection of national security, public order or of public health or morals.³⁷ In this realm, the HRC has been faced with cases involving hate speech. For example, *Faurisson v France*,³⁸ which was brought by a revisionist who, *inter alia*, made claims such as the following:

I would wish to see that 100 percent of all French citizens realize that the myth of the gas chambers is a dishonest fabrication (“est une gredinerie”), endorsed by the victorious powers of Nuremberg in 1945-46 and officialized on 14 July 1990 by the current French Government, with the approval of the court historians.³⁹

The historian who was prosecuted under an anti-revisionist law (the Gaysot Act) brought his case to the HRC, claiming that his freedom of expression had been violated. It found that anti-Semitic speech could be restricted in order to protect the rights and freedoms of others, namely Jews, from religious hatred. It held that:

The restrictions placed on the author did not curb the core of his right to freedom of expression, nor did they in any way affect his freedom of research; they were intimately linked to the value they were meant to protect - the right to be free from incitement to racism or anti-semitism; protecting that value could not have been achieved in the circumstances by less drastic means.

2.2 Article 20(2) of the International Covenant on Civil and Political Rights

Article 20(2) of the ICCPR is different to the majority of rights found in this Covenant and other conventions because, rather than providing a particular human right as with most convention articles, this directly prohibits certain forms of expression. This approach is like that of Article 4 of the ICERD which limits rights and freedoms for purposes of restricting the manifestation of racism.

Article 20(2) stipulates that: “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”

Issues of free speech arise, just as in the case of Article 4 ICERD since advocacy occurs through the vehicle of expression. Several countries have incorporated reservations to Article 20(2) on free speech ground, an indicative example being the reservation of Luxembourg which held:

The Government of Luxembourg declares that it does not consider itself obligated to adopt legislation in the field covered by article 20, paragraph 1, and that article 20 as a whole will be implemented taking into account the rights to freedom of thought, religion, opinion, assembly and association laid down in articles 18, 19 and 20 of the Universal Declaration of Human Rights and reaffirmed in

36 *Faurisson v France*, Communication no. 550/1993 (8 November 1996) CCPR/C/58/D/550/1993, Individual opinion of Elizabeth Evatt and David Kretzmer (concurring opinion), <https://globalfreedomofexpression.columbia.edu/cases/faurisson-v-france/>.

37 Article 19 ICCPR.

38 *Faurisson v France*, para. 9.6.

39 *Ibid* at para. 2.6.

articles 18, 19, 21 and 22 of the Covenant.

In relation to this, the HRC has been clear in its approach. In its General Comment 34, the Committee held that “Articles 19 and 20 are compatible with and complement each other. The acts that are addressed in Article 20 are all subject to restriction pursuant to Article 19, paragraph 3.”⁴⁰

In terms of the meaning of Article 20(2) and the thresholds attached thereto, two documents have been particularly relevant to clarifying its meaning. A 2012 Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, defined advocacy as the “explicit, intentional, public and active support and promotion of hatred towards the target group.”⁴¹ This report also provides a brief description of what is meant by hatred, incitement, discrimination, hostility and violence. Providing such explanations potentially facilitates States Parties’ understanding of Article 20(2). The Rabat Plan of Action seeks to clarify the standards and thresholds linked to Article 20 ICCPR. This document can be used and applied in a variety of frameworks, ranging from content regulation online to the approach of national and international Courts. It states that there must be a high threshold when applying Article 20 of the ICCPR.⁴² This is also noted in the 2012 Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression that “the threshold of the types of expression that would fall under the provisions of Article 20(2) should be high and solid.”⁴³ The Rabat Plan of Action underlines that restrictions to the freedom of expression are to be clearly defined without an overly broad scope, must respond to a pressing social need, must be the least intrusive measures available and be proportional to their goal.⁴⁴ It notes that “criminal sanctions related to unlawful forms of expression should be seen as last resort measures.”⁴⁵ Here, it must be noted that in General Recommendation 15 of the European Commission against Racism and Intolerance (ECRI), criminal law should be used as a method of last resort.⁴⁶ To achieve the protection of speech the Rabat Plan of Action puts forth a six-part threshold test for the application of Article 20(2) which incorporates:

- (1) the social and political **context**
- (2) status of the **speaker**
- (3) **intent** to incite the audience against a target group
- (4) **content** and form of the speech
- (5) **extent** of its dissemination and
- (6) **likelihood** of harm, including imminence.

The only regional convention in which Article 20(2) appears to have a direct impact on is the American Convention on Human Rights. Article 13 therein provides for freedom of expression (with certain limita-

40 Human Rights Committee General Comment 34: para. 50.

41 Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (2012) A/67/357, Para. 44(b), https://ap.ohchr.org/documents/dpage_e.aspx?si=A/67/357.

42 [Rabat Plan of Action](#), para. 22.

43 *Ibid* at para. 45.

44 *Ibid* at para. 18.

45 *Ibid* at para. 22.

46 ECRI, General Recommendation No. 15, <https://rm.coe.int/ecri-general-policy-recommendation-no-15-on-combating-hate-speech/16808b5b01>.

tions as seen in Article 19 of the ICCPR such as respecting the rights or reputations of others, protecting public order etc). However, part 5 therein sets out the following:

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.

As the Inter-American Court of Human Rights has not yet delivered a judgment involving this article, a separate section on jurisprudence is not included in this report. Instead, it is noteworthy that the Special Rapporteur for the region underlined that intention and capacity are both necessities for proving advocacy of hatred. Specifically, the Special Rapporteur noted that there must be “as a prerequisite strong, objective evidence that the person was not simply expressing an opinion, but also had the clear intention to commit an unlawful act and the real, present, and effective possibility of achieving his or her objectives.”⁴⁷

Although not the core regional document for Africa, in 2002 the African Commission on Human and Peoples’ Rights adopted the Declaration of Principles on Freedom of Expression and Access to Information in Africa. It was revised in 2019.⁴⁸ This includes, amongst others, a mandatory ban on hate speech phrased in a similar manner to Article 20(2) of the ICCPR. Specifically, Principle 23 entitled “Prohibited Speech” provides that:

1. States shall prohibit any speech that advocates national, racial, religious or other forms of discriminatory hatred which constitutes incitement to discrimination, hostility or violence.
2. States shall criminalize prohibited speech as a last resort and only for the most severe cases. In determining the threshold of severity that may warrant criminal sanctions, States shall take into account the: a. prevailing social and political context; b. status of the speaker in relation to the audience; c. existence of a clear intent to incite; d. content and form of the speech; e. extent of the speech, including its public nature, size of audience and means of dissemination; f. real likelihood and imminence of harm.
3. States shall not prohibit speech that merely lacks civility or which offends or disturbs.

2.3 Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination: Prohibiting Manifestations of Racism

The text of Article 4 of the ICERD reads as follows:

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to

47 Catalina Botero Marino (Inter-Am. Comm’n H.R. Special Rapporteur for freedom of expression), Annual Report of the Inter-Am. Comm’n H.R., OEA/Ser.L/V/II. Doc. 51, ¶ 544 (Dec. 20, 2009), <https://www.oas.org/en/iachr/expression/docs/reports/annual/Informe%20Anual%202009%20%20ENG.pdf>.

48 Declaration of Principles on Freedom of Expression and Access to Information in Africa 2019, <https://achpr.au.int/en/node/902>.

this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of this Convention, *inter alia*:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

Article 4 of the ICERD encapsulates the prohibition of racist ideas, propaganda and expression as well as racist acts of violence and incitement to such acts. It seeks to tackle racial hatred as manifested both by speech, acts and organised groups and racist speech uttered by public officials. In its General Recommendation 35, the CERD noted that speech and acts prohibited under this article are those which are:

directed against groups recognized in Article 1 of the Convention — which forbids discrimination on grounds of race, colour, descent, or national or ethnic origin — such as indigenous peoples, descent-based groups, and immigrants or non-citizens, including migrant domestic workers, refugees and asylum seekers, as well as speech directed against women members of these and other vulnerable groups... The Committee's attention has also been engaged by hate speech targeting persons belonging to certain ethnic groups who profess or practice a religion different from the majority, including expressions of Islamophobia, anti-Semitism and other similar manifestations of hatred against ethno-religious groups...⁴⁹

The historical context of the ICERD is significant in contextualizing the formulation of Article 4. As noted by the CERD, at that time, “there was a widespread fear of the revival of authoritarian ideologies”⁵⁰ and the need militantly to restrict the expression and association of racists was considered paramount, hence the existence of Article 4. In General Recommendation 15, the CERD highlighted that this article is of a mandatory character,⁵¹ and has been described by Mahalic and Mahalic as “the most important article in the Convention.”⁵² It is particularly relevant to the current discussion since, as noted by the CERD, it has “functioned as the principal vehicle for combatting hate speech.”⁵³

The UN General Assembly has reiterated the importance of States Parties taking the necessary measures to tackle the different forms and manifestations of racism, as extrapolated in Article 4,⁵⁴ whilst the UN Human Rights Council has highlighted that States Parties must criminalize the incitement to imminent

49 [CERD General Recommendation 35](#), para. 6.

50 [CERD General Recommendation 15](#), para. 1.

51 *Ibid* at para. 10.

52 Drew Mahalic & Joan Gambée Mahalic, The Limitation Provisions of the International Convention on the Elimination of all Forms of Racial Discrimination (1987) 9 Human Rights Quarterly 1, 89, <https://doi.org/10.2307/761947>.

53 [CERD General Recommendation 35](#), para. 8.

54 General Assembly Resolution 66/143: Inadmissibility of certain practices that contribute to fuelling contemporary forms of racism, racial discrimination, xenophobia and related intolerance: (29 March 2012), <https://adsdatabase.ohchr.org/IssueLibrary/Res%2066%20143%20GA%20inadmissibility%20of%20practicesfuelling%20racism,%20racial%20discrimination,%20xenophobia%20and%20related%20intolerance.pdf>.

violence based on religion or belief.⁵⁵ From the very beginning of its activities, the CERD has underlined that the incorporation of Article 4 into national legislation is “obligatory under the Convention for all States Parties”⁵⁶ and damns countries which do not comply with this strict requirement. For example, in Concluding Observations to Japan, the CERD expressed its concern in relation to national legislation, arguing that, although there are provisions for defamation and other crimes that can be used in relation to racist ideas, “the legislation of the State party does not fully comply with all provisions of Article 4.”⁵⁷ As such, the CERD recommended that “the State party take appropriate steps to revise its legislation, in particular its Penal Code, in order to give effect to the provisions of article 4.”⁵⁸ Although the development of relevant legislation is an obligation to acceding States Parties, the CERD has highlighted that enacting legislation is not sufficient for purposes of Article 4 compliance, and that the proper implementation of such legislation is a necessary prerequisite.⁵⁹ For example, in its jurisprudence, it has highlighted that:

It does not suffice, for the purposes of Article 4 of the Convention, merely to declare acts of racial discrimination punishable on paper. Rather, criminal laws and other legal provisions prohibiting racial discrimination must also be effectively implemented by the competent national tribunals and other State institutions. This obligation is implicit in Article 4 of the Convention.⁶⁰

Article 4 provides that States must take immediate and positive measures in order to meet the requirements of this article. Such measures have been defined by the Committee as a comparison of “legislative, executive, administrative, budgetary and regulatory instruments...as well as plans, policies, programmes and...regimes.”⁶¹

However, General Recommendation 15 of the CERD on Article 4 of the Convention, which deals with racist speech amongst others, offers no definition of what this speech is. General Recommendation 35 of the same committee on Combatting Racist Hate Speech looks at several related issues, such as what factors are considered for criminalization and, whilst incitement is defined, racist hate speech is not. In fact, this recommendation recognizes that the lack of a definition of hate speech in the Convention has “not impeded the Committee from identifying and naming hate speech phenomena and exploring the relationship between speech practices and the standards of the Convention.”⁶² The closest the Recommendation gets to an explanation of hate speech is its remark that:

Racist hate speech can take many forms and is not confined to explicitly racial remarks. As is the case with discrimination under article 1, speech attacking particular racial or ethnic groups may employ indirect language in order to disguise its targets and objectives.⁶³

Despite the low threshold of free speech protection attached to this remark, the CERD has underlined

55 Human Rights Council Resolution 16/18: Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence, and violence against persons based on religion or belief (12 April 2011), https://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/a.hrc.res.16.18_en.pdf; Human Rights Council Resolution 19/25: Combating intolerance, negative stereotyping and stigmatization of, and discrimination and incitement to violence and violence against persons based on religion or belief, (10 April 2012), https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/RegularSession/Session19/A.HRC.19.25_en.pdf.

56 CERD General Recommendation 1: States Parties' Obligations (1972) A/8718 at 37, <http://hrlibrary.umn.edu/gencomm/genrei.htm>.

57 Concluding Observations: Japan, CERD, CERD/C/JPN/CO/7-9 (2014), para.10, <https://www.mofa.go.jp/files/000060744.pdf>.

58 Ibid.

59 [CERD General Recommendation 15](#), para. 2.

60 [Gelle v Denmark](#), Communication no. 34/2004 (15 March 2006) CERD/C/68/D/34/2004, para. 7.3., This was reiterated in [Jama v Denmark](#), [Adan v Denmark](#) and [TBB-Turkish Union v Germany](#).

61 CERD [General Recommendation 32](#), para. 13.

62 CERD [General Recommendation 35](#), para. 5.

63 Ibid at para. 7.

that free speech “carries special duties and responsibilities, among which is the obligation not to disseminate racist ideas.”⁶⁴ In its General Recommendation 15 on Measures to Eradicate Incitement to or Acts of Discrimination, the CERD highlighted that “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.”⁶⁵ However, this position is of no substantial assistance as it is not accompanied by any conceptual, contextual or theoretical analysis of free speech and hate speech and can, at best, offer solely (empty) rhetorical value to the deep-rooted issues related to hate speech regulation. The readiness of the CERD to restrict free speech in the name of protecting the rights and freedoms of others, in the sphere of regulating hatred was also reflected in *Jewish Community of Oslo et al. v Norway*, which involved a march commemorating Rudolf Hess, in which the CERD considered what is meant by the “due regard clause” of Article 4. More particularly, the prohibition of racist speech and activity, as incorporated in Article 4, should have “due regard of the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention” which include, amongst others, the freedom of expression. In this case, the CERD held that:

to give the right to freedom of speech a more limited role in the context of Article 4 does not deprive the due regard clause of significant meaning, all the more so since all international instruments that guarantee freedom of expression provide for the possibility, under certain circumstances, of limiting the exercise of this right.⁶⁶

In fact, the CERD noted that the “freedom of speech has been afforded a lower level of protection in cases of racist and hate speech dealt with by other international bodies.”⁶⁷ This is in line with its position that the due regard clause cannot be exploited for “canceling or justifying a departure from the mandatory obligations set forth in Articles 4(a) and 4(b).”⁶⁸

In relation to the actual handling of prohibited speech and acts under Article 4, the CERD has not been clear. For example, in its General Recommendation 31, the Committee held that “States parties should fully comply with the requirements of Article 4 of the Convention and criminalize all acts of racism.”⁶⁹ However, in *Yilmaz-Dogan v The Netherlands*, which involved racist statements made by an employer, the CERD recognised the importance of the expediency principle in which ‘the freedom to prosecute or not prosecute, is governed by considerations of public policy’⁷⁰ and held that the Convention ‘cannot be interpreted as challenging the *raison d’être* of that principle.’⁷¹ However, it underlined that the Convention is to be considered in all cases involving racial discrimination.⁷² In *Zentralrat Deutscher Sinti und Roma et al. v Germany*, the Committee found that the disciplinary procedures taken against the author of a racist letter were sufficient to meet the requirements of Article 4.⁷³ So the article itself notes that the dissemination of racist ideas and

64 CERD Concluding Observations: United States of America (2001) CERD/C/59/Misc.17/Rev.3, para. 12, <http://hrlibrary.umn.edu/usdocs/conclcomments-usa.html>.

65 CERD General Recommendation 15, para. 4.

66 *The Jewish Community of Oslo et al. v Norway* (15 August 2005) Communication no. 30/2003, (CERD/C/67/D/30/2003), para. 10.3, <https://www2.ohchr.org/english/bodies/cerd/docs/CERD67/CERD-C-67-D-30-2003-En.pdf>.

67 *Ibid* at para. 10.5.

68 Committee on the Elimination of Racial Discrimination, 18th Sess. (339 mtg). at 152, CERD/C/SR.399 (1978), para. 2.

69 CERD General Recommendation 31: The Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System (2005) A/60/18 (2005) 98, para. 4, <https://www.refworld.org/docid/48abd56dd.html>.

70 *Yilmaz-Dogan v The Netherlands*, Communication no. 1/1984 (10 August 1988) CERD/C/36/D/1/1984, para. 9.4, https://adsdata-base.ohchr.org/IssueLibrary/CERD_Communication_1_1984_A.Yilmaz%20Dogan%20v.%20Netherlands.pdf.

71 *Ibid* at para. 9.4.

72 *Ibid*.

73 *Zentralrat Deutscher Sinti und Roma et al. v Germany*, CERD/C/72/D/38/2006 (3 March 2008), CERD/C/72/D/38/2006, para. 7.7, https://adsdatabase.ohchr.org/IssueLibrary/CERD_Communication_38_2006_Zentralrat%20Deutscher%20Sinti%20und%20Roma%20v.%20Germany.pdf.

expressions should be “punishable by law”, General Recommendation 31 stipulates the requirement for criminal penalties yet CERD jurisprudence has also been accepting of other types of punishment such as those of a disciplinary nature.

In light of the above, Article 4 ICERD is designed to tackle racist speech (not hate speech in general). However, it is unclear whether its significance is more than conceptual, the free speech concerns are significant, whilst meanings of key terms in the article remain unclear. Further, it includes a fleeting reference to the prohibition of “all dissemination of ideas based on racial superiority or hatred,” with no adequate supporting extrapolation on relevant semantics and notions. This is contrary to incitement, which has been explained in a CERD General Recommendation:

Incitement characteristically seeks to influence others to engage in certain forms of conduct, including the commission of crime, through advocacy or threats. Incitement may be express or implied, through actions such as displays of racist symbols or distribution of materials as well as words.⁷⁴

In relation to free speech concerns, several of the reservations made to Article 4 of the ICERD emanate from such concerns. For example, a plethora of States Parties, have incorporated reservations to Article 4 on free speech grounds, a random (but reflective) example being France’s reservation, which holds that:

With regard to article 4, France wishes to make it clear that it interprets the reference made therein to the principles of the Universal Declaration of Human Rights and to the rights set forth in article 5 of the Convention as releasing the States Parties from the obligation to enact anti-discrimination legislation which is incompatible with the freedoms of opinion and expression and of peaceful assembly and association guaranteed by those texts.⁷⁵

2.4 Addressing Hate Speech at the UN Level: Modes of Punishment or Prohibition

General Comment 11 of the HRC on the Prohibition of Propaganda for War and Inciting National, Racial or Religious Hatred holds that, in order to meet the obligations of Article 20(2) States Parties must implement relevant legislation which directly prohibits the advocacy set out therein.⁷⁶ The case of *Mohamed Rabbae, A.B.S and N.A v The Netherlands* was brought against the Netherlands for the acquittal of Geert Wilders, leader of the Dutch Party for Freedom (*Partij voor de Vrijheid*) following his prosecution for racist statements. This is the only case of the HRC, where there is a relatively in-depth extrapolation of the State obligations that amount from Article 20(2).⁷⁷ Here, the Committee held that Article 20(2) “does not merely impose a formal obligation on States parties to adopt legislation prohibiting such conduct. Such a law would be ineffective without procedures for complaints and appropriate sanctions.”

The HRC noted that “Article 20(2) does not expressly require the imposition of criminal penalties, but instead requires that such advocacy be ‘prohibited by law.’ Such prohibitions may include civil and administrative as well as criminal penalties.”⁷⁸ In this case, the fact that the State Party had an established

⁷⁴ CERD General Recommendation 35, para. 16.

⁷⁵ ‘Human Rights Documents: Compilation of Documents Pertaining to Human Rights’ (September 1983), p. 679.

⁷⁶ General Comment 11: Article 20 - Prohibition of Propaganda for War and Inciting National, Racial or Religious Hatred (1994), HRI/GEN/1/Rev.1 at 12, para. 1, <https://www.ohchr.org/sites/default/files/Documents/Issues/Opinion/CCPRGeneralCommentNo11.pdf>.

⁷⁷ Vassilari, Maria et al. v Greece (19 March 2009) Communication no. 1570/2007, <https://digitallibrary.un.org/record/653524?ln=en>; J.R.T and the W.G. Party v Canada (6 April 1983) Communication no. 104/1981, <http://hrlibrary.umn.edu/undocs/html/104-1981.htm>.

⁷⁸ Mohamed Rabbae, A.B.S and N.A v The Netherlands (14 July 2016) Communication no. 2124/2011, para. 10.4, <https://globalfreedomofexpression.columbia.edu/cases/rabbae-v-netherlands/>.

legislative framework that covered the obligations arising from Article 20(2) and given that the State Party pursued the prosecution of this case meant that the Netherlands had not violated its obligations under Article 20(2).⁷⁹ Importantly, the Committee set out that the obligation under this article “does not extend to an obligation for the State party to ensure that a person who is charged with inciting to discrimination, hostility or violence will invariably be convicted by an independent and impartial court of law.” To demonstrate contrast, Article 4 ICERD renders racist expression an “offense punishable by law.”

In discussing Article 4 in *Gelle v Denmark*, the CERD observed that “it does not suffice, for purposes of Article 4 of the Convention, merely to declare acts of racial discrimination punishable on paper. Rather, criminal laws and other legal provisions prohibiting racial discrimination must also be effectively implemented by the competent national tribunals and other State institutions. This obligation is implicit in Article 4 of the Convention.”⁸⁰

The terms “punishable” and “prohibited”, although indicative of the criminal or non-criminal nature of a penalty, do not go far in designating what kind of repercussion haters should have in law. In assessing Article 20(2), the Special Rapporteur on the Freedom of Opinion and Expression noted that “there is no requirement to criminalize such expression,”⁸¹ while the Rabat Plan of Action noted that “criminal sanctions related to unlawful forms of expression should be seen as last resort measures.”⁸²

The issue of sanctioning bad speech is of direct relevance to the discussion on Article 20(2) as well as Article 4. There does not appear to be a set agreement within the UN as to what sanctions need to be imposed on such speech. This is reflected in the discrepancy arising from the wording of the two articles under consideration, with Article 4 ICERD referring to the prohibited conduct being “punishable by law,” and Article 20(2) ICCPR referring to the advocacy being “prohibited by law” rather than punishable. What is paradoxical is that, while Article 4 prohibits the dissemination of racist ideas, Article 20(2) prohibits the advocacy of phenomena such as hatred and violence. It is, however, the former which is criminally punishable based on the reading of the article rather than the latter, notwithstanding the lower threshold of harm associated with Article 4.

3. INTERNATIONAL LEGAL STANDARDS: THE EUROPEAN UNION

3.1 The European Union’s Framework Decision on Combating Certain Forms and Expressions of Racism and Xenophobia by means of Criminal Law.

Following seven years of negotiation,⁸³ The European Union developed the Framework Decision on Combating Racism and Xenophobia through Criminal Law. This document seeks to tackle the phenomena of racism and xenophobia as manifested, *inter alia*, through hate speech, endorsing criminal law as the only tool. As such, this is not a hate speech tool in its entirety but, rather, a tool that *also* deals with racist and xenophobic speech. Given the solely criminal nature of this law, the threshold necessary for speech to be

79 Ibid at para 10.7.

80 *Gelle v Denmark*, Communication no. 34/2004 (15 March 2006) CERD/C/68/D/34/2004, para. 73., This was reiterated in *Jama v Denmark*, *Adan v Denmark* and *TBB-Turkish Union v Germany*.

81 Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (2012) A/67/357, para. 47, <https://www.palermo.edu/cele/pdf/SRs-Report.pdf>.

82 *Rabat Plan of Action*, para. 22.

83 European Commission. 2014. Report from the Commission to the European Parliament and the Council on the Implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law. European Commission report. <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52014DC0027>.

punishable is high and definitely higher than those existing on either of the tools available at a UN level.

A major issue in relation to the Framework Decision is the problem of uniform application across EU Member States due to the differentiation in countries' approaches to the meaning of hate speech and the limits of free speech. The European Parliament has picked up on this reality and, in 2017, called for a resolution on establishing a common legal definition of hate speech in the EU (European Parliament 2017).⁸⁴ The Framework Decision itself does not provide for a definition of hate speech. Instead, Article 1, therein, entitled "offences" concerning racism and xenophobia holds that:

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

- (a) publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin; and
- (b) the commission of an act referred to in point (a) by public dissemination or distribution of tracts, pictures or other material.

It also includes two provisions on the prohibition of publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group. In relation to Article 1, the Framework Decision⁸⁵ states that Member States may choose only to punish conduct which is either carried out in a manner likely to disturb public order or which is threatening, abusive or insulting. This provision serves as a tool for States that wish to limit the scope of expression that falls within the Framework Decision.⁸⁶ Article 3 directly stipulates that the prohibition of these acts needs to happen through criminal law and sets out penalties which should range between one and three years of imprisonment.

Article 1 of the Framework Decision prohibits publicly condoning, denying or grossly trivializing certain international crimes directed at particular groups, insofar as this conduct occurs in a manner likely to incite to violence or hatred against such a group or a member of such a group. Article 1(2) provides that the above outlined conduct can be deemed punishable only if it is carried out in a manner likely to disturb public order or which is threatening, abusive or insulting, thereby giving the possibility to Member States to heighten the threshold (and free speech protection) even further. However, it could also be argued that such safety nets are, in fact, futile since the punishable conduct *per se* disturbs public order (particularly since incitement needs to be public, hateful and or violent). Moreover, conduct, which publicly seeks to advance violence or hatred against a particular group, could automatically tick the boxes of abusive or insulting and, potentially, the box of threatening. To further protect free speech considerations in relation to revisionist and negationist speech, Article 1(4) provides that States can punish only the denial of international crimes, which have been established by the decision of a national and/or international court.

A few points can be taken from this article. Firstly, intention is necessary and the punishable conduct must be public. Furthermore, the speech must amount to incitement. It is not sufficient that there is a mere dissemination of ideas, as is the case in Article 4 ICERD. Unlike Article 20(2) ICCPR, which prohibits incitement to, *inter alia*, discrimination, this document restricts itself solely to prohibit incitement to violence or hatred, thereby automatically heightening the threshold of punishable conduct. At first sight, one may

84 European Parliament. 2017. Motion for a European Parliament resolution on establishing a common legal definition of hate speech in the EU. European Parliament document. https://www.europarl.europa.eu/doceo/document/B-8-2017-0172_EN.html?redirect

85 Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32008F0913>.

86 Ibid.

consider this to be reasonable given that the tool (criminal law) which is used in the Framework Decision is the most restrictive of all and, as such, the threshold must be sufficiently high. This can be contrasted to the position of the CERD discussed above, which notes that, for purposes of Article 4, States must ensure the adequate implementation of “criminal laws and other legal provisions prohibiting racial discrimination.”⁸⁷ Therefore, it is either the case of the UN adopting a very low threshold of what constitutes hate speech, even when criminal law is to be utilized, or that the EU has gone too far in threshold requirements because criminal law is utilized. Unfortunately, the EU did not take any steps to develop, either within this Framework Decision or elsewhere, the possibility for other tools to be used by Member States to tackle hate speech, that could emanate from civil law and thereby have lower speech threshold requirements due to the severity of its consequence. In addition, as with all other tools that are examined in this report, the speech must be racist or xenophobic, with the EU disregarding phenomena such as homophobia and transphobia and, as such, their byproducts such as homophobic and transphobic speech.

In sum, this document deals with racism and xenophobia and its by-products, one of them being racist and xenophobic speech. It endorses a higher threshold of punishable speech in comparison to Article 4 ICERD and Article 20(2) ICCPR and punishes only speech, which targets members of a group characterized by its race, colour, religion, descent or national or ethnic origin and, as such, only criminalizing certain types of hate speech. The European Parliament has recognized this issue and recommended that the European Commission propose a “recast” of the Framework Decision to include “other forms of bias crime and incitement to hatred, including on grounds of sexual orientation and gender identity.”⁸⁸ Several other steps have been taken since then in this arena which are described in detail in a paper by Uladzislau Belavusau and the report’s author.⁸⁹

4. INTERNATIONAL LEGAL STANDARDS: THE COUNCIL OF EUROPE

4.1 The European Convention on Human Rights and Basic Precepts of the European Court of Human Rights

4.1 (i) Article 10 of the ECHR

Although the Convention does not specifically limit and/or sanction speech that promotes racial or ethnic hatred,⁹⁰ or other types of hate speech, the Court predominantly deals with relevant cases, as they arise, under Article 10 or Article 17.

Article 10 of the ECHR provides for the 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 broad-

87 [Gelle v Denmark](#), Communication no. 34/2004 (15 March 2006) CERD/C/68/D/34/2004, para. 7.3. This was reiterated in [Jama v Denmark](#), [Adan v Denmark](#) and [TBB-Turkish Union v Germany](#).

88 European Parliament Resolution of 4 February 2014 on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity (2013/2183(INI)), <https://oeil.secure.europarl.europa.eu/oeil/popups/printficheglobal.pdf?id=635364&!en>.

89 Alkiviadou N & Belavusau U, ‘Rien Que de Mots: Counteracting Homophobic Speech in European and U.S. Law’ (2021) 21 International Journal of Discrimination 4.

90 Unlike Article 20(2) of the ICCPR or Article 4(a) of the ICERD.

casting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 10 ECHR incorporates a reference to “special duties and responsibilities,” something which is not present in any other Convention article and demonstrates the drafters’ concern as to the potential for abuse of this right and/or the dangers associated with it. The European Court of Human Rights (ECtHR) has professed that the freedom of expression “constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man.”⁹¹ It also notes that this freedom:

is applicable not only to “information” or “ideas” that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.⁹²

This statement has been reiterated time and time again since it was first held in the 1976 case of *Handyside v The United Kingdom*. However, despite the extent of protection which the freedom of expression should be enjoying in view of the *Handyside* statement, jurisprudence reaching Strasbourg which involves what is perceived to be hateful speech, is vigorously ousted from Convention protection. It is beyond the scope of this report to examine all relevant cases and, as such, three different thematics will be chosen for purposes of demonstrating the point that, notwithstanding the *Handyside* statement, the Court has *not* protected offensive, shocking or disturbing speech. Danish think tank, Justitia⁹³, conducted an analysis⁹⁴ of the approach of the ECtHR and the defunct European Commission of Human Rights to hate speech, in a total of 60 identified cases⁹⁵ which were decided between 1979-2020. The study finds that, on average, free speech restrictions have been overruled in just over one out of three hate speech cases. Specifically, 57 of those cases were brought by the utterers of the speech and 3 by the targets/victims. The analysis reveals that 61% of cases brought by the utterers resulted in the applicant’s loss through a finding of non-violation of Article 10 (21%), incompatible *ratione materiae* (9%) or manifestly ill-founded (32%). Only 39% of cases brought by the utterers on the grounds of an Article 10 violation have resulted in a finding in favor of the applicant. Thus, on average, free speech restrictions have been upheld in just over one out of three hate speech cases.

4.1 (ii) Article 17 ECHR

Article 17 is the Convention non-destruction clause. It is entitled “Prohibition of abuse of rights” and provides that:

Nothing in this Convention may be interpreted as implying for any State, group or person any right

91 *Handyside v The United Kingdom*, para. 49.

92 *Ibid.*

93 Justitia: <http://justitia-int.org/en/>.

94 Future of Free Speech Project: <https://futurefreespeech.com/hate-speech-case-database/>.

95 European Commission of Human Rights - 7 cases and European Court of Human Rights - 53 cases.

to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

The use of Article 17 to prohibit hate speech must not be taken lightly. Article 17 has a great impact on free speech in that it eliminates the speech in question from an Article 10 appraisal and thus the conjoined balancing process. The now defunct European Commission on Human Rights and the Court triggered this article on the basis of content, that content being revisionist or negationist speech,⁹⁶ with rare shifts such as *Norwood* which involved Islamophobia discussed below. Interestingly, the Court has not limited itself to relying only on Article 17 in relation to revisionism and negationism in relation to the Holocaust, but also anti-Semitism in the form that does not seek to dispute horrific historical tragedies. For example, in *Ivanov v Russia*, the applicant, a newspaper editor, was convicted for a series of publications in his newspaper which called for the exclusion of Jews from social life, alleging the existence of a causal link between social, economic and political discomfort and the activities of Jews, and portraying the malignancy of the Jewish ethnic group. In deciding on this case, the Court relied on Article 17.

4.1 (iii) Definition of Hate Speech by the European Court of Human Rights?

Paramount to evaluating the ECtHR's approach to hate speech cases is the issue of its meaning. The first case in which hate speech was used as a term was that of *Sürek v Turkey* (1999). However, the Court has yet to provide any substantial definition of hate speech. In *Gündüz v. Turkey* (2004), the Court noted that "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."⁹⁷

In this case the Court expanded on its reference to hate speech by noting 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.⁹⁸

In the above, the Court refers to the low threshold of 'insulting' which raises concerns in relation to freedom of expression. The Court's relationship with 'insults' has not been too clear. In *Ibragim Ibragimov and Others v Russia* (2018), which involved the banning of Muslim scholar Said Nursi's book, due to it allegedly constituting extremist literature, the Court found that, since the book depicted a moderate, non-violent, understanding of Islam, the restriction to speech was not legitimate. It highlighted that:

merely because a remark may be perceived as offensive or insulting by particular individuals or groups does not mean that it constitutes "hate speech." Whilst such sentiments are understandable, they alone cannot set the limits of freedom of expression. The key issue in the present case is thus whether the statements in question, when read as a whole and in their context, could be seen as

⁹⁶ For a full analysis, see David Keane, 'Attacking Hate Speech under Article 17 of the European Convention on Human Rights' (2007) 25 *Netherlands Quarterly of Human Rights* 4, 642, <https://doi.org/10.1177/016934410702500404>.

⁹⁷ *Gündüz v. Turkey*, Application no. 35071/97 (ECHR 14 June 2004), <https://globalfreedomofexpression.columbia.edu/cases/gunduz-v-turkey/>.

⁹⁸ *Ibid* at para. 40.

promoting violence, hatred or intolerance.⁹⁹

In *Atamanchuk v Russia* (2020), which involved an application made by a journalist/politician after he was convicted of making statements against non-Russians, referring to them as criminals (without making any calls for violence), the Court found that:

inciting hatred does not necessarily involve an explicit call for an act of violence, or other criminal acts. Attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favour combating xenophobic or otherwise discriminatory speech in the face of freedom of expression exercised in an irresponsible manner.¹⁰⁰

In the former, mere insult was not sufficient to prohibit speech whereas in the latter, not only could insult be prohibited, but it was also incorporated in the framework of inciting hatred, with no explanation of the nexus between insult and hatred.

The threshold provided for in the above paragraph is rather broad since it incorporates even the mere justification of hatred and not only its incitement as is set out in the “hate speech clause” of the international level and namely Article 20(2) of ICCPR which prohibits advocacy for national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. At the same time, however, and given the incongruence which exists at the international level in terms of thresholds, when it comes to racial discrimination, the above approach is more in line with the less speech protective Article 4 of the ICERD. This provides that States Parties should condemn “propaganda...which attempt to justify...racial hatred and discrimination in any form.”

Beyond the element of insult, which remains a contested concept, even within the jurisprudence of the Court, the above references made to hate speech are generic, offering no substantial definition of this form of speech. The closest we have come to a conceptual understanding of hate speech has been *Lilliendahl v Iceland* (2000). This case involved comments made under an online article by a citizen regarding a proposal to strengthen education and counseling in schools on matters concerning those who identify themselves as lesbian, gay, bisexual or transgender. He stated, amongst others, that:

We...have no interest in any [expletive] explanation of this *kynvilla* [derogatory word for homosexuality, literally “sexual deviation”] ... This is disgusting. To indoctrinate children with how *kynvillingar* [literally “sexual deviants”] *eðla sig* [“copulate”], primarily used for animals] in bed.... How disgusting.

He was subsequently charged under Article 233 (a) of the General Penal Code, which provides for a fine or imprisonment of a person who “publicly mocks, defames, denigrates or threatens a person or group of persons” due to his/her/their protected characteristic(s) which include sexual orientation. This case represents the first time that the Court posed the direct question of whether the speech amounted to hate speech within the meaning of the Court’s case-law. To answer this, the Court set out an explanation of hate speech based on its previous jurisprudence, adopting a hierarchal categorization, rather than assessing the substance of what can actually fall within the framework of hate speech. The first is the “gravest forms of hate speech”¹⁰¹ that are excluded from any protection through Article 17 (with no definition of what con-

99 Ibragim Ibragimov and Others v Russia (Application nos. 1413/08 and 28621/11) para. 115, <https://futurefreepress.com/ibragim-ibragimov-and-others-v-russia/>.

100 *Atamanchuk v Russia*, Application no. 4493/11 (ECHR 11 February 2020) para. 52, <https://globalfreedomofexpression.columbia.edu/cases/atamanchuk-v-russia/>.

101 *Lilliendahl v Iceland*, Application Number 29297/18 (ECHR 12 May 2020) para. 34, <https://globalfreedomofexpression.columbia.edu/cases/lilliendahl-v-iceland/>.

stitutes the “gravest forms of hate speech”). The second is the “less grave forms of hate speech”¹⁰² which do not fall outside Article 10 but which the Court “has considered permissible for the Contracting States to restrict.”¹⁰³ Here, the Court incorporated not only calls for violence or other criminal acts but also insults, ridicule and slander in order to combat “prejudicial speech within the context of permitted restrictions on freedom of expression.”¹⁰⁴ It made no elaboration of what this context of permitted restriction may be, something which would have been expected given the fundamental nature of free speech in addition to the very low threshold attached to insult or ridicule.

The Court waited until 2020 to set out this overview of tiers and explanation of the term (albeit without too much nuance). This 2020 positioning demonstrates that the threshold of the ECtHR is in fact low since insults can be prohibited, whilst the reference to “prejudicial” speech is also indicative of this. Further, the Court held that determining whether speech constitutes hate speech is based on an assessment of the content of the expression and the manner of its delivery.¹⁰⁵ As is reflected in the jurisprudential analysis, the Court often uses these ambits to suit the State’s decision in relation to protected and unprotected speech, all within a wide margin of appreciation.

4.2 The Committee of Ministers

In 1997, the Committee of Ministers of the Council of Europe adopted Recommendation 97 (20) on Hate Speech. This document defines hate speech 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.

The document recommends countries to take appropriate measures to combat hate speech, to ratify the UN’s CERD and to review their domestic legislation in order to ensure compliance with the principles set out in the Recommendation. For purposes of illustration, a couple of the principles are set out here. Firstly, there should exist a sound legal framework consisting of civil, criminal and administrative law provisions on hate speech. The Committee reminds countries that some instances of hate speech may be “so insulting” to individuals or groups that this speech falls outside Article 10. The above overview, therefore, allows the identification of three issues. Firstly, that the Committee of Ministers’ definition includes the “justification” of, amongst others, racial hatred, thereby adopting a wide threshold of forms and types of speech which falls within its realm. Secondly, that the Council of Europe considers the law (including criminal law) to constitute a central mechanism to tackle what it perceives to be hate speech and that the element of “insult” is also considered to fall in the definitional realm. The objective of the recommendation and, subsequently, the aforementioned proposals, is to contribute to “a greater unity between its members, particularly for the purpose of safeguarding and realizing the ideals and principles which are their common heritage.” Although reaffirming its “profound attachment to the freedom of expression,” the Recommendation does not actually explain or develop any strategy or formula through which countries can implement criminal law to tackle “hate speech” as broadly defined, therein, whilst simultaneously sustaining a high level of protection to freedom of expression. The use of criminal law was further incorporated in a 2007 Parliamentary Assembly Recommendation entitled “Blasphemy, religious insults and hate speech against persons on grounds of their

102 Ibid at para. 35.

103 Ibid.

104 Ibid at para. 36.

105 Ibid.

religions.” Once again, this document makes a reference to the important position of freedom of expression in a democratic society, yet endorses its criminalization.

5. JURISPRUDENTIAL ANALYSIS: HATE SPEECH BY THEME

5.1(i) *Genocide Denial and Anti-Semitism – The European Court of Human Rights*

When it comes to Holocaust revisionism or negationism, numerous applications have been declared manifestly ill-founded or incompatible *rationae materiae* with the Convention. In a series of nineties cases¹⁰⁶ before the European Commission on Human Rights, the applications were excluded on Article 17 grounds. At the ECtHR, some cases were dealt with by Article 17 and others by Article 10. In the 1998 case of *Lehideux and Isorni v. France* (1998), historically revisionist commentary on the existence of the Holocaust is systematically precluded from Convention protection.¹⁰⁷ However, jurisprudence involving Holocaust denial or negation is difficult to reconcile with the Court’s insistence in other types of cases that “it is an integral part of freedom of expression to seek historical truth,”¹⁰⁸ and that “it is not its role to arbitrate the underlying historical issues.”¹⁰⁹

In the illustrative case of *Garaudy v. France* (2003),¹¹⁰ the applicant published a book that rejected the Holocaust, claiming it to be “a myth dressed up as history and the political mileage gained from it.”¹¹¹ Garaudy’s domestic convictions for denying crimes against humanity, racial defamation and incitement to racial hatred were held not to have been a breach of his freedom of expression as the underlying content was removed from protection under Article 17. The Court noted that there is 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.”¹¹²

The Court made the link between Holocaust Denial and hatred by holding that:

The real purpose being to rehabilitate the National Socialist regime and, as a consequence, accuse the victims themselves of falsifying history. Denying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incitement to hatred of them.¹¹³

In *M’Bala M’Bala v France* (2015), the applicant, a comedian, put on a performance during which he invited an academic, who had received a number of convictions in France for his negationist and revisionist opinions to join him on stage at the end of the show. The applicant called up an actor wearing a pair of striped pyjamas with a yellow star bearing the word “Jew” – to award the academic a “prize for unfrequentability and insolence.” The applicant was charged and found guilty of public insults directed at

106 *Remer v Germany*, Application number 25096/94 6 (EComHR September 1995), *Nachtman v Austria*, Application number 36773/97 (EComHR 9 September 1998), *Marais v France*, Application number 31159/96 (EComHR 24 June 1996) *Honsik v Austria*, Application Number 25062/94 (18 October 1995).

107 *Ibid* at para. 47.

108 *Giniewski v. France*, Application no. 64016/00 (ECHR 31 January 2006) para. 51, quoting *Chauvy and Others v. France*, Application number 64915/01 (29 September 2004) para. 69.

109 *Ibid*.

110 *Garaudy v. France*, Application number 65831/01 (ECHR 24 June 2003), <https://globalfreedomofexpression.columbia.edu/cases/garaudy-v-france/>.

111 *Ibid*.

112 *Ibid*.

113 *Ibid* at para. 23.

a person or group of persons on account of their origin or of their belonging, or not belonging, to a given ethnic community, nation, race or religion. The Court found that the performance was highly anti-Semitic, supported Holocaust denial and that the offending scene could not be regarded as entertainment but, rather, as a political engagement. The Court noted that art or humour did not provide any more protection to Holocaust denial than regular expression.¹¹⁴ Through the use of Article 17, the Court found the application incompatible *ratione materiae*. However, there was no analysis of issues such as the impact on the audience and the probability that they chose to watch the particular comedian.

Perhaps the most far-reaching decision on Holocaust denial is *Witzsch v. Germany*.¹¹⁵ Here the Court found that the applicant's freedom of expression had not been violated when he was prosecuted for having, in the context of a *private* letter, denied the responsibility of Hitler and the Nazi party in the Holocaust, though he did not deny the occurrence of the Holocaust itself. In upholding the national court's determination that such sentiment "disparaged the dignity of the deceased" and in so doing exposed "the applicant's disdain towards the victims," the Court held that the expression was not protected by virtue of Article 17 ECHR.¹¹⁶ Without offering any explanation, the Court simply declared "irrelevant" the fact that the comments had been confined exclusively to a private letter. The expression was made as an individual and private assertion, as opposed to it being part of the propaganda of a National Socialist movement as envisaged in the drafting of Article 17.

In more recent cases, such as *Williamson v Germany* (2019) and *Pastörs v Germany* (2020), the applicants had denied the Holocaust during an interview and a (political) speech respectively. Both applications were found to be manifestly ill-founded, with only the latter conducting some form of assessment under Article 10 and incorporating Article 17 in a blended manner. No clarity exists on the variation in approaches between the two similar cases.

One may be tempted to make sense of the decision in Holocaust denial cases as a misplaced yet well-meaning paternalistic attempt by the Court to protect the memory of victims and the plight of the survivors of the Holocaust. Unfortunately, the Court's stance with regard to other genocides, suggests an arbitrary and inconsistent standard when determining the accuracy of historical events and the protection to be afforded to victims. A prime example of this is *Perinçek v. Switzerland*, where the applicant's prosecution for publicly describing the Armenian genocide as "an international lie" was found to be in violation of Article 10.¹¹⁷ The Court was influenced by the lack of legal consensus within Europe as to whether the denial of the Armenian genocide was punishable by national law. The applicant had not denied the massacre of the Armenian population between 1915 and 1919 as such, but rather refuted its status as genocide. In recognizing that a discussion of the events was a matter of public interest, the Court highlighted that the determination should be made by "historical research, [which] is by definition controversial and debatable and does not lend itself to definitive conclusions or objective and absolute truths."¹¹⁸ This approach was never followed in regard to the Holocaust. The Court was willing to distinguish its rulings that had upheld restrictions on Holocaust denial because, according to it, such denial was the main cause of Anti-Semitism.¹¹⁹ In terms of the speech uttered in the Swiss case, the Court provided that:

taking into account the overall thrust of his statements, [the Court] does not perceive them as a

114 M'Bala M'Bala v France, Application Number 25239/13 (ECHR 20 October 2015), para. 39, <https://globalfreedomofexpression.columbia.edu/cases/mbala-v-france-no-2523913/>.

115 Witzsch v. Germany, Application no. 7485/03 (ECHR 13 December 2005), <https://futurefreespeech.com/witzsch-v-germany/>.

116 Ibid at para. 3.

117 Perinçek v. Switzerland, Application no. 27510/08 (ECHR 15 October 2015), <https://globalfreedomofexpression.columbia.edu/cases/ecthr-perincek-v-switzerland-no-2751008-2013/>.

118 Ibid at para. 117.

119 Ibid at para. 119.

form of incitement to hatred or intolerance. The applicant did not express contempt or hatred for the victims of the events of 1915... He did not call the Armenians liars, use abusive terms with respect to them, or attempt to stereotype.

Nowhere in cases related to the Holocaust is such a nexus looked for, namely whether the speech does constitute incitement to hatred or intolerance.¹²⁰ In fact, the Court recognized that in relation to the Holocaust, “for historical and contextual reasons,” the link between Holocaust denial and hatred or intolerance has “invariably been presumed.”¹²¹ Although it did not adequately extrapolate on why and how this is so and why it is not so in terms of the Armenian genocide, it did do something else. It spoke in temporal and spatial terms, namely that the events had taken place about ninety years previously. It also stated that such hatred or intolerance could not arise given that the applicant was speaking in Switzerland about something that had happened in the Ottoman Empire. Such contextual distinctions and investigations are lacking when it comes to case-law related to National Socialism and Holocaust denial. The sharp contrast in standards indirectly disparages the memory of the victims of the Armenian Genocide in comparison to the victims of the Holocaust. This was also the opinion of Judges Vučinić and Pinto de Albuquerque, who maintained, in their joint partly dissenting opinion that:

the sufferings of an Armenian because of the genocidal policy of the Ottoman Empire are not worth less than those of a Jew under the Nazi genocidal policy. And the denial of Hayots Tseghaspanutyun... or Meds Yeghern... is not less dangerous than Holocaust denial.¹²²

While no serious historian would question the historical truth of the Holocaust, the Court’s refusal to protect Holocaust denial or trivialization undermines the very foundation on which the documentation of the crimes of the Holocaust is based, namely, academic freedom. While the Court has not gone as far as to identify the criminalization of Holocaust denial as a positive obligation, as things stand, the Court’s doctrine creates a double standard according to which the Holocaust alone is protected from denial or trivialization. The dangers of this unprincipled and arbitrary approach are highlighted by the tendency of illiberal regimes, like Russia, to adopt memorial laws protecting specific nationalist versions of historical truth.¹²³

The Court has also dealt with anti-Semitism as a standalone issue and, as with many of the denial cases, relied on Article 17. In *Ivanov v Russia* (2007), the applicant, a newspaper editor, was convicted for a series of publications in his newspaper which called for the exclusion of Jews from social life, alleging the existence of a causal link between social, economic and political discomfort and the activities of Jews. The Court followed *Norwood*, discussed below, finding that the speech constituted a “general and vehement attack on one ethnic group” and that, since this is against the “underlying values of the convention,” the Court ousted the application through Article 17.

In *Balsytė-Lideikienė v. Lithuania* (2009), the targets were both Jews and Poles. This case involved an application by an owner of a publishing company which published the “Lithuanian Calendar.” The applicant complained that her right to freedom of expression had been violated after she received an administrative warning and her calendar was confiscated and its distribution banned. Statements in the calendar included:

“Through the blood of our ancestors to the worldwide community of the Jews”, “... executions against the Lithuanians and the Lithuanian nation, carrying out pro-Jewish politics”

120 Ibid at para. 233.

121 Ibid at para. 235.

122 Ibid, joint partly dissenting opinions of Judges Vučinić and Pinto de Albuquerque, para. 22.

123 Jacob Mchangama, Foreign Policy: “First They Came for the Holocaust Deniers, and I Did Not Speak Out” (2 October 2016) <https://foreignpolicy.com/2016/10/02/first-they-came-for-the-holocaust-deniers-and-i-did-not-speak-out/>.

The ECtHR endorsed the position of the national courts, noting that “the courts agreed with the conclusion of the experts that a biased and one-sided portrayal of relations among nations hindered the consolidation of civil society and promoted national hatred.”¹²⁴

The Court found no violation of Article 10 since it considered the passages to incite hatred against Poles and Jews. It made no explanation of why it endorsed the above position and what the nexus between the statements and the alleged harm actually was or what, for example, “the consolidation of civil society” meant. It is unclear why there is a discrepancy between the choice of articles between the above two cases, with one possibility being that the Court did not find the statements in the calendar to constitute “a general vehement attack.” However, this is just a supposition as the Court has never actually elucidated the meaning of this statement which has been used to trigger Article 17.

In *Fáber v Hungary* (2012), the Court dealt with a complaint following the fining of an individual for displaying the striped Árpád flag,¹²⁵ which has controversial historical connotations, less than 100 metres away from a demonstration against racism and hatred. The Court found that, since the applicant had not behaved violently or abusively and had not posed a threat to public order, he should not have been sanctioned for merely displaying the Árpád flag. The Court noted that:

even assuming that some demonstrators may have considered the flag as offensive, shocking, or even “fascist,” for the Court, its mere display was not capable of disturbing public order or hampering the exercise of the demonstrators’ right to assemble as it was neither intimidating, nor capable of inciting to violence by instilling a deep-seated and irrational hatred against identifiable persons. The Court stresses that ill feelings or even outrage, in the absence of intimidation, cannot represent a pressing social need for the purposes of Article 10(2), especially in view of the fact that the flag in question has never been outlawed.¹²⁶

This case maintained a comparatively high protection of freedom of expression given that the applicant was standing at the steps leading to the Danube embankment, the location where in 1944/1945, during the Arrow Cross regime, Jews were exterminated in large numbers. The fact that the applicant was standing at that particular location holding a flag could be deemed to reject democratic principles. As noted in the dissenting opinion of Judge Keller, if one takes into account the fact that in previous cases involving Holocaust denial and related issues, the Court and the Commission have repeatedly found that such speech should not be afforded Convention protection, the rationale behind allowing this flag is striking.¹²⁷ The Court did recognize that where an applicant expresses contempt for victims of totalitarian regimes, this may call for an application of Article 17, but it declared that “it is satisfied that in the instant case no such abusive element can be identified.”¹²⁸ Unfortunately the Court did not actually substantiate on how it reached its findings in relation to this whilst there is no explanation of why a symbol was treated differently to other forms of expression which are linked to Nazism such as revisionist or negationist speech in relation to the Holocaust.

This case demonstrates that freedom of expression, as manifested in the use of what can be perceived as totalitarian symbols, can only fall outside the scope of Article 10 if they cause intimidation. This is

124 *Balsytė-Lideikienė v. Lithuania*, Application Number 72596/01, (ECHR 2 February 2009) para. 80, <https://globalfreedomofexpression.columbia.edu/cases/balsyte-lideikiene-v-lithuania/>.

125 The flags’ roots go back more than eight-hundred years to a medieval dynasty. However, the flag was expropriated by the notorious Hungarian Arrow Cross Party, whose Nazi-installed puppet regime in late 1944 began murdering thousands of Jews. This is not an illegal symbol in Hungary.

126 *Fáber v Hungary*, Application no. 40721/08 (ECHR 24 July 2012) para. 56, <https://futurefreespeech.com/a>

127 *Ibid.* Dissenting Opinion of Judge Keller.

128 *Ibid* at para. 58.

a much higher threshold of protection in comparison to other forms of speech. However, this approach was not followed in the more recent case of *Nix v Germany* (2018). The applicant had a blog on which he wrote about certain matters concerning economics, politics and society. In 2014, he published a series of blog posts about the interaction between the employment office and his daughter. He was arguing that his child was unduly pushed towards vocational training by the employment office. He wrote a post under the heading “[Name of the staff member] offers ‘customised’ integration into the low-wage [economy].” He placed a picture Heinrich Himmler, showing him in SS uniform, with the badge of the Nazi party (including a swastika) on his front pocket, and wearing a swastika armband. He was convicted for using symbols of unconstitutional organizations. The Court accepted that the applicant did not seek to spread totalitarian propaganda, to incite violence, to utter hate speech or to intimidate.¹²⁹ Nevertheless, in finding his application was manifestly ill-founded, the ECtHR noted that:

In the light of their historical role and experience, States which have experienced the Nazi horrors may be regarded as having a special moral responsibility to distance themselves from the mass atrocities perpetrated by the Nazis. The Court considers that the legislature’s choice to criminally sanction the use of Nazi symbols, to ban the use of such symbols from German political life, to maintain political peace (also taking into account the perception of foreign observers), and to prevent the revival of Nazism must be seen against this background.¹³⁰

One of the perplexing elements of the Court’s approach is the distinction between the manner in which Nix used the Nazi symbols (in comparison to their use in Fáber). He was using his blog to record the experience of his daughter with the Employment Office, wanting to contribute to a debate of public interest. In these specific circumstances, Germany’s use of the relevant law essentially operated as a form of “sedition” law, criminalizing vehement and hyperbolic criticism of government officials. Another significant issue is the manner in which context was approached. In *Vajnai*, the Court recognized the “terror” and “scar”¹³¹ left by communist regimes in countries such as Hungary but also noted that these emotions were not sufficient to limit Article 10. This reasoning was not extended to the emotional impact of Nazism in *Nix*.¹³² Instead, a particular reference was made by the Court to the right of countries such as Germany to blanket ban all manifestations linked to that particular regime because of the horrors they experienced under it.

Apart from *Fáber*,¹³³ which can, at least indirectly, be linked to Nazism, in the rest of the abovementioned decisions regarding National Socialism, the Commission and the Court have refrained from any scrutiny of the national authorities’ categorization of the applicants’ views. Rather, both bodies endorse a rhetorical approach with little coherent analysis of the actual harm in the impugned speech, the practical link between the expression and the actual ideology and the danger that this speech may cause to the democratic order. The discussion conducted, for example, by the Court in *Vajnai* in relation to the temporal framework of Communism and particularly the fact that twenty years had passed since that regime finds no equivalent in cases involving Nazism. Whilst this is not a quantitative or qualitative comparison of totalitarian regimes, such analyses would be necessary throughout the board of cases for purposes of maintaining a certain fundamentality to the freedom of expression. As Mendel duly points out:

[i]n those cases in which the European Commission or Court has approved of a hate speech conviction, they often spend very little time analyzing the impugned speech itself, providing little legal

129 Ibid at para. 51.

130 Ibid at para. 47.

131 *Vajnai v Hungary*, App. No 33629/06 (ECHR 8 July 2008), <https://globalfreedomofexpression.columbia.edu/cases/vajnai-v-hungary/>.

132 *Nix v Germany*, App. No 35285/16 (ECHR 13 March 2018), <https://globalfreedomofexpression.columbia.edu/cases/hans-burkhard-nix-v-germany/>.

133 *Faber v Hungary*, App. No 40721/08 (ECHR 24 July 2012), <https://futurefreespeech.com/faber-v-hungary/>.

analysis for their holding. It sometimes appears that the decision hinges primarily on whether the content and intent of the speech in question *appears* to be of a racist character, rather than the application of a legal test...¹³⁴

5.1 (ii) *Genocide Denial and Anti-Semitism: The United Nations*

In *J.R.T and the W.G. Party v Canada*, the applicant argued that his Article 19 rights had been violated given that the State Party had cut off the telephone services of tape recorded messages warning callers of international Jewry and its destructive effects. Here, as well as finding no case of a breach of Article 19 of the ICCPR, given the anti-Semitic and, thus, racially discriminatory nature of the messages which the applicant sought to disseminate, the HRC held that the messages “clearly constitute the advocacy of racial or religious hatred which Canada has an obligation under article 20 (2) of the Covenant to prohibit.”¹³⁵ The HRC reached this conclusion, however, without offering any interpretative explanation of the general meaning of the terms and concepts contained in Article 20(2) and without clarifying the threshold for hatred.

5.1 (iii) *Genocide Denial and Anti-Semitism: The US Supreme Court*

The 1969 *Brandenburg v Ohio*¹³⁶ case involved the speech of Brandenburg, a leader of the KKK and, in particular, the request he submitted to a reporter to cover a KKK meeting in which persons were burning a cross and making speeches whilst wearing the KKK outfits. The speeches referred to, *inter alia*, taking revenge on Jews and alleged that the government was working with non-white groups against whites. Brandenburg made one of the speeches which advocated violence. After this was shown on the television, he was charged under the Ohio Criminal Syndicalism statute for “advocat[ing] ... the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform.” The Court found that speech can be restricted if it is likely to incite or produce imminent lawless action and not simply advocate such action. To this end, the Court held that accordingly, we are here confronted with a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action. Such a statute falls within the condemnation of the First and Fourteenth Amendments.

Thus, the Court took a great leap forward from the “clear and present danger” test articulated in *Schenck v U.S. (1919)*,¹³⁷ which involved the dissemination of leaflets against mandatory army conscription by the Socialist Party. In *Brandenburg*, the developed the imminent lawless action test which provides that:

Freedoms of speech and press do not permit a State to forbid advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.¹³⁸

134 Toby Mendel, “Does International Law Provide for Consistent Rules on Hate Speech?” in Michael Herz and Peter Molnar (eds.) *The Content and Context of Hate Speech: Rethinking Regulation and Response*, (Cambridge: Cambridge University Press, 2012), p.422, doi:10.1017/CBO9781139042871.029.

135 J. R. T. and the W. G. Party v Canada, Communication no. 104/1981 (18 July 1981) CCPR/C/OP/2 at 25, para. 8(b), <https://future-freespeech.com/j-r-t-and-the-w-g-party-v-canada/>.

136 *Brandenburg v Ohio* 395 U.S. 444 (1969), <https://globalfreedomofexpression.columbia.edu/cases/brandenburg-v-ohio/>.

137 *Schenck v United States*, 249 U.S. 47 (1919).

138 *Brandenburg v Ohio* 395 U.S. 444 (1969), <https://globalfreedomofexpression.columbia.edu/cases/brandenburg-v-ohio/>, p. 444.

As such, for purposes of restricting violent speech, the violence in the speech must go beyond mere advocacy to actual incitement or production of action, with an extra safety net incorporated by the Court, namely, that such action must be imminent. However, the Court never actually defined incitement, nor did it set out guidelines on the threshold for such incitement to exist. Moreover, the prohibition of advocacy of violence constituting sufficient grounds to limit speech is in direct contravention with Article 20(2) of the ICCPR. In fact, that Article not only prohibits the advocacy of violence but also of discrimination and hostility, which fall under even lower thresholds. The judgment in *Brandenburg*, therefore, shows the stark difference of the U.S. and UN approach to hate speech regulation. Combining that with the prohibition of content-based regulation, set out in *R.A.V.* below, the U.S. and international frameworks are complete opposites, with, for example, Article 20(2) prohibiting such advocacy when it is directed to national, racial or religious groups.

In 1977, the case of the *National Socialist Party of America v Village of Skokie* reached the Supreme Court. Skokie, a suburb in Chicago, had a population of 70,000 persons, 40,000 of whom were Jews with approximately 5,000 being survivors of Nazi concentration camps. Collin, the leader of the National Socialist Party of America (NSPA), alerted Skokie officials to a march of approximately thirty to fifty persons in uniforms similar to those worn by the Nazis, including swastika armbands, holding banners with swastikas and messages such as “free speech for whites.” Skokie officials sought to prohibit the march holding that this would “incite or promote hatred against persons of Jewish faith or ancestry.”¹³⁹ The Circuit Court of Cook County entered an injunction against petitioners. The injunction prohibited them from performing any of the following actions within the village of Skokie:

[m]arching, walking or parading in the uniform of the National Socialist Party of America; [m]arching, walking or parading or otherwise displaying the swastika on or off their person; [d]istributing pamphlets or displaying any materials which incite or promote hatred against persons of Jewish faith or ancestry or hatred against persons of any faith or ancestry, race or religion.¹⁴⁰

The Illinois Appellate Court denied an application for stay pending appeal. Applicants then filed a petition for a stay in the Illinois Supreme Court, together with a request for a direct expedited appeal to that court. The Illinois Supreme Court denied both the stay and leave for an expedited appeal. Applicants then filed an application for a stay with a Circuit Justice, who referred the matter to the U.S. Supreme Court. The NSPA argued that the prohibition deprived it of its First Amendment Rights during the period of review. The Supreme Court reversed the denial for stay and returned the case to the Illinois Supreme Court. More particularly, it found that where a State seeks to impose a prohibition of such severity there must be “strict procedural safeguards” which could include expedited appeal or temporary suspension of the prohibition which was denied by the Illinois Supreme Court. The Supreme Court declined to review. Therefore, although the Court did not assess the actual content of this case and decipher on whether or not it was protected by the First Amendment, it gave the demonstration a high threshold of protection under the First Amendment and found that the procedural safeguards that should have existed in the event of a curtailment of this kind were great and had not been met.

5.1 (iv) Genocide Denial – The African Court of Human and People’s Rights

Ingabire Victoire Umuhoza v. Rwanda involved the appeal of a criminal conviction for the trivialization of genocide. Here, the African Court of Human and Peoples’ Rights found that a criminal sanction for genocide minimization violated the applicant’s right to freedom of expression under the African Charter on

¹³⁹ *National Socialist Party of America v Village of Skokie*, 432 U.S. 43 (1977), <https://globalfreedomofexpression.columbia.edu/cases/national-socialist-party-america-v-village-skokie/>.

¹⁴⁰ *Ibid* at p. 43.

Human and Peoples' Rights. Nevertheless, it did note that statements "that deny or minimize the magnitude or effects of the genocide or that unequivocally insinuate the same fall outside the domain of the legitimate exercise of the right to freedom of expression and should be prohibited by law."¹⁴¹ As noted by Aswad and Kaye, "such an approach contrasts with the U.N.'s Human Rights and the ICERD Committees' approach to genocide denial, which were not cited in the opinion."¹⁴²

5.2(i) Ethnic and Religious Hate - The European Court of Human Rights

Since the majority of relevant cases discussed in this section involved elements of political speech, a couple of pointers must be put forth regarding the protection which this form of speech enjoys. The ECtHR's jurisprudence demonstrates a particularly high value granted to political speech. In *Lingens v Austria*, the Court found that freedom of political debate "is at the very core of the concept of a democratic society,"¹⁴³ with *Wingrove v The United Kingdom* noting that there is little scope under Article 10(2) to restrict political speech or issues of public interest.¹⁴⁴ The Court reminds us that the right to hyperbolic and provocative language and speech is a central part of political speech and, in this light, polemical,¹⁴⁵ sarcastic¹⁴⁶ and satirical¹⁴⁷ language is permitted.

Féret v. Belgium (2009) involved the leader of a nationalist Belgian party who was banned from political office for ten years for writing and disseminating publications which included statements such as "stop the Islamization of Belgium" and "save our people from the risk posed by Islam, the conqueror." The Court found that there was no violation of Article 10 but rejected the Belgian government's request for the enforcement of Article 17 (without any explanation of the differentiation between this case and *Norwood*). It held that the statements were "inevitably of such a nature as to arouse, particularly among the less informed members of the public, feelings of distrust, rejection or hatred towards foreigners."¹⁴⁸ In the dissenting opinion of Judge Sajó, joined by Judges Zagrebelsky and Tsotsoria, it was argued that the Court's majority viewed humans as "nitwits ... incapable of replying to arguments and counter-arguments, due to the irresistible drive of their irrational emotions."¹⁴⁹ The ECtHR also noted that "to recommend solutions to immigration-related problems by advocating racial discrimination was likely to cause social tension and undermine trust in democratic institutions."¹⁵⁰ The actual nexus between the speech and the grave impact of

141 Umuhoza, [Afr. Ct. H.P.R.], para.158, <https://globalfreedomofexpression.columbia.edu/cases/ingabire-victoire-umuhoza-v-rwanda/>.

142 Evelyn Aswad & David Kaye, 'Convergence & Conflict: Reflections on Global and Regional Human Rights Standards on Hate Speech' (2022) 20 *Northwestern Journal of Human Rights* 3, pg. 200, <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1245&context=njihr>.

143 Case-law includes, amongst others: *Lingens v Austria*, Application no. 9815/82 (ECHR 8 July 1986) para. 42, *Özgurluk v Dayanisma Partisi (ÖDP v Turkey)* Application no. 7819/04 (ECHR 10 May 2012) para. 28, *Raelien Suisse v Switzerland*, Application no. 16354/06 (ECHR 13 July 2012) para. 46.

144 *Wingrove v The United Kingdom*, Application no. 17419/90 (ECHR 25 November 1996) para. 58; *Surek v Turkey* no. 1, Application no. 26682/95 (ECHR 8 July 1999) para. 6; *Mouvement Raëlien Suisse v Switzerland*, Application no. 16345/06 (ECHR 13 July 2012) para. 61.

145 *Lopes Gomes da Silva v Portugal*, Application no. 37698/97 (ECHR 28 September 2000) para. 35, <https://hudoc.echr.coe.int/app/conversion/docx/?library=ECHR&id=001-58817&filename=CASE%20OF%20LOPES%20GOMES%20DA%20SILVA%20v.%20PORTUGAL.docx&l>.

146 *Katrami v Greece*, Application no. 19331/05 (ECHR 6 December 2007), <https://hudoc.echr.coe.int/fre?i=001-83816>.

147 *Eon v France*, Application no. 26118/10 (ECHR 14 June 2013) para. 61, <https://globalfreedomofexpression.columbia.edu/cases/eon-v-france/>.

148 *Féret v Belgium*, Application no. 15615/07 (ECHR 16 July 2009) para. 69, <https://globalfreedomofexpression.columbia.edu/cases/feret-v-belgium/>.

149 *Ibid.*

150 *Ibid* at para. 77.

undermining trust in democratic institutions (whatever that means) is unclear. Another concerning element of this case is that the Court took a very broad outlook of what can constitute hate speech by noting that incitement to hatred:

did not necessarily require the calling of a specific act of violence or another criminal act. Attacks on persons committed through insults, ridicule or defamation aimed at specific population groups or incitation to discrimination, as in this case, sufficed for the authorities to give priority to fighting hate speech when confronted by the irresponsible use of freedom of expression which undermined people's dignity, or even their safety.¹⁵¹

Féret's threshold thus falls to speech which, amongst others, ridicules or insults, forgetting *Handyside* scope of shock, offence or disturbance. It dilutes protection given to political speech by arguing that although political parties should have a broad freedom of expression during an electoral campaign, "the impact of racist and xenophobic discourse then becomes greater and more damaging."¹⁵² However, it is far from clear when and where lines are drawn. The determination of limits to speech is dependent on subjective points of view rather than objective criteria. As such, the Court essentially recognizes expression for political commentary which is endorsing what States (and thus the Court as a result of a wide margin of appreciation) consider to be acceptable. In the above mentioned dissenting opinion, the judges could not reconcile the approach of the majority given the paramount protection to be afforded to political discourse, such being the cornerstone of a free and democratic society.

In 2010, the Court declared a complaint from the controversial far-right French politician *Jean-Marie Le Pen* inadmissible under Article 10 rather than Article 17. Le Pen was fined 10,000 Euros for his purportedly disparaging remarks about Muslims, including alleging that, "the day there are no longer 5 million but 25 million Muslims in France, they will be in charge." The Court found that the comments "presented the Muslim community as a whole in a disturbing light likely to give rise to feelings of rejection and hostility." As in *Féret*, the impugned remarks did not include incitement to violence or unlawfulness, with the difference being that no violation was found in the Belgian case whereas the French case was found to be manifestly ill-founded. No explanation of this difference is provided.¹⁵³

In *Zemmour v France*, the ECtHR unanimously held that the applicant's Article 10 right had not been violated. Zemmour, a journalist and author, had been convicted for inciting discrimination and religious hatred against Muslims in France through statements made in a 2016 interview. For example, he stated that "for 30 years we've been experiencing an invasion, a colonization which is bringing about a conflagration" and "I think they (Muslims in France) need to be given a choice between Islam and France." The Court followed the position adopted in *Féret* and *Le Pen*, in that inciting hatred does not necessarily require inciting violence but can include incitement to discrimination.¹⁵⁴ In finding no violation of Article 10 it noted, amongst others, that the applicant's statements were made with a discriminatory intention of inciting viewers to reject and exclude the Muslim community as a whole.¹⁵⁵

Just as the right to offend, shock and disturb is difficult to reconcile with the Court's leniency towards hate speech laws in general, the Court's allegiance to a robust protection of freedom of expression for politicians is difficult to reconcile with the decisions in *Féret*, *Le Pen* and *Zemmour*.

151 Ibid at para. 73.

152 Ibid at para. 76.

153 *Le Pen v France*, App. No 18788/09 (ECHR 20 April 2010), <https://globalfreedomofexpression.columbia.edu/cases/le-pen-v-france/>.

154 *Zemmour v France*, App. No 6539/19 (ECHR 20 December 2022) para. 54.

155 Ibid at para. 65.

Beyond the political spectrum, in *Soulas v France* (2008), the authors of a book discussing the alleged incompatibilities between European and Islamic cultures complained of an interference of their Article 10 rights due to their conviction by the national court for inciting hate propaganda. In reaching its judgment, the ECtHR found that phrases such as “it is only if an ethnic civil war breaks out that the solution can be found” could potentially incite aggression against a particular group¹⁵⁶ and is, thus, unacceptable speech under Article 10. However, it was not deemed serious enough to fall within the framework of Article 17.¹⁵⁷ Once again, the nexus between the alleged incitement of aggression and the expression was unsubstantiated. Importantly, the ECtHR noted that the book itself was easy to read and addressed a wide audience, thereby enhancing its potential harm. This demonstrates a pattern in the manner in which the Court contextualizes each case. In *Féret*, for example, the Court looked at the particular context of the electoral campaign period and the assumed dangers attached thereto. It almost seems to be the case that the Court is ready and willing to contextualize the alleged danger on a case by case basis rather than developing and conforming to legal tests and does so all within a wide margin of appreciation granted to States to prohibit speech. Whilst a case to case sensitivity and contextual understanding is a must, this should all take place within the backdrop of stringent legal tests rather than through what sometimes appears as “subjective ad-hockery.”¹⁵⁸

Norwood v. the United Kingdom (2004) concerned a regional organizer of the far-right British National Party, who was fined for putting up a poster of the Twin Towers in flames, with the words “Islam out of Britain – Protect the British People” and a symbol of a crescent and star in a prohibition sign in the window of his home shortly after 9/11. In finding the case inadmissible, the Court held that the expression was:

“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.”¹⁵⁹

The complaint was deemed to amount to an abuse of the ECHR under Article 17 and thus did not enjoy the protection of Article 10. Though possible, it is by no means clear that the words “Islam out of Britain” entailed an attack on all Muslims rather than an attack on Islam as a religion, as was contended by the applicant. In any event, the Court spent no time in explaining how the facts actually met the intended threshold of Article 17. This is the only case involving Islamophobia in which the Court has invoked Article 17. Whilst the hierarchy created by the use of this article for anti-Semitism as discussed above is by no means satisfactory, its use in *Norwood* enhances the chilling effect on speech since no analysis under Article 10 took place. It is therefore submitted that the actions of the applicant ought, at least, to have been assessed under Article 10(2), in order to determine whether his conviction of aggravated hostility towards a religious group satisfied the test for legitimate restriction, including whether such was necessary in a democratic society. The applicant’s argument that “criticism of religion is not to be equated with an attack upon its followers” was not even considered by the Court, which instead deferred to the conclusion of the British courts that the expression was rather “an attack on all Muslims in [the UK].” The Court’s judgment suggests that religious sensitivities, as so defined by the respondent State, should be prioritized at the cost of free speech.

The context of the impugned expression at issue in *Norwood*, namely the proximity to the attacks of 9/11, could reasonably have been expected to spark significant public debate, both constructive and hostile, with regard to the threat of terrorism. However, rather than recognizing the importance of allowing free

156 *Soulas and Others v France*, Application no. 15948/03 (ECHR 10 July 2008) para. 43, <https://futurefreespeech.com/soulas-and-others-v-france/>.

157 *Ibid* at para. 48.

158 Conall Mallory, ‘Human Rights Imperialists: The Extraterritorial Application of the European Convention on Human Rights’ (1st edn. Hart 2020).

159 *Norwood v The United Kingdom*, Application no. 23131/03 (ECHR 16 November 2004), <https://globalfreedomofexpression.columbia.edu/cases/norwood-v-uk/>

debate on an issue of great public interest, the courts, both national and European, chose to adopt a disproportionate and highly restrictive approach, using ill-reasoned paternalism as a *carte blanche* for restriction. The temporal proximity between this case and the attacks on the twin towers may also have led to the different outcome in *Norwood* and similar cases. This is unacceptable given that the legitimacy of restricting the fundamental right of free speech should be governed by legal certainty rather than ad-hoc contextual sensitivity.

In *Šimunić v Croatia (2019)*, the applicant was a football player who addressed the spectators at a match by shouting “For Home.” When the spectators replied “Ready,” the applicant repeated the same three more times. The national courts held that the said expression, irrespective of its original Croatian literary and poetic meaning, had also been used as an official greeting of the fascist Ustashe movement and totalitarian regime of the Independent State of Croatia. The national courts also held that the Ustashe movement had originated from fascism, based, *inter alia*, on racism, and thus symbolized hatred towards people of a different religious or ethnic identity and the manifestation of racist ideology. The applicant received a fine of about EUR 3,300. Here the ECtHR noted that:

the nature of the fine imposed on the applicant and the context in which the applicant shouted the impugned phrase, struck a fair balance between the applicant’s interest in free speech, on the one hand, and the society’s interests in promoting tolerance and mutual respect at sports events as well as combating discrimination through sport on the other hand, thus acting within their margin of appreciation.¹⁶⁰

The Court dealt with the real and actual impact of the speech in a narrative manner, not explaining how the balancing exercise was conducted or how the restriction actually reflected a pressing social need, beyond reiterating what the national courts found and adding some rhetoric, in this case, about the need to fight racism in sport.

5.2(ii) Ethnic and Religious Hate - The United Nations

In *Vassilari, Maria et al. v Greece*, the Committee dealt with alleged discrimination against the Roma. A letter had been sent to the University of Patras entitled “Objection against the Gypsies: Residents gather signatures for their removal.” The first and second authors filed a criminal complaint against the local associations under the Anti-Racism Law. The first and second applicants contended that the Patras Court failed to appreciate the racist nature of the impugned letter and effectively implement the Anti-Racism Law aimed at prohibiting dissemination of racist speech. Upon examination of the case, the HRC considered that the authors had not sufficiently substantiated the facts of their case for the purpose of admissibility of their complaint under Article 20(2), making this part of the communication inadmissible.¹⁶¹ As a result, the HRC could not arrive at any substantive conclusions as to the application and meaning of Article 20(2). In his dissenting individual opinion in this case, Mr Abdelfattah Amor complained that the Committee had not yet provided an opinion on the applicability of Article 20(2) when dealing with individual communications.¹⁶² Mr Amor went on to state that the Committee’s approach to this article was “neither logical nor legally sound”¹⁶³ which he argued had resulted in the uncertainty of Article 20’s scope. In the case of *Mohamed Rabbae, A.B.S and N.A v The Netherlands*, briefly discussed above, the authors claimed to be victims of,

160 *Šimunić v Croatia*, Application number 20373/17 (ECHR 22 January 2019) para. 45, <https://futurefreespeech.com/simunic-v-croatia/>.

161 *Vassilari v Greece*, Communication no. 1570/2007, (29 April 2009) CCPR/C/95/D/1570/2007, para. 6.5, <https://futurefreespeech.com/vassilari-et-al-v-greece/>.

162 *Ibid.* Individual Opinion of Committee Member Mr. Abdelfattah Amor (dissenting) para. 1.

163 *Ibid.*

inter alia, a violation of their rights under Article 20(2) as a result of statements made by Geert Wilders, Leader of the Dutch Freedom Party, and particularly that Wilders's acquittal by the domestic court was in contravention of Article 20(2). This was the first time that the HRC gave a relatively extensive analysis of Article 20(2). It held that this article secures the right of persons to be free from hatred and discrimination, but holds that it is "crafted narrowly" so as to ensure a protection of free speech. It recalled that free speech may incorporate "deeply offensive" speech and speech which is disrespectful to a religion, except if the strict threshold of Article 20(2) is met.¹⁶⁴ The Committee recognized that the Netherlands had established a legislative framework to meet the obligations imposed by Article 20(2), and underlined that this allowed victims to trigger and participate in a prosecution. In this light, and given the existence, suitability and triggering of the framework of the Wilders's case, the Committee found that the State Party had taken the "necessary and proportionate measures in order to 'prohibit' statements made in violation of article 20(2)"¹⁶⁵ and, thus, found no violation. Before 2016, the HRC had not been particularly helpful in elucidating the obligations of States Parties, as these arise from Article 20(2), which could potentially limit the effectiveness of its implementation within the national systems of States Parties. However, in the case against Wilders, it essentially found that what States Parties had to demonstrate was that they established a functional and relevant legal framework for the incorporation of Article 20(2) into national law. This obligation does not, however, come with an obligation to convict.¹⁶⁶

5.2(iii) Ethnic and Religious Hate - The United States Supreme Court

In 1992, the Supreme Court decided on *R.A.V. v City of St. Paul*, in which a group of youths had put and burnt a cross on the lawn of an African American family in their predominantly white neighborhood. The petitioner, one of the teenagers involved, was charged under the St. Paul Bias Motivated Crime Ordinance which provided that:

Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.¹⁶⁷

Although the fighting words doctrine had been developed in *Chaplinsky*¹⁶⁸ in a framework beyond hate speech, *per se*, and even though the Supreme Court had not directly struck down the role and relevance of this doctrine, it had not, since then, upheld any conviction on the grounds of the fighting words doctrine.¹⁶⁹ Given the form and context of the expression looked at in *R.A.V.*, the Court could not avoid tackling the question of the doctrine's applicability. Whilst it did not strike it down, it argued that the doctrine could not be applied in this case since the ordinance was content specific, targeting particular groups, thereby, demonstrating State involvement in what and how people should think about particular issues and not abstractly tackling themes of offense and public order as did the ordinance in *Chaplinsky*. Specifically, the Court deemed that the ordinance "unconstitutionally prohibits speech on the basis of the subjects the speech addresses."¹⁷⁰

164 Mohamed Rabbae, A.B.S and N.A v The Netherlands, Communication no. 2124/2011 (14 July 2016) CCPR/C/117/D/2124/2011, para. 10(4), <https://globalfreedomofexpression.columbia.edu/cases/rabbae-v-netherlands/>.

165 Ibid at para. 10(7).

166 Mohamed Rabbae, A.B.S and N.A v The Netherlands, Communication no. 2124/2011 (14 July 2016) CCPR/C/117/D/2124/2011, para. 10 (7), <https://globalfreedomofexpression.columbia.edu/cases/rabbae-v-netherlands/>.

167 *R.A.V. v City of St. Paul*, 505 U.S. 377, 380 (1992), <https://globalfreedomofexpression.columbia.edu/cases/r-v-v-city-st-paul/>.

168 *Chaplinsky v New Hampshire*, 315 U.S. 568 (1942).

169 Geoffrey R. Stone, 'Hate Speech and the U.S. Constitution' (1994) 3 *East European Constitutional Review* 1, 80.

170 *R.A.V. v City of St. Paul*, 505 U.S. 377 (1992), <https://globalfreedomofexpression.columbia.edu/cases/r-v-v-city-st-paul/>.

At the heart of the Court’s decision lies the prohibition of content-based regulation. In particular, the Court found that:

Displays containing abusive invective no matter how vicious or severe, are permissible unless they are addressed to one of the specific disfavoured topics. Those who wish to use “fighting words” in connection with other ideas – to express hostility for example, on the basis of political affiliation, union membership or homosexuality – are not covered. The first amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.¹⁷¹

In addition, the Court underlined that “St Paul’s desire to communicate to minority groups that it does not condone the group hatred of bias motivated speech does not justify selectively silencing speech on the basis of its content.”¹⁷² As such, *R.A.V.* underlines that the government is not allowed to determine, regardless of contextual realities in the realm of hatred and discrimination, particular characteristics which are to be protected from phenomena such as hate speech. This is unilaterally different from the approach of, for example, the EU Framework Decision which prohibits, *inter alia*, the incitement to violence or hatred on specific grounds, namely participation in an ethnic or religious group. It also differs from the low threshold approach of the ECtHR as demonstrated in cases such as *Féret* (and subsequent cases following its paradigm) where mere insult against a group with protected characteristics was sufficient to find no violation of Article 10.

Importantly, from the onset the doctrine was eliminated from the Court’s discussion. More specifically, it held that “assuming that all of the expression reached by the ordinance is proscribable under the fighting words doctrine, we nonetheless conclude that the ordinance is facially unconstitutional.”¹⁷³

However, it simply assumes this for purposes of making its core argumentation on the prohibition of content-based regulation, without ever actually examining whether the cross burning in *R.A.V.* did, in fact, constitute fighting words. As a result, the issue of whether an historically burdened burning cross in America constituted fighting words came about. Furthermore, the Court found that “there are other ways to punish a defendant for the admittedly reprehensible behavior of cross burning”¹⁷⁴ but does not provide additional information of what such measures, analogous or not, may be, thereby limiting the relevance of this reference reminiscent, to an extent, of the proportionality test of the ECtHR. The only indication of what such measures could be were set out in White J’s concurring opinion which held that the content based nature of the ordinance did not contribute to the compelling interest of the city to ensure human rights and non-discrimination, as these could have been achieved through a generic ordinance (rather than a biased based ordinance).

White J found that, in fact, the only interest distinctively served by the content limitation is that of displaying the city council’s special hostility towards the particular biases singled out. This is precisely what the first amendment forbids.¹⁷⁵ Therefore, the Court incorporated a safety net on the fighting words exception by holding it to apply insofar as it was content neutral. This demonstrates that it “highly favored speech interests over those of equal protection.”¹⁷⁶ The development from *Beauharnais* to *R.A.V.* is dramatic. Specifically, in 1952, the Court was faced with a case of group defamation in *Beauharnais v Illinois*.¹⁷⁷ *Beauharnais*, the president of the White Circle League co-ordinated and participated in the dissemination

171 Ibid at 391.

172 Ibid at 378.

173 Ibid at 381.

174 Ibid at 377.

175 Ibid at 396.

176 Ibid at 395.

177 *Beauharnais v Illinois*, 343 U.S. 250, 252 (1952).

of leaflets which called upon the city council of Chicago to “halt the further encroachment, harassment and invasion of white people, their property, neighbourhoods and persons, by the Negro” and wrote that if persuasion and the need to prevent the white race from becoming mongerised by the Negro will not unite us, then the aggression, robberies, knives, guns and marijuana of the Negro surely will. Beauharnais was convicted for his participation in the leaflet dissemination. The relevant statute declared unlawful the distribution of any publication which “portrays depravity, criminality, unchastity or lack of virtue of a class of citizens, of any race, color, creed or religion” or subjects them “to contempt, derision or obloquy.” The Supreme Court relied on *Chaplinsky* and upheld Beauharnais’s conviction. More specifically, it found that “libelous utterances are not within the area of constitutionally protected speech” and found it irrelevant that Beauharnais’s speech did not create a clear and present danger of serious harm. Interestingly, the Supreme Court held that it was enough that the case did not involve a “purposeless restriction unrelated to the peace and well being of the State.”

Essentially, following *R.A.V.*, it could be deduced that no hate speech regulation, even if the speech in question constitutes restrictable speech, such as fighting words, could be legitimate, if the measure to restrict it targeted the speech because of its particular content. The Court’s desire to ban content based regulation emanates from its more general premise that, in categories of low value expression, there is an “equality of status in the field of ideas” and “above all else, the first amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content.”¹⁷⁸

The reason for this approach is not because the Court finds no harm in hate speech or that it considers it a fiction in terms of individual and societal impact, but, rather, that it prohibits the government from interfering in deciphering the legitimacy of certain ideas and from providing certain groups with enhanced protection over others. As noted, the content neutral approach “delimits official power over estimation of ideas.”¹⁷⁹

Virginia v Black (2003) involved three individuals, Black, Elliot and O’Mara, who were convicted separately on two separate occasions for violating a Virginia statute on cross burning. Black was charged for violating the statute for his role in a KKK rally on private property, used with the owner’s permission. The other two were not KKK members but, instead, burnt the cross in Elliot Black’s neighbor’s yard. All three defendants appealed their convictions, arguing that the Virginia statute is unconstitutional. The statute made it a felony “for any person . . . , with the intent of intimidating any person or group . . . , to burn a cross on the property of another, a highway or other public place,” and specifies that “[a]ny such burning . . . shall be prima facie evidence of an intent to intimidate a person or group.” The Court placed the statute in an historical context, outlining the “cross burning’s long and pernicious history as a signal of impending violence.”¹⁸⁰ The Court clarified that the First Amendment permits Virginia to ban cross burnings insofar as these are done “with the intent to intimidate.”¹⁸¹ In this framework, the Court embraced the “true threat test” which has been defined as an “opening” for hate speech regulation.¹⁸² The Court ruled that cross burning can be prohibited if it constitutes a true threat if the purpose of burning is to intimidate, as is the case of cross burning in the yard of the black family.¹⁸³ The Court went on to underline that, if there is no true threat of intimidation, then cross burning does constitute free speech. The significance of intimidation for purposes of ensuring constitutionality in the prohibition went further insofar as the existence of a burning

178 *Police Department of Chicago v Mosley* 408 US 92 (1972).

179 Edward J. Eberle, ‘Cross Burning, Hate Speech, and Free Speech in America’ (2004) 36 *Arizona State Law Journal* 1, 972, https://docs.rwu.edu/cgi/viewcontent.cgi?article=1058&context=law_fac_fs.

180 *Virginia v Black*, 538 U.S. 343 (2003), <https://globalfreedomofexpression.columbia.edu/cases/virginia-v-black/>.

181 *Ibid* at 347.

182 Edward J. Eberle, ‘Cross Burning, Hate Speech, and Free Speech in America’ (2004) 36 *Arizona State Law Journal* 1, 993, https://docs.rwu.edu/cgi/viewcontent.cgi?article=1058&context=law_fac_fs.

183 *Supra* note 180.

cross itself was not sufficient proof of intimidation. On this ground, and despite the previous acknowledgements of the Court, the Court struck down the statute as the evidentiary element was insufficient. More particularly, the Court acknowledged that a burning cross could be a true threat but could also fall in the realm of protected “messages of shared ideology.”¹⁸⁴ The existence of the cross could not constitute *prima facie* evidence of intention. As a result, the Virginia statute was found to be constitutional in terms of its prohibitions of cross burning, but unconstitutional in relation to its presumption of intimidation through the existence of the burning cross as the sole justification for the prosecution. This indicates the intricate procedural requirements which come with regulating hate speech, a characteristic which constitutes an extra barrier to hate speech regulation.

5.3 (i) Sexual Orientation: The European Court of Human Rights

The ECtHR has ruled that hate speech targeting persons on the basis of sexual orientation can prompt the legitimate restriction of Article 10. The first pronouncement of the Court in this regard arose in the unanimously decided case of *Vejdeland and Others. v. Sweden* (2012), which concerned the promotion of anti-gay sentiments through leaflets deposited in pupils’ lockers in a high school. The applicants maintained that they were drawing attention to the lack of objectivity in Swedish schools regarding LGBT issues. The content of the leaflets made various disparaging, homophobic allegations including that the “deviant” and “promiscuous” lifestyle of homosexuals was the cause of HIV and AIDS and that homosexuals sought to downplay paedophilia. In this case, the Court held that “discrimination based on sexual orientation is as serious as discrimination based on race, origin or colour.”¹⁸⁵ The Court highlighted that incitement to hatred need not necessarily advocate violence or call for criminal acts, as was established in *Féret*.¹⁸⁶

In his concurring opinion, Judge Zupančič expressed a reluctance in the holding of the majority, but again was ultimately swayed on account of the specific facts of the case. The Judge indicated that, although the approach of the US towards the freedom of expression can be seen to be somewhat “insensitive,” the Swedish counterpart borders on the oversensitive, the distinction arising from a so-called “culturally predetermined debate.” He ultimately suggested that the Court may “[have gone] too far in the present case...in limiting freedom of speech by overestimating the importance of what is being said.”

In *Beizaras and Levickas v Lithuania* (2020),¹⁸⁷ the Court found that the applicants had been denied an effective remedy and that their right to private life in combination with the principle of non-discrimination had been violated, since the authorities refused to open criminal proceedings against homophobic comments accompanying a picture of the two men kissing on Facebook. Here, a link to a 2012 case must be made where the Grand Chamber took the step of identifying a positive obligation in Article 8 to combat “negative stereotypes”¹⁸⁸ (in this case against the Roma). This is the only case we have, whereby speech directed at protected characteristics is deemed to find protection under the Convention, and it is interesting that this is one brought by an individual who claimed to be a victim of this speech, rather than the utterer, demonstrating the broadness of the margin of appreciation granted to States in dealing with expression. However, this case planted the seeds of creating an *ex officio* duty to limit freedom of expression under the

184 Ibid at 354.

185 *Vejdeland and Others. v. Sweden*, Application Number 1813/07 (ECHR 9 May 2012) para. 55, <https://globalfreedomofexpression.columbia.edu/cases/case-of-vejdeland-and-others-v-sweden/>.

186 Ibid.

187 *Beizaras and Levickas v Lithuania*, Application Number 41288/15 (ECHR 14 January 2020), <https://globalfreedomofexpression.columbia.edu/cases/beizaras-and-levickas-v-lithuania/>.

188 *Aksu v. Turkey*, Applications nos. 4149/04 and 41029/04 (ECHR 15 March 2012) para.75, <https://futurefreespeech.com/aksu-v-turkey/>.

ECHR, which was further ripened in *Beizaras and Levickas*.

Lilliendahl v Iceland (2020) discussed in the definitional section on the ECtHR followed *Vejdeland*, finding that the applicant’s comments (for example references to sexual deviants) were “serious, severely hurtful and prejudicial.”¹⁸⁹ It did not make any difference to the Court that his comments were not likely to reach a wide audience.

5.3 (ii) Sexual Orientation: The United Nations

Fedotova v Russia (2012) involved an LGBTQ activist who displayed posters that included the statements “Homosexuality is normal” and “I am proud of my homosexuality” near a secondary school. She was fined for propaganda of homosexuality among minors. The HRC found a violation of Article 19 of the ICCPR. The HRC found that the State Party failed to demonstrate how the author posed a risk to the welfare of minors and also underlined that the author sought to raise awareness of her sexual identity rather than advocate any particular sexual orientation. In this light, it found that by imposing an administrative fine on the author for the display of posters, Russia violated Article 19 of the ICCPR. The HRC noted that:

while the Committee recognizes the role of the State party’s authorities in protecting the welfare of minors, it observes that the State party failed to demonstrate why, on the facts of the present communication, it was necessary for one of the legitimate purposes of article 19, paragraph 3, of the Covenant to restrict the authors right to freedom of expression on the basis of section 3.10 of the Ryazan Region Law, for expressing her sexual identity and seeking understanding for it, even if indeed, as argued by the State party, she intended to engage children in the discussion of issues related to homosexuality.¹⁹⁰

In the similar case of *Kiril Nepomnyashchiy v Russia*, a LGBTQ activist put up a poster which read “Homosexuality is a healthy form of sexuality This should be known by children and adults!” and displayed it near the entrance to a children’s library. He was fined for propaganda of homosexuality among minors. The HRC found a violation of Article 19 of the ICCPR. The HRC held that “the wording of section 2.13 of the regional law, including promoting propaganda of homosexuality, is highly ambiguous as to the actions being prohibited and therefore does not satisfy the requirement of lawfulness under article 19 (3).”¹⁹¹

5.3 (iii) Sexual Orientation – The United States Supreme Court

Snyder v Phelps (2011) in which the Westboro church picketed a Marine’s funeral with signs that said, *inter alia*, “thank God for dead soldiers” “God hates you” “Fag troops.” In this case, Chief Justice Roberts of the Supreme Court underlined that:

Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow and as it did here inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a nation we have chosen a different course – to protect even hurtful speech on public issues to ensure that we do not stifle public debate. (Sec. IV)

189 *Lilliendahl v Iceland*, Application Number 29297/18 (ECHR 12 May 2020) para. 38, <https://globalfreedomofexpression.columbia.edu/cases/lilliendahl-v-iceland/>.

190 *Fedotova v Russia*, Comm No 1932/2010 (2012) <https://futurefreespeech.com/fedotova-v-russia/>.

191 *Kirill Nepomnyashchiy v Russia*, Comm No. 2318/2013, para 7.7, <https://futurefreespeech.com/kirill-nepomnyashchiy-v-russia/>.

This is a polar opposite course to Europe which has embraced a position of militancy and restriction. As a direct parallel to *Snyder*, one could recall *Vejdeland*, in which the ECtHR allowed for the punishment of persons disseminating leaflets, which included, *inter alia*, statements such as “Tell them that HIV and AIDS appeared early with the homosexuals and their promiscuous lifestyle” and “tell them that homosexual lobby organizations are also trying to play down paedophilia, and ask if this sexual deviation should be legalized.”

This by no means implies that Europe is on the correct path. It simply reflects the variation in approaches which are not without their problems, since hate speech continues to be present on both continents. It is safe to say that the U.S. will only allow for the prohibition of speech which could reasonably result in intimidation or speech which could cause imminent lawless action. The protected characteristic of hate speech, as this has been developed on a European level, is a no go area for the U.S. counterpart since *R.A.V.* prohibits any type of content regulation. Therefore, it could be argued that, for purposes of ensuring First Amendment protection, speech which meets the aforementioned thresholds related to intimidation or incitement to violence is limited insofar as the relevant measure is not protecting only certain groups of persons from such intimidation or incitement. Although this means that no hierarchy issue of who is protected or not arises in the U.S. framework, as it does in relation to the international and European equivalents, an issue discussed in previous chapters, it does appear to defeat the purpose of protecting contextually vulnerable groups from attack.

5.3 (iv) *Sexual Orientation: South Africa*

In *Qwelane v. South African Human Rights Commission (2019)*,¹⁹² The Supreme Court of Appeal (SCA) dealt with a 2008 publication by Jon Qwelane, a well-known anti-apartheid activist and journalist, in the *Sunday Sun*. The article was titled “Call me names—but gay is not okay” and used homophobic language and was accompanied by a cartoon comparing homosexuality to bestiality. The publication led to a public outcry and the South African Human Rights Commission received around 350 complaints regarding the article and the cartoon. In 2017, the Johannesburg High Court (sitting as an Equality Court) decided that certain statements were “hurtful[,] harmful, incite[d] harm and propagate[d] hatred” and thus contravened section 10(1) of the Equality Act. Qwelane then appealed the case to the SCA, arguing that the Equality Act’s definition of hate speech was unconstitutional, because it prohibited more speech than permitted by section 16(2) of the constitution.¹⁹³

The judgment of the SCA recognized that hatred goes against the country’s constitution and acknowledged South Africa’s “painful past”¹⁹⁴ and the need “to heal the divisions of our past and establish a society based on democratic values, social justice and fundamental rights.”¹⁹⁵ Here, as in other judgments discussed in this report, the historical past of the country was acknowledged but, unlike the ECtHR, this was accompanied with an emphasis placed on the significance of freedom of expression.

The SCA substantively discussed the “tension between hate speech and freedom of expression”¹⁹⁶ and particularly the constitutionality of section 10(1) of the Equality Act. The court underlined that the constitutional standard set out in section 16(2) is an objective test, namely whether the expression constituted advocacy of hatred based on one of the prohibited grounds and then whether that advocacy was an incitement

¹⁹² *Qwelane v South African Human Rights Commission (686/2018) [2019] ZASCA 167*, <https://globalfreedomofexpression.columbia.edu/cases/qwelane-v-south-african-human-rights-commission/>.

¹⁹³ *Ibid* at paras. 34, 36.

¹⁹⁴ *Ibid*.

¹⁹⁵ *Ibid*.

¹⁹⁶ *Ibid* at para. 3.

to cause harm.¹⁹⁷ The court concluded that section 10 of the Equality Act did, in fact, go beyond what was constitutionally permissible under section 16(2) and warned that “one must be careful not to stifle the views of those who speak out of genuine conviction.”¹⁹⁸ Whilst recognizing the importance of dignity, the court also underlined that “given our history . . . freedom of expression must also be prized.”¹⁹⁹ In light of the above, the court upheld the appeal, declaring section 10 of the Equality Act in contravention of section 16 of the constitution and thus unconstitutional and invalid. Parliament was given 18 months commencing on November 29th 2019 to remedy this. In the meanwhile, the court held that section 10 shall read as follows:

10(1) No person may advocate hatred that is based on race, ethnicity, gender, religion or sexual orientation and that constitutes incitement to cause harm.

10(2) Without prejudice to any remedies of a civil nature under this Act, the court may, in accordance with section 21(2)(n) and where appropriate, refer any case dealing with the advocacy of hatred that is based on race, ethnicity, gender, religions or sexual orientation and that constitutes incitement to cause harm, as contemplated in subsection 1 to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation.

The SCA based its analysis on the historical framework, recognizing the country’s divisive past but, as opposed to other, apartheid-related speech cases, underlined that a high threshold should be reached when restricting expression. Moreover, unlike the ECtHR the SCA does not apply a one-sided reading of history in which hate speech is solely seen as a threat to the new democratic and egalitarian constitutional order. It also acknowledges that restricting freedom of expression, even with the best of intentions, poses inherent risk to such a constitutional order and forms an integral part of the oppressive arsenal of apartheid rule. Substantiated and objective tests are necessary to ensure that prohibited hate speech is *actually* inciting hatred.²⁰⁰

The South African Human Rights Commission appealed the SCA’s decision to the Constitutional Court of South Africa (CCSA), arguing that section 10(1) is constitutional. The matter was heard in September 2020 and judgment was passed in July 2021. The CCSA found that section 10 of the Equality Act was in fact constitutional, apart from its reference to “hurtful.” In relation to the term “hurtful” as incorporated in the Equality Act, the CCSA noted that “if speech that is merely hurtful is considered hate speech, this sets the bar rather low.”²⁰¹

Accordingly, while the CCSA narrowed the speech protection demonstrating that, despite the reversal of the other aspects of the SCA decision on section 10, the issue of threshold continued to be important for the CCSA when faced with speech restrictions. The assessment of dignity also played a role in its decision on the term “hurtful.” The CCSA underlined that the central issue was balancing free speech with dignity and equality.²⁰² Interestingly, it noted that “it is not only the right to equality and dignity that our Constitution seeks to protect. The right to free speech is equally protected.”²⁰³ It further noted that “the prohibition of hurtful speech would certainly serve to protect the rights to dignity and equality of hate speech victims. However, hurtful speech does not necessarily seek to spread hatred against a person because of their mem-

197 Ibid at para. 62.

198 Ibid at para. 70.

199 Ibid at para. 85.

200 Ibid at paras. 62, 85, 88, 96.

201 Qwelane v South African Human Rights Commission and Another CCT13/20 [2021] ZACC 22, para.139, <https://globalfreedomof-expression.columbia.edu/cases/qwelane-v-south-african-human-rights-commission-2/>.

202 Ibid at para. 2.

203 Ibid at para. 67.

bership of a particular group Therefore, the relationship between the limitation and its purposes is not proportionate.”²⁰⁴

In addition to the issue of threshold and dignity is that of transparency. The court underlined that “it is difficult for ordinary citizens to know whether their conduct will be “hurtful” or “harmful” and thus whether it meets the threshold required by section 10.” For the reasons discussed above, the court therefore found the term “hurtful” to be vague and a breach of the rule of law.²⁰⁵

In relation to the incitement of harm, the CCSA noted that “there is no requirement of an established causal link between the expression and actual harm committed.”²⁰⁶ It referred to foreign courts, including the ECtHR case of *Vejdeland v. Sweden*, in which the court held that inciting hatred does not necessarily entail a call for violence or other criminal acts.²⁰⁷ As noted above, this is one of the cases illustrating the low threshold attached by the ECtHR to what is permissible speech. Further, the CCSA underlined that the constitution requires that “we not only be reactive to incidence or systems of unfair discrimination but also pre-emptive.”²⁰⁸ As such, it held that the SCA was wrong in concluding that there was no evidence to demonstrate a link between the article in question and subsequent attacks on the LGBT+ community.²⁰⁹ It also assessed the likelihood of harm through the dignity lens, noting that:

The likelihood of the infliction of harm and the propagation of hatred is beyond doubt. It is difficult to conceive of a more egregious assault on the dignity of LGBT+ persons. Their dignity as human beings, deserving of equal treatment, was catastrophically denigrated by a respected journalist in a widely read article.²¹⁰

In brief, the CCSA’s judgment meant that the reference to “harmful” or incitement to such harm as well as promotion of hatred, as incorporated in the Equality Act, were constitutional. We argue that the free speech problem lies with the element of “harmful.” This was considered by the SCA not to meet the threshold of section 16(2) of the constitution, which limits itself (for purposes of the current discussion) to the restriction of speech insofar as it constitutes an incitement of imminent violence or advocacy of hatred. The element of “harm” or “harmful” is not incorporated in the constitution nor is it found in the UN counterpart, namely article 20(2) of the ICCPR, which prohibits the advocacy of hatred that constitutes incitement to discrimination, hostility, or violence.

Whilst the significance of dignity in the South African constitutional order is clear, it could be argued that the CCSA did not adequately support the link it made between the dignity of the LGBT community on the one hand and the banning of “harmful” speech on the other. Although it stated that their dignity as human beings was “catastrophically denigrated” by the article, given the high threshold and importance granted to freedom of expression in this jurisdiction (not that it trumps dignity), the causal link between dignity and the alleged “catastrophe” should have been more manifest. As such the CCSA decision in *Qwelane* is vulnerable to some of the same criticisms as the hate speech jurisprudence of the ECtHR when it comes to the applicable threshold as well as foreseeability and arbitrariness. Nevertheless, despite the less stringent approach to freedom of expression when compared to the position of the SCA, *Qwelane* continues to include some findings that can be useful for limiting hate speech regulation, by explicitly exempting mere “hurtful” expressions from the limitation clause in Article 16(2).

204 Ibid at para. 139.

205 Ibid at para. 156.

206 Ibid at para. 107.

207 Ibid at para. 108.

208 Ibid at Apar. 110.

209 Ibid.

210 Ibid at para. 181.

6. CONCLUSION

The UN Framework deals with hate speech through the limitation grounds of Article 19 of the ICCPR (freedom of expression) and puts forth positive obligations to prohibit hate speech (although not referred to as such) in Article 20(2). The UN is of central importance to the global setting when it comes to the approach to hate speech by the legislature, the judiciary and the executive given that it is the only global organization relevant to the issue under consideration. The Rabat Plan of Action, outputs of the HRC and Recommendations made by the Special Rapporteur on Freedom of Expression have meant that the two articles from the ICCPR are a good point of reference for institutions and authorities to conceptualize what hate speech is, accompanying this with free speech protection. However, the UN framework is not without its flaws, particularly the incoherence when it comes to thresholds and speech protection when looking comparatively at the ICCPR and the ICERD, specifically Article 20(2) and Article 4 therein. Further, the UN framework focuses solely on speech attacking racial, ethnic and religious characteristics, with no Covenant/Convention directly prohibiting attacks on sexual orientation and gender identity. As demonstrated in the jurisprudential analysis, cases involving homophobic speech, for example, can be brought to the HRC only under Article 19, with no respective positive obligation to sexual/gender characteristics incorporated, as is the case with religion and ethnicity (Article 20(2)).

On a European level, there are two relevant institutions, the Council of Europe and the EU. In relation to the former, prohibited speech should, in theory, go beyond types of expression that “shock, offend or disturb,”²¹¹ which, according to the ECtHR falls within the protective scope of Article 10 of the European Convention on Human Rights. Despite this statement, hate speech judgments demonstrate that Strasbourg has strayed away from the *Handyside* doctrine.

What differentiates the ECtHR from other courts such as the higher courts of South Africa but even more so the US Supreme Court is the very low threshold afforded to freedom of expression when it comes to hate speech. Even speech which is insulting has been deemed to be hate speech with the Court stipulating that it does not need to amount to and/or incite violence for it to violate the limitation grounds of Article 10. Another key issue identified in relation to the ECtHR is the lacking assessment of notions/meanings/context/impact/possibility of harm and other themes which if considered (as is done by higher courts in South Africa) could lead to, at least, more substantiated decisions. One could argue this is due to the different nature of the ECtHR as a regional court that is a regulator of a broad range of beliefs and ideologies which mark the Contracting Parties, as opposed to national courts which are there to serve the country individually rather than a region. The ECtHR is a regional court (with whatever accompanies that status as noted above) while the doctrine of the margin of appreciation gives states a “space for maneuver”²¹² when it comes to meeting their Convention obligations. Nevertheless, it does appear that the ECtHR steers away from analyses of issues such as the nexus between speech and harm and the impact of restriction on speakers/listeners (see for example the reference to the Court’s perception of people as “nitwits” in the dissenting opinion in *Féret*). Further, the Court offers no clear guidelines as to when Article 17 of the ECHR, rather than the limitation clauses of Article 10, should be applied. Whilst we are most used to seeing this in cases involving Holocaust denial/anti-Semitism there have been applications of Article 17 as was seen in *Norwood*. In relation to the ECtHR’s status as a regional court adopting the margin of appreciation, a contrast can be made with the Inter-American system where the burden is on the State to demonstrate that the prohibition of hate speech meets the conditions of legality, necessity,

211 As stated by the ECtHR in *Handyside v UK*, Application no. 5493/72 (ECHR 1976), <https://globalfreedomofexpression.columbia.edu/cases/handyside-v-uk/>.

212 Council of Europe, ‘The Margin of Appreciation’, https://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp.

and legitimacy.²¹³

Further, the impact of the ECtHR's approach to hate speech spreads beyond the Council of Europe's contracting parties. For example, as noted by Aswad and Kaye, "the African system has cited favorably to a variety of European Court views"²¹⁴ while the Organization for Islamic Cooperation Human Rights Commission relied on ECtHR jurisprudence to "justify its departure from UN freedom of expression protections with respect to blasphemy, speech that offends religious sensibility and expression that displays religious intolerance."²¹⁵

In the U.S., speech and its vehicles are almost absolutely protected, unless they meet very high thresholds related to threats or violence and as long as restrictions are content neutral. It is the First Amendment that constituted the justification for reservation grounds imposed on Article 4 ICERD, and Article 20 ICCPR. As demonstrated in *Brandenburg*, for purposes of restricting violent speech, the violence in the speech must go beyond mere advocacy to actual incitement or production of action, with an extra safety net incorporated by the Court, namely, that such action must be imminent. Moreover, the fact that advocacy for violence is not a sufficient ground to limit speech is in direct contravention with Article 20(2) of the ICCPR. In fact, that Article not only prohibits the advocacy of violence but also of discrimination and hostility, which fall under even lower thresholds. The judgment in *Brandenburg*, therefore, shows the stark difference between the U.S. and UN approach to hate speech regulation. Combining that with the prohibition of content based regulation, set out in *R.A.V.*, the U.S. and UN frameworks are complete opposites, with, for example, Article 20(2) prohibiting such advocacy when it is directed to national, racial or religious groups.

So, there is a direct contrast with UN obligations but also with the practices of the European region in which, although we witness varying thresholds of what is to be restricted, the common denominator of hate speech treatment is protecting particular characteristics through hate speech regulation. This is not only permissible but also a necessity if States Parties are to meet their obligations to the UN, the Council of Europe and the EU. Judge Zupančič sums up the differences well in his concurring opinion in *Vejdeland*. Specifically, he notes (quoting the U.S. Supreme Court at times) that:

This case..may relevantly be compared to *Snyder v Phelps*...It is interesting to note that the American Supreme Court takes a very liberal position concerning the contents of the controversial messages. That the statement is arguably of inappropriate or controversial character "is irrelevant to the question of whether it deals with a matter of public concern." In other words, freedom of speech in *Snyder*.. was not to be impeded by considerations of proportionality as long as the statement in question could be "fairly considered as relating to any matter of political, social or other concern to the community."²¹⁶

As such the First Amendment obligations of the US make conformity with Article 19 limitation grounds and Article 20(2) obligations difficult. On the other hand, the ECtHR's overly-restrictive ap-

213 Office of the Special Rapporteur for Freedom of Expression Inter American Commission on Human Rights, 'Inter-American Legal Framework Regarding the Right to Freedom of Expression' (2009), p.24, <http://www.oas.org/en/iachr/expression/docs/publications/INTER-AMERICAN%20LEGAL%20FRAMEWORK%20OF%20THE%20RIGHT%20TO%20FREEDOM%20OF%20EXPRESSION%20FINAL%20PORTADA.pdf>.

214 Evelyn Aswad & David Kaye, 'Convergence and Conflict: Reflections on Global and Regional Human Rights Standards on Hate Speech' (2022) 20 Northwestern Journal of Human Rights 3, p. 209, <https://scholarlycommons.law.northwestern.edu/njihr/vol20/iss3/1/>.

215 Ibid.

216 *Vejdeland and Others. v. Sweden*, Application Number 1813/07 (ECHR 9 May 2012), <https://globalfreedomofexpression.columbia.edu/cases/case-of-vejdeland-and-others-v-sweden/>, Concurring Opinion Judge Zupančič, para.1.

proach to hate speech is at the cost of Article 10 of the ECHR. As a middle ground, looking at the higher courts of South Africa could be beneficial with their coming closer than the others to the letter and spirit of Article 19 and Article 20(2) ICCPR. At the same time, the attention paid by the South African judiciary to context, history and harm is a practice that should be followed by other courts when dealing with the controversial issue of hate speech.

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