E.U. NETWORK OF INDEPENDENT EXPERTS ON FUNDAMENTAL RIGHTS
RÉSEAU U.E. D'EXPERTS INDÉPENDANTS EN MATIÈRE DE DROITS FONDAMENTAUX
(*CFR-CDF*)

COMBATING RACISM AND XENOPHOBIA THROUGH CRIMINAL LEGISLATION : THE SITUATION IN THE EU MEMBER STATES

Opinion n° 5-2005

28 November 2005

EXECUTIVE SUMMARY

Ref. CFR-CDF.Opinion 5-2005.doc

Le **Réseau UE d'Experts indépendants en matière de droits fondamentaux** a été mis sur pied par la Commission européenne (DG Justice, Liberté et Sécurité), à la demande du Parlement européen. Depuis 2002, il assure le suivi de la situation des droits fondamentaux dans les Etats membres et dans l'Union, sur la base de la Charte des droits fondamentaux de l'Union européenne. Chaque Etat membre fait l'objet d'un rapport établi par un expert sous sa propre responsabilité, selon un canevas commun qui facilite la comparaison des données recueillies sur les différents Etats membres. Les activités des institutions de l'Union européenne font l'objet d'un rapport distinct, établi par le coordinateur. Sur la base de l'ensemble de ces (26) rapports, les membres du Réseau identifient les principales conclusions et recommandations qui se dégagent de l'année écoulée. Ces conclusions et recommandation sont réunies dans un Rapport de synthèse, qui est remis aux institutions européennes. Le contenu du rapport n'engage en aucune manière l'institution qui en est le commanditaire.

Le Réseau UE d'Experts indépendants en matière de droits fondamentaux se compose de Florence Benoît-Rohmer (France), Martin Buzinger (Rép. slovaque), Achilleas Demetriades (Chypre), Olivier De Schutter (Belgique), Maja Eriksson (Suède), Teresa Freixes (Espagne), Gabor Halmai (Hongrie), Wolfgang Heyde (Allemagne), Morten Kjaerum (supléant Birgitte Kofod Olsen) (Danemark), Henri Labayle (France), Rick Lawson (Pays-Bas), Lauri Malksoo (Estonie), Arne Mavcic (Slovénie), Vital Moreira (Portugal), Jeremy McBride (Royaume-Uni), François Moyse (Luxembourg), Bruno Nascimbene (Italie), Manfred Nowak (Autriche), Marek Antoni Nowicki (Pologne), Donncha O'Connell (Irlande), Ilvija Puce (Lettonie), Ian Refalo (Malte), Martin Scheinin (suppléant Tuomas Ojanen) (Finlande), Linos Alexandre Sicilianos (Grèce), Pavel Sturma (Rép. tchèque), Edita Ziobiene (Lithuanie). Le Réseau est coordonné par O. De Schutter, assisté par V. Van Goethem.
Les documents du Réseau peuvent être consultés via :
http://www.europa.eu.int/comm/justice_home/cfr_cdf/index_fr.htm

The **EU Network of Independent Experts on Fundamental Rights** has been set up by the European Commission (DG Justice, Freedom and Security), upon request of the European Parliament. Since 2002, it monitors the situation of fundamental rights in the Member States and in the Union, on the basis of the Charter of Fundamental Rights. A Report is prepared on each Member State, by a Member of the Network, under his/her own responsibility. The activities of the institutions of the European Union are evaluated in a separated report, prepared for the Network by the coordinator. On the basis of these (26) Reports, the members of the Network prepare a Synthesis Report, which identifies the main areas of concern and makes certain recommendations. The conclusions and recommendations are submitted to the institutions of the Union. The content of the Report is not binding on the institutions.

The EU Network of Independent Experts on Fundamental Rights is composed of Florence Benoît-Rohmer (France), Martin Buzinger (Slovak Republic), Achilleas Demetriades (Cyprus), Olivier De Schutter (Belgium), Maja Eriksson (Sweden), Teresa Freixes (Spain), Gabor Halmai (Hungary), Wolfgang Heyde (Germany), Morten Kjaerum (substitute Birgitte Kofod Olsen) (Denmark), Henri Labayle (France), Rick Lawson (The Netherlands), Lauri Malksoo (Estonia), Arne Mavcic (Slovenia), Vital Moreira (Portugal), Jeremy McBride (United Kingdom), François Moyse (Luxemburg), Bruno Nascimbene (Italy), Manfred Nowak (Austria), Marek Antoni Nowicki (Poland), Donncha O'Connell (Ireland), Ilvija Puce (Latvia), Ian Refalo (Malta), Martin Scheinin (substitute Tuomas Ojanen) (Finland), Linos Alexandre Sicilianos (Greece), Pavel Sturma (Czech Republic), Edita Ziobiene (Lithuania). The Network is coordinated by O. De Schutter, with the assistance of V. Van Goethem.
The documents of the Network may be consulted on :
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EXECUTIVE SUMMARY OF THE OPINION 5-2005 OF THE EU NETWORK OF INDEPENDENT EXPERTS ON FUNDAMENTAL RIGHTS ON COMBATING RACISM AND XENOPHOBIA THROUGH CRIMINAL LEGISLATION

Introduction

In November 2001, the Commission presented a proposal for a Council Framework Decision on combating Racism and Xenophobia[1]. The objective of this proposal is to realise the approximation of laws and regulations of the Member States and a closer co-operation between judicial and other authorities of the Member States regarding offences involving racism and xenophobia (Article 1 of the Proposal). The Decision shall apply to offences involving racism and xenophobia committed within the territory of the Member States or by nationals of a Member State where the act affects individuals or groups of that State or is adopted for the benefit of a legal person established in a Member State (Article 2 of the Proposal). The main difference from the Joint Action concerning action to combat racism and xenophobia, which was adopted on the basis of Article K.3 of the Treaty on the European Union (Article 31 EU) on 15 July 1996[2], is that instead of allowing for a choice between criminalising certain forms of conduct listed or derogating from the principle of dual criminality, the proposed Framework Decision would impose an obligation on Member States to punish the conduct listed as a criminal offence.

The Council was however unable to agree on the text of the draft Framework Decision on combating racism and xenophobia. The main obstacle resided in defining a balance between repression of racist conduct and freedom of expression which would be acceptable to all. It is in this context that the European Commission requested the EU Network of Independent Experts on Fundamental Rights to submit an opinion on existing legislation on racism and xenophobia and in particular, on the issues surrounding the borderline between freedom of expression and the repression of racism and xenophobia. One should note however that these issues have been already partially addressed both by the Thematic Comment No. 3 of 25 April 2005 of the EU Network of Independent Experts on Fundamental Rights regarding the protection of minorities in the European Union and by its Opinion 3-2005 of 23 August 2005 regarding the requirements of fundamental rights in the framework of the measures of prevention of violent radicalisation and recruitment of potential terrorists[3]. These issues are also addressed in the country reports of the European Commission against Racism and Intolerance (ECRI) of the Council of Europe and in the ECRI Reports regarding the legal measures to combat racism and intolerance in the Member States of the Council of Europe[4], as well as in the studies provided by the 25 National Focal Points that constitute the entrance points of the European Racism and Xenophobia Network (RAXEN) coordinated by the European Monitoring Centre on Racism and Xenophobia (EUMC)[5].

The legal orders of the EU Member States present strong similarities on the issues which are the subject of this Opinion. This is due, in particular, to the fact that they are bound by the same international instruments which exist in this field, although certain variations may be noted between their respective international commitments. At the universal level, the most relevant international human rights instruments relating to combating racism and xenophobia are the International Convention on the Elimination of All forms of Racial Discrimination of 21 December 1965 (ICERD),

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[1] Proposal of 28 November 2001 for a Council Framework Decision on combating racism and xenophobia, COM(2001) 664 final.

[2] Joint Action of 15 July 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning action to combat racism and xenophobia (96/443/JHA), OJ L 185 of 24.07.1996.

[3] See the website of the EU Network of Independent experts on Fundamental Rights : http://europa.eu.int/comm/justice_home/cfr_cdf/index_en.htm#

[4] The country reports provide useful tables summarising the state of constitutional, criminal, civil and administrative legislation for each of the State Parties to the Council of Europe (please note that these reports are not always up to date). These documents are available on the following website: http://www.coe.int/T/e/human_rights/ecri/4-Publications/

[5] http://eumc.eu.int/eumc/index.php

the International Covenant on Civil and Political Rights of 16 December 1966 (ICCPR) and the Rome Statute of the International Criminal Court of 17 July 1998. Within the Council of Europe, the most relevant instruments are the 1950 European Convention on Human Rights and Fundamental Freedoms (ECHR) and the Framework Convention for the Protection of National Minorities of 1st February 1995. The contents of the Proposal for a Framework Decision on combating racism and xenophobia also are obviously related to the Council of Europe Convention on Cybercrime of 23 November 2001 and its Additional Protocol of 28 January 2003 concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems. Whereas all the Member States are parties to the ICERD,[6] the ECHR, the ICCPR, and the Rome Statute of the International Criminal Court, not all of them are parties to the Council of Europe Framework Convention for the Protection of National Minorities : **Belgium, Greece** and **Luxembourg** have not ratified this instrument, and **France** has not even signed it. Furthermore only **Cyprus**, **Denmark**, **Estonia**, **Hungary**, **Lithuania** and **Slovenia** have ratified the Convention on Cybercrime (all the Member States have signed it). And all the Member States except **Czech Republic, Hungary, Ireland, Italy, Slovak Republic, Spain** and the **United Kingdom** have signed the Additional Protocol to the Convention on Cybercrime but only **Cyprus**, **Denmark** and **Slovenia** have ratified it.

At the level of the Council of Europe, the General Policy Recommendation No. 7 by the European Commission against Racism and Intolerance (ECRI) of the Council of Europe (see the appendix to the Opinion)[7] also constitutes a key instrument which shall contribute to framing the discussion launched by the Proposal of 28 November 2001 for a Council Framework Decision on combating racism and xenophobia.

The Opinion of the EU Network of Independent Experts on Fundamental Rights on combating racism and xenophobia through criminal legislation aims at answering the following questions, as formulated by the Commission in its request for an opinion :

1. How is the issue of racism and xenophobia addressed at the national level? Is there any systematic and structured approach to this problem?
2. Is there any definition of racism and xenophobia available at the national level?
3. Is there any domestic legislation or draft bill concerning racism and xenophobia?
4. Is there any legislation punishing the following conducts:

- Publicly inciting discrimination, 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?

[6] However, certain Member States have made reservations to Article 4 ICERD, which constitutes the most relevant provision as regards combating racism and xenophobia. Specifically, the reservations or declarations made by **Austria**, **Belgium**, **Ireland**, **Italy** the **United Kingdom** when signing or ratifying the Convention on the Elimination of All Forms or Racial Discrimination which emphasize the importance attached to the fact that Article 4 of the ICERD provides that the measures laid down in subparagraphs (a), (b), and (c) should be adopted with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of the Convention and which therefore consider that the obligations imposed by Article 4 CERD must be reconciled with the right to freedom of opinion and expression and the right to freedom of peaceful assembly and association.

[7] European Commission against Racism and Intolerance (ECRI) – General Policy Recommendation No. 7 of 13 December 2002 on National Legislation to Combat Racism and Discrimination, CRI (2003) 8. This document is available on the website of the ECRI. The European Commission against Racism and Intolerance has been created by the Resolution Res(2002)8 of the Committee of Ministers of the Council of Europe on the statute of the European Commission against Racism and Intolerance (Adopted by the Committee of Ministers on 13 June 2002 at the 799th meeting of the Ministers' Deputies).

- Publicly inciting discrimination, 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 committed by public dissemination or distribution of tracts, pictures or other material?
- Publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes?
- Instigating, aiding, abetting and attempting the conduct mentioned above?

5. Is there any legislation on specific manifestations of racism such as anti-Semitism, Islamophobia or towards other groups, such as Roma? Please describe and analyse the legislation and draft bills.
6. Is there any legislation aiming to criminalize 'institutional racism' including when committed by police forces? Are there specific procedural arrangements such as, for instance, the reversal of proof? Please describe and analyse legislation and draft bills.
7. Is there any legislation on incitement to hatred through the giving of speeches or other forms of expression, notably when through the media, the press and Internet? Please describe and analyse legislation and draft bills.
8. How does domestic legislation strike the balance between freedom of expression and repression or racist behaviours? Is there a common trend? Please describe and analyse legislation and draft bills.
9. Is there any domestic legislation concerning the ban of racist symbols as such? Please describe and analyse legislation and draft bills.

1. Member States' approaches to the issues of racism and xenophobia

(p. 9 of the Opinion)

Although all the Member States' legal frameworks provide several legal provisions and other measures applying to racism and xenophobia, there is rarely a systematic and structured approach to these issues. In general, legal provisions are scattered in different acts and activities aimed at preventing racism and xenophobia often lie in the hands of various institutions. This dispersal of measures and legislations – which does not facilitate their accessibility and visibility – has been questioned by the Committee on the Elimination of all forms of Racial Discrimination under the ICERD. While noting in certain Member States the existence of provisions in criminal legislation aimed at combating racism, as well as including racist or xenophobia motivations among aggravating circumstances for crimes, the ICERD Committee has reiterated its recommendation to introduce general legislation prohibiting racial discrimination in all its forms. In addition, the Committee has encouraged State parties to ensure greater coordination of the activities of the competent authorities in this area.

Thus, the issues of racism and xenophobia are often touched upon only in a partial and indirect way in the Member States, mainly via the criminalization of certain forms of conduct, the prohibition of discrimination in civil and administrative law and by making racist motives a ground for increasing the punishment. Although the adoption of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin[8] led a number of Member States to adopt legislation, sometimes of a criminal nature, to combat discrimination in a number of areas mentioned in Article 3(1) of the Directive, the Member States have generally not seen this as an opportunity to improve the protection of victims of incitement to racial hatred or discrimination, except insofar as this may be construed as a form of harassment as provided under Article 2(3) of the Directive.

Nevertheless, attempts are made in certain Member States to improve the coherence of their approach to the issues of racism and xenophobia. This is particularly true for the Member States that have launched *National Action Plans (NAPs) against Racism and Xenophobia* (see the draft NAPs or the NAPs implemented inter alia in **Belgium, Czech Republic, Denmark, Germany, Finland, Ireland, Latvia, Netherlands, Poland, Slovak Republic** and **United Kingdom**). The Committee on the Elimination of all forms of Racial Discrimination regularly reaffirms the need for the States Parties to implement such plans. It recently reiterated its recommendation that the States Parties should 'implement national strategies or plans of action aimed at the structural elimination of racial discrimination. These long-term strategies should include specific objectives and actions as well as indicators against which progress can be measured. They should include, in particular, guidelines for prevention, recording, investigation and prosecution of racist or xenophobic incidents, assessment of the level of satisfaction among all communities concerning their relations with the police and the system of justice, and recruitment and promotion in the judicial system of persons belonging to various racial or ethnic groups; [States Parties are also encouraged] to entrust an independent national institution with the task of tracking, monitoring and measuring progress made under the national plans of action and guidelines against racial discrimination, identifying undetected manifestations of racial discrimination and submitting recommendations and proposals for improvement'[9]. These examples of national action plans launched in the field of racism and xenophobia – the list of which does not seek to be exhaustive – are likely to constitute a first step towards a relatively systematic and structured approach of the issues of racism and xenophobia.

Another encouraging development consists in *the establishment or the reinforcement of the various specialized bodies or instances aimed at contributing to combating racism and xenophobia at the*

[8] OJ L 180 of 19.7.2000, p. 22.

[9] Committee on the Elimination of Racial Discrimination, Draft General Recommendation on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System, U.N. Doc. CERD/C/GC/31/Rev.4 (2005), point I-2.

national level, especially in compliance with Article 13 of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. This provision imposes on the Member States an obligation to 'designate a body or bodies for promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin'. This is likely to contribute to the improvement of the adoption of a structured approach to the issues of racism and xenophobia in the Member States, insofar as these bodies shall be, in particular, in charge of 'conducting independent surveys concerning discrimination, publishing independent reports and making recommendations on any issue relating to such discrimination'.

1.2. Definition of racism and xenophobia

(p. 16 of the Opinion)

According to Article 3 of the Proposal of 28 November 2001 for a Council Framework Decision on combating racism and xenophobia, 'racism and xenophobia' shall mean 'the belief in race, colour, descent, religion or belief, national or ethnic origin as a factor determining aversion to individuals or groups'. The notion of racism as such is not defined in the International Convention on the Elimination of All Forms of Racial Discrimination, which only provides a definition of 'racial discrimination' in its Article 1, paragraph 1[10]. Certain elements of a definition of the notion of racism could however be found in Article 4 (a) CERD which imposes to States Parties to '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'. Moreover for the purposes of the Additional Protocol to the Convention on Cybercrime of the Council of Europe of 28 January 2003, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, 'racist and xenophobic material' means any written material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or violence, against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors.

The European Commission against Racism and Intolerance (ECRI) of the Council of Europe, in its General Policy Recommendation No. 7 of 13 December 2002 on National Legislation to Combat Racism and Discrimination defines 'racism' as 'the belief that a ground such as race, colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons'. The Explanatory Memorandum of ECRI General Policy Recommendation No. 7 underlines that the term 'racism' should be understood in a broad sense, 'including phenomena such as xenophobia, anti-Semitism and intolerance' and the use of the expression 'grounds such as' in the definition of racism aims at establishing an open-ended list of grounds, 'thereby allowing it to evolve with society'[11]. However, the ECRI Explanatory Memorandum expressly provides that unlike the definition of racial discrimination – which should be included in the law – States Parties may or may not decide to define racism within their criminal legislation. The Explanatory Memorandum adds that, if they do choose to resort to such a definition, an exhaustive list of grounds – rather than an open-ended list of grounds – could be established 'in order to respect the principle of forseeability which governs this branch of the law'.

Although most of the Member States' criminal legislations routinely deal with notions related to racism and xenophobia (e.g. the notions of 'racist' behaviour, 'racist' speech or the inclusion of

[10] Article 1 of the CERD: 'In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life'

[11] This Explanatory Memorandum is attached to the General Policy Recommendation No. 7.

'racist' motives as an aggravating factor for sentencing), they rarely include a definition of the very notion of '*racism'*. The term '*xenophobia'* is even less frequently used or defined. If certain Member States provide elements of the definitions of the notions of racism and xenophobia in the national legislations prohibiting racial discrimination or other forms of hostility towards persons of a certain 'race' or ethnic origin, the existing National Action Plans against racism and xenophobia sometimes address these concepts in a more detailed manner. In **Poland** for instance, the definitions of racism and xenophobia were developed by the National Action Plan for Counteracting Racial Discrimination, Xenophobia and Related Intolerance[12]. According to these definitions, 'racism' is to be understood as 'a theory saying that there is causality between physical traits (somatic, e.g. body structure, skin colour, head shape) and certain psychological traits (e.g. IQ level and personality), which means that certain races dominate others and, as more valuable, are predestined to govern over others'. As to the definition of 'xenophobia' the Polish NAP provides that it is 'a groundless fear of and hostility towards others'. 'Intolerance' is 'a lack of respect for the practice and beliefs of others. It is manifested by forbidding all type of behaviour or beliefs different to oneself. It is a basis for racial discrimination and xenophobia'. In **Ireland**, the definition of 'racism' contained in the National Action Plan Against Racism (NPAR)[13] represents the most authoritative statement on the matter within the domestic order : 'Racism is a specific form of discrimination and exclusion faced by cultural and ethnic minorities. It is based on the false belief that some 'races' are inherently superior to others because of their cultural or ethnic background, different skin colour and nationality. Racism denies people their basic human rights, dignity and respect'.[14] Furthermore, the Irish NPAR recognises the variety of ways in which racism can be manifested, including (i) discrimination, (ii) assaults, threatening behaviour and incitement to hatred, (iii) institutional/systemic forms of racism and (iv) labelling.[15] In **Denmark**, according to the National Action Plan to Promote Equal Treatment and Diversity and Combat Racism, the notion of 'racism' 'refers generally to the view that 'racial differences' should translate into differences in social or political rights'[16].

However as mentioned above, the principal way by which the Member States address the issues of racism and xenophobia remains through their legislation combating *'racial discrimination'* (which covers i.a. discrimination based on race, colour, nationality, ethnic or national origin). Whereas many Member States do not provide a definition of 'racism' or 'xenophobia' in their criminal law or in national action plans against racism and xenophobia, generally the national legislations enshrine a definition of the offence of racial discrimination, based either on the definition provided by Article 1, paragraph 1, of the International Convention on the Elimination of All Forms of Discrimination or on Article 2 of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

2. Prohibition of certain conducts expressing racism and xenophobia

(p. 22 of the Opinion)

It is not the purpose of this Opinion to address all the different kinds of offences Member States should sanction in the field of racism and xenophobia. This has been done already elsewhere[17]. In the

[12] National Action Plan for Counteracting Racial Discrimination, Xenophobia and Related Intolerance 2004 – 2009, Published on the website of the Government Plenipotentiary for Equal Status for Women and Men, http://www.rownystatus.gov.pl p. 8-9

[13] See Department of Justice, Equality and Law Reform, *Planning for Diversity: The National Action Plan Against Racism 2005-2008* (January, 2005) [hereinafter: NPAR].

[14] *Ibid* at p.38.

[15] NPAR, *op. cit.* at p.29.

[16] According to the Action Plan this definition is not exhaustive, but summarize the content of the individual concepts as generally interpreted or expressed.

[17] See, e.g., ECRI country reports which provide useful tables summarising the state of constitutional, criminal, civil and administrative legislation for each of the State Parties to the Council of Europe (these reports, however, are not always up to date). These documents are available on the following website: http://www.coe.int/T/e/human_rights/ecri/4-Publications/
See also the study by the European Network against Racism (ENAR) of June 2001 entitled *From Principle to Practice - Evaluation of legislation dealing with racial and ethnic discrimination in certain EU Member States.* This report is available on http://www.enar-eu.org/

request of the Commission, the EU Network of Independent Experts on Fundamental Rights has been asked, rather, to examine the way in which a certain number of limited offences are addressed by the Member States. The concerned behaviours are the following :

2.2. The incrimination of the conduct of 'Publicly inciting discrimination, 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'.

(p. 26 of the Opinion)

The incitement to hate, to discrimination, or to violence, constitutes an offence classically recognized in the national laws of the Member States. Indeed, it is well established in the international law of human rights that such conduct requires to be combated through the adoption of criminal legislation. Article 20(2) of the 1966 International Covenant on Civil and Political Rights, which all the Member States have ratified, provides that 'Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'. Article 4 ICERD provides, *inter alia*, that States Parties (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. The Committee on the Elimination of Racial Discrimination recalls that the provisions of Article 4 ICERD are of mandatory character : 'to satisfy these obligations, States parties have not only to enact appropriate legislation but also to ensure that it is effectively enforced'[18].

As can be inferred from the list of national criminal law provisions on the incitement to racism and xenophobia (cited on pp. 28-42 of the Opinion), public incitement to discrimination, 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 is prohibited by the criminal law of almost all the Member States. In **France,** this offence is enshrined in the Act of 29 July 1881 on the freedom of the press (Section 24.6). In the **United Kingdom** there is no offence of publicly *inciting discrimination* – this remains essentially a civil wrong – but incitement of violence 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 could lead to a conviction under the Crime and Disorder Act 1998 (as amended), which introduces the concept of 'racially aggravated offence'. Indeed Sections 28-33 of the Crime and Disorder Act 1998 introduced the concept of a 'racially aggravated offence', resulting in enhanced penalties where racial hostility was an element in the offence committed. In the case of *incitement to 'racial' hatred* – defined for the purpose of the law of the United Kingdom as hatred against a group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins – the Public Order Act 1986 establishes a number of relevant offences. The Public Order Act 1986 only

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See also ENAR final amendments of 25 June 2002 regarding the report of the Rapporteur Ozan Ceyhun on the Proposal for a Council Framework Decision on combating racism and xenophobia COM (2001) 664 – C5-0689/2001 – 2001/0270(CNS). This document is available on http://www.enar-eu.org/

[18] Committee on the Elimination of Racial Discrimination, General Recommendation XV, Measures to eradicate incitement to or acts of discrimination (Forty-second session, 1993), U.N. Doc. A/48/18 at 114 (1994), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.6 at 204 (2003).

Voy. à propos des obligations que cette disposition impose aux Etats parties à la Convention pour l'élimination de toutes les formes de discrimination raciale, Comité pour l'élimination de la discrimination raciale, Recommandation générale n°15 : Violence organisée fondée sur l'origine ethnique (adoptée à la 42ième session du Comité, 1993) (UN Doc. A/48/18) : 'To satisfy these obligations, States parties have not only to enact appropriate legislation but also to ensure that it is effectively enforced. Because threats and acts of racial violence easily lead to other such acts and generate an atmosphere of hostility, only immediate intervention can meet the obligations of effective response.'

applies to Great Britain but similar provisions exist in respect of Northern Ireland by virtue of the Public Order (Northern Ireland) Order 1987. *Incitement to 'religious' hatred* is currently only a specific offence in Northern Ireland – under the Prevention of Incitement to Hatred Act (Northern Ireland) 1970. However, incitement to hatred against certain religions (notably Judaism and Sikhism) would be covered by the racial hatred offence under the public order legislation discussed above because of the close identification of the religion with ethnic origin. It should be noted that in the United Kingdom there have been many calls in recent years for offences dealing with incitement to religious hatred but the government, after meeting resistance, abandoned its proposal to include them in the Anti-terrorism, Crime and Security Act 2001.

In general, such incitement would have to be intentional in order for the offence to be committed.[19] However, the Committee on the Elimination of Racial Discrimination had taken the view that the criminalization of public incitement to racial discrimination, violence or hatred should also be considered even where such behaviour is not intentional. Thus, in its 2001 Conclusions on **Cyprus** for instance, the Committee expressed satisfaction at the amendment (Law 28 III of 1999) of Law 11 (III) of 1992 which criminalizes acts mentioned in Article 4 of the ICERD and accordingly notes that 'as a result of the amendment it is no longer necessary that incitement to racial hatred be intentional in order for the offence to be committed'[20].

Another point to be emphasized concerns the requirement that the legislation enacted in order to comply with Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination be 'effectively enforced'. As noted by the Committee on the Elimination of Racial Discrimination, Article 4 (a) in particular requires States parties to 'penalize four categories of misconduct: (i) dissemination of ideas based upon racial superiority or hatred; (ii) incitement to racial hatred; (iii) acts of violence against any race or group of persons of another colour or ethnic origin; and (iv) incitement to such acts'.[21] The Committee insists that 'to satisfy these obligations, States parties have not only to enact appropriate legislation but also to ensure that it is effectively enforced. Because threats and acts of racial violence easily lead to other such acts and generate an atmosphere of hostility, only immediate intervention can meet the obligations of effective response'.[22] In the examination of individual communications submitted to the Committee, it also could not accept the claim by a State party that 'the enactment of law making racial discrimination a criminal act in itself represents full compliance with the obligations of States parties under the Convention'[23] ; indeed, this implies that the freedom to prosecute criminal offences (expediency principle, principe d'opportunité), while in principle acceptable, 'should be applied in each case of alleged racial discrimination in the light of the guarantees laid down in the Convention'[24].

Although they generally prohibit public incitement to discrimination, violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion,

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[19] Indeed, Article 4 of the Proposal for a Council Framework Decision on combating racism and xenophobia expressly provides that Member States shall ensure that the conducts listed in this provision are by any means punishable as criminal offence, when *intentionally* committed.

[20] Conclusions and recommendations of the Committee on the Elimination of Racial Discrimination, Cyprus, U.N. Doc. A/56/18, paras. 256-277 (2001).

[21] Committee on the Elimination of Racial Discrimination, General Recommendation XV on Article 4 of the Convention, adopted by the Committee at its forty-second session (1993)(doc. A/48/18), in : Compilation of the general comments or general recommendations adopted by human rights treaty bodies, UN doc. HRI/GEN/1/Rev.7, 12 May 2004, at 207, at para. 3.

[22] Committee on the Elimination of Racial Discrimination, General Recommendation XV on Article 4 of the Convention, adopted by the Committee at its forty-second session (1993)(doc. A/48/18), in : Compilation of the general comments or general recommendations adopted by human rights treaty bodies, UN doc. HRI/GEN/1/Rev.7, 12 May 2004, at 207, at para. 2.

[23] Committee on the Elimination of Racial Discrimination, *L.K. v. the Netherlands*, communication n°4/91, para. 6.4. (insuffient investigation and prosecution of a case of alleged incitement to racial discrimination and to acts of violence against persons of another colour or ethnic origin).

[24] Committee on the Elimination of Racial Discrimination, *Yilmaz-Dogan v. the Netherlands*, communication n° 1/1984, views of 10 August 1987 ; and Committee on the Elimination of Racial Discrimination, *L.K. v. the Netherlands*, communication n°4/91, para. 6.5.

descent or national or ethnic origin, the relevant national provisions rely on more or less strict definitions of this behavior. The main differences appear, in particular, with regard to (1) the publicity of the offence ; (2) the types of acts concerned ; and (3) the personal scope of the protection against incitement to violence or hatred.

(1) Publicity of the offence

Article 4 of the Proposal for a Council Framework Decision on combating racism and xenophobia provides that Member States shall ensure that the following intentional conduct committed by any means is punishable as criminal offence: '(a) public incitement to violence or hatred for a racist or xenophobic purpose or to any other racist or xenophobic behaviour which may cause substantial damage to individuals or groups concerned; (b) public insults or threats towards individuals or groups for a racist or xenophobic purpose; (c) public condoning for a racist or xenophobic purpose of crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court; (d) public denial or trivialisation of the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 April 1945 in a manner liable to disturb the public peace; (e) public dissemination or distribution of tracts, pictures or other material containing expressions of racism and xenophobia; (…)' (emphasis added). Similarly ECRI's General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination limits the scope of certain criminal offences set out in paragraph 18 to the condition that they are committed in 'public'. However according to the Explanatory Memorandum to ECRI General Policy Recommendation No. 7 current practice 'shows that, in certain cases, racist conducts escapes prosecution because it is not considered as being of a public nature'. Accordingly, provides the Explanatory Memorandum – even though the condition of publicity is enshrined in almost all the Member States' legislations – 'States should ensure that it should not be too difficult to meet the condition of being committed in 'public''[25].

Even though most of the Member States Certain Member States expressly provide that the incitement to hatred, violence and discrimination shall be made 'public' in order to be punished, certain Member States' legislations do not enshrine this condition. This is the case in **Italy** and in **Malta** for instance. Neither does the condition of publicity appear in Article 510 of the Penal Code in **Spain**. Similarly in **Slovenia,** the offence of 'stirring up ethnic, racial or religious hatred, strife or intolerance' (Article 300 of the Penal Code) does not include explicitly a condition of publicity. In **Latvia,** Section 78 and Section 150 of the Criminal Law do not include a condition of publicity.

(2) *Types of action covered*

The second difference between national criminal legislations regarding the conduct of publicly inciting discrimination, 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 relates to the types of actions covered by the national offences. Most of the Member States' criminal legislations expressly address the incitement to *discrimination*, *violence* or *hatred.* In some cases however, the provisions are more limited or differently formulated. They address, for instance, 'the incitement of acts that are likely to cause discrimination, hatred or violence' (**Cyprus**), 'the instigation of social hatred and violence' (**Estonia**), 'the spreading of statements or other information which threaten, defame or insult certain groups of persons' (**Finland**) or 'the stirring up of hatred (**Ireland**, **Malta** and **Slovenia**).

(3) *Personal scope of the protection against incitement to violence or hatred*

According to Article 4 of the Proposal for a Council Framework Decision on combating racism and xenophobia, Member States shall ensure that the following intentional conduct committed by any

[25] The Memorandum provides e.g. that 'this condition should be met in cases of words pronounced during meetings of neo-Nazi organisations or words exchanged in a discussion forum on the Internet'. (Paragraph 38 of the Explanatory Memorandum).

means is punishable as criminal offence: '(a) public incitement to violence or hatred for a racist or xenophobic purpose or to any other racist or xenophobic behaviour which may cause substantial damage to individuals or groups concerned; (b) public insults or threats towards individuals or groups for a racist or xenophobic purpose; (…)' (emphasis added). This scope of the protection may still be considered as limited. Paragraph 18 of ECRI General Policy Recommendation No. 7 of 13 December 2002 on National Legislation to Combat Racism and Discrimination provides that criminal law should penalise the following acts when committed intentionally: '(a) public incitement to violence, hatred or discrimination; (b) public insults and defamation or (c) threats against a person or a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin; (d) the public expression, with a racist aim, of an ideology which claims the superiority of, or which depreciates or denigrates, a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin (…)' (emphasis added). The Explanatory Memorandum clarifies why ECRI General Policy Recommendation No. 7 uses the notion of 'grouping of persons':

> Some of the offences set out in paragraph 18 of the Recommendation concern conduct aimed at a 'grouping of persons'. Current practice shows that legal provisions aimed at sanctioning racist conduct frequently do not cover such conduct unless it is directed against a specific person or group of persons. As a result, expressions aimed at larger groupings of persons, as in the case of references to asylum seekers or foreigners in general, are often not covered by these provisions. For this reason, paragraph 18 a), b), c), and d) of the Recommendation does not speak of 'group' but of 'grouping' of persons.

In certain Member States, the list of grounds which define these groups or the persons belonging to these groups is left open in order to allow it to evolve with society (e.g. by using the expression 'grounds such as' in the definition). Other Member States on the contrary have taken the view that, in order to respect the principle of foreseeability which governs criminal law, the law should contain an exhaustive list of grounds defining the groups at stake.

The national legislations criminalizing public incitement to discrimination, 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, in principle also protects asylum-seekers or foreigners insofar as they are members of groups thus defined. However, a distinct but important question is whether foreigners as such, or asylum-seekers as such, should be protected from public incitement to discrimination, violence or hatred directed against them as a group. Extending to the group of foreigners the protection from public incitement to discrimination, violence or hatred directed against them as a group, or against the members of that group as such, has been recommended at the international level[26].

A similar question arises, to some extent, with respect to the Roma community, although the Roma will generally be considered to constitute a group defined by the ethnic origin of its members and, thus, to be protected as such.[27] Indeed, such appears to be the presumption of the ECRI where it recommends to the Member States of the Council of Europe to bear in mind 'the manifestations of racism and intolerance of which Roma/Gypsies are victims, to give a high priority to the effective implementation of the provisions contained in ECRI's General Policy Recommendation No. 1, which

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[26] Committee on the Elimination of Racial Discrimination, General Recommendation 30, Discrimination against Non-citizens (Sixty-fourth session, 2004), U.N. Doc. CERD/C/64/Misc.11/rev.3 (2004).

[27] On the issue of the rights of the Roma community, see in particular General Recommendation 27 by the Committee on the Elimination of Racial Discrimination regarding discrimination against Roma (Committee on the Elimination of Racial Discrimination, General Recommendation 27, Discrimination against Roma (Fifty-seventh session, 2000), U.N. Doc. A/55/18, annex V at 154 (2000), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.6 at 216 (2003)) as well as the Thematic Comment No. 3 of the EU Network of Independent Experts on Fundamental Rights of 25 April 2005 on the protection of minorities in the European Union.
The third Thematic Comment is available on the website of the EU Network of Independent experts on Fundamental Rights : http://europa.eu.int/comm/justice_home/cfr_cdf/index_en.htm#

requests that the necessary measures should be taken to ensure that national criminal, civil and administrative law expressly and specifically counter racism, xenophobia, anti-Semitism and intolerance'.[28] Despite these provisions, in most of the Member States' criminal legislation, no explicit mention is made of the incitement to hatred, discrimination or violence towards foreigners and/or asylum-seekers or towards Roma, as such. This is not to say that the existing provisions do not cover such forms of incitement to hatred, discrimination or violence.

2.3. The incrimination of the conduct of 'publicly inciting discrimination, 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 *committed by public dissemination or distribution of tracts, pictures or other material*'.

(p. 52 of the Opinion)

2.3.1. Overview

(p. 52 of the Opinion)

Article 4 (e) of the Proposal for a Council Framework Decision on racism and xenophobia submitted by the Commission in November 2001 requests the Member States to ensure that the public dissemination or distribution of tracts, pictures or other material containing expressions of racism and xenophobia committed by any means be punishable as a criminal offence[29]. Article 3 of the Additional Protocol of 28 January 2001 to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems already requests each State Party to adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the fact of distributing, or otherwise making available, racist and xenophobic material to the public through a computer system. However, a Party may reserve the right not to attach criminal liability to conduct as defined by paragraph 1 of Article 3 of the Additional Protocol, where the material, as defined in Article 2, paragraph 1 of the Additional Protocol, advocates, promotes or incites discrimination that is not associated with hatred or violence, provided that other effective remedies are available.

With respect to television broadcasting, the level of convergence between the Member States is comparatively high.[30] Indeed, Article 22b of Directive 89/552/EC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities,[31] as amended by Directive 97/36/EC of the European Parliament and the Council of 30 June 1997,[32] obliges the member states to ensure that "broadcasts do not contain any incitement to hatred on grounds of race, sex, religion or nationality" (Article 22).

For a list of the main provisions of Member States' legislation on incitement to hatred through the giving of speeches or other forms of expression, in particular when through the media, the press and the Internet, see pp. 53-65 of the Opinion.

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[28] ECRI General Policy Recommendation No. 3 on Combating Racism and Intolerance against Roma / Gypsies of 6 March 1998.

[29] On the specific issue of combatting racism on the Internet, see the Report prepared by the Swiss Institute of Comparative Law on the Legal Instruments To Combat Racism On The Internet, Lausanne, Strasbourg, August 2000 (CRI (2000) 27). This Report is available on the website of the European Commission against Racism and Intolerance (ECRI) of the Council of Europe.

[30] For further details, see EU Network of Independent Experts on Fundamental Rights, *Thematic Comment n°3 : The Rights of Minorities in the EU*, March 2005, at 4.2.

[31] *O.J.* L 298, 27 November 1989, pp.0023-0030.

[32] *O.J.* L 202, 30 July 1997, pp.0060-0070.

2.3.2. The balance between freedom of expression and the repression of racist behaviours at the national level.

(p. 65 of the Opinion)

In the opinion of the Committee on the Elimination of Racial Discrimination[33], 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, which is embodied in particular in Article 19 of the Universal Declaration of Human Rights, in Article 19 of the International Covenant on Civil and Political Rights, in Article 5 (d) (viii) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and within the Council of Europe, in Article 10 of the European Convention on Human Rights. As noted above in the introduction to this Opinion, Article 4 ICERD itself states that it is compatible with the requirements of freedom of expression. Nevertheless, a certain number of reservation and declarations have been entered by the States Parties to the ICERD precisely on this need to ensure the conciliation of the obligations imposed by this provision with the right to freedom of expression and association[34].

While all the Member States' domestic legislations enshrine the recognition of the right to freedom of expression and opinion, they also prohibit – albeit to a more or less far-reaching extent – racist and xenophobic behaviours. The approach chosen by most of the Member States is based on the premise that freedom of expression has a distinguished role among other fundamental rights. Therefore, the restrictions to the freedom of expression are limited to that which is strictly necessary. Since generally the law as such does not strike a balance in the abstract between the freedom of expression and the repression of racist behaviour, it is left up to the courts to strike the right balance between competing interests in each specific case (see the national examples of balances provided on pp. 65-71).

2.3.3. The abuse of fundamental rights

(p. 72 of the Opinion)

Article 17 of the European Convention on Human Rights (ECHR) states that no provision in that instrument may be interpreted 'as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth [in the ECHR] or at their limitation to a greater extent than is provided for in the Convention'. In so far as it concerns individuals, the Court reads this provision as aimed at 'making it impossible for them to derive from the Convention a right to engage in any activity or perform any act aimed at destroying any of the rights and freedoms set forth in the Convention; ... no one may be able to take advantage of the provisions of the Convention to perform acts aimed at destroying the aforesaid rights and freedoms; ...'.[35] Article 17 ECHR thus creates an obstacle to an individual or a group relying on the freedoms guaranteed in the Convention in order to promote objectives which run counter to the values of the Convention, for instance in order to promote racial hatred or discrimination.[36] For instance, the Court has considered that, like any other remark directed against the values underlying the Convention, the justification of a pro-Nazi policy could not be allowed to enjoy the protection afforded under Article 10 and 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'.[37] One recent example of the Court relying on this clause is the case of *Garaudy v. France*,

[33] Committee on the Elimination of Racial Discrimination, General Recommendation 15, Measures to eradicate incitement to or acts of discrimination (Forty-second session, 1993), U.N. Doc. A/48/18 at 114 (1994), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.6 at 204 (2003).
[34] See *supra*, fn. 6.
[35] Eur. Ct. HR, *Lawless v. Ireland,* judgment of 1 July 1961, Series A no. 3, p. 45, § 7.
[36] See in particular *Glimmerveen and another v. the Netherlands*, Commission decision of 11 October 1979, Decisions and Reports (DR) 18, p. 198, and *Pierre Marais v. France*, Commission decision of 24 June 1996, DR 86, p. 184.
[37] Eur. Ct. HR, *Lehideux and Isorni* v. France, judgment of 23 September 1998, *Reports of Judgments and Decisions* 1998-VII, §§ 47 and 53.

which clearly illustrates the willingness of the European Court of Human Rights to allow for restrictions to freedom of expression where such restrictions are justified by the need to combat racism and xenophobia, or the denial of the Holocaust[38].

2.3.4. The acceptable limitations to freedom of expression

(p. 73 of the Opinion)

All the EU Member States are parties to the International Covenant on Civil and Political Rights. Article 19(2) of the International Covenant on Civil and Political Rights guarantees freedom of expression which, it states, 'shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice'. This right is not absolute. According to Article 19(3) of the Covenant : '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'. Furthermore, Article 20(2) of the Covenant provides that 'Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'. In its General Comment n°11 : Article 20 (1983),[39] the Human Rights Committee underlined that 'these required prohibitions are fully compatible with the right of freedom of expression as contained in article 19, the exercise of which carries with it special duties and responsibilities. The prohibition under (…) paragraph 2 is directed against any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, whether such propaganda or advocacy has aims which are internal or external to the State concerned. (…) For article 20 to become fully effective there ought to be a law making it clear that propaganda and advocacy as described therein are contrary to public policy and providing for an appropriate sanction in case of violation'. Therefore the prohibition of the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence not only constitutes a restriction to freedom of expression which the States parties to the Covenant are authorized to adopt ; rather, the States parties are under an obligation to adopt legislation which effectively imposes such a prohibition, through the imposition of effective, proportionate and dissuasive sanctions. The compatibility of such prohibition with the right to freedom of expression has also been confirmed by the Committee on the Elimination of Racial Discrimination.

Although the European Convention on Human Rights does not contain a provision similar to Article 20 of the International Covenant on Civil and Political Rights or Article 4(a) of the International Convention on the Elimination of All Forms of Racial Discrimination, the principle of freedom of expression as stipulated in Article 10 ECHR does not constitute an obstacle to the States parties fully complying with those provisions. As already mentioned, Article 17 ECHR makes it impossible for an individual to rely on the guarantee of freedom of expression in order to disseminate ideas based upon racial superiority or hatred, or in order incite to discrimination, hostility or violence (see the judgment of the European Court of Human Rights delivered on 23 September 1994 in the case of *Jersild v. Denmark*). In general, the European Convention on Human Rights is interpreted in the light of any relevant rules and principles of international law applicable in relations between the Contracting Parties (Article 31 § 3 (c) of the Vienna Convention on the Law of Treaties of 23 May 1969), which principles include that of *pacta sunt servanda*.[40] Therefore compliance with other international obligations constitutes in the view of the European Court of Human Rights a legitimate public interest

[38] Eur. Ct. HR, *Garaudy v. France* (Appl. No. 65831/01), decision of 24 June 2003.

[39] Human Rights Committee, General Comment n°11 : Article 20 (1983), in : Compilation of the general comments or general recommendations adopted by human rights treaty bodies, UN doc. HRI/GEN/1/Rev.7, 12 May 2004, at 133.

[40] See Eur. Ct. HR (GC), *Waite and Kennedy v. Germany* judgment of 18 February 1999 (Appl. no. 26083/94), ECHR 1999-I at §§ 63 and 72 ; Eur. Ct. HR (GC), *Al-Adsani v. the United Kingdom* judgment of 21 November 2001 (Appl. no. 35763/97), ECHR 2001-XI, §§ 54-55 ; Eur. Ct. HR (GC), *Bosphorus Hava Yolları Turizm ve Ticaret Anonim _irketi v. Ireland* judgment of 30 June 2005, § 150.

of a considerable weight, which may be taken into account when examining the restrictions to freedom of expression under Article 10 § 2 ECHR.

For certain examples of how this balance has been struck by each Member State, in certain cases which have been submitted to its national jurisdictions, see pp. 75-78 of the Opinion.

2.4. The incrimination of the conduct of 'Publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes'.

(p. 78 of the Opinion)

Article 4 (c) and (d) of the Proposal for a Council Framework Decision on combating racism and xenophobia[41] provides that Member States shall ensure that both 'public condoning for a racist or xenophobic purpose of crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court' and the 'public denial or trivialisation of the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 April 1945 in a manner liable to disturb the public peace', committed by any means, are punishable as criminal offences (emphasis added).

According to Article 6 of the Council of Europe Additional Protocol to the Convention on Cybercrime of 28 January 2003 concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, each State Party shall adopt such legislative measures as may be necessary to establish the following conduct as criminal offences under its domestic law, when committed intentionally and without right: 'distributing or otherwise making available, through a computer system to the public, material which denies, grossly minimises, approves or justifies acts constituting genocide or crimes against humanity, as defined by international law and recognised as such by final and binding decisions of the International Military Tribunal, established by the London Agreement of 8 August 1945, or of any other international court established by relevant international instruments and whose jurisdiction is recognised by that Party'. It adds that a State Party may either (a) require that the denial or the gross minimisation referred to in paragraph 1 of this article is committed with the intent to incite hatred, discrimination or violence against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors, or otherwise ; (b) reserve the right not to apply, in whole or in part, paragraph 1 of this article.

These restrictions to freedom of expression are compatible with the requirements of the international law of human rights, to the extent at least that the laws which make it a criminal offence to challenge the conclusions and the verdict of the International Military Tribunal at Nuremberg are not exceedingly vague and overbroad[42]. In a case which concerned the presentation of the role of Philippe Pétain during the Second World War, the European Court of Human Rights took the view that 'it is an integral part of freedom of expression to seek historical truth and it is not the Court's role to arbitrate the underlying historical issue, which is part of a continuing debate between historians that shapes opinion as to the events which took place and their interpretation'.[43] The Court nevertheless has consistently emphasized, in that case and in later cases, that the negation or revision of clearly established historical facts such as the Holocaust is removed from the protection of Article 10 by Article 17.[44] The Committee on the Elimination of All Forms of Racial Discrimination regularly recalls that the prohibition of attempts to justify crimes against humanity, and of their denial, should

[41] Proposal of 28 November 2001 for a Council Framework Decision on combating racism and xenophobia, COM (2001) 664 final.
[42] See Human Rights Committee, *R. Faurisson v. France*, communication n° 550/1993, views adopted on 8 November 1996, para. 9.3.
[43] Eur. Ct. HR (GC), *Lehideux and Isorni v. France*, judgment of 23 September 1998, *Reports* 1998-VII, § 51.
[44] Eur. Ct. HR (GC), *Lehideux and Isorni v. France*, judgment of 23 September 1998, *Reports* 1998-VII, § 51; Eur. Ct. HR, *Garaudy v. France*, decision of 24 June 2003; Eur. Ct. HR (2nd sect.), *Chauvy and Others v. France* (Appl. 64915/01), judgment of 29 June 2004, § 69.

not be limited to those committed during the Second World War[45].

There is no unanimity among Member States on the issue of the incrimination of the conduct of publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes. Whilst certain States have adopted specific provisions incriminating the conducts at stake, others incriminate these behaviours through their general legislations.

2.5. The incrimination of the conduct of 'Instigating, aiding, abetting and attempting the conduct mentioned above'.

(p. 82 of the Opinion)

Article 5 of the Proposal for a Council Framework Decision on combating racism and xenophobia[46] request Member States to ensure 'that instigating, aiding, abetting or attempting to commit an offence referred to in Article 4 [i.e. offences concerning racism and xenophobia] is punishable'. Certain Member States expressly provide criminal provisions on the instigating, aiding, abetting or attempting of racially motivated offences (see eg **Austria, Cyprus, Ireland** and **the Netherlands**). Other Member States apply their general criminal rules to these conducts (see eg. **Belgium, Denmark, Estonia, France, Finland, Germany, Hungary, Latvia, Luxembourg, Malta, Poland, Portugal, Slovenia** and the **United Kingdom**).

3. The ban of racist symbols

(p. 84 of the Opinion)

Member States are relatively divided on the issue of the ban of racist symbols.

Certain Member States such as **Austria** (where it is forbidden to publicly wear, display, depict or disseminate insignia of an organisation that is prohibited in Austria under Austrian law, particularly under the Prohibition Statute[47]), **France** (where the Penal Code prohibits the wearing of uniforms and/or emblems reminiscent of those of persons responsible for crimes against humanity), **Germany** (where the Criminal Code prohibits the use of symbols of 'unconstitutional organizations'[48]), **Hungary** (where the Criminal Code prohibits the use of symbols of despotism[49]), **Latvia, Slovak Republic** and **Sweden** do provide an explicit prohibition to wear certain symbols or insignia.

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[45] On this issue, see for instance : Conclusions and recommendations of the Committee on the Elimination of Racial Discrimination, France, U.N. Doc. CERD/C/304/Add.91 (2000), point 6.

[46] Proposal of 28 November 2001 for a Council Framework Decision on combating racism and xenophobia, COM (2001) 664 final.

[47] Sec 12 para 1 Association Act (*Vereinsgesetz*) prohibits associations if their purpose, name or form of organisation is illicit; See: Österreich, BGBl I 66/2002, (26.04.2002).

[48] *Symbols* within the meaning of Section 86a paragraph 1 of the Criminal code mean characteristic signs which may be recognized by in the form of visible or audible, embodied or un-corporeal symbols, that give uninhibited third persons the impression of a symbol of an organization of that kind which is referred to in Section 86 paragraph 1 no. 1, 2 or 4 Criminal code. Section 86a paragraph 2 sentence 1 designates as symbols, in particular, flags, insignia, uniforms, slogans and forms of greeting. The term *use* in the meaning of Section 86a of the Criminal code stands for the showing or use of the symbols under circumstances, which may be understood as a confession to the aims of the banned organization. Every use that makes the symbol optical or acoustical perceptible is included in this term.

[49] In Spring 2000 this passage criminalizing the use of dictatorial symbols was declared constitutional. Although the grounds of the judgment [Constitutional Court decision 14/2000. (V.12.)] again repeat the arguments underpinning Decision 30/1992. AB határozat of 29 March 1992 of the Hungarian Constitutional Court on the issue of incitement, giving special place to dignity of communities and endangering of public peace as possible grounds for restricting freedom of speech, the judges do not identify another basic right of greater weight regarding the constitutionality of restriction, as specified in the test used in the decision, so legitimization of lesser weight had to be sought. The judgment claimed to have found this in the fact that 'Article 61 of the Constitution does not defend statements of opinion incompatible with constitutional values.' Activity incompatible with the constitution is specified with reference to Article 2, Paragraph (3) of the Constitution which provides that no organization of society, state body or citizen may conduct activity directed at the violent acquisition or exercise of power, or at exclusive possession of power. Under this constitutional provision, everybody is entitled and obliged to act against such endeavors by legal means. At the same time, the majority constitutional judges failed to prove that the activity of persons committing an offense under the provision is necessarily directed at violent acquisition or exercise of power, or

Other Member States have decided to address this issue through general regulations – notably regulations regarding the incitement to racism and xenophobia (see eg **Belgium, Czech republic, Finland, Ireland, Italy, Lithuania, Luxembourg, Poland, Netherlands, Slovenia**) – or through specific regulations but applying only in specific areas (see eg **Portugal** and **Spain** that have enacted laws that prohibit to wear racist insignia or to show racist symbols during sport events).

4. The incrimination of forms of 'institutional racism'.

(p. 88 of the Opinion)

The Proposal for a Council Framework Decision on combating racism and xenophobia does not envisage addressing the issue of institutional racism, understood as racist acts or racial discrimination committed or incited by public authorities or public institutions, national or local. Even though Article 9 of the Proposal tackles the liability of legal persons for racist or xenophobic offences ('Member States shall ensure that legal persons can be held liable for the forms of conduct referred to in Articles 4 and 5, committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person' (…)), Article 3 of the Proposal excludes that public authorities fall within the ambit of this provision. It explicitly provides that the notion of 'legal person' – which shall apply for the purposes of the Framework Decision – means 'any entity having such status under the applicable law, except for States or other public bodies in the exercise of State authority and for public international organisations'.

However Article 4 (c) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) provides that States 'shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination'. According to paragraph 18 (h) of the ECRI General Policy Recommendation No.7 on national legislation to combat racism and racial discrimination, criminal law should penalise 'racial discrimination in the exercise of one's public office or occupation'[50]. The need for an incrimination of forms of 'institutional racism' – whether by civil servants in general or by members of the police forces – also appears in the conclusions and recommendations of the Committee on the Elimination of Racial Discrimination. In its 2000 Conclusion on **Malta** for instance, the Committee notes with concern that the new Police Code (Malta Police Force Act) provides that officers found to have treated persons in a discriminatory manner in the course of their duties are subjected to disciplinary action only. It recommends to the State party to 'take the necessary measures to ensure that criminal charges are brought against police officers for acts violating the provisions of the Convention'[51].

As regards the situation in the Member States, most of them enshrine provisions regarding the duties of civil servants in their *civil* or *administrative legislation* (see eg **Austria, Cyprus, Italy, Latvia** and **Portugal**). Certain Member States also address the issue of institutional racism through *codes of conduct or internal circulars* (see eg **Greece**). Only a minority of Member States directly address the issue of institutional racism in their *criminal law* (see eg **Belgium, Cyprus, France, Latvia, Luxembourg, the Netherlands** and **Spain**). But often there is no specific criminal regulation for expressions of institutional racism, meaning that the general rules of criminal law apply both to the civil servants and to other citizens. This is the case, for instance, in **Germany,** in **Hungary,** in **Sweden** and in the **United Kingdom**.

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exclusive possession of power. This is obviously not provided by the challenged Article 269/B. The grounds for judgment given in the majority decision at one point even acknowledge the lack of a dangerous situation by saying, 'the provision prohibits preparatory conduct, and the constitutional state defends public peace, with due heed to recent historical events.'

[50] According to the Explanatory memorandum attached to ECRI General Policy Recommendation No.7, 'racial discrimination in the exercise of one's public office or occupation includes notably the discriminatory refusal of a service intended for the public, such as discriminatory refusal by a hospital to care for a person and the discriminatory refusal to sell a product, to grant a bank loan or to allow access to a discotheque, café or restaurant'.

[51] Conclusions and recommendations of the Committee on the Elimination of Racial Discrimination, Malta, U.N. Doc. CERD/C/304/Add.94 (2000).