



UNIVERSITY OF LATVIA
FACULTY OF LAW

Promotion Thesis

**“Freedom of expression, prohibition of hate speech
and incitement to discrimination: the striking of
balance”**

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Abbreviations

CE	Council of Europe
CERD	Committee on the Elimination of Racial Discrimination
CiO	Chairman in Office
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECRI	European Commission against Racism and Intolerance
EU	European Union
EUMC	European Monitoring Centre on Racism and Xenophobia
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
NGO	Non governmental organization
OP	Optional Protocol
OSCE	Organization of Security and Cooperation in Europe
Press Law	The Law on the Press and Other Mass Media
Siracusa Principles	Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights
UDHR	Universal Declaration of Human Rights
UN	United Nations
USSR	Union of Soviet Socialist Republics

Introduction

The essential role of the right to the freedom of expression has been emphasized by many academics. John Stuart Mill is the most well known among them.¹ His arguments in favour of freedom of expression have been subsequently developed by such legal scholars and philosophers as Ronald Dworkin,² John Rawls³ and Eric Barendt.⁴ They can be summarized in four points. Firstly, the free exchange of views is necessary to search for truth, to challenge the accepted policies and look for solutions which are directed to the improvement of the society's life. Secondly, the freedom of expression is a precondition for the individual progress and self-fulfilment. Thirdly, the right to receive varying information and freely express different views is interlinked with the citizen's participation in the democratic governance. Fourthly, the freedom of expression ensures the protection against the possibility of the governing elite to silence the views it objects.

These essential claims in favour of the right to the freedom of expression explain why the states have to mention very serious reasons in order to justify the interference within the exercise of this right. However, most academics agree that this right is not absolute. Furthermore, the way it has been formulated in international human rights documents allow the imposition of restrictions on the exercise of the freedom of expression in order to protect other fundamental rights of the individuals. The expressions inciting to hatred and discrimination have frequently been among the ones, which are restricted in international human rights instruments and in national laws. What explains such approach is the fact that these expressions jeopardize rights and values, which are considered in many societies of similar importance as the right to the freedom of expression. These include for instance the right to human dignity, the right to equal treatment and prohibition of discrimination. In sweeping cases hate expressions can endanger the physical integrity of the individual or make threats to peaceful coexistence within society by denying the right of existence of certain group of society. The history of Europe proves that unrestricted dissemination of hatred against some groups of population might result in violence and even mass killings of individuals belonging to the targeted group.

¹ Mill John Stuart, "Selected Writings of John Stuart Mill", The New American Library, 1968, pp.121-230.

² Ronald Dworkin, "Taking Rights Seriously", Harvard University Press, 1977, pp.266-291.

³ John Rawls, "Political Liberalism", New York: Columbia University Press, 1993.

⁴ Erik Barendt, "Freedom of Speech", Oxford University Press, 2005, pp.6-23.

The search for balance between the right to the freedom of expression and prohibition of various manifestations of hate speech is visible in legal theory and philosophy, in international human rights documents and in national law. The law and theory in Europe in contrast to the United States of America generally express support for those restrictions on freedom of expression, which are necessary to combat incitement to discrimination and hatred. The explanations for such stance might be found in tragic history of Europe, where the repressions against certain vulnerable groups were common already since the Middle Ages. However, the differences exist also within the theory and practice in Europe. The choice for particular solutions in balancing the involved interests has been determined by the constitutional system, history, political culture, the existence of self-regulatory measures, the homogeneity of state's population and other factors.

The solutions adopted within the United Nations and European human rights sources also differ. Some documents emphasize the obligation to eliminate discrimination and other forms of hatred, others provide far reaching guarantees for the protection of the right to the freedom of expression. This divergence is explained by the various aims of these documents and events, which motivated their elaboration. For example the International Convention on the Elimination of All Forms of Racial Discrimination was largely adopted as a tool against resurgence of apartheid in South Africa and the revival of anti-Semitism in Europe. Therefore, the primary aim of this Convention is to eliminate different forms of racism and discrimination, and the implementation of other human rights is subordinated to this goal. However, the differences among various international human rights instruments concerning balancing the involved interests raise an issue about the coherence of the international human rights system and the enforceability of international standards at national level. In order to explore this subject, the thesis includes the analysis of interaction among different United Nations and European human rights mechanisms and a study of solutions adopted by states, when they are faced with contradictory obligations at international level.

The analysis of the international human rights sources makes a basis for a subsequent comparative assessment of the Latvian legal framework and case-law. To begin with, the balancing between the right to the freedom of expression and the prohibition of hate speech is a relatively new phenomenon for the Latvian authorities, media and society. Although the incitement to hatred was outlawed already in the period of Soviet Union, the relevant provisions in principle were hardly applied in practice, because due to the censorship it was not possible to communicate hate expressions to a wider audience. As a result of this, the majority of the society was left with an impression that there are no instances of hate speech. This view largely influenced the balance

between the involved interests in law and the attitude of the law enforcement authorities towards hate crimes after the restoration of independence. Moreover, in some branches like for example criminal law the existing legal framework was in principle inherited from the Soviet period. The subsequent amendments were mainly spontaneous determined by internal or external factors. For example in the summer of 2006 after numerous instances of hatred against sexual minorities the Prime Minister proposed to supplement the existing Criminal Law in order to ensure protection against manifestations of hatred also to individuals belonging to this group. However, the legislation and case-law has not always followed the developments in the society. For example there is still no special legal act which would determine the responsibility of internet service providers for the dissemination of hatred through the Internet, despite the fact that this medium of communication is frequently used in such cases.

The balance between the right to the freedom of expression and the prohibition of hate speech has not been much studied also in the Latvian legal theory. The publications of Latvian legal experts have mainly focused only on the examination of Criminal Law, but missed a comprehensive analysis of national law. This thesis attempts to redress this situation. Furthermore, it includes a assessment of national laws and jurisprudence in the light of relevant rules of principal universal and European human rights sources. Apart from identifying incompliance between the national and international regulation the author suggests concrete solutions, how to reach the maximum adequacy between both levels. The thesis also substantiates that changes in national laws and practice are not necessary only to fulfil the international legal obligations of the state, but are in accordance of interests of Latvia as a democracy. It should be emphasized that Latvia is a country with large percentage of ethnic minorities. Moreover, it is expected that the diversity of the population will increase in the future as the result of the integration processes within the European Union. The economic development of the country already now requires government to search for solutions, how to attract additional labour force. Therefore, it is essential that domestic law and practice protects all individuals against incitement to hatred and discrimination in order to ensure peaceful coexistence among different groups of society. At the same time the law should guarantee free exchange of views on issues of public interest, including the ones which are sensitive to representatives of some groups. It is not an easy task to find the balance between the analyzed interests, which would be the optimal one in the situation of Latvia. Therefore, the analysis of jurisprudence of universal and European human rights instruments serves not only as a tool for

comparative assessment, but also as a source of inspiration for various ways, how the right to the freedom of expression and the prohibition of hate speech can be balanced.

Chapter I

1. Aims and methodology

The aim of thesis is divided in the following sub-aims:

- 1) To reveal the normative approaches in the United Nations and European human rights treaties and the principles elaborated in practice by their monitoring bodies regarding the balance between the right to the freedom of expression and the prohibition of hate speech.
- 2) To analyze the reciprocity among solutions adopted within different human rights mechanisms and to explore the problems posed by this divergence as regards the implementation of international norms at national level.
- 3) To make a comparative assessment of the relevant international and Latvian legal framework and practice and in case of identifying inconsistencies to elaborate solutions corresponding to the international obligations and the interests of Latvia as a democratic state.

The following tasks served to implement these aims:

- 1) To study the approaches used to balance the right to the freedom of expression and the prohibition of hate speech in the jurisprudence of the monitoring bodies of the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination.
- 2) To identify the common and the distinctive elements in balancing the analyzed interests in the practice of the Human Rights Committee and the Committee on the Elimination of Racial Discrimination and to explore the reasons for the existing divergence.
- 3) To analyze the European Human Rights Court's case-law as regards the right to the freedom of expression and its limitations in order to detect principles the Court uses in examining such cases.
- 4) To study the standards elaborated by the European Commission against Racism and Intolerance and to examine the approach employed by this institution to combat different manifestations of hate speech.
- 5) To make a comparative assessment of the standards elaborated within the analyzed United Nations treaties and European human rights documents on the research topic in order to reveal the differences.

- 6) To characterize the problems posed by the existing divergence on the enforcement of international standards at national level and to identify issues, where there is a need to search for more coordinated approach among the involved universal and European human rights institutions.
- 7) To explore approaches, how the existing differences on balancing the freedom of expression and the prohibition of hate speech has been managed in the practice of various institutions in order to avoid the conflict among them.
- 8) To study the Latvian legal doctrine and the evolution of domestic legal framework and case-law as regards the balancing the right to the freedom of expression and prohibition of hate speech.
- 9) To make a comparative assessment of Latvian legal framework and international standards on the research issue and on the basis of conclusions made to elaborate solutions which would correspond to the international obligations of state and the interests of Latvia as a democracy.

There are several research methods used in the thesis, but the dominant one is the comparative method. It was first used to analyze the relevant jurisprudence of the two United Nations human rights treaties monitoring bodies. Subsequently, the comparative analysis was used to reveal the common and different elements as regards the research issue in the practice of the pertinent United Nations and European human rights institutions. Lastly, the thesis included the comparison between the relevant Latvian legal framework and the international and regional standards binding on the state. The inductive method was used to draw general conclusions from the study of individual cases as regards the balancing of involved interests in the practice of respective human rights bodies. Furthermore, the different methods of interpretation were used in analyzing the content of the relevant legal provisions. The historical method helped to illustrate the evolution of Latvian legal doctrine and legal framework and to discover internal and external factors which have influenced the existing balance between the right to the freedom of expression and prohibition of hate speech. In addition, this method was used to study the development of practice of United Nations and European human rights institutions on the research issue. Lastly, the sociological method served to assess the conformity of the Latvian legal framework to the latest developments and the needs of the society.

2. Structure of thesis

The promotion thesis includes an introduction, five chapters, most of which are divided in sub-chapters and the conclusions. The introductory chapter characterizes the research issue and formulates the purpose and tasks of the thesis. Furthermore, it illustrates the problems linked to the definition of terms „freedom of expression” and „hate speech” and explains the way these terms are used in the thesis. Lastly, the introduction contains description of research methods used and characterizes the legal sources and bibliography.

The second chapter explores the jurisprudence of two United Nations human rights treaties monitoring bodies, namely the Human Rights Committee and the Committee on the Elimination of Racial Discrimination in relation to the right to the freedom of expression and the prohibition of certain forms of hate speech. It reveals the evolution of the practice of both monitoring bodies and changes as regards the interpretation of the pertinent treaty norms. Subsequently, the author proceeded with a comparative assessment of the ways both Committees balance the analyzed interests and examined the reciprocity between their jurisprudence in concrete cases. Furthermore, the author studied also the ways the countries have approached the situations, when they were faced with contradictory international legal obligations as the result of the differences in the relevant practice of both bodies.

The third chapter explores the balance between the right to the freedom of expression and prohibition of hate speech at European level. The sources analyzed were the most widely accepted regional human rights treaty - the European Convention on Human Rights and the standards elaborated by the European Commission against Racism and Intolerance, the Council of Europe's institution which has a specific mandate to combat racism, xenophobia and various forms of intolerance. The first sub-chapter examines the case-law of the European Court of Human Rights. It discovers criteria, which the Court considers in passing a judgement as regards the legitimacy of restrictions imposed on the right to the freedom of expression according to the second paragraph of Article 10. It continues with an analysis of those decisions by the European Human Rights Court and by the Commission, where the complaints about the restriction of the freedom of expression were declared inadmissible on the basis of Article 17 of the Convention. The thesis also characterizes the role of Article 17 in the Convention system and those forms of hate speech which the Court and Commission have traditionally considered under this provision. The author gives a critical assessment of certain inadmissibility decisions. The main concern as regards the application

of Article 17 is the fact that this provision does not require the examination of the proportionality of the restrictive measures applied. The second sub-chapter characterizes the purpose of establishing the European Commission against Racism and Intolerance, its mandate and methods of work, differences from the Court, and the legal approaches it utilizes in balancing the analyzed interests. The main focus is on the analysis of recommendations and state reports elaborated by the Committee. The recommendations on combating various manifestations of hate speech illustrate alternative ways of balancing the interests involved. Furthermore, they provide well-detailed and comprehensive guidelines for national legislation as regards the research issue. Apart from recommendations the author analyzed reports prepared by the Committee on the situation in different states. These reports highlight the problems common in most European states, as for example the hate speech in political discourse, and illustrate various legal solutions adopted at national level. As a sample case-study I chose reports on those states, where the problems of hate speech were among the issues of special concern and reports on other two Baltic States, which face the same problems as Latvia in searching the balance between the different interests involved.

The fourth chapter of promotion work provides comparative assessment of the practice of universal and regional human rights institutions analyzed before. This analysis reveals common elements and differences between various human rights bodies as regards the balancing of the right to the freedom of expression and prohibition of hate speech. It characterizes the impact of existing divergence in their jurisprudence on the implementation of international standards at national level and identifies those issues which require a more coordinated approach in order to improve the enforcement of relevant provisions. The analysis also explains the reasons for the different approaches to the balancing of the pertinent interests.

The last chapter gives a comprehensive analysis of the Latvian legal doctrine, relevant statutes and case-law in a comparative context. It illustrates the historical evolution of laws and highlights the most essential international and domestic factors, which have determined the existing balance between the freedom of expression and the prohibition of different manifestations of hatred. Subsequently, the thesis identifies the most serious contradictions between the domestic and international rules and reveals those issues where the law does not correspond to the latest developments in the society. It elaborates concrete suggestions in order to make the domestic legal framework and practice in accordance with the international obligations and the interests of Latvia as a state where all groups of society are protected against incitement to hatred. The final part of thesis formulates conclusions and suggestions.

3. Terminology

The analysis of the thesis relates to the study of interaction between the two terms: the “freedom of expression” and “hate speech.” International human rights monitoring bodies and legal scholars sometimes separate such manifestations of the right to the freedom of expression as freedom of press, artistic freedom and political speech. However, in the present thesis all these manifestations are analyzed together, as the analysis is focused on balancing the prohibition of hate speech with the right to the freedom of expression in general.

There is no definition of the term “freedom of expression” in international human rights instruments. The content and elements of this right becomes apparent only in the case-law of the European Court of Human Rights and jurisprudence of the United Nations Human Rights Committee and other treaty monitoring bodies. While the analysis of the practice of different human rights institutions provides a general understanding on the core of this right, there are differences among the institutions as regards its scope. For example the European Court of Human Rights has declared some manifestations of hate speech to fall outside the scope of freedom of expression. At the same time in the jurisprudence of the Human Rights Committee similar expressions are considered to form a part of the freedom of expression, while the Committee recognizes the possibility to impose legitimate restrictions on them. In view of the existing differences the thesis does not contain a single definition, but the term “freedom of expression” is used in the context of each chapter. The formulation of a definition would exclude some manifestations of the freedom of expression from the scope of the analysis and thus would create obstacles for the purpose of this thesis, which is aimed at the analysis of balancing the prohibition of hate speech with various forms of freedom of expression.

A similar approach is used in relation to the term “hate speech.” The provisions of international human rights treaties, other sources of law and the interpretation of these norms in practice identifies the core of this term and its constituting elements. However, there are differences as regards the content of this term and none of the international human rights sources gives its definition. The only exception is Recommendation on „Hate Speech” adopted by Council of Europe Committee of Ministers on 30 October 1997.⁵ However, despite the fact that the definition included

⁵ Recommendation No. R (97) 20 of the CE Committee of Ministers on “Hate speech”, adopted on 30 October 1997. Accessible at: [http://www.coe.int/t/e/human_rights/media/4_Documentary_Resources/CM/Rec\(1997\)020&ExpMem_en.asp](http://www.coe.int/t/e/human_rights/media/4_Documentary_Resources/CM/Rec(1997)020&ExpMem_en.asp) (last visited 07.08.2006)

in this document is a very broad one, it does not comprise all manifestations of “hate speech”. At the same time the Recommendation includes some which are not covered by the analyzed human rights treaties. The differences among various human rights documents relate both to the types of prohibited expressions and groups which are protected against hate speech.

For instance, most human rights documents outlaw such manifestations of hate speech as incitement to violence, hatred or discrimination against some group of the society. Some legal sources include also expressions which defame or make a ridicule of the person on the basis of his/her group affiliation. Furthermore, some documents directly prohibit specific forms of hate speech as for example the dissemination of xenophobia and anti-semitism, the denial or justification of holocaust and of other crimes against humanity. In other legal sources the legitimate restrictions on the freedom of expression are formulated in a more general way. In view of all these differences the thesis does not include a definition of the term “hate speech”, but this term is used according to its content in the international and regional human rights documents analyzed.

There are two terms used in the title of the thesis: “prohibition of hate speech” and “incitement to discrimination.” This was done in order to emphasize that the analysis deals not only with expressions inciting to violence, but also the ones inciting to discrimination. However, within the thesis they are frequently merged under the term “hate speech”, which includes also the incitement to discrimination. The concrete manifestations of “hate speech” are mentioned only in those situations, when it is considered essential for the analysis of the specific issue.

4. Characteristics of legal and other sources

Court judgements, jurisprudence² of international human rights treaties monitoring bodies and other primary sources form the larger half. However, among the sources analyzed there were also scientific research and publications, which deal with theoretical aspects of balancing the freedom of expression and prohibition of hate speech or study the practice of different human rights institutions as regards the balancing of the interests involved.

Theoretical aspects of the research issue are examined in the writings of such philosophers and legal scholars as John Stuart Mill, Ronald Dworkin, John Rawls and Eric Barendt. The publications of these authors illustrate the justifications for the right to the freedom of expression and highlight at theory level problems related to finding the balance between the freedom of expression and prohibition of hate speech. Various approaches to the balancing of the analyzed interests are evident

also in the jurisprudence of the international human rights institutions and particularly in the individual opinions adopted by judges or members of treaty monitoring bodies.

Scientific publications, which analyze specific United Nations or European human rights documents demonstrate the way the respective provisions of human rights treaties have been applied in practice and give guidance to the main judgements and decisions adopted on the thesis subject. Besides, they include the study of those cases, which reveal the inconsistencies in the practice and suggest alternative ways in interpreting the respective treaty provisions. The fundamental monographs of Manfred Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary* and Natan Lerner, *The U.N. Convention on the Elimination of All Forms of Racial Discrimination* are the main publications used concerning the study of jurisprudence of United Nations Human Rights treaties monitoring bodies. Despite the fact that the work of Natan Lerner was published already in 1980's, it is still the most comprehensive analysis of the history of the Convention and evolution of its provisions. In addition to these works the author used the scientific publications accessible in various electronic data bases, which add new arguments to the analysis made by Manfred Nowak and Natan Lerner.

The study of the work and standards adopted by the European Commission against Racism and Intolerance was based on the original sources, because the Commission was established only in 1993 and there are no scientific publications devoted to the analysis of Commission's activities on the thesis subject. On the contrary, there are many studies on the European Convention of Human rights and the practice of the European Human Rights Court. Among the main ones used in thesis was one of the oldest and most comprehensive analysis: *Theory and Practice of the European Convention on Human Rights* written by P. Van Dijk and G.J.H Van Hoof and the monograph of C.Ovey and R.White *The European Convention on Human Rights*, which illustrates the recent trends in Courts case-law.

The primary sources firstly include the relevant General Comments and decisions on individual complaints adopted by the Human Rights Committee and the Committee on the Elimination of Racial Discrimination. These sources illustrate the content and interpretation of the analyzed human rights treaties provisions. The decisions also characterize the interaction between both human rights monitoring bodies, because the states and petitioners sometimes invoke the provisions of the other body in order to substantiate their position. Lastly, the author analyzed the state reports on the implementation of both treaties and the conclusions adopted by Committees after the assessment of these reports. This source demonstrates the main problems of enforcing the relevant treaty

provisions and the ways in which the states have implemented international obligations at the national level. Furthermore, the primary sources comprise the decisions and judgements of the European Court of Human Rights. They were used as a main basis for the analysis of the relevant provisions of the Convention. The judgements concerning the assessment of limitations on expressions inciting to hatred and discrimination do not create the majority of the Court's case-law on Article 10. Therefore, in order to illustrate the interpretation of Article 10 the thesis comprises the study of case-law which relates to different manifestations of freedom of expression.

However, many complaints regarding restrictions on expressions inciting to hatred or discrimination are rejected on admissibility stage on the basis of Article 17. The analyzed case-law on Article 17 includes both the decisions of the Court and the European Commission of Human Rights, because the Commission was responsible for the examination of the admissibility of complaints until the Additional Protocol 11 entered into force. In total there are more than forty judgements and decisions studied, which makes it possible to conceive the principles applied by Court and the Commission in balancing the right to the freedom of expression and the prohibition of hate speech. Lastly, the primary sources, as for example reports on states and recommendations, were also used in studying the standards elaborated by the European Commission against Racism and Intolerance.

The emphasis is on the study of primary sources, because their analysis provides an immediate and precise insight into the criteria and arguments considered by treaty monitoring bodies in balancing the freedom of expression and other interests. The academic commentaries give a critical assessment of the practice of different human rights bodies, but they do not reveal all aspects of the decision making process. A source of particular interest is the individual opinions adopted by the members of the Human Rights Committee or the judges of the European Court of Human Rights. These opinions frequently illustrate the inconsistencies in the jurisprudence and alternative ways of interpreting respective treaty provisions. The analysis of primary sources also identifies obligations, which the respective provisions of international human rights sources impose on states. The clarity about the scope and content of these provisions is essential to make a comparative assessment of domestic and international legal sources in the following chapter.

In analyzing the interaction between the international and domestic human rights norms I used both the monographs of well-known experts of international law as for example Malcolm N. Shaw, Peter Malanczuk and the publications of Latvian legal scholars as for instance Ineta Ziemele, Juris Bojars and Egils Levits. The first type of sources illustrates general theoretical issues as regards the interaction between international and national law, whereas the second ones characterize these

issues in the context of Latvian legal system and practice. Furthermore, the publications of such Latvian legal experts as Martins Mits, Valentija Liholaja and Andrejs Judins highlighted the most controversial issues in Latvian legal doctrine as far as the consistency between the provisions of Latvian Criminal Law and pertinent international rules is considered. In addition to scholarly publications, I have analyzed judgements of the Constitutional Court and ordinary courts. These judgements reveal the interpretation of international human rights norms by national courts and demonstrate the impact of international standards on the way in which the domestic legal provisions are applied.

Chapter II

The United Nations system: International Covenant on Civil and Political Rights and International Convention on the Elimination of All Forms of Racial Discrimination

Introduction

This chapter will focus on the analysis of relationship between the prohibition of hate speech and the right to freedom of expression within the context of two international and widely ratified human rights treaties: the International Covenant on Civil and Political Rights (ICCPR)⁶ and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)⁷.

Both of them recognise the right to the freedom of expression as well as prohibit the speech inciting to racial discrimination or hatred. However, the respective provisions of both treaties and the approach of their monitoring bodies to some degree differ in assessing the permissible limitations on the freedom of expression in favour of prohibition of hate speech.

Initially, both the relevant articles of these instruments and the practice of their supervisory bodies will be examined separately. The aim of this analysis is to identify the principles applied by the Human Rights Committee (HRC) and the Committee on the Elimination of Racial Discrimination (CERD) in striking the balance between the freedom of expression and prohibition of hate speech. The relevant norms of the treaties will be analysed predominantly on the basis of their interpretation in the practice of the respective supervisory bodies: in decisions on individual communications, in concluding observations⁸ on state reports and in general comments⁹ or recommendations.¹⁰ Yet,

⁶ There are 156 States Parties to the International Covenant on Civil and Political Rights. Accessible at: <http://www.ohchr.org/english/countries/ratification/4.htm> (last visited 29.09.2006)

⁷ There are 170 States Parties to the International Convention on the Elimination of All Forms of Racial Discrimination. Accessible at: <http://www.ohchr.org/english/countries/ratification/2.htm> (last visited 29.09.2006)

⁸ According to the glossary of treaty bodies terminology *Concluding Observations* (sometimes called also Concluding Comments) are defined as “The observations and recommendations issued by a treaty body after consideration of a

other relevant sources of interpretation which might complement the analysis such as comments by individual academics or relevant documents adopted by UN bodies¹¹ will be referred to occasionally.

This will be followed by a comparative assessment afterwards. The outcome of this comparative analysis identifies what is common and what is different in the practice of CERD and HRC in relation to application of substantial provisions and procedural approaches to striking the balance between the freedom of expression and prohibition of hate speech. Furthermore, the comparative assessment gives an explanation for the differences discovered as well as examines advantages and disadvantages in the approaches of human rights treaties monitoring bodies. Lastly, the comparative analysis characterizes the possible negative effects caused by the differences in practice of both bodies on the issue and makes proposals for making the jurisprudence of Committees more coherent in order to strengthen the authority of both HRC and CERD.

1. Analysis of the International Covenant on Civil and Political Rights (ICCPR)

1.1. Scope of the right to the freedom of expression and relationship between the Article 19 and Article 20 (2)

a) Scope of the right to the freedom of expression

The right to the freedom of opinion and expression is guaranteed in Article 19 of the ICCPR. The paragraphs one and two of this provision declare:

“1. Everyone shall have the right to hold opinions without interference.

State party’s report. Concluding Observations refer both to positive aspects of State’s implementation of the treaty and areas where the treaty body recommends that further action needs to be taken by the State...”

See: <http://www.ohchr.org/english/bodies/treaty/glossary.htm>

⁹ According to the glossary of treaty bodies terminology *General Comment* is “a treaty body’s interpretation of the content of human rights provisions, on thematic issues or its methods of work. They often seek to clarify the reporting duties of State parties with respect to certain provisions and suggest approaches to implementing treaty provisions.”

Ibid.

¹⁰ General Recommendation is the term used by CERD to refer to the same source – general comments. Ibid.

¹¹ Look for example Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1985/4 (1985). Accessible at: <http://wwwserver.law.wits.ac.za/humanrts/instree/siracusaprinciples.html> (last visited 27.06.2006)

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”¹²

The monitoring body of the Covenant - the Human Rights Committee has constantly emphasized the importance of the right to the freedom of expression in a democratic society despite the fact that there is no reference to democracy in the text of Article 19. In the Communication of *Tae-Hoon Park v. Republic of Korea* it stated: “The right to freedom of expression is of paramount importance in any democratic society, and any restrictions to the exercise of this right must meet a strict test of justification.”¹³ The importance of freedom of expression in a democratic society has also been recognized by the HRC in its findings as regards acts which might constitute the interference within this right. Apart from long-established restrictions on the right to the freedom of expression like censorship and fine or imprisonment as a result of the exercise of this right, the Committee has acknowledged that also the following acts might constitute restrictions on free expression: the loss of an employment position as a result of expression of ones views,¹⁴ an obligation to register the publication in advance¹⁵ or the refusal to grant permanent accreditation in a Parliamentary Press Gallery.¹⁶

The Committee has confirmed that the scope of this right is very wide one. For example in a case of *Ballantyne, Davidson, McIntyre v. Canada* the Committee refused to accept the arguments of the Government of Quebec that commercial activity, namely, the prohibition on outdoor advertising in a language other than the French, does not fall within the ambit of Article 19. The HRC emphasized that: “Article 19, paragraph 2, must be interpreted as encompassing every form of subjective ideas and opinions capable of transmission to others, which are compatible with article 20 of the Covenant, of news and information, of commercial expression and advertising, of works of art, etc.;

¹² Cited from: http://www.unhchr.ch/html/menu3/b/a_ccpr.htm (last visited 12.09.2006)

¹³ Communication *Tae-Hoon Park v. Republic of Korea*, No 628/1995, 20/10/98, CCPR/C/64/D/628/1995 (1998), paragraph 10.3. Accessible at: <http://www.unhchr.ch/tbs/doc.nsf> (last visited 15.08.2006). See also Communication *Laptsevich v. Belarus*, No 780/1997, 13/04/2000, CCPR/C/68/D/780/1997, paragraph 8.2. Accessible at: <http://www.law.wits.ac.za/humanrts/undocs/session68/view780.htm> (last visited 15.08.2006).

¹⁴ Communication *Ross v. Canada*, No 736/2000: Canada. 26/10/2000. CCPR/C/70/D/736/1997. (Jurisprudence) Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/29712c8ddea3414dc12569ad003d0316?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/29712c8ddea3414dc12569ad003d0316?Opendocument) (last visited 10.09.2006)

¹⁵ Communication *Laptsevich v. Belarus*, No 780/1997, 13/04/2000, CCPR/C/68/D/780/1997, paragraph 8.1. Accessible at: <http://www.law.wits.ac.za/humanrts/undocs/session68/view780.htm> (last visited 15.08.2006)

¹⁶ Communication *Robert W. Gauthier v. Canada*, No 633/1995. 05/05/1999, CCPR/C/65/D/633/1995, paragraph 13.6. Accessible at: <http://www.unhchr.ch/tbs/doc.nsf> (last visited 15.08.2006)

it should not be confined to means of political, cultural or artistic expression. In the Committee's opinion, the commercial element in an expression taking the form of outdoor advertising cannot have the effect of removing this expression from the scope of protected freedom.”¹⁷

The HRC expressed its opinion on the scope of right to the freedom of expression also in the case of *Lee v. Republic of Korea*, where the author of communication complained about alleged violation of his rights to the freedom of expression and to the freedom of association. He was sentenced with one-year imprisonment for membership in Korean Federation of Student Councils, an organization which was declared by Supreme Court of Korea to constitute an anti-State organization and “enemy-benefiting group” because its programme was to some extent similar to North Korean ideology and strategy to achieve national unification.¹⁸ In its assessment of the case the HRC has noted that in a democratic society it is essential to protect those ideas, which are not favourably received by the government or the majority of population as long as they are promoted peacefully.¹⁹ The Committee also emphasized that existence of a plurality of associations is one of the foundations of a democratic society. It found that author’s conviction violated his right to the freedom of association on the basis of two factors. First, the Committee stressed the vague nature of National Security Law provisions, which constituted the legal basis for the applicant’s conviction. Secondly, the HRC took into consideration the lack of state to specify precisely the nature of threat posed by the author’s membership in a Student Council. In the light of finding violation under article 22 of ICCPR, the Committee did not examine alleged violation of author’s right to the freedom of expression. However, the principle that in a democratic society there is a need to allow for non-violent expression of different views, including the ones not acceptable to the majority, is applicable also to the freedom of expression. Moreover, the borders between the freedom of

¹⁷ See the Communication *Ballantyne, Davidson, McIntyre v. Canada*, No 385/1989: Canada, 05/05/93, CCPR/C/47/D/359/1989, (Jurisprudence) paragraph 11.3.

Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/eca9df4fd85650a6c1256ae300493208?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/eca9df4fd85650a6c1256ae300493208?OpenDocument) (last visited 15.08.2006)

¹⁸ The basis of his conviction was the article 7 (1) of the National Security Law which reads: "Any person who praises, incites or propagates the activities of an anti-State organization, a member thereof, or a person who has received an order from it, or who acts in concert with it, or propagates or instigates a rebellion against the State, with the knowledge of the fact that it may endanger the existence and security of the State or democratic fundamental order, shall be punished by imprisonment for a term not exceeding seven years." Communication *Lee v. Republic of Korea*, No 1119/2002. 23/08/2005. CCPR/C/84/D1119/2002, paragraph 2 of the Notes o Communication.

Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.84.D.1119.2002.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.84.D.1119.2002.En?OpenDocument) (last visited 17.08.2006)

¹⁹ Communication *Lee v. Republic of Korea*, No 1119/2002. 23/08/2005. CCPR/C/84/D1119/2002, paragraph 7.2.

Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.84.D.1119.2002.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.84.D.1119.2002.En?OpenDocument) (last visited 17.08.2006)

association and freedom of expression are sometimes not fixed as the establishment of an association might be an instrument for discussing and expressing ideas and views in public.

In order to give a more extensive analysis on the scope of the freedom of expression one needs to examine also the permissible restrictions on this right, since the Committee has stated that: “It is the interplay between the principle of freedom of expression and ... limitations and restrictions which determines the actual scope of the individual's right.”²⁰

b) Restrictions on the freedom of expression

Similarly as in the Universal Declaration of Human Rights (UDHR)²¹ and other human rights treaties,²² this right is not absolute but may be subject to restrictions. According to paragraph 3 of Article 19 of 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.”²³

²⁰ General Comment No.10: Freedom of expression (Art.19), Human Rights Committee, 29/06/83, paragraph 3.

Accessible at:

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/2bb2f14bf558182ac12563ed0048df17?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/2bb2f14bf558182ac12563ed0048df17?Opendocument) (last visited 30.09.2006)

²¹ The Article 29 (2) of the UDHR states:

“In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society”.

Accessible at: <http://www.un.org/Overview/rights.html> (last visited 30.09.2006)

²² For example, the paragraph 2 of the Article 10 of the ECHR, which guarantees the right to the freedom of expression, states:

“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.”

Accessible at: <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm> (last visited 30.09.2006)

²³ Cited from: http://www.unhchr.ch/html/menu3/b/a_ccpr.htm (last visited 30.09.2006)

While restrictions on the freedom of expression are allowed, they may be imposed only in strict accordance with the conditions provided in paragraph 3 and may not put in jeopardy the essence of the right itself.²⁴ The Committee has stressed that: “Any restriction of the freedom of expression must cumulatively meet the following conditions: it must be provided for by law, it must address one of the aims enumerated in paragraph 3(a) and (b) of Article 19, and must be necessary to achieve the legitimate purpose.”²⁵ In addition, limitations must be construed narrowly, with a presumption in favour of freedom of expression.²⁶

The examination of individual complaints by HRC indicate that the restrictions on freedom of expression are usually established by law and are based on the one of the legitimate grounds mentioned in paragraph 3. In order to restrict expressions inciting to hatred, apart from quoting Article 20 of ICCPR, the HRC has referred to such legitimate aims as “the protection of national security or of public order” and the “respect of the rights or reputation of others.”²⁷ As regards the interpretation of the latter concept, the Committee has explained that this need not relate to the rights of a single, identifiable person, but may relate to a community as a whole. For example in the Communication of *Ross v. Canada* the HRC made a reference to its decision in an earlier case and declared that: “For instance, and as held in *Faurisson v France*, restrictions may be permitted on statements which are of a nature as to raise or strengthen anti-Semitic feeling, in order to uphold the Jewish communities' right to be protected from religious hatred. Such restrictions also derive support from the principles reflected in Article 20 (2) of the Covenant.”²⁸

However, the most disputed issue concern the assessment of the “necessity” of restrictions. The HRC has not formulated clearly or defined what the term “necessity” implies. Neither does the

²⁴ Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1985/4 (1985), Principle 2. Accessible at:

<http://wwwserver.law.wits.ac.za/humanrts/instree/siracusaprinciples.html> (last visited 27.06.2006)

²⁵ See the Communication *Ballantyne, Davidson, McIntyre v. Canada*, No 385/1989: Canada, 05/05/93, CCPR/C/47/D/359/1989, (Jurisprudence) paragraph 11.4.

Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/eca9df4fd85650a6c1256ae300493208?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/eca9df4fd85650a6c1256ae300493208?Opendocument) (last visited 15.08.2006)

²⁶ Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1985/4 (1985), Principle 3. Accessible at:

<http://wwwserver.law.wits.ac.za/humanrts/instree/siracusaprinciples.html> (last visited 27.06.2006)

²⁷ See the Communication *Faurisson v. France*, No 550/1993: France. 16/12/96. CCPR/C/58/D/550/1993 and the Communication *Ross v. Canada*, No 736/2000: Canada. 26/10/2000. CCPR/C/70/D/736/1997. Accessible at: <http://www.unhchr.ch/tbs/doc.nsf/> (last visited 10.09.2006)

²⁸ Communication *Ross v. Canada*, No 736/2000: Canada. 26/10/2000. CCPR/C/70/D/736/1997, paragraph 11.5. Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/29712c8dde3414dc12569ad003d0316?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/29712c8dde3414dc12569ad003d0316?Opendocument) (last visited 10.09.2006)

General Comment on Freedom of Expression contain an elaboration on this issue.²⁹ Yet, certain elements of this term might be identified in the case law of HRC and the practice of Committee suggests that interpretation of the “necessity requirement” in paragraph 3 of Article 19 of ICCPR would be close to the meaning of this term expressed in *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights (Siracusa Principles)*. According to Siracusa Principles the restrictions should, inter alia, respond to a pressing public or social need, pursue a legitimate aim and to be proportionate to that aim.³⁰ Such a formulation of the concept of “necessity of restrictions” is to a large degree similar to the one as interpreted by other human rights treaties monitoring bodies, like the European Court of Human Rights.

In examining whether the restrictions in question meet the requirements of the term “necessity” the HRC has particularly opposed the restrictions which have been formulated broadly and have left the scope for their abusive application and interpretation. For example in the case of *Kim v. Republic of Korea* the author of communication was a founding member and chair of a political organization. He was imprisoned because he disseminated material that was critical of the government and he was appealing for national re-unification, which according to the national Courts constituted activities coinciding with the policy and being beneficial to North Korea. The actions against him were based on National Security Law, which stated that “any person, who assists an anti-state organisation by praising or encouraging the activities of the organisation, shall be punished” and “any person who produces or distributed documents, drawings or any other materials to the benefit of an anti-state organisation shall be punished”.³¹

In assessing the necessity of restrictions on the freedom of expression the Committee emphasized the need for careful scrutiny in view of the “broad and unspecific terms in which the offence under the National Security Law is formulated.”³² The HRC noted that the State had failed to explain how

²⁹ General Comment No.10: Freedom of expression (Art.19), Human Rights Committee, 29/06/83. Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/2bb2f14bf558182ac12563ed0048df17?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/2bb2f14bf558182ac12563ed0048df17?Opendocument) (last visited 30.09.2006)

³⁰ Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1985/4 (1985), Principle 10. Accessible at: <http://wwwserver.law.wits.ac.za/humanrts/instreet/siracusaprinciples.html> (last visited 27.06.2006)

³¹ Communication *Kim v. Republic of Korea*, No 574/1994, 04/01/1999, CCPR/C/64/D/574/1994, paragraph 2.3. Accessible at: <http://www1.umn.edu/humanrts/undocs/session64/view574.htm#Made%20public%20by%20decision%20of%20the%20Human%20Rights%20Committee>. (last visited 15.08.2006)

³² *Ibid.*, paragraph 12.3.

the dissemination of the views of the author created a risk to national security and what the nature or extent of such a risk could be bearing in mind that North Korean policies were well known within the State party. Another evidence of arbitrary application of these broadly defined restrictions was the way the national courts have assessed the case. The Committee found that: “There is no indication that the courts...considered whether the contents of the speech or the documents had any additional effect upon the audience or readers such as to threaten public security, the protection of which would justify restriction within the terms of the Covenant as being necessary.”³³ Since the state has failed to specify the precise nature of the threat allegedly posed by the author’s statements, the restriction of the author’s right to freedom of expression were found incompatible with the requirements of Article 19, paragraph 3, of the ICCPR. As follows from the quotations of the HRC decision the requirement to define the restrictions in explicit terms and the need to establish the causal link between the expressions restricted and the legitimate aim pursued are indispensable criteria in order to justify the “necessity” of the restrictive measures.

The Committee has taken also into account the proportionality of sanctions or other measures applied in its assessment of the “necessity” of restrictions. For example in the case of *Ross v. Canada*³⁴ it pointed inter alia to a minor and short term effect on the applicant of the restrictive measure applied in finding the restrictions justified.³⁵ On the contrary, in the case of *Lee v. Republic of Korea* HRC emphasized that the State Party should have demonstrated that less intrusive measures³⁶ would be insufficient to achieve the purpose pursued by restrictions.³⁷ Furthermore, the Committee has required to ensure that procedure for the application of restrictions on freedom of expression is not arbitrary. For example, in the case of *Gauthier v. Canada* the author of the Communication was refused permanent membership of the Canadian Parliamentary Press Gallery. The HRC acknowledged that an accreditation system is a justifiable method of achieving such a

³³ Communication *Kim v. Republic of Korea*, No 574/1994, 04/01/1999, CCPR/C/64/D/574/1994, paragraph 12.4. Accessible at:

<http://www1.umn.edu/humanrts/undocs/session64/view574.htm#Made%20public%20by%20decision%20of%20the%20Human%20Rights%20Committee>. (last visited 15.08.2006)

³⁴ See the analysis of this case in Sub-chapter 1.2. (b) of this Chapter.

³⁵ As the result of his expressions the author lost a teaching position. He was temporarily placed on unpaid leave of absence for a couple of months, which is no small sanction. However, in fact he did not need to stay on unpaid leave the whole term and he was appointed to a non-teaching position within a very short period of time.

Communication *Ross v. Canada*, No 736/2000: Canada. 26/10/2000. CCPR/C/70/D/736/1997, paragraph 8.3. Accessible at: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/29712c8ddea3414dc12569ad003d0316?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/29712c8ddea3414dc12569ad003d0316?Opendocument) (last visited 10.09.2006)

³⁶ Mr. Lee was convicted with one year imprisonment on the basis of national security protection for a membership in an organization who allegedly supported the policy of the Democratic People’s Republic of Korea (North Korea).

legitimate aim as the need to prevent interference of elected bodies carrying out their functions. However, the Committee found that "...The relevant criteria for the accreditation scheme should be specific, fair and reasonable, and their application should be transparent. In the instant case, the State party has allowed a private organization to control access to the Parliamentary press facilities, without intervention. The scheme does not ensure that there will be no arbitrary exclusion from access to the Parliamentary media facilities. In the circumstances, the Committee is of the opinion that the accreditation system has not been shown to be a necessary and proportionate restriction of rights within the meaning of Article 19, paragraph 3, of the Covenant..."³⁸

c) Application of margin of discretion

In one of the cases concerning the assessment of the necessity of restrictions, yet not linked to "hate speech", the HRC has also used the concept of the "margin of discretion" in assessing the need for limitations in the particular country. This was the case of *Hertzberg et al. v Finland*³⁹ which concerned the interference of the State controlled Finnish Broadcasting Company with the right of freedom of expression and information of the number of applicants, inter alia, by censoring of radio and TV programmes dealing with homosexuality. Among the applicants were also journalists who prepared a radio programme and TV series related to the issues of homosexuality and whose programmes were censored and cut before the broadcast and transmission. The Finnish government invoked such a legitimate aim referred to in Article 19 (3) as public morals in order to justify the actions complained and the Finnish legislation these actions were based. The HRC in this regard stated that: "public morals differ widely. There is no universally applicable common standard. Consequently, in this respect, a certain margin of discretion must be accorded to the responsible national authorities."⁴⁰ The Committee also stressed that programmes were communicated through radio and TV, whose audience cannot be controlled. It found the State's actions justifiable, because

³⁷ Communication *Lee v. Korea*, No 1119/2002. 23/08/2005. CCPR/C/84/D1119/2002. (Jurisprudence), paragraph 7.2. Accessible at: <http://www.unhchr.ch/tbs/doc.nsf> (last visited 17.08.2006)

³⁸ Communication *Robert W. Gauthier v. Canada*, No 633/1995. 05/05/1999. CCPR/C/65/D/633/1995, paragraph 13.6. Accessible at:

<http://www.unhchr.ch/tbs/doc.nsf> (last visited 15.08.2006)

³⁹ See the Communication *Hertzberg et al. v Finland*, No 61/1979: Finland. 02/04/82. CCPR/C/15/D/61/1979. (Jurisprudence), paragraph 18.21.

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/23a5d17c91636ac3c1256ab50030c76b?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/23a5d17c91636ac3c1256ab50030c76b?Opendocument) (last visited 10.09.2006)

⁴⁰ *Ibid.*, paragraph 10.2.

some aspects of the programme could be judged as encouraging homosexual behaviour and such discussions on TV might have a harmful effects on minors.

In reaching such a conclusion HRC gave a sweeping preference to the discretion of government to decide on restrictions necessary to protect “public morals”. While the “public morals” is among the grounds were also the European Human Rights Court is occasionally granting wider margin of appreciation to States,⁴¹ the HRC has not assessed other essential criteria in this case, which would question the need to limit the freedom of expression of the applicants. These include for example that the case related to the issue of public concern – discussions about the homosexuality and the situation of homosexuals in the Finnish society and concerned the possibility of journalists to present different views about this issue as well as that interference was in a form of censorship. However, it should be stressed that this decision of HRC was adopted in 1979 and an assessment of the case today would certainly be different if one takes into account both the transformation of the position within the society towards the issue of homosexuality and the latest decisions of the HRC, where much more significance is afforded to the right to the freedom of expression and particularly the role of media in ensuring this right. For instance in the Communication of *Laptsevich v. Belarus* the Committee emphasized that: “The right to freedom of expression is of paramount importance in any democratic society, and any restrictions to the exercise of this right must meet a strict test of justification.”⁴² Furthermore, in the *Gauthier v. Canada* the Committee has stressed the importance of media in providing the society with the opportunity to have access to information and to disseminate opinions about the activities of elected bodies and their members. In particular The HRC stated that: “In order to ensure the full enjoyment of rights protected by Article 25⁴³, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.”⁴⁴

An extensive margin of discretion accorded to the State in the case of *Hertzberg et al. v Finland* might also explain the fact why the application of this concept is an exception in the jurisprudence

⁴¹ *Otto-Preminger-Institut v. Austria*, European Court of Human Rights, Judgment of 20 September 1994. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 19.06.2006)

⁴² Communication *Laptsevich v. Belarus*, No 780/1997, 13/04/2000, CCPR/C/68/D/780/1997, paragraph 8.2. Accessible at: <http://www.law.wits.ac.za/humanrts/undocs/session68/view780.htm> (last visited 15.08.2006)

⁴³ See the text of the Article 25 of ICCPR in the Appendix.

⁴⁴ Communication *Robert W. Gauthier v. Canada*, No 633/1995. 05/05/1999. CCPR/C/65/D/633/1995, para 13.4. Accessible at: <http://www.unhchr.ch/tbs/doc.nsf> (last visited 15.08.2006)

of HRC. The Committee has directly rejected to use the margin of discretion in a subsequent case against Finland. The case of *Lansmann v. Finland*⁴⁵ concerned the complaint of indigenous population about the alleged violation of Article 27, namely, their right to enjoy their culture based on reindeer husbandry as the result of planned economic activities on the reindeer herding territory. In its submission on the merits the State party argued that in the application of Article 27 a margin of discretion must be left to national authorities, because “[...] As confirmed by the European Court of Human Rights in many cases ..., the national judge is in a better position than the international judge to make a decision. In the present case, two administrative authorities and ... the Supreme Administrative Court, have examined the granting of the permit and related measures and considered them as lawful and appropriate”⁴⁶. The Committee, however, rejected this approach by stating that: “A State may understandably wish to encourage development or allow economic activity by enterprises. The scope of its freedom to do so is not to be assessed by reference to a margin of appreciation, but by reference to the obligations it has undertaken in Article 27. Article 27 requires that a member of a minority shall not be denied his right to enjoy his culture. Thus, measures whose impact amount to a denial of the right will not be compatible with the obligations under Article 27. However, measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under Article 27.”⁴⁷

The Committee has apparently rejected the Finnish claim because the Finland had thoroughly examined the case. But this quotation from the Committee’s view also illustrates that the HRC is reluctant to grant some margin of discretion as regards application of rights of the Covenant. Instead of entitling the State with some discretion the Committee is focusing on the degree of impact of restrictive measures on the enjoyment of the rights guaranteed by the ICCPR. Such approach certainly has some advantages in contrast to the concept of “margin of discretion”. It leaves the Committee a certain scope of flexibility in its consideration of the alleged violation of the Covenant. This is particularly essential as regards country specific situations or the issues where the practice of the States parties differs widely. In assessing the degree of encroachment on the enjoyment of the

⁴⁵ See the Communication *Lansman v Finland*, No 511/1992: Finland. 08/11/94. CCPR/C/52/D/511/1992. (Jurisprudence) Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/7e86ee6323192d2f802566e30034e775?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/7e86ee6323192d2f802566e30034e775?Opendocument) (last visited 15.09.2006)

⁴⁶ Ibid., paragraph 7.13.

⁴⁷ Ibid., paragraph 9.4.

Covenants rights the Committee maintains a power to evaluate such situations itself, while according to the concept of “margin of discretion” it transfers powers of assessment to states. Besides margin of discretion left to States might result in lower standards. The Covenant in contrast to ECHR is an international instrument and accordingly there would be much more issues where there is no general consensus among the member states. The HRC as a highest supervisory body of ICCPR could make a final decision in relation to which rights and how far “margin of discretion” might be applied. However, it would need to indicate some objective criteria or emphasize the areas of the application of “margin of discretion” in order to escape accusations from member states about unfair application of this concept. This, however, might result in abuse of this concept in view of wide variety of practices in States parties. At the same time, the evaluation of the degree of encroachment is largely a subjective criteria and thus mainly within the determination of the Committee. Therefore, in order to maintain the confidence of States parties the HRC should carry out such evaluation in a way, which allows to adress all country specific situations.

d) Relationship between Articles 19 and 20 (2)

ICCPR contains not only the safeguards for the right to the freedom of expression. Contrary to the Universal Declaration of Human Rights and European Convention on Human Rights, it also includes the provision which obliges the State to prohibit specific types of “hate speech”. Article 20 (2) of ICCPR states:

"Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."⁴⁸

One of the most comprehensive analyses of the ICCPR asserts that this provision is primarily conceived of as a special State duty to take preventive measures at the horizontal level to enforce the rights to life and equality in order to combat the roots of the main causes for their systematic violation by way of preventive prohibitions in the area of formation of public opinion.⁴⁹ Thus, it is intended to eradicate at the very outset the expressions inciting to hostility, violence or

⁴⁸ Cited from: http://www.unhchr.ch/html/menu3/b/a_ccpr.htm (last visited 15.09.2006)

⁴⁹ Nowak, M. “U.N. Covenant on Civil and Political Rights, CCPR Commentary”, N.P. Engel, Publisher, 1993, pp. 359-368.

discrimination. Such extensive interference within the freedom of expression is understandable if the right to life or even the right to equality can be endangered.

There are controversial discussions on understanding the relationship between Articles 19 and 20 (2). Firstly, can Article 20 be applied independently or is it considered as *lex specialis* in regard to Article 19?⁵⁰ Secondly, can the restrictions under Article 19 (3) be broader than under Article 20 (2)? As a result of this controversy a number of Western democratic states have made reservations or declarations as regards Article 20 (2) in order to provide necessary safeguards for the right to the freedom of expression. The main idea of these declarations is that Article 20 (2) should be interpreted consistently with the rights conferred by Article 19 of the ICCPR. The HRC has tried to elucidate the relationship between Article 19 and Article 20 (2) in its General Comments. It has noted that the prohibitions enumerated in the Article 20 (2) are “fully compatible” with the right to freedom of expression as contained in Article 19, indicating that such prohibitions are subsumed into the “special duties and responsibilities” upon which the exercise of the right of the freedom of expression is contingent.⁵¹ This view is also affirmed in the commentary of ICCPR by Professor Manfred Nowak, where it is emphasized that Article 20 (2) does not authorise interference with freedom of expression forbidden by Article 19(3). He also notes that “Article 20 differs from permissible purposes for interference in Article 19 (3) only in that the States Parties are internationally obligated to interfere in certain cases, whereas in others they are merely entitled to do so.”⁵²

An attempt to strike a balance between the freedom of expression and the rights it might collide with is also evident in the practice of the HRC in assessing the legitimacy of restrictions on “hate speech”. One can presume that expressions which incite to violence would be restricted by the Committee without much hesitation. Complaints about the restriction of such expressions which might endanger the right to life could be declared by the Committee to be outside the scope of Article 19 and declared inadmissible. But if the Committee has decided that an individual communication about the restrictions of hate expressions is admissible, it has always considered the legitimacy of restrictions both on the basis of Article 20 and the requirements established in Article

⁵⁰ Nowak, M. “U.N. Covenant on Civil and Political Rights, CCPR Commentary”, N.P. Engel, Publisher, 1993, pp.335.-359.

⁵¹ Article 11 paragraph 2., General Comment No. 11: Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20), Human Rights Committee, 29/07/83, paragraph 2. “Compilation of General Comments and General Recommendations Adopted By Human Rights Treaty Bodies, HRI/GEN/1/Rev.6”, 12 May 2003. Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/HRI.GEN.1.Rev.5.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/HRI.GEN.1.Rev.5.En?OpenDocument) (last visited 30.09.2006)

19 (3). Furthermore, the attempt to find a balance between the rights and values is also visible in other sources. According to the commentary of ICCPR by Professor Manfred Nowak, Article 20 (2) does not prohibit incitement to discrimination, which is not violent in private circles. Otherwise, it would overstep the necessary restrictions on the freedom of expression in order to safeguard the right to equality or dignity of the person. Besides the “*travaux preparatoire*” and commentaries by members of HRC permits to conclude that obligation in Article 20 to prohibit certain expressions "by law" does not necessarily require imposition of criminal sanctions.⁵³ However, there should be at least some sanctions in case of violation of this provision.⁵⁴ In order to illustrate more in detail the ways HRC has approached the cases which relate both to the Articles 19 and 20 (2), the subsequent sub-chapter is devoted to analysis of the case-law of Committee.

1.2. Approaches of the Human Rights Committee to assess the legitimacy of the restrictions on the expressions containing “hate speech”.

The Committee has used two avenues when it was confronted with an assessment of restrictions imposed on expressions inciting to hostility or discrimination. The first method the HRC has applied in some earlier cases has been to declare communications on restriction of “hate speech” inadmissible. In some later cases the Committee has preferred to consider justification of restrictions in substance both according to the requirements established in paragraph 3 of Article 19 and in the light of Article 20. The subsequent analysis of the decisions and views of HRC in these cases illustrate more in detail the approach applied by HRC as well as the changes in the practice of HRC.

⁵² Ibid.

⁵³ During preparatory work of the Covenant the words “shall be prohibited by the law of the state” were chosen in preference to the words “constitutes crime and shall be punished under the law of the State.” See Bossuyt, Marc J. “Guide to the “*travaux preparatoires*” of the International Covenant on Civil and Political Rights”, 1987, pp.405-406. // Defeis, E.F. “Freedom of Speech and International Norms: A Response to Hate Speech”, 29 Stanford Journal of International Law (1992-1993), p.82.

⁵⁴ Nowak, M. “U.N. Covenant on Civil and Political Rights, CCPR Commentary”, N.P. Engel, Publisher, 1993, p.368.

a) Inadmissibility decisions - *J.R.T. and the W.G. Party v. Canada* and *M.A. v. Italy*

In those two earlier cases⁵⁵ concerning the complaints about restrictions on expressions, which might be characterized as “hate speech”, the Committee chose to refer to the inadmissibility procedure on the basis of Article 5 (1) of ICCPR, which states:

"Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant."⁵⁶

In *J.R.T. and the W.G. Party v. Canada*⁵⁷ the applicants were attempted to attract members to their political party through playing anti-Semitic messages on a telephone service which people could call up and listen to. The contents of the messages were basically to warn the callers "of the dangers of international finance and international Jewry leading the world into wars, unemployment and inflation and the collapse of world values and principles".⁵⁸ The applicants complained that their right to freedom of opinion and expression was violated because the Canadian authorities curtailed the telephone service on the basis of Human Rights Act according to which the acts of the applicants constituted a discriminatory practice.⁵⁹ In its submission the Canadian authorities objected to the admissibility of the communication. They argued that no breach of the Covenant occurred, because the respective provision of Canadian Human Rights Act and proscription imposed on applicants served to give effect to Article 20 (2) of the ICCPR. It was emphasized that

⁵⁵ *J.R.T. and the W.G. Party v. Canada* and *M.A. v. Italy* were decided accordingly in 1983 and 1984, while the views of HRC in *Faurisson v. France* and *Ross v. Canada* were adopted in 1996 and in 2000.

⁵⁶ Cited from: http://www.unhchr.ch/html/menu3/b/a_ccpr.htm (last visited 27.06.2006)

⁵⁷ Communication *J.R.T. and the W.G. Party v. Canada*, No. 104/1981: Canada. 06/04/83. CCPR/C/18/D/104/1981.(Jurisprudence) Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/be24fa123874d7b7c1256abe0047f366?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/be24fa123874d7b7c1256abe0047f366?Opendocument) (last visited 20.08.2006)

⁵⁸ *Ibid.*, paragraph 2.1.

⁵⁹ The decision was made on the basis of Section 13 (1) of the Canadian Human Rights Act, which reads as follows: "It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of fact that the person or those persons are identifiable on the basis of a prohibited ground of discrimination." Canadian Human Rights Act (1985). Accessible at: <http://lois.justice.gc.ca/en/H-6/> (last visited 27.06.2006)

“...not only is the author’s “right” to communicate racist ideas not protected by the Covenant, it is in fact incompatible with its provisions...”⁶⁰

The Committee apparently agreed with the arguments of the Canadian government and held that the application was inadmissible, reasoning in part that: “... the opinions which [the applicant] seeks to disseminate through the telephone system clearly constitute the advocacy of racial or religious hatred which Canada has an obligation under Article 20(2) of the Covenant to prohibit.”⁶¹ The decision of the HRC to declare the case falling *prima facie* within the scope of Article 20 inadmissible was criticised by Professor Manfred Nowak as “...based on an excessively broad interpretation of incompatibility *ratione materiae* as a ground for inadmissibility and on an incorrect understanding of the relationship between Articles 19 and 20.”⁶² The Committee relied only on Article 20 and did not measure the restrictions imposed against the background of Article 19 (3). It did assess neither the content of the messages nor the sanctions employed by the state.

In principle the decision of the HRC to justify the restrictions imposed seems to be reasonable, because the expressions which the applicants were trying to convey were on some occasions inciting to violence.⁶³ They certainly went beyond the principle established by the Committee in a later case,⁶⁴ namely, that there should be a plurality of views tolerated in a democratic society, including the ones not favourably received by the government or majority of the population. However, the Committee should have approached with more scrutiny to the alleged violation of the Article 19 and requirements laid down in paragraph 3 of this provision. It should have *inter alia* assessed the sanctions applied to the applicant in order to measure the proportionality of restrictions.⁶⁵

⁶⁰ Communication *J.R.T. and the W.G. Party v. Canada*, No. 104/1981: Canada. 06/04/83. CCPR/C/18/D/104/1981, paragraph 6.2. Accessible at:

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/be24fa123874d7b7c1256abe0047f366?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/be24fa123874d7b7c1256abe0047f366?Opendocument)

(last visited 20.08.2006)

⁶¹ Communication *J.R.T. and the W.G. Party v. Canada*, No. 104/1981: Canada. 06/04/83. CCPR/C/18/D/104/1981. Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/be24fa123874d7b7c1256abe0047f366?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/be24fa123874d7b7c1256abe0047f366?Opendocument)

(last visited 20.08.2006)

⁶² Nowak, M. “U.N. Covenant on Civil and Political Rights, CCPR Commentary”, N.P. Engel, Publisher, 1993, p.368.

⁶³ After the prohibition imposed by Canadian Courts Mr. J.R.T. conveyed a new message on a telephone service which stated that “some corrupt Jewish international conspiracy is depriving the callers of their birthright and that the white race should stand up and fight back.” Ibid., paragraph 2.8.

⁶⁴ Communication *Lee v. Korea*, No 1119/2002. 23/08/2005. CCPR/C/84/D1119/2002. (Jurisprudence), paragraph 7.2. Accessible at: <http://www.unhchr.ch/tbs/doc.nsf/> (last visited 17.08.2006)

⁶⁵ Initially W.G. Party and Mr. J.R.T. were ordered to cease using the telephone to communicate their tape-recorded messages whose content exposed persons to hatred or contempt by reason of the fact that the person is identifiable by race or religion. The decision was appealed and both the W.G. Party and Mr. J.R.T. continued to use messages that were

In a subsequent non-admissibility case *M.A. v. Italy* the applicant complained about violation of expression and association rights under ICCPR because of his conviction for reorganising the dissolved Fascist Party in violation of Italian law. The Italian government objected to the admissibility of the communication on the basis that conviction of M.A. took place prior to the entry into force of the Covenant and the Optional protocol for Italy. Furthermore, the government stated that even if the HRC is of different view the communication is inadmissible also on the basis of other ground, namely, that it is manifestly devoid of foundation and by virtue of the restrictions provided for under Paragraph 3 of Article 19. In particular, it emphasized that: “an examination of the indictment against M. A. shows that it is for ‘reorganizing the dissolved fascist party’ that is, for organizing a movement which has as its object the elimination of the democratic freedoms and the establishment of a totalitarian regime. It is clearly a case of restrictions expressly stipulated by law (Scelba Law) and which are necessary . . . in a democratic society for the protection of national security, public order.”⁶⁶ However, there was no evidence submitted by Italian government that the acts of the applicant or the aims of the party in whose reorganization the M.A. were involved included recourse to undemocratic methods or the establishment of totalitarian regime. As stated by the legal representative of M.A.: “The restrictions in the law applied in M.A.'s case are themselves based on a law which was purportedly enacted in order to protect public safety, but which in reality does not permit the expression of one particular ideology even by democratic and non-violent means. Therefore it is a law that persecutes or discriminates on the basis of ideology ... It is also inherently discriminatory because it is aimed not at all allegedly ‘anti-democratic’ movements (anarchistic, Leninist, etc.) but solely at movements with fascist leanings;”⁶⁷

The Committee found the communication inadmissible on the basis of “*ratione temporis*”, since the conviction of the applicant took place prior the Italy was bound by the provisions of ICCPR and therefore unfortunately did not give a wider assessment of the case. Nevertheless, it made an essential comment by stating that: “it would appear to the Committee that the acts of which M. A. was convicted (reorganizing the dissolved fascist party) were of a kind which are removed from the protection of the Covenant by Article 5 thereof and which were in any event justifiably prohibited

deemed to be in contravention of the order. Therefore, subsequently both the party and Mr. J.R.T. were found guilty of contempt of court. The W.G. party was sentenced with the fine, but Mr. J.R.T. with one year imprisonment.

⁶⁶ Communication *M.A. v Italy*, No. 163/1984; Italy. 10/04/84. CCPR/C/21/D/163/1984, paragraph 7.2.
Accessible at: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/b89e52b2512c465ec1256aca004e9a5d?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/b89e52b2512c465ec1256aca004e9a5d?Opendocument)
(last visited 15.09.2006)

⁶⁷ *Ibid.*, paragraph 9 (b).

by Italian law having regard to the limitations and restrictions applicable to the rights in question under the provisions of articles ... 19 (3)... of the Covenant.”⁶⁸

This suggests that even without more thorough analysis of the facts the HRC would tend to agree with the arguments of Italian government that restrictions imposed on applicant in particular case were in accordance with requirements of Article 5 or Article 19 (3) of the ICCPR. The case law of HRC is insufficient to explain why the Committee preferred to apply inadmissibility procedure in these situations and not in others. However, the analysis of these two initial decisions indicate that at that moment in time the Committee has accepted a view that some expressions of "hate speech" might be of such an insulting nature that they are outside the scope of the right to the freedom of expression *ab initio*. However, the latest decisions of the Committee analyzed in the next sub-chapter demonstrate the trend to abstain from this initial practice and preference to assess each case individually in substance according to the requirements stipulated in paragraph 3 of Article 19.

b) Views on admissible communications – *Faurisson v. France* and *Ross v. Canada*.

The view of the HRC in the case of *Faurisson v. France*⁶⁹ characterizes the approach of the Committee to the generally worded absolute restrictions on freedom of expression in national law, like for example the prohibition to deny or challenge certain crimes against humanity. Furthermore, as noted above this decision by the HRC illustrates the departure from its earlier case-law and a preference to apply a more thorough analysis on restrictions imposed on expressions, even the ones which actually amount to holocaust denial and anti-Semitism. The facts of the case relate to Mr. Faurisson, an academic, who has publicly questioned the policy of extermination of Jews and existence of gas extermination chambers in Nazi death camps. He has expressed an opinion that this is a myth of a dishonest fabrication. In an interview to the French monthly magazine *Le Choc du Mois* he made inter alia the following statements:

“... No one will have me admit that two plus two make five, that the earth is flat, or that the Nuremberg Tribunal was infallible. I have excellent reasons not to believe in this policy of extermination of Jews or in the magic gas chamber ...” and “I would wish to see that 100 per cent of

⁶⁸ Ibid., paragraph 13.3.

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'."⁷⁰

Mr. Faurisson was convicted for these statements under a French law (Gayssot Act) which criminalised contesting the existence of the category of crimes against humanity defined in the London Charter of 1945, on the basis of which International Military Tribunal at Nuremberg convicted Nazi leaders. His conviction was upheld also by the Court of Appeal. Therefore, subsequently Mr. Faurisson submitted a communication to the HRC, where he challenged both the law itself and his conviction under Gayssot Act, claiming that his freedom of expression rights under ICCPR, Article 19 (2) had been violated.

As regards the vague nature of the law and requirement that restriction on freedom of expression should be "provided by law" the Committee noted that it cannot criticize in abstract laws enacted by States parties. However, it referred to the discussions in France and in other European countries about the effect of similar legislations⁷¹ and emphasized that:

"...the application of the terms of the Gayssot Act, which, in their effect, make it a criminal offence to challenge the conclusions and the verdict of the International Military Tribunal at Nuremberg, may lead, under different conditions than the facts of the instant case, to decisions or measures incompatible with the Covenant."⁷² This observation of the HRC suggests that it is not in accordance with Article 19 to rule out criticism of court decisions, including the ones by the Nuremberg Tribunal. Furthermore, the Committee seems to point that it opposes national laws, which lay down general content based restrictions on freedom of expression, leaving no room for exceptions and individual assessment of expressions. Yet, the Committee found the restriction provided by law because it was "...satisfied that the Gayssot Act, as read, interpreted and applied to the author's case by the French courts, is in compliance with the provisions of the Covenant."⁷³

⁶⁹ Communication *Faurisson v. France*, No 550/1993: France. 16/12/96. CCPR/C/58/D/550/1993. (Jurisprudence) Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/4c47b59ea48f7343802566f200352fea?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/4c47b59ea48f7343802566f200352fea?Opendocument) (last visited 10.09.2006.)

⁷⁰ Ibid., paragraph 2.6.

⁷¹ Holocaust denial laws exist for example also in Germany and Austria.

⁷² Communication *Faurisson v. France*, No 550/1993: France. 16/12/96. CCPR/C/58/D/550/1993, paragraph 9.2. Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/4c47b59ea48f7343802566f200352fea?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/4c47b59ea48f7343802566f200352fea?Opendocument) (last visited 10.09.2006.)

⁷³ Ibid., paragraph 9.5.

The Committee also agreed with the French government that the restriction of the author's expressions were based on a legitimate aim provided for by the Covenant. HRC declared that "...Since the statements made by the author, read in their full context, were of a nature as to raise or strengthen anti-Semitic feelings, the restriction served the respect of the Jewish community to live free from fear of an atmosphere of anti-Semitism."⁷⁴ The Committee made a reference in this regard to its General Comment 10 on Freedom of Expression according to which the rights for the protection of which restrictions are permitted by Article 19, paragraph 3, "may relate to the interests of other persons or those of the community as a whole."⁷⁵ In its findings that the restriction was also necessary the Committee noted the arguments of French government that introduction of Gayssot Act was intended to serve the struggle against racism and anti-Semitism, since holocaust denial was one of the principle contemporary vehicles for anti-Semitism. This again demonstrates the reluctance of Committee to accept carte blanche or content based restrictions on freedom of expression. In finding the restriction of the challenged expressions necessary the Committee did look not only at the content of expressions, but took into account the wider context in which they were made, the alleged purpose and social effects of these expressions.

The Committee's departure from its earlier practice in *J.R.T. and W.G. v Canada*, namely, to declare some types of expressions outside the scope of freedom of expression and thus to proclaim them inadmissible was evident also in a subsequent case considered on merits: *Ross v. Canada*. The facts of this case concern the restrictions imposed on freedom of expression of Mr. Ross, who was working as a teacher. He had been appointed to a non-teaching position because in his spare time he published books and made public statements, reflecting views which were discriminatory towards Jews. The applicant complained that the fact that he had lost a teaching position as a result of his public statements had severely violated his right to the freedom of expression guaranteed by Article 19 of ICCPR. He challenged the assessment of his statements made by Canadian courts and particularly stressed that his views has never formed part of his teaching.

The Canadian authorities contested the admissibility of the communication on several grounds, inter alia, on the basis of fact that the author's publications were contrary to Article 20, Paragraph 2 of the Covenant which prohibits advocacy of national, racial or religious hatred. To support their

⁷⁴ Communication *Faurisson v. France*, No 550/1993; France. 16/12/96. CCPR/C/58/D/550/1993, paragraph 9.6. Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/4c47b59ea48f7343802566f200352fea?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/4c47b59ea48f7343802566f200352fea?Opendocument) (last visited 10.09.2006.)

argument Canadian authorities cited the practice of the Committee in an earlier decision: *J.R.T. and W.G. v Canada*. In this case the communication was declared inadmissible because the HRC found that challenged expressions are prohibited under Article 20, Paragraph 2 of ICCPR. However, the Committee did not follow this practice and in response to the claim of government emphasized:

“While noting that such an approach indeed was employed in the decision in *J.R.T. and W.G. v Canada*, the Committee considers that restrictions on expression which may fall within the scope of Article 20 must also be permissible under Article 19, paragraph 3, which lays down requirements for determining whether restrictions on expression are permissible. In applying those provisions, the fact that a restriction is claimed to be required under Article 20 is of course relevant. In the present case, the permissibility of the restrictions is an issue for consideration on the merits.”⁷⁶ Thus, the Committee stresses that obligations laid down in Article 20 (2) of ICCPR constitute an essential factor in its assessment whether restrictions on freedom of expression are justified. However, the statement cited illustrates that the HRC will not assess the permissibility of restrictions just on a basis of Article 20 alone, but will measure them also in the light of requirements laid down in Article 19, Paragraph 3.

As regards the consideration of the merits of the case, the HRC first opposed the arguments of the State that the removal of the applicant from his teaching position was not in effect restriction on his freedom of expression, because he was not prohibited to express his views, while holding a non-teaching position. Despite this argument, the Committee considered that the loss of a teaching position was a significant detriment, which was imposed on the Mr. Ross because of the expression of his views and therefore has to be justified under Article 19, Paragraph 3. The Committee also expressed some concerns about the vague criteria of the national law provisions, which constituted the ground to remove the author from his teaching position. However, in order to establish whether the requirement that restrictions on freedom of expression should be “provided by law” is satisfied, the Committee followed its reasoning in the case of *Faurisson v. France*. It looked to the application of these criteria in practice. The Committee found that restriction was “provided for by law” on the basis of two considerations. Firstly, the Canadian Supreme Court has considered all aspects of the case and has established that legal basis in domestic law was sufficient for the

⁷⁵ Ibid., paragraph 9.6.

⁷⁶ Communication *Ross v. Canada*, No 736/2000: Canada. 26/10/2000. CCPR/C/70/D/736/1997, paragraph 10.5. Accessible at: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/29712c8dde3414dc12569ad003d0316?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/29712c8dde3414dc12569ad003d0316?Opendocument) (last visited 10.09.2006)

restrictions imposed on Mr. Ross. Secondly, the HRC noted the fact that the applicant has been granted the opportunity to appeal all decisions against him and he has availed himself of this legal remedy. As regards the legitimate aim of the restrictions on the author's freedom of expression the HRC found that they served the purpose of protecting the rights or reputations of others. Concerning the interpretation of phrase "rights or reputations of others", the Committee noted that this might relate to other persons or to a community as a whole and referred to earlier case law by stating: "For instance, and as held in *Faurisson v France*, restrictions may be permitted on statements which are of a nature as to raise or strengthen anti-Semitic feeling, in order to uphold the Jewish communities' right to be protected from religious hatred. Such restrictions also derive support from the principles reflected in Article 20(2) of the Covenant."⁷⁷

Despite the reference to the anti-Semitic nature of the statements and to the principles reflected in Article 20 (2) of the Covenant, the HRC reaffirmed its position to assess each case individually and abstain from exclusion of some category of expressions from freedom of expression. The Committee only stated that restrictions on such expressions may be permitted, but does not assert that these expressions per se would be considered beyond the scope of freedom of expression. Therefore, there would still be a requirement to justify the restrictions on such expressions according to requirements of Paragraph 3, Article 19. This position of the HRC does not imply that complaints about the restriction of expressions directly inciting to violence against certain racial or religious group could not be rejected by the Committee on admissibility stage. But the Committee's decision to declare admissible this as well as the communication of *Faurisson v France* and a thorough approach applied in the examination of justification of restrictions imposed on freedom of expression in these cases, illustrates a shift from the earlier practice of the Committee.⁷⁸

Furthermore, in order to find that restrictions imposed on the author served the rights or reputations of others, the HRC emphasized not only the anti-Semitic and discriminatory nature of the author's statements, but also their effect. The effect of the statements made by Mr. Ross were linked to his position as a teacher and the wider role a teacher has in ensuring the confidence of the society in the public school system. Therefore, the restrictions imposed on the author served specifically the

⁷⁷ Ibid., paragraph 11.5.

⁷⁸ See the communication *J.R.T. and the W.G. Party v. Canada*, No. 104/1981: Canada. 06/04/83. CCPR/C/18/D/104/1981.

Accessible at: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/be24fa123874d7b7c1256abe0047f366?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/be24fa123874d7b7c1256abe0047f366?Opendocument) (last visited 20.08.2006)

protection of Jewish community's right to have an education in the public school system free from bias, prejudice and intolerance. The HRC gave much consideration to the status of the author as a school teacher also in its finding as to the necessity of restrictions imposed on his freedom of expression. The Committee observed that the exercise of the right to freedom of expression carries with it special duties and responsibilities which are of particular relevance to the teaching of young students. Therefore: "...the influence exerted by school teachers may justify restraints in order to ensure that legitimacy is not given by the school system to the expression of views which are discriminatory."⁷⁹ Consequently, it was not only the nature of the expressions by Mr. Ross, which led the Committee to the finding that measures imposed on the author were necessary to protect the legitimate aim pursued. An additional factor was the effect of his statements on perception of society about public school system in view of the position of author as a school teacher To substantiate its findings the Committee noted also that the Supreme Court of Canada has found a 'causal link' between the 'poisoned school environment' for Jewish children in the School District and the expressions of author.

Lastly, the minimal impairment of the author's rights seems to be another factor, which had an effect on Committee's decision to find a restriction necessary. The sanction imposed on Mr. Ross, which was forced leave with no pay for 18 months could not be regarded as minimal. But the HRC observed: "...that the author was appointed to a non-teaching position after only a minimal period on leave without pay and that the restriction thus did not go any further than that which was necessary to achieve its protective functions."⁸⁰ Thus, the HRC did not consider the original sanction, but examined the factual situation of Mr. Ross.

1.3. Conclusions

The analysis of the jurisprudence of the Committee, academic comments and other relevant sources demonstrates that the right to the freedom of expression as guaranteed by Article 19 of the Covenant encompasses a broad variety of forms and types of expressions. The HRC has opposed

⁷⁹ Communication *Ross v. Canada*, No 736/2000: Canada. 26/10/2000. CCPR/C/70/D/736/1997, paragraph 11.6. Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/29712c8ddea3414dc12569ad003d0316?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/29712c8ddea3414dc12569ad003d0316?Opendocument) (last visited 10.09.2006)

⁸⁰ *Ibid.*, paragraph 11.6.

for example the attempts to exclude the commercial speech from the ambit of the Article 19.⁸¹ Furthermore, the Committee has emphasized particular role of media to inform society and comment freely about public and political issues.⁸² In the light of restrictions on “hate speech” it is essential to mention that according to the views of the Committee in a democratic society safeguards to freedom of expression should also apply to ideas and opinions which are not favourably received by the government or majority of population as long as they are promoted peacefully.⁸³ Therefore, expression of ideas which are offensive to certain degree to some groups of population will not *per se* go beyond the scope of the right of freedom of expression.

At the same time the wording of Article 19 and the practice of the Committee demonstrates that freedom of expression is not absolute. It might be subject to restrictions according to the strict requirements set down in Paragraph 3 of Article 19, namely, any restriction on freedom of expression must be provided by law, shall address one of the legitimate aims enumerated in Article 19 and lastly shall be necessary to achieve one or several of these legitimate aims. As regards the first requirement, the Committee has been reluctant to accept restrictions on freedom of expression defined in broad and ambiguous terms by national law. This principle as affirmed by case-law⁸⁴ applies also to legal framework for restrictions on “hate speech”. However, the Committee might still find such limitations justified if they have been applied with proper scrutiny and the applicant have been granted necessary protection against their arbitrary application. For example in *Ross v. Canada* the Committee emphasized the vague criteria of the provisions that were used to remove the author from his teaching position as the result of his public statements. Nevertheless, it finally acknowledged the restrictions to be “provided by the law” taking into consideration the scrupulous way of their application by national courts, the thorough consideration of the case at national level and the safeguards used by the applicant through the opportunity to appeal the decisions against

⁸¹ See the Communication *Ballantyne, Davidson, McIntyre v. Canada*, No 385/1989: Canada, 05/05/93, CCPR/C/47/D/359/1989, (Jurisprudence) paragraph 11.3. Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/eca9df4fd85650a6c1256ae300493208?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/eca9df4fd85650a6c1256ae300493208?Opendocument) (last visited 15.08.2006)

⁸² See General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25), Human Rights Committee, 12/07/96, paragraph 25. Accessible at: <http://www.unhchr.ch/tbs/doc.nsf/0/d0b7f023e8d6d9898025651e004bc0eb?Opendocument> (last visited 30.09.2006)

⁸³ See Communication *Lee v. Korea*, No 1119/2002. 23/08/2005. CCPR/C/84/D1119/2002. (Jurisprudence) Accessible at: <http://www.unhchr.ch/tbs/doc.nsf/> (last visited 17.08.2006)

⁸⁴ Communication *Ross v. Canada*, No 736/2000: Canada. 26/10/2000. CCPR/C/70/D/736/1997. (Jurisprudence), paragraph 11.4. Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/29712c8dde3414dc12569ad003d0316?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/29712c8dde3414dc12569ad003d0316?Opendocument) (last visited 10.09.2006).

him.⁸⁵ As regard legitimate purpose pursued the Committee has referred to such aims as the protection of “national security” or of “public order” in order to substantiate the restrictions on expressions inciting to hatred. In consideration of these criteria the HRC has also referred to the principles reflected in Article 20 (2).

The third and most disputed criterion is the need to justify the “necessity of restrictions” for one of the purposes pursued. The Committee considers a number of elements which might depend on the nature of each individual case in order to ascertain whether the necessity for restrictions has indeed been demonstrated by the State. One of these elements is the sufficiency of evidence about the need to impose restrictions in order to protect the alleged legitimate aim. For example the Committee has noted that the existence of any reasonable and objective justification for limiting the Covenant rights is not sufficient and that State party must demonstrate that restriction is “[...] in fact necessary to avert real, and not only hypothetical danger to national security or democratic order[...].”⁸⁶ Another element frequently invoked by the Committee is the existence of casual link between the restricted expressions and legitimate aim pursued. For instance in the case of *Ross v. Canada* the Committee found a correlation between the expressions of the author and the “poisoned school environment” experienced by Jewish children in the School district. Furthermore, in this and other cases the Committee has considered also the proportionality of restrictive measures applied and availability of less intrusive measures to achieve the purpose pursued in order to consider the “necessity” of limitations applied. Lastly, among the factors which the Committee takes into account might also be the effect of public statements in view of the special status of the author of the racist or racially discriminatory remarks and thus an influence he exerts on a society. For example the Committee has emphasized that special duties and responsibilities with witch the freedom of expression should be exercised are of particular relevance with regard to the teaching of young students. Therefore “the influence exerted by school teachers may justify restraints in order

⁸⁵ Also in the case of *Faurisson v. France* the Committee expressed the concern about the wide scope of Gaysson Act and emphasized that under different conditions than the facts of the instant case it may lead to the measures incompatible with the Covenant.

Communication *Faurisson v. France*, No 550/1993: France. 16/12/96. CCPR/C/58/D/550/1993, paragraph 9.3. Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/4c47b59ea48f7343802566f200352fea?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/4c47b59ea48f7343802566f200352fea?Opendocument) (last visited 10.09.2006.)

⁸⁶ Communication *Lee v. Korea*, No 1119/2002. 23/08/2005. CCPR/C/84/D1119/2002. (Jurisprudence), paragraph 7.2. Accessible at: <http://www.unhchr.ch/tbs/doc.nsf> (last visited 17.08.2006)

to ensure that legitimacy is not given by the school system to the expression of views which are discriminatory.”⁸⁷

The expressed ideas and opinions should also be compatible with Article 20 of the Covenant,⁸⁸ which obliges the states to prohibit any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. The obligation to restrict certain forms of “hate speech” according to the explanation given by of the HRC in the General Comments and as follows from its case-law is fully consistent with the right to the freedom of expression as contained in Article 19 and is embedded in “special duties and responsibilities” with which this right should be exercised.⁸⁹ In its practice the Committee has resorted to two procedures in order to ensure the safeguards for the freedom of expression and to implement the obligations imposed by Article 20 of the Covenant. It has made a substantial examination of the complaints about restrictions on the freedom of expression on the merits or rejected these complaints on admissibility stage according to Article 5 of the Covenant⁹⁰. While there are only few cases examined by the Committee in which both Article 19 and Article 20 were invoked, the existing case-law suggests that the trend is towards a more thorough analysis of the restrictions. For instance the Committee has preferred to consider the last two communications on the merits.⁹¹ The Committee opted for this approach despite rather evident character of anti-Semitic nature of statements in one of these cases⁹² and contrary to its earlier case-law where the restrictions on expressions of anti-Semitic character

⁸⁷ Communication *Ross v. Canada*, No 736/2000: Canada. 26/10/2000. CCPR/C/70/D/736/1997. (Jurisprudence), paragraph 11.6. Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/29712c8ddea3414dc12569ad003d0316?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/29712c8ddea3414dc12569ad003d0316?Opendocument) (last visited 10.09.2006)

⁸⁸ See Communication *Ballantyne, Davidson, McIntyre v. Canada*, No 385/1989: Canada, 05/05/93, CCPR/C/47/D/359/1989, (Jurisprudence) paragraph 11.3. Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/eca9df4fd85650a6c1256ae300493208?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/eca9df4fd85650a6c1256ae300493208?Opendocument) (last visited 15.08.2006)

⁸⁹ General Comment No. 11: Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20), Human Rights Committee, 29/07/83, paragraph 2. Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/60dcfa23f32d3feac12563ed00491355?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/60dcfa23f32d3feac12563ed00491355?Opendocument) (last visited 30.09.2006)

⁹⁰ See the text of the Article 5 of the ICCPR in the Appendix.

⁹¹ Communication *Faurisson v. France*, No 550/1993: France. 16/12/96. CCPR/C/58/D/550/1993. (Jurisprudence) Accessible at:

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/4c47b59ea48f7343802566f200352fea?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/4c47b59ea48f7343802566f200352fea?Opendocument) (last visited 10.09.2006) and Communication *Ross v. Canada*, No 736/2000: Canada. 26/10/2000. CCPR/C/70/D/736/1997. (Jurisprudence) Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/29712c8ddea3414dc12569ad003d0316?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/29712c8ddea3414dc12569ad003d0316?Opendocument) (last visited 10.09.2006)

⁹² Communication *Faurisson v. France*, No 550/1993: France. 16/12/96. CCPR/C/58/D/550/1993. (Jurisprudence) Accessible at:

were found valid on the admissibility stage.⁹³ Another evidence of the inclination towards stricter examination of restrictions on the freedom of expression is the shift in the Committee's practice as regards the interplay between the Article 19 and Article 20. In an early case of *J.R.T. v Canada* the Committee has declared inadmissible the complained about the restrictions imposed on the applicant. It based such decision primarily on the consideration that expressions the author was trying to communicate were contrary to the Article 20 of the Covenant. However, in a later case of *Ross v. Canada* considered on merits the Committee explicitly abstained from this practice. It declared that restrictions imposed on expressions by Article 20 should also fulfil the requirements of Paragraph 3, Article 19. Thus the Committee has refrained from the application of Article 20 in isolation, but applied it only in the light of the requirements for any restrictions on the freedom of expression as set down in Paragraph 3 of Article 19. Yet, the impact of the Article 20 has been evident in the arguments of the Committee as regards the assessment of justification of restrictions imposed on "hate speech" expressions. In none of the communications, where restrictions on freedom of expression were *inter alia* based on requirements of Article 20, the Committee found a violation of the Covenant.⁹⁴ This suggests that while the Committee prefers to consider restrictions on merits, it is quite liberal in cases of "hate speech" to find these restrictions justified if they have been established and applied by national institutions according to the strict requirements of Paragraph 3 of Article 19.

The necessity to justify the restrictions on freedom of expression, including on "hate speech", according to rigorous conditions in Article 19 is also underlined by the fact that the Committee has been unwilling to grant states the right to invoke a concept of "margin of appreciation" in order to support limitations on the exercise of the Covenant's rights. The HRC has referred to the concept of "margin of discretion" only once in its jurisprudence on freedom of expression, in relation to restrictions imposed by the state broadcasting company on programmes dealing with homosexuality on the basis of protection of "public morals."⁹⁵ In its subsequent case-law the Committee has not

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/4c47b59ea48f7343802566f200352fea?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/4c47b59ea48f7343802566f200352fea?Opendocument) (last visited 10.09.2006.)

⁹³ Communication *J.R.T. and the W.G. Party v. Canada*, No. 104/1981: Canada. 06/04/83. CCPR/C/18/D/104/1981.(Jurisprudence) Accessible at:

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/be24fa123874d7b7c1256abe0047f366?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/be24fa123874d7b7c1256abe0047f366?Opendocument) (last visited 20.08.2006)

⁹⁴ Sarah.J., Schultz.J., Castan M. The International Covenant on Civil and Political Rights, Oxford University Press, 2nd edition, 2005, p.567.

⁹⁵ Communication *Hertzberg et al. v Finland*, No 61/1979: Finland. 02/04/82. CCPR/C/15/D/61/1979. (Jurisprudence). Accessible at:

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/23a5d17c91636ac3c1256ab50030c76b?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/23a5d17c91636ac3c1256ab50030c76b?Opendocument)

used this concept. It has opposed the States arguments based on the concept of “margin of discretion” also concerning claims, which relate to other provisions of the Covenant.⁹⁶ Instead of resorting to this concept, the HRC has occasionally employed another approach – to assess the degree of interference within the enjoyment of one’s rights, in order to find whether the Covenant’s rights have not been disproportionately limited. This method allows the Committee to maintain flexibility in its assessment of the justification of restrictions taking into account the country specific situations. Bearing in mind the universal character of the ICCPR and wide variety of issues where national or even regional practices differ widely it important that Committee has an opportunity to respond to this divergence. At the same time it is solely within the competence of the Committee to examine, whether the arguments presented by states justify interference within the Covenant’s rights to a certain degree. Such approach minimize threats of undue limitations to the standards of the Covenant which might result from the willingness of states to refer to “margin of discretion” as a basis for restrictions on the exercise of Covenant’s rights.

(last visited 10.09.2006)

⁹⁶ See Communication *Lansman v Finland*, No 511/1992: Finland. 08/11/94. CCPR/C/52/D/511/1992. (Jurisprudence) Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/7e86ee6323192d2f802566e30034e775?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/7e86ee6323192d2f802566e30034e775?Opendocument) (last visited 15.09.2006)

2. Analysis of International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

2.1. The meaning and scope of Article 4

The ICERD is the most important of the general instruments that develops the fundamental norm of the United Nations Charter requiring respect for and observance of human rights and fundamental freedoms for all, without distinction as to race.⁹⁷ Therefore, it is not surprising that the monitoring body of this treaty – the Committee on the Elimination of Racial Discrimination (CERD) has attached equal, if not overriding status to the prohibition of incitement to racial discrimination compared to the right to the freedom of expression. To some degree this is in contrast with the approach of the HRC and with the case-law of the European Court of Human rights, which has emphasised the essential role of the freedom of expression in a democratic society and the need to interpret any limitations on it restrictively.

The central provision as regards the prohibition of racist speech is Article 4, which declares:

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

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

⁹⁷ Article 1 of the Charter of the United Nations. Accessible at: <http://www.un.org/aboutun/charter/> (last visited 30.09.2006)

*(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;*⁹⁸

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

Article 4 contains far-reaching restrictions on the freedom of expression, which is the result of its preventive character and the aim to eradicate the very offspring's of racial discrimination. The wide scope of restrictions on freedom of expression imposed by Article 4 is demonstrated by the fact that it requires states to impose criminal liability for the dissemination of ideas (freedom of expression) alone. Furthermore, Article 4 does not link the culpability with intent and according to its interpretation by the CERD is based on absolute liability. It has been emphasised "that the mere act of dissemination is penalised, despite lack of intention to commit an offence [...]"⁹⁹ In addition Article 4 contains very general and broad definition of the offences enlisted and includes no adequate guidance about permissible restraints on implementation or balancing considerations that may be properly invoked by states. Clear balancing criteria as regards the obligations provided in Article 4 of the ICERD would have been necessary, since implementation of this provision might jeopardize such fundamental rights as for example the right to the freedom of expression and the right to privacy. Moreover, the importance of existence of balancing considerations and safeguards against the abuse of this provision follows from the fact that Article 4 requires imposition of criminal sanctions for the acts proscribed. The only balancing element is "the due regard" clause which refers to the principles embodied in the UDHR and the rights set forth in Article 5 of the Convention, which include *inter alia* the right to freedom of expression. However, the effect of this clause is ambiguous and it has been subject to different interpretations.¹⁰⁰

⁹⁸ Since the thesis focus on the issue of freedom of expression, the part of Article 4 which restricts the freedom of association, will only be dealt with as far as the comments of the Committee were made in relation to the interpretation and application of Article 4 as whole.

⁹⁹ Ingles, J. "Study on the Implementation of Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination", UN Doc. A/CONF.119/10 (1983), paragraph 83. Theodor Meron. The Meaning and Reach of The International Convention on the Elimination of All Forms of Racial Discrimination. The American Journal of International Law, Vol.79, 1985, p.283.

¹⁰⁰ See in "Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination." // K. J. Partsch, "Racial Speech and Human Rights: Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination.", Article 19, Human Rights Centre, University of Essex, 1992, pp.22-26.

Furthermore, the practice of the Committee suggests that the obligations of Article 4 relate to all kinds of media or channels through which the expressions of racial hatred are conveyed. For example, the CERD has expressed concern about the racist and xenophobic propaganda on Internet sites and has encouraged the States parties to combat “this contemporary form of racial discrimination”¹⁰¹ as well as to ratify the Council of Europe Convention on Cybercrime and its Additional Protocol concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems.¹⁰² Lastly, the practice of the CERD illustrates that Article 4 of ICERD possibly might be applicable not only in relation to public but also private conduct. The Committee has touched upon on this issue, but has not given a clear answer, how far the obligations of the ICERD could apply to the private life. It seems that the views of the members of the CERD on this issue differ. Some of them have an extremely broad conception of the ICERD provisions. Thus, Belgium was criticised in the past for legislation requiring that certain offences must be committed publicly in order to be punishable.¹⁰³ Contrary to that, the members of the CERD have noted with regard to penal provision of Norway, which covered only public utterances and communications, that “private utterances and communications lay outside the field in which the penal law could effectively be applied without an oppressive system of surveillance.”¹⁰⁴ In its recent jurisprudence the Committee has emphasized that central focus of the Convention are racist and racially discriminatory statements which are made in the public arena.¹⁰⁵

However, the distinction itself between what is considered private domain and when the expressions disputed are regarded to be made publicly is blurred in Committee’s practice. For example in the communication of *Sadic v. Denmark*¹⁰⁶ the petitioner were trying to prove that racially discriminatory remarks expressed against him by his employer were public. The disputed statements were made at work during the argument between him and employer and allegedly

¹⁰¹ Concluding observations of the Committee on the Elimination of Racial Discrimination: Luxembourg. 18/04/2005, paragraph 14. CERD/C/LUX/CO/13.

Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/ec1122e25ac443cdc125700e004ed65c?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/ec1122e25ac443cdc125700e004ed65c?Opendocument) (last visited 12.03.2006).

¹⁰² Ibid, but look also Concluding observations of the Committee on the Elimination of Racial Discrimination: Iceland. 01/11/2005, paragraph 17. CERD/C/ISL/CO/18.

Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/b09e1e20b5e4383cc12570b200354e74?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/b09e1e20b5e4383cc12570b200354e74?Opendocument) (last visited 12.07.2006).

¹⁰³ 39 UN GAOR Supp. (No.18) paragraph 238, UN Doc. A/39/18 (1984).

¹⁰⁴ 32 UN GAOR Supp. (No.18) paragraph 157, UN Doc. A/32/18 (1977).

¹⁰⁵ Communication *Mohammed Hassan Gelle* No 34/2004: Denmark. 15/03/2006. CERD/C/68/D/34/2004, paragraph 6.5. Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/6715d3dbeff3c0dc125714d004f62e0?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6715d3dbeff3c0dc125714d004f62e0?Opendocument) (last visited 07.08.2006)

overheard by two other workers. As regards the public nature of expressions Mr. Sadic based his arguments on previous jurisprudence of the Committee, where it has regarded as public the insults which were made “in a school corridor and in the presence of several witnesses.”¹⁰⁷ The CERD did not give a view on public or private nature of the expressions challenged in this opinion. However, it made a reference to communication of Mr.Sadic in its subsequent jurisprudence, where it considered employer’s comments against Mr.Sadic as “[...] essentially private or ...made within a very limited circle.”¹⁰⁸ The use of such additional concept as “within a very limited circle” might indicate that the Committee is not establishing firm criteria to delimitate between public and private character of the expressions, but it is rather focusing on the level of publicity of the statements disputed leaving a scope for individual assessment in each case. This would be the right approach in view of the difficulties which are often entailed in delimitation between public and private and the existence of grey zones between them.

If apart from public also private communication of racist ideas are prohibited by criminal provisions, which expressly penalize acts of racial discrimination, it might invite state invasion of the right to privacy and restrict in a disproportional way the right to the freedom of expression.¹⁰⁹ In its recent practice the Committee has acknowledged that the possibility for alleged victims of racist or racially discriminatory statements which are essentially private or made within a very limited circle to request the institution of criminal proceedings under general provisions on defamatory statements. This could be a reasonable course and constitute an “effective remedy” within the meaning of Article 6 of the Convention.¹¹⁰ Such a view of the Committee reduces the scope of

¹⁰⁶ Communication *Sadic v. Denmark* No 25/2002: Denmark. 25/05/2002. CERD/C/62/D/25/2002. Accessible at: <http://www.law.wits.ac.za/humanrts/country/decisions/25-2002.html> (last visited 07.08.2006)

¹⁰⁷ Communication *Kashif Ahmad v. Denmark* No 16/1999: Denmark. 08/05/2000. CERD/C/56/D/16/1999, paragraph 6.1. Accessible at: <http://www.unhchr.ch/tbs/doc.nsf/MasterFrameView/f363487f33153646c1256914002cdd48?Opendocument> (last visited 07.08.2006)

¹⁰⁸ Communication *Kamal Quereshi v. Denmark* No 33/2003: Denmark. 10/03/2005. CERD/C/66/D/33/2003, paragraph 6.3. Accessible at: <http://www.unhchr.ch/tbs/doc.nsf/MasterFrameView/7de05b5d0fbd62e9c1256fc5005087f9?Opendocument> (last visited 07.08.2006)

¹⁰⁹ It is interesting to note that in the recently drafted regional instrument: ECRJ General Policy recommendation No.7 “On national legislation to combat racism and racial discrimination”, the punishment of some of the offences have been linked to the requirement that such views are expressed “in public”, December 13, 2002. Accessible at: http://www.coe.int/T/E/human_rights/Ecri/1-ECRI/3-General_themes/1- (last visited 30.07.2006)

¹¹⁰ Look examples when the defamation provisions might constitute an effective remedy and when it is not the case: Communication *Sadic v. Denmark* No 25/2002: Denmark. 25/05/2002. CERD/C/62/D/25/2002, paragraphs 6.3. and 6.4. Accessible at: <http://www.law.wits.ac.za/humanrts/country/decisions/25-2002.html> (last visited 07.08.2006) and Communication *Mohammed Hassan Gelle* No 34/2004: Denmark. 15/03/2006. CERD/C/68/D/34/2004, paragraph 6.5. Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/6715d3bdbeff3c0dc125714d004f62e0?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6715d3bdbeff3c0dc125714d004f62e0?Opendocument) (last visited 07.08.2006)

possible encroachment by the state into interpersonal relations and interference within the freedom of expression. Despite the fact that the CERD refers to criminal law proceedings, the provisions criminalizing defamatory statements traditionally contain a lower level of punishment than provisions prohibiting racist statements due to different level of harm which might result from both offences. Since racist statements are either directly or indirectly targeted at the whole group of persons, the deprivation of liberty is usually among the possible punishments applicable to the authors or disseminators of such remarks. In contrast, the defamatory comments are targeted at an individual person. Their offensive character might still relate to the group affiliation of the person defamed, but if these remarks are made in private or within a very limited circle, they do not have an effect on other members of group. Therefore, the most common punishment provided for such insults is a fine, apology and similar measures. The deprivation of liberty in cases of defamation is generally not applied by the courts in Europe, even if it is still provided by criminal provisions of some countries. Moreover, such regional organization as the Council of Europe has recommended states to abstain from such measures, unless the seriousness of the violation of the reputation of others makes the imprisonment a strictly necessary and proportionate penalty.¹¹¹

Some states have argued that they are not obliged to introduce criminal sanctions in all cases and that Article 2.1 (d)¹¹² allows each state party a margin of appreciation as regards appropriate means to counter incitement to racial discrimination. But the CERD has rejected this view by stating that "...the wording of Article 4 was so peremptory that it excluded this article from the discretion otherwise conferred in Article 2.1(d)...".¹¹³ "...In saying that certain acts shall be punishable, the Convention requires sanctions under criminal law. Actions prohibited under other articles of the Convention can be dealt with under other branches of law...but not those to which Article 4 (a) and (b) relate."¹¹⁴ This view of the Committee might be explained by the preventive role of Article 4

¹¹¹ See for instance, Council of Europe, Committee of Ministers, Declaration on freedom of political debate in the media. 12 February 2004, paragraph VIII. Accessible at: <https://wcd.coe.int/ViewDoc.jsp?id=118995&Lang=en> (last visited 13.08.2006)

¹¹² Article 2.1 (d) of the ICERD provides:

"1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:

(d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;"

Cited from: http://www.unhcr.ch/html/menu3/b/d_icerd.htm (last visited 07.08.2006)

¹¹³ Lerner, N. "The U.N. Convention on the Elimination of All Forms of Racial Discrimination", Sijthoff & Noordhoff, Aalphen aan den Rijn, 1980, p.205.

¹¹⁴ Lerner, N. "The U.N. Convention on the Elimination of All Forms of Racial Discrimination", Sijthoff & Noordhoff, Aalphen aan den Rijn, 1980, p.205.

and the concern of CERD members that civil action or even administrative remedies would not effectively limit the conduct prohibited by Article 4 without the deterrent effect of criminal sanctions. The Committee has observed in a number of its opinions that the objectives pursued through a criminal investigation namely, the criminal investigation and conviction by a criminal tribunal of the perpetrators of racist acts, could not be achieved by means of civil or administrative remedies.¹¹⁵

While the criminal prohibition of expressions included in Article 4 of ICERD is required, the Committee has also stressed an additional possibility for alleged victims to institute private civil proceedings to request damages under defamation acts or general provisions of liability for damages. Civil remedies might also provide some immediate assistance for victims in those cases, where states contrary to obligations in Article 4 of Convention fail to initiate criminal proceedings. In view of the fact that some individuals might be afraid of initiating proceedings and make themselves public as well because racist remarks are often targeted at the whole group of persons in abstract and not particular individuals, the non-governmental organisations representing the respective groups targeted or focusing on anti-racism should have the right to initiate the cases. The Article 14 of the ICERD which empowers to submit communications as regards alleged violations of the Convention not only individuals, but also “groups of individuals” as well as the broad way the Committee has interpreted this phrase¹¹⁶ might serve as an example on this issue.

Lastly, the existence of criminal provisions penalising the acts included in Article 4 of the Convention itself is not sufficient to fulfil the obligations laid down by the ICERD. The Committee has emphasized the need to implement these laws effectively by the respective national institutions. In order to monitor how the States implement their obligations under Article 4 of ICERD, the Committee has constantly required States to submit information on number of complaints, prosecutions and sentences regarding acts of racial hatred or incitement to racial hatred when it

¹¹⁵ See for example Communication *Mohammed Hassan Gelle* No 34/2004: Denmark. 15/03/2006. CERD/C/68/D/34/2004, paragraph 6.6. Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/6715d3bdbeff3c0dc125714d004f62e0?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6715d3bdbeff3c0dc125714d004f62e0?Opendocument) (last visited 07.08.2006) and Communication *Dragan Durmic v Serbia and Montenegro* No 29/2003: Montenegro, Serbia. 08/03/2006. CERD/C/68/D/29/2003, paragraph 9.2. Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/768c701774901852c125714d00435610?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/768c701774901852c125714d00435610?Opendocument) (last visited 07.08.2006)

¹¹⁶ The CERD has given an extensive interpretation to the concept of “group of individuals” established in paragraph 1 of Article 14 by authorizing the organizations representing alleged victims and non-governmental organizations acting in the respective area to submit communications. See for example the analysis of the communication *Jewish community of Oslo and Trondheim and others v. Norway* in Sub-chapter 2.3 b).

considers national reports on the implementation of the Convention.¹¹⁷ For example the Committee has expressed its concern about the situation in Lithuania where the Convention has never been applied by domestic Courts despite its applicability in domestic law¹¹⁸ or about the lack of effective implementation of relevant criminal law provisions in Bosnia and Herzegovina.¹¹⁹

2.2. The “due regard” clause in Article 4 as a safeguard to the right to the freedom of expression

The goal of racial equality in Article 4 has been widely acknowledged and agreed by states parties to the ICERD. However, there are essential differences as regards the relationship between this provision and other important values, namely, the importance attached to the right to the freedom of expression in the light of obligations set out in Article 4. The danger that the right to the freedom of expression might be abused by the extensive scope of Article 4 and restrictive measures imposed by this provision explains why a number of Western democracies have made reservations¹²⁰ and interpretative declarations¹²¹ to the Article 4.¹²² The ones which have made declarations are still bound by Article 4 of the Convention, but through declarations they communicate their interpretation of “due regard” clause and the way they would exercise their obligations under Article 4. Apart from that, the CERD has admitted that even among the states which have not made

¹¹⁷ See the Concluding observations of the Committee on the Elimination of Racial Discrimination: Lithuania. 11/04/2006, paragraph 13. CERD/C/LTU/CO/3. Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/67f24838b6b5d369c1257162003d57f0?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/67f24838b6b5d369c1257162003d57f0?Opendocument) (last visited 12.03.2006) and the Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia. 14/04/2005, paragraph 12. CERD/C/AUS/CO/14. Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/fff3368f665eaf93c125701400444342?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/fff3368f665eaf93c125701400444342?Opendocument) (last visited 12.07.2006).

¹¹⁸ Concluding observations of the Committee on the Elimination of Racial Discrimination: Lithuania. 11/04/2006, paragraph 10. CERD/C/LTU/CO/3. Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/67f24838b6b5d369c1257162003d57f0?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/67f24838b6b5d369c1257162003d57f0?Opendocument) (last visited 12.03.2006)

¹¹⁹ Concluding observations of the Committee on the Elimination of Racial Discrimination: Bosnia and Herzegovina. 11/04/2006, paragraph 16. CERD/C/BIH/CO/6. Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/72b2390667c6f922c1257180004b369a?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/72b2390667c6f922c1257180004b369a?Opendocument) (last visited 14.07.2006).

¹²⁰ According to the glossary of treaty bodies terminology “A reservation is a statement made by a State by which it purports to exclude or alter the legal effect of certain provisions of a treaty in their application to that State...” See: <http://www.ohchr.org/english/bodies/treaty/glossary.htm> (last visited 12.03.2006)

¹²¹ According to the glossary of treaty bodies terminology by making an “interpretative declaration” State gives its understanding of a matter contained in or the interpretation of a particular provision in a treaty. Ibid.

¹²² Among these states are Ireland, Australia, the United Kingdom of Great Britain and France. See the list of Declarations and Reservations of States to the Convention at: <http://www.ohchr.org/english/countries/ratification/2.htm#reservations> (last visited 15.07.2006)

reservations to Article 4, few have carried out their obligation under that article to adopt the necessary implementing legislation.¹²³

Among these ones that have not implemented fully obligations under Article 4 are many European states. They regard freedom of expression as a fundamental right that is deeply rooted in their Constitutions and give priority to this right when compared with other ones. Apart from considerations of national law, these states also have to take into account their obligations under Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).¹²⁴ The case-law of the European Court of Human Rights illustrates that the Court attaches the broad scope to the right of freedom of expression and have emphasised that all its limitations should be interpreted narrowly. Nevertheless, the analysis of the Court's case law identifies that it tends to give lower protection to the expressions of "hate speech" and have dismissed a number of complaints about the restrictions of such expressions on the admissibility stage.¹²⁵ Furthermore, it is most likely that in the future the European Court of Human Rights will give more prominence also to the right to non-discrimination. The basis for such hypothesis is Additional Protocol 12th to the Convention which entered into force in 2005. This Protocol introduced independent and broadly defined right of non-discrimination instead of the Article 14 of the ECHR, which granted only limited protection against the discrimination, to the extent that the fact of discrimination was linked to one of the rights contained in the Convention.

The effect of the reference in Article 4 to having "due regard" to the principles embodied in the UDHR and the rights set forth in Article 5 of the ICERD, has been one of the key issues in interpreting obligations implied in Article 4. This is explained by the fact that the right to the freedom of expression is guaranteed both by the UDHR¹²⁶ and is laid down in Article 5 of the ICERD.¹²⁷ Three different views have been expressed about the effect of the "due regard" clause.¹²⁸

¹²³ 39 UN GAOR Supp. (No.18), paragraph 303, UN Doc. A/39/18 (1984). Theodor Meron. The Meaning And Reach Of The International Convention on the Elimination of All Forms of Racial Discrimination. The American Journal of International Law, Vol.79, 1985, p.301.

¹²⁴ See the case *Jersild v. Denmark* which illustrates the inconsistency between two instruments as regards the importance attached to the right to the freedom of expression and striking the balance between the this right and prohibition of hate speech. *Jersild v. Denmark*, European Court of Human Rights, Judgment of 23 September 1994. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 19.06.2006)

¹²⁵ See the analysis of the Court's case law in Chapter III.

¹²⁶ See the text of Article 19 of the UDHR in the Appendix.

¹²⁷ Article 5 (d) (viii) of ICERD states:

"In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction

The first reflects the essence of declarations made by a number of states with respect to Article 4. It provides that this provision should be interpreted in a way that measures described in Article 4 may not jeopardise the right to freedom of expression and opinion and the state parties must strike the balance between the fundamental freedoms and their duties under the Convention.¹²⁹ The second view is more favourable to the freedom of expression. It states that: "...states are not authorised to take any action which would in any way limit or impair the rights referred to in this clause."¹³⁰ The third position is that: "states may not invoke the protection of civil rights as a reason to avoid implementation of the Convention."¹³¹

The CERD has made also its own statement as regards the interpretation of "due regard" clause by emphasizing that: "...it could not have been the intention of the drafters of the Convention to enable States parties to construe the phrase safeguarding the human rights in question as cancelling the obligations relating to the prohibition of racist activities concerned. Otherwise, there would have been no purpose whatsoever for the inclusion in the Convention of the articles laying down those obligations."¹³²

At the same time, the Committee has stressed that Article 4 (a) is compatible with the right to freedom of expression and opinion, given the saving clause that the obligations of Article 4 should be fulfilled with due regard to the principles embodied in the UDHR, namely the Article 19¹³³ which embodies the right to freedom of expression, and Article 5 (d) (viii) of the ICERD, which refers to the freedom of expression. On the other hand, the CERD has emphasised that the right to

as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(d) Other civil rights, in particular:

(viii) The right to freedom of opinion and expression;"

Cited from: http://www.unhchr.ch/html/menu3/b/d_icerd.htm (last visited 07.08.2006)

¹²⁸ Lerner, N. "The U.N. Convention on the Elimination of All Forms of Racial Discrimination", Sijthoff & Noordhoff, Aalphen aan den Rijn, 1980, p.203.

¹²⁹ See the declarations of Austria, Belgium, France and Italy. The list of Declarations and Reservations of States to the Convention is accessible at: <http://www.ohchr.org/english/countries/ratification/2.htm#reservations> (last visited 15.07.2006)

¹³⁰ Lerner, N. "The U.N. Convention on the Elimination of All Forms of Racial Discrimination", Sijthoff & Noordhoff, Aalphen aan den Rijn, 1980, p.203.

¹³¹ Ibid.

¹³² 33 UN GAOR Supp. (No.18) at 112, UN Doc. A/33/18 (1978). Theodor Meron. The Meaning and Reach of The International Convention on the Elimination of All Forms of Racial Discrimination. The American Journal of International Law, Vol.79, 1985, p.283.

¹³³ Article 19 of the UDHR states: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." Accessible at: <http://www.un.org/Overview/rights.html> (last visited 30.09.2006)

freedom of expression is not absolute and according to the Article 29, paragraph 2 of the Universal Declaration of Human Rights¹³⁴ the exercise of this right carries special duties and responsibilities, “among which the obligation not to disseminate racist ideas is of particular importance.”¹³⁵ Furthermore, in a recent case-law the Committee has also stated that in cases of racist and hate speech the principle of freedom of expression has been afforded a lower level of protection and that the right to freedom of expression has a more limited role in the context of Article 4.¹³⁶ To reinforce its position the Committee has made clear that the “due regard” clause relates not only to freedom of expression but generally to all principles embodied in UDHR, therefore the “due regard” clause does not serve as a safeguard only to this right.¹³⁷

The reference of the "due regard" clause to the "principles embodied in the UDHR" permits also to take into account another provision of the UDHR, Article 30. It states:

*"Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein."*¹³⁸

This provision might provide protection against the abuse of the right to the freedom of expression in cases of dissemination or promulgation of racist messages. The HRC has occasionally used the similarly worded Article 5 of the ICCPR¹³⁹ to declare inadmissible the individual complaints in cases, where racist groups have claimed the violation of their right to the freedom of expression.¹⁴⁰

¹³⁴ Article 29 (2) of the UDHR states: "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society". Accessible at: <http://www.un.org/Overview/rights.html> (last visited 30.09.2006)

¹³⁵ General Recommendation No.15: Organized violence based on ethnic origin (Art.4), Committee on the Elimination of Racial Discrimination, 23/03/93. Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/e51277010496eb2cc12563ee004b9768?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/e51277010496eb2cc12563ee004b9768?Opendocument) (last visited 30.09.2006)

¹³⁶ Communication *Jewish community of Oslo and Trondheim and others v. Norway* No 30/2003: Norway. 22/08/2005. CERD/C/67/D/30/2003, paragraph 10.5. Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/b0f01303db356e96c125714c004eb10f?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/b0f01303db356e96c125714c004eb10f?Opendocument) (last visited 07.08.2006)

¹³⁷ Ibid.

¹³⁸ Universal Declaration of Human Rights. Accessible at: <http://www.un.org/Overview/rights.html> (last visited 30.09.2006)

¹³⁹ Article 5(2) of the ICCPR states: "There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent." Cited from: http://www.unhchr.ch/html/menu3/b/a_ccpr.htm (last visited 30.09.2006)

¹⁴⁰ See the Communication *M.A. v Italy*, No. 163/1984: Italy. 10/04/84. CCPR/C/21/D/163/1984. (Jurisprudence) Accessible at:

On the other side, it has been argued that this provision might also "perhaps been relied upon by the Committee more seriously to balance the prohibition of racial discrimination with the freedoms of association and expression stated in the Universal Declaration."¹⁴¹ The right to prohibit incitement to racial discrimination might also be abused by petitioners to restrict the views unfriendly to them or the group they belong to.

As regards other balancing elements in relation to obligations laid down in Article 4, the opinion of the Committee in a recent communication, apparently indicates that some statements might be of such an inoffensive character as to fall *ab initio* outside the scope of Article 4 and other respective provisions of the Convention.¹⁴² The requirement that the statements disputed include certain level of gravity in order to fall within the scope of Article 4 would constitute at least some counterbalancing element at the initial assessment of the expressions. Yet, this element is certainly a very subjective one. It depends fully on the assessment of the Committee. The view of the CERD on this issue as the practice confirms¹⁴³ might differ from the position of the respective State party. Furthermore, the above-mentioned Article 29 (2) of UDHR, which represents another "principle embodied in the UDHR" might also have been used by the Committee to provide some balancing with the right to the freedom of expression in the application of Article 4 of ICERD. It requires limitations to be "*determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society (Art 29 (2)).*"¹⁴⁴

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/b89e52b2512c465ec1256aca004e9a5d?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/b89e52b2512c465ec1256aca004e9a5d?Opendocument)

(last visited 15.09.2006)

¹⁴¹ 39 UN GAOR Supp. (No.18), paragraph 238, UN Doc. A/39/18 (1984) (in the case of Belgium).Theodor Meron. The Meaning And Reach Of The International Convention on the Elimination of All Forms of Racial Discrimination. The American Journal of International Law, Vol.79, 1985, p.300.

¹⁴² Communication *Mohammed Hassan Gelle* No 34/2004: Denmark. 15/03/2006. CERD/C/68/D/34/2004, paragraph 6.2. Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/6715d3bdbeff3c0dc125714d004f62e0?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6715d3bdbeff3c0dc125714d004f62e0?Opendocument) (last visited 07.08.2006)

¹⁴³ Communication *Mohammed Hassan Gelle* No 34/2004: Denmark. 15/03/2006. CERD/C/68/D/34/2004, paragraphs 4.2., 4.5. and 6.2 Accessible at:

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/6715d3bdbeff3c0dc125714d004f62e0?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6715d3bdbeff3c0dc125714d004f62e0?Opendocument) (last visited 07.08.2006)

¹⁴⁴ Schwelb, E. "The International Convention on the Elimination of All Forms of Racial Discrimination", International and Comparative Law Quarterly, Vol.15, Oct.1966, p.1024.

2.3. The practice of CERD as regards the implementation of obligations in Article 4 and the application of “due regard” clause to the freedom of expression

So far the Committee has examined few communications as regards Article 4 and the restrictions on speech inciting to racial discrimination or hatred. In most of these communications it is the states' failure to investigate the acts properly that have been at the basis of CERD's findings that the state has violated the Convention, not the balancing of conflicting rights.¹⁴⁵ In this regard, the Committee has emphasized that it is not enough, for the purposes of Article 4 of the ICERD, merely to declare acts of racial discrimination punishable on paper, but the respective laws must also be effectively implemented by the competent national institutions.¹⁴⁶ This involves also a positive obligation, which is expressively stated in Article 2, Paragraph 1 (d) of the Convention, to take effective action against reported incidents of racial discrimination, including carrying out an effective investigation to determine whether or not such acts had taken place. If the national authorities would make a decision not to open an investigation about the allegedly racist or racially discriminatory statements reported to them without a wider and substantiated explanation of reasons for doing so, the Committee would most probably find their actions to violate not only the Article 4, but also Article 2, Paragraph 1(d) and Article 6 of the Convention. However, apart from the communications which relate to the states failure to launch an effective investigation about the reported incidents, there are two communications assessed by the Committee which directly relate to the balance between the obligations of states under Article 4 to prohibit certain forms of "hate speech" and the protection granted to the right to the freedom of expression in this process.

¹⁴⁵ See the Communication *Kashif Ahmad v. Denmark* No 16/1999: Denmark. 08/05/2000. CERD/C/56/D/16/1999. Accessible at:

<http://www.unhcr.ch/tbs/doc.nsf/MasterFrameView/f363487f33153646c1256914002cdd48?Opendocument> (last visited 17.08.2006) and

Communication *L.K. v. Netherlands* No 4/1991: Netherlands. 16/03/93. CERD/C/42/D/4/1991. Accessible at: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/ec0884e5a47c1a1480256714005f6000?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/ec0884e5a47c1a1480256714005f6000?Opendocument) (last visited 17.08.2006)

¹⁴⁶ Communication *Mohammed Hassan Gelle* No 34/2004: Denmark. 15/03/2006. CERD/C/68/D/34/2004, paragraph 7.3. Accessible at: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/6715d3bdbeff3c0dc125714d004f62e0?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/6715d3bdbeff3c0dc125714d004f62e0?Opendocument) (last visited 17.08.2006)

a) *POEM and FASM v. Denmark*¹⁴⁷

This communication was submitted by two non-governmental organisations representing the ethnic minorities and Muslim students in Denmark. They criticized the State for failure to prosecute the leader of the Danish People's Party and Member of Parliament for allegedly racially discriminatory statements made in her weekly newsletter and subsequently disseminated on the party's web site and through a press release. According to the view of petitioners the assertions made by Mrs Pia Kjærsgaard violated the Article 4 of the ICERD. The disputed statements were the following:

“Behind this lurks the phenomenon which becomes ever more obvious in all its horror: that the multiculturalization of Denmark brings trouble in its train like gang and group formation, mass rape and complete indifference to the principles on which the Danish legal system is built.[...] The phenomenon of mass rape is also new in a Danish context and is linked with a cultural perception of Danish girls as prostitutes who can be defiled without shame, while the same boys and guys are brought up to murder a sister if she breaches the family and cultural codes.”¹⁴⁸

The context in which these statements were made by Mrs Pia Kjærsgaard related to the discussions about proposed legislative amendment purporting to increase the punishment in case of gang rapes following the case of 14-year-old girl who had been raped by several men of non-Danish ethnic background. The Documentation and Advisory Centre on Racial Discrimination (DRC) reported the statement to the police authorities, alleging a violation of section 266 (b) of the Danish Criminal Code.¹⁴⁹ However, the Copenhagen Police discontinued the case. The DRC appealed this decision, but it was upheld also by the Regional Public Prosecutor and the Director of Public Prosecutions.

¹⁴⁷ See Communication *POEM and FASM v. Denmark* No 22/2002: Denmark. 15/04/2003. CERD/C/62/D/22/2002. Accessible at: <http://www.unhchr.ch/tbs/doc.nsf/MasterFrameView/b0d9f9415342207ac1256d60004be627?Opendocument> (last visited 07.08.2006)

¹⁴⁸ See Communication *POEM and FASM v. Denmark* No 22/2002: Denmark. 15/04/2003. CERD/C/62/D/22/2002, paragraph 2.4. Accessible at: <http://www.unhchr.ch/tbs/doc.nsf/MasterFrameView/b0d9f9415342207ac1256d60004be627?Opendocument> (last visited 07.08.2006)

¹⁴⁹ Section 266 (b) of the Danish Criminal Code reads:

1. Any person who publicly or with the intention of disseminating it to a wide circle of people, makes a statement or imparts other information threatening, insulting or degrading a group of persons on account of their race, colour, national or ethnic origin, belief or sexual orientation shall be liable to a fine or imprisonment for any term not exceeding two years.
2. When the sentence is meted out, the fact that the offence is in the nature of propaganda activities shall be considered an aggravating circumstance.

The decision explains the reasons and identifies criteria applied by the responsible authorities in balancing the right to the freedom of expression with the obligation to prohibit racially discriminatory remarks. The national authorities in making a decision to terminate the case apparently gave much consideration to the freedom of expression and the need to ensure free political debate. This is evidenced by the following statement in the police decision: "...Political statements, although they may be perceived by some as offending, are part of dialectic where, traditionally, there are wide limits to the use of generalization and simplified allegations. The above-mentioned weekly newsletter consists in an observation on the scale of penalties for crimes of violence, which is legitimate in a political debate."¹⁵⁰ The decision of Regional Public Prosecutor to whom the case was appealed followed the same reasoning. He emphasized *inter alia* "...that it must be accepted, to a certain degree, that, in order to secure a free and critical debate, statements may be offending to individuals or groups. Regardless of the degrading and insulting character of the statement for individuals of a different cultural background, the allegations made in the statement are not serious enough to justify a derogation from the freedom of expression."¹⁵¹

The wider scope of the right to the freedom of expression as regards political debate on issues of public concern have been stressed also in the jurisprudence of other human rights monitoring bodies of which Denmark is a party.¹⁵² Furthermore, the European Court of Human Rights has emphasized that it is not only the content of expressions which is protected, but also the form these expressions are conveyed. Thus also the statements which are offending for somebody are protected to a certain degree, especially if they generally contribute to the public debate¹⁵³ or are the result of the provoking actions made by the victim himself.¹⁵⁴ In the case of *Jersild v. Denmark* the Court had even found a violation of freedom of expression concerning the punishment of journalist for assisting in dissemination of racist views through the TV report. The Court came to the conclusion

Cited from: http://www.humanrights.dk/news/briefs/briefs_01/ (last visited 19.08.2006)

¹⁵⁰ Communication *POEM and FASM v. Denmark* No 22/2002: Denmark. 15/04/2003. CERD/C/62/D/22/2002, paragraph 2.6. Accessible at:

<http://www.unhchr.ch/tbs/doc.nsf/MasterFrameView/b0d9f9415342207ac1256d60004be627?Opendocument>
(last visited 07.08.2006)

¹⁵¹ *Ibid.*, paragraph 2.8.

¹⁵² See for example the view of the Human Rights Committee as regards communication *Robert W. Gauthier v. Canada*, No 633/1995. 05/05/1999. CCPR/C/65/D/633/1995 Accessible at: <http://www.unhchr.ch/tbs/doc.nsf> (last visited 15.08.2006) and the judgements of the European Court of Human Rights in the cases *Lingens v. Austria* and *Castells v. Spain*. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 19.06.2006)

¹⁵³ *Jersild v. Denmark*, European Court of Human Rights, Judgment of 23 September 1994. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 19.06.2006)

that the aim of the report was not racist. Besides there was a number of counterbalancing arguments in the programme and the inclusion of racist remarks made by the members of extremist group interviewed served the purpose to illustrate the existence of racism in the country and to demonstrate the social background of members of such groups.

Therefore, as regards this case the public interest, the context of the political debate, in which the statements were made by the leader of the Danish People's Party, as well as the alleged aim to participate in such a debate were important criteria for the authorities to take into consideration in order to assess whether the challenged statements fall within the scope of freedom of expression. However, despite the fact that these criteria were present in the actual case, the case-law of human rights monitoring bodies also affirms that recourse to insulting statements is not justified if these statements entail no added value and the contribution to the public debate would have had the same effect by avoiding such statements. This principle would be even more applicable to racially discriminatory expressions, in view of the prohibition of racial discrimination by several human rights treaties provisions. The Committee apparently followed this principle in a subsequent communication which challenged the statements of the same Danish politician.¹⁵⁵ In that case Regional Public Prosecutor upheld the decision of the police not to open investigation into the matter on the basis *inter alia* “[...] that the statements were made as a part of political debate, which, as a matter of principle, affords quite wide limits for the use of unilateral statements in support of a particular political view”.¹⁵⁶ The CERD, however, emphasized that “that the fact that Ms. Kjærsgaard's statements were made in the context of a political debate does not absolve the State party from its obligation to investigate whether or not her statements amounted to racial discrimination.”¹⁵⁷ This position of the Committee makes it clear that despite the fact that the disputed expressions were made within the context of a political debate, including by Members of Parliament, they still might be found to be of racially discriminatory character. Therefore, the state is under an obligation to give a proper consideration of these statements.

¹⁵⁴ *Oberschlick v. Austria (No.2)*, European Court of Human Rights, Judgment of 1 July 1997, paragraph 33. Accessible at HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 19.06.2006)

¹⁵⁵ Communication *Mohammed Hassan Gelle* No 34/2004: Denmark. 15/03/2006. CERD/C/68/D/34/2004. Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/6715d3bdbeff3c0dc125714d004f62e0?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6715d3bdbeff3c0dc125714d004f62e0?Opendocument) (last visited 07.08.2006)

¹⁵⁶ *Ibid.*, paragraph 2.4.

¹⁵⁷ Communication *Mohammed Hassan Gelle* No 34/2004: Denmark. 15/03/2006. CERD/C/68/D/34/2004, paragraph 7.5. Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/6715d3bdbeff3c0dc125714d004f62e0?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6715d3bdbeff3c0dc125714d004f62e0?Opendocument) (last visited 07.08.2006)

The facts of the actual case, *POEM and FASM v. Denmark*, does not present reasons why the leader of the Danish People's Party needed to make a recourse to racially discriminatory and prejudicial statements about Muslims to express her view and to contribute to the alleged legitimate aim - debate on the scale of penalties for crimes of violence.¹⁵⁸ The responsible law enforcement authorities seemingly did not consider this issue. As stated in the decision of Director of Public Prosecutions cited above, he acknowledged the insulting character of statements but found the allegations made not enough serious to justify derogation from the freedom of expression. The assessment of seriousness of disputed statements is a very subjective criterion, since it is based largely on the individual's appraisal, contrary to the earlier criteria like aim, context and contribution to public interest of the expressions which can be measured on a more objective basis. The practice of the CERD confirms that the Committee might disagree with the assessment of national authorities as regards the seriousness or gravity of the insulting expressions.¹⁵⁹ In order to minimize the possible contradictions between the State's and the Committee's view the authorities should make thorough analysis of the disputed statements and in reaching a decision take into consideration also the point of view of the alleged victims.

This case raises another interesting issue, namely the extended right to the freedom of expression for members of Parliament concerning controversial public matters and their responsibility if they make statements prohibited by Article 4 of ICERD. The Danish authorities did not give an opinion on this issue, even though the petitioner made such request to the Director of Public Prosecutions. In most democracies the deputies are entitled to parliamentary immunity against the prosecution, particularly for the views they have expressed within the public debate. Nevertheless, this well-established principle in democratic societies could not serve as an excuse for states to fulfil their international obligations under Article 4 of ICERD. In most countries the Parliament can lift the immunity of its members if they are accused of committed offences. This rule should apply also to the offence of dissemination of statements prohibited by Article 4 of the Convention. Moreover, in most states parliamentarians have codes of ethics and other self-regulatory measures, which prevent the use of parliamentary immunity in order to disseminate racist slogans. However, if the

¹⁵⁸ See Communication *POEM and FASM v. Denmark* No 22/2002: Denmark. 15/04/2003. CERD/C/62/D/22/2002, paragraph 2.6. Accessible at: <http://www.unhcr.ch/tbs/doc.nsf/MasterFrameView/b0d9f9415342207ac1256d60004be627?Opendocument> (last visited 07.08.2006)

¹⁵⁹ See communication *Jewish community of Oslo and Trondheim and others v. Norway* No 30/2003: Norway. 22/08/2005. CERD/C/67/D/30/2003, paragraph 10.4.

authorities do nothing to prevent the dissemination of prohibited expressions, the CERD will find the State in violation of its international obligations.

The communication also referred to a procedural issue concerning the implementation of Article 4 of ICERD. Namely, the petitioners challenged the public prosecutor's office as the proper institution to draw the line between the freedom of expression and protection from racist remarks. They emphasized the need for the courts to consider such cases, especially where the alleged offender is a politician, because of the independence of judiciary. Due to inadmissibility of the case the CERD did not give an opinion on this issue. The Convention itself does not specify which authority should decide on complaints about alleged violations of Article 4 of ICERD. However, the courts would be the most appropriate institutions in view of their guarantees of independence and the thorough analysis which is often required in such cases and might be ensured by possibility to appeal the case for examination at higher level. Certainly, the Public Prosecutor should not bring the case before the Court if he does not assess that it can lead to a sentence. But the individual should have a possibility to bring a private prosecution, if he disagrees with such assessment. Moreover, the Committee has in numerous cases found the states responsible for violating the ICERD only on the basis of lack of effective investigation of the incidents reported. This supports the view that examination of the complaints about the alleged violations of the Convention at the level of police and public prosecutor might not ensure the proper diligence in the examination of complaints.¹⁶⁰

When the case about the statements by the leader of Danish People's Party went to the consideration by the CERD, the representatives of Denmark followed the reasoning of national institutions and emphasized the need of balancing the prohibition of the dissemination of ideas based on racial superiority or hatred with the right to the freedom of expression on the basis of "due regard clause" in the Article 4 of ICERD. The Danish authorities also referred to their obligations under the Article 19 of the ICCPR and Article 10 of the ECHR. The state authorities emphasized that freedom of expression applies also to comments on racial groups and referred particularly to

Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/b0f01303db356e96c125714c004eb10f?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/b0f01303db356e96c125714c004eb10f?Opendocument) (last visited 07.08.2006.)

¹⁶⁰ Communication *L.K. v. Netherlands* No 4/1991; Netherlands. 16/03/93. CERD/C/42/D/4/1991. Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/ec0884e5a47c1a1480256714005f6000?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/ec0884e5a47c1a1480256714005f6000?Opendocument) (last visited 17.08.2006) and Communication *Mohammed Hassan Gelle* No 34/2004; Denmark. 15/03/2006. CERD/C/68/D/34/2004. Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/6715d3bdbeff3c0dc125714d004f62e0?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6715d3bdbeff3c0dc125714d004f62e0?Opendocument) (last visited 07.08.2006)

the principles settled by the European Court of Human Rights in the case of *Jersild v Denmark*¹⁶¹, where the Court established that also the protection against racist statements had to be balanced against the freedom of expression. The State party considered that the expressions in question were part of a political or social debate and that the European Court of Human Rights in its case-law has emphasised the need to ensure free public debate on the issues of public concern.¹⁶² It will be interesting to see how the CERD is going to approach all these arguments including the obligation of the State to provide necessary safeguards to the right to the freedom of expression under other human rights treaties. Unfortunately, the case was declared inadmissible due to the fact that petitioners have not exhausted domestic remedies. However, there is an implicit indication that the Committee might have found a violation in this case considering the racially discriminatory nature of these statements and the special responsibilities of members of parliament concerning the fight with racial discrimination as well as bearing in mind the influence politicians exert on society. This is evidenced by the following comment of the CERD: "Committee calls the State party's attention to the content of paragraph 115 of the Programme of Action adopted by the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance in Durban (South Africa) on 8 September 2001, which "underlines the key role that politicians and political parties can play in combating racism, racial discrimination, xenophobia and related intolerance and encourages political parties to take concrete steps to promote equality, solidarity and non-discrimination in society, inter alia by developing voluntary codes of conduct which include internal disciplinary measures for violations thereof, so their members refrain from public statements and actions that encourage or incite racism, racial discrimination, xenophobia and related intolerance".¹⁶³

The subsequent jurisprudence of the CERD affirms that the Committee considers with particular seriousness racist or racially discriminatory remarks made by political figures¹⁶⁴ and other actors who are capable of influencing the opinion of society. For example its General Recommendation

¹⁶¹ *Jersild v. Denmark*, European Court of Human Rights, Judgment of 23 September 1994. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 19.06.2006)

¹⁶² *Ibid.*, paragraphs 4.8. - 4.16.

¹⁶³ See Communication *POEM and FASM v. Denmark* No 22/2002; Denmark. 15/04/2003. CERD/C/62/D/22/2002, paragraph 7. Accessible at: <http://www.unhchr.ch/tbs/doc.nsf/MasterFrameView/b0d9f9415342207ac1256d60004be627?Opendocument> (last visited 07.08.2006)

¹⁶⁴ The particular seriousness of "hate speech" when made by political figures is emphasized in subsequent Opinion of the Committee. See Communication *Kamal Quereshi v. Denmark* No 33/2003; Denmark. 10/03/2005. CERD/C/66/D/33/2003, paragraph 8.

Accessible at:

<http://www.unhchr.ch/tbs/doc.nsf/MasterFrameView/7de05b5d0fbd62e9c1256fc5005087f9?Opendocument>

30: “Discrimination against non-citizens” recommends the State parties to take “resolute action to counter any tendency to target, stigmatize, stereotype or profile, on the basis of race, colour, descent, and national or ethnic origin, members of "non-citizen" population groups, especially by politicians, officials, educators and the media [...]”¹⁶⁵

b) *Jewish community of Oslo and Trondheim and others v. the State of Norway*¹⁶⁶

The communication analyzed above raised a number of interesting issues as regards the implementation of Article 4 at national level and the approach of national institutions in balancing the obligations under this provision with the right to the freedom of expression. However, the Committee did not express a lot of statements concerning the balance between the right of freedom of expression and obligation to prohibit certain forms of speech under Article 4 of ICERD, because it found the complaint inadmissible. The Committee had a chance to elaborate more on these complex issues in its opinion on a subsequent communication submitted by the Jewish community of Oslo and Trondheim and others versus the Norway. This opinion provides the thorough interpretation of Article 4 itself, the “due regard clause” and the approach of the Committee to balance the obligations included in Article 4 of ICERD with the right to the freedom of speech.

The facts of the case relate to a speech made during march organized by a group known as the “Bootboys” in commemoration of the Nazi leader Rudolf Hess. There were 38 people taking part in this march, which was routed over 500 m through the centre of Askim (town near the Oslo) and lasted five minutes. The march was headed by Mr. Sjolie who made a speech, including the following statements:

“...Every day immigrants rob, rape and kill Norwegians, every day our people and country are being plundered and destroyed by the Jews, who suck our country empty of wealth and replace it with immoral and un-Norwegian thoughts.” And “...Our dear Führer Adolf Hitler and Rudolf Hess

(last visited 07.08.2006)

¹⁶⁵ General Recommendation No. 30: Discrimination against non-citizens, Committee on the Elimination of Racial Discrimination, 01/10/2004, paragraph 12. Accessible at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/e3980a673769e229c1256f8d0057cd3d?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/e3980a673769e229c1256f8d0057cd3d?Opendocument)

(last visited 30.09.2006)

¹⁶⁶ Communication *Jewish community of Oslo and Trondheim and others v. Norway* No 30/2003: Norway. 22/08/2005. CERD/C/67/D/30/2003.

sat in prison for what they believed in, we shall not depart from their principles and heroic efforts, on the contrary we shall follow in their footsteps and fight for what we believe in, namely a Norway built on National Socialism”¹⁶⁷

Subsequently, the District Attorney of Oslo charged Mr. Sjolie with a violation of Section 135a of the Norwegian Penal Code¹⁶⁸ on a basis of several complaints filed with the police. The case was assessed differently by various Norwegian courts. Thus, the Court of Appeal found Mr. Sjolie guilty of violation of Section 135a of Norwegian Penal Code because of the references in his speech to Jews and interpreted the speech as accepting the mass extermination of the Jews. However, the Supreme Court overturned the conviction. The majority of the Court found that the statements by Mr. Sjolie “did nothing more than express support for National Socialist ideology”¹⁶⁹ and stated that: “...penalizing approval of Nazism would involve prohibiting Nazi organizations, which ...would go too far and be incompatible with the right to freedom of speech.”¹⁷⁰ After this Supreme Court decision the Jewish community organizations in Oslo and Trondheim, the Norwegian Antiracist Centre and several individuals submitted a communication to CERD claiming to be victims of violations by Norway of Articles 4 and 6 of the ICERD. They argued that the way the Supreme Court had interpreted Section 135a of Norwegian Penal Code in its decision left no protection in national law against the dissemination of anti-Semitic and racist propaganda, nor against incitement to racial discrimination, hatred and violence.

Before the consideration on merits, the communication raised a number of issues as regards its admissibility. First of all, the State party argued that the communication amounts to *actio popularis*, namely, to an assessment of the relevant provisions of Norwegian Penal Code. It observed that authors cannot claim to be victims since none of them was present when the remarks were made

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¹⁶⁷ Communication *Jewish community of Oslo and Trondheim and others v. Norway* No 30/2003: Norway. 22/08/2005. CERD/C/67/D/30/2003, paragraph 2.1.

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¹⁶⁸ This provision of Penal Code prohibits a person from threatening, insulting, or subjecting to hatred, persecution or contempt, any person or group of persons because of their creed, race, colour or national or ethnic origin. The General Civil Penal Code of Norway, adopted at 22 May 1902 with subsequent amendments, the latest made by Act of 21 December 2005. Accessible at: <http://www.ub.uio.no/ujur/ulovdata/lov-19020522-010-eng.pdf> (last visited 19.08.2006)

¹⁶⁹ Communication *Jewish community of Oslo and Trondheim and others v. Norway* No 30/2003: Norway. 22/08/2005. CERD/C/67/D/30/2003, paragraph 2.7.

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¹⁷⁰ Ibid.

and they were not personally targeted by these remarks. Secondly, the State questioned the standing of petitioners on a basis that the relevant organizations cannot be considered “groups of individuals” for the purposes of Article 14, Paragraph 1 of the Convention.¹⁷¹ According to the Norwegian authorities, this phrase “should be understood as meaning a group of which every individual member could claim to be a victim of the alleged violation. ... It is the individuals, rather than the groups, which have standing.”¹⁷² The CERD disagreed with both of these arguments made by the State party. As regards the status of “potential victim” the Committee adopted a similar approach to this concept as accepted by the Human Rights Committee and the European Court of Human Rights in some of their decisions referred to in the authors’ submissions.¹⁷³ This approach implies that the very existence of a particular legal regime (inability of Norwegian law to protect authors against the speech prohibited by Article 4 of ICERD) might directly affect the author’s rights in such a way as to give rise to a violation of the Convention, even if the petitioners have not been adversely affected by this legal regime up to now. In addition the authors have illustrated that they are more likely to be potential victims because they belong to a particular group as Jews, and that they consequently would face an imminent risk of suffering racial discrimination, hatred and violence created by non-existence of legal safeguards in national law.

Concerning the interpretation of the term “groups of individuals”, the Committee disagreed with the strict interpretation suggested by the State party and emphasized: “to require that each individual within the group be an individual victim of an alleged violation, would be to render meaningless the reference to ‘groups of individuals.’”¹⁷⁴ The CERD found that the petitioners have satisfied also this requirement to be considered as “victims”, in view of the nature of the organizations’ activities and the classes of person they represent. This was the first communication in which the Committee has expressed its opinion on the interpretation of the phrase “group of individuals” in relation to Article

¹⁷¹ See the text of Article 14, paragraph 1 of the ICERD in the Appendix.

¹⁷² Communication *Jewish community of Oslo and Trondheim and others v. Norway* No 30/2003: Norway. 22/08/2005. CERD/C/67/D/30/2003, paragraph 4.3.

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¹⁷³ Communication *Toonen v. Australia*, No 488/1992: Australia. 04/04/94. CCPR/C/50/D/488/1992. (Jurisprudence) Accessible at: <http://www.unhchr.ch/tbs/doc.nsf/0/d22a00bcd1320c9c80256724005e60d5> (last visited 25.09.2006) and *Open Door and Dublin Well Woman v. Ireland*, European Court of Human Rights, Judgment of 29 October 1992, paragraph 44. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 19.06.2006)

¹⁷⁴ Communication *Jewish community of Oslo and Trondheim and others v. Norway* No 30/2003: Norway. 22/08/2005. CERD/C/67/D/30/2003, paragraph 7.4.

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14. As can be concluded from the opinion, the Committee is giving a broad interpretation to this concept. However, the Committee took into consideration also the nature of organizations activities and the groups they represent. Therefore, there should be demonstrated at least some identification between the organizations submitting the communication and the potential victims of alleged violation.

As regards the consideration of the merits, the Committee followed a two step procedure. It first assessed whether the statements made by Mr. Sjolie fell within any of the categories of the speech prohibited in Article 4. In relation to characterization of the speech, the CERD held a different view to the findings than that of the Supreme Court of Norway. The Committee agreed that the content of the speech was objectively absurd, but at the same time emphasized that: “the lack of logic of particular remarks is not relevant to the assessment of whether or not they violate article 4.”¹⁷⁵ The CERD found that the statements contain ideas based on racial superiority or hatred. Furthermore, contrary to the Supreme’s Court assessment which found no actual threats or incitement to particular actions within the statements, CERD considered that “the deference to Hitler and his principles and 'footsteps' must ... be taken as incitement at least to racial discrimination, if not to violence.”¹⁷⁶

After the conclusion that the challenged statements fell within at least one of the categories of impugned speech set out in Article 4, the CERD proceeded with the analysis as to whether these expressions are protected by the “due regard” provision as it relates to the freedom of speech. The Committee stressed that despite the “due regard” clause the right to freedom of speech has a more limited role in the context of Article 4. It also referred to its general Recommendation XV according to which “the prohibition of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression.”¹⁷⁷ To support its view the Committee mentioned also the practice of other international bodies which affirms that the freedom of speech has been afforded a lower level of protection in cases of racist and hate speech.

¹⁷⁵ Communication *Jewish community of Oslo and Trondheim and others v. Norway* No 30/2003: Norway. 22/08/2005. CERD/C/67/D/30/2003, paragraph 10.4.

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¹⁷⁶ *Ibid.*, paragraph 10.5.

¹⁷⁷ General Recommendation No.15: Organized violence based on ethnic origin (Art.4), Committee on the Elimination of Racial Discrimination, 23/03/93, paragraph 4. Accessible at:

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/e51277010496eb2cc12563ee004b9768?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/e51277010496eb2cc12563ee004b9768?Opendocument) (last visited 30.09.2006)

Furthermore, the CERD noted that there is a possibility to limit the exercise of the freedom of expression in all international instruments that guarantee this right. Therefore, the Committee found that in view of the manifestly offensive character of the statements of Mr. Sjolie, they are not protected by the “due regard” clause. The CERD apparently did not give much consideration to the argument of Norwegian authorities that there should be a margin of appreciation granted to states to balance their obligations under the Article 4 of ICERD with the requirement to protect the freedom of speech. In its comment on this point the Committee just stated that it is aware of the Supreme Court’s analysis of the case, and emphasized that “...it has the responsibility to ensure the coherence of the interpretation of the provisions of Article 4 of the Convention as reflected in its general recommendation XV.”¹⁷⁸ The Committee has expressed also earlier its firm opposition to the possibility to grant some margin of appreciation to states as regards the obligations set out in Article 4, for example in relation to the option to apply civil instead of criminal sanctions to acts prohibited in Article 4.

Lastly, the CERD rejected the arguments of the State party, which challenged the possibility for individuals to invoke Article 4 alone as a basis for alleged violation without evidence that the statements disputed have adversely affected their enjoyment of any substantive rights protected under Article 5 of the Convention. The Opinion of the Committee illustrates that failure to enforce obligations under Article 4 in itself might constitute a ground for an individual communication claiming violation of the ICERD. The Committee observed: “...the fact that article 4 is couched in terms of States parties' obligations, rather than inherent rights of individuals, does not imply that they are matters to be left to the internal jurisdiction of States parties, and as such immune from review under article 14. If such were the case, the protection regime established by the Convention would be weakened significantly.”¹⁷⁹ To reinforce its conclusion that the Convention’s rights are not confined to Article 5, the Committee referred both to the wording of Article 6¹⁸⁰ and its earlier

¹⁷⁸ Communication *Jewish community of Oslo and Trondheim and others v. Norway* No 30/2003: Norway. 22/08/2005. CERD/C/67/D/30/2003, paragraph 10.3.

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¹⁷⁹ Communication *Jewish community of Oslo and Trondheim and others v. Norway* No 30/2003: Norway. 22/08/2005. CERD/C/67/D/30/2003, paragraph 10.5.

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¹⁸⁰ See the text of Article 6 of the ICERD in the Appendix.

practice under Article 14 to examine communications in which no violation of Article 5 has been alleged.¹⁸¹

2.4. Conclusions

The specific nature of the ICERD and purpose which motivated the adoption of Convention, namely the struggle against racial discrimination, has determined the balance between both interests - the prohibition of dissemination of racist ideas and incitement to racial hatred in opposition to the the freedom of expression. While the prohibition of racist speech and ideas is firmly embedded in Article 4 of the Convention, the freedom of expression is recalled in Article 5 (d) (viii) among other civil rights in the light of prohibition of discriminatory practice as regards its enjoyment. This imbalance has influenced also the approach of the Committee in cases where it was confronted with the controversy between the different interests involved. Furthermore, in the practice of the Committee there have been complaints only about the violation of Article 4, namely the lack of the state to restrict the racist expressions prohibited by this provision. Therefore, it has approached the freedom of expression only from restrictive angle.

In many cases the CERD has found violations of Article 4 and based its decision primarily on the fact that the relevant state authorities have not made an effective investigation in the allegedly racist incidents. In its jurisprudence, the Committee has consistently emphasized that States parties are under obligation not only to enact legislation required by Article 4 but also to ensure that it is effectively enforced.¹⁸² For example, in the concluding observations on state reports the Committee has constantly asked the states to provide information on the implementation of Article 4 and the relevant case-law where this provision or pertinent national law provisions have been applied. However, in some cases the CERD was directly confronted with the necessity to declare its position

¹⁸¹ See for example: communication *Ziad Ben Ahmed Habassi v Denmark*, paragraphs 9.3 and 10, where the Committee found a violation of articles 2 and 6. Communication *Ziad Ben Ahmed Habassi v. Denmark* No 10/1997: Denmark. 06/04/99. CERD/C/54/D/10/1997. Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/0897d66dcdd5e34ec1256914003130a5?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/0897d66dcdd5e34ec1256914003130a5?Opendocument) (last visited 07.08.2006) and *Kamal Quereshi v Denmark*, paragraphs 7.1 – 9. Communication *Kamal Quereshi v. Denmark* No 33/2003: Denmark. 10/03/2005. CERD/C/66/D/33/2003. Accessible at: <http://www.unhchr.ch/tbs/doc.nsf/MasterFrameView/7de05b5d0fbd62e9c1256fc5005087f9?Opendocument> (last visited 07.08.2006)

¹⁸² General Recommendation No.15: Organized violence based on ethnic origin (Art.4), Committee on the Elimination of Racial Discrimination, 23/03/93, paragraph 2. Accessible at:

on the relationship between the obligations imposed by Article 4 and the right to the freedom of expression.

Article 4 encompasses far reaching restrictions on the freedom of expression. For example it obliges states to penalize *per se* the dissemination of ideas based on racial superiority or hatred. There is no requirement to prove the intention or the aim which has been pursued by such act. Similarly, the consequences or effect of dissemination of such ideas is not among the factors which could justify an exception to the application of restrictive measures to the one who has committed this prohibited act. Furthermore, Article 4 requires imposition of criminal sanctions on those responsible. While the the jurisprudence of the Committee has indicated that the remedies available under civil law might assist victims in claims as regards compensation for moral harm suffered, the Committee has emphasized that the sole existence of civil or administrative remedies is not appropriate to proper enforcement of this provision of the Convention. The Committee has explained that remedies under other branches of law cannot satisfy the aims the victims of racist statements are usually trying to achieve, namely the investigation and criminal punishment of those responsible. Furthermore, it is an obligation of state authorities and not the individuals to open and make a proper investigation in the cases of racist incidents, which can be ensured through criminal proceedings. Another reason for the emphasis on criminal sanctions might be their deterrent effect, which is essential in the light of preventive role of Article 4. The Committee has emphasized that at the time when the ICERD was adopted there was a widespread fear of the revival of authoritarian ideologies and Article 4 was regarded as central in the struggle against racial discrimination.¹⁸³

Additionally, while Article 4 imposes broad restrictions on the right to freedom of expression, it does not contain clearly defined counter-balancing elements and safeguards against the undue limitations on the freedom of expression. The only exception has been the “due regards” clause in Article 4 which refers to the principles embodied in the UDHR and the rights expressly set forth in Article 5 of the Convention. The freedom of expression is among the rights recalled in Article 5 of ICERD and is also embodied in Article 19 of the UDHR. However, the “due regard” clause has been subject to different interpretations by States parties and the Committee. In addition, the

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/e51277010496eb2cc12563ee004b9768?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/e51277010496eb2cc12563ee004b9768?Opendocument) (last visited 30.09.2006)

¹⁸³ General Recommendation No.15: Organized violence based on ethnic origin (Art.4), Committee on the Elimination of Racial Discrimination, 23/03/93, paragraph 1. Accessible at:

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/e51277010496eb2cc12563ee004b9768?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/e51277010496eb2cc12563ee004b9768?Opendocument) (last visited 30.09.2006)

likelihood that the “due regard” clause might function as a safeguard to the freedom of expression has been weakened by the fact that according to the author’s knowledge the Committee has never invoked this clause in its case-law in order to find the communication about the alleged violation of Article 4 unjustified. Moreover, the Committee has made it clear that despite the due regard clause, the right to freedom of expression has a more limited role in the light of the obligations included in Article 4.¹⁸⁴ The CERD is of the view that such a position does not contradict the freedom of expression arguing that other human rights monitoring bodies have given a lower level of protection to freedom of expression in cases of racist speech and that all human rights treaties guaranteeing the freedom of expression also provide for restrictions on the exercise of this right under certain circumstances. The Committee has stressed that the exercise of freedom of expression carries special duties and responsibilities and the obligation not to disseminate racist ideas is of particular importance in this context.¹⁸⁵

The way the Committee has applied Article 4 has not removed uncertainties about the wide possibilities of encroachment on freedom of expression by the application of measures required by Article 4. In the practice of the Committee it is not clear whether this provision is applicable only to public statements or whether it is also applicable to statements made in private circles. The recent practice of the Committee also suggests that it is focusing on the degree of publicity of the expressions disputed instead of making a firm delimitation between the public and private area.¹⁸⁶ This approach allows the Committee to address in each case individually this occasionally complex issue and to take into account grey areas between the private and public. As regards the application of Article 4 to private domain it seems that the Committee would accept as appropriate remedy a possibility to appeal to criminal proceedings based on protection against defamation. It has

¹⁸⁴ Communication *Jewish community of Oslo and Trondheim and others v. Norway* No 30/2003: Norway. 22/08/2005. CERD/C/67/D/30/2003, paragraph 10.5. Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/b0f01303db356e96c125714c004eb10f?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/b0f01303db356e96c125714c004eb10f?Opendocument) (last visited 07.08.06)

¹⁸⁵ General Recommendation No.15: Organized violence based on ethnic origin (Art.4), Committee on the Elimination of Racial Discrimination, 23/03/93, paragraph 4. Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/e51277010496eb2cc12563ee004b9768?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/e51277010496eb2cc12563ee004b9768?Opendocument) (last visited 30.09.2006)

¹⁸⁶ Communication *Kamal Quereshi v. Denmark* No 33/2003: Denmark. 10/03/2005. CERD/C/66/D/33/2003. Accessible at: <http://www.unhchr.ch/tbs/doc.nsf/MasterFrameView/7de05b5d0fbd62e9c1256fc5005087f9?Opendocument> (last visited 07.08.2006)

confirmed such view in cases where racially discriminatory statements have been of non-violent character and essentially private or expressed within a limited circle.¹⁸⁷

The CERD has rejected arguments by State party which challenged the possibility for individuals to invoke Article 4 alone as a basis for alleged violation without evidence that the statements disputed have adversely affected their enjoyment of any substantive rights protected under Article 5 of the Convention. The jurisprudence of the Committee illustrates that failure to enforce obligations under Article 4 in itself might constitute a ground for an individual communication claiming violation of the ICERD. The Committee has stated that Article 4 can be invoked by individuals as an autonomous basis for alleged violation in the proceedings before the Committee, despite the fact that it is couched in terms of state obligations. For example in the case of *Jewish community of Oslo and Trondheim and others versus the State of Norway* the Committee disagreed with the States parties' position that in order to invoke Article 4 the individuals should also provide evidence that alleged racist or racially discriminatory statements had adverse impact on their enjoyment of any substantive rights protected under Article 5 of the Convention.¹⁸⁸

The Committee apparently supports *carte blanche* restrictions on freedom of expression in implementing Article 4. For example in concluding observations on the report submitted by France the Committee has even suggested to widen the scope of application of the much disputed¹⁸⁹ Gayssot Act, which makes it an offence to contest the existence of the category of crimes against humanity as defined in the London Charter of 8 August 1945, on the basis of which Nazi leaders were tried and convicted by the International Military Tribunal at Nuremberg in 1945-1946. This might be concluded from the following statement of the CERD:

“The Committee considers, as it has done in previous conclusions relating to the State party, that the prohibition of attempts to justify crimes against humanity, and of their denial, should not be limited to acts committed during the Second World War. The Committee encourages the State party to

¹⁸⁷ Communication *Sadic v. Denmark* No 25/2002: Denmark. 25/05/2002. CERD/C/62/D/25/2002. Accessible at: <http://www.law.wits.ac.za/humanrts/country/decisions/25-2002.html> (last visited 07.08.2006)

¹⁸⁸ Communication *Jewish community of Oslo and Trondheim and others v. Norway* No 30/2003: Norway. 22/08/2005. CERD/C/67/D/30/2003, paragraph 10.5.

Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/b0f01303db356e96c125714c004eb10f?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/b0f01303db356e96c125714c004eb10f?Opendocument) (last visited 07.08.06)

¹⁸⁹ Look for comparison the concerns about this act expressed by the HRC in its assessment of the Communication *Faurisson v. France*, No 550/1993: France. 16/12/96. CCPR/C/58/D/550/1993. (Jurisprudence) Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/4c47b59ea48f7343802566f200352fea?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/4c47b59ea48f7343802566f200352fea?Opendocument) (last visited 10.09.2006.)

criminalize attempts to deny war crimes and crimes against humanity as defined in the Statute of the International Criminal Court, and not only those committed during the Second World War.”¹⁹⁰ Despite the fact that the CERD apparently supports adoption of such legislation, there is no evidence in the jurisprudence of the Committee that the CERD would require such far reaching restrictions on freedom of expression as obligatory.

In view of the far reaching obligations of Article 4 and in order to provide safeguards for the right to the freedom of expression, a number of Western European states have made reservations or interpretative declarations as regards this provision of the ICERD. The reluctance of states to be bound by Article 4 is understandable in light of the broad scope of the prohibitions on speech it encompasses. In addition, these states also have to bear in mind their obligations under other human rights treaties, particularly ECHR, to provide guarantees against undue limitations on the right to the freedom of expression. While the Committee has introduced some flexibility in its assessment of statements allegedly violating Article 4, the elements which might influence the Committee’s consideration are not transparent. For example, in one of the recent cases the Committee has opposed the State parties’ arguments that the statements disputed were of such an inoffensive character as to *ab initio* fall outside the scope of Article 4 of the Convention.¹⁹¹ This may lead to the presumption that in order for the disputed expressions to come within the scope of Article 4, they should reach a certain level of offensiveness. The decision whether this level has been reached, however, is purely dependent on the CERD’s view.

The lack of transparency in the reasoning of the Committee may sometimes be the result of the fact that there are a number of factors involved in the decision-making and that it would be hard to set down any objective criteria. The Committee has several times disagreed with the assessment of national courts as regards the seriousness and nature of the expressions disputed. For example in the case of *Jewish community of Oslo and Trondheim and others versus the State of Norway*¹⁹² the

¹⁹⁰ Concluding observations of the Committee on the Elimination of Racial Discrimination: France. 18/04/2005, CERD/C/FRA/CO/16, paragraph 20.

Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/919beacf0882320dc12570200047fe62?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/919beacf0882320dc12570200047fe62?Opendocument) (last visited 16.07.2006).

¹⁹¹ Communication *Mohammed Hassan Gelle* No 34/2004: Denmark. 15/03/2006. CERD/C/68/D/34/2004, paragraph 6.2. Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/6715d3dbeff3c0dc125714d004f62e0?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6715d3dbeff3c0dc125714d004f62e0?Opendocument) (last visited 07.08.2006)

¹⁹² Communication *Jewish community of Oslo and Trondheim and others v. Norway* No 30/2003: Norway. 22/08/2005. CERD/C/67/D/30/2003.

Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/b0f01303db356e96c125714c004eb10f?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/b0f01303db356e96c125714c004eb10f?Opendocument) (last visited 07.08.2006)

CERD diverged from the view of the Supreme Court of Norway which considered that the statements disputed in this communication did nothing more than expressed support for National Socialist ideology and contained no actual threats or incitement to particular actions.¹⁹³ The Committee, however, was of the view that these statements contained ideas based on racial superiority or hatred and characterized these statements as incitement at least to racial discrimination, if not violence.¹⁹⁴ The CERD did not give an elaborate explanation about the factors which lie beneath its assessment of the statements, which was different from the ones adopted by the national court. The Committee's reference to the obligation to ensure the coherence of interpretation of Article 4 according to its general recommendation XV does not in itself give more light on the Committee's reasoning. However, there are at least some factors which might explain the findings of the CERD in this case. Firstly, the Committee did not consider it relevant that the content of the speech was objectively absurd, a point which the national court took into account. Secondly, the Committee considered the deference to Hitler and his principles and "footsteps" in the speech to be exceptionally offensive and not just a Nazi rhetoric as assessed by the national court. Thirdly, the fact that national institutions in examining the case at different levels were not in harmony on its assessment and the views diverged even within the Supreme Court might have influenced the CERD's decision.

Lastly, the resistance of CERD to grant states any margin of appreciation on the implementation of their rights under Article 4 could be another factor which makes the states to abstain from obligations imposed by Article 4. This position of the Committee towards the "margin of appreciation" is reasonable in light of the universal character of the Convention. The application of this concept in view of the wide variety of national and regional practices of States Parties on the Convention issues could easily water down the standards established by the Convention. However, the Committee could have instead set up some counterbalancing elements to the implementation of strict obligations of Article 4 and to make more elaborate and transparent its reasoning as to the factors underlying its findings on individual communications. This would motivate the states to remove their reservations as regards Article 4. Besides, such a step from the Committee would encourage more states to recognize the competence of the CERD to consider individual

¹⁹³ Ibid., paragraph 2.7.

¹⁹⁴ Communication *Jewish community of Oslo and Trondheim and others v. Norway* No 30/2003: Norway. 22/08/2005. CERD/C/67/D/30/2003, paragraph 10.5.
Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/b0f01303db356e96c125714c004eb10f?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/b0f01303db356e96c125714c004eb10f?Opendocument) (last visited 07.08.2006)

communications from their citizens, thus offering individuals in these states an essential remedy above the ones available at national a level, and it would provide the Committee with an additional tool to strengthen the implementation of the Convention.

3. Comparison between the ICCPR and ICERD

There are a number of common elements essential to both treaties. The International Covenant on Civil and Political Rights (ICCPR) as well as the International Convention on the Elimination of Racial Discrimination (ICERD) are universal treaties adopted by the United Nations' (UN) General Assembly. Both treaties serve to implement the obligation of the States under the Charter of the United Nations to promote universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion and both of them refer to the principles and values as reflected in the Universal Declaration of Human Rights (UDHR).¹⁹⁵ These principles include the recognition of the right to the freedom of expression¹⁹⁶ and at the same time also the respect for inherent human dignity¹⁹⁷ and the obligation to prohibit all forms of discrimination, including the incitement to discrimination.¹⁹⁸ Similarities are also visible in their monitoring system, which is predominantly based on state reports examined by an independent body of experts. There is also an additional monitoring procedure provided for in both treaties - the possibility for individuals to submit communications to the respective committee as regards alleged violation of their rights guaranteed by the treaty. However, this procedure is optional and thus dependent on the State's explicit recognition.¹⁹⁹ The Committee on the Elimination of Racial Discrimination (CERD) and the Human Rights Committee (HRC) have also general recommendations and general comments which reflect their interpretation of the content of the different provisions of the treaties. The General recommendations and comments include guidelines for states concerning the fulfilment of their obligations as well as information to be included in reports submitted to the committees. The similarity of the two monitoring bodies lies also in the fact that both of them have to submit annual reports to the UN General Assembly on their activities.²⁰⁰

¹⁹⁵ See the Preambles of ICCPR and ICERD. The text of both treaties is accessible at: <http://www.ohchr.org/english/law/index.htm> (last visited 11.09.2006)

¹⁹⁶ The right to the freedom of expression is guaranteed by the article 19 of the UDHR. Accessible at: <http://www.unhchr.ch/udhr/lang/eng.htm> (last visited 11.09.2006)

¹⁹⁷ See the Preamble and article 1 of the UDHR. Ibid.

¹⁹⁸ See the articles 2 and 7 of the UDHR. Ibid.

¹⁹⁹ In relation to ICCPR the right to submit individual communications is guaranteed by first Opional Protocol to the Covenant. As regards ICERD States parties of the Convention might declare such right for individuals under Article 14 of the ICERD.

²⁰⁰ See Article 45 of ICCPR and Article 9 of ICERD. The text of both treaties is accessible at: <http://www.ohchr.org/english/law/index.htm> (last visited 11.09.2006)

The interplay between the two Committees is also evident in their jurisprudence. The CERD and HRC have frequently quoted the provisions of the other treaty and the practice of the respective monitoring body in order to justify the position concerning the need for restrictions on the right to the freedom of expression or contrary to that in order to support their view that limitations on freedom of expression would not be legitimate in the instant case. Thus, in its General Comment XV the CERD has indicated that the prohibition of ideas based on racial superiority or hatred does not contradict the right to the freedom of expression. In order to strengthen its view the Committee has, *inter alia*, pointed to the Article 20 of ICCPR, which prohibits any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.²⁰¹ Furthermore, the CERD has invoked the practice of other international human rights bodies to grant a lower of protection to racist speech.²⁰² On the other hand, the HRC has stated in its General Comment No.11 on Article 20 that an obligation to adopt legislative measures prohibiting the actions referred to in this provision does not conflict with the right of freedom of expression as guaranteed by Article 19.²⁰³ Such restrictions are subsumed by the special duties and responsibilities with which freedom of expression should be exercised and by the possibility to restrict it in certain circumstances according to the requirements set down in Paragraph 3 of Article 19.

In addition to the practice of the Committees to quote each other, the State parties to both treaties and individual petitioners have often invoked the jurisprudence of the other body in order to reinforce their position on the issue of balancing prohibition of racist and racially discriminatory speech with the right to the freedom of expression. The interaction between the two monitoring bodies has also been evident on other issues. For example the CERD has accepted the concept of “potential victim” which allows individuals to be considered as “victims” and to submit individual complaints about alleged violation of their rights despite the fact that they have not yet been

²⁰¹ General Recommendation No.15: Organized violence based on ethnic origin (Art.4), Committee on the Elimination of Racial Discrimination, 23/03/93, paragraph 4. Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/e51277010496eb2cc12563ee004b9768?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/e51277010496eb2cc12563ee004b9768?Opendocument) (last visited 30.09.2006)

²⁰² Communication *Jewish community of Oslo and Trondheim and others v. Norway* No 30/2003: Norway. 22/08/2005. CERD/C/67/D/30/2003. Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/b0f01303db356e96c125714c004eb10f?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/b0f01303db356e96c125714c004eb10f?Opendocument) (last visited 07.08.2006)

²⁰³ General Comment No. 11: Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20), Human Rights Committee, 29/07/83, paragraph 1 and 2. “Compilation of General Comments and General Recommendations Adopted By Human Rights Treaty Bodies, HRI/GEN/1/Rev.6”, 12 May 2003. Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/HRI.GEN.1.Rev.5.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/HRI.GEN.1.Rev.5.En?OpenDocument) (last visited 30.09.2006)

adversely affected in the enjoyment of those rights. The CERD adopted such an understanding of the concept of “victim” taking into account the findings of the HRC in the case of *Toonen v. Australia*.²⁰⁴ In this case the HRC considered the very existence of a particular legal regime to have affected author’s right in such a way as to give rise to violation of the Covenant.²⁰⁵

The universal character of the treaties probably explains the fact why both of their monitoring bodies have been reluctant to grant states a “margin of appreciation” as regards the implementation of the Article 4 of ICERD or Article 19 of ICCPR and in ensuring the exercise of the rights guaranteed by these treaties in general. The CERD has never invoked this concept, but the HRC has referred to “margin of discretion” only once in its jurisprudence.²⁰⁶ The “margin of appreciation” allows the states to use some discretion as regards the application of treaty rights to those issues where there is no general consensus among the States parties and where national practices diverge significantly. This concept seems to function quite well within the European human rights monitoring system. It has been accepted within the case-law of the European Court of Human Rights, where it has traditionally been applied to issues where there is no common policy in the majority of member-states of Council of Europe, like the practice on the issues of abortion or euthanasia. However, at the universal level there would be much more issues where the regional or national practice of States parties differs widely and thus the prospects for the states to invoke this concept. The frequent reference to this concept could easily jeopardize the standards of both treaties. At the same time if the Committees will disregard the positions of the various member states to essentially controversial issues they might risk losing the acceptance of their jurisdiction. Therefore, the Committees should occasionally allow States to use this concept. Alternatively, the Committees should find other methods how to take into account the country specifics without undermining the standards of both treaties.

While there are a number of similarities between the both treaties and the jurisprudence of their monitoring bodies on the issues of freedom of expression and prohibition of hate speech, there are

²⁰⁴ Communication *Toonen v. Australia*, No 488/1992; Australia. 04/04/94. CCPR/C/50/D/488/1992. (Jurisprudence) Accessible at: <http://www.unhchr.ch/tbs/doc.nsf/0/d22a00bcd1320c9c80256724005e60d5> (last visited 25.09.2006)

²⁰⁵ Communication *Jewish community of Oslo and Trondheim and others v. Norway* No 30/2003; Norway. 22/08/2005. CERD/C/67/D/30/2003, paragraph 7.3. Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/b0f01303db356e96c125714c004eb10f?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/b0f01303db356e96c125714c004eb10f?Opendocument) (last visited 07.08.2006)

²⁰⁶ Communication *Hertzberg et al. v Finland*, No 61/1979; Finland. 02/04/82. CCPR/C/15/D/61/1979. (Jurisprudence). Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/23a5d17c91636ac3c1256ab50030c76b?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/23a5d17c91636ac3c1256ab50030c76b?Opendocument) (last visited 10.09.2006)

also significant differences. They are explainable by the fact that reasons underlying the adoption of ICERD and ICCPR and their specific aims were to some degree distinct. Among the main preoccupations which motivated to draft the ICERD in the 1960's was fear of revival of totalitarian doctrines and growing anti-Semitism. Furthermore, the adoption of Convention was connected to the newly acquired independence by former colonies and an attempt for prevent future racism, which had been an element of colonialism. The goal of the Convention was to promote the respect for human rights for all without distinction of any kind and to eliminate racial discrimination in all its forms and manifestations, particularly the policies of apartheid and segregation. The importance of prohibition of certain types of hate speech in this context is reflected not only in Article 4 of ICERD, but also in the Preamble of the Convention, which explicitly states that: "[...] any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination, in theory or in practice, anywhere."²⁰⁷ As regards ICCPR, it transformed in a legally binding form most of the civil and political rights included in the UDHR. This was the result of long term discussions among UN member-states, which finally led to the adoption of two covenants – one on economic, social and cultural rights and another one on civil and political rights – since the states due to the different perspectives could not agree on one treaty incorporating all types of rights proclaimed in UDHR. Thus, the purpose underlying the Covenant is the promotion and insurance of civil and political rights, which comprise both the right to the freedom of expression and the prohibition of discrimination, including particularly the obligation to outlaw the speech inciting to national, religious or racial discrimination, hostility or violence.

These inherent differences between the two treaties have also influenced the level of protection granted to various interests involved. For example Article 4 of ICERD established firm guarantees for the prohibition of racist speech and incitement to racial discrimination. At the same time the right to the freedom of expression is recalled in Article 5 of the Convention among other civil rights only in the light of the prohibition of discrimination in the enjoyment of these rights. On the contrary, Articles 19 and 20 of ICCPR include the safeguards both for the right to the freedom of expression and prohibition of hate speech. Besides, this divergence had an impact on the approach of both Committees to the situations were they had to draw a balance between the prohibition of hate speech and freedom of expression. They had approached these disputable situations from

²⁰⁷ See the Preamble of ICERD. Accessible at: <http://www.ohchr.org/english/law/index.htm> (last visited 11.09.2006)

different angles. CERD has only examined the compliance with the obligation to prohibit certain forms of hate speech stipulated in Article 4 and thus has examined cases in the light of its restrictive position to freedom of expression. On the contrary, the HRC has defined that all limitations on the freedom of expression should be defined narrowly and have assessed the restrictions on hate speech not only under the obligations stated in Article 20 of the Covenant, but also in the context of requirements defined in paragraph 3 of Article 19. However, as noted earlier, both Committees have declared that it is possible to find concord between the prohibition of racist speech and the right to the freedom of expression. To support their position CERD has, *inter alia*, referred to the “due regard” clause in Article 4 of the ICERD, but the HRC to Article 20 and paragraph 3 of Article 19 of the Covenant. Similarly, in assessing individual communications the HRC has so far never found a State party in violation of freedom of expression as regards the restrictions imposed on hate speech statements. It has considered these restrictions justified either under Article 19 (3) and 20²⁰⁸ or rejected such complaints on the admissibility stage.²⁰⁹

Despite this common perspective as regards the lower level of protection of hate speech expressions, there is a divergence between the two bodies concerning the degree of scrutiny in the examination of respective cases and the principles employed in such assessment. The CERD has expressed support for *carte blanche* prohibitions on freedom of expression, like for example the French legislation which punishes any public denial of the crimes against humanity recognized as a reality by a French or international court,²¹⁰ which applies *inter alia* to Holocaust denial. The HRC on the contrary during its consideration of the communication *Faurisson v. France* has expressed concerns about this legislation. The Committee emphasized that it: “may lead, under different

²⁰⁸ Communication *Faurisson v. France*, No 550/1993: France. 16/12/96. CCPR/C/58/D/550/1993. (Jurisprudence) Accessible at:

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/4c47b59ea48f7343802566f200352fea?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/4c47b59ea48f7343802566f200352fea?Opendocument) (last visited 10.09.2006) and Communication *Ross v. Canada*, No 736/2000: Canada. 26/10/2000. CCPR/C/70/D/736/1997. (Jurisprudence) Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/29712c8dde3414dc12569ad003d0316?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/29712c8dde3414dc12569ad003d0316?Opendocument) (last visited 10.09.2006)

²⁰⁹ Communication *J.R.T. and the W.G. Party v. Canada*, No. 104/1981: Canada. 06/04/83. CCPR/C/18/D/104/1981. (Jurisprudence) Accessible at:

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/be24fa123874d7b7c1256abe0047f366?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/be24fa123874d7b7c1256abe0047f366?Opendocument) (last visited 20.08.2006) and Communication *M.A. v Italy*, No. 163/1984: Italy. 10/04/84. CCPR/C/21/D/163/1984. (Jurisprudence) Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/b89e52b2512c465ec1256aca004e9a5d?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/b89e52b2512c465ec1256aca004e9a5d?Opendocument) (last visited 15.09.2006)

²¹⁰ Sixteenth periodic report of France to the Committee. CERD/C/430/Add.4, 13 May 2004, paragraph 304. Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/b46aecddb05da774c1256f9c00497b1c?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/b46aecddb05da774c1256f9c00497b1c?Opendocument) (last visited 20.09.2006)

conditions than the facts of the instant case, to decisions or measures incompatible with the Covenant.”²¹¹ The more balanced approach of the HRC as to the assessment of the situation when the two rights collide is apparent also in the following elements invoked in its examination of individual communications. The HRC analyses the necessity and proportionality of the applied restrictive measures. It has expressed concerns particularly about the imposition of criminal sanctions when the state has not demonstrated the necessity to make recourse to such stringent measures and there have been less severe measures available to protect the legitimate aim pursued. In contrast, the CERD is of the view that obligations under ICERD Article 4 require the application of criminal sanctions and cannot be properly implemented under other branches of law. Furthermore, the HRC has required proof of the the existence of casual link between the statement disputed and threats to the legitimate aim pursued, while the Article 4 of the ICERD penalises the dissemination of ideas based on racial superiority as such.

Both Committees agree that the status of certain actors, which can exert influence on the formation of the public opinion, like for example media, politicians and teachers, may justify the application of more restrictive measures towards racially discriminatory and hostile statements made by them.²¹² On the other hand the HRC has emphasized the essential role of media in a democratic society to report freely on political issues and issues of public concern,²¹³ which would include debates on racism and xenophobia. Furthermore, according to the jurisprudence of the HRC the freedom of expression in a democratic society covers also expression of ideas and opinions which are not received favourably by the majority of population as long as they are advocated peacefully.²¹⁴ This principle would imply that the dissemination of ideas which by some racial, ethnic or religious groups would be considered offensive to some degree, will not *per se* be outside the scope of the freedom of expression as guaranteed by the Article 19 of the ICCPR.

²¹¹ Communication *Faurisson v. France*, No 550/1993: France. 16/12/96. CCPR/C/58/D/550/1993, paragraph 9.3. Accessible at:

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/4c47b59ea48f7343802566f200352fea?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/4c47b59ea48f7343802566f200352fea?Opendocument) (last visited 10.09.2006.)

²¹² See the position of HRC in Communication *Ross v. Canada*, No 736/2000: Canada. 26/10/2000. CCPR/C/70/D/736/1997. Accessible at:

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/29712c8ddea3414dc12569ad003d0316?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/29712c8ddea3414dc12569ad003d0316?Opendocument)

(last visited 10.09.2006) and the position of CERD in Communication *POEM and FASM v. Denmark* No 22/2002: Denmark. 15/04/2003. CERD/C/62/D/22/2002. Accessible at:

<http://www.unhchr.ch/tbs/doc.nsf/MasterFrameView/b0d9f9415342207ac1256d60004be627?Opendocument>

(last visited 07.08.2006)

²¹³ Communication *Robert W. Gauthier v. Canada*, No 633/1995. 05/05/1999. CCPR/C/65/D/633/1995. Accessible at:

<http://www.unhchr.ch/tbs/doc.nsf> (last visited 15.08.2006)

²¹⁴ Communication *Lee v. Korea*, No 1119/2002. 23/08/2005. CCPR/C/84/D1119/2002. (Jurisprudence)

The criteria underlying the reasoning and findings of the HRC in examining conflicting situations are more transparent than the ones invoked by the CERD. While some principles employed by the HRC in its decision-making process depend on each individual case, it has traditionally focused on the assessment of such criteria as for example the content and context of the disputed statements, the alleged aim of author of expressions, the existence of casual link between the statements and threats to legitimate aim pursued, the evidence of necessity of restriction in order to protect this aim and proportionality of sanctions. Apart from the requirement to demonstrate the “necessity of restrictions” it examines also the fulfilment of two other conditions stated in paragraph 3 of Article 19, namely, the legal basis of restrictions and the legitimacy of the purpose pursued by them. In this context the HRC has particularly opposed legal provisions of national law which define the restrictions on freedom of expression in a broad and vague manner.

The elements used by the CERD in its consideration about the need to apply restrictive measures of Article 4 to the statements disputed are rather obscure and concealed. The Committee apparently developed a two step procedure. It first assesses whether the statements disputed comes within the one of the categories of speech protected by Article 4. In these considerations the CERD primarily focuses on the content of the speech. If the Committee comes to the affirmative answer, it then proceeds with the second step, namely the deliberation on whether restriction of the statements may be justified by the “due regard” clause. The reference to this clause presents some degree of balancing between the obligations of Article 4 and the right to the freedom of expression. However, in none of the individual communications so far examined by the Committee, it has justified the reluctance of states to restrict the expressions disputed on the basis of due regard clause. Furthermore, the components which the Committee would utilize in its deliberations on the application of due regards clause to the statements challenged are unclear. While it is hard to indicate some criteria employed constantly by the Committee, in different cases the CERD has pointed to the following factors which has influenced its findings: private individual or public audience to whom the statements have been addressed, the status of the author of the impugned remarks, the degree of offensiveness of the relevant expressions. It has also emphasized that for example the lack of logic of the disputed statements is not relevant to the assessment of whether or not they violate Article 4.²¹⁵

Accessible at: <http://www.unhchr.ch/tbs/doc.nsf> (last visited 17.08.2006)

²¹⁵ Communication *Jewish community of Oslo and Trondheim and others v. Norway* No 30/2003: Norway. 22/08/2005. CERD/C/67/D/30/2003, paragraph 10.4.

These differences between the two treaties and the practice of their monitoring bodies on the balancing of the right to the freedom of expression with the prohibition of racist and hate speech are among the factors which explain reservations and interpretative declarations of a number of Western democratic states to Article 4 of ICERD and Article 20 of ICCPR. The additional reason for European States parties of these treaties is also the obligation to observe the practice of the European Court of Human Rights, where the freedom of expression has been regarded as an essential right in the functioning of democratic society. These reservations and declarations allow states to implement their international obligations and to avoid the conflict of interests which may be the outcome of the differences between the treaties. As regards states which have fully adopted the relevant provisions of ICERD and ICCPR, an essential tool for them to prevent being found in violation of the treaties is to subject the challenged expressions to the most thorough assessment and to present in their decisions an elaborated argumentation of the reasons underlying their findings. This is essential because both Committees apparently take into account in their considerations the way the case have been dealt with at the national level. For example the CERD has on several occasions found a State party in violation of Article 4 on the sole basis of the fact that relevant authorities have not made a proper investigation and assessment of complaints about the alleged racist or racially discriminatory character of statements.²¹⁶ Furthermore, the analysis of the jurisprudence of both monitoring bodies indicates that the Committees are more inclined to recognize violation in situations where the national courts of different levels or other institutions have disagreed on the necessity to restrict the disputed statements.

There are some counter-balancing elements in both treaties²¹⁷ and a certain flexibility in the jurisprudence of their monitoring bodies which allows maintenance of the delicate border between the right to the freedom of expression and the prohibition of racist or hate speech. The CERD and HRC at times have approached these issues from different angles. Therefore, the possibility exists

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²¹⁶ See for example Communication *L.K. v. Netherlands* No 4/1991: Netherlands. 16/03/93. CERD/C/42/D/4/1991. Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/ec0884e5a47c1a1480256714005f6000?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/ec0884e5a47c1a1480256714005f6000?Opendocument) (last visited 17.08.2006)

²¹⁷ As noted earlier article 4 of ICERD includes “due regard” clause which refers, *inter alia*, to the need to take into account the right to the freedom of expression in its implementation. Similarly, the article 20 of ICCPR obliges to prohibit certain forms of hate speech, but paragraph 3 of article 19 defines requirements under which the exercise of the right to the freedom of expression can be restricted.

that the two Committee's may come to conflicting findings.²¹⁸ However, the opposing views on this complex issue of balancing the prohibition of racist speech with freedom of expression would not be beneficial to the authority of any of these two UN treaty monitoring bodies. This is among the factors which motivates the interplay in their jurisprudence in considerations on this matter. Although both Committees are independent, it is important to maintain the interaction between them in order to endorse States to implement the respective treaty provisions properly. Similarly, in order to fulfil their mandate it is essential to uphold the common approach accepted by both Committees which in principle provides the right to the freedom of expression with lower level of protection in cases of racist and hate speech, but at the same time allows CERD and HRC to diverge on certain elements in the implementation of this approach and the level of scrutiny exercised as regards restrictions on the freedom of expression.

²¹⁸ See for example the support of CERD to legal provisions containing cart blanc prohibitions on freedom of expressions in Concluding Observations on report submitted by France and the concerns expressed by the HRC during the consideration of the case *Faurisson v. France* as regards validity of such legislation to the provisions of ICCPR.

Chapter III

European human rights mechanisms: European Convention on Human Rights and European Commission against Racism and Intolerance

Introduction

This chapter mainly focuses on analysis of two human rights mechanisms within Europe – the European Human Rights Convention and the European Commission against Racism and Intolerance. A number of reasons explain the choice of these mechanisms as sample case studies to reflect approaches at regional level to the issue of balancing the right to the freedom of expression with the prohibition of speech inciting hatred and discrimination. First as regards the ECHR, the Convention and its implementation mechanism through the case-law of the European Court of Human Rights has been the driving force for improving the human rights situation in Europe. It is the only human rights treaty in Europe which provides the possibility for victims of human rights violations to submit individual complaints to the Court, which settles the issue by adopting legally binding decisions. Despite exceptional problems as regards enforcement of the Court's decisions and problems experienced by Court due to the growing caseload after the enlargement of the CE, this mechanism has proved to be highly efficient in advancing human rights in Europe. The Court has developed substantial case-law and a set of principles as regards the interpretation of Article 10 of the Convention, which guarantees the right to the freedom of expression. The different methods of balancing the exercise of this right when it collides with other values, including the right to equality and non-discrimination, is also reflected in the Court's case-law under Article 17 of the Convention, which prohibits abuse of rights guaranteed in the Convention.

The ECRI with its specific mandate to combat racism and intolerance has elaborated detailed rules, which have strengthened guarantees of the right to equality and non-discrimination. This issue has been insufficiently covered by Article 14 of the ECHR. The recommendatory nature of Commission decisions has allowed it to issue very far-reaching and detailed rules as regards legal measures necessary at domestic level to effectively combat manifestations of racism, hatred, and

discrimination. While the ECRI has concentrated predominantly on non-discrimination issues, it has also observed whether measures aimed at suppressing hate speech have not been abused in order to limit in a disproportionate way the right to freedom of expression. Moreover, the Statute establishing the ECRI itself refers to the standards established by the Convention as an element to be respected by the Commission in fulfilling its tasks.

At the European level, many other significant initiatives have occurred that have focused on separate aspects of the issue of striking a balance between freedom of expression and prohibition of hate speech. For example, the CE Cyber-crime Convention and its Additional Protocol dealing with criminalisation of acts of a racist and xenophobic nature committed through computer systems.²¹⁹ So far this is the only legally-binding international instrument that attempts to formulate rules for suppressing hate speech on the Internet, which due to its global scope is increasingly used by different racist groups. However, most of these proposals and instruments have prioritized either the right to freedom of expression or the right to equality and non-discrimination. Furthermore, not all of these were directed to the study and elaboration of legal measures, which have been the focus of this thesis.

Among these proposals and initiatives are documents adopted at the European conference against racism held in 2000 “*All different all equal: from principle to practice*”²²⁰ and a number of recommendations issued by the Committee of Ministers and the Parliamentary Assembly of the CE, emphasizing both the need to safeguard the right to freedom of expression and to adopt effective tools to combat racism, xenophobia, and related intolerance. Of particular importance among these was the Recommendation of the Committee of Ministers on “Hate Speech,”²²¹ which formulates a definition of the concept of “hate speech” and is discussed in greater detail in the introductory part of this thesis.²²² Apart from the CE, other important actors in the region, such as Organization of Security and Co-operation in Europe (OSCE), have greatly contributed to the debate on freedom of expression and combating various forms of discrimination through proposals and initiatives

²¹⁹ Additional Protocol to the Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems. Adopted by the Council of Europe on 28 January 2003. Accessible at: <http://conventions.coe.int/Treaty/EN/Treaties/Html/189.htm> (last visited 01.07.2006).

²²⁰ Information about this event and materials adopted by the Conference are accessible at: http://www.coe.int/T/e/human_rights/ecri/2-European_Conference/ (last visited 01.08.2006)

²²¹ Recommendation No. R (97) 20 of the CE Committee of Ministers on “Hate speech”, adopted on 30 October 1997. Accessible at: [http://www.coe.int/t/e/human_rights/media/4_Documentary_Resources/CM/Rec\(1997\)020&ExpMem_en.asp](http://www.coe.int/t/e/human_rights/media/4_Documentary_Resources/CM/Rec(1997)020&ExpMem_en.asp) (last visited 07.08.2006)

launched by the OSCE Representative on Freedom of the Media and Personal Representatives of the Chairman-in-Office to promote greater tolerance and combat racism, xenophobia, and discrimination. The European Union has also adopted a number of legally binding instruments, which have strengthened safeguards against discrimination within EU Member States.²²³ The EU has also been very active in the fight against manifestations of racism and xenophobia through the activities of the European Monitoring Centre on Racism and Xenophobia.

However, none of these initiatives and instruments have elaborated such detailed legal rules on the issue of striking a balance between freedom of expression and the prohibition of hate speech as are contained in the ECRI General Policy Recommendations. There is also no analogous regional human rights mechanism compared to the European Court of Human Rights which have made extensive case-law as regards interpretation of the right to freedom of expression and its restrictions. Furthermore, analysis will concentrate on the ECHR and ECRI both because of the constraints of the scope of this thesis and taking into account that the aim was not to analyze all pertinent mechanisms and initiatives launched at the European level. Nevertheless, other sources will be quoted when they illustrate essential alternative solutions to balancing the right examined. The analysis begins with the ECHR and the case-law of the European Court of Human Rights on Article 10 of the Convention. Discussion of the scope of freedom of expression, the possibilities and mechanisms for legitimate restrictions on this right leads to illustration of some general principles established by the Court as regards interpretation of Article 10. This is followed by discussion of the methods developed in the Court's practice concerning assessment of restrictions on expressions inciting hatred or discrimination under Articles 10 or 17 of the Convention. After that, the nature and activities commenced by the ECRI are discussed. This will include analysis of relevant ECRI General Policy recommendations and ECRI observations made on the basis of assessment of country reports. The concluding part of this chapter illustrates the advantages and insufficiencies of both instruments in attempts to secure a balance and enforce implementation of different rights involved, how they have complemented each other, as well as identifying areas where potential conflict might emerge due to their diverging practices on specific issues.

²²² See Chapter I sub-chapter 3 which analyzes the main terms used in thesis.

²²³ See for instance the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

Accessible at: http://ec.europa.eu/employment_social/news/2001/jul/directive78ec_en.pdf (last visited 14.08.2006)

1. The European Convention on Human Rights (ECHR)

The European Court of Human Rights has recognized in its case law that freedom of expression is a fundamental value in a democratic society, intrinsic to its development and fulfilment. In one of the first cases regarding freedom of expression, the Court described this right as, “*one of the basic conditions for the progress of democratic societies and for the development of each individual.*”²²⁴ This statement by the Court includes two theoretical bases for protecting expression – the essential part that it plays, first, in the operation of the democratic political process, and, second, in the self-realization of the individual.²²⁵

Yet, this fundamental right is not absolute. Indeed, legitimate reasons might exist to limit freedom of expression. This is evidenced both by the case-law of the Court and the text of Article 10 ECHR, which states:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.²²⁶

²²⁴ *Handyside v. the United Kingdom*, European Court of Human Rights, Judgment of 7 December 1976. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 19.06.2006)

²²⁵ Harris, D. J. O’Boyle, M. Warbrick. C. “Law of the European Convention on Human Rights”, Butterworths, 1995, p.373.

²²⁶ Cited from the home page of the Council of Europe:
<http://conventions.coe.int/treaty/Commun/QueVoulezVous.asp?NT=005&CL=ENG>

The Court has two avenues in assessing the legitimacy of interference with freedom of expression. First, it may decide that under Article 17²²⁷ ECHR, complaints of interference with freedom of expression are inadmissible *ratione materiae* and therefore dismiss them at this stage. Second, it may declare the case admissible and then decide whether the limitations on the expressions in question are permissible or whether they violate the 2nd part of Article 10 of the Convention.

The first part of this chapter analyzes the scope of expressions protected by Article 10, the notion of interference and the requirements that the second part of Article 10 imposes to justify any restrictions on freedom of expression. Some general principles of application of Article 10 are then examined. This is followed by in-depth analysis of some cases to illustrate how the Court has applied these principles to expressions that incite hatred and hostility or fall within another category of “hate speech.”²²⁸

The second part of this section of the thesis is devoted to analysis of the rationale of Article 17 and the Court’s case-law on admissibility decisions. I will also attempt to identify some factors explaining why the Court has chosen to deal with expressions challenged under Article 10 in some cases, but has not applied such a detailed assessment to other expressions, preferring to declare them inadmissible under Article 17. In view of the fact that the Court’s case-law on Article 17 in cases on freedom of expression is limited in comparison with that under Article 10, in this part of thesis no separate sample case study will be performed, but analysis of case-law will be incorporated in the general study of application of Article 17.

1.1. Freedom of expression: scope and limitations under Article 10 ECHR.

The European Court of Human Rights has developed substantial case law on the interpretation of Article 10 of the Convention, together with a number of principles as regards assessment of limitations on the freedom of expression. Most of these cases have dealt with evaluation of the need to restrict the exercise of freedom of expression in order to protect the honour and dignity of persons, private life, national security, or other interests. Limitations of expressions that incite violence, hate, or discrimination have only seldom come to the Court’s attention. Despite this fact, most of the general principles that the Court has developed for interpreting Article 10 are also

²²⁷ See the text of Article 17 of the ECHR in the Appendix.

relevant in assessing the legitimacy of limitations on “hate speech”, because they form the basis for assessing any interference with the exercise of freedom of expression

1.1.1. Scope of right to freedom of expression; and the notion of interference

The freedom to hold opinions and to receive and impart information and ideas without interference by public authority, which Article 10 entails, enjoys a very wide scope.

The Court has stated that:

Article 10 (art. 10) does not apply solely to certain types of information or ideas or forms of expression, in particular those of a political nature; it also encompasses artistic expression [and] information of a commercial nature...²²⁹

Article 10 protects all kinds (political, artistic, commercial), forms (words, pictures, sounds) and media (films, cartoons, radio, television broadcasts, etc.) of expression, independent of the content of the expression. As regards the latter, the Court has emphasized:

Subject to paragraph 2 of Article 10, it [the freedom of expression] is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society."²³⁰

It has been suggested that expressions of no value, including, *inter alia*, abusive or inflammatory words,²³¹ might not be covered by the Convention. Nevertheless, the Court's practice so far has been that all expression, whatever its content, falls within Article 10 (1) and the emphasis shifts to

²²⁸ See Chapter I sub-chapter 3 on the terminology of this thesis.

²²⁹ *Casado Coca v. Spain*, European Court of Human Rights, Judgment of 24 February 1994. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 19.06.2006)

²³⁰ *Handyside v. the United Kingdom*, European Court of Human Rights, Judgment of 7 December 1976, para 49. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 19.06.2006)

²³¹ See the *Lehideux and Isorni v. France*, European Court of Human Rights, Judgment of 23 September 1998, and *Otto-Preminger-Institut v. Austria*, European Court of Human Rights, Judgment of 20 September 1994. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 19.06.2006)

justification for interference under Article 10 (2).²³² Yet, it should be stressed that particularly repugnant types of expression, such as racial epithets and incitement to violence, are considered by the Court to fall outside the notion and scope of freedom of expression guaranteed by Article 10. Complaints about interference with such expressions have predominantly been considered by the Court at the admissibility stage under Article 17.²³³

As regards the notion of interference, the Court's practice illustrates that this might include both pre-publication measures and post-publication sanctions. The Court has condemned pre-publication censorship in particular. Such measures as licensing of journalists²³⁴ and court-ordered injunctions²³⁵ are subject to close examination by the Court for their necessity. The rationale behind the Court's highly restrictive approach regarding these measures is explained by the fact that they prevent at the very outset "the transmission of information and ideas to those who wish to receive them and thus to make their own mind about them..."²³⁶.

Post-publication restrictions usually include civil and criminal sanctions.²³⁷ The Court has been specifically demanding as regards justification for criminal sanctions in view of the possibility to apply civil remedies²³⁸ and the possible chilling effect that such sanctions might create for those responsible for subsequent publications. The seizure or forfeiture of the means of communication or the work itself has been another form of sanction which might be applied both prior and after

²³² Harris, D. J. O'Boyle, M. Warbrick. C. "Law of the European Convention on Human Rights", Butterworths, 1995, p.375.

²³³ Analysis of the Court's practice regarding application of Article 17 is examined in sub-chapter 1.2. of this Chapter.

²³⁴ *De Becker v. Belgium*, European Court of Human Rights, Judgment of 7 December 1976. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 19.06.2006)

²³⁵ *Observer and Guardian*, European Court of Human Rights, Judgment of 7 December 1976. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 19.06.2006)

²³⁶ Harris, D. J. O'Boyle, M. Warbrick. C. "Law of the European Convention on Human Rights", Butterworths, 1995, p.387.

²³⁷ Apart from these two more common means of restriction on the freedom of expression the Court has recognized as an additional one – the application of disciplinary sanctions to the authors of challenged expressions. See, for example, the Court's judgment in the case of *Steur v. Netherlands*, where the applicant, a lawyer, allegedly made defamatory statements with respect to the unacceptable manner in which a police officer took evidence from his client. As a result of this Mr. Steur was found by the Disciplinary council of the bar association to have failed to observe the standards expected from a lawyer. However, The European Court of Human Rights came to the conclusion that there was a factual basis for Mr. Steur to express criticism. Despite the fact that no penalty had been imposed on Mr. Steur it found the State in violation of Article 10, bearing in mind that he had nonetheless been found guilty of violating the applicable professional standards, which could have a discouraging effect on his duty as an advocate to defend the interests of his clients in future.

²³⁸ See the *Lehideux and Isorni v. France*, European Court of Human Rights, Judgment of 23 September 1998, and the *Castells v. Spain*, European Court of Human Rights, Judgment of 23 April 1992. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 19.06.2006)

publication. The Court has required stringent reasons for justifying such measures,²³⁹ because they result in limiting future access to information and its consideration.

1.1.2. Assessment of limitations on freedom of expression under the test of Article 10(2)

As mentioned, freedom of expression is not absolute. Indeed, the Court has noted that: “*whoever exercises his freedom of expression undertakes "duties and responsibilities"*.”²⁴⁰ The state authorities may interfere with the exercise of the right to freedom of expression, but all interferences should be assessed according to the demands stipulated in the second part of Article 10. These requirements include the following key elements. To start with, the grounds and procedure to interference in the freedom of expression should be established by national law. Such an act should be adopted by Parliament or similar representative body. The government or other executive body can limit the freedom of expression only in those cases when they are specifically entitled to do so by the Parliament.

In addition, a national act that limits freedom of expression should correspond to certain quality criteria. This presupposes that the relevant law should be accessible to the person concerned. It is usually presumed that accessibility is ensured if the act has been published in an official publication. Furthermore, the expression “prescribed by law” requires that the person is able to foresee its consequences for him. The Court has stated that: “A norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct.”²⁴¹ As regards the level of precision required by domestic legislation, the Court has mentioned that this issue “[...] depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed.”²⁴² For example, the Court has noted that constitutional law provisions because of their general nature may be of a lower level of precision than other legislation.²⁴³

²³⁹ *Otto-Preminger-Institut v. Austria*, European Court of Human Rights, Judgment of 20 September 1994. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 21.06.2006)

²⁴⁰ *Handyside v. the United Kingdom*, European Court of Human Rights, Judgment of 7 December 1976. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 22.06.2006)

²⁴¹ *Hashman and Harrup v. The United Kingdom*, European Court of Human Rights, Judgment of 25 November 1999, para 31. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 19.06.2006)

²⁴² *Rekvenyi v. Hungary*, European Court of Human Rights, Judgment of 25 November 1999, para 34. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 22.06.2006)

²⁴³ *Ibid.*

Bearing in mind that the notion of “hate speech” itself is very extensive,²⁴⁴ the Court might find it too loose, if such a concept is included in a national act as a basis for restricting freedom of expression without more detailed specification as to – for instance - its content, form, purpose, or the context in which hate remarks have been expressed.

However, the possibility that the act might be subject to interpretation in itself does not contradict the requirement of foreseeability. According to the Court’s position:

[...] whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.²⁴⁵

Lastly, a law that provides for interference within rights should be compatible with the rule of law. This requires that such a national act should be clear and unambiguous in order to avoid arbitrariness in its application by public officials. If a law confers discretion on a public authority, then it must indicate the scope of that discretion. The Court in this regard has emphasized that:

[...] it would scarcely be possible to formulate a law to cover every eventuality. For all that, in the absence of any detail at all as to the kind of restrictions permitted or their purpose, duration and extent or the arrangements for their review, the...provisions do not offer the minimum degree of protection against arbitrariness required by the rule of law in a democratic society.²⁴⁶

The requirement that limitations on the exercise of freedom of expression are made by law has generally been satisfied and has not raised serious discussion in the Court’s case law as far as restrictions on “hate speech” are concerned.

Secondly, limitations on freedom of expression should have a legitimate aim. The second part of Article 10 lists a number of such legitimate aims, and expressions characterized as “hate speech” might be contrary to many of them. Generally, these expressions incite either discrimination or hatred against certain groups of people. States have mentioned different grounds as a basis to

²⁴⁴ See the Chapter I sub-chapter 3 on the terminology of thesis.

²⁴⁵ *Rekvenyi v. Hungary*, European Court of Human Rights, Judgment of 25 November 1999, paragraph 34. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 22.06.2006)

restrict “hate speech”. However, “the prevention of disorder or crime” or “the protection of the reputation and rights of others” have been referred to for the most part.²⁴⁷ In view of the fact that aims included in the second part of Article 10 are interpreted extensively in the Court’s case-law,²⁴⁸ it has not raised problems for the state authorities to prove that the limitation of expressions questioned is needed for one of the purposes provided in the Convention.

The third and key element requires that interference with the freedom of expression should be necessary in a democratic society. And it is the fulfilment of this element that has raised the most debate among parties, indeed often among the judges themselves.

The Court has stated:

...whilst the adjective “necessary”, within the meaning of Article 10 (2) (art. 10-2), is not synonymous with "indispensable", neither has it the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or "desirable" and that it implies the existence of a "pressing social need."²⁴⁹

The Court has also reiterated that the public authorities should demonstrate the existence of relevant and sufficient grounds to justify interference with freedom of expression and these grounds should be convincingly established.²⁵⁰

Crucially, in assessing the need for interference with freedom of expression, *inter alia* within insulting and offensive remarks, the Court does not look at the content of the expressions disputed

²⁴⁶ *Herczegfalvy v. Austria*, European Court of Human Rights, Judgment of 24 September 1992, paragraph 91. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 23.06.2006)

²⁴⁷ See for example the *Lehideux and Isorni v. France*, European Court of Human Rights, Judgment of 23 September 1998. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 23.06.2006)

²⁴⁸ See for example *Ahmed and Others v. The United Kingdom*, European Court of Human Rights, Judgment of 2nd September 1998. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 23.06.2006)

²⁴⁹ *The Sunday Times v. The United Kingdom*, European Court of Human Rights, Judgment of 26 April 1979, paragraph 59. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 23.06.2006)

²⁵⁰ See for example the *Goodwin v. The United Kingdom*, European Court of Human Rights, Judgment of 27 March 1996 and *Jersild v. Denmark*, European Court of Human Rights, Judgment of 23 September 1994. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 23.06.2006)

in abstract, but examines the facts of the case as a whole, including the context in which the expressions challenged were made.²⁵¹

Apart from the requirement to demonstrate the existence of “pressing social need”, any interference with freedom of expression should also be proportionate to the legitimate aim pursued. In assessing the proportionality of the interference, the nature and severity of the penalties or other measures imposed are among the factors to be taken into account.²⁵² For example, in the case of *Tolstoy Miloslavsky v. the United Kingdom* concerning the amount of non-pecuniary damage awarded by the jury for a defamatory article, the European Human Rights Court stated that “...under the Convention, an award of damages for defamation must bear a reasonable relationship of proportionality to the injury to reputation suffered.”²⁵³ In this case it found a violation of Article 10 solely on the basis of disproportionate sanctions applied, whereas the defamatory character of the expressions and justification for their limitation in principle were not questioned by the applicant.

Furthermore, proportionality will generally not be observed if a less restrictive solution was available to protect the legitimate aim pursued than the one actually applied by the authorities. For instance, in the case of *Lehideux and Isorni v. France*, where the applicants were convicted for publicly promoting Marshal Pétain’s achievements, the Court noted the “seriousness of a criminal conviction for publicly defending the crimes of collaboration, having regard to the existence of other means of intervention and rebuttal, particularly through civil remedies.”²⁵⁴

The thorough consideration by the Court of the necessity to apply criminal sanctions to the challenged statements and the special seriousness of measures applied under this branch of law was confirmed also in the case of *Scharsach and News Verlagsgesellschaft mbH v. Austria*, where a journalist was sentenced to a suspended fine for allegedly defaming a politician by referring to him among others as “old closed Nazis”. As regards the argument of the government about the modest level of penalties imposed on the applicant, the Court stated: “Even though this fine was in the

²⁵¹ See for example the *Lehideux and Isorni v. France*, European Court of Human Rights, Judgment of 23 September 1998. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 23.06.2006)

²⁵² *Tammer v. Estonia*, European Court of Human Rights, Judgment of 6 February 2001, paragraph 69. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 19.06.2006)

²⁵³ *Tolstoy Miloslavsky v. The United Kingdom*, European Court of Human Rights, Judgment of 13 July 1995, paragraph 49. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 23.06.2006)

lower range of possible penalties and was suspended for a three-year probationary period, it was a sentence under criminal law, registered in the first applicant's criminal record.”²⁵⁵

1.1.3. Principles in the case law of the European Court of Human Rights as regards application of Article 10

a) “Public watchdog” role of the press

The Court has stated in a number of cases that the press and media in general have a special role as “public watchdog” in a democratic society. This principle implies that the media and journalists may use further criticism and expressions than would be allowed for private persons if they inform the public about matters of public interest. Debates about racism and xenophobia in society would be among issues of public concern, so that broader guarantees for journalistic expression would relate also to media reports that contribute to public debate on this subject.

The Court has established particularly wide borders of media freedom concerning political speech. As regards severe criticism of politicians, the Court has stated:

...Whilst the press must not overstep the bounds set, inter alia, for the “protection of the reputation of others”, it is nevertheless incumbent on it to impart information and ideas on political issues just as on those in other areas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them.²⁵⁶

²⁵⁴ See, *inter alia*, the *Lehideux and Isorni v. France*, European Court of Human Rights, Judgment of 23 September 1998. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 24.06.2006)

²⁵⁵ *Scharsach and News Verlagsgesellschaft mbH v. Austria*, European Court of Human Rights, Judgment of 13 November 2003, paragraph 32. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 19.06.2006)

²⁵⁶ *Lingens v. Austria*, European Court of Human Rights, Judgment of 8 July 1986, paragraph 32. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 24.06.2006)

The Court has commented similarly on the right of the media to impart information concerning matters that come before the courts, as far as the media do not overstep the bounds imposed in the interests of the proper administration of justice.²⁵⁷

While the borders of the exercise of freedom of expression are broader as far as concerns the media, limits still apply to the media as well. This follows directly from the text of the 2nd part of Article 10 as well as case law. The Court has emphasized that “Article 10 of the Convention does not guarantee a wholly unrestricted freedom of expression even with respect to press coverage of matters of serious public concern.”²⁵⁸ It has also stressed that “duties and responsibilities” inherent in the exercise of freedom of expression also apply to the press. Therefore, “the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism.”²⁵⁹

The ethics of journalism and alertness in the work of journalists are in particular essential if they report about situations where the interests of different groups clash, or issues that are sensitive to some group of individuals or society in general. In a series of cases against Turkey in relation to sanctions imposed on authors of critical publications on the situation in Kurdish areas, the Court stressed that journalists bear special responsibilities and duties in situations of conflict and tension. The Court stated that:

Particular caution is called for when consideration is being given to the publication of views of representatives of organisations which resort to violence against the State lest the media become a vehicle for the dissemination of hate speech and the promotion of violence.²⁶⁰

However, the Court subjects to thorough scrutiny the necessity of restrictions even as regards these expressions by declaring that:

²⁵⁷ *The Sunday Times v. The United Kingdom*, European Court of Human Rights, Judgment of 26 April 1979, paragraph 59. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 24.06.2006)

²⁵⁸ *Bergens Tidende and others v. Norway*, European Court of Human Rights, Judgment of 2 May 2000, paragraph 53. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 24.06.2006)

²⁵⁹ *Ibid.*

²⁶⁰ *Surek (No4) v. Turkey*, European Court of Human Rights, Judgment of 8 July 1999, paragraph 60. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 24.06.2006)

At the same time, where such views cannot be categorised as such, Contracting States cannot with reference to the protection of territorial integrity or national security or the prevention of crime or disorder restrict the right of the public to be informed of them by bringing the weight of the criminal law to bear on the media.²⁶¹

The Court also grants a rather wide discretion to journalists as to the different methods of reporting adopted, if it is persuaded that the activities of journalists genuinely serve the interests of debate on an issue of public interest²⁶² and journalists have presented the facts or information accurately in accordance with the ethics of journalism.²⁶³ It has declared that journalistic freedom also includes “possible recourse to a degree of exaggeration, or even provocation.”²⁶⁴

The Court has reiterated several times that when assessing the need for interference with media freedom, a distinction should be drawn between the author of the remarks complained of and the journalist. If the journalist by disseminating the views of another person, including views offensive to some group in society, has contributed to discussion of matters of public interest, then particularly strong reasons should be established for his punishment.²⁶⁵

b) Kinds of expression

The second principle developed in the Court’s case law relates to the kind of expression. This first of all relates to the distinction in the Court’s case-law between public and private domain of the issue discussed. It is established practice that when expressions questioned relate to the private life of politicians²⁶⁶, public officials, or individuals,²⁶⁷ the scope of the permissible exercise of freedom

²⁶¹ Ibid.

²⁶² *Jersild v. Denmark*, European Court of Human Rights, Judgment of 23 September 1994. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 24.06.2006)

²⁶³ *Bergens Tidende and others v. Norway*, European Court of Human Rights, Judgment of 2 May 2000, paragraphs 56 and 57. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 24.06.2006)

²⁶⁴ *De Haes and Gijssels v. Belgium*, European Court of Human Rights, Judgment of 24 February 1997. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-e> (last visited 24.06.2006)

²⁶⁵ *Savitchi v. Moldova*, European Court of Human Rights, Judgment of 11 January 2006, paragraph 46. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 24.06.2006)

²⁶⁶ *Societe Prisma Presse v. France*, European Court of Human Rights, Judgment of 23 September 1994. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 24.06.2006)

of expression is narrower and a real public interest should be demonstrated to justify the expression.²⁶⁸ Yet, the court has emphasized that the public has the right to be informed and this right "...in certain special circumstances, may even extend to aspects of the private life of public figures, particularly where politicians are concerned."²⁶⁹ Therefore, if journalists or other authors of contested expressions could show that the issue presented a matter of public interest, at least to some degree, and that they acted in good faith as well as on the basis of accurate factual representation, then the interference with the private life of a politician will most probably be justified.²⁷⁰

The distinction between public and private domain relates not only to politicians but also to other individuals. "Private individuals or associations lay themselves open to scrutiny when they enter the arena of public debate."²⁷¹ Therefore, if someone participates in public discussions and is active in a field of public concern, the person should show a higher degree of tolerance to criticism when opponents consider his aims and means employed as regards the matter discussed.²⁷²

Yet, the general distinction between the scope of permissible expressions as regards private life and public activities leads to a hypothesis. Namely, that non-violent expressions within political and public discourse which might be offensive for some ethnic, religious, or other groups of the population will not as such go beyond the scope of protection afforded by Article 10, if they contribute to and form a part of issues of public debate. Moreover, restrictions on such expressions will not be justified if the Court is persuaded that these expressions serve the public interest.

²⁶⁷ *Von Hannover v. Germany*, European Court of Human Rights, Judgment of 24 September 2004. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 24.06.2006)

²⁶⁸ *Tammer v. Estonia*, European Court of Human Rights, Judgment of 6 February 2001. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 24.06.2006)

²⁶⁹ *Von Hannover v. Germany*, European Court of Human Rights, Judgment of 24 September 2004, paragraph 64. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 24.06.2006)

²⁷⁰ For example in *Karhuvaara and Italehti v. Finland*, a report about the conviction of the spouse of a politician was found to be justified as it could affect people's voting decisions and thus at least partially related to a matter of public interest. *Karhuvaara and Italehti v. Finland*, European Court of Human Rights, Judgment of 16 February 2005, paragraph 45. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 24.06.2006)

²⁷¹ *Nilsen and Johnsen v. Norway*, European Court of Human Rights, Judgment of 25 November 1999, paragraph 52. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 15.08.2006)

²⁷² *Jerusalem v. Austria*, European Court of Human Rights, Judgment of 27 May 2001, paragraph 38. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 24.06.2006)

In contrast, interference with derogatory remarks against an individual concerning his private life would most probably be found legitimate, if no public interest is demonstrated that might have motivated recourse to offensive expressions. Furthermore, if such derogatory comments are linked to a person's racial, religious, or ethnic origin, then the legitimacy of their restriction will most likely be decided by the Court at the admissibility stage under Article 17 of the Convention.

Apart from the distinction between the private and public realms of expressions, the Court has referred from time to time to three basic categories of expression: political, artistic, and commercial. To distinguish among these categories, the principal factor is not the form of expression, but the content and purpose of expression. For example, the Court has recognized text presented in the form of an advertisement to be outside the scope of commercial expression because of its content.²⁷³

The Court has attached the highest importance to the protection of political expression, while restrictions on, for example, commercial speech have been subject to lower level of scrutiny by the Court.²⁷⁴ The particular status of political speech is based on the premise that it plays a central role in a democratic society, both in so far as it relates to the electoral process and to matters of day-to-day public concern.²⁷⁵ The notion of political expression in the Court's case law should be understood widely and relates not only to discussions about the work of public institutions and state representatives, but also covers debates on issues of considerable public interest in a wider sense.

The Court emphasized in the case of *Lingens v. Austria*: Freedom of political debate is at the very core of the concept of a democratic society, which prevails throughout the Convention."²⁷⁶ In line with this pre-eminent role of political expression, the Court has recognized on a number of occasions that politicians and public officials should be ready to accept wider criticism than other persons as regards fulfilment of their functions.

In the same case it emphasized:

²⁷³ *Lehideux and Isorni v. France*, European Court of Human Rights, Judgment of 23 September 1998. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 19.06.2006)

²⁷⁴ Van Dijk.P., Van Hoof G.J.H., Theory and Practice of the European Convention on Human Rights, 3rd edition, Kluwer Law International, 1998, pp.88-89.

²⁷⁵ Harris, D. J. O'Boyle, M. Warbrick. C. "Law of the European Convention on Human Rights", Butterworths, 1995, p.397.

²⁷⁶ *Lingens v. Austria*, European Court of Human Rights, Judgment of 8 July 1986, paragraph 42. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 19.06.2006)

The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance. No doubt Article 10 paragraph 2 (art. 10-2) enables the reputation of others - that is to say, of all individuals - to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues.²⁷⁷

Yet, a distinction exists in the Court's case-law between politicians and public officials. The scope of permissible criticism in relation to public officials is narrower than as regards politicians. The rationale for such a distinction is based on the premise that: "Civil servants must enjoy public confidence in conditions free of undue perturbation if they are to be successful in performing their tasks and it may therefore prove necessary to protect them from offensive and abusive verbal attacks when on duty."²⁷⁸ However, the requirements of such protection still have to be weighed against the interests of freedom of the press or of open discussion of matters of public concern.

The special status of political expression implies not only wider criticism of public officials by the media and society, but relates also to relations among politicians themselves. The Court assigns high importance to the guarantees of free public expression within the Parliament or similar representative bodies. Thus, it has emphasized that: "In a democracy, Parliament or such comparable bodies are the essential fora for political debate. Very weighty reasons must be advanced to justify interfering with the freedom of expression exercised therein."²⁷⁹ Therefore, the Court might find even minor sanctions such as an injunction to amount to a disproportionate interference with freedom of expression if they are applied in relation to an elected politician and concern statements made by that individual in the representative body in the course of a political debate and relating to a matter of public concern.²⁸⁰

²⁷⁷ Ibid.

²⁷⁸ *Janowski v. Poland*, European Court of Human Rights, Judgment of 21 January 1999, paragraph 33. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 25.06.2006)

²⁷⁹ *Jerusalem v. Austria*, European Court of Human Rights, Judgment of 27 May 2001, paragraph 40. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 25.06.2006)

²⁸⁰ *Jerusalem v. Austria*, European Court of Human Rights, Judgment of 27 May 2001. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 25.06.2006)

The Court is also particularly cautious as to safeguarding exercise of freedom of expression for the opposition. In the case of *Castells v. Spain* the Court stated:

While freedom of expression is important for everybody, it is especially so for an elected representative of the people. He represents his electorate, draws attention to their preoccupations and defends their interests. Accordingly, interferences with the freedom of expression of an opposition member of parliament, like the applicant, call for the closest scrutiny on the part of the Court.²⁸¹

On the other hand, it is no secret that politicians and parliamentarians representing extreme groups use racially offensive and hostile rhetoric from time to time, even during debates within the Parliament. The special weight of political speech and guarantees for free debate among parliamentarians in the practice of the Court might seemingly come into conflict with obligations under other international documents such as the UN Durban Declaration²⁸² and CE Committee of Ministers recommendations, which emphasize the particular responsibility of politicians to abstain from racist and xenophobic statements. Yet, despite stressing the essential role of free political debate in a democratic society, the Court has not stated so far that this kind of speech is exempt from limitations. It can be presumed with a high degree of certainty that the Court would approach with closest scrutiny any assessment of justification for interfering with political speech. However, the Court's findings would most probably be determined not only by the political context of the speech, but also such factors as the degree of offensiveness of the statements complained of and their contribution to the debate at issue, the existence of public interest in the issue discussed, the proportionality of restrictive measures applied, and their possible chilling effect in future.

c) Distinction between statements of fact and value judgments

The essence of this principle can be summarized as follows: if somebody states facts that are challenged by another person as false, then the truth of those facts should be proved. In turn, if

²⁸¹ *Castells v. Spain*, European Court of Human Rights, Judgment of 23 April 1992. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 27.06.2006)

²⁸² UN World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Declaration and Programme of Action, paragraph 115. Durban, South Africa, 31 August – 8 September 2001. Accessible at: <http://www.unhchr.ch/html/racism/02-documents-cnt.html> (last visited 29.08.2006)

somebody expresses a value judgment about a person or event, then no requirement arises for a person to prove the truthfulness of their opinion.

The Court has reiterated in a number of cases that:

*The existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof. The requirement to prove the truth of a value judgment is impossible to fulfill and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10.*²⁸³

While in principle allegations of fact should be substantiated, some exceptions to this principle are established in the Court's case-law. These exceptions relate particularly to the functions of journalists. For example, in the case of *Bladet Tromso and Stensaas v. Norway* the Court justified a report from journalists that contained assertions of fact subsequently found to be erroneous. Several reasons brought the Court to the conclusion that there were "special grounds in the present case for dispensing the newspaper from its ordinary obligation to verify factual statements that were defamatory of private individuals."²⁸⁴

The first and decisive element was the fact that the allegations made by the journalists were based on an official report, which they could reasonably believe was true at the relevant time. In this regard the Court emphasized that:

*the press should normally be entitled, when contributing to public debate on matters of legitimate concern, to rely on the contents of official reports without having to undertake independent research. Otherwise, the vital public-watchdog role of the press may be undermined.*²⁸⁵

Secondly, the issue of the report concerned a matter of public concern. Lastly, the Court seemed to be persuaded that the journalists had acted in good faith according to the ethics of journalism, while the manner in which the report was presented included various factors limiting the likely harm to the reputation of the individuals mentioned in the article.

²⁸³ *Jerusalem v. Austria*, European Court of Human Rights, Judgment of 27 May 2001, paragraph 42. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 25.06.2006).

²⁸⁴ *Bladet Tromso and Stensaas v. Norway*, European Court of Human Rights, Judgment of 20 May 1999, para 66. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 27.06.2006)

²⁸⁵ *Bladet Tromso and Stensaas v. Norway*, European Court of Human Rights, Judgment of 20 May 1999, para 68. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 27.06.2006)

It is sometimes hard to distinguish between statements of fact and value judgments. These differences have appeared not only between the European Court of Human Rights and national courts,²⁸⁶ but also among the judges of the European Court themselves. For example, in the case of *Pedersen and Baadsgaard v. Denmark*, examined by the Grand Chamber of the Court, a number of judges disagreed about assessment of the same statements as fact or value judgment.²⁸⁷ As a result of the complexity in distinguishing between these two concepts on some occasions, the Court has apparently accepted the practice of not making a firm distinction in these situations as to which category the challenged remarks belong to. Instead of defining such expressions as statements of fact or value judgments, the Court has focused on the degree of factual proof that should be provided.

The Court has emphasized that:

*[...] the assessment of whether a certain statement constitutes a value judgment or a statement of fact might in many cases be difficult. However, since under the Court's case-law a value judgment must be based on sufficient facts in order to constitute a fair comment under Article 10..., their difference finally lies in the degree of factual proof which has to be established*²⁸⁸

However, in those situations when distinction between the two concepts was feasible, the key factors in declaring remarks complained of as statements of fact or value judgments were not the grammatical meaning of words or expressions, but the context in which they were uttered, the way the audience perceived them, and the meaning attached by the author to those statements.

As mentioned, it is not possible to require proof of the truthfulness of value judgments. However, a requirement still exists that they should be based on a sufficient factual basis. In the case of *De Haes and Gijssels v. Belgium* the Court stated:

²⁸⁶ *Vides aizsardzibas klubs c. Lettonie*, European Court of Human Rights, Judgment of 27 May 2004 and *Jerusalem v. Austria*, European Court of Human Rights, Judgment of 27 May 2001. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 25.06.2006)

²⁸⁷ *Pedersen and Baadsgaard v. Denmark*, European Court of Human Rights, Judgment of 17 December 2004. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 27.06.2006)

²⁸⁸ *Scharsach and News Verlagsgesellschaft mbH v. Austria*, European Court of Human Rights, Judgment of 13 November 2003, paragraph 40. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 27.06.2006)

*Looked at against the background of the case, the accusations in question amount to an opinion, whose truth, by definition, is not susceptible of proof. Such an opinion may, however, be excessive, in particular in the absence of any factual basis, but it was not so in this instance....*²⁸⁹

What amounts to a sufficient factual basis should be assessed in each case individually. However, the more specific and concrete the actual statements are, the higher the degree of factual proof that needs to be established. For example in the case of *Constantinescu v. Romania*²⁹⁰ the applicant, who was the president of a teacher's trade union, was prosecuted following publication in the media of his comment regarding internal disputes in the union. That is, he had referred to three teachers, members of the previous trade-union leadership, as "delapidatori" (receivers of stolen goods) because they refused to return money belonging to the union after the election of new leaders.

The Court found the infringement of the applicant's freedom of expression justified despite the fact that the relevant comments were made in the context of a debate on the independence of the unions and the functioning of the courts, and thus was of public interest. The Court emphasized that limits exist to the right to freedom of expression, and the applicant despite his position as union representative: "...had a duty to react within limits fixed, *inter alia*, in the interest of 'protecting the reputation or rights of others', including the presumption of innocence."²⁹¹ Furthermore, the Court was of the view that: "...the term 'delapidatori', which refers to persons found guilty of the offence of fraudulent conversion, was of a kind to offend the three teachers because they had not been convicted by a court"²⁹² and concluded that there was no need for the applicant to use this word in order to express his criticism and to contribute to public debate.

The Court's case-law indicates that even clear-cut value judgments must have some connection to reality. For example in the case of *Andreas Wabl v. Austria* the European Court of Human Rights found no violation of Article 10 where the Austrian courts had made an injunction prohibiting Mr. Wabl from repeating a statement that a defamatory article published by an Austrian newspaper amounted to "Nazi-journalism." The Court acknowledged that the article defaming Mr. Wabl was understandable ground for indignation. However, the Court found that the accusation against the

²⁸⁹ *De Haes and Gijssels v. Belgium*, European Court of Human Rights, Judgment of 24 February 1997, paragraph 47. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-e> (last visited 27.06.2006)

²⁹⁰ *Constantinescu v. Romania*, European Court of Human Rights, Judgment of 27 June 2000. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 27.06.2006)

²⁹¹ *Ibid.*, paragraph 72.

²⁹² *Ibid.*, paragraph 73

newspaper about Nazi working methods, which came close to a charge of criminal behaviour, exceeded the limits of acceptable criticism. These findings of the Court were explained by the special stigma attached to activities inspired by National Socialist ideas and Austrian legislation which made such activities criminal. Furthermore, the Court took into consideration that the applicant had other legal remedies available. Lastly, the Court noted that the injunction imposed did not prevent Andreas Wabl from expressing his opinion about the reporting of the newspaper in other terms.²⁹³

The Court has emphasized that freedom of expression also applies to “ideas” and “information” that offend, shock, or disturb.²⁹⁴ Therefore, criticism expressed about individuals or their activities might include a certain degree of offensiveness. The limits of permissible expression depend on the context of each case; however, the behaviour and status of the person to whom the criticism has been addressed and the motives that prompted utterance of offensive words as well as their value to the general public, are among the factors that outline the borders of criticism expressed in offensive language. For example in the case of *Oberschlick v Austria (2)* a journalist was fined for calling a politician a *Trottel* [an idiot]. However, the Court found such interference with the freedom of expression of the journalist unjustified and stated:

It is true that calling a politician a “Trottel” in public may offend him. In the instant case, however, the word does not seem disproportionate to the indignation knowingly aroused by Mr Haider. As to the polemical tone of the article, which the Court should not be taken to approve, it must be remembered that Article 10 (art. 10) protects not only the substance of the ideas and information expressed but also the form in which they are conveyed.²⁹⁵

This leads to the conclusion that when individuals, especially public officials, come out with statements that in themselves are provocative, they should be ready to accept sharp and even injurious judgements from their opponents.

²⁹³ *Andreas Wabl v. Austria*, European Court of Human Rights, Judgment of 21 March 2000, paragraph 40-44. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 19.06.2006)

²⁹⁴ *Tammer v. Estonia*, European Court of Human Rights, Judgment of 6 February 2001, paragraph 59. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 19.06.2006)

²⁹⁵ See *Oberschlick v. Austria (No.2)*, European Court of Human Rights, Judgment of 1 July 1997. Accessible at HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 19.06.2006)

On the other hand, the limitation of a value judgment couched in insulting terms might be justified if recourse to insulting words was not prompted by the need to contribute to public debate and did not serve the public interest. For example in the case of *Tammer v. Estonia* the applicant, a journalist, was fined for the offence of insult as a result of his interview with the publisher of the memoirs of Ms. Laanaru, during which he had asked the following question:

“By the way, don't you feel that you have made a hero out of the wrong person? A person breaking up another's marriage [*abielulõhkuja*], an unfit and careless mother deserting her child [*rongaema*]. It does not seem to be the best example for young girls.”²⁹⁶

Ms. Laanaru was at the time of interview the wife of former Prime Minister of Estonia Mr. Edgar Savisaar, but had worked for him while he was married to his first wife. She was previously also an active member of the political party led by Mr. Savisaar. After publication of the interview, she instituted private prosecution proceedings against the journalist for allegedly having insulted her by referring to her as “*abielulõhkuja*” and “*rongaema*” following which the applicant was convicted of the offence of insult.

The European Court of Human Rights recalled both the role of freedom of expression and the essential function of the press in a democratic society. However, it noted that the impugned remarks related to aspects of Ms Laanaru's private life. In further assessing justification for the use of the actual words by the journalist, the Court concluded that it:

[...]does not find it established that the use of the impugned terms in relation to Ms Laanaru's private life was justified by considerations of public concern or that they bore on a matter of general importance. In particular, it has not been substantiated that her private life was among the issues that affected the public in April 1996.²⁹⁷

In the context of hate speech, this latter conclusion would allow the assumption that when criticism of private individuals or even politicians and public figures has been expressed in offensive language, for example making derogatory remarks in association with their ethnic or national origin, then limitations on such expressions would be justified, unless the utterance of offensive

²⁹⁶ The translation of the Estonian words “*abielulõhkuja*” and “*rongaema*” is descriptive since no single-word equivalent exists in English. See the Note by the Registry: *Tammer v. Estonia*, European Court of Human Rights, Judgment of 6 February 2001, paragraph 22. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 19.06.2006)

²⁹⁷ *Ibid.*, paragraph 68.

terms was prompted by a genuine interest in contributing to public debate and served the public interest.

The distinction between value judgments and statements of fact is also important in such specific type of “hate speech” as denial of the holocaust and other crimes against humanity or justification of pro-Nazi policy, which is often related to anti-Semitism. This issue has been dealt by the Court on some occasions, predominantly under Article 17, and is analyzed in greater detail in the second part of this chapter.

d) Margin of appreciation

The doctrine of margin of appreciation developed by the Court’s case-law allows the Court to take due regard of national particularities and decide what level of scrutiny is appropriate in each case. The doctrine certainly does not establish a reserved domain for Contracting States. Indeed, the Court has reiterated that States do not have unlimited power of appreciation and it is the Court that is empowered to give the final ruling on adequacy of the measures adopted by States to implement the provisions of the Convention. Thus “The domestic margin of appreciation ... goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its ‘necessity’, it covers not only the basic legislation but also the decision applying it, even one given by an independent court.”²⁹⁸

In one of the first cases on freedom of expression, the Court declared that “...Article 10 (2) leaves the Contracting States a margin of appreciation.”²⁹⁹ However, the Court’s practice reveals that it is unwilling to accord States a wide margin of appreciation with respect to restricting freedom of expression. This is in line with the importance of freedom of expression in a democratic society, as the Court has frequently recalled. Yet, in cases where the balancing of different interests involved was complex due to lack of common European ground on the matter, the Court has accorded such a margin to national authorities, allowing that they are in principle in a better position to give an opinion on the necessity of measures adopted.

²⁹⁸ *Handyside v. the United Kingdom*, European Court of Human Rights, Judgment of 7 December 1976. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 27.06.2006)

²⁹⁹ *Handyside v. the United Kingdom*, European Court of Human Rights, Judgment of 7 December 1976. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 27.06.2006)

For example, the Court has granted a wider possibility for interference with freedom of expression as far as the restrictions served to protect “morals” because “...it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals.”³⁰⁰ A wider margin of appreciation for national authorities also applies to assessing the need for interference to protect religious feelings of others, because “[...] it is not possible to discern throughout Europe a uniform conception of the significance of religion in society...even within a single country such conceptions may vary.”³⁰¹

At the same time, the Court declined to grant wide discretion to national authorities concerning restrictions on freedom of expression imposed with the aim of maintaining the authority of the judiciary, because - as the Court noted: “The domestic law and practice of the Contracting States reveal a fairly substantial measure of common ground in this area.”³⁰²

The scope of the margin of appreciation may also vary, depending on the nature of the activities restricted. Restrictions on free debate on matters of public interest have commonly been subject to the highest level of scrutiny by the Court. The Court has emphasized that: “There is little scope under article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest.”³⁰³ In contrast, the Court’s scrutiny has been looser as regards restrictions on commercial speech.³⁰⁴

The narrow margin of appreciation in relation to expressions on issues of public concern might imply that very weighty reasons would be needed for States to justify restrictions on those types of “hate speech”, which the Court has considered to come within the public debate and has found to be

³⁰⁰ *Handyside v. the United Kingdom*, European Court of Human Rights, Judgment of 7 December 1976, p.22. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 27.06.2006).

³⁰¹ *Otto-Preminger-Institut v. Austria*, European Court of Human Rights, Judgment of 20 September 1994, paragraph 50. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 19.06.2006). The Court also followed this position in a subsequent judgment *Wingrove v The United Kingdom*, European Court of Human Rights, Judgment of 22nd of October 1996, paragraph 58. Accessible at HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 29.06.2006)

³⁰² *The Sunday Times v. The United Kingdom*, European Court of Human Rights, Judgment of 26 April 1979. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 19.06.2006)

³⁰³ *Scharsach and News Verlagsgesellschaft mbH v. Austria*, European Court of Human Rights, Judgment of 13 November 2003, paragraph 30. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 23.06.2006)

³⁰⁴ See for example *Krone Verlag GmbH & Co. KG v. Austria (no.3)*, European Court of Human Rights, Judgment of 11 of March 2004, paragraph 30. Accessible at HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 27.06.2006)

within the scope of Article 10. Yet, analysis of the Court's case-law indicates that no clear criteria exist as to how the Court will approach a margin of appreciation issue in each individual case. Several factors are involved in the Court's assessment, which sometimes might point in different directions.

For example, in the case of *Lehideux and Isorni*³⁰⁵ the applicants were convicted of publicly defending crimes of collaboration with the enemy for an advertisement promoting Marshal Pétains's achievements. The Court refused to grant the State a wide margin of appreciation as regards restrictions on these expressions, despite the arguments by government that restrictions imposed on interpretation of certain parts of the history of the State is very specific and an internal issue. This decision was made despite the fact that this interpretation of history included a certain social effect and might inflict harm on a part of the society concerned.

The potential social consequences of publication of expressions which were recognized to be more than insulting to their targets were also not found sufficient by the Court to grant the State a margin of appreciation that would justify their limitation in another case.³⁰⁶ The high importance that the Court attributes to freedom of the press and its ability to contribute to public debate on matters of public concern seems to have outweighed in this case other interests involved in the balancing exercise. Therefore, "the interplay between the margin of appreciation factors makes it difficult to predict how the Court will decide... the margin question in any given case..."³⁰⁷

1.1.4. Approaches of the Court to assessing legitimacy of restrictions on expressions containing "hate speech"

The two cases analyzed below specify the principles of application of Article 10 in cases of "hate speech" expressions. The first case relates to expressions that incite to hatred and hostility against certain racial groups and the role of journalists as well as the scope of media freedom when

³⁰⁵ See the sub-chapter 1.1.4. b) for analysis of this case.

³⁰⁶ *Jersild v. Denmark*, European Court of Human Rights, Judgment of 23 September 1994. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 19.06.2006)

³⁰⁷ Van Dijk.P., Van Hoof G.J.H., *Theory and Practice of the European Convention on Human Rights*, 3rd edition, Kluwer Law International, 1998, p.91.

reporting on such contentious issues of public concern as racism. The second focuses on the possibilities to interpret controversial and sensitive historical events despite the social effect on some part of the population that such interpretations might create. It also highlights those events whose negation or revision the Court would remove from the scope of protection of Article 10.

a) *Jersild v. Denmark*³⁰⁸

The case of *Jersild v. Denmark* has probably by now become a classic of the case law of the Court and is referred to in almost all cases where the right and duty of the press to inform the public about matters of public interest, including issues that are contentious, is to be balanced against other interests involved. Apart from the considerations relevant for the Court in such weighing, the case also presents some light on the relationship between the freedom of expression guaranteed by Article 10 of the Convention and the obligation of the State to declare an offence all dissemination of ideas based on racial superiority or hatred under Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (the ICERD).

Facts

Mr. Jersild was a journalist with the Danish Broadcasting Corporation. After a Danish newspaper published an article about the racist attitudes of members of a group of young people in Copenhagen calling themselves “the Greenjackets”, he decided to make a documentary on this group. He invited three members of the group to take part in a television interview, during which the Greenjackets made abusive and derogatory remarks about immigrants in Denmark. For example, they stated that: blacks are not human beings, but animals; also that foreign workers and immigrants come to Denmark to sell drugs.³⁰⁹ Mr. Jersild subsequently edited and cut the film of the interview down to a few minutes, but maintaining the crudest remarks. The film was then broadcasted as a part of the *Sunday News Magazine*.

³⁰⁸ *Jersild v. Denmark*, European Court of Human Rights, Judgment of 23 September 1994. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 24.06.2006)

³⁰⁹ *Ibid.*, Paragraph 11.

Following the programme the Public Prosecutor on the basis of a complaint instituted criminal proceedings charging the three youths interviewed with a violation of article 266 (b) of the Penal Code for a number of statements they had made during the interview. Charges were also brought against Mr. Jersild for aiding and abetting the three youths. The charges against Mr. Jersild were upheld by the Court of first instance and subsequently by the High Court of Eastern Denmark and the Supreme Court, which examined the case as the court of appeal. However, both in the High Court and in the Supreme Court one judge took a different view. Both judges pointed to the object of the programme, which according to them, “was to inform about ...the particular racist attitudes and social background of the youth group in question”³¹⁰ and “...to contribute to information on the issue - the attitude towards foreigners - which was the subject of extensive and sometimes emotional public debate.”³¹¹

Assessment of the case by the European Court of Human Rights

All parties agreed that there had been an interference with the applicant’s right to freedom of expression, which was “prescribed by law” and pursued a legitimate aim, namely the “protection of the reputation or rights of others”. Therefore, the Court directly went to assessment of the only disputed point – the necessity of interference in a democratic society. The Court first of all expressed its position towards the relationship between Article 10 of the Convention and Article 4 of the ICERD, which the government had largely relied on to justify the need for interference with the applicant’s freedom of expression. The Court emphasized the vital role of the fight against racial discrimination in all its forms and manifestations and noted that in order to determine whether the applicant’s conviction was “necessary” within the meaning of Article 10 (2), “the object and purpose pursued by the UN Convention are of great weight”.³¹² Furthermore, the Court took into account Denmark’s obligations under the ICERD, and the need to interpret Article 10 of the Convention “...to the extent possible, so as to be reconcilable...”³¹³ with these obligations. At the same time, the Court stated that “due regard” clause in Article 4 of the ICERD is open to various constructions. The Court emphasized that it is not competent to clarify the meaning of this clause,

³¹⁰ *Jersild v. Denmark*, European Court of Human Rights, Judgment of 23 September 1994, paragraph 17. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 24.06.2006)

³¹¹ *Ibid.*

³¹² *Ibid.*, paragraph 30.

but concluded that the way it interprets Article 10 in the present case is compatible with obligations of Denmark under the ICERD.

The Court did not advance explicit arguments to substantiate this conclusion, but it seems from the subsequent paragraph of the Court's judgment that the decisive factor was the fact that the applicant did not made the objectionable statements himself, but merely assisted in their dissemination. Similarly important was the fact that he was doing so in his capacity as a television journalist³¹⁴ and dissociated himself from the authors of racist remarks or the remarks themselves. That assumption can also be derived from other parts of the Court's judgment, where the Court is explicit that the remarks expressed by the Greenjackets "...were more than insulting to members of the targeted groups and did not enjoy the protection of Article 10."³¹⁵ Lastly, the Court's analysis of the purpose of the item in question and its findings in this regard made the government's reliance on the requirements of the ICERD in this case unconvincing.

Afterwards the Court referred to the principles in its case law relating to the role of the press. It reiterated one of its well established principles that in a democratic society safeguards to be afforded to the press are of particular importance and emphasized the duty of the press to impart information and ideas of public interest as long as it does not overstep the bounds set, inter alia, for "the protection of the reputation or rights of others." In order to consider the duties and responsibilities of a journalist, the Court noted that the potential impact of the medium concerned is an essential factor. The Court referred to earlier case law according to which "...the audiovisual media have often a much more immediate and powerful effect than the print media"³¹⁶ as it was so in the instant case. However, the Court went on by saying that there are different methods of objective and balanced reporting and that:

*"It is not for this Court, nor for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists"*³¹⁷

and referred to another well established principle:

³¹³ *Jersild v. Denmark*, European Court of Human Rights, Judgment of 23 September 1994, paragraph 30. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 24.06.2006)

³¹⁴ Paragraph 31.

³¹⁵ Paragraph 35.

³¹⁶ Paragraph 31.

³¹⁷ *Jersild v. Denmark*, European Court of Human Rights, Judgment of 23 September 1994, paragraph 31. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 24.06.2006)

*...that Article 10 (art. 10) protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed.*³¹⁸

This seems to be the Court's response to the arguments made by the national judges and which laid considerable emphasis on the active involvement of the applicant in the way the programme was prepared and their conclusion that "such reports must be carried out in a more balanced and comprehensive manner."³¹⁹ Therefore, the European Court of Human Rights is open to applying the guarantees embodied in Article 10 to rather different methods of reporting.

The Court's high regard for the freedom of the press was also acknowledged later in the judgment by stating that:

News reporting based on interviews, whether edited or not, constitutes one of the most important means whereby the press is able to play its vital role of "public watchdog". [...] The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so. In this regard the Court does not accept the Government's argument that the limited nature of the fine is relevant; what matters is that the journalist was convicted.³²⁰

Regarding the balance and objectivity of reporting as well as other factors that might determine the need for interference with the applicant's freedom of expression, the Court identified four elements which it was going to look at. First, it was the manner in which the programme was prepared. Secondly, it was the content of the programme. Thirdly, the Court noted the context in which it was broadcast; and lastly, it focused on the purpose of the programme.

As to assessment of the manner in which the "Greenjackets" feature was prepared, which appears to have played a dominant role in the reasoning of the Danish courts who convicted the applicant, the Court noted the facts that the applicant not only took the initiative of preparing the report but also encouraged racist statements to be made during the interview and edited the programme in such a way as to include the offensive assertions. The Court agreed that these were relevant reasons for the purposes of Article 10 (2). Yet, as regards consideration of other elements, the Court's view shifted

³¹⁸ Ibid.

³¹⁹ Paragraph 18.

³²⁰ Paragraph 35.

in favour of the freedom of expression of the applicant, on occasion being in sharp contrast with the assessment of the national courts. Concerning the content and context of the report, the Court noted that introduction of the programme referred to recent public discussion and press comments on racism in Denmark. Thus the programme dealt with specific aspects of this matter, which even then was of great public concern. The Court also disagreed with the national courts about the lack of counterbalancing elements in the report. It pointed both to the introduction of the programme as well as emphasizing the fact that the applicant had clearly dissociated himself from the persons interviewed. In view of these facts, as well as a journalist's discretion as to the form of expression used, the Court did not consider relevant the absence of explicit reminders about the dangers of promoting racial hatred in the programme.³²¹

Lastly, the Court turned to assessment of the purpose of the item. It had noted earlier in the judgment that in view of Denmark's obligations under the ICERD, "an important factor in the Court's evaluation will be whether the item in question, when considered as a whole, appeared from an objective point of view to have had as its purpose the propagation of racist views and ideas."³²² The Court emphasized that the announced object of the programme was "to address aspects of the problem, by identifying certain racist individuals and by portraying their mentality and social background."³²³ The Court seemed persuaded that the ensuing interviews fulfilled the aim of exposing and analysing this particular group of young people and therefore came to the conclusion that taken as a whole the purpose of the applicant in compiling the broadcast in question was not racist.³²⁴ This conclusion of the Court might look questionable from the point of view of the obligations under Article 4 ICERD, which declares an offence not only intentional propagation of racial discrimination, but also those acts which result in this. However, what makes this case different is the fact that the applicant did not express the racist remarks himself.

The Court also dismissed the government's arguments about the limited nature of the fine imposed on the journalist. In line with its particular respect for freedom of the media, it emphasized that

³²¹ However, seven of nineteen judges who were a minority noted in their dissenting opinions that the report did lack counterbalancing elements as for example a clear statement of disapproval of racist remarks. See joint dissenting opinions of judges Ryssdal, Bernhardt, Spielman and Loizou, paragraph 3. and joint dissenting opinion of judges Golcuklu, Russo and Valticos.

³²² *Jersild v. Denmark*, European Court of Human Rights, Judgment of 23 September 1994, paragraph 31. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 24.06.2006)

³²³ *Ibid.*, paragraph 33.

³²⁴ *Jersild v. Denmark*, European Court of Human Rights, Judgment of 23 September 1994, paragraph 37. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 24.06.2006)

“what matters is that the journalist was convicted.”³²⁵ Furthermore, in finding a violation of Article 10 in the given case, it noted that “in particular the means employed were disproportionate to the aim of protecting “the reputation or rights of others””.³²⁶

The arguments stated by the Court affirm the high importance that the Court confers on the right of the media to inform the public about matters of public concern such as racism and xenophobia, including through the technique of reporting which results in public statements of remarks which the Court acknowledged to be “...more than insulting to members of the targeted group and did not enjoy the protection of Article 10.” Despite such assessment of the remarks, the Court opted in favour of justification of public exposure, as this was done with the aim of contributing to the public debate on the matter, which was then of great public concern in Denmark.

It is true that freedom of expression and especially media freedom is one of the cornerstones of democracy and its paramount importance is well established in the Court’s case-law. This is essential where the media inform the public about matters of considerable public concern on matters that are sensitive and contentious. The Court emphasized the discretion of the media to choose the technique for such reporting and predominantly focused on the purpose of the item challenged. However, in concentrating predominantly on these aspects the Court apparently ignored the social and psychological harm that public exposure of such expression might impose on its victims. This aspect of the case was thoroughly considered by the Danish Supreme Court, which did not find that an acquittal of Mr. Jersild “*could be justified on the ground of freedom of expression in matters of public interest as opposed to the interest in the protection against racial discrimination.*”³²⁷ To explain the reasons for the judgment, one of the judges of the Supreme Court stated that acquitting Mr. Jersild “*...could only be justified by reasons clearly outweighing the wrongfulness of their actions. In this connection, the interest in protecting those grossly insulted by the statements had to be weighed up against that of informing the public of the statements.*”³²⁸ The Danish Supreme Court came to the conclusion that “the news or information value of the feature was not such as to justify the dissemination of the offensive remarks.”³²⁹ However, The European Court of Human Rights

³²⁵ *Jersild v. Denmark*, European Court of Human Rights, Judgment of 23 September 1994, paragraph 35. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 24.06.2006)

³²⁶ *Ibid.*, paragraph 37.

³²⁷ *Ibid.*, paragraph 17.

³²⁸ *Jersild v. Denmark*, European Court of Human Rights, Judgment of 23 September 1994, paragraph 18. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 24.06.2006)

³²⁹ *Ibid.*, paragraph 33.

disagreed with this statement and relied on the broadcasting company's appreciation of the news value of the item complained of.

While the Danish Courts put more weight on the protection of human dignity of the targets of racist remarks, the majority of the European Court of Human Rights attributed "much more weight to the freedom of the journalist than to the protection of those who have to suffer from racist hatred."³³⁰ This approach by the Court might be explained by strong guarantees for the right to the freedom of expression within the Convention. Contrary to that, the prohibition of discrimination guaranteed by Article 14 does not enjoy similar level of protection and independent status within the Convention's system.³³¹

The European Court of Human Rights also did not give any commentary in its judgment on the government's statement that decisions of national courts were within the margin of appreciation, since they were in better position to evaluate the effects of the programme. While some dissenting judges were of the opinion that to some degree "Danish courts acted inside the margin of appreciation which must be left to the Contracting states in this sensitive area"³³² the judgment adopted by the majority seems to affirm the principle that there are hardly any exceptions to to some degree Court's restrictive approach to the margin of appreciation in cases where the right of freedom of expression - and particularly the right of the press to impart information of serious public concern - is at stake.³³³

b) Lehideux and Isorni v. France³³⁴

In the case of *Lehideux and Isorni v. France*, the Court made a number of statements which are essential not only for the particular case, but also for analysis of the Court's case-law on the dividing lines between Articles 10 and 17 in general. Besides, the Court identified the scope of historical debate which should be allowed in a democratic society, despite the fact that such debate

³³⁰ Joint dissenting opinion of judges Ryssdal, Bernhardt, Spielman and Loizou. *Ibid.*, paragraph 2.

³³¹ In 2005 Additional protocol 12 on non-discrimination came into force and this might change the Court's approach to the status of right to non-discrimination.

³³² Joint dissenting opinion of judges Ryssdal, Bernhardt, Spielman and Loizou. *Ibid.*, paragraph 5.

³³³ *Ibid.*, paragraph 49.

³³⁴ *Lehideux and Isorni v. France*, European Court of Human Rights, Judgment of 23 September 1998. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 29.06.2006)

relates to interpretation of controversial and sensitive events that have negative social impact on part of society. On the other hand, the Court singled out those historical facts which are clearly established and whose negation or revision is removed from the protection of Article 10.

Facts of the case

The two applicants Mr. Lehideux (President of the Association for the Defence of the Memory of Marshal Pétain and Mr. Isorni (a lawyer who had assisted in the defence of Marshal Pétain in his trial for collaboration with Germany during World War II) wrote an advertisement which was published by a national newspaper *Le Monde*, calling the people of France to recognise Marshal Pétain's achievements during the period after the Armistice with Germany. This advertisement presented in a positive light certain acts of Philippe Pétain, head of the Vichy government, who was sentenced to death in 1945 by the High Court of Justice for collaboration with Nazi Germany. The advertisement claimed, for example, that Pétain implemented a skilful policy, and secretly acted for the interests of France and the Allies. The publication related to a very grim and painful part of the history of France due to controversies around the responsibility of isolated individuals or entire institutions for the policy of collaboration with the National Socialist regime.³³⁵

After publication of the advertisement, the National Association of Former Members of the Resistance filed a criminal complaint against the applicants.³³⁶ The public prosecutor considered the case but recommended dropping the charges against Mr. Lehideux and Mr. Isorni on the ground that no offence had been committed. He emphasized that: "although their aim had been to enhance Philippe Pétain's image and praise his conduct during the Second World War, this positive assessment could be construed as a public defence of his actions "only by arbitrarily separating the image thus embellished from its supporting text and its link with the purely extrinsic information

³³⁵ *Lehideux and Isorni v. France*, European Court of Human Rights, Judgment of 23 September 1998, paragraph 43. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 29.06.2006)

³³⁶ According to section 24 (3) of the Freedom of the Press Act of 29 July 1881 it is a criminal offence to publicly defend the crime of collaboration with the enemy. See more in detail on relevant domestic law paragraphs 24 - 27 of the Court's judgment. Law of July 29, 1881, on the Freedom of the Press with subsequent amendments accessible at: <http://www.legifrance.gouv.fr/texteconsolide/PCEAA.htm> (last visited 18.08.2006)

which, for the most part, was contained in the documents on the High Court's file".³³⁷ The public prosecutor concluded that "it might appear strange to commit for trial before the Criminal Court the authors and producers of a text which glorifies an individual, not for the crimes of which he was convicted, but for the beneficial actions which he is deemed to have performed for the good of France, its people and, secretly, the Allies."³³⁸

Despite the public prosecutor's submission, the investigating judge decided to continue proceedings against the applicants. However, the Paris Criminal Court acquitted the defendants. The Court emphasized that its task was "not to take sides in the historical controversy which, for more than forty years, has pitted the Resistance associations against Philippe Pétain's supporters".³³⁹ It furthermore added that "the defendants [were] being prosecuted for their opinions..." and that "no restrictions [could] be imposed on freedom of expression other than those derived from statute, strictly interpreted..."³⁴⁰ The Court concluded that "...the text contained "no attempt to justify collaboration with Nazi Germany", but stated that Marshal Pétain's aim had been to "facilitate the Allies' victory"; Marshal Pétain's collaboration with Nazi Germany was neither acknowledged nor presented in a favourable light;..."³⁴¹ The case was also dismissed by the Court of Appeal because the formal requirements established by law were not satisfied.

Yet, the Court of Cassation quashed this judgment and reopened the proceedings. The Court of Appeal, in assessing the case for the second time, found the applicants guilty of the crime of publicly defending the crime of collaboration with the enemy. The Court stated that three constituent elements of the offence had been made out. First the public element had been made out because the text was published in *Le Monde*. Second the text contained an "apologia" for the crimes of collaboration. The eulogy was produced by two different methods: the authors of the publication had sometimes justified Pétain's decisions by endeavouring to give them a different meaning and at other times had omitted to mention historical facts of common knowledge but which were inescapable and essential for any objective account of the policy concerned. Lastly, the mental

³³⁷ *Lehideux and Isorni v. France*, European Court of Human Rights, Judgment of 23 September 1998, paragraph 14. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 29.06.2006).

³³⁸ *Ibid.*

³³⁹ *Ibid.*, paragraph 16.

³⁴⁰ *Ibid.*

³⁴¹ *Lehideux and Isorni v. France*, European Court of Human Rights, Judgment of 23 September 1998, paragraph 16. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 29.06.2006).

element had been made out owing *inter alia* to the fact that: "...since they [applicants] knew that by putting forward an unqualified and unrestricted eulogy of the policy of collaboration they were *ipso facto* justifying the crimes committed in furtherance of that policy, and therefore cannot have acted in good faith."³⁴² The judgment of the Court of Appeal was upheld by the Court of Cassation.

European Court of Human Rights' assessment

The Court's judgment in the case is important for a number of reasons. It identifies some of the criteria by which the Court might choose to deal with a case under Articles 10 or 17. The intention of French government was to exclude the application under Article 17 of the Convention, since they considered that the publication violated the very spirit of the Convention and the essential values of democracy. However, the Court decided to assess the case under Article 10. Thus, the Court followed the argumentation of the Commission, which had stated: "that the advertisement which had given rise to the applicants' conviction did not contain any terms of racial hatred or other statements calculated to destroy or restrict the rights and freedoms guaranteed by the Convention"; "...the applicants' object had been to secure revision of Philippe Pétain's trial. Furthermore, it could not be deduced from the text that the applicants' expression of their ideas constituted an "activity" within the meaning of Article 17."³⁴³

There was a common agreement among the parties that conviction of the applicants amounted to "interference" with the applicants' freedom of expression. The parties also agreed that this was prescribed by law and pursued several legitimate aims, namely protection of the reputation or rights of others and the prevention of disorder or crime. Therefore, the focus of the Court turned to assessment of the need for interference in a democratic society for the achievement of those aims.

In assessing the necessity for interference, the Court first emphasized that the interpretation of events presented by the applicants formed part of an ongoing debate among historians. Thus, the Court distinguished this issue from "the category of clearly established historical facts – such as the

³⁴² *Lehideux and Isorni v. France*, European Court of Human Rights, Judgment of 23 September 1998, paragraph 22. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 29.06.2006).

³⁴³ *Lehideux and Isorni v. France*, European Court of Human Rights, Judgment of 23 September 1998, paragraph 37. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 29.06.2006).

Holocaust – whose negation or revision would be removed from the protection of Article 10 by Article 17.”³⁴⁴ Moreover, the Court added that the applicants did not attempt to deny or revise Nazi atrocities, but they were “...rather supporting one of the conflicting theories in the debate about the role of the head of the Vichy government.”³⁴⁵ Thus, the Court illustrated that it will interpret very restrictively the category of historical facts which are a matter of common knowledge, negating or challenging which would most probably be outside the scope of freedom of expression guaranteed by Article 10. The judgment also demonstrates that the Court considers interpretation of those facts, which are not commonly established as a value judgment. Therefore, the fact that the applicants tried to justify Pétain’s decisions in their publication by giving them a different explanation than the one adopted by French authorities, did not in itself go beyond the scope of freedom of expression. The Court noted that events presented in the publication formed part of a debate among historians. Therefore there was a sufficient ground to express contradictory opinions about them.

As regards the content of the publication in issue, the Court acknowledged its one-sided character, since the applicants did not mention any of the offences that Pétain had been accused of, and stated that “...it could without any doubt be regarded as polemical.”³⁴⁶ However, in that connection the Court reiterated one of the basic principles in its case law on freedom of expression, namely, that “Article 10 protects not only the substance of the ideas and information expressed but also the form in which they are conveyed.”³⁴⁷ Thus the Court would be ready to accept even one-sided judgments on contentious and vulnerable historical events, which do not belong to the category of facts clearly established. Yet, it has to be noted that the text was published as an advertisement with the inclusion of the associations’ names at the foot of the page. Therefore, readers had a clear indication why the publication had a particular stance on the events in question. The fact that readers were not misguided might have been essential in finding that the unilateral character of the publication did not go beyond the scope of freedom of expression.

However, the Court gave more detailed analysis to another method used by the applicants in their publication, namely, omission to mention historical facts, which were essential for any objective account of the policy concerned. The reason for this is that “These were not omissions about facts

³⁴⁴ *Lehideux and Isorni v. France*, European Court of Human Rights, Judgment of 23 September 1998, paragraph 47. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 29.06.2006).

³⁴⁵ *Ibid.*

³⁴⁶ *Ibid.*, paragraph 52.

³⁴⁷ *Ibid.*

of no consequence but about events directly linked with the Holocaust. Admittedly, the authors of the text did refer to “Nazi barbarism”, but without indicating that Philippe Pétain had knowingly contributed to it... The gravity of these facts, which constitute crimes against humanity, increases the gravity of any attempt to draw a veil over them.” Yet, the Court emphasized the need to look at the context of the expressions contested in the light of the case as a whole. Like in other cases on freedom of expression, when there is a need to assess the disputed expressions or to distinguish the facts from opinions, the Court does not analyze the contested remarks in abstract, but it takes into account the wider context. This sometimes might imply even going beyond the publication in issue and looking at a series of publications and debates in society around the subject matter.³⁴⁸

The argumentation of the Court demonstrates that the way the case is approached by the national authorities is also among the factors of the Court’s assessment of the legitimacy of interference, especially if the expressions disputed concern controversial and sensitive issues of public debate at national level. The Court first noted the argument made by the government that “this page of the history of France remains very painful in the collective memory...”.³⁴⁹ Yet, in that connection it emphasized that “...it was for the prosecution, whose role it is to represent all the sensibilities which make up the general interest and to assess the rights of others, to put that case during the domestic proceedings”³⁵⁰ and pointed to the passivity of the prosecuting authorities. Secondly, the Court stressed that the publications corresponded to the aim of the associations - the Association for the Defence of the Memory of Marshal Pétain, and the National Pétain-Verdun Association. These associations on behalf of whom the applicants were acting were legally constituted in France and no proceedings had been brought against them or against their aims. While the Court took into account the position of the national authorities, that did not prevent it from finding interference with the disputed expressions unjustified, despite the fact that all three levels of national courts had come to opposite conclusion.

The time element is another factor that affects the Court’s assessment of the need for interference as regards interpreting sensitive historical events. It appears that as time goes on, the Court is more reluctant to justify restrictions of such expressions, despite the fact that they are still sensitive to

³⁴⁸ See *Bergens Tidende and others v. Norway*, European Court of Human Rights, Judgment of 2 May 2000, paragraph 55. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 24.06.2006)

³⁴⁹ *Lehideux and Isorni v. France*, European Court of Human Rights, Judgment of 23 September 1998, paragraph 55. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 29.06.2006).

part of the population. The Court noted that the publication referred to events that had occurred more than forty years before, adding:

Even though remarks like those the applicants made are always likely to reopen the controversy and bring back memories of past sufferings, the lapse of time makes it inappropriate to deal with such remarks, forty years on, with the same severity as ten or twenty years previously. That forms part of the efforts that every country must make to debate its own history openly and dispassionately.³⁵¹

As regards the sensitivity of the publication, the judgment affirmed the well-established practice of the Court. This implies that Article 10 also protects opinions that might be offensive to some part of society, because freedom of expression also applies to “information” and “ideas” that offend, shock, or disturb society. Finally, the Court’s judgment demonstrates that if a case is assessed under Article 10, the Court would measure not only the content and context of the disputed expressions, but also the sanctions applied. The Court noted “...the seriousness of a criminal conviction for publicly defending the crimes of collaboration, having regard to the existence of other means of intervention and rebuttal, particularly through civil remedies.”³⁵² The Court’s argumentation indicates that undue severity of sanctions even in cases inciting hate and hostility might result in violation of Article 10. Unfortunately, the Court as a common practice does not assess the proportionality of sanctions, when it analyzes expressions at issue under Article 17. In view of all the factors mentioned above, the Court found the applicants’ criminal conviction disproportionate and, as such, unnecessary in a democratic society.

A number of judges added dissenting opinions to the judgment. These generally encompassed two arguments. Firstly, the publication cannot be regarded as a contribution to genuine historical debate, given its wholly one-sided and promotional character.³⁵³ Yet, the majority of Court found that even such a form of expression is protected by Article 10. Secondly, a number of judges agreed with arguments put forward previously by the French government that publication related to a very

³⁵⁰ Ibid.

³⁵¹ *Lehideux and Isorni v. France*, European Court of Human Rights, Judgment of 23 September 1998, paragraph 55. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 29.06.2006).

³⁵² Ibid., paragraph 57.

³⁵³ See joint dissenting opinion of judges Foighel, Loizou and Sir John Freeland, paragraph 2 and also dissenting opinion of judge Casadevall paragraph 5. *Lehideux and Isorni v. France*, European Court of Human Rights, Judgment of 23 September 1998. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 29.06.2006).

specific field – the history of the State, which was impossible to define objectively in European terms. Also due to the sensitivity of the issue and effect on the feelings of the population, national courts presumably were best placed to assess the facts and the social consequences of publication of the text. However, the majority of judges affirmed the principle that the Court is restrictive in its approach to the margin of appreciation in cases involving the right to freedom of expression. The exception has been issues likely to offend personal convictions in the religious or moral domain, where the Court has accepted a wider margin.³⁵⁴ Yet, another explanation of the Court’s approach in this case might relate to the passivity of the national prosecuting institutions to proceed with the case against the applicants, because the Court indirectly indicated that it was for the prosecution “to represent all the sensibilities which make up the general interest and to assess the rights of others...”³⁵⁵

If the Court maintains a restrictive approach to the margin of appreciation enjoyed by states in all cases relating to interpretation of contentious and sensitive events in a State’s history, such a policy might pose a challenge for Eastern European states. These states have largely suffered not only from Nazi offences but also from atrocities of the totalitarian communist regimes. The crimes perpetrated by these regimes have not so far been condemned at international level, but are of common knowledge in these states.³⁵⁶

1.2. Article 17 ECHR and decisions declaring inadmissible complaints on restriction of “hate speech”

As illustrated above, the Court may decide on the justification of limitations on expressions containing “hate speech” under the second part of Article 10. However, the Court also has the possibility to dismiss the case at the admissibility stage. The Court has used this practice in a number of “hate speech” cases by referring to Article 17 of the Convention.

³⁵⁴ See *Otto-Preminger-Institut v. Austria*, European Court of Human Rights, Judgment of 20 September 1994. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 19.06.2006)

³⁵⁵ *Lehideux and Isorni v. France*, European Court of Human Rights, Judgment of 23 September 1998, paragraph 55. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 29.06.2006).

³⁵⁶ See for example the Declaration on condemnation of the totalitarian communist occupation regime implemented in Latvia by the Union of Soviet Socialist Republics, adopted by the Latvian Parliament on 12th of May, 2005. Accessible at: http://www.saeima.lv/Lapas/Deklaracija_an.htm (last visited 30.09.2006)

This Article states:

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

This article of the Convention, which has analogies in other human rights treaties,³⁵⁷ prohibits abuse of rights and was made to restrict totalitarian and other activities subversive to the Convention. It prevents extremist groups and other individuals from exploiting the right of freedom of expression or other basic rights guaranteed by the Convention for the purpose of undermining the free operation of democratic institutions and to destroy human rights, and in a such way to act against the values of the Convention. Among these values of the Convention, the Court has mentioned justice and social peace,³⁵⁸ tolerance, and non-discrimination.³⁵⁹

One of the first cases concerning the application of Article 17 related to the dissolution of the German Communist Party. In rejecting the application, the Commission underlined that the avowed aim of the Communist Party:

...was to establish a communist society by means of a proletarian revolution and the dictatorship of the proletariat. Consequently, even if it sought power by solely constitutional methods, recourse to dictatorship was incompatible with the Convention because it would involve the suppression of a number of rights and freedoms which the Convention guaranteed.³⁶⁰

In view of the wide possibility for restrictions on the rights this provision entails and in order to avoid abuse of Article 17, the Court has taken a very restrictive approach towards its application. The cases when the Court has relied on Article 17 to justify interference within the exercise of the right to the freedom of expression have been exceptions of almost last resort.³⁶¹ The application of Article 17 has also been restricted by the fact that this provision does not have an independent

³⁵⁷ See for example the Article 5 (1) of the ICCPR in the Appendix.

³⁵⁸ *Garaudy v. France*, European Court of Human Rights, Decision as to the admissibility of 24 June 2003. Accessible at HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 15.04.2006)

³⁵⁹ *Norwood v. The United Kingdom*, European Court of Human Rights, Decision as to the admissibility of 16th November, 2004, p.4. Accessible at HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 19.06.2006)

³⁶⁰ Ovey, C. White, R. "The European Convention on Human Rights", Oxford University Press, 4th edition, 2006, p.433.

³⁶¹ Harris, D. J. O'Boyle, M. Warbrick. C. "Law of the European Convention on Human Rights", Butterworths, 1995, p.374.

character. It can only be invoked in connection with an alleged violation of one or more substantive rights protected by the Convention.³⁶² The Court's practice also illustrates that this Article might be applied only to those rights that entitle individuals to engage in activities subversive of the Convention. It is established by the Court that freedom of expression is among such rights.³⁶³ Yet, in order to apply Article 17, it should be demonstrated that the aim of using freedom of expression has been to destroy rights protected by the Convention. Furthermore, Article 17 permits limitation of the rights guaranteed only to the extent that such limitation is necessary to prevent their total subversion.³⁶⁴

Compared to the Court's case law under Article 10, it is more complicated to identify some general principles in the Court's decisions on application of Article 17. This might be explained by the fact that cases when the Court has applied Article 17 are numerically far fewer than those when Article 10 has been applied. Besides, the reasoning and argumentation of the Court in admissibility decisions is less elaborated than in its judgments. There are also no clear criteria to make a distinction as to when the Court would analyze interference with free expression under Article 10 (2), but when it would opt to dismiss the case at the admissibility stage. The Commission has only stated that freedom of expression guaranteed by Article 10 may not be invoked contrary to Article 17.³⁶⁵ However, analysis of admissibility decisions and those judgments of the Court when it has preferred to assess the case under Article 10 instead of Article 17 reveals some general trends in the practice of the Court and the Commission, as well as problems the application of Article 17 encompasses.

As the case-law illuminates, the social value of speech has been one of the crucial factors for the Court in order to decide either to deal with cases at the admissibility stage or analyze limitations on expression in substance under the 2nd part of Article 10. Complaints about limitation on expressions

³⁶² Gomien, D. "Short guide to the European Convention on Human Rights", Directorate General of Human Rights, Council of Europe, 2002, p.46.

³⁶³ *Glimmerveen & Hagenbeek v. Netherlands*, European Commission of Human Rights, Decision as to the admissibility of 11 October 1979. Accessible at HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 01.06.2006)

³⁶⁴ Ovey, C. White, R. "The European Convention on Human Rights", Oxford University Press, 4th edition, 2006, p.433.

³⁶⁵ *Kühnen v. The Federal Republic of Germany*, European Commission of Human Rights, Decision as to the admissibility of 12 May 1988. Accessible at HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=9229000&skin=hudoc-en&action=request> (last visited 29.07.2007)

that directly incite to violence or discrimination³⁶⁶ have constantly been dealt by the Court at the admissibility stage. The same practice applies to private racist and derogatory remarks.³⁶⁷ On the other hand, the practice towards offensive views and other types of “hate speech” that come within the realm of public is less certain, but suggests that the application of the second part of Article 10 would prevail in most cases.³⁶⁸ For instance, the Court has applied Article 10 (2) in relation to offensive remarks about the religious opinions of others that “do not contribute to any form of public debate capable of furthering progress in human affairs.”³⁶⁹ Nevertheless, the Court has dismissed some particularly repugnant hate expressions at the admissibility stage despite the fact that they might have been characterized as coming within the realm of public interest.³⁷⁰

Another factor that makes a distinction between the application of Article 17 or Article 10 (2) to racist expressions and other types of ‘hate speech’ concerns the motives or aims behind such expressions. Such aims cannot be identified in the abstract and the Court has emphasized that it should look at the challenged expressions in the light of the facts of the case as a whole, including the context in which the disputed remarks were made.

As noted earlier, Article 17 can be applied only in those cases when the aim behind using the contested expressions was to destroy the rights of others and implement activities subversive of the Convention. This explains why claims concerning the limitation of intentional propagation of racial hatred would usually be dismissed at the admissibility stage,³⁷¹ but the dispassionate presentation of existence of such sentiments within society would be assessed through the second part of Article 10.³⁷²

³⁶⁶ *Glimmerveen & Hagenbeek v. Netherlands*, European Commission of Human Rights, Decision as to the admissibility of 11 of October 1979. Accessible at HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 01.06.2006)

³⁶⁷ *Jersild v. Denmark*, European Court of Human Rights, Judgment of 23 September 1994, paragraph 35. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 19.06.2006).

³⁶⁸ *Lehideux and Isorni v. France*, European Court of Human Rights, Judgment of 23 September 1998. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 29.06.2006)

³⁶⁹ *Otto-Preminger-Institut v. Austria*, European Court of Human Rights, Judgment of 20 September 1994, paragraph 49. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 19.06.2006)

³⁷⁰ See for example *Glimmerveen & Hagenbeek v. Netherlands*, European Commission of Human Rights, Decision as to the admissibility of 11 of October 1979. Accessible at HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 01.06.2006)

³⁷¹ *Ibid.*

³⁷² *Jersild v. Denmark*, European Court of Human Rights, Judgment of 23 September 1994. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 19.06.2006)

It was previously stated that there is no speech that does not receive the protection of Article 10 because of its content. Nonetheless, some decisions of the Court under Article 17, as well as judgments under Article 10 (2), might give a basis for the conclusion that there are types of expressions that would usually fall outside the scope of protection of Article 10 and therefore be assessed at the admissibility stage.

The most frequently mentioned example is holocaust denial.³⁷³ For example, in the case of *Lehideux and Isorni v. France* the Court was confronted with an interference with freedom of expression where the applicants were convicted of publicly defending crimes of collaboration with the enemy for an advertisement promoting Marshal Pétains's achievements. Contrary to the arguments of the government that the contested publication was against the spirit and values of the Convention and Article 17 should be applied, the Court decided to apply Article 10 (2). In distinguishing this case from those that might have been dealt under Article 17 the Court stated: "...it does not belong to the category of clearly established historical facts – such as the Holocaust – whose negation or revision would be removed from the protection of Article 10 by Article 17."³⁷⁴ The Court was even more straightforward on this issue in its decision in the case of *Garaudy v. France*, where it noted: "There can be no doubt that denying the reality of clearly established historical facts, such as the Holocaust, as the applicant does in his book, does not constitute historical research akin to a quest for the truth."³⁷⁵ The Court continued that: "Denying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incitement to hatred of them."³⁷⁶

Moreover, some regional human rights documents, such as ECRI General Policy Recommendation 7³⁷⁷ and the CE Parliamentary Assembly Recommendation on hate speech³⁷⁸, which define holocaust denial as part of speech not protected by guarantees of freedom of expression.

³⁷³ *Garaudy v. France*, European Court of Human Rights, Decision as to the admissibility of 24 June 2003. Accessible at HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 15.04.2006)

³⁷⁴ *Lehideux and Isorni v. France*, European Court of Human Rights, Judgment of 23 September 1998, paragraph 47. See also *Garaudy v. France*, European Court of Human Rights, Decision as to the admissibility of 24 June 2003. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 19.06.2006)

³⁷⁵ *Garaudy v. France*, European Court of Human Rights, Decision as to the admissibility of 24 June 2003. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 19.06.2006)

³⁷⁶ Ibid.

³⁷⁷ European Commission against Racism and Intolerance, General Policy recommendation No.7 "On national legislation to combat racism and racial discrimination", December 13, 2002. Accessible at: http://www.coe.int/T/E/human_rights/Ecri/1-ECRI/3-General_themes/1- (last visited 11.06.2006)

³⁷⁸ Recommendation No. R (97) 20 of the CE Committee of Ministers on "Hate speech", adopted on 30 October 1997. Accessible at:

Furthermore, a number of European countries have made denial of the holocaust as a crime in their national legislations.³⁷⁹

In addition to holocaust denial, the denial of crimes against humanity as recognized by the Nuremberg Trials as well as justification of pro-Nazi policy³⁸⁰ would also most probably be removed from protection of Article 10 by Article 17. In *Garaudy v. France*, the Court declared:

The book which gave rise to the applicant's criminal convictions analyses in detail a number of historical events relating to the Second World War, such as the persecution of the Jews by the Nazi regime, the Holocaust and the Nuremberg Trials. Relying on numerous quotations and references, the applicant questions the reality, extent and seriousness of these historical events that are not the subject of debate between historians, but – on the contrary – are clearly established.³⁸¹

This quotation of the Court seems to suggest that it is not only the denial of such events which is not protected by Article 10, but also their questioning by trivialisation and pejoration of the facts.

Despite the strong language expressed by the Court about denial of crimes against humanity in *Garaudy v. France*, no settled practice exists to support the view that any discussion, including an unbiased academic one, on the holocaust and challenges to historical events would *ratione materia* be outside the scope of freedom of expression. Even in this decision, the Court pointed out that the applicant in his book did not undertake “...an objective study of revisionist theories” and merely called for “...a public and academic debate on the historical event of the gas chambers.”³⁸² Thus, the Court indirectly illustrated that if the aim of the applicant would have been to make an objective study or to raise an academic debate, the Court’s assessment of the case would have been different. Yet, this practice of the Court reveals the distinction between controversial opinions on historical events and denial or questioning of facts that the Court considers to be clearly established.³⁸³

[http://www.coe.int/t/e/human_rights/media/4_Documentary_Resources/CM/Rec\(1997\)020&ExpMem_en.asp](http://www.coe.int/t/e/human_rights/media/4_Documentary_Resources/CM/Rec(1997)020&ExpMem_en.asp) (last visited 07.08.2006)

³⁷⁹ Such countries include Germany, Austria and France.

³⁸⁰ *Lehideux and Isorni v. France*, European Court of Human Rights, Judgment of 23 September 1998. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 19.06.2006)

³⁸¹ *Garaudy v. France*, European Court of Human Rights, Decision as to the admissibility of 24 June 2003. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 19.06.2006)

³⁸² *Ibid.*

³⁸³ The *Garaudy v. France* decision illustrates that the Court considers the persecution of Jews by the Nazi regime, the Holocaust, and the Nuremberg Trials as clearly established facts. The Court adopted a different approach to the

It is often difficult to separate the facts and opinions. It is even harder to judge whether academic discussion on the holocaust or crimes against humanity is unbiased or has a hidden anti-Semitic or other agenda. Therefore, it seems that the Court would still be against *cart blanche* prohibitions of some types of speech and would instead prefer to look at each case individually.³⁸⁴ As the Court has stated in one of its first judgments on freedom of expression:

It is not sufficient that the interference involved belongs to that class of the exceptions listed in Article 10 (2) (art. 10-2) which has been invoked; neither is it sufficient that the interference was imposed because its subject-matter fell within a particular category or was caught by a legal rule formulated in general or absolute terms: the Court has to be satisfied that the interference was necessary having regard to the facts and circumstances prevailing in the specific case before it.³⁸⁵

The rationale of applying Article 17 and dismissing at the admissibility stage racist, violent, and similar expressions receiving only scarce protection under freedom of expression is linked to the initial aims behind this provision – to restrict activities subversive of the Convention and prevent the resurgence of fascism or other totalitarian activities that would exploit Convention rights in order to destroy democracy and eliminate basic freedoms. This aim was certainly essential at the time when the Convention was adopted and also afterwards when revision of fascist ideology emerged in some European countries. In view of the cold war, the safeguards against red terror and activities to achieve dictatorship of the proletariat were equally important.³⁸⁶

The same preoccupations were important for new member-states of the CE at the beginning of the 90s, when the democratic political systems in those states were fragile.³⁸⁷ But as time goes on and the likelihood of such expressions to reverse or destroy the democratic system lessens, there seem to be fewer arguments to support the assessment under Article 17 of expressions, even reviled ones, that touch on issues of public interest.

assessment of historical events that it was confronted with in the case of *Lehideux and Isorni v. France* case, where the Court stressed that the role of Pétain in the Second World War is not among the historical facts clearly established.

³⁸⁴ A similar approach is employed by the UN Human Rights Committee. See the case of *Faurisson v. France*.

³⁸⁵ *The Sunday Times v. The United Kingdom*, European Court of Human Rights, Judgment of 26 April 1979, paragraph 65.

Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 19.06.2006)

³⁸⁶ See *Parti Communiste v. Federal Republic of Germany*, European Court of Human Rights, Decision of 20 July 1957, Yearbook I (1955- 1957), p. 224.

³⁸⁷ See for example *Ždanoka v. Latvia*, European Court of Human Rights, Judgment of 16 of March 2006. Accessible at HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 28.06.2006)

The current approach adopted by the Court as regards the application of Article 17 seems to be reflected in the case of *The United Communist Party of Turkey and Others v. Turkey*, where the Commission stated that: in order that Article 17 may be applied, the aim of the offending actions must be to spread violence or hatred, to resort to illegal or undemocratic methods, to encourage the use of violence, to undermine the nation's democratic and pluralist political system, or to pursue objectives that are racist or likely to destroy the rights and freedoms of others.³⁸⁸

This approach by the Court certainly does not exclude the possibility that the situation might change over the years and that new imminent threats to democracy might emerge. In addition, even if alteration or denial of certain historical facts might not pose a threat to democracy nowadays, the application of Article 17 to such expressions is still justified if the trivialization of these events is an integral element of a wider campaign of racial defamation and incitement to hatred against a certain racial or ethnic group.³⁸⁹

It is also legitimate, and an advantage from the point of view of efficiency and time spent on consideration of cases, that Article 17 is still applied to the most obnoxious expressions, such as racist remarks, as well as to expressions that incite to violence. However, the Court should approach even these cases with proper scrutiny to prevent undue limitations on freedom of expression – the right recognized by the court as constituting one of the essential foundations of a democratic society. Despite the fact that interference with such expressions is usually legitimate, the Court should still assess whether the repressive measures taken by a state are proportionate. Analysis of the practice of the Court suggests that - contrary to the assessment of cases under Article 10 (2)³⁹⁰ - the Court has not always followed this requirement when examining cases under Article 17.³⁹¹

³⁸⁸ *United Communist Party of Turkey and Others v. Turkey*, European Court of Human Rights, Judgment of 30 January 1998, paragraph 23. Accessible at HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 29.06.2006)

³⁸⁹ See for example *Garaudy v. France*, where the Court emphasized the link between holocaust-denial and incitement to hatred against Jews. *Garaudy v. France*, European Court of Human Rights, Decision as to the admissibility of 24 June 2003. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 19.06.2006)

³⁹⁰ For example in the case of *Lehideux and Isorni v. France*, the Court stated: "Court notes the seriousness of a criminal conviction for publicly defending the crimes of collaboration, having regard to the existence of other means of intervention and rebuttal, particularly through civil remedies." *Lehideux and Isorni v. France*, European Court of Human Rights, Judgment of 23 September 1998, paragraph 57. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 19.06.2006)

³⁹¹ See *Norwood v. The United Kingdom*, European Court of Human Rights, Decision as to the admissibility of 16th November, 2004. Accessible at HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 19.06.2006)

Lastly, in view of the wide possibilities for restrictions that Article 17 contains, it should be referred to only as matter of last resort. In cases where the expression contested might come within the public interest, the Court's practice has increasingly been to opt for assessment of interference under Article 10 (2).

1.3. Conclusions

Analysis of the Court's case-law demonstrates the high significance that the Court grants to the right of freedom of expression guaranteed by Article 10 of the Convention. This is first of all confirmed by the wide scope that the Court confers on this right. For example, the Court has applied the guarantees of Article 10 not only to political but also to commercial and artistic speech. The Court has also emphasized that it is not only the content of expressions but also the form in which they are conveyed that is protected. Secondly, the importance conferred on freedom of expression is also evident from the Court's argumentation in judgments, where this right is recognized as intrinsic to democracy³⁹² - the political model whose values the Convention was designed to maintain and promote.³⁹³ In addition, the Court has also adopted a thorough approach to the notion of interference with this right. Thus, it has limited the freedom of States to apply measures that could limit freedom of expression without being subject to the Court's revision.

Nevertheless, instances might occur when freedom of expression needs to be limited. The Court has justified such limitations imposed on this right if the requirements laid down in the second part of Article 10, especially the need to prove the necessity of limitations in a democratic society, are fulfilled. However, the Court has emphasized on a number of occasions that all limitations on freedom of expression should be interpreted narrowly, thus again underlining its importance.

This principle also relates to limitations on expressions characterized as "hate speech", if the Court has decided that these fall within the scope of Article 10. Such expressions usually incite to discrimination against certain groups of people on the basis of their racial, ethnic, or national origin. These expressions might also incite violence and hostility towards these groups of people or insult their dignity on the basis of their group affiliation.³⁹⁴ According to the legitimate aims listed in the second part of Article 10, these expressions are usually limited "for the protection of reputation or rights of others" or for "the prevention of disorder and crime."

³⁹² *Handyside v. the United Kingdom*, European Court of Human Rights, Judgment of 7 December 1976. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 19.06.2006)

³⁹³ *Ždanoka v. Latvia*, European Court of Human Rights, Judgment of 16 of March 2006, paragraph 98. Accessible at HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 29.06.2006)

³⁹⁴ See chapter 1 on terminology, *Norwood v. The United Kingdom*, European Court of Human Rights, Decision as to the admissibility of 16th November, 2004. Accessible at HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 29.06.2006)

The explanations why the Court has subjected to strict scrutiny also the limitations on expressions that incite discrimination or insult the dignity of certain racial or ethnic groups might be found in the text of the Convention. As noted earlier, freedom of expression enjoys significant status among the other rights of the Convention. At the same time, protection of reputation is only included as one of the legitimate aims in limiting freedom of expression in the second part of Article 10, and is not recognized as a separate right by itself. Moreover, prohibition of discrimination in the Convention system for a long time was a soft right and did not have an independent position in comparison with the hard-core right to freedom of expression. However, this situation might change in the Court's case-law, since Additional Protocol 12 of the Convention, which provides for an independent right to non-discrimination, recently came into force, so that the Court will have to take into account its provisions when it encounters the need to strike a balance between prohibition of discrimination and freedom of expression.

As mentioned above, the Court has been thorough in assessing the legitimacy of limitations on freedom of expression guaranteed by Article 10. However, apart from assessing the legitimacy of limitations under Article 10 (2), the Court might - on the basis of Article 17 - declare complaints about limitations on freedom of expression to be outside the scope of protection of Article 10 and thus inadmissible. The Court, and previously the Commission, has applied such an approach to "hate speech" expressions on a number of occasions.³⁹⁵

No clear criteria exist as to when the Court would dismiss a case at the admissibility stage and when it would prefer to assess justification of interference with freedom of expression under Article 10. However, the case law affirms that most vehement expressions and incitement to violence would be declared beyond the scope of freedom of expression protected by Article 10. The fact that expressions belong to derogatory remarks expressed in private or concern an issue of general public interest is also among the decisive factors. The first are, as a rule, dealt with under Article 17. The reasons for such an approach as follows from the case-law have been that such expressions harm the dignity and rights of others and also have no value, because they do not relate to issues of public interest or in no way contribute to public debate on an issue because of their obviously racist

³⁹⁵ *Norwood v. The United Kingdom*, European Court of Human Rights, Decision as to the admissibility of 16th November, 2004; *Garaudy v. France*, European Court of Human Rights, Decision as to the admissibility of 24 June 2003; *Glimmerveen & Hagenbeek v. Netherlands*, European Commission of Human Rights, Decision as to the admissibility of 11 of October 1979, *Witzsch v. Germany*, European Court of Human Rights, Decision as to the admissibility of 13 December 2005. Accessible at HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 30.06.2006)

motivation. Yet, the Court has emphasized its exclusive power to decide whether the expressions challenged have any value in order to be protected by safeguards embodied in Article 10.³⁹⁶

The Court might also apply Article 17 to “hate speech” expressions on issues that might come within public debate. For example, the Court has identified certain types of historical events, to deny or challenge which would be declared contrary to the underlying values of the Convention due to common knowledge of these events - and the social consequences that the expressions denying them might produce. Such expressions include, for example, holocaust denial and attempts to justify Nazi policy.³⁹⁷ The firm approach of the Court towards these types of statements is understandable if one takes into account the consequences of World War II and threats to the new democratic institutions posed by a resurgence of totalitarian ideas at the time when the Convention was adopted. Moreover, the need to introduce Article 17 was precisely motivated by the concern to prevent persons relying on the rights enshrined in the Convention or its Protocols in order to attempt to derive the right to conduct what amounts in practice to activities intended to destroy the rights or freedoms set forth in the Convention.³⁹⁸ Lastly, denial of the holocaust, for example, is not only a matter of history or even an issue of suffering inflicted on its victims by expressions denying this crime against humanity. It is often used as an instrument in a wider campaign of anti-Semitism and incitement to hatred of Jews.

However, today - fifteen years after the end of the Cold war and collapse of the Soviet Union - it would seem appropriate that the Court should adopt a similarly strict approach towards expressions denying atrocities made by the communist regime, such as mass killings, deportations, and forced movement of certain ethnic groups. Yet, the case-law of the Court suggests that such approach of the Court would hardly be applicable to the interpretation of events which might be particularly sensitive for some countries, but whose truth is not commonly acknowledged at the European level.³⁹⁹ Therefore, the Court’s stance towards offences committed under totalitarian communist

³⁹⁶ *Lehideux and Isorni v. France*, European Court of Human Rights, Judgment of 23 September 1998. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 29.06.2006)

³⁹⁷ See *Lehideux and Isorni v. France*, European Court of Human Rights, Judgment of 23 September 1998; *Garaudy v. France*, European Court of Human Rights, Decision as to the admissibility of 24 June 2003; *Witzsch v. Germany*, European Court of Human Rights, Decision as to the admissibility of 13 December 2005. Accessible at HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 30.06.2006)

³⁹⁸ *Ždanoka v. Latvia*, European Court of Human Rights, Judgment of 16 of March 2006, paragraph 99. Accessible at HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 29.06.2006)

³⁹⁹ *Lehideux and Isorni v. France*, European Court of Human Rights, Judgment of 23 September 1998. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 29.06.2006)

regimes would most probably be directly linked to recent initiatives in the Council of Europe and European Parliament to condemn atrocities committed under communist regimes.⁴⁰⁰

It would certainly not be proportionate to prohibit all pro-communist speech or expressions glorifying communist policy. The case-law illustrates that the Court is against *carte blanche* prohibitions even as regards interpretation of those facts that it has so far taken as granted. The approach adopted by the Court is to look at the content and context of expressions in each case individually and it will not declare expressions outside the scope of freedom of expression simply on the basis of the content itself.⁴⁰¹ The dissemination of pro-communist ideas could hardly pose a threat to democratic institutions of these countries at present, when most of them have become members of the European Union, so long as these ideas do not resort to use of violence or any other form of rejection of democratic principles. However, as regards the denial of atrocities committed by the Communist regime, the Court should on the one hand take into account its well established principle that freedom of expression in a democratic society also protects speech that shocks or even offends part of society. But on the other hand, it should also consider the suffering inflicted by such expressions on victims of these offences, or grant the state a wider margin of appreciation when national institutions are better placed to make such assessment. Lastly, the Court should apply Article 17 to cases when denial or revision of crimes perpetrated under the Communist regime is clearly used as a vehicle for racial defamation and incitement to hatred against certain ethnic groups.

The Court's assessment of limitations on expressions under Article 17 has been rather loose and has occasionally been criticized. The criticism has mostly related to the fact that the Court does not measure the proportionality of sanctions if the complaint is considered under Article 17 and even if there might be legitimate grounds to restrict the questions at issue, the sanctions applied might be disproportionate.⁴⁰² On the other hand, the Court has been rather cautious in its application of

⁴⁰⁰ See for example the CE Parliamentary Assembly Resolution 1481 (2006) "Need for international condemnation of crimes of totalitarian communist regimes", adopted on 25th of January 2006. Accessible at: <http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta06/Eres1481.htm> (last visited 29.07.2006)

⁴⁰¹ See for example the distinction that the Court drew between the Commission's decision in the German Communist Party case, where the dissolution of the party was justified because it sought to establish domination of one social class over the others, and the decision of the Turkish authorities to dissolve the United Communist Party of Turkey solely on the basis on the party's name, which the Court found unjustified. See the judgment of *United Communist Party of Turkey and Others v. Turkey*, European Court of Human Rights, Judgment of 30 January 1998, paragraph 54. Accessible at HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 29.06.2006)

⁴⁰² Ovey C. and White R. "The European Convention on Human Rights", Oxford University Press, 4th edition, 2006, p.436.

Article 17 and has referred to it only as a matter of exception to cut at the outset expressions which obviously have the purpose of abusing the rights enshrined in the Convention and which are intended to destroy the underlying values of the Convention. In cases where the Court had doubts whether the expressions questioned have a purpose – or result in actions - contrary to the Convention, the Court has chosen to consider the complaint under Article 10 (2) despite the claims of respective government representatives to apply Article 17.

As stated earlier, the Court’s assessment of limitations under Article 10 (2) is very scrupulous. This is particularly so in relation to the requirement to prove the necessity of interference with the freedom of expression in a democratic society. This is explained by the status of the freedom of expression in the overall structure of the Convention and the lack of independent status of those rights which the expressions characterized as “hate speech” might violate.

A very wide scope of protection is granted to media freedom, taking into account the “public watchdog” role of the press in a democratic society. The Court has emphasized the right of the media to inform the public about issues of public interest and general concern, including such controversial matters as racism and xenophobia. The Court has stressed the need to draw a distinction between the authors of racist remarks and the journalist who makes a report about them. If he has dissociated himself from these expressions, then particularly strong reasons should be demonstrated in order to justify measures against the journalist.⁴⁰³

The wide scope of media protection also relates to the techniques used by journalists to prepare their report on an issue. The Court has justified even such methods of reporting that include public statements offensive and insulting to part of society, if it is persuaded that the report contributes to an issue of great public concern and its purpose is not racist.⁴⁰⁴ The Court has reiterated that journalistic freedom also includes a degree of exaggeration and even provocation; moreover, that it is not only the content but also the form of expression which is protected by Article 10. However, in order to receive this protection journalists should observe professional standards and ethics of journalism and act in goodwill, because their reports on these sensitive issues may not only contribute to public debate but may also be used as a medium to disseminate racist propaganda.

⁴⁰³ *Jersild v. Denmark*, European Court of Human Rights, Judgment of 23 September 1994. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 19.06.2006)

⁴⁰⁴ *Jersild v. Denmark*, European Court of Human Rights, Judgment of 23 September 1994. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 19.06.2006)

If a complaint is considered under Article 10 (2), the Court is also reluctant to grant States a wide margin of appreciation even on issues whose content and social consequences are essentially linked to the domestic or national level, such debates about interpreting controversial and vulnerable historical events. The reasoning of the Court might best be explained by the concurring opinion of judge Jambrek in the case of *Lehideux and Isorni v. France* in stating that:

The best protection for democracies against the resurgence of the racist, anti-Semitic and subversive doctrines which originated in the totalitarian regimes of national-socialist or communist persuasion remains the possibility of engaging in a free critique which reveals the real dangers and the ways to forestall them. Democracies, unlike dictatorships, can cope with the sharpest controversies and promote what should be the democratic ideal resulting from the European Convention on Human Rights.⁴⁰⁵

However, as noted earlier, historical facts which the Court considers to be commonly acknowledged on a European scale amount to an exception, and limitations on expressions denying them has traditionally been dealt with at the admissibility stage. As regards limitation of these expressions, the Court has referred to the concept of a “democracy capable of defending itself”,⁴⁰⁶ since expressions such as glorification of Nazi policy are considered to constitute an abuse of rights and contradict the underlying values of the Convention.

The application of Article 10 (2) to expressions challenged in comparison with decisions under Article 17 certainly includes much detailed analysis as regards the need for interference and thus creates stronger safeguards for the right to freedom of expression. However, the case-law and dissenting opinions of judges in these cases indicate that occasionally the majority of the Court disregards assessing the suffering inflicted by “hate speech” expressions on its targets. Therefore, in those cases where the social consequences of these expressions can clearly be better assessed by national courts, a possibility to grant a wider margin of appreciation to States should be thoroughly considered.

⁴⁰⁵ *Lehideux and Isorni v. France*, European Court of Human Rights, Judgment of 23 September 1998, Concurring opinion of Judge Jambrek, paragraph 3. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 29.06.2006)

⁴⁰⁶ *Vogt v. Germany*, European Court of Human Rights, Judgment of 26 September 1995, paragraphs 51 and 59. Accessible at HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 12.06.2006)

2. European Commission against Racism and Intolerance (ECRI)

The ECRI is a mechanism within the CE which plays a major role in the struggle against racism and intolerance in their various aspects, including the elaboration of guidelines to constrain speech inciting hatred and discrimination. It was established following a decision of the 1st Summit of Heads of State and Government of the CE, held in Vienna in October 1993. According to its Statute⁴⁰⁷, which the Committee of Ministers renewed in 2002, the ECRI is an independent human rights monitoring body on racism and racial discrimination whose specific task is to combat racism, xenophobia, anti-Semitism, and intolerance at the level of greater Europe. “ECRI action covers all necessary measures to combat violence, discrimination and prejudice faced by persons or groups of persons, notably on grounds of “race”, colour, language, religion, nationality and national or ethnic origin.”⁴⁰⁸ Thus, compared to the ECHR and its supervisory system, which covers most civil and political rights as well as some economic rights, the ECRI focuses on different aspects of non-discrimination in the enjoyment of those rights and more general trends of racism.

The way the ECRI operates is very different from the Convention system. The major distinction is that it is not a court institution. It cannot make decisions on individual complaints and its recommendations to States are not legally binding. It is also not based on a treaty. Moreover, in its activities the Commission uses not only legal tools, but also employs a comprehensive approach to combating various forms of racism and racial discrimination, including proposals for adequate measures at policy level, and educational initiatives. But some similarities exist in its work with UN human rights treaty monitoring bodies. For example, one of the primary methods that the ECRI uses to monitor the phenomena of racism and racial discrimination in all Member States of the CE is preparation of reports every four to five years on the situation in each country and the elaboration of recommendations on the basis of the analysis contained in those reports. The report is later made public, unless the government in question is expressly against publication. Compared to the European Court of Human Rights, which considers individual cases on alleged violations of the ECHR, the advantage of the ECRI is its preventive character and holistic approach to the phenomenon of racism. It can analyze the situation in a country and point to shortcomings in

⁴⁰⁷ The statute of ECRI is accessible at:

http://www.coe.int/t/e/human_rights/ecri/1%2Decri/ECRI_statute.asp#TopOfPage (last visited 01.08.2006)

⁴⁰⁸ The ECRI programme of activities was adopted on September 2005. Accessible at: http://www.coe.int/t/e/human_rights/ecri/1%2Decri/1%2Dpresentation_of_ecri/1%2Decri_and_its_programme_of_activities/ECri_and_its_programme_of_activities.asp#TopOfPage (last visited 01.08.2006)

legislation, policy and practice prior to the violation. Furthermore, the Commission can address more general problems within the system rather than focusing on individual situations. For instance, it makes annual reports which highlight the most common problems and trends in all CE Member States as regards the phenomena of racism and racial discrimination.

Another aspect of the ECRI programme focuses on general themes which are of particular relevance for fighting racism and intolerance. For instance, in 2005 the ECRI adopted a Declaration condemning the increasing use of racist, anti-Semitism, and xenophobic arguments in political discourse, including by mainstream political parties.⁴⁰⁹ The Declaration expresses concern that the use of racist, anti-Semitic, and xenophobic political discourse is no longer confined to extremist political parties and that this development might lead to legitimisation of this type of discourse. It recalls Europe's history, which shows that political discourse promoting prejudice and hatred against certain minority groups considerably threatens social peace and leads to suffering for entire populations. The Declaration calls on political parties and national parliaments to adopt a number of measures, including self-regulatory measures, and effective implementation of criminal law to reduce racist and xenophobic expressions in political discourse. The ECRI's work on general themes also includes adoption of General Policy Recommendations. These Recommendations serve as guidelines for policy-makers when they elaborate national policies and legal frameworks. The last aspect of the ECRI programme of action, which will not be examined separately in this analysis due to its broad nature, is relations with civil society. It includes a wide variety of sets of measures such as organization of round tables and meetings with NGOs, thematic seminars with national specialised bodies and government officials, and educational campaigns through the media.

I will start with analysis of relevant General Policy Recommendations and continue with some general conclusions from ECRI country reports, which illustrate areas where countries experience most problems as far as concerns suppression of hate speech.

⁴⁰⁹ The text of the Declaration as well as the study prepared by Jean-Yves Camus on "The use of racist, anti-Semitic and xenophobic arguments in political discourse" is accessible at: http://www.coe.int/t/e/human_rights/ecri/1-ecri/4-relations_with_civil_society/1-programme_of_action/14-public_presentation_paris_2005/actes%2021%20March%202005_en.pdf (last visited 03.07.2006)

2.1. General Policy Recommendations

As noted above, the ECRI Recommendations include, *inter alia*, a valuable source of principles which States can transform in their legal acts, when they design their anti-racism policy. So far, the ECRI has adopted nine Recommendations.⁴¹⁰ This analysis focuses only on those recommendations that are of particular importance for developing legal tools and approaches to limit hate speech. The principle documents there are General Policy Recommendation No 1 on “Combating racism, xenophobia, anti-Semitism and intolerance” and General Policy Recommendation No 7 on “National legislation to combat racism and racial discrimination”. However, for particular instances of hate speech, such as for combating dissemination of racist, xenophobic, and anti-Semitic material via Internet, I will discuss Recommendation No 6. I will also quote the latest, Recommendation No 9, “The fight against anti-Semitism”⁴¹¹ as far as it contains specific measures to restrict speech inciting hatred and discrimination against Jews.

The first ECRI General Policy Recommendation, adopted on 4 October 1996, sets a number of principles and proposes concrete measures concerning law, judicial remedies, and policies in a number of areas. The Recommendation emphasizes a need for a comprehensive approach to effectively counter racism, xenophobia, anti-Semitism, and intolerance. While it recognizes the fact that legal measures alone cannot counter these acts, the Recommendation acknowledges the importance of legal measures in action against racism and intolerance. As far as concerns restrictions on speech inciting to hatred, the Recommendation requires categorization as a criminal offence of various forms of expressions, “...including the electronic media, inciting to hatred, discrimination or violence against racial, ethnic, national or religious groups or against their members on the grounds that they belong to such a group.”⁴¹² Moreover, the Recommendation obliges application of criminal sanctions not only to expressions *per se*, but also to the production,

⁴¹⁰ The full list and text of all ECRI General Recommendations is accessible at: http://www.coe.int/t/e/human_rights/ecri/1%2Decri/3%2Dgeneral_themes/1%2Dpolicy_recommendations/intro.asp#TopOfPage (last visited 01.08.2006).

⁴¹¹ ECRI General Policy Recommendation N° 9: The fight against antisemitism, adopted on 25 June 2004.

Accessible at: http://www.coe.int/t/e/human_rights/ecri/1-ecri/3-general_themes/1-policy_recommendations/recommendation_n9/1-Recommendation_9.asp#TopOfPage (last visited 01.08.2006).

⁴¹² ECRI General Policy Recommendation N° 1: Combating racism, xenophobia, antisemitism and intolerance, adopted on 4 October 1996, Part A. Concerning law, law enforcement and judicial remedies. Accessible at: http://www.coe.int/t/e/human_rights/ecri/1-ecri/3-general_themes/1-policy_recommendations/recommendation_n1/1-Recommendation_n%01.asp#TopOfPage (last visited 01.08.2006)

distribution, and storage for distribution of the material in question. Another important principle established in the document and strengthened in subsequent recommendations⁴¹³ and ECRI country reports⁴¹⁴ advocates taking specifically into account the racist or xenophobic motives of the offender. For instance, in some situations the victims of hate speech use so called anti-defamation laws in order to initiate a prosecution against those who express statements inciting hate. The authorities should take into account racist motivation both when they are considering the legal basis for launching prosecutions as well as when deciding on applicable sanctions. The principles laid down in this first Recommendation were further elaborated in General Policy Recommendation No 7, which deals explicitly with legal measures.

This Recommendation contains a comprehensive set of measures which the national authorities are recommended to include in their legal framework on anti-discrimination. It encompasses necessary instruments at all levels of law. The Recommendation starts with guarantees of the right to equality and non-discrimination at the constitutional level and continues with the necessity to declare certain acts as offences under criminal law and to provide adequate remedies for victims of discrimination, including the possibility to claim financial compensation under civil law. The Recommendation prohibits incitement to hatred and discrimination only on such grounds as racial, ethnic, or national origin, or religious affiliation. Thus it leaves out from its scope such groups as sexual minorities. In order to cover additional grounds might involve amending the Statute of the ECRI, which mentions fight against racism, racial discrimination, xenophobia, anti-Semitism, and intolerance as its institutional aim.⁴¹⁵ However, the ECRI might also have considered including other groups within its scope, at least when the Commission is implementing its activities focusing on specific countries, such as preparation of country reports and relations with civil society. The legal ground for this might be to interpret broadly the notion of “intolerance”, whose suppression is among the tasks entrusted to this institution. If evident and persistent acts of hatred against some minority group are not prevented at the initial stage, then a strong probability arises that in the longer term the atmosphere of intolerance will comprise also those groups, which are the primary focus of ECRI activity.

⁴¹³ See ECRI General Policy Recommendations No 7 on “National legislation to combat racism and racial discrimination” and No 9 on “The fight against anti-Semitism”.

⁴¹⁴ See for example the ECRI Third report on Italy, Paragraph 8 and the Third report on Denmark, Paragraph 24, adopted on 16 December 2005. Reports are accessible at: http://www.coe.int/T/E/human_rights/Ecri/ (last visited 09.07.2006).

⁴¹⁵ Appendix to Resolution (2002)8, Statute of the European Commission against Racism and Intolerance (ECRI), Adopted by the Committee of Ministers on 13 June 2002, Article 1. Accessible at:

The Recommendation - in line with the mandate of the ECRI - focuses on various aspects of non-discrimination and does not deal specifically with the hate speech issue. However, Paragraph 6 of the Recommendation refers expressly to inciting another person to discriminate and announcing the intention to discriminate as the form of discrimination. While the ECHR prohibits discrimination against persons on various grounds and the application of Convention in practice has affirmed that restrictions on expressions inciting to discrimination are legitimate,⁴¹⁶ the link between actual discrimination and incitement to discriminate has not been so clearly expressed in the Convention. When certain acts of discrimination are outlawed it would be appropriate also to prohibit direct and concrete incitement to such acts, which seems to be the aim of the Recommendation. The Explanatory Memorandum of the Recommendation declares that: "The announced intention to discriminate should be considered as discrimination, even in the absence of a specific victim. For instance, an employment advertisement indicating that Roma/Gypsies need not apply should fall within the scope of the legislation, even if no Roma/Gypsy has actually applied."⁴¹⁷ However, to label as a form of discrimination broader discussions on the issue of discrimination would jeopardize the right to freedom of expression. Thus, a distinction should be made between debates and expression of different views on this subject, and calls for specific discriminatory measures to be taken.

Furthermore, the Recommendation includes a number of clauses that regulate precisely the applicable restrictions on hate speech. It requires that there should be a possibility according to the Constitution to limit the right to the freedom of expression. In order not to limit this right disproportionately, the Recommendation emphasizes that restrictions on freedom of expression should be in accordance with the ECHR. The Recommendation also requires that there exist effective remedies in civil law, which allow victims of prohibited acts, including those who have suffered harm from hate speech, to claim just satisfaction for the harm inflicted as a result of unlawful acts. As regards measures necessary for adoption in relation to criminal law, the Recommendation - compared to the first Recommendation - makes a detailed list of forms of hate

http://www.coe.int/t/e/human_rights/ecri/1%2Decri/ECRI_statute.asp#TopOfPage (last visited 12.07.2006)

⁴¹⁶ *Glimmerveen & Hagenbeek v. Netherlands*, European Commission of Human Rights, Decision as to the admissibility of 11 of October 1979. Accessible at HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 01.06.2006).

⁴¹⁷ Explanatory Memorandum to ECRI General Policy Recommendation N° 7, Paragraph 16. Accessible at: http://www.coe.int/t/e/human_rights/ecri/1%2Decri/3%2Dgeneral_themes/1%2Dpolicy_recommendations/recommendation_n7/3-Recommendation_7.asp#TopOfPage (last visited 10.07.2006)

speech, which should be declared offences when committed intentionally. It requires that national authorities provide criminal penalties for the following acts:

- 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;
- e) the public denial, trivialisation, justification or condoning, with a racist aim, of crimes of genocide, crimes against humanity, or war crimes.⁴¹⁸

The list of acts enumerated is a very wide one. Although the Recommendation includes *inter alia* a requirement that sanctions applicable to these offences should be not only effective but also proportionate, an obligation to declare all these types of expressions as offences might in itself raise the issue of proportionality, because of the serious character of criminal penalties and their chilling effect on the enjoyment of the right to the freedom of expression. This concern especially involves the last category of expressions, which might restrict public debate on controversial historical events.

A number of counterbalancing elements included in the Recommendation, apparently in order to avoid unbalanced limitations on freedom of expression. Firstly, the Recommendation applies only to those pertinent expressions that are made in public. Thus it contains safeguards against undue limitations on freedom of expression and intrusion within the private life of citizens. However, the case-law of human rights treaties monitoring bodies indicate that it is often hard to make a distinction between private and public communication and that grey areas exist between the public and private realm.⁴¹⁹ Therefore, the precise nature of expression should be considered on the basis of the circumstances of each case. Primary factors that allow a distinction to be drawn include the intent of the individual expressing racist ideas and obvious reasons to be aware that the message is

⁴¹⁸ ECRI General Policy Recommendations No 7 on “National legislation to combat racism and racial discrimination” and No 9 on “The fight against anti-Semitism”, article 18.

Accessible at:

http://www.coe.int/t/e/human_rights/ecri/1%2Decri/3%2Dgeneral_themes/1%2Dpolicy_recommendations/recommendation_n7/3-recommendation_7.asp#P128_11492 (last visited 20.08.2006)

expressed in an environment where it could be heard by other persons. As regards division between the public and private nature of expressions communicated in the Internet environment, the Explanatory Report to the Additional Protocol to the Convention on Cyber-crime,⁴²⁰ concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, refers to a number of objective factors that might help to establish the intent of the sender. It mentions such factors as the content of the message, the technology used, applied security measures, and the context in which the message is sent. Furthermore, "...Where such messages are sent at the same time to more than one recipient, the number of the receivers and the nature of the relationship between the sender and the receiver/s is a factor to determine whether such a communication may be considered as private."⁴²¹ For example, the exchange of racist material in chat rooms and posting xenophobic material in discussion fora are considered as forms of public communication, because the material is accessible to any person.

Secondly, in order to bring an accusation against somebody such expressions should be expressed intentionally. Furthermore, the relevant provision emphasizes the need for existence of a racist aim as a condition for applying criminal penalties to those publicly expressing ideologies based on racial superiority or denying genocide or crimes against humanity. Thus, the Recommendation makes it possible to assess each individual case, the real interests pursued by the individuals concerned, and does not limit such expressions just to the basis of their content. This is in contrast with Article 4 of ICERD, which obliges States to declare an offence punishable by law any expression of ideas based on racial superiority as such.

The approach to limitations set up in Recommendation No 7 is maintained in subsequent Recommendation No 9 on "The fight against anti-Semitism", which requires the criminalisation of the same expressions but is directed particularly against anti-Semitic statements. It also refers to the elements of intention and the public nature of expressions as well as anti-Semitic aim as regards the last two categories of expressions, namely, the expression of ideologies that denigrate a grouping of persons on the grounds of their Jewish identity or origin, and denial or trivialisation of genocide and other crimes mentioned in Recommendation No 7. However, there is an exception as regards one

⁴¹⁹ See the Communication *Sadic v. Denmark* No 25/2002: Denmark. 25/05/2002. CERD/C/62/D/25/2002. Accessible at: <http://www.law.wits.ac.za/humanrts/country/decisions/25-2002.html> (last visited 20.08.2006)

⁴²⁰ The Additional Protocol was adopted on 28 January 2003 and entered into force on 1 March 2006. The text of the Additional Protocol and Explanatory report is accessible at: <http://conventions.coe.int/Treaty/EN/Treaties/Html/189.htm> (last visited 01.07.2006).

⁴²¹ *Ibid.*, paragraph 30.

specific crime, that is, denial, trivialisation or justification of the Shoah⁴²² ('holocaust'), where the presence of an anti-Semitic aim is not required, while the elements of intention and the public nature of such expressions are maintained. The specific attitude to the holocaust is understandable if one takes into account the horrific nature of this crime and the fact that it constitutes one of the modern forms of anti-Semitism and incitement to discrimination against Jews. The particular attitude to holocaust-denial is also emphasized by the European Court of Human Rights⁴²³ and the Human Rights Committee⁴²⁴. Furthermore, a number of CE member-states have made expressions denying the holocaust a crime at national level.⁴²⁵ Thus there has been widespread acceptance that the existence of the holocaust was a historical fact. Therefore statements challenging or denying this historical event *per se* would be outside the scope of the freedom of expression, as their only purpose is to insult the feelings of Jews and to incite hatred and discrimination against this group. At the same time, there is concern that a broadly-worded restriction on freedom of expression might inhibit free academic debate on detailed aspects of this historical tragedy, such as the scale of the holocaust or the knowledge and involvement of the German nation in this Nazi policy. Therefore, each case should be assessed individually despite the general wording in which this offence has been formulated in the Recommendation. It is not only the content, but also the aim of the person expressing such statements as well as the context within which they have been uttered, which should be taken into account in deciding whether there is sufficient ground for applying restrictions.

Recommendation No 6 focuses on specific aspects of suppression of dissemination of racist, xenophobic, and anti-Semitic material *via* the Internet. It further develops the principle already established in the first recommendation that restrictions on racist and other illegal expressions should include the electronic media. Thus the Recommendation requires that relevant national legislation should also apply to racist, xenophobic, and anti-Semitic offences committed via the Internet. The preamble of the Recommendation also refers to other initiatives taken in this field at

⁴²² **Shoah** or **Ha Shoah** (literally denoting a "catastrophic upheaval") is the Hebrew term for the [Holocaust](#). See more on this term in Wikipedia accessible on: <http://en.wikipedia.org/wiki/Shoah> (last visited 02.08.06).

⁴²³ *Garaudy v. France*, European Court of Human Rights, Decision as to the admissibility of 24 June 2003; *Lehideux and Isorni v. France*, European Court of Human Rights, Judgment of 23 September 1998. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 19.06.2006)

⁴²⁴ Communication *Faurisson v. France*, No 550/1993: France. 16/12/96. CCPR/C/58/D/550/1993. (Jurisprudence) Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/4c47b59ea48f7343802566f200352fea?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/4c47b59ea48f7343802566f200352fea?Opendocument) (last visited 10.09.2006)

⁴²⁵ Such countries include Germany, Austria and France.

United Nations and European level, namely the draft Convention on Cyber-crime⁴²⁶ and the Political Declaration adopted by the Member States of the CE at the closing session of the European Conference against racism,⁴²⁷ where the States committed themselves to combat all forms of expression inciting racial hatred and act against dissemination of such material, in particular on the Internet.

The Recommendation emphasizes the two principal problems related to suppressing illegal content on the Internet. It acknowledges the trans-national nature of the Internet and the need for solutions at international level to combat incitement to racial hatred through computer systems. Therefore, it recommends Member States to take measures strengthening international co-operation between law enforcement authorities in order to take more efficient action against dissemination of illegal content via the Internet.⁴²⁸ The problem of determining responsibility for dissemination of racist material is another specific issue related to the Internet environment. In this regard, the Recommendation does not provide any precise guidelines, but only advises States to clarify the responsibility of all parties involved: the content host, the content provider, and the site publisher. The document also encourages adoption of self-regulatory measures by the Internet industry, such as codes of conduct and software filtering.

The latest development on this issue within the CE is the adoption of an Additional Protocol to the Convention on Cyber-crime, which deals with criminalisation of acts of a racist and xenophobic nature committed through computer systems.⁴²⁹ The ECRI has constantly urged States to ratify both the Convention and its Additional Protocol.⁴³⁰ The Additional Protocol emphasizes the need to harmonize substantive law provisions concerning the fight against racist and xenophobic

⁴²⁶ The CE Cyber-crime convention was adopted on 21 November 2001 and entered into force on 1 July 2004. The text of the Convention is accessible at: <http://conventions.coe.int/Treaty/EN/Treaties/Html/185.htm> (last visited 01.07.06).

⁴²⁷ The European Conference against racism *All different all equal: from principle to practice* took place on 11 - 13 October 2000 in Strasbourg. The text of the Political declaration is accessible at: http://www.coe.int/t/e/human_rights/ecri/2%2Deuropean_conference/1%2Ddocuments_adopted/01-Political%20Declaration.asp#TopOfPage (last visited 01.07.2006).

⁴²⁸ As regards the problem of restricting hate speech instances on websites located abroad, see also the ECRI Third report on Italy, adopted on 16 December 2005, Paragraph 62. Accessible at: http://www.coe.int/t/e/human_rights/ecri/1%2Decri/2%2Dcountry%2Dby%2Dcountry_approach/Italy/Italy_CBC_3.asp#TopOfPage (last visited 10.07.2006).

⁴²⁹ The Additional Protocol was adopted on 28 January 2003 and entered into force on 1 March 2006. The text of the Additional Protocol is accessible at: <http://conventions.coe.int/Treaty/EN/Treaties/Html/189.htm> (last visited 01.07.2006).

⁴³⁰ See for example the ECRI Third report on Italy, Paragraph 3 and the Third report on the Russian Federation, Paragraph 5, adopted on 16 December 2005. Reports are accessible at: http://www.coe.int/T/E/human_rights/Ecri/ (last visited 09.07.2006).

propaganda and defines a list of acts of communication through computer systems which should be declared criminal offences. These acts are in principle the same ones as contained in ECRI General Recommendation No 7. However, the Additional Protocol - unlike Recommendation No 7 - offers a more balanced approach and more safeguards to freedom of expression by permitting States to enter reservations as regards application of criminal liability to certain conduct. For example, States might provide other effective remedies instead of applying criminal sanctions to conduct which makes available to the public through computer systems “racist and xenophobic material”⁴³¹ which advocates or incites discrimination that is not associated with hatred or violence. As regards the problem of responsibility, the Protocol - in the same way as Recommendation No 7 - emphasizes the intentional character of the offences in order to apply criminal liability. Therefore, for example, service providers cannot be held criminally liable just on the basis that they hosted a website containing outlawed material. “Moreover, a service provider is not required to monitor conduct to avoid criminal liability.”⁴³²

2.2. Country Reports

ECRI country reports, as noted above, focus on analysis of the situation as regards racism and intolerance in all CE Member States and makes suggestions as to how to tackle the problems identified. Assessment of the situation is based not only on evaluation of legal frameworks, but includes a wide variety of areas such as analysis of social attitudes and policies adopted or exploration of motives explaining increasing trends in racism. As far as legal measures are concerned, the ECRI analyses the situation and elaborates its proposals both on the basis of its General Policy Recommendations and similar initiatives taken at the European and universal level. For example, it constantly draws attention of States to the importance of ratifying Protocol No 12 to the ECHR and the above-mentioned CE Convention on Cyber-crime and its Additional Protocol.

⁴³¹ Article 2 Part 1 of the Additional Protocol defines this concept as “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.”

Cited from: <http://conventions.coe.int/Treaty/EN/Treaties/Html/189.htm> (last visited 01.07.2006).

⁴³² Explanatory Report to Additional Protocol to the Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, Paragraph 25. Adopted by the Council of Europe on 28 January 2003.

Accessible at: <http://conventions.coe.int/Treaty/EN/Treaties/Html/189.htm> (last visited 01.07.2006).

This thesis concentrates predominantly on those elements of ECRI reports which concern evaluation of pertinent legislation and practice as regards the issue of suppression of hate speech. It would not be feasible to analyse all reports, nor indeed is that necessary for the purposes of this thesis, since the intention is to present main findings and concerns addressed by the ECRI as regards effective suppression of hate speech at national level. Furthermore, at the introduction of each report the ECRI makes a short executive summary, where the principle problems established in the previous report on state are addressed. As sample case studies, I have chosen to analyze reports on six countries. The decisive factor in order to analyse reports on Denmark, Italy, and the Russian Federation was the fact that these are among the latest reports issued by the ECRI and they illustrate recent trends in the Committee's practice. Moreover, for the last two countries expressions inciting hatred were included among those specific issues that the Committee examines in more depth. Analysis of country reports of all three Baltic States is explained by the fact that one of the principal aims of this thesis is to discuss the Latvian legal framework and practice in light of international standards as regards the balance between freedom of expression and restrictions on hate speech. Analysis of Estonia and Lithuania is of special interest because their situation is similar to the Latvian one in many aspects, including the heritage of the post-totalitarian period and development of adequate legal tools and practice to effectively fight speech inciting hatred, while maintaining safeguards for the right to freedom of expression.

The first problem identified in almost all ECRI country reports is a lack of adequate enforcement of pertinent legal measures outlawing hate speech.⁴³³ The authorities are reluctant to initiate proceedings as regards reported incidents of hate speech, and even if persons are charged with an offence, subsequently the charges are frequently terminated. In some cases the offenders are convicted with only a minor punishment, such as a fine. ECRI reports identify a number of reasons for such state of affairs. The main ones include unawareness among law enforcement officials of the seriousness of racist crimes. Occasionally, there is also a problem of knowledge among those involved in the criminal justice system as to how to apply the relevant provisions of the Criminal law and lack of understanding of what is to be considered racist.⁴³⁴ As the result of such practice by law enforcement authorities, the victims of hate speech often feel discouraged to report on pertinent

⁴³³ See for example the ECRI Third report on Italy and the Third report on the Russian Federation. Reports are accessible at: http://www.coe.int/T/E/human_rights/Ecri/ (last visited 09.07.2006).

cases. One way to improve the situation can be the existing practice in Denmark, where the Director of public prosecutions is notified of all complaints regarding hate speech and thus he makes the final decision whether substantial grounds exist to bring charges for violation of the relevant provisions of the Criminal Code.

There are also difficulties in ensuring the presence of evidence of racist intent in distributing racist or xenophobic material. National law provisions in most countries require the proof of racist intent in expressing racially discriminatory ideas or spreading hatred. The General Policy Recommendations of the ECRI also include the intentional character of conduct as a precondition to applying criminal sanctions to those responsible. Another reason has been the concern of authorities on the probable violation of the right to freedom of expression or the very high status attributed to this right among other basic rights in national legal systems of some countries.⁴³⁵ Lastly, the lack of alternative sanctions to those involving very serious consequences has been mentioned among the factors explaining why authorities are reluctant to initiate proceedings. For example, in the Third report on the Russian Federation, the ECRI stated that criminal law provisions aimed at combating racially motivated speech in the media should be reviewed and complemented in the light of experience, because the "...only possible sanction is the mere closure of the media concerned after a certain number of official warnings. This cumbersome procedure and its serious consequences do not encourage police and prosecutors to introduce action against media on the ground of racist statements."⁴³⁶ Therefore, the ECRI suggests introduction of a wider range of penalties aimed at those responsible for hate speech in the media, allowing judges to choose the most appropriate sentence. At the same time, the Commission has expressed concern⁴³⁷ as regards those country situations where existing sanctions are too insignificant to have a deterrent effect and the practice of their application does not take fully into account the gravity of hate crimes.⁴³⁸

⁴³⁴ See for example ECRI Third report on the Russian Federation, adopted on 16 December 2005. Accessible at: http://www.coe.int/t/e/human_rights/ecri/1-ECRI/2-Country-by-country_approach/Russian_Federation/Russian_Federation_CBC_3.asp#TopOfPage (last visited 09.07.2006).

⁴³⁵ ECRI Third report on Denmark, adopted on 16 December 2005. Accessible at: http://www.coe.int/T/E/human_rights/Ecri/ (last visited 09.07.2006).

⁴³⁶ ECRI Third report on the Russian Federation, adopted on 16 December 2005, Paragraph 14. Accessible at: http://www.coe.int/t/e/human_rights/ecri/1-ECRI/2-Country-by-country_approach/Russian_Federation/Russian_Federation_CBC_3.asp#TopOfPage (last visited 09.07.2006).

⁴³⁷ ECRI Third report on Estonia, adopted on 24 June 2005. Accessible at: http://www.coe.int/T/E/Human_Rights/Ecri/1-ECRI/2-Country-by-country_approach/Estonia/Estonia_CBC_3.asp (last visited 15.07.2006)

⁴³⁸ According to the Criminal Code of the Republic of Estonia, a first-time breach of provisions of the Code that prohibit incitement to hatred or violence as well as discrimination is considered to be a misdemeanour. It will be considered a

The ECRI has focused not only on necessary limitations to suppressing hate speech, but has also expressed concerns where laws contain or have been applied by authorities in a manner placing far-reaching and disproportionate limitations on freedom of expression.⁴³⁹ The Committee in this regard has urged States to respect the guarantees provided for freedom of expression in Article 10 ECHR. However, in other situations countries have rejected criticisms expressed by the ECRI as regards reluctance to prosecute hate speech by stating their obligation to respect the right to freedom of expression as guaranteed by the ECHR. They also quote the case-law of the European Court of Human Rights in interpreting Article 10 ECHR, which has acknowledged that freedom of expression "...is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Exceptions to this freedom must be construed strictly, and the need for any restrictions must be established convincingly."⁴⁴⁰ Some tension between the ECHR and ECRI General Policy recommendations seems to be inevitable, since the Convention does not recognize as a right *per se* protection against incitement to racism and discrimination, while the European Court of Human Rights has attributed very broad scope to the right to freedom of expression in its practice. At the same time, the Court has justified as a rule the restrictions imposed by authorities on disseminators of hate speech either under the second part of Article 10 or under Article 17 as regards the most violent and repugnant manifestations of racial hatred. The exceptions in the Court's case-law in favour of freedom of expression have involved situations that concern the important role of the media in informing society about issues of public concern, including the spreading of racism within society,⁴⁴¹ as well as debates on complex and sensitive historical events, whose truth has not been commonly acknowledged.⁴⁴²

crime only if it causes substantial damage to the other person's rights or interests or to public interests. The applicable sanction in such cases is only 30 days imprisonment or a fine. Criminal Code of the Republic of Estonia. Accessible at: <http://www.legislationline.org/upload/legislations/93/8f/0b603ac473e3c0831ff831c47a40.htm> (last visited 19.08.2006)

⁴³⁹ ECRI Third report on the Russian Federation, adopted on 16 December 2005, Paragraph 13. Accessible at: http://www.coe.int/t/e/human_rights/ecri/1-ECRI/2-Country-by-country_approach/Russian_Federation/Russian_Federation_CBC_3.asp#TopOfPage (last visited 09.07.2006)

⁴⁴⁰ *Jerusalem v. Austria*, European Court of Human Rights, Judgment of 27 May 2001, Paragraph 32. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 19.06.2006)

See also the observations by the government of Denmark concerning the ECRI's third report. The observations together with the report are accessible at: http://www.coe.int/t/e/human_rights/ecri/1%2Decri/2%2Dcountry%2Dby%2Dcountry_approach/denmark/denmark_cb_c_3.asp#P133_14289 (last visited 12.07.2006).

⁴⁴¹ *Jersild v. Denmark*, European Court of Human Rights, Judgment of 23 September 1994. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 19.06.2006)

⁴⁴² *Lehideux and Isorni v. France*, European Court of Human Rights, Judgment of 23 September 1998. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 19.06.2006)

The second principal problem identified in reports is the increase of racist statements in the media and in political discourse. Racist and xenophobic statements have transcended marginal extremist parties and become widespread among mainstream political groups. Manifestations of racism are also more frequently apparent in media focusing on a broader audience. Concern that such trend can lead to the legitimization and trivialization of expressions inciting racial hatred and discrimination was also expressed in the above-mentioned Declaration recently adopted by the ECRI, which focuses particularly on this issue.⁴⁴³ The ECRI has also conducted research on this subject, which shows that it is a common problem both in Western Europe and in post-authoritarian countries of Eastern Europe. The most common reasons for politicians to refer to populist and racist slogans, especially during pre-election campaigns, are to obtain the support of the majority of the population, where prejudices against certain minority groups are deeply embedded. The two groups suffering from such prejudice in almost all the States examined are Jews and Roma. In Western Europe, too, islamophobia and negative stereotypes against Muslims are widespread, while in Eastern Europe among the main targets of such expressions are so called “visible minorities”, which differ visually from the majority of population. The possibility to weaken existing stereotypes and prejudices is complicated by the fact that in many countries the majority of the population in principle does not have personal contact with representatives of these vulnerable minority groups, while the media as well as the public statements of politicians are the main sources that form public opinion on this issue.

The importance of political speech in a democratic society and parliamentary immunity against prosecutions of members of parliament for speech expressed during political debates also requires elaboration of very careful solutions in this sensitive area. Measures aimed at protection against expressions inciting racial hatred and discrimination should not undermine the right to freedom of expression and should contain safeguards against the arbitrary use of relevant provisions to silence members of opposition parties. While the possibility to apply sanctions in certain cases to deputies should also exist, the emphasis should lie on self-regulatory measures, such as codes of conduct, which are adopted by many Parliaments. Another essential tool is the challenge of racist statements promoted by some political groups through political debate and the clearly-stated condemnation of

⁴⁴³ Declaration condemning the increasing use of racist, anti-Semitism, and xenophobic arguments in political discourse, including by mainstream political parties. Accessible at: http://www.coe.int/t/e/human_rights/ecri/1-ecri/4-relations_with_civil_society/1-programme_of_action/14-public_presentation_paris_2005/actes%2021%20March%202005_en.pdf (last visited 03.07.2006)

expressions inciting racial prejudice and hostility by mainstream political parties. In this regard, the ECRI quotes in its reports the *Charter of European Political Parties for a Non-Racist Society*, which was adopted in 1998 and is signed by various political parties of the Member States of the European Union as well as political groups of the EU Parliament.⁴⁴⁴ The Charter acknowledges the importance of the right to free and uninhibited political debate, but it also stresses that this right is not absolute in view of the equally fundamental right to be protected against racial discrimination. "...Therefore political freedoms cannot be allowed to be abused to exploit, cause or initiate prejudice on the grounds of race, colour, ethnic origin or nationality or for the purpose of seeking to gain the sympathy of the electorate for prejudice on such grounds."⁴⁴⁵ The Charter emphasizes the special responsibility of political parties in defending the basic principles of a democratic society and formulates certain principles of good practices, which the signatories of the Charter commit themselves to respect. Among these principles is the obligation to refuse to publish or to endorse views that stir up prejudices, hostility, or division between people of different ethnic origins or religious beliefs. The signatories not only pledge to deal firmly with any racist sentiments within their own ranks but also to refrain from cooperation with any political party that incites racial or ethnic prejudices and racial hatred. Lastly, the parties commit themselves to stimulate recruitment of candidates from ethnic and religious minority groups for membership in order to represent these groups in the political process and reflect all groups of society. There are many signatories to the Charter, which hopefully will uphold its implementation and will encourage even more political parties, especially from the new EU Member States⁴⁴⁶, to adhere to the principles and practice contained in the document. Such international initiatives, together with criticism expressed by the public and NGO's at the domestic level, is an effective way to marginalize those expressing racist statements in political discourse, since mainstream political parties and politicians are usually disinclined to be labelled as racist. Such recommendatory measures also maintain the necessary balance for the existence of free political debate. The option to apply criminal sanctions should be left only for the most radical forms of hate speech within the political discourse, as for example where there has been direct incitement to violence against a certain social group.

⁴⁴⁴ The text of the Charter as well as the list of signatures is accessible at: http://www.eumc.europa.eu/eumc/index.php?fuseaction=content.dsp_cat_content&catid=3ef0500f9e0c5&contentid=3ef0546396bb5 (last visited 16.07.2006)

⁴⁴⁵ Ibid.

⁴⁴⁶ As the Charter was adopted prior to the last enlargement of the EU, political parties only from some new EU Member States have signed this document.

The ECRI reports also highlight specific manifestations of hate speech and problems with effectively combating such speech experienced in some countries. For instance, in Italy manifestations of incitement to hatred frequently appear during sporting events, especially in football stadiums. None of the three Baltic States has provisions in its criminal law that a racist motive for an offence is an aggravating circumstance, which should be taken into account when the judge decides on the applicable penalty. Minor shortcomings also exist in the legislative framework of a number of other countries. However, the principal problem as stated above is the passive enforcement of the respective provisions in practice.

3. Comparison between European Court of Human Rights and European Commission against Racism and Intolerance

There is a legal basis and evidence of co-operation between the different European human rights bodies in the area of freedom of expression and the right to equality and non-discrimination. As stated earlier, the Statute of the ECRI itself refers to the Convention and the case-law of the European Court of Human Rights as an element to be taken into account in the work of the Commission.⁴⁴⁷ The ECRI has also emphasized in its country reports the need to respect guarantees of the right to freedom of expression as laid down by Article 10 ECHR, when it had faced allegedly disproportionate restrictions on freedom of expression as the result of arbitrary application of legal norms prohibiting incitement to hate speech and discrimination.⁴⁴⁸ Moreover, the Commission has constantly urged States to ratify Additional Protocol 12 to the ECHR, among other relevant instruments, to combat racial discrimination. The European Court of Human Rights has occasionally quoted the standards elaborated by ECRI General Policy Recommendations, including those cases concerning limitations on statements classified by domestic courts as “hate speech”.⁴⁴⁹ The ECRI General Policy Recommendations have frequently been invoked before the Court by applicants as well.⁴⁵⁰

Both mechanisms feature elements that make them complementary in combating racial discrimination, including the dissemination of speech inciting discrimination against certain minority groups. The Court’s decisions are legally binding and offer a direct remedy for victims of racial discrimination if adequate solutions in national law cannot be found. While the ECHR in the past has not included sufficient safeguards for those who have suffered from discrimination, the situation should improve after Protocol No 12 entered into force. However, the Convention

⁴⁴⁷ Article 1 of the Statute of the European Commission against Racism and Intolerance. Accessible at: http://www.coe.int/t/e/human_rights/ecri/1%2Decri/ECRI_statute.asp#TopOfPage (last visited 20.07.2006)

⁴⁴⁸ ECRI Third report on the Russian Federation, adopted on 16 December 2005, Paragraph 13. Accessible at: http://www.coe.int/t/e/human_rights/ecri/1-ECRI/2-Country-by-country_approach/Russian_Federation/Russian_Federation_CBC_3.asp#TopOfPage (last visited 09.07.2006)

⁴⁴⁹ *Gunduz v. Turkey*, European Court of Human Rights, Judgment of 4 December 2003, paragraph s 22 and 40. Accessible at HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 19.06.2006)

⁴⁵⁰ *Coster v. The United Kingdom*, European Court of Human Rights, Judgment of 18 January 2001, paragraph s 73 and 107. Accessible at HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 20.07.2006)

apparently would still not cover victims of those racially defamatory remarks that cannot be regarded as discriminatory. While the Court would justify measures applied by authorities to restrict racially defamatory hate speech,⁴⁵¹ there is no positive obligation within the ECHR system to suppress such expressions. In this regard, a valuable source that addresses these inadequacies consists of the detailed legal standards elaborated by ECRI General Policy Recommendations. The Recommendations encompass various forms of manifestations of racism, racial discrimination, intolerance, and xenophobia which States are requested to outlaw. Despite the fact that these recommendations are not legally binding, the ECRI monitors their implementation through examination of country situations and drawing Country reports. Public criticism expressed in reports as regards, *inter alia*, the weaknesses in enforcing recommendations, is among the factors fostering an attitude in authorities towards improving the situation. Thus, the Recommendations while primarily addressed to States, strengthen the legal protection and remedies available to individual victims of hate speech at the domestic level. State institutions do care about their public image on such sensitive issues as racism. This is evidenced by the fact that authorities have added a comprehensive list of comments to ECRI reports, which challenge the findings of the Commission.

However, some differences exist between the ECRI and the European Court of Human Rights concerning standards formulated as regards striking a balance between the right to freedom of expression and prohibition of hate speech. However, these differences are inevitable in view of the mandate of both institutions, the aims underlying their establishment, as well as the ways in which they operate. The ECHR - with the Court as its supervisory mechanism - was established in 1950 to strengthen the democratic values and realization of fundamental freedoms in CE Member States. The maintenance of human rights was regarded by States as a foundation of justice and peace⁴⁵² and aimed to prevent a resurgence of totalitarian regimes and crimes against humanity which led Europe to the Second World War. The ECHR - compared to the ECRI and other European initiatives - is so far the only legally binding instrument with an advanced supervisory mechanism, namely the European Court of Human Rights. This mechanism has proved to be highly efficient in ensuring human rights in Europe. The Court through its case-law has developed the standards of the Convention in line with social developments and progressive implementation of human rights,

⁴⁵¹ See for instance *Gunduz v. Turkey*, European Court of Human Rights, Judgment of 4 December 2003, paragraph s 40 and 41, Accessible at HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 19.06.2006)

making the ECHR “a living instrument”. Unlike the ECRI and other human rights protection initiatives developed in Europe, the Convention has also been much closer to, and well known among, the peoples of Europe, because of its individual complaints procedure. Other initiatives taken at the European level were predominantly of a recommendatory character or were based on country reports or some similar monitoring system, not directly entitling individual to effective remedies in case of violation. The Charter of Fundamental Rights adopted in 2000 by the EU might have a similar effect as the Convention in the future in relation to EU Member States. However, such a development depends on many factors, including whether it will be incorporated in the Constitution of the EU or will acquire a legally binding character in some other form. Discussion about the interrelationship between the Charter and the ECHR, as well as their supervisory mechanisms, is a complex issue, since a concern exists that the increasing role of the European Court of Justice in human rights issues might undermine the authority of the European Court of Human Rights and weaken human rights implementation within the CE.

While so far the human rights protection system based on the ECHR and the Court has been generally highly effective, the Convention also contains many weaknesses, especially as regards guarantees of the right to equality and non-discrimination. The ECHR has focused predominantly on guarantees of civil and political rights and has included only some economic and social rights within its scope. Unlike in the UDHR⁴⁵³, adopted just before elaboration of the text of the Convention and quoted in the Preamble of the ECHR, the Convention contains no explicit clause prohibiting incitement to racial discrimination. Furthermore, the non-discrimination provision, Article 14, has been very weak compared to the equality and non-discrimination clauses in other human rights instruments.⁴⁵⁴ It has related to situations of discrimination merely as regards the enjoyment of rights guaranteed by the ECHR. Moreover, the possibility to invoke Article 14 independently of the Court’s findings as regards violation of other rights of the Convention has developed only later through the case-law of the Court. However, this inadequacy within the ECHR

⁴⁵² Preamble of the ECHR. Accessible at:

<http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=005&CM=7&DF=8/12/2006&CL=ENG> (last visited 21.07.2006).

⁴⁵³ Article 7 of the UDHR states: “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.” The text of Declaration is accessible at: <http://www.unhchr.ch/udhr/lang/eng.htm> (last visited 11.08.2006).

⁴⁵⁴ See the text of Articles 26 and 2 of the ICCPR in the Appendix.

has been removed by the adoption of Additional Protocol No 12 to the Convention,⁴⁵⁵ which widens the scope of Article 14 by introducing an independent self-standing right for non-discrimination within the Convention system.

The ECRI, as noted earlier, was established only in 1993 with a specific mandate to combat racism, xenophobia, and intolerance. As a result of growing tendencies of racism, xenophobia, and anti-Semitism throughout Europe in the 90s, similar initiatives have been developed both within the EU⁴⁵⁶ and the OSCE⁴⁵⁷. Taking into account that different manifestations of discrimination was exactly the core of the ECRI mandate, the Commission could certainly advance more progress in elaborating respective legal standards as regards limitations on speech inciting discrimination and hatred against the groups coming within its mandate. The advantage of the ECRI as far as concerns suppressing racism and hate speech has also been its comprehensive approach, which entitles the Commission to work not only with legal tools, but also to analyze and to suggest policy and educational measures to combat the phenomenon of racism and prejudice against certain social groups. The holistic approach to this issue and analysis of country situations has also allowed the ECRI to identify problems and recommend solutions in the early phase of conflict development, while the European Court of Human Rights could in principle only attempt to redress a situation after violation of basic rights has occurred.

The potential for conflict between the two bodies in striking a balance between the different pertinent rights involved lies in their diverse approach to these rights. The ECHR, as noted above, does not specifically impose the obligation to prohibit speech inciting hatred and racial discrimination. The European Court of Human Rights has established wide guarantees for the right to freedom of expression and has only examined hate speech cases by assessing the legitimacy of restrictions imposed on freedom of expression. The ECRI, however, has elaborated detailed rules advocating *inter alia* imposition of criminal sanctions on expressions inciting racial hatred,

⁴⁵⁵ Additional Protocol No 12 entered into force on 1 April 2005, but has been ratified so far only by fourteen CE Member States. The text of the Protocol and the list of ratifications is accessible at: <http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta06/Eres1481.htm> (last visited 11.08.2006).

⁴⁵⁶ The Council of the European Union established in 1997 the European Monitoring Centre on Racism and Xenophobia (EUMC). More information about the activities of the EUMC are accessible on the web-site of the Centre: http://eumc.eu.int/eumc/index.php?fuseaction=content.dsp_cat_content&catid=2 (last visited 12.08.2006)

⁴⁵⁷ The issues of tolerance and non-discrimination are within the activities of the OSCE Office for Democratic Institutions and Human Rights. In 2004 the OSCE Chairman-in-Office (CiO) also appointed three Personal Representatives to promote greater tolerance and combat racism, xenophobia and discrimination across the OSCE region. The appointments were extended by the CiO in 2005 and in 2006.

discrimination, anti-Semitism and intolerance. The specific aspects of these rules - in view of their broad formulation and taking into account the serious impact of criminal sanctions on freedom of expression - in theory might contradict the case-law of the European Court of Human Rights under Article 10. For example, the Danish government has actually stated the need to observe the standards established by the Court as regards the right to freedom of expression as the basis for rejecting criticism expressed by the Commission about insufficient enforcement of relevant provisions of national law criminalising incitement to hatred and discrimination. Furthermore, unlike the judgments of the Court, ECRI standards are not legally binding. Thus, the Commission can elaborate further-reaching rules and principles than the Court, which has to abide by the consensus prevailing in the majority of Member States of the CE.

Despite the considerations expressed above, there is a basis for presuming that both institutions will enhance rather than weaken the authority of the regional human rights system and the effectiveness of the fight against various forms of racial discrimination, while also ensuring necessary safeguards for the right to freedom of expression. One can expect that in view of a growing awareness in Europe of the need to enhance guarantees for the right to equality and non-discrimination as well as adoption of Additional Protocol No12 to the Convention, the Court will consider with particular scrutiny complaints about discrimination, including those experienced by speech inciting such action. The ECRI standards on this issue could serve as a good source of reference for the Court on this issue. These rules, while advocating the penalisation of hate speech, also contain counterbalancing elements, such as the need to prove the intentional character and public nature of statements uttered, prior to applying sanctions. Moreover, the reluctance of the ECRI to accept ambiguous limitations on freedom of expression has also been illustrated in its practice.⁴⁵⁸ Taking into account the balanced approach of the Commission to the issue of prohibition of hate speech, and recent developments in Convention mechanisms concerning guarantees for non-discrimination, there is little likelihood that existing differences could lead to open conflict between the two mechanisms and undermine efforts at regional level to enhance implementation of all the different rights involved.

⁴⁵⁸ See for example the ECRI Third report on the Russian Federation, adopted on 16 December 2005, Paragraph 13
Accessible at:
http://www.coe.int/t/e/human_rights/ecri/1-ECRI/2-Country-by-country_approach/Russian_Federation/Russian_Federation_CBC_3.asp#TopOfPage
(last visited 09.07.2006)

Chapter IV

United Nations and European standards compared

As mentioned previously there are a number of initiatives at UN and European level both through the adoption of treaties as well as elaboration of recommendations, declarations and other soft-law measures in the area of right to the freedom of expression and even more as regards the suppression of different manifestations of racism and intolerance, including the prohibition of hate speech. In this comparative analysis, however, I will focus predominantly on those instruments and practices, which have been previously examined in this thesis, namely, the ICCPR, ICERD at the UN level and the ECHR and ECRI within the European system.

There is a common principal element in all instruments examined that there might be situations when it is necessary to restrict the right to the freedom of expression. Some of these instruments permit limitations on demonstrations of hate speech, others do oblige the states to do so. However, while there is similar approach to the issue of striking the balance between the freedom of expression and prohibition of hate speech at the basic level, there are also a number of differences. Some divergence among treaty monitoring bodies both within UN and European system is understandable and unavoidable, due to diverse primary goals and values they are aimed to protect and thus different status accorded to the pertinent rights. For example, while ICERD contains very firm guarantees against the speech inciting to racial hatred and discrimination, the Convention includes very weak safeguards for the right to the freedom of expression. At the same time the ECHR until the adoption of Protocol 12 included very restricted guarantees against the discrimination,⁴⁵⁹ but the protection for the right to the freedom of expression was strongly embedded in the courts case-law.

As regards the detailed differences, most of the instruments analyzed in thesis put a positive obligation on state to prohibit the hate speech. The exception is the ECHR, which, however, according to the case-law of the European Court of Human Rights would in most cases justify the restrictions of states imposed on expressions of such nature. The ICERD and ECRI General Policy

Recommendations directly require the imposition of criminal sanctions on various manifestations of hate speech. While Article 4 of ICERD is criminalising the fact of dissemination of outlawed speech as such, the ECRI standards are more balanced and require the intentional character of the conduct as well as public nature of the statements before the criminal law sanctions can be applied. The practice of the CERD on assessing individual petitions, however, have indicated that the Committee takes into account in its decision-making process, whether the racist statements have been expressed in public or private area.⁴⁶⁰ Article 20 of ICCPR obliges the states merely to prohibit such speech, but gives discretion for states as far as applicable sanctions are concerned.

As expressed in academic debates and illustrated in the country reports of different monitoring bodies criminal sanctions might have effective deterrent effect and would be appropriate to most radical forms of hate speech, as for example, the calls for violence against certain minority group or representative of this group. However, the lack of alternative sanctions which the authorities involved in justice system could apply to various manifestations of hate speech result in reluctance of officials to bring charges and very few prosecutions. Thus, in fact the ones expressing less severe forms of hate speech receive impunity. Another factor which require availability of additional remedies for victims of hate speech is the fact that in many situations authorities are unable to prove the intentional character of the offence and as the consequence terminate the criminal proceedings. Various penalties under criminal law, which would allow law enforcement authorities to choose the basis for the charge according to the seriousness of the offence as well as additional remedies under civil law and administrative penal law would eliminate the atmosphere of impunity and would give a clear signal to perpetrators of such conduct that they will face certain sanctions. The effective suppression of hate speech instances would also serve as a message to the society that speech is not only unethical but is outlawed. The discretion given to the authorities should, however, not lead to trivialisation of racist crimes and the situation when the perpetrators of such acts face only minor sanctions.

⁴⁵⁹ Article 14 of the ECHR was not self standing and prohibited discrimination only in relation to the rights guaranteed within the Convention. Furthermore, an independent application of this provision and finding of violations merely on the basis of this provision was developed by Court only subsequently.

⁴⁶⁰ Communication *Kamal Quereshi v. Denmark* No 33/2003: Denmark. 10/03/2005. CERD/C/66/D/33/2003, paragraph 6.3.

Accessible at:

<http://www.unhchr.ch/tbs/doc.nsf/MasterFrameView/7de05b5d0fbd62e9c1256fc5005087f9?Opendocument>

(last visited 07.08.2006)

There are also differences among pertinent legal sources as to what kind of speech is prohibited. The common minimum element established in all instruments is the prohibition of speech inciting to discrimination and hatred against person or groups of persons on the basis of outlawed grounds. Then follows additional elements as for example the public insults or defamation on these grounds, the expression of an ideology of superiority of one certain group or public denial or justification of crimes against humanity, genocide or war crimes. The last category is of most concern as regards the uninhibited existence of the right to the freedom of expression, since in theory might encroach on the free public debates on controversial historical issues. Such restrictions in most cases have been elaborated in order to restrict activities of those denying or justifying the holocaust. The existence of this crime has been acknowledged by human rights bodies as a fact and thus the statements denying this event would be contrary to the freedom of expression. However, even as regards this tragic historical fact there are uncertainties as regards the details it was planned and carried out. Therefore, the balanced solution would be to assess each case individually and look to the context in which the challenged expressions have been made instead of encouraging the adoption of abstract limitations based just on the content of expressions. Since the proof of existence of anti-Semitic aim in the activities of those challenging the accepted history of holocaust might be hard to establish, it might not be a precondition to bring the charges against the person. However, the intent of person should still be among the elements taken into account in considering the necessity of restrictions and severity of applicable sanctions.

The unfortunate limitation of all instruments examined is that they include in their scope of protection only certain groups and none of them leaves open the grounds on which the discrimination or incitement to such action is prohibited. As a consequence some groups like sexual minorities are excluded from protection against incitement to hatred and discrimination under all these instruments. However, all the instruments cover the incitement against Roma and Jews, the two groups frequently being among the targets of hate speech throughout Europe. Furthermore, the ECRI has adopted additional General Policy recommendations focused specifically on the protection of these groups.⁴⁶¹

⁴⁶¹ See ECRI General Policy Recommendation N° 9: The fight against antisemitism, adopted on 25 June 2004. Accessible at:

http://www.coe.int/t/e/human_rights/ecri/1-ecri/3-general_themes/1-policy_recommendations/recommendation_n9/1-Recommendation_9.asp#TopOfPage (last visited 01.08.2006) and ECRI General Policy Recommendation N° 3: Combating racism and intolerance against Roma/Gypsies, adopted on 6 March 1998. Accessible at: http://www.coe.int/t/e/human_rights/ecri/1%2Decri/3%2Dgeneral_themes/1%2Dpolicy_recommendations/recommendation_n3/1-Recommendation_n%B03.asp#TopOfPage (last visited 01.08.2006)

There are different ways in which these institutions operate. The principal difference of ECRI from other bodies examined lies in the fact that it is not based on legally binding treaty and its scope of activities include not only legal measures, but also policy assessment and educational initiatives. Due to its non-binding nature the mandate of the Commission applies also to all CE member-states. Furthermore, the advantage of ECRI is the possibility to tackle the phenomenon of racism and racist speech in a comprehensive way, since the legal tools are essential but only one element of strategy against the evil of racism. The analysis of country reports demonstrate that effective implementation of anti-racist legislation and suppression of hate speech is hardly possible without the educational measures and existence of awareness within law enforcement officials about the seriousness of racist crimes.

The benefit of instruments based exclusively on legal tools, as for example the ECHR, is to offer practical remedies for victims of discrimination and impose legally binding rules on states. Furthermore, while the European Court of Human Rights assess the issue of alleged violation only as regards the facts of the case before it, the Courts decisions often have wider implications and would require amendments of pertinent legislation if the country want to escape further being found in violation of the ECHR. The HRC and CERD has both the possibility to consider individual complaints as regards those states which have entitled them with such rights as well as the opportunity to address more general problems through their examination of the country reports. In their recommendations adopted on the basis of the assessment of national reports both bodies can indicate problems and necessary action prior the violation of ones rights has occurred.

While there is a constant possibility of conflict between the international human rights treaties monitoring institutions and other bodies on the issue of balancing the freedom of expression with other important rights involved they have tried to avoid the tension, in particular when states have referred the practice and obligations under another instrument as a basis for their conduct. This is especially the case if these institutions are on the same level, like HRC and ICERD. For example in theory the categorical requirement under Article 4 of the CERD to declare a criminal offence any dissemination of ideas based on racial superiority as well as encouragement by CERD to the abstractly and generally worded limitations on the freedom of expression⁴⁶² might come in

⁴⁶² Concluding observations of the Committee on the Elimination of Racial Discrimination: France. 18/04/2005. CERD/C/FRA/CO/16. Accessible at:

contradiction with the guarantees established for this right in Article 19 of the ICCPR and the practice of its application by HRC. However, both treaty monitoring bodies have used some flexibility and have interpreted relevant provisions in concrete situations in a way to avoid mutual tension. The evident controversy among different bodies would weaken their authority as well as the weight of the whole UN human rights protection system. The similar development has taken place at the European level. Moreover, the Statute of ECRI itself makes a reference to the ECHR, its additional protocols and case-law as a source which the Commission should respect in its activities. There have been examples of co-ordination and the reference to practices of another body also between the UN and European systems.⁴⁶³ However, there are at least some cases which have come very close to the situation where the assessment of various institutions would result in completely divergent positions.⁴⁶⁴ Therefore, more co-operation and co-ordination especially between the institutions at UN and European level, the study of each other practices and similar activities would have been advisable in order to prevent such situations, which can impair the effectiveness of the whole human rights protection system and create uncertainty as regards the applicable standards.

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/919beacf0882320dc12570200047fe62?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/919beacf0882320dc12570200047fe62?Opendocument) (last visited 16.07.2006).

⁴⁶³ One such example is the decision of the European Commission of Human Rights in the case *Glimmerveen & Hagenbeek v. Netherlands*, where the Commission quoted the ICERD in order to substantiate its decision. Decision as to the admissibility of 11 of October 1979. Accessible at HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 01.06.2006)

⁴⁶⁴ *Jersild v. Denmark*, European Court of Human Rights, Judgment of 23 September 1994. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 19.06.2006).

Chapter V

Latvian law in view of the international and regional standards:

Introduction

After the study of the relevant United Nations and European treaties and the case-law of their monitoring bodies, this chapter of thesis examines the legal framework and practice on striking the balance between the right to freedom of expression and prohibition of hate speech in Latvia. There are two main aims in this chapter. Firstly, I am going to analyze in depth the pertinent national legal acts and case-law. Secondly, this chapter will highlight problematic issues and grey areas in national legal framework in the light of obligations arising from international human rights treaties the Latvia has acceded to.

At the beginning the brief historical development and the structure of the Latvian legal system will be outlined. Furthermore, the status of international human rights treaties at the national level will be discussed, including the issue of the direct enforceability of international treaty provisions. Afterwards, I will analyze the Constitutional framework as well as relevant provisions of civil, criminal and media law together with sample case-studies from the national courts. This study of national provisions and case-law on freedom of expression will provide a basis for the subsequent assessment of domestic practice in view of principles established by the two United Nations human rights treaties monitoring bodies, namely, the Human Rights Committee and the Committee on the Elimination of Racial Discrimination. Apart from these two United Nations treaties ratified by the Latvia, the standards established by the European Court of Human Rights will also be invoked in the review of national laws and practice.

The conclusion part of this chapter should reveal, whether there are areas in national law and practice incompatible with international legal obligations of the state and suggest the possible solutions in case of affirmative answer. The ending of this chapter will also identify the areas in national law, like for example the issue of group libel, where there has been little or no practice so far and will propose theoretical arguments in which direction the development should take place. The concluding observations will also highlight those issues, where the stance of various international human rights treaties monitoring bodies have differed and will illustrate the ways the

national courts and other institutions could act in order to minimize the possibility that the relevant national practice might be found incompatible with any of the treaties binding for the state.

1. The outline of Latvian legal system and status of international human rights treaties at the national level

1.1. The development and the structure of the Latvian legal system

The current Latvian legal system might be characterized as synthesis between legal systems of Civil law⁴⁶⁵ and Socialist law⁴⁶⁶, with the trend of elements of Socialist system slowly losing its effect. Apart from separate legal acts there are codifications in all branches of law which are used by judiciary as a principle source of law. The case-law, which is a major source of law in Common law countries, is used by the Latvian courts occasionally and only as a secondary source of law. The case-law can be invoked for example in order to make the argumentation of the Court more convincing, but it cannot serve as a primary basis on which the Courts judgement is based.

The legal framework, especially in private law area, is mainly founded on statutes adopted in the pre-war Republic of Latvia.⁴⁶⁷ For example the codification of Civil law was drafted in 1937 and was largely based on German Civil Code⁴⁶⁸. In such areas of public law as Criminal law and Administrative law originally the codes of law adopted under the Communist regime⁴⁶⁹ continued to be in force with minor amendments. These codes had been gradually replaced by the new ones, which reflect the realities and demands of democratic system, including stronger safeguards for human rights.

⁴⁶⁵ The Civil law is a codified system of law that sets out comprehensive system of rules that are applied and interpreted by judges. It is based on Roman law, especially the Corpus Juris Civilis of Emperor Justinian as later developed through the Middle Ages by mediaeval legal scholars. However, modern systems are descendants of the 19th century codification movement, during which the most important codes (most prominently the Napoleonic Code and the BGB) came into existence. See more information on this legal system in: http://en.wikipedia.org/wiki/Civil_law_%28legal_system%29 (last visited 14.08.2006)

⁴⁶⁶ “The Socialist law is the official name of the legal system used in Communist states. It is based on the civil law system, with major modifications and additions from Marxist-Leninist ideology. While civil law systems have traditionally put great pains in defining the notion of private property, how it may be acquired, transferred, or lost, Socialist law systems provide for most property to be owned by the state or by agricultural co-operatives, and having special courts and laws for state enterprises.” http://en.wikipedia.org/wiki/Socialist_law (last visited 14.08.2006)

⁴⁶⁷ The Republic of Latvia was established in 18th of November 1918.

⁴⁶⁸ German Civil Code is commonly referred in literature as BGB (Bürgerliches Gesetzbuch). Accessible at: <http://www.iuscomp.org/gla/statutes/BGB.htm> (last visited 20.07.2006)

⁴⁶⁹ The Republic of Latvia was occupied by the USSR in 17th of June 1940 and declared the restoration of independence on 4th of May 1990.

The Constitutional law is based on the old Constitution (*the Satversme*), which was adopted in 1922 and had been influenced by the principles of the German Constitution of Weimar Republic and the ideas of the Basic Law of the Swiss Confederation.⁴⁷⁰ The decision to re-effect the *Satversme* has been explained by the State continuity doctrine⁴⁷¹ and the fact that the text of the *Satversme* has been drafted well enough to be appropriate to the demands of the democratic system after the restoration of independence. However, the original text of the Constitution established only the institutional framework of country and the balance of powers among legislature, executive and judiciary. But it did not contain explicit reference to human rights. While the Parliament in 1920ies discussed the need to include basic rights chapter in the Constitution, in the end there prevailed a view that basic rights should be guaranteed in separate laws instead of being included in the Constitution.⁴⁷² But after the restoration of independence in 90ties the parliamentarians considered it necessary to ensure human rights at the constitutional level and such a practice has been also in two neighbouring Baltic States, which established human rights guarantees in their new constitutions. Therefore in 1998 an important amendment was made to the Constitution by supplementing it with a Bill of Rights.⁴⁷³ This chapter of the *Satversme* included both major civil and political rights and also economic, social and cultural rights.

The authorities have gradually adjusted legal acts to the demands of democratic system. However, their application in practice was still much dominated by the methodology used in Socialist school of law, where the principal source of law was statutes, which were interpreted primarily by using the grammatical (linguistic) interpretation method that is, ascertaining the meaning of the norm of law linguistically.⁴⁷⁴ Other methods of interpretation⁴⁷⁵ were not known or applied by judges, most of whom maintained their positions after the restoration of independence and the change of regime.

⁴⁷⁰ See Ikstens, J. "Latvijas Satversme". Accessible at: <http://www.politics.lv/satvars/3.1/1.htm> (last visited 16.07.2006)

⁴⁷¹ See Ziemele, I. "Starptautisko tiesību vieta un nacionālo tiesību attiecības." *Cilvēktiesību žurnāls* Nr.6 / *Juristu žurnāls* Nr.5, 1997, pp.195-196.

⁴⁷² On the discussions in the Parliament of the pre-war Republic of Latvia about the need to include basic rights in the Constitution, see more: Andersons, E. "Latvijas vēsture, 1914-1920", Stokholma: Daugava, 1967.

⁴⁷³ Published in *Latvijas Vēstnesis* [Official Gazette], no.308/312, 23.10.1998.

⁴⁷⁴ See more on the tradition of courts to give overly significance the grammatical method of interpretation and problems arising hereof in: Mits, M. "Par vārda brīvību Latvijas un Eiropas tiesu praksē", *Jurista Vārds*, 01.11.2000, Nr.34 (187).

⁴⁷⁵ Nowadays Latvian legislation provides for also such methods of interpretation as historical interpretation, systemic interpretation method and teleological (meaning and purpose) interpretation method. These methods have also been gradually accepted and applied by the courts and other institutions in interpreting the norms of law.

See more on the meaning of these methods in Article 17, Part 1, paragraph 4 of the Administrative Procedure Law (Latvia), which entered into force on 1st February 2004. The English translation of the law is accessible at: <http://www.ttc.lv/index.php?skip=30&itid=likumi&id=10&tid=50&l=EN> (last visited 18.07.2006)

The heritage of the past legal practice had influenced also the attitude towards international human rights treaties and human rights in general. The judges considered the provisions of international human rights agreements as declaratory norms rather than as substantial rights, which should be applied in practice. The same attitude was widespread also among the legislator. For example on 4 May 1990 when the Supreme Soviet of the Latvia SSR adopted a *Declaration of the Renewal of the Independence of the Republic of Latvia* it also issued a *Declaration on the Accession of the Republic of Latvia to International Instruments Relating to Human Rights*.⁴⁷⁶ According to this document the Republic of Latvia joined to 51 UN and OSCE human rights instruments. The speed with which such decision was taken seems to suggest that there was a perception of human rights as declaratory norms. This decision was largely determined by the political goal to acquire recognition of the country at the international level and the recommendations from the international organizations to ratify these human rights instruments.⁴⁷⁷

This is explained by the fact that there were all major human rights guaranteed in the Constitutions of the USSR and the United Socialist Republic of Latvia, but these rights, especially civil and political ones, have never been applied in practice. The Soviet Union was also a part of all major United Nations human rights treaties, but the authorities implemented only those parts of the treaties, which did not contradict the Communist system. The judges also did not have a practice of application of human rights norms, because there was no possibility under Communist regime for individuals to invoke these human rights treaties before the courts in order to challenge the acts of authorities. In case of making a claim against authorities the individual could face imprisonment or similar repressive measures. Another explanation of reluctance of judges to apply international treaties in general were the mood of independence and freedom in early 90-ties, when foreign legal acts were perceived as enforced from outside, which reminded the period of Soviet occupation and the rules imposed from Moscow.

However, steadily the Latvian authorities became aware that there is an international legal system and numerous international treaties which the country has to accede to if the state wants to be integrated in major international organizations and be considered as part of democratic world. The

⁴⁷⁶ Deklarācija "Par Latvijas Republikas pievienošanas starptautisko tiesību dokumentiem cilvēktiesību jautājumos" [Declaration on the Accession of the Republic of Latvia to International Instruments Relating to Human Rights] Ziņotājs [Official Reporter], No.21, 24 May 1990. English translation available in Scheinin, M. "International Human Rights Norms in the Nordic and Baltic Countries", The Hague, Martinus Nijhoff Publishers, 1996, pp. 94-96.

⁴⁷⁷ Bojārs, J. "Starptautiskās publiskās tiesības I", Zvaigzne ABC, 2004, 45.lpp.

aim of Latvian authorities to become a member of the United Nations and to join the CE but afterwards the EU and NATO also stimulated the accession to major human rights treaties and their enforcement. An important step, which improved the implementation of international human rights norms and national human rights provisions in practice, was the creation of Constitutional Court in 1996.⁴⁷⁸ The primary aim of the Court is to ensure the constitutional control over the respect for basic rights in the legal acts issued by the legislature and executive. The Court reviews also the compliance with the Constitution of international agreements signed or entered into by Latvia as well as compliance of the national legal norms of Latvia with the international agreements binding on Latvia. Despite the fact that it is only ten years since the Court was established, it has produced substantial case-law since 2001, when the amendments were made in the legislation allowing the individuals to apply to the Constitutional Court in case of alleged violation of fundamental rights guaranteed by the *Satversme*. The Constitutional Court has been very active in applying the provisions of European Convention of Human Rights as well as United Nations human rights treaties in its practice both in order to substantiate its reasoning and as a tool to interpret the basic rights in the Constitution. For example, the Court so far⁴⁷⁹ has considered 54 cases where it was asked to examine compliance of domestic legal rules with the Basic Rights Chapter of the Constitution and the binding international human rights treaties. In 44 out of these cases the Constitutional Court made a reference to international human rights treaties. Moreover, “in 36 cases the Constitutional Court referred to international human rights treaties on its own initiative although it was asked to examine domestic legal provisions only against the Constitution.”⁴⁸⁰ The Court has until now adopted also two judgements relevant for the interpretation of Article 100 of the Constitution, which guarantees the freedom of expression.⁴⁸¹

The awareness of the need to improve the knowledge and practice as regards international human rights standards increased after Latvia lost the first cases in the European Court of Human Rights in 2002.⁴⁸² The training seminars about the interpretation of international human rights norms as well as changes within the judge’s personnel enhanced the application of human rights provisions also among the ordinary courts. There are examples when the international treaty provisions has been

⁴⁷⁸ See more on the history and practice of the Constitutional Court at the home page of the Court: <http://www.satv.tiesa.gov.lv/ENG/STlikums.htm> (last visited 16.07.06)

⁴⁷⁹ Statistics referred in the report “Internationalisation of Public law: Latvia” prepared by Martins Mits as regards the situation on 13 May 2005. Not published.

⁴⁸⁰ Ibid.

⁴⁸¹ See more on these cases and case-law of the Constitutional Court in the subsequent sub-chapter 2.

used as a legal basis for national courts decision⁴⁸³ or when the judgement has been quashed because it did not take into account the principles developed by the European Court of Human Rights.⁴⁸⁴ The latter case in fact concerned the restrictions on the freedom of the press, namely, the award of damages against a journalist for alleged defamation of Minister of Economics. The Supreme Court acting as a court of cassation annulled the decision of the court of appeal by stating, *inter alia*, that: the court had disregarded the fact that Article 4 of the “Law on the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and its Protocols No.1, 2, 4, 7 and 11” states that the Republic of Latvia recognises as compulsory *ipso facto* without special agreement the jurisdiction of the European Court of Human Rights in all matters concerning interpretation and application of this Convention, and the court had not applied those standards which comply with Article 10 of the Convention.”⁴⁸⁵ Furthermore, “the case law of the European Court of Human Rights has been given as the reason for changing jurisprudence in the area of taxation law.”⁴⁸⁶

1.2. Relevant international human rights treaties ratified by Latvia

Concerning the international obligations of state, Latvia has ratified all major UN human rights treaties, including the ones analyzed above: the ICCPR and ICERD. Contrary to many western European states, which have made reservations to Article 20 of ICCPR and Article 4 of ICERD, Latvia has adopted fully the obligations originating from these international human rights treaties. As noted earlier these provisions of ICCPR and ICERD oblige the states to restrict certain forms of hate speech. The decision to ratify these two international human rights treaties without reservations were apparently motivated by the foreign policy considerations, namely the attempt of authorities to enter the major international organizations, and should not be understood that Latvia would have more restrictive policy towards the freedom of expression than other European democracies.

⁴⁸² See the case of *Lavents c. Lettonie*, European Court of Human Rights, Judgment of 28 November 2002. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/view.asp?item> (last visited 11.08.2006)

⁴⁸³ In *V.G. v. the Ministry of Finance* such reference was made to Article 14 (6) of the ICCPR. Judgement of Riga Regional Court No.CA-711/2 of 2 December 1996, published in the *Latvian Human Rights Quarterly* No.2, pp.55-58.

⁴⁸⁴ *Strujevics v. “Diena” and Ozolins*, Judgement of the Supreme Court No.SKC-102, 13 February 2003, unpublished.

⁴⁸⁵ *Ibid.*

⁴⁸⁶ “*Anvars un Partneri*” v. *the State Revenue Service*. Judgement of the Supreme Court No.SKA – 172, 3 August 2004, paragraph 6, unpublished. The report “Internationalisation of Public law: Latvia”, prepared by Martins Mits. Not published.

Apart from the ratification of ICCPR and ICERD, the state has ratified also the 1st Optional Protocol to the Covenant and thus acknowledged the right of the Human Rights Committee to consider individual petitions about the alleged violations of the ICCPR from the individuals under the jurisdiction of the state. So far the HRC has considered two communications⁴⁸⁷ and found a violation of Covenant in one of them. This communication related to the discriminatory and arbitrary restriction of the right of petitioner to stand for local elections.⁴⁸⁸

Conversely, the state authorities have not entrusted the right to consider complaints from individuals to monitoring body of ICERD – the Committee on the Elimination of Racial Discrimination. The apparent explanation for such stance towards CERD is not linked to the implementation of Article 4 of the Convention and the considerations about the possible undue limitations on freedom of expression. The most probable reason is the anxiety of authorities that the CERD with its wide competence in the area of non-discrimination could start to examine individual claims related to the national policy in the area of rights of minorities and non-citizens. National debates on these issues have been very sensitive and emotional ones, since it was difficult to find a solution which would rectify the past wrongdoings and at the same time would be appropriate to the new realities as well as would provide sufficient safeguards to the people who came to Latvia during the period of USSR. The political decisions on these issues have been largely determined by the consequences of Soviet policy of migration and rusification, which drastically changed the composition of the Latvian society during the period of occupation.⁴⁸⁹ The solutions adopted by Latvian authorities, especially at the early 90ties, when the nationalistic forces had an essential impact on policy making, were occasionally in contradiction of international human rights standards. Consequently, authorities tried to limit the possibilities of individuals to question the national policy decisions on these topics, including the opportunities to submit communications for the consideration to CERD. At the same time Latvia is subject to the monitoring procedure of the Committee based on state reports.

⁴⁸⁷ The first communication of *Meer and Shulamit Vaisman v. Latvia* concerned alleged violation of right to a fair trial and the right to presumption of innocence under Article 14, paragraphs 1 and 2, of the Covenant, but was found by the HRC to be unsubstantiated. See the Communication No. 650/1995: Latvia. 01/05/98. CCPR/C/62/D/650/1995. Accessible at: <http://www1.umn.edu/humanrts/undocs/session62/view650.htm> (last visited 17.07.2006)

⁴⁸⁸ See the Communication *Ignatane v. Latvia*, No. 884/1999: Latvia. 31/07/2001. CCPR/C/72/D/884/1999. Accessible at:

[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/81b05015054b5075c1256acb004bf9ca?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/81b05015054b5075c1256acb004bf9ca?Opendocument)
(last visited 17.07.2006)

⁴⁸⁹ Latvians constituted 77% of the Latvia's population in 1935 and only 52% in 1989. // International Obligations and National Debates: Minorities around the Baltic Sea. Zepa, B. The case of Latvia. The Aland Islands Peace Institute, 2006, p.303.

As the member-state of the Council of Europe Latvia has ratified all main human rights treaties within this organization, including the ECHR - the principal human rights treaty at the regional level and one of the most essential ones as far as the debate on freedom of expression and prohibition of hate speech is concerned. The European Court of Human Rights has so far twice examined individual complaints about violation of Article 10 of the Convention in relation to Latvia.

Both of these complaints concerned the defamation proceedings. The first case of *Vides Aizsardzibas Klubs v. Latvia*⁴⁹⁰ related to the award of damages against an association for the protection of the environment following its criticism of a mayor of the municipality and its denunciation of administrative malpractice. The European Court of Human Rights found a violation of Article 10 on a number of bases. Firstly, the national courts had not taken due regard of the public watchdog role of the non-governmental organization and the fact the criticism was expressed in relation to the politician, the head of the local municipality. Secondly, the negative expressions related to her functions as a mayor and concerned the issue of public interest. Furthermore, the Latvian courts had not made a distinction between the value judgements and the statements of fact.

In the second case *Harlanova v. Latvia*⁴⁹¹ the journalist complained about a breach of Article 10 because the national courts have awarded damages against her for defamation of a religious official. The European Court of Human Rights declared the complaint inadmissible, because the journalist has failed to fulfil the professional and ethical obligation of journalism, namely, to provide society with accurate and credible information. There were three principal reasons for such decisions. First of all, the articles of the applicant contained serious accusations and specific allegations of fact against a specific person. Therefore she could have expected "...to be required to prove the truth of the imputation"⁴⁹² which she failed to do. Secondly, The Court emphasized the wider context in which the allegations against religious leader were made. There were two conflicting parties of the Old Orthodox community, which regularly published charges against each other. "In those circumstances, any journalist intending to report those charges was under a particular duty of

⁴⁹⁰ *Vides aizsardzibas klubs c. Lettonie*, European Court of Human Rights, Judgment of 27 May 2004. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/view.asp?item> (last visited 11.08.2006)

⁴⁹¹ *Harlanova contre la Lettonie*, European Court of Human Rights, Decision of 3 April 2003. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Harlanova&sessionid=9186177&skin=hudoc-en> (last visited 11.08.2006)

⁴⁹² *Ibid.*

vigilance...”⁴⁹³ and could not automatically give credence to it. Lastly, the Court emphasized that form in which allegations in issue were presented to the reader left no doubt as to their veracity. Furthermore, there was no indication that journalist intended to distance herself from these imputations. In view of these considerations and the fact that the gravity of penalty applied in the present case was found by the European Court of Human Rights to be proportionate the Court declared that national courts have not overstep the guarantees of freedom of expression.

As far as the obligation to restrict certain forms of hate speech is concerned, it is essential to note that Latvia is also subject to country reports by ECRI. The Commission has so far made two reports on Latvia. It has noted in a report a number of shortcomings in the legislation related to the prohibition of incitement to discrimination and availability of remedies for victims of such acts. Apart from that the ECRI stressed the lack of relevant practice where the appropriate provisions of national law would have been applied.⁴⁹⁴ However, the Latvia has not ratified the CE Convention on Cyber-crime and its Additional Protocol,⁴⁹⁵ concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems.

1.3. The status of international agreements at domestic level

The status of human rights treaties and international agreements in general at the national legal hierarchy is first of all determined by the Constitution of the Republic of Latvia. The Constitution requires that: “All international agreements, which settle matters that may be decided by the legislative process, shall require ratification by the *Saeima* [the Parliament].”⁴⁹⁶ After a law on ratification of pertinent international agreement has been adopted by the *Saeima* or the acts of international law have passed under another respective procedure, the international treaty becomes a

⁴⁹³ *Harlanova contre la Lettonie*, European Court of Human Rights, Decision of 3 April 2003. Accessible at the HUDOC data base:

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Harlanova&sessionId=9186177&skin=hudoc-en> (last visited 11.08.2006)

⁴⁹⁴ ECRI Second report on Latvia, adopted on 14 December 2001, paragraphs 24 - 26. Accessible at: http://www.coe.int/t/e/human_rights/ecri/1%2Decri/2%2Dcountry%2Dby%2Dcountry_approach/latvia/latvia_cbc_2.asp#P139_22686 (last visited 10.07.2006)

⁴⁹⁵ The Additional Protocol was adopted on 28 January 2003 and entered into force on 1 March 2006. The text of Additional Protocol and Explanatory report is accessible at: <http://conventions.coe.int/Treaty/EN/Treaties/Html/189.htm> (last visited 01.07.2006)

⁴⁹⁶ Article 68 of the Constitution of the Republic of Latvia. Accessible at: http://www.saeima.lv/Likumdosana_eng/likumdosana_satversme.html (last visited 14.07.2006)

part of the national legal system.⁴⁹⁷ In this regard Latvian legal system is closer to the group of states where theory of monism⁴⁹⁸ prevails and differs from those states which require separate incorporation or transformation of provisions of international treaty at national law before the relevant international treaty can be invoked by the national courts and individuals. The fact that international human rights treaties provisions are directly enforceable at the national level is affirmed both in the Latvian legal theory⁴⁹⁹ and in the practice of Constitutional⁵⁰⁰ as well as ordinary courts, which refer frequently to norms of international human rights agreements in their judgements.⁵⁰¹

The importance of the standards and principles established by the HRC, CERD, European Court of Human Rights and other treaty monitoring bodies is confirmed also by the method the Constitutional Court has interpreted the content of basic rights included in the Constitution. According to the Article 89 of the Constitution: “*the State shall recognise and protect fundamental human rights in accordance with this Constitution, laws and international agreements binding upon Latvia.*” The Court has emphasized that: “From this Article it can be seen that the aim of the legislator has not been to oppose norms of human rights, included in the *Satversme* to the international ones. Quite contrary- the aim has been to achieve mutual harmony of the norms.”⁵⁰² Therefore, the Court concludes that: “In cases, when there is doubt about the contents of the norms of human rights included in the *Satversme*, they should be interpreted [as far as possible]⁵⁰³ in

⁴⁹⁷ See the position of government on the relationship between the international and domestic legal acts: Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Second period report. Latvia*, CCPR/C/LVA/2002/2, 29 November 2002, p. 3, para 5. Accessible at: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/49ee829adffba340c1256d600045d989?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/49ee829adffba340c1256d600045d989?Opendocument) (last visited 17.07.06)

⁴⁹⁸ There are two main theories that explain the relationship between international and domestic law: monism and dualism. According to the monism international law and domestic law is part of the same legal order. Therefore, international law automatically applies in the domestic legal order. The theory of dualism considers international law and domestic law as separate bodies of law and consequently under dualism rules of international law must be incorporated or transformed into domestic law before they can affect individual rights and obligations. See more on these two theories and their modifications in Shaw, M. N. “International Law”, 5th Edition, Cambridge University Press, 2003, pp.120-124 and in Malanczuk, P. “Akehurst’s modern introduction to International Law,” 7th edition, Routledge, 1999, pp. 63 - 65.

⁴⁹⁹ See Ziemele, I. “Starptautisko tiesību vieta un nacionālo tiesību attiecības.” *Cilvēktiesību žurnāls Nr.6 / Juristu žurnāls Nr.5*, 1997, pp. 54.-70.

⁵⁰⁰ The case-law of the Constitutional Court can be accessed at the home page of the Court: <http://www.satv.tiesa.gov.lv/ENG/STlikums.htm> (last visited 16.07.06)

⁵⁰¹ Look for example the judgement in case *Strujevics v. “Diena” and Ozolins*, Judgement of the Supreme Court No.SK-102, 13 February 2003, unpublished.

⁵⁰² See the Judgement of The Constitutional Court of the Republic of Latvia in *Case No.2000-03-01*, paragraph 5. Accessible at: [http://www.satv.tiesa.gov.lv/Eng/Spriedumi/03-01\(opinions\).htm](http://www.satv.tiesa.gov.lv/Eng/Spriedumi/03-01(opinions).htm) (last visited 20.07.2006)

⁵⁰³ The words “as far as possible” are not included in the English translation of the judgement available at the home page of the Constitutional Court, however they present in the original, Latvian version of the judgement.

compliance with the practice of application of international norms of human rights.”⁵⁰⁴ Furthermore, the Constitutional Court has also referred to the norms of soft-law human rights documents as the tool to interpret the content and the scope of rights guaranteed in the Constitution.⁵⁰⁵

Thus, even if the Constitution has a higher legal rank than international treaties in the domestic hierarchy of legal norms, there is a tradition in legal practice to ensure the compatibility of the application of the *Satversme* with international human rights norms and principles binding on Latvia. While the Constitution should not be interpreted in a way to lower the protection of human rights, the Constitution can certainly extend the basic rights guarantees beyond the international standards. For example the Constitutional Court has noted that in order to interpret Article 91 of the *Satversme*, which lays down the principle of equality and non-discrimination, it is not sufficient to take into account only Article 14 of the ECHR, because the scope of Article 91 of the Constitution is wider.⁵⁰⁶ Furthermore, the international treaties have clearly higher hierarchical status and legal power with respect to other domestic sources of law.⁵⁰⁷ Moreover, the priority of norms and principles of international law over the national law follows from the Declaration of 4 May 1990 “On Restoration of the Independence of the Republic of Latvia.” The Article 1 of this Declaration prescribes the dominance of fundamental principles of international law over national laws.⁵⁰⁸ In addition to the Declaration, under Article 13 of the Law “On International Agreements of the Republic of Latvia”, provisions of an international agreement apply if the international agreement

⁵⁰⁴ Ibid.

⁵⁰⁵ For example the Constitutional Court has referred in this regard to such documents as “Standard Minimum Rules for the Treatment of Prisoners”, adopted in 1955 in Geneva at the first United Nations Congress on the Prevention of Crime (accessible at: http://www.unhchr.ch/html/menu3/b/h_comp34.htm (last visited 15.07.2006)) and Recommendation No. R /87/ 3 on the European Prison Rules adopted by the Council of Europe, Committee of Ministers, February 12, 1987 (Accessible at: <http://www.legislationline.org/legislation.php?tid=106&lid=4930&less=false> (last visited 15.07.2006)). See the Judgement of The Constitutional Court of the Republic of Latvia in *Case No.2002-04-03*. Accessible at the home page of Constitutional Court: [http://www.satv.tiesa.gov.lv/Eng/spriedumi/04-03\(02\).htm](http://www.satv.tiesa.gov.lv/Eng/spriedumi/04-03(02).htm) (last visited 20.06.2006)

⁵⁰⁶ The Article 91 of the *Satversme* includes not only the rule of non-discrimination which is established in Article 14 of the ECHR, but institutes also the guarantee of the equality before the law and courts. See more on the content of Article 91 in Levits, E. “Par līdztiesību likuma un tiesas priekšā, un diskriminācijas aizliegumu. Par Satversmes 91.pantu.”, *Latvijas Vēstnesis*, 08.05.2003, Nr. 68 (2833).

⁵⁰⁷ See the last report submitted by Latvia to the Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Second period report. Latvia*, CCPR/C/LVA/2002/2, 29 November 2002, p. 3, para 5. Accessible at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/49ee829adffba340c1256d600045d989?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/49ee829adffba340c1256d600045d989?Opendocument) (last visited 17.07.06)

⁵⁰⁸ Declaration of the Supreme Soviet of the Latvian SSR “On Restoration of the Independence of the Republic of Latvia”, 4 May 1990. The full text of the Declaration is available at: <http://www.humanrights.lv/doc/latlik/neatkdek.htm> (last visited 15.09.2006)

that has been approved by the *Saeima* (Parliament) prescribes provisions different from those prescribed by legislative acts of Latvia.⁵⁰⁹

However, there is some uncertainty, whether the priority of international norms over domestic ones apply not only to international treaties, but also international custom and general principles. Unlike the Law “On International Agreements of the Republic of Latvia” which mentions only international agreements, the Declaration of Independence refers also to the fundamental principles of international law. It has been argued in the Latvian legal theory that general principles and international custom should be applied in the Latvian domestic legal system in the same way as international treaties⁵¹⁰ and the trend towards the development in this direction seems to be confirmed by the legislator. The legal acts adopted subsequently as for example Administrative Procedure Law⁵¹¹ states that the term ‘legal norms of international law’ should be understood to comprise international agreements binding on Latvia, international customary law and general principles of international law.⁵¹²

2. Statutes of the Republic of Latvia

2.1. The analysis of the Constitutional regulation of the Republic of Latvia

The freedom of expression, right to equality and non-discrimination as well as other basic rights has been explicitly provided for in the Constitution only since the 6th November of 1998, when the Bill of Rights entered into force and supplemented the pre-war text of *Satversme*. However, there was a discussion among the Latvian legal academics even prior the adoption of the Bill of Rights on the issue, whether the human rights are protected at the constitutional level. The basis for arguments in favour of positive answer was Article 1 of the Constitution, which states that: “*Latvia is an independent democratic republic.*”⁵¹³ This provision has been interpreted by some representatives

⁵⁰⁹ The Law of 13 January 1994 “On International Agreements of the Republic of Latvia”. Published in *Latvijas Vēstnesis* [Official Gazette], No.11 (142), 26.01.1994.

⁵¹⁰ Report on the Situation of Fundamental Rights in Latvia in 2003. E.U. Network of Independent Experts on Fundamental Rights (CFR-CDF), p.8.

Accessible at:

http://ec.europa.eu/justice_home/cfr_cdf/doc/synthesis_report_2003_en.pdf (last visited 18.07.2006)

⁵¹¹ The Law was adopted on 25th of October 2001, but entered into force on 1st February 2004.

⁵¹² Article 1 Part 7 of the Administrative Procedure Law (Latvia). The English translation of the law is accessible at:

<http://www.ttc.lv/index.php?skip=30&itid=likumi&id=10&tid=50&l=EN> (last visited 18.07.2006)

⁵¹³ http://www.saeima.lv/Likumdosana_eng/likumdosana_satversme.html (last visited 30.05.2004)

of Latvian legal thinking⁵¹⁴ to include the safeguards for human rights since the link between the democracy, at least in the western liberal meaning of this concept, and the observance of human rights is rather obvious. The presence of framework of guaranteed citizen rights is one of essential preconditions in order the key democratic principles, namely, the popular control and political equality can be realised.⁵¹⁵ For instance the European Court of Human Rights has emphasized in relation to the right analyzed in this work substantially, namely, the freedom of expression, that it “...constitutes one of the essential foundations of such a society (*“democratic society”*), one of the basic conditions for its progress and for the development of every man.”⁵¹⁶

However, while there exists interdependence between the democracy and human rights at the theoretical level, it is not without problems to use the concept of democracy as a legal basis for practical application of human rights in specific cases. The problem that is overlooked by such approach is connected to the fact that both the concept of ‘democracy’ and of ‘human rights’ is a very ambiguous one. It is evident that the implementation of basic human rights would be indispensable for the effective functioning of the democratic political institutions. Nevertheless, it would be problematic to claim the enforcement of all human rights merely on the basis of requirements of democratic political system. Despite the fact that UN 1993 Vienna Declaration of World Conference on Human Rights proclaimed that “All human rights are universal, indivisible and interdependent and interrelated”⁵¹⁷ there are different levels of recognition and enforcement of for example social and economic rights in countries commonly regarded as democracies. Therefore, the argument about the correlation between the democracy and human rights is effective to guarantee basic human rights standards, but it might prove to be unhelpful to endorse the implementation of these rights above the minimum level.

Thus, it is uncertain, how wide there was a protection of human rights before 1998 at the constitutional level. However, the safeguards for human rights were clearly established in the

⁵¹⁴ See the article by Egils Levits, the judge of the European Court of Human Rights, “Interpretation of legal norms and the notion of “Democracy” in Article 1 of Satversme [The Constitution]”, *Latvian Human Rights Quarterly*, Vol.1, 1996.

⁵¹⁵ Beetham, D. “Democracy and human rights: contrast and convergence”, United Nations Office of the High Commissioner for Human Rights, Seminar on the Interdependence Between Democracy and Human Rights, Geneva, 25-26 November, 2002. Materials of the seminar are accessible at:

<http://www.unhchr.ch/democracy/D-Beetham.pdf> (last visited 13.08.2006)

⁵¹⁶ *Handyside v. the United Kingdom*, European Court of Human Rights, Judgment of 7 December 1976. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 19.06.2006)

Constitutional Law about the Rights and Obligations of a Citizen and a Person adopted just after the restoration of independence in 1991.⁵¹⁸ Despite the fact that this law was called “constitutional” it was adopted by simple majority and from legal point of view it was questioned, either it had any higher status than an ordinary law.⁵¹⁹ The text of this law, which was in force until the adoption of the human rights Chapter of the *Satversme* largely served as a basis for the content of the Bill of Rights. Both the right to the freedom of expression and the right to equality were provided in this legal act.⁵²⁰ Therefore, it is not surprising that these rights were included also in the Bill of Rights.

The freedom of expression is guaranteed in Article 100 of the *Satversme*, which states that: “*Everyone has the right to freedom of expression, which includes the right to freely receive, keep and distribute information and to express their views. Censorship is prohibited.*”⁵²¹ However, the right to the freedom of expression as most basic rights included in the Constitution is not absolute. The Article 116 of the *Satversme* sets forth the mechanism for the limitations of those rights, including the right to the freedom of expression. It states that: “*The rights of persons set out in Articles ... one hundred ...of the Constitution may be subject to restrictions in circumstances provided for by law in order to protect the rights of other people, the democratic structure of the State, and public safety, welfare and morals. ...*”⁵²² Thus, the constitutional protection of the freedom of expression in Latvia follows the tradition in Europe, where this right might be restricted in order to safeguard other human rights, including the right to equality and the dignity of the person. Such formulation of freedom of expression at the constitutional level is precondition in order to allow further explore the possibilities at the domestic law for restricting certain kinds of hate speech.

⁵¹⁷ Vienna Declaration, World Conference on Human Rights, Vienna, 14 - 25 June 1993, Paragraph 5. U.N. Doc. A/CONF.157/24 (Part I) at 20 (1993). Accessible at: <http://www1.umn.edu/humanrts/instree/11viedec.html> (last visited 13.08.06)

⁵¹⁸ The English version of the law is accessible at: http://www.oefre.unibe.ch/law/icl/lg_indx.html (last visited 19.07.06)

⁵¹⁹ See more discussions on this subject in: Ziemele, I. “Starptautisko cilvēktiesību vieta un nacionālo tiesību attiecības.” *Cilvēktiesību žurnāls Nr.6 / Juristu žurnāls Nr.5*, 1997.

⁵²⁰ Part 1 of the Article 30 of the Constitutional Law about the Rights and Obligations of a Citizen and a Person states that: “*Each person has the right to freely acquire and disseminate information, to express his/her views and ideas in oral, written or any other form. The realization of these rights must, not be restricted by censorship.*”, but Article 12 ensures the right to equality providing that: “*All persons in Latvia are equal under the law regardless of race, nationality, sex, language, party affiliation, political, and religious persuasion, social, material and occupational standing and origin.*” Accesible at: <http://www.uta.edu/cpsees/latconst.htm> (last visited 29.08.2006)

⁵²¹ Article 100 of the Constitution // http://www.saeima.lv/Likumdosana_eng/likumdosana_satversme.html (last visited 30.05.2004)

⁵²² Article 116 of the Constitution // http://www.saeima.lv/Likumdosana_eng/likumdosana_satversme.html (last visited 30.05.2004)

The procedure for testing the legitimacy of restrictions on freedom of expression and a number of other human rights is established in Article 116 of the Constitution. This provision is similar to the analogous limitation clauses at the international human rights treaties. As far as the right to freedom of expression is concerned one can mention part 3 of the Article 19⁵²³ of the International Covenant on Civil and Political Rights (ICCPR) and part 2 of the Article 10 of the European Convention on Human Rights.⁵²⁴ The difference between the *Satversme* and the international human rights treaties, however, is in the fact that Article 116 applies to a number of those basic rights,⁵²⁵ which might be limited,⁵²⁶ but the ICCPR and ECHR formulates the limitation clauses to each right individually.. The system of applying limitations on human rights envisaged by international treaties provides an opportunity to elaborate in detail the possible legitimate aims and to mention only those aims which are closely linked to the functioning of the right to the freedom of expression. The inclusion of all possible legitimate aims for limitations in one provision is more abstract and puts burden on the judiciary, which should judge in each case, whether the alleged legitimate aim is appropriate basis for the restriction on the pertinent human right.⁵²⁷

The first requirement set up by the Article 116 is that any restriction of the basic rights should be provided for by the law. This initial step of testing the legitimacy of restrictions includes certain quality criteria as regards the legal act limiting the rights. First of all such act should be adopted by the Parliament. The government and other branches of executive can issue provisions restricting fundamental rights only in those cases, when it has been specifically entrusted with such power by the legislator. Furthermore, such act should be published in an official magazine or accessible in another way. The act has also to be clearly formulated so that the addressee may understand his/her

⁵²³ For the text of the relevant provision see the Appendix.

⁵²⁴ Ibid.

⁵²⁵ There are some basic rights in the Constitution where the Article 116 will not apply, but their limitations are included in the pertinent provision of the Constitution itself. An example is Article 105 of the Constitution, which guarantees the right to property, but at the same time declares that "...Property shall not be used contrary to the interests of the public. Property rights may be restricted only in accordance with law." Furthermore, the Constitutional Courts case-law confirms that if the Court finds that in order to reach certain objective there is a necessity for restrictions it can impose restrictions proportional to the objective also on those rights which are not mentioned in Article 116. The Court derives such competence from the systematic interpretation of the norms of the *Satversme*. See the Judgement of the Constitutional Court of the Republic of Latvia in *Case No.2002-04-03*, paragraph 2. Accessible at the home page of Constitutional Court: [http://www.satv.tiesa.gov.lv/Eng/spriedumi/04-03\(02\).htm](http://www.satv.tiesa.gov.lv/Eng/spriedumi/04-03(02).htm) (last visited 20.06.2006)

⁵²⁶ One exception where the limitations clause will not apply is for example the prohibition of torture, cruel or degrading treatment and inhuman or degrading punishment.

⁵²⁷ Levits, E. "Comments on Chapter 8 of the *Satversme* [The Constitution] – Fundamental Rights", *Latvian Human Rights Quarterly*, Vol.7-10, 1999, pp.38-40.

rights and obligations.⁵²⁸ As regards the last element of the concept ‘provided by law’ the Constitutional Courts has referred to the case-law of the European Court of Human Rights, which has declared that: “It would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference.”⁵²⁹ The Constitutional Court has also referred in its practice to this element in order to declare unconstitutional for instance the government regulations limiting the rights to property, as the law issued by the *Saeima* did not clearly determined the scope and way of implementation of authorization, thus allowing the executive power to interfere arbitrarily with the realization of the pertinent human rights.⁵³⁰

As far as legal basis for limitations on expressions inciting to racial hatred or discrimination is concerned, the relevant provisions of domestic law include first of all the rules of the Constitution itself. As mentioned earlier the *Satversme* guarantees not only the freedom of expression, but contains also the right to equality and non-discrimination.⁵³¹ Another applicable provision of the Constitution is Article 95, which protects human honour and dignity. The safeguards for this right have also widely been used in practice to restrict defamatory hate speech. Regarding the norms below the Constitution such expressions might be restricted on the basis of Articles 78 and 150 of the Criminal law, which makes it an offence the instigation of hatred as well as discrimination of the person on the basis of such grounds as racial or national origin and religious affiliation. Furthermore, the prohibition to disseminate certain forms of hate speech is laid down also by the Article 7 of the Law on the Press and other Mass Media as well as Articles 17 and 20 of the Law on the Radio and television.⁵³² Lastly, the Articles 1635 and 2352 (1) of the Civil Law offer the

⁵²⁸ *Silver and others v. the United Kingdom*, European Court of Human Rights, Judgement of 25 of March 1983. Accessible at HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 19.06.2006).

⁵²⁹ *Malone v. The United Kingdom*, European Court of Human Rights, Judgement of 2 of August 1984. Accessible at HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 19.06.2006).

⁵³⁰ See the Judgement of the Constitutional Court of the Republic of Latvia in *Case No.2002-01-03*, paragraph 2. Accessible at the home page of Constitutional Court: [http://www.satv.tiesa.gov.lv/Eng/spriedumi/01-03\(02\).htm](http://www.satv.tiesa.gov.lv/Eng/spriedumi/01-03(02).htm) (last visited 27.06.2006)

⁵³¹ Article 91 of the Constitution states: “All human beings in Latvia shall be equal before the law and the courts. Human rights shall be realised without discrimination of any kind.” Accessible at:

http://www.saeima.lv/Likumdosana_eng/likumdosana_satversme.html (last visited 30.05.2006)

⁵³² For the text of the relevant provisions see the Appendix.

guarantees to victims of discriminatory or defamatory hate speech to claim satisfaction for moral injury suffered.⁵³³

Secondly, the restrictions of the freedom of expression must be based on one of the legitimate objectives included to in the Article 116 of the Constitution. At some variance with other Baltic States, there is no specific reference to the prohibition of hate speech or the speech inciting to the racial discrimination as the legitimate aim to restrict the freedom of expression. The direct reference to the prohibition of hate speech as a legitimate purpose to restrict freedom of expression can be found at the Constitution of the Republic of Lithuania. The Part 4 of Article 25 of Lithuanian Constitution declares: “Freedom to express convictions or impart information shall be incompatible with criminal actions - the instigation of national, racial, religious, or social hatred, violence, or discrimination, the dissemination of slander, or misinformation.”⁵³⁴ The relevant provision of Estonian Constitution, which guarantees the right to freedom of speech (Article 45) does not make explicit reference to incitement to discrimination or the instigation to hatred as a legitimate objective to restrict the freedom of expression. Similarly to Article 116 of the *Satversme* it lists more general objectives as protection of public order or morals, or the rights and liberties, health, honour and reputation of others. However, the prohibition of hate speech is laid down by the Article 12 of the Estonian Constitution, which declares the right to equality and non discrimination. The second part of this article *inter alia* states that: “The propagation of national, racial, religious or political hatred, violence or discrimination is prohibited and punishable by law.”⁵³⁵

These differences, however, are explainable by the fact that both Lithuanian and Estonian Constitutions follow the system where the limitation clauses are formulated in relation to each basic right, which allows to make more detailed and specific regulations. But the Latvian Constitution as mentioned above contains one limitation clause, which is applicable to a number of fundamental rights, including the freedom of expression. Because Article 116 is applicable to different rights the legitimate aims included in it are abstract and general in order to be appropriate to various situations.⁵³⁶ The general way in which the Constitution has formulated limitations on freedom of expression was emphasized also by the Constitutional Court, which noted that as regards more

⁵³³ Ibid.

⁵³⁴ Accessible at: <http://www.oefre.unibe.ch/law/icl/lh000000.html#C002> (last visited 17.06.06)

⁵³⁵ Accessible at: <http://www.oefre.unibe.ch/law/icl/en000000.html> (last visited 17.06.06)

⁵³⁶ See: Mits, M. “The Satversme in the Context of the European Human Rights Standards”, Latvian Human Rights Quarterly, Vol.7-10, 1999 and Levits, E. “Comments on Chapter 8 of the Satversme [The Constitution] – Fundamental Rights”, Latvian Human Rights Quarterly, Vol.7-10, 1999.

detailed limitations on the freedom of expression the relevant norms of the Constitution should be interpreted in the light of Article 10 of the ECHR.⁵³⁷ Therefore, expressions instigating racial hatred or inciting to discrimination are not left with impunity, but might be restricted on such grounds as “the protection of the rights of other people”, “the protection of the democratic structure of the state” or “the protection of the public safety”⁵³⁸.

The Constitutional Court so far did not have a chance to consider the case, where the limitations on the freedom of expression in order to prohibit hate speech would be challenged. But the Court had expressed in its case-law the understanding of some of the legitimate aims referred to above. For example in relation to the concept of “the protection of the democratic structure of the state” the Court has stated that: “Protection of the democratic state system is one of the legitimate aims of restrictions, mentioned in Article 116 of the Satversme, as human rights shall not be used against the democratic state system as such. In compliance with the principle of self – protecting democracy, the democratic state system shall be protected from attempts to liquidate it or hinder its functioning faculties.”⁵³⁹ It can be added that European Court of Human Rights has also used the concept of protection of democracy in order to dismiss at the admissibility stage some of the complaints about the restrictions on expression inciting to hatred and violence.⁵⁴⁰ The Constitutional Court has expressed its view also on the content of such legitimate aim as “public security”. It noted that: “ “Public security” – that means ensurance of the interests of the society. In a democratic state this notion means protection of life, liberty, health, honour and possessions of a person.”⁵⁴¹

As regards such legitimate aim as “the protection of the rights of other people” it is essential to emphasize that “hate speech” on most occasions jeopardize the rights to non-discrimination and the right to honour and dignity of person. The protection of these rights under the Latvian Constitution is not only legitimate, but it has the same importance as ensuring the guarantees for the freedom of

⁵³⁷ See the Judgement of the Constitutional Court of the Republic of Latvia in *Case No.2003-05-01*, paragraph 22. Accessible at the home page of Constitutional Court: [http://www.satv.tiesa.gov.lv/Eng/Spriedumi/05-01\(03\).htm](http://www.satv.tiesa.gov.lv/Eng/Spriedumi/05-01(03).htm) (last visited 20.07.2006)

⁵³⁸ Look also Chapters II and III, which include the analysis of the case-law of the European Court of Human Rights and the UN Human Rights Committee, which has used similar grounds to restrict hate speech.

⁵³⁹ See the Judgement of the Constitutional Court of the Republic of Latvia in *Case No.2000-03-01*, Dissenting Opinions, paragraph 5.4.3. Accessible at: [http://www.satv.tiesa.gov.lv/Eng/Spriedumi/03-01\(opinions\).htm](http://www.satv.tiesa.gov.lv/Eng/Spriedumi/03-01(opinions).htm) (last visited 20.07.2006)

⁵⁴⁰ See more Chapter III sub-chapter 1.2. on analysis of Article 17 of the ECHR.

expression. This is explained by the fact that there are safeguards at the constitutional level not only for the freedom of expression, but also for the rights to equality and non-discrimination as well as the right to protection of human dignity and honour.⁵⁴² This view is confirmed by case-law of the Constitutional Court. The Court has stated in its considerations of the constitutional complaint challenging the legitimacy of restrictions on free expression based on protection of the dignity of state officials: “Two fundamental rights guaranteed to the person are opposed in the present case: the right to freedom of expression and the right to inviolability of dignity and respect. Just like the right to freedom of expression, inviolability of human dignity and respect is fixed both in the *Satversme* and several international human rights acts, binding on Latvia.”⁵⁴³ One can expect that the Court would follow the same approach if it will be faced with assessment of limitations on freedom of expression based on the right to equality and non-discrimination, because this right is guaranteed by the *Satversme* in the same way as the right to honour and dignity.

The third criterion for testing the legitimacy of restrictions is the existence of necessity of restriction in the democratic society. The Article 116 of the Constitution at variance with limitation clause in Article 10 of the ECHR does not explicitly request for the need to assess the necessity of the limitations on the freedom of expression to the objectives pursued. However, the case-law of the Constitutional Court of the Republic of Latvia reveals that the requirement of “necessity in a democratic society” is derived from the Article 1 of the Constitution⁵⁴⁴ and the Courts case-law leaves no doubt that only when the restriction of basic rights is in accordance with the necessity requirement it conforms the Constitution. The Court has expressed its opinion also on the content of this concept. It has stated that: “In the Western democracy the notion “necessity in the democratic society” establishes balance between the interests of an individual and the society. In a democratic society restrictions are necessary if they are socially needed and proportionate.”⁵⁴⁵

⁵⁴¹ See the Judgement of the Constitutional Court of the Republic of Latvia in *Case No.2000-03-01*, Dissenting Opinions, paragraph 5.4.3. Accessible at: [http://www.satv.tiesa.gov.lv/Eng/Spriedumi/03-01\(opinions\).htm](http://www.satv.tiesa.gov.lv/Eng/Spriedumi/03-01(opinions).htm) (last visited 20.07.2006)

⁵⁴² See the text of Article 91 and Article 95 of the Constitution in the Appendix.

⁵⁴³ See the Judgement of the Constitutional Court of the Republic of Latvia in *Case No.2003-05-01*, paragraph 24. Accessible at the home page of Constitutional Court: [http://www.satv.tiesa.gov.lv/Eng/Spriedumi/05-01\(03\).htm](http://www.satv.tiesa.gov.lv/Eng/Spriedumi/05-01(03).htm) (last visited 20.07.2006)

⁵⁴⁴ See the Judgement of The Constitutional Court of the Republic of Latvia in *Case No.2000-05-01*, “On the Compliance of Article 271 of the Criminal Law with Articles 91 and 100 of the *Satversme* (Constitution) of the Republic of Latvia”, paragraph 34. Accessible at: [http://www.satv.tiesa.gov.lv/Eng/Spriedumi/05-01\(03\).htm](http://www.satv.tiesa.gov.lv/Eng/Spriedumi/05-01(03).htm) (last visited 28.04.2004)

⁵⁴⁵ See the Judgement of the Constitutional Court of the Republic of Latvia in *Case No.2000-03-01*, Dissenting Opinions, paragraph 5.4.4. Accessible at: [http://www.satv.tiesa.gov.lv/Eng/Spriedumi/03-01\(opinions\).htm](http://www.satv.tiesa.gov.lv/Eng/Spriedumi/03-01(opinions).htm) (last visited 20.07.2006) The same understanding of this concept has been expressed in other judgements of the Court.

Furthermore, the Court has emphasized that in order to determine the human rights restrictions as necessary the suspicions that the legitimate objective might be endangered should be substantiated with facts.⁵⁴⁶ As regards the interpretation of the principle of proportionality the Court has declared that it: "...means that the public benefit derived from the restriction of the particular fundamental right shall be greater than the loss the restriction incurs to other rights."⁵⁴⁷ The disproportionate character of the Article 271 of Criminal Law in the above mentioned dispute on the special protection of honor and dignity of public officials, namely too wide definition of the notion of "State official", was in fact the basis, why the Court found this legal norm in its present wording at variance with the right to freedom of expression.

2.2. Civil Law and liability

a) The analysis of Civil Law

As indicated in the introduction of this chapter, the Latvian Civil Law was adopted in 1937 and it was gradually re-effected after the country regained independence. The changes of the political system in early 90-ties were accompanied by the transformation of the economic system, which moved from the state regulation to free market economy. Therefore, there was a need for the proper legal basis to regulate these new economic relationships. There was a number of a separate laws adopted to regulate such transitional issues as privatization of land and state enterprises, but the pre-war Civil Law with minor amendments provided the regulation of the issues intrinsic to most economic systems with domination of private property.

While it is called a Civil Law (*Civillikums*) it is in a fact a codification of civil law, which is largely based on the German Civil Code.⁵⁴⁸ Prior to the 1937, when this Law was adopted, there was no common civil legislation. The territory of Latvia before the emergence of independent state in 1918 was divided into different provinces of the Russian empire each having its own rules regulating

⁵⁴⁶ Ibid.

⁵⁴⁷ See the Judgement of The Constitutional Court of the Republic of Latvia in Case No.2000-05-01, "On the Compliance of Article 271 of the Criminal Law with Articles 91 and 100 of the Satversme (Constitution) of the Republic of Latvia", paragraph 34. Accessible at: [http://www.satv.tiesa.gov.lv/Eng/Spriedumi/05-01\(03\).htm](http://www.satv.tiesa.gov.lv/Eng/Spriedumi/05-01(03).htm) (last visited 28.04.2004)

⁵⁴⁸ German Civil Code is commonly referred in literature as BGB (Burgerliches Gesetzbuch). Accessible at: <http://www.iuscomp.org/gla/statutes/BGB.htm> (last visited 20.07.2006)

civil law issues. These rules with amendments continued to be in force until the adoption of the codification of civil law.

The codification consists of four parts. The first part regulates Family Law and it was in fact this section of the law where many amendments were needed, because the issue of equality of spouses has much developed since the 1930ties. The second part of law establishes rules as regards Inheritance Law, but the third section of Law does this in relation to Property Law. The fourth part of the Civil Law, which is the most relevant for the subject matter of this thesis, concerns the Law on Obligations. This section of Law contains norms which could offer legal remedies for victims of hate speech, including claims for financial reward for the harm suffered.

There is no specific provision in the Civil Law, which would expressly refer to the harm inflicted by the threats of racial discrimination as a legal basis to claim the compensation for moral injury suffered. According to the 2nd section of 1st Sub-chapter “Claims Due to Private Delicts” of the Chapter 19 of the Civil Law “Claims on Various Grounds” the possibility to claim financial compensation for moral injury is provided expressly only for the offences against personal freedom, reputation, dignity and chastity of women. The possibility to demand satisfaction for moral injury for victims of racial discrimination is directly provided for only in the Labour Law.⁵⁴⁹ But these are actual cases of discrimination, which is beyond the mere incitement. Apart from that, the Labour Law covers only employment relationships and is not applicable to the discrimination in other spheres. However, the courts in applying the Civil Law have made clear that there is a protection guaranteed also for the victims of incitement to racial discrimination and the racial defamation. There are two provisions of Civil Law which might be invoked in such cases to substantiate the right to claim satisfaction from the infringer.

The first one is Article 2352¹ of the Law, which has been frequently applied by the courts in the defamation proceedings. It states:

“Each person has the right to bring court action for the retraction of information that injures his or her reputation and dignity, if the disseminator of the information does not prove that such information is true.

⁵⁴⁹ Article 29 Paragraph 8 of the Labour Law. Adopted on 20 June 2001, published in *Latvijas Vēstnesis* [Official Gazette], no.105, 06.07.2001.

If information, which injures a person's reputation and dignity, is published in the press, then where such information is not true, it shall also be retracted in the press. If information, which injures a person's reputation and dignity, is included in a document, such document shall be replaced. In other cases, a court shall determine the procedures for retraction.

If someone unlawfully injures a person's reputation and dignity orally, in writing or by acts, he or she shall provide compensation (financial compensation). A court shall determine the amount of the compensation.”⁵⁵⁰

This provision of Civil Law was not included in the pre-war version of the Law and was adopted only with amendments in 1992, when the first cases of defamation appeared and there was a trend in civil law development to provide option to claim compensation also for moral injury. The primary purpose of this provision is to protect the honour and dignity of the person. However, in most cases expressions inciting to hatred and discrimination against some group of population are also defaming the persons belonging to this group. Therefore, the victims of such expressions might use this provision to claim the compensation for moral injury suffered as a result of defamatory remarks.

From the wording of the Part 1 of Article 2352¹ one might get impression that this provision applies only to the dissemination of false statements of fact and does not cover insults expressed in the form of rude or defamatory opinions or value judgements. It is exactly these forms of expression that in most cases convey the racially defamatory remarks. However, the recent case-law illustrates that Part 3 of this provision of the Civil Law might be applied autonomously and comprises also value judgements or opinions that incite to racial hatred or discrimination and unlawfully violate persons dignity and honour. For example in the case of *George Steal versus political organization “Party of Freedom” and state enterprise “Latvian Television”* decided by the Latgale District Court of the Riga the judge stated that: “The advertisement of the “Party of Freedom” divides white and black inhabitants of Latvia and spreads the view, that marriage between these people is undesirable, thus the advertisement divides the persons on the basis of their race regarding the right to create a family and to reside in Latvia. Such a division according to the Part 1 of the Article 1 of the ICERD is

⁵⁵⁰ The English translation of Latvian Civil Law can be found at: http://www.ttc.lv/index.php?squery=Civil+Law&search_sbm=Search&srctype=trans&id=2&l=EN&seid=search, (last visited 10.05.2006)

recognized as discrimination.”⁵⁵¹ Furthermore the court: “recognizes as proved that the content of the advertisement in question is discriminatory and thus unlawful...”⁵⁵² and refers to Part 3 of the Article 2352¹ of the Civil Law by concluding that: “...it is enough to have the evidence of the unlawful violation of ones dignity and honour to have a basis for the claim of compensation of damages.”⁵⁵³

Article 1635 of Civil Law is another provision, which might be used by victims of hate speech as a remedy. It declares:

“Every delict, that is, every wrongful act per se, as a result of which harm has been caused (also moral injury), shall give the person who suffered the harm therefrom the right to claim satisfaction from the infringer, insofar as he or she may be held at fault for such act.

By moral injury is understood physical or mental suffering, which are caused as a result of unlawful acts committed to the non-financial rights or non-financial benefit delicts of the person who suffered the harm. The amount of compensation for moral injury shall be determined by a court at its own discretion, taking into account the seriousness and the consequences of the moral injury.

If the unlawful acts referred to in Paragraph two of this section are expressed as criminal offences against a person’s life, health, morals, inviolability of gender, freedom, honour, dignity or against the family, or minors, it is presumed that the person who suffered the harm as a result of such acts has been done moral injury. In other cases moral injury shall be proved by the person who suffered the harm.

*Note. The term act is used here within the widest meaning, including not only acts, but also the failure to act, that is, inaction.”*⁵⁵⁴

In contrast to Article 2352¹ of the Civil Law this provision does not focus on some specific acts, like offence against the dignity and reputation of person. It provides the victims of any wrongful act with the right to claim satisfaction if they as a result of this act have suffered harm, including moral

⁵⁵¹ See the text of Article 1 of ICERD in the Appendix.

⁵⁵² The judgement of the Latgale District Court of the Riga in case Nr. C29240503, 8th September, 2003. Not published.

⁵⁵³ Ibid.

injury. It is important to add in relation to individuals suffered from hate speech that the law defines the concept of ‘moral injury’ as including not only physical, but also mental suffering caused by unlawful act. Therefore, if the ones behind the hate expressions are found guilty of unlawful act under Criminal Law or other legal acts, there are no obstacles for the victim to claim satisfaction for moral injury suffered. Since the international human rights norms, after ratification in Parliament, become national law and can be applied directly, the individuals should be able to base their claims also on these norms, like for example provisions of the ICERD. Such a view is supported also by the case-law.⁵⁵⁵

The third part of Article 1635 specifies those unlawful acts, which are presumed by definition to inflict moral injury on victims. These are criminal offences against a person’s life, health, morals, inviolability of gender, freedom, honour, dignity or against the family, or minors. Therefore, if for example the expressions inciting to hatred have been found to be racially defamatory and an offence against persons dignity, the person is free from the obligation to prove that he/she has suffered moral injury, because it is presumed by law.

There have been only two cases so far, where victims of hate speech have asked the compensation for the moral injury suffered. The Article 1635 of the Civil Law was invoked by the court of appeal in one of these proceedings. In the case of *K.Edzugbo and P.Mensahs versus political organization “The Party of Freedom” and state enterprise “The Latvian Television”* the representative of “The Party of Freedom” disputed the possibility that the racially discriminatory advert challenged by applicants might come within the scope of Article 2352¹ of the Civil Law. He emphasized that this was the view of the party about the issues of migration, but the relevant provision of Law according to his interpretation applied only to false statements of fact. The Section of Civil Law of the Supreme Court rejected this argument on the basis that the claim is supported not only by the Article 2352¹, but also Article 1635 of the Civil Law, which provides that every wrongful act gives the person who suffered harm therefrom the right to claim satisfaction from the infringer.⁵⁵⁶ The

⁵⁵⁴ The English translation of Latvian Civil Law can be found at:

http://www.ttc.lv/index.php?squery=Civil+Law&search_sbm=Search&srctype=trans&id=2&l=EN&seid=search, (last visited 10.05.2006)

⁵⁵⁵ See, for example, the above mentioned citation from the judgement of the Latgale District Court of Riga in case of George Steal versus political organization “Party of Freedom” and state enterprise “Latvian Television”, where the judge referred to Part 1 of the Article 1 of the ICERD to base its findings about the racially discriminatory and thus unlawful nature of the parties advertisement.

⁵⁵⁶ The judgement of the Supreme Court in case No.PAC-244, 9th of April 2003. Not published.

way this case has been dealt by national courts illustrates a number of essential details as regards the application of the Civil Law. Therefore, subsequent section of this chapter presents a comprehensive analysis of this case.

b) Case study: Case of C.K.Edzugbo and P.Mensahs versus political organization “The Party of Freedom” and state enterprise “The Latvian Television” (*The Freedom’s Party case*)

This is the first case where the victims of racially discriminatory expressions tested the possibility under Latvian Civil Law to claim financial compensation for moral injury suffered as a result of dissemination of pertinent expressions. The case illustrates the interpretation of relevant norms of Civil Law as well as provisions of international human rights treaties by the domestic courts. The discussions between the different parties also indicate the co-relation between the incitement to racial discrimination and defamation, thus disclosing in which circumstances the anti-defamation norms can be effective against the expressions inciting to hatred and discrimination.

The Facts

The “Party of Freedom”, which is marginal⁵⁵⁷ anti-EU political party formed by the former Minister of Interior Z.Cebers before the parliamentary elections in 2002 as a part of its pre-election campaign made a political advert, which was broadcasted on the Latvian State television. The advert showed a black man in the uniform of the Latvian army standing beside the Monument of the Freedom.⁵⁵⁸ Another black man was embracing the Latvian girl in the national folk costume in the following picture. These pictures were accompanied by the voice saying: “Today the guard of Latvia, tomorrow might be the husband of your daughter.” There was also text, which stated: “Party of freedom warns! Around 20 million economic refugees from Asia and Africa will look for asylum in the European Union already within the next ten years. How much of them will choose Latvia as their destination? Are you sure about your employment? Party of freedom warns!” After the Latvian

⁵⁵⁷ The party did not pass the necessary threshold of votes (5%) to enter the Parliament in last parliamentary elections.

⁵⁵⁸ This monument was one of the symbols of resistance to Soviet occupation and has a particular meaning for the Latvian society.

State television discontinued the broadcast of the advert because of its racist nature, the advert of analogous content was disseminated through the post-office.

Arguments and legal basis referred to by the victims

C.K.Edzugbo and P.Mensahs, the black performers, who participated in the advert, but were misinformed about its content, made a claim against the Party asking for the compensation of moral injuries suffered. Among the reasons for the claim, they mentioned that: "...the advert is discriminating persons on the basis of race. It shows a person of another race in Latvia in an unpleasant light and in such a way the advert violates their honour and dignity."⁵⁵⁹ As a legal basis of their claim they referred to the Articles 1635 and 2352¹ of the Civil Law,⁵⁶⁰ the Articles 92⁵⁶¹ and 95⁵⁶² of the Constitution. Furthermore, they referred to a number of provisions of international treaties, including Articles 1⁵⁶³ and 4⁵⁶⁴ of the ICERD and Part 2 of Article 20 of the ICCPR⁵⁶⁵.

Arguments of the accused

The legal representative of the accused, firstly, stated that the advert does not contain a statement of fact but an opinion⁵⁶⁶ that in the near future there might be around 20 million people arriving in the EU from the poorest African countries. She mentioned that this opinion is based on the conclusions of the recent summit of the heads of the EU. Secondly, the legal representative mentioned that the purpose of the advert was not to violate the honour and dignity of the claimants but to raise the issues, which are essential regarding the Latvian membership in the EU. The director of the advertisement company, who created the scenario of advert, was of the same view. He stressed that

⁵⁵⁹ The judgement of the Riga Regional Court in case No. CA-2881/4, 3rd June 2002. Not published.

⁵⁶⁰ See the text of the Articles 1635 and 2352¹ in the Appendix.

⁵⁶¹ The Article 92 of the Constitution states: "*Everyone has the right to defend their rights and lawful interests in a fair court. Everyone shall be presumed innocent until their guilt has been established in accordance with law. Everyone, where their rights are violated without basis, has a right to commensurate compensation. Everyone has a right to the assistance of counsel.*"

⁵⁶² The Article 95 of the Constitution, *inter alia*, provides for that: "*The State shall protect human honour and dignity.*"

⁵⁶³ See the text of the Part 1 of the Article 1 of ICERD in the Appendix.

⁵⁶⁴ See the text of the Article in the Appendix.

⁵⁶⁵ It states that: "*Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.*"

⁵⁶⁶ See the discussion of the applicability of Article 2352¹ of the Civil Law to value judgements in the Chapter V sub-chapter 2.2.a.

the advert neither violates the racial equality nor incites to racial hatred, but that it effectively raises a discussion regarding the membership of Latvia into the EU.

The analysis of the judgement of the Court

The Riga Regional Court, which adjudicated the case as the court of 1st instance, satisfied the claim of the plaintiffs. As a legal basis for its decision to restrict such forms of expression the Court referred to Article 116 of the Constitution,⁵⁶⁷ Article 2352¹ of the Civil Law, the relevant provisions of the Law on the Press and Other Mass Media⁵⁶⁸ and the Law on Radio and Television.⁵⁶⁹ Besides, the Court referred to a number of provisions of international treaties, including Articles 1 and 4 of the ICERD, Part 2 of Article 20 of the ICCPR and Part 2 of Article 10 of the ECHR.

First of all the Court expressed its view as regards the argument of the legal representative of the “Party of Freedom” that the advert entails an opinion instead of a statement of fact and therefore the Article 2352¹ of the Civil Law is not applicable. The Court declared that it is not essential in this case, whether the “Party of Freedom” has expressed the opinion or a statement of fact, because it infringed the limits, which the legislator has established concerning the right to the freedom of opinion.⁵⁷⁰ The Court recognized the argument, which was put forward by claimants, that the “...advert entails an idea, which discriminates black people, to whom the applicants belong to, thus their honour and dignity has been violated.”⁵⁷¹

By stating this in the judgement the Court might have illustrated the possible link between the illegal act, incitement to racial discrimination, and the violation of the honour and dignity of persons belonging to the group of persons against whom the incitement to discriminate has been directed. However, it is not clear is the Court ready to interpret the relevant provision of the Civil Law as far as to allow for the claims of group defamation. It is an open question, had the Court

⁵⁶⁷ This provision states: “*The rights of persons set out in Articles ... one hundred ...of the Constitution may be subject to restrictions in circumstances provided for by law in order to protect the rights of other people, the democratic structure of the State, and public safety, welfare and morals. ...*”

⁵⁶⁸ See the text of the Article 7 in the Appendix. “The Law on the Press and Other Mass Media”, adopted on 12 December 1990, Published in *Ziņotājs* [Official Edition], No.5, 14.02.1991.

⁵⁶⁹ See the text of the Articles 20 and 38 in the Appendix. “The Law on Radio and Television”, adopted on 24 August 1995, Published in *Latvijas Vēstnesis* [Official Gazette], No.137 (420), 08.09.1995.

⁵⁷⁰ The judgement of the Riga Regional Court in case No. CA-2881/4, 3rd June 2002. Not published.

⁵⁷¹ The judgement of the Riga Regional Court in case No. CA-2881/4, 3rd June 2002. Not published.

come to similar conclusion if the applicants have not participated in the advert themselves, but if they would have regarded the advert as insulting because they belong to racial group discriminated.

The slight indication that there might be a move towards such interpretation of the Article 2352¹ of the Civil Law might be deduced from another defamation case connected to the same advert of the “Party of Freedom”. In this case a black man, G. Steel, brought a claim against the party by stating that the advert is racially defamatory and violates his honour and dignity as a black person, who has been married to Latvian woman and has lived in Latvia for some years. The main distinguishing feature of both cases is precisely the fact that the claimant was not directly involved in the advert in this latter case. The Riga City Court of Latgale municipality satisfied his claim. However, it emphasized in the judgement a very close relationship between the facts displayed in the advert and the situation of the applicant.⁵⁷²

This is the only case so far, where an element of group defamation were present, therefore it is hard yet to answer how far the Courts would accept such claims. In principle persons belonging to the group targeted by racist and defamatory expressions should be able to claim satisfaction if they have suffered moral injury as a result of such expressions. The law should not leave arbitrarily without legal remedies some representatives of the victimized group. The exception are situations when it can be proved that apart from the ones directly affected by the expressions, other persons of this group could not have suffered harm because of the limited area within which the expressions were disseminated or other objective circumstances.

As mentioned above, the Court also made a link in its judgement between the incitement to racial discrimination and the violation of the honour and dignity of persons. This raises an issue, should the expressions that entail discrimination or incite to racial discrimination always be regarded as violating the honour and dignity of the persons. This is largely the issue of interpretation in practice of such concepts as ‘honour’ and ‘dignity’. There is not enough case-law at the moment concerning the application of Article 2352¹ of the Civil Law to such expressions in order to make any definite answer. In theory, however, there might be cases, when the incitement to discriminate some racial or ethnic group of persons might not be at the same time found defamatory. In spite of this, the relevant provisions of international human rights treaties, among them Article 6 of ICERD, require that the state should provide for effective remedies, including the possibility to claim financial

compensation, for victims of expressions, that involve or incite to racial discrimination or hatred. This obligation is not conditioned by any additional requirements, including the one that expressions should also be regarded as violating the honour and dignity of the persons. Therefore the state is under an obligation to provide effective financial remedies for victims of discriminatory expressions also in the cases that are not covered by Article 2352¹ of the Civil Law. The most appropriate legal basis for claims of satisfaction in such situations would be Article 1635 of the Civil Law. It only requires the proof of the unlawfulness of the expressions and the harm suffered as a result of them.

The Court also stated in the judgement that: "...the advert expresses prejudice against the black people and is directed towards incitement to racial hatred and enmity"⁵⁷³ and referred to the notion of racial discrimination stated in Article 1 of the ICERD. However, the Courts judgement does not contain a precise explanation, how the fact of racial discrimination has been expressed in the instant case. The content of the advertisement shows that it was directed precisely against the people from Africa and Asia. During the trial it was made clear from the statements of witnesses that two black artists were chosen intentionally to perform the roles in the advertisement. Such a differentiation of people on the basis of race or colour and incitement to restrict their rights to search for asylum and to create a family life in Latvia corresponded to racial discrimination according to the Part 1 of the Article 1 of the ICERD.

The legal representative of the "Party of Freedom" also stated that the aim of the advertisement was not to violate the honour and dignity of the persons or to incite to racial discrimination. However, the Court stressed that the fact of violation of honour and dignity of the person, according to the interpretation of Article 2352¹ by the Supreme Court, is not subject to the requirement that the authors or disseminators of the insulting expressions should be held at fault for it. The dissemination of such views is *per se* contrary to the relevant provision of Civil Law. This is in contrast with Criminal Law provisions on defamation and libel, where the existence of proof of intent to insult the victim is the precondition to hale accountable the ones behind defamatory expressions. However, such an interpretation of the Article 2352¹ of the Civil Law, when it is applied to the expressions that incite to racial discrimination corresponds to the definition of racial

⁵⁷² See the judgement of the Latgale District Court of the Riga in case Nr. C29240503, 8th September, 2003. Not published.

⁵⁷³ The judgement of the Riga Regional Court in case No. CA-2881/4, 3rd June 2002. Not published.

discrimination in Part 1 of Article 1 of the ICERD.⁵⁷⁴ According to this definition, it is enough to identify the fact of discrimination, notwithstanding the aim of the perpetrators of such acts.

The Supreme Court, which decided the case on appeal, stated that in this case it is irrelevant either the “Party of Freedom” has expressed the opinion or a statement of fact. It is true that the opinion or value judgement is also subject to limitations if it incites to racial discrimination as in the instant case. However, the need to distinguish between the statement of fact and value judgement or opinion might still be essential in order to avoid contradictions and present better argumentation as regards the need for limitations in the Court’s judgement.

The facts of the case illustrate that the “Party of Freedom” expressed its opinion that after the Latvia’s access to the EU the country will be faced with a mass influx of refugees from Asia and Africa. However, the content of the advert and form in which the party presented its view on the issues regarding Latvia’s access to the EU overstepped the permissible scope of the freedom of expression.

However, contrary to the fact that it was an opinion instead of statement of fact, which entailed insulting expressions, the Supreme Court stated, *inter alia*, in its judgement that: “plaintiffs have not identified, which information about themselves they ask to rectify.”⁵⁷⁵ The opinion or value judgement in contrast to the statement of fact cannot be measured as true or false and there is no reason to ask for its rectification. The Court might have referred to this distinction, despite the confusion of the plaintiffs themselves. Though, what the Court might and has done in this case – it is to oblige the Party of Freedom to make an apology to the victims and assess the need and amount of financial compensation awarded to the plaintiffs.

⁵⁷⁴ See the text of the Part 1 of the Article 1 of the ICERD in the Appendix.

⁵⁷⁵ The judgement of the Supreme Court in case No.PAC-244, 9th of April 2003. Not published.

2.3. Criminal Law and liability

a) The analysis of Criminal Law

During the first years of the independence the criminal law of Latvia was based on the Criminal Code left over from the Soviet system, which was periodically amended to be in compliance with the functioning of democracy and free market economy. Criminal Code contained Article 69 which declared an offence the act, which intentionally incites to national or racial hatred or to the defamation of national honour and dignity.⁵⁷⁶ However, this provision of Law to the knowledge of author was rarely applied in practice during the Soviet period, because according to the official ideology there were no instances of hatred among the different ethnic groups living in the Soviet Union. The new codification of law, named the Criminal Law, was adopted in 1998. The offence of incitement to racial or national hatred or discrimination was taken over from the Criminal Code and is established in Article 78 of the Criminal Law. It states:

“1) For a person who commits acts knowingly directed towards instigating national or racial hatred or enmity, or knowingly commits the restricting, directly or indirectly, of economic, political, or social rights of individuals or the creating, directly or indirectly, of privileges for individuals based on their racial or national origin,

the applicable sentence is deprivation of liberty for a term not exceeding three years or a fine not exceeding sixty times the minimum monthly wage.

2) For a person who commits the same acts, if they are associated with violence, fraud or threats, or where they are committed by a group of persons, a State official, or a responsible employee of an undertaking (company) or organisation,

the applicable sentence is deprivation of liberty for a term not exceeding ten years.”⁵⁷⁷

Up to now there have been few prosecutions where the Article 78 of the Criminal Law was applied in practice.⁵⁷⁸ Furthermore, there have been no charges brought against the persons of disseminating

⁵⁷⁶ Latvijas Kriminālkodekss [Latvian Criminal Code], Komentāri pie atsevišķiem Kriminālkodeksa pantiem, Tieslietu ministrijas Tiesiskās informācijas centrs, 1995, 46.lpp.

⁵⁷⁷ Article 78 of the Criminal Law. Accessible at: <http://www.ttc.lv/New/lv/tulkojumi/E0032.doc> (last visited 30.08.2006)

⁵⁷⁸ According to the paper prepared by the two high officials of Police Department of Riga there has been three charges brought on the basis of the Article 78 in 2000, only one both in 2001 and 2002, three in 2003 and one in 2004. These

hate speech expressions on the basis of anti-defamation provisions of Criminal Law. While the Article 78 of Criminal Law in contrast to the Article 69 of the Criminal Code does not guarantee protection against the defamation of national honour and dignity, in situations when defamatory remarks are targeted at concrete individuals they can use as a safeguard general anti-defamation provisions of Law.⁵⁷⁹ Taking into account the lack of case-law, the academic commentaries of the Law and observations by the human rights treaties monitoring bodies regarding the national legislation will be used as the main source to interpret the content of the Article 78 of the Criminal Law and, where it would seem essential, the anti-defamation provisions of Law.

The text of Article 78 makes clear that the subject of this provision may be both the private person and the state official. Moreover, according to the Part 2 of this provision the state official⁵⁸⁰ is considered as a special subject and might be punished with deprivation of liberty up to ten years for the intentional incitement to racial or national hatred or discrimination. Despite the direct applicability of provision to public officials and the serious sanctions provided, this clause of Criminal Law suffers from a number of deficiencies. One of the major shortcomings of Article 78 relates to the intentional character of the offence and the way the intent requirement has been interpreted in practice by institutions involved in criminal justice system. The words "...a person who commits acts knowingly directed..." have been interpreted in academic commentaries⁵⁸¹ and in case-law⁵⁸² as applicable only to those situations when the offender have disseminated or expressed incitement to racial or national hatred or discrimination with direct intent. The intentional character of an act as a precondition to apply criminal sanctions to those spreading speech inciting

cases predominantly concern the manifestations of the hate speech on the Internet or in the press. See Dzenis, A. un Voins, V. "Nacionālā un rasu vienlīdzība Latvijā – vēsture, šodiena, nākotne". Accessible at: www.humanrights.org.lv/upload_file/17.09.05.DzenisVoins.doc (last visited 30.08.2006). The paper does not contain the information on a number of convictions, but according to the study prepared earlier until 2001 there has been one conviction on the basis of Article 78 alone and two prosecutions where this provision has been applied together with other provisions of the Criminal Law. See: Feldhūne, G. Mits, M. "Legal analysis of national and European anti-discrimination legislation, comparison of the EU Race Equality Directive and Protocol No 12 with anti-discrimination legislation in Latvia", Interights, European Roma Rights Center, Migration Policy Group, 2001, pp. 35 -36.

⁵⁷⁹ Defamation and libel offences are regulated by Articles 156, 157 and 158 of the Criminal Law. Accessible at: <http://www.ttc.lv/New/lv/tulkokumi/E0032.doc> (last visited 30.08.2006).

⁵⁸⁰ The definition of the concept "state official" is given in the Article 316 of the Criminal Law, which states that:

"(1) Representatives of State authority, as well as every person who permanently or temporarily performs his or her duties in the State or local government service and who has the right to make decisions binding on other persons, or who has the right to perform any functions regarding supervision, control, inquiry, or punishment or to deal with the property or financial resources of the State or local government, shall be considered to be State officials.

(2) The President, members of the Saeima, the Prime Minister and members of the Cabinet as well as officials of State institutions who are elected, appointed or confirmed by the Saeima or the Cabinet, heads of local government, their deputies and executive directors shall be considered to be State officials holding a responsible position."

⁵⁸¹ Krastiņš, U. Liholaja, V. Niedre, A. "Krimināltiesības", Rīga: Tiesu nama aģentūra, 2001, 151. lpp.

⁵⁸² Judgement of the Liepāja City Court in case No. K20-90/1 (kr./l. Nr.184000300), 12 January, 2001. Not published.

to racial hatred or discrimination is common in criminal laws of many countries. It is also contained in ECRI General Policy Recommendation No 7 on “National legislation to combat racism and racial discrimination”. However, the Article 78 of Criminal Law makes this element of offence stricter, requiring the presence of direct intent in the conduct of person, who is behind the expressions inciting for racial hatred or discrimination.⁵⁸³ Furthermore, the authorities have made a high threshold for the proof of such intent in practice⁵⁸⁴ which results in termination of further proceedings. Therefore, despite the fact that the law enforcement institutions identify that expressions complained of are inciting to racial or national hatred or discrimination, no charges can be brought, unless there exists a proof that the person has expressed such views with a direct intent to instigate hatred or discrimination. The same requirement of proof of direct intent relates also to anti-defamation provisions of Criminal Law.

There are a number of other reasons, why the police and public prosecutor’s office in most reported cases decide not to bring charges under this article. The same situation characterizes also other stages of criminal proceedings. There have been few cases when the pre-trial investigation has succeeded with an accusation of person, the bringing of case to trial and the conviction of the person. Such a situation exists, despite the fact that society periodically faces expressions, which either incite to racial or national hatred or discrimination or at least raises a concern about the exceeding the permissible scope of the freedom of expression. Taking into account the seriousness of this offence, the reported cases on the dissemination of hate speech and incitement to racial discrimination should have been examined more thoroughly by authorities and adjudicated by Courts instead of being terminated at the initial stage of criminal proceedings by police or public prosecutor.

Among the experts the following explanations are cited why there are hardly any proceedings introduced in practice under the Article 78. First of all, this situation is explained by the reference to the heritage of the past, namely, the denial of existence of ethnic or racial hatred or discrimination in the Soviet Union. The negligence among authorities towards this offence and unawareness of this

⁵⁸³ According to Article 9 of the Criminal Law “Commission of a Criminal Offence Deliberately (Intentionally)”:

“A criminal offence shall be considered to have been committed deliberately if the person who has committed it has foreseen the consequences of the offence and has desired such (**direct intent**) or, even if such consequences have not been desired, nevertheless has knowingly allowed these to result (**indirect intent**).” See the application of the concept of ‘direct intent’ in practice in next part of this sub-chapter, which contains the analysis of the Landmanis case.

⁵⁸⁴ See: Feldhüne, G. Mits, M. “Legal analysis of national and European anti-discrimination legislation, comparison of the EU Race Equality Directive and Protocol No 12 with anti-discrimination legislation in Latvia”, Interights, European Roma Rights Center, Migration Policy Group, 2001, pp. 35 -36.

phenomenon is inherited from that time. Another reason is weak experience of the law enforcement authorities on how to investigate such cases and apply the relevant provisions of domestic law.⁵⁸⁵ There is also insufficient knowledge of applicable international standards, which occasionally results in the confusion of what material or expressions is considered as racist. Furthermore, the lack of alternative provisions in Criminal Law applicable to different manifestations of racial hatred and discrimination has been among the factors explaining the reluctance of authorities in enforcing the implementation of Article 78.

For example in public discussions the representatives of law enforcement institutions have frequently expressed the view that they refused to open the criminal proceedings because the expressions challenged have not been of sufficient gravity. The Estonian Criminal Code for instance provides that the first time breach of provisions of Code, which protects against hate speech and discrimination⁵⁸⁶ is considered to be misdemeanour, unless such act has caused substantial damage to other person's rights or interests or to public interests.⁵⁸⁷ More discretion for law enforcement officials as regards the provisions applicable to concrete situations of outlawed speech would apparently improve the situation and would at least limit number of those cases, when the perpetrators of such conduct enjoy impunity.⁵⁸⁸ However, the way how the officials use such discretion should be constantly monitored in order to avoid undue limitations on the freedom of expression and on the other hand situations, where the gravity of hate crimes is not fully taken into account.

In order to change the attitude that prevails among the officials towards hate crimes it is also necessary to raise awareness of the phenomenon of hate speech and the harm it creates within the society as whole. For instance, until recently it was quite common practice in media reports on chronology of criminal offences to mention one's ethnic origin, especially if the person was of Roma origin. Such reports, while are not being the primary source of hatred, created negative stereotypes towards relevant minority groups. Despite the need of comprehensive approach to

⁵⁸⁵ Kučas, A. "Vārda brīvības robežas: goda un cieņas aizskaršana, naida kurināšana", Sabiedriskās politikas centrs Providus, 2004.

⁵⁸⁶ Articles 151 and 152 of Criminal Code. Criminal Code of the Republic of Estonia. Accessible at: <http://www.legislationline.org/upload/legislations/93/8f/0b603ac473e3c0831ff831c47a40.htm> (last visited 19.08.2006)

⁵⁸⁷ ECRI Third Report on Estonia, adopted on 24 June 2005, Paragraph 34. Accessible at: http://www.coe.int/T/E/Human_Rights/Ecri/1-ECRI/2-Country-by-country_approach/Estonia/Estonia_CBC_3.asp (last visited 15.07.2006)

⁵⁸⁸ Some experts of Latvian Criminal law have recommended to provide sanctions for less severe hate speech cases in Administrative Penal Code instead of directly applying the Criminal Law. See: "Subjektīvā naid kurināšana", *Latvijas Avīze*, 19.07.2005.

achieve fundamental changes, certain results to limit the instances of racist speech might also be attained by introducing the amendments in the existing legal framework and transforming its application in practice.

A number of criminal law experts have suggested that the law enforcement authorities should lower a threshold for the proof of direct intent and when considering this issue to take into account not only the explanations of the person questioned but also the nature of expressions and the context in which they have been uttered.⁵⁸⁹ It is hard to explain, how the person could not have intended to instigate national or racial hatred when it has publicly pronounced the most vehement racist slogans. The change of practice of law enforcement authorities as regards the intent element of the offence would improve the situation at least in relation to the most obvious situations of instigating hatred. However, such change might be ineffective to cope with more moderate and sophisticated manifestations of racial hatred and xenophobia. Therefore, the ultimate solution would require the amendments in Article 78, which would extend its scope and would permit to apply it both in cases of direct or indirect intent. This would allow the restriction of expressions which in fact have instigated hatred or discrimination, but there is not enough evidence to prove the intent of the person. Moreover, some human rights experts have emphasized that the need to prove the direct intent in order to apply Article 78, taken together with the fact that there are no other effective remedies available at the domestic level, violates the international human rights treaties binding on Latvia, namely the Article 4 of the ICERD.⁵⁹⁰ This provision entails the obligation of the State to declare an offence the dissemination of ideas of racial superiority or incitement to racial hatred and discrimination or hatred without any additional requirements.⁵⁹¹ Therefore, the need to enlarge the scope of Article 78 is determined also by international obligations. However, in order to avoid disproportional limitations on the freedom of expression the court should take into account the level of intent in determining the responsibility of the accused and in deciding about the applicable sanctions. The existing version of the first part of Article 78 provides some discretion for the judges, since it contains as sentence not only the deprivation of liberty but also the imposition of fine.

⁵⁸⁹ Judins, A. "Rasisms Latvijā: vai gaidām nāvi?" 2005.gada 14.jūnijs. Accessible at: <http://www.politika.lv/index.php?id=4820> (last visited 16.07.2006)

⁵⁹⁰ Mits, M. "The study of the Freedom of Expression in Latvia", 2000. Not published.

⁵⁹¹ Harris, D. "Cases and Materials on International Law", 5th ed., London: Sweet&Maxwell, 1998, pp.704. -705.

There are also some other shortcomings in the Article 78 of the Criminal Law, which makes it difficult to fight expressions inciting to discrimination and would most probably require the amendment of the provision. Firstly, the title of the Article is “*Violation of National or Racial Equality and Restriction of Human Rights*”. However, the Article directly mentions only economic, political and social rights, excluding discrimination on the basis of such a broad group of human rights as civil and cultural rights. This deficiency might be reversed by the courts interpreting and applying the law in accordance with its purpose. Alternatively, the Article 78 should be amended in order to include also civil and cultural rights. Secondly, this provision of the Criminal Law is not applicable to the expressions which incite to hatred or discrimination against the person or group of persons on the basis other than race or national origin. The case-law illustrates that authorities interpret these terms as including also ethnic origin of person. However, such vulnerable group as for example sexual minorities are left without any protection against incitement to hatred. The only additional provision in Criminal Law is Article 150,⁵⁹² which protects against the discrimination and incitement to hatred on the basis of persons religious belief. The proposal to include the person’s sexual orientation among the grounds covered by Article 78 have been expressed already in 1999.⁵⁹³ The protection against the incitement to hatred or discrimination on a basis of sexual orientation is for example included in the Criminal Code of other Baltic State, Lithuania⁵⁹⁴ as well as in the Criminal Code of Sweden.⁵⁹⁵ However, due to the existing stereotypes and conservative attitudes within the Latvian society towards the persons of different sexual orientation there has

⁵⁹² Article 150 states: “*For a person who commits direct or indirect restriction of the rights of persons or creation of whatsoever preferences for persons, on the basis of the attitudes of such persons towards religion, excepting activities in the institutions of a religious denomination, or commits violation of religious sensibilities of persons or incitement of hatred in connection with the attitudes of such persons towards religion or atheism, the applicable sentence is deprivation of liberty for a term not exceeding two years, or community service, or a fine not exceeding forty times the minimum monthly wage.*”

⁵⁹³ Lavrikovs, J. Valsts Cilvēktiesību biroja pasūtīts pētījums “Geju un lezbiešu tiesību stāvokļa analīze Latvijā”, 1999, 112. lpp. Accessible at: www.vcb.lv/zinojumi/geju_un_lezbiesu_ties_1999.doc (last visited 19.07.2006)

⁵⁹⁴ Article 170 of the Lithuanian Criminal Code (Instigation against any nationality, race, ethnic, religious or other group of persons) punishes those who “by public oral or written statements or through public mass media, ridicule, express contempt, incite to hatred or advocate discrimination towards a person or a group of persons on grounds of gender, sexual orientation, race, nationality, language, origin, social status, belief convictions or attitudes” and those who “publicly incite to violence or physical harsh treatment of a person or a group of persons” on the same grounds “or provide funding or support such activity in any material way”. ECRI Third report on Lithuania, adopted on 24 June 2005, Paragraph 13. Accessible at: http://www.coe.int/t/e/human_rights/ecri/1%2Decri/2%2Dcountry%2Dby%2Dcountry_approach/lithuania/lithuania_c_bc_3.asp#P130_14811 (last visited 20.07.2006)

⁵⁹⁵ Chapter 16, Section 8 of the Criminal Code of Sweden provides that a person becomes guilty of agitation against a group by making a statement or otherwise spreads a message that threatens or expresses contempt for an ethnic group or any other group of people with reference to their race, skin colour, nationality or ethnic origin, religious belief or sexual

been consistent resistance from the majority of parliamentarians to include in legislation any specific norms directed towards the protection of sexual minorities. The need of such amendments in Article 78 was recognized by the Prime Minister of Latvia only in July 2006 after the wave of hatred and violence against sexual minorities unseen before.⁵⁹⁶ Today, this group is probably the subject to hate speech most frequently. But the proponents of hatred and discrimination could choose another group as their target tomorrow. Therefore, more durable solution against manifestations of racial hatred would be to leave open in the Article 78 the reference to prohibited grounds of incitement to hatred and discrimination, in order to protect any identifiable group within the society.

Apart from provisions of Article 78 victims of speech inciting to hatred and discrimination in principle can also use the general provisions of Criminal Law, which protect the personal honour and dignity.⁵⁹⁷ However, there are differences between the Article 78 and anti-defamation provisions as regards procedural issues and in substance. The procedural distinction relates to the initial stage of initiating the case. According to the *Law of Criminal Procedure*⁵⁹⁸ the state authorities are under an obligation to initiate the criminal proceedings and investigation in relation to acts within the scope of Article 78, if there are facts that indicate that the relevant offence allegedly have been made. In relation to defamation and libel cases the criminal investigation might be launched only after the judge has received the complaint from the alleged victim. Furthermore, the offences of defamation and libel are subject to the procedure of private indictment, which means that it is not a public prosecutor but the victim itself who brings a charge and tries to prove the accusation.⁵⁹⁹

The differences in substance firstly relates to the primary objectives and interests Article 78 and anti-defamation provisions are intended to protect. As regards the last ones their primary focus is on defamatory character of the expressions and it is not essential, whether the expressions complained

orientation. On 1 January 2003, an amendment of the Act criminalized incitement against homosexuals as a group. Cited from the judgement of the Supreme Court of Sweden adopted on 29 November 2005. Accessible at <http://www.hogstodomstolen.se/2005/Dom%20pa%20engelska%20B%201050-05.pdf> (last visited 21.07.2006)

⁵⁹⁶ The news headline in 23rd of July, 2006: “Ministru prezidents uzdod Jaundzeikaram sniegt atskaiti par darbu seksuālo minoritāšu pasākumu laikā.”

Accessible at:

<http://www.delfi.lv/archive/article.php?id=15033720&ndate=1153602000&categoryID=193> (last visited 25.07.2006)

⁵⁹⁷ Defamation and libel offences are regulated by Articles 156, 157 and 158 of the Criminal Law. See the text of these provisions in the Appendix.

⁵⁹⁸ “The Law on Criminal Procedure”, adopted on 21 April 2005, Published in *Latvijas Vēstnesis* [Official Gazette], No.74, 11.05.2005.

of incite to hatred or not. Secondly, there exists a difference as regards the gravity of the sentence which might be applied to the persons charged guilty with pertinent offences. The Article 78 of the Criminal law is included in Chapter IX of the Law “Crimes against Humanity and Peace, War Crimes and Genocide.” The offences included in this chapter are considered as particularly serious. Therefore, the applicable sentence for this offence is deprivation of liberty for a term up to three years or alternatively the fine not exceeding sixty times the minimum monthly wage. In special circumstances, for example when the incitement to hatred or discrimination is associated with violence the only applicable sentence is the deprivation of liberty up to ten years. The relevant anti-defamation clauses contain merely the possibility to apply the fine to those held guilty, unless the defamation or bringing into disrepute has been made through the mass media. In the last situation the person can be sentenced with imprisonment for a term not exceeding one year, sentenced with custodial arrest or community service.

According to the comments made by Latvian criminal law experts the general anti-defamation provisions of Criminal Law can be applied only to those situations when the defamatory expressions are targeted at certain individuals but do not cover insults made in relation to the racial, ethnic or national group as such.⁶⁰⁰ In criminal law of some other countries the provisions similar to Article 78 of the Latvian Criminal Law are formulated more broadly and include not only incitement to hatred and discrimination, but also expression of contempt and ridicule towards the person on the prohibited grounds.⁶⁰¹ As mentioned earlier Article 69 of the Criminal Code inherited from the soviet period contained similar structure. Apart from outlawing expressions inciting to hatred, this provision included also safeguards against expressions defaming national honour and dignity. Taking into account the fact that Article 78 is included in Chapter “Crimes against Humanity and Peace, War Crimes and Genocide”, which contains offences of particular gravity, the application of Article 78 to defamatory expressions might be disproportional to the right to the freedom of expression. However, a separate clause or additional element to general anti-defamation provisions would have been necessary to cover those expressions which ridicule or express contempt against the person or a group of persons on prohibited grounds. Because it is not the case in all situations that racially defamatory expressions also include incitement to discrimination and hatred and thus are covered by Article 78. Lastly, the existing anti-defamation clauses do not take

⁵⁹⁹ Ibid., Article 7 and Article 102.

⁶⁰⁰ Liholaja.V., “Kad vārda brīvība saskaras ar godu, cieņu un naida kurināšanu.” *Latvijas Vēstnesis, Jurista vārds*, No 2 (357), 18.01.2005 and No 3 (358) 25.01.2005.

⁶⁰¹ See for example the above mentioned article 170 of the Lithuanian Criminal Code.

into account during the sentencing phase the racist subtext of the expressions defaming person on the basis of his national or ethnic origin. This is contrary to the practice in many countries and international standards,⁶⁰² where the racist motive of the offence is listed among aggravating circumstances of the offence.

b) Case study: *Case of Landmanis*

This is the first case where the person has been charged with and found guilty solely on the basis of Article 78 of the Criminal Law. The case illustrates how the shortcomings in the Article 78 discussed above create problems in practice. It also demonstrates the limits of the freedom of expression when it collides with the prohibition of hate speech under the national legal system. On the one hand, in the court proceedings the reference was made to the Article 100 of the Constitution as well as to the provisions of international human rights treaties, which guarantee the freedom of expression. On the other hand, the UN Declaration and the UN Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which prohibits dissemination of ideas based on racial superiority or hatred, was referred to.

Facts

The facts of the case can be briefly summarised as follows. G.Landmanis who was the editor of the monthly “Patriot”⁶⁰³ was charged with an offence provided for in Part 1 of the Article 78 - for the commitment of acts that are intentionally directed towards instigating national or racial hatred or enmity. In January of 2001 the Liepaja City Court, which adjudicated the case as the court of first instance, stated in the judgement that: “...G. Landmanis has distributed the first, second and third volume of the monthly “Patriot” and satirical journal “Comic stories on holocaust”⁶⁰⁴ during the period from the October of 1999 to January of 2000. The publications included in these journals,

⁶⁰² European Commission against Racism and Intolerance, General Policy Recommendation No.7 “On national legislation to combat racism and racial discrimination”, December 13, 2002. Accessible at: http://www.coe.int/T/E/human_rights/Ecri/1-ECRI/3-General_themes/1- (last visited 11.05.2006)

⁶⁰³ “Patriot” was a local bulletin, not distributed through public sale.

⁶⁰⁴ According to the Landmanis the story was the translation from the edition published and freely accessible in the United States of America.

especially in the 3rd volume of monthly “Patriot”, express negative, insulting and offensive attitude towards the Jews.”⁶⁰⁵

Arguments of the accused

The accused, G. Landmanis during the trial denied that he has disseminated the monthly, and stated that “...the monthly has been intended only as a form of communication among his pen-friends and acquaintances, which received every month around 30 numbers from each volume either by mail or directly.”⁶⁰⁶ He emphasized that this is not a distribution, but only an exchange of views. Furthermore, the accused stressed that: “He had no intention to incite to racial enmity or hatred, since he included in the journal only the personal views of other members of correspondence.” He also stressed during the trial that there is nothing anti-Semitic in the articles. Lastly, he referred to the Article 100 of the Constitution, which states that: “*Everyone has the right to freedom of speech, which includes the right to freely acquire, hold and distribute information and to express his/her own opinions. Censorship is prohibited.*”⁶⁰⁷

The analysis of the judgement of the Court

What is meant by the dissemination?

The Court found established that the monthly “Patriot” has been intended for the dissemination, despite the opposing arguments of the accused. The fact of dissemination constitutes the necessary element of the objective part of the offence. The Court based its decision on the following facts. Firstly, the Court noted that G.Landmanis has proposed to sign up for the monthly. Secondly, he has sent the journal to persons, who were not personally familiar with him and have not participated in the communication with editor. However, this fact that the Court devoted extensive part of its argumentation to prove the act of dissemination, might indicate that there is high threshold applied in practice in order to prove the objective part of the offence. The accused has recognized that he himself has collected the material and has chosen the articles to publish as well as has edited the

⁶⁰⁵ Cited from the judgement of the Liepaja City Court in case No. K20-90/1 (kr./l. Nr.184000300), 12 January, 2001. Not published.

⁶⁰⁶ Cited from the judgement of the Liepaja City Court in case No. K20-90/1 (kr./l. Nr.184000300), 12 January, 2001. Not published.

monthly. Furthermore, he has sent or given around thirty numbers of the each volume to a large number of persons. These facts alone should have constituted sufficient basis to recognize the act of dissemination, no matter how these acts were named by the accused.⁶⁰⁸

The requirement to prove the direct intent

As mentioned above the proof of direct intent is the most complex problem as regards application of Article 78. The accused denied that he had the intent to instigate racial or national hatred or enmity. However, the Court found that the acts in question – collection of the articles, their selection and edition might only be committed with a direct intent and the accused should have realised the harm of his acts. Such a finding was based on a number of evidences, including the statements of witnesses. Furthermore, on the basis of linguistic analysis and other evidence at the Courts disposal, the Court recognized as proved that the publications express negative, insulting and offensive attitude towards the Jews and that they are directed towards incitement to national hatred or enmity. For example in one of the journals it was stated that one should treat Jews the same way as harvest-bugs, namely, to put them on oven to burn.

In this situation, it was not difficult for the Court to prove the existence of direct intent Apart from the clearly racist character of the expressions, the Court had a number of other evidences that confirmed this. Among them were the letters by some of the readers of the monthly to the accused, where they have emphasized the anti-Semitic nature of the journal and warned the editor about the possibility to be brought to criminal liability by the law enforcement authorities. Furthermore, these acts were committed systematically and during the long period of time, which also made the proof of the direct intent easier. It would be more difficult to prove the existence of intent if there would be an isolated instance of incitement to racial or national hatred. For example, all three cases where persons have been convicted under Article 78 of the Criminal Law have been related to long-term, systematic and organized acts. As noted in theoretical analysis presented above in order to restrict more sophisticated forms of hate speech there is a need to make amendments in Article 78, which

⁶⁰⁷ Article 100 of the Constitution // http://www.saeima.lv/Likumdosana_eng/likumdosana_satversme.html (last visited 30.05.2006)

⁶⁰⁸ See for comparison the Communication *J.R.T. and the W.G. Party v. Canada* examined by the Human Rights Committee, where the persons complained of disseminated hate messages through the phone. No. 104/1981: Canada. 06/04/83. CCPR/C/18/D/104/1981.(Jurisprudence)
[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/be24fa123874d7b7c1256abe0047f366?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/be24fa123874d7b7c1256abe0047f366?Opendocument)

would allow to apply it to those situations where the acts of incitement to hatred have been identified, but the direct intent of those responsible cannot be proved.

Assessment for the need of restrictions

During the trial the accused referred to Article 100 of the Constitution, which guarantees to anyone the right to the freedom of expression. The Court, however, stated that the acts committed by the accused are not punished until they do not contradict the law and international legislation, in this case, the Criminal Law, and the UN Declaration on the Elimination of Racial Discrimination. In the instant case the need for the limitations of expressions was obvious and the Courts finding is valid, in principle. However, the arguments used by Court to substantiate the need for limitation contain some shortcomings.

Firstly, there is no necessity to refer to the Declaration, since the Latvia has ratified the UN Convention on the Elimination of All Forms of Racial Discrimination. The latter one contrary to the soft-law nature of the Declaration is legally binding upon the country and contains a number of obligations the state ought to observe. Such confusion as to the relevant international norms is explained by the insufficient knowledge of international human rights norms among the judiciary. The understanding of ECHR and the practice of the European Human Rights Court has improved significantly in the last years. However, the awareness of other human rights mechanisms, especially at the UN level, is still inadequate.

Secondly, the Court should have referred not only to the UN Convention and the Criminal Law but also should have made a reference to the Article 116 of the Constitution, which lays down the mechanism to limit the right to the freedom of expression entailed in Article 100 of the Constitution. Furthermore, the Court should have identified one or several aims provided by the Article 116, which constitute the basis for the restriction of the freedom of expression in this case. These might have been, for example, the protection of the rights of others, the protection of the democratic order of the state or protection of public safety. Despite the fact that the legal representative of the accused referred to the case-law of the European Court of Human Rights, namely the case of *Jersild v. Denmark*, the Liepaja City Court did not take notice of this fact in deciding the case. In order to see the relevance of the principles stated by the European Court of

Human Rights in that case and their applicability to the case of Landmanis, the facts of both cases and the Courts reasoning will be compared in detail in next section.

Case of Landmanis and the judgement of the European Court of Human Rights in the case of *Jersild v. Denmark* compared

During the trial the legal representative of the accused stated that: "...according to international standards, mass media and every individual has the right to introduce other persons with different views and opinions, even if these opinions are not acceptable to the society."⁶⁰⁹ In order to support this argument he referred to the case of *Jersild v. Denmark* decided by the European Court of Human Rights. It is true that the Court has declared in this case as well as in a number of other cases that: "...freedom of expression is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb, such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society"."⁶¹⁰ At the same time the Court has also recognized that the right to the freedom of expression carries with it duties and responsibilities and might be subject to restrictions which are enumerated in Part 2 of the Article 10 of the European Convention of Human Rights.⁶¹¹

There also a number of essential differences between the instant case and the case of *Jersild v. Denmark*. Firstly, European Court of Human Rights emphasized that Jersild as the journalist has clearly disassociated himself from the persons he interviewed and from the racist views, which they expressed. Contrary to this, G.Landmanis during the trial stressed that the monthly has been intended for the group of persons who share his views, but denied the fact that the publications do entail incitement to national hatred or enmity. Secondly, the aim of Jersild in including the television report racist statements made during the interview with Green jackets was to reveal the existence of racist groups in Denmark. Thus he did not cut the racist expressions from the report on

⁶⁰⁹ Cited from the judgement of the Liepaja City Court in case No. K20-90/1 (kr./l. Nr.184000300), 12 January, 2001. Not published.

⁶¹⁰ *Lehideux and Isorni v. France*, European Court of Human Rights, Judgment of 23 September 1998, paragraph 55. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 19.06.2006)

⁶¹¹ See, among others, *Garaudy v. France*, European Court of Human Rights, Decision as to the admissibility of 24 June 2003. Accessible at HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 15.04.2006)

order to create a discussion on the issue, which has been much debated in the Danish society. In contrast to that, the Landmanis recognized that the monthly “Patriot” was not intended for the general public, but its audience was persons who share views reflected in the journal. Therefore it would be hard to argue that the periodical could raise issues of public concern within the whole society. While the issues of public interest might be discussed also within the limited scope of persons, the titles of the publications and the findings of the linguistic experts demonstrated that publications contained very frequent harmful expressions against some Jewish persons and the Jews in general. Thus instead of illustration of different views and facilitating the discussion on the subject, the evidently one-sided character of publications allows to conclude that they were intended to propagate anti-Semitic views.

2.4. Laws regulating the press and other media

The press and other mass media played an essential role in the struggle for the democracy and independence during the late 80ties and early 90ties when the *'perestroika'* (transition) period introduced by the last President of the USSR M.Gorbachev lessened the censorship constraints of the authoritarian regime. The media brought the first waves of freedom to the Latvian society. The open critics of the deportations in 1940ties and other crimes against humanity committed by the Communist regime as well as the possibility to discuss freely the growing influx of migrant workers which led the titular nation and the survival of Latvian language at risk were important factors in an increasing resentment against Soviet authorities. The publications illustrating the true facts about the pre-war Latvia, sometimes accompanied by the glorification of that period of history, were among the driving forces in consolidating the nation and strengthening the spirit of Latvian people to regain independence.

Important role of media in the break-up of the authoritarian system as well as experience of censorship were among the reasons, why the first laws regulating the media were based on the principle that they should enjoy as much freedom and independence as possible. Despite the fact that first legal act regulating the media "*The Law on the Press and Other Mass Media*" (*Press Law*) adopted in 1990 established some generally worded restrictions in media work, until the mid of 90ties, when the first defamation cases appeared in Courts, these norms had been rarely applied in practice. Apart from the cases of defamation at this period media frequently faced also restrictions based on the rules on the use of Latvian language. This legislation considerably limited the possibilities of national public and private radio and television companies to broadcast in a language other than Latvian. However, it did not establish any limitations as far as the functioning of press is concerned. These laws were aimed to strengthen the position of Latvian within the society after the russification policy implemented in Soviet period, which led to the situation that most persons belonging to minorities in Latvia did not have a fluency to communicate in Latvian language after the break-up of the USSR. However, in 2003 the Constitutional Court of Latvia declared this norm of Radio and Television Law as uncomfortable with the guarantees of the

freedom of expression in the Constitution.⁶¹² Recently, the authorities have started discussions about more detailed restrictions of media freedom in such areas as for example the dissemination of pornography or the broadcasting of violent scenes on television during the daytime.⁶¹³

Since the beginning of 90ties there has been an increasing trend of authorities to regulate different aspects of media work through the amendments in laws, the intervention of Court and decisions of public supervisory institution of broadcasting media. This is explained not only by the experience of the abuse of the right to the freedom of expression faced by authorities since 1990 and changes in the structure of media, where the number and variety of press as well as radio and television companies has grown fundamentally. An important reason, why the courts and other institutions need to intervene periodically in media work, is that media professional organizations in Latvia are very weak and more formal than active. There are no journalism rules or codes applicable for the whole country. The Latvian Association of Journalists adopted a Code of Ethics already in 1992, but it has not been recognized by most media companies. In fact each newspaper sets their own ethical standard and the only force which can influence its observance is the reader's attitude.⁶¹⁴ This is in contrast to many European countries where most disputes about the media work are settled by the professional bodies which make their decisions on the basis of media codes of ethics.⁶¹⁵ Apart from making it unnecessary for state institutions to intervene in media freedom, decisions of professional bodies improve the quality of media work and serve as a guide for journalists in sensitive and complex situations in their work. An exception to the reluctance among media to elaborate professional rules of conduct was the recent declaration against the dissemination of hate and intolerance on the Internet.⁶¹⁶ This declaration was drawn and signed by the editors of all major national internet portals as well as representatives of number of NGO's and other actors.

⁶¹² See the Judgement of The Constitutional Court of the Republic of Latvia in *Case No.2003-02-0106*. Accessible at the home page of Constitutional Court: [http://www.satv.tiesa.gov.lv/Eng/Spriedumi/02-0106\(03\).htm](http://www.satv.tiesa.gov.lv/Eng/Spriedumi/02-0106(03).htm) (last visited 27.07.2006)

⁶¹³ National Radio and Television Council, Decision No 45 "On the protection of children and adolescents from the harmful effects of violence in the television broadcasting" [Par bērnu un pusaudžu aizsardzību pret vardarbības kaitīgo ietekmi televīzijas raidījumos.], adopted on 11 April 2002. Accessible at: <http://www.nrtv.lv/info/index.php?mid=29> (last visited 23.08.2006).

⁶¹⁴ Breiksa, A. "The Latvian Media Landscape". Accessible at: www.ejc.nl (last visited 19.07.2006)

⁶¹⁵ Berugs, R. "Viela diskusijai par Latvijas mediju politiku", sabiedriskās politikas portāls politika.lv, 2005. gada 15. februāris. Accessible at: www.politika.lv/index.php?id=6755 (last visited 30.07.2006).

⁶¹⁶ Declaration on Respect, Tolerance, and Cooperation on the Internet was adopted on 30 May 2006. The text of Declaration is accessible at: <http://www.dialogi.lv/article.php?id=2487&t=&rub=&la=3> (last visited 08.08.2006)

There are two principal laws regulating the media work. The first one is above mentioned “*The Law on the Press and Other Mass Media*”, which was adopted in 1990. The provisions of this Law state that it applies both to the press and other mass media, including the radio and television broadcasts.⁶¹⁷ However, the Parliament subsequently adopted special law regulating the operation of audiovisual media.⁶¹⁸ Therefore, today the Press Law affects only those aspects of the functioning of radio and television companies, which are not fixed in a special law. Contrary to the work of press, the Law on the Radio and Television establishes a supervision institution for the radio and television sector – National Radio and Television Council. The Council issues the broadcasting permits and monitors whether the electronic media respect in their work the Constitution and pertinent laws. It also examines the complaints about the radio and television companies and in cases of serious and long-term violations can even annul temporarily the broadcasting permit or submit a claim to court to decide on termination of work of broadcasting company.

As regards the issue of remedies available to the individual, there are some specific remedies provided in media laws like for example the possibility to claim apology or the retraction of information in certain cases. However, the majority of provisions of both the Press Law and the Law regulating audiovisual media make a reference to the relevant clauses of Civil Law, Criminal Law or Administrative Penal Code concerning the applicable sanctions to the press or broadcasting companies. Therefore, in most cases courts apply the articles of Civil Law or Criminal Law or Administrative Penal Code and refer to media regulating laws to emphasize the unlawful act. The Courts have used the media laws also to strengthen the argumentation of their judgements, especially in cases when there is an uncertainty, whether the norms of codified legislation are appropriate to solve the pertinent situation.⁶¹⁹

Since the time both laws were adopted there have been fundamental changes in media area both in relation to the number of companies and their variety. In 1990 when the Press Law entered into force there were only few private newspapers, radio and television companies. Therefore, there have been developed drafts of new media laws. Among the main amendments is the proposal to change the supervision institution of audiovisual media in order to reflect more the interests of the

⁶¹⁷ Article 2 of the Press Law. “*The Law on the Press and Other Mass Media*”, adopted on 12 December 1990, Published in *Ziņotājs* [Official Edition], No.5, 14.02.1991.

⁶¹⁸ The first Law on Radio and Television was adopted in 1992 and replaced with the one currently in force in 1995.

⁶¹⁹ See the Sub-chapter 2.2. on analysis of norms of Civil Law.

society and strengthen the independence of broadcasting media. At its present version the members of National Radio and Television Council are elected by Parliament, which often results in situation that they are inclined to represent in their work the interests of political party, who has nominated them. Another fundamental change might be the introduction of fee for public broadcasting service, which have been intensely debated among parliamentarians, media companies and experts. Due to complexity of issues involved in this debate it is not foreseen that the new laws will be adopted in the near future. Therefore, the analysis of restrictions of hate speech in the media work is based on the existing legal framework regulating this area.

a) The Law on the Press and Other Mass Media (Press Law)

After the Latvia declared independence, this was the first Law adopted by Parliament to guarantee the media freedom and to state the principles of media policy. As was stated earlier today it mostly relates to the work of press, but operation of audiovisual media is regulated by a special law. Article 1 of the Press Law provides that any person has the right to freely express his/her views and opinions, to disseminate announcements in the press and other mass media and receive by such means the information on questions of public interest or any issue he/she is interested in. However, the Article 7 of the Law includes the list of the types of information, whose publication is outlawed. Part 1 of this provision states that such information *inter alia* entails the one: “...which promotes violence and... advocate war, cruelty, racial, national or religious superiority and intolerance, and incites to the commission of some other crime.”⁶²⁰ Moreover, the Article 12⁶²¹ of the Law states that the publication of the information, which advocates the use of violence or incites to racial discrimination might even constitute the basis for the Court to decide on the termination of operation of a mass medium.

⁶²⁰ “The Law on the Press and Other Mass Media”, adopted on 12 December 1990, Published in *Ziņotājs* [Official Edition], No.5, 14.02.1991.

⁶²¹ Article 12 of the Press Law states that:

“The Prosecutor General of the Republic of Latvia, the Chief State Notary of the Enterprise Register and the Minister for Finance have the right to initiate that the court adjudicate the matter in regard to termination of operation of a mass medium.

A court may make an adjudication regarding the termination of operation of a mass medium, if it:

- 1) has published an invitation to use violent or any other unlawful methods;
- 2) has published an invitation not to comply with laws of the Republic of Latvia;...
- 4) has published information which in a criminal case has been found by court judgment to be slanderous and defamatory...or violation of racial and national equality; and
- 5) within a one-year period has repeatedly committed other violations of the provisions of this Law.”

Despite this rather strong language, the law contains a number of shortcomings, which has prevented its effective application to limit hate speech instances on the media. The Press Law as noted earlier was adopted in the 1990 and notwithstanding a number of subsequent amendments it has not covered all developments in mass communication area. It has left unregulated the websites, chat rooms and other types of public communication on the Internet. Today the expressions which incite to racial hatred or discrimination could be found more frequently on the Internet rather than in such traditional means of communication as press, radio or television broadcasts.⁶²² However, it can not be said that the public communication on the Internet are left totally unregulated and allows the perpetrators of racist crimes to act without impunity. Such a situation would run against the international obligations of Latvia. For example the Committee on the Elimination of Racial Discrimination (CERD) has stated that Article 4 of the ICERD includes the obligation of states to ban expressions inciting to racial hatred and discrimination on the Internet as well.⁶²³ Also such prominent Council of Europe institution as European Commission against Racism and Intolerance (ECRI) has issued the special Recommendation on combating the racism on the Internet.⁶²⁴ Latvia has also signed but not ratified the CE Convention on Cyber crime.⁶²⁵

The above-mentioned Articles 1635 and 2352¹ of the Civil Law as well as the Article 78 of the Criminal Law are applicable to the Internet environment. However, these provisions apparently do not cover all instances of hate speech and does not deal with specific aspects of liability for spreading hatred on Internet. In order a victim of hate messages can claim satisfaction according to the Article 1635 of the Civil Law there is a need to prove that unlawful act has been committed and a person has suffered moral injury as a result of this. The Article 2352¹ of the Civil Law comprise only those situations when the hate or discriminatory expressions in question could be regarded also

⁶²² The non-governmental association Dialogi.lv monitored the instances of hate speech in three main national Internet portals from 19th until 23rd of July 2006, when there was intensive debates within the society about the planned gay and lesbian parade in Riga. The organization read 11 022 comments and found the components of hate speech in 1502 of them, including the direct or indirect calls for violence in 121 case. “Naida runu saturošos interneta komentāros konstatēti klaji aicinājumi uz vardarbību”. Dialogi.lv, 24.07.2006. Accessible at: <http://www.dialogi.lv/article.php?id=2529&t=15&rub=0> (last visited 13.07.2006)

⁶²³ The Concluding observations of the Committee on the Elimination of Racial Discrimination on Finland, CERD/C/63/CO/5, 10th December 2003, paragraph 13. Accessible at: <http://www.formin.fi/doc/eng/humanrights/reportng/reports/cerd03en.pdf> (last visited 20.05.2006)

⁶²⁴ ECRI General Policy recommendation N° 6: Combating the dissemination of racist, xenophobic and antisemitic material via the internet, 15 December 2000. Accessible at: http://www.coe.int/t/e/human_rights/ecri/I-ecri/3-general_themes/I-policy_recommendations/recommendation_n6/I-Recommendation_n%206.asp#TopOfPage (last visited 21.05.2004)

⁶²⁵ The text of the Convention on Cybercrime can be found at: <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=185&CL=ENG> (last visited 30.07.06)

as defamatory, since its primary focus is the protection of persons' dignity and honour. In most situations hate expressions are also defamatory, but it is not necessary always the case. Moreover, there is some uncertainty in jurisprudence, whether Article 2352¹ applies not only to the untrue statements of fact, but also to value judgements. Furthermore, it is difficult to initiate civil proceedings as regards outlawed expressions on the Internet, because the ones disseminating the manifestations of hate and discrimination are often remain anonymous. Contrary to the Article 2352¹ of Civil Law, the Article 78 of the Criminal Law bans expressions inciting to national or racial hatred or discrimination without any additional requirement that these expressions should be also defamatory.⁶²⁶ However, in order to apply this provision of Criminal Law there is a need to prove that the dissemination of hate expressions have been made with the direct intention to cause racial or national hatred, which proved to be rather difficult in practice.⁶²⁷

Furthermore, neither the Civil law nor the Criminal law deals specifically with the responsibility of the Internet service providers, owners of web pages and other actors connected to the dissemination of information on the Internet. Therefore, there have been suggestions to make amendments to the Press Law, which would permit to apply the restrictions stipulated in this Law also to the service providers and other relevant actors. Yet, before such step is taken a number of issues, not the least the fear of self-censorship of the Internet service providers and the enforceability of the national court decisions should be considered taking due regard of the complexity of the regulation of the communication on Internet compared to the traditional media.⁶²⁸ An alternative to amendments in Press Law could be the adoption of the legal act regulating specifically the liability and other issues related to the flow of information on the Internet. The model for such legislation is presented by the CE Cyber crime convention and its Additional Protocol concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems.

As indicated above the major national Internet portals, some daily newspapers that make electronic version of their publications and a number of non-governmental associations have recently signed a Declaration on Respect, Tolerance, and Cooperation on the Internet, whose main aim is to decrease and control the manifestations of intolerance and hate on the Internet. The document illustrates the

⁶²⁶ Defamation is a separate offence punished under Articles 156, 157 and 158 of the Criminal Law.

⁶²⁷ See Sub-chapter 2.3. on analysis of provisions of Criminal Law

⁶²⁸ See: Legal Instruments to Combat Racism on the Internet. Report prepared by the Swiss Institute of Comparative Law, Strasbourg, August 2000. Accessible at:

http://www.coe.int/T/E/human_rights/Ecri/1-ECRI/3-General_themes/3-Legal_Research/2-Combat_racism_on_Internet/Internet_Table.asp#TopOfPage (last visited 19.05.2006)

common understanding among the signatories as regards speech to be outlawed. It states: “We understand intolerance as incitation to violence, discrimination, threats, insults directed at an individual or a group of individuals because of their racial or ethnic background, religious background or belief, language, gender, sexual orientation, age, health or citizenship status.”⁶²⁹ Thus, compare to the Press Law it includes also such additional grounds as sexual orientation, language, gender, age and health as prohibited grounds of incitement to violence and discrimination. While focusing on suppression of hate speech the Declaration takes due regard also of the right to the freedom of expression by stating that all individuals are free to advocate their values provided this is done in conformity with law and respects the dignity and honour of other persons. The parties agree to include the principles of Declaration in their corporate policy and support a dialogue between Internet companies, public institutions and non-governmental sector as well as the need to cooperate in creating a system for monitoring intolerance. Thus there is a trend among main actors on Internet environment to establish rules, which would restrict the incitement to hatred and dissemination or dissemination of other unlawful information through their web-sides. While such initiative is appreciable, the main principles of this Declaration should be subsequently transformed in the legislation, in order to permit authorities to hold responsible those owners of web pages and Internet service providers, who do not respect the rules stated in the Declaration.

Another shortcoming of the Press Law relates to the remedies provided. Part 1 of the Article 21 of the Law states that: “*Persons...are entitled to require mass media to retract information published (broadcast) about them if such information is not true.*” However, expressions, which incite to racial hatred or discrimination, are usually conveyed in the form of value judgements or opinions rather than the statement of facts. Therefore, retraction of information is not a proper remedy as regards opinions expressing hate. Furthermore, the requirement to retract one’s view would actually violate the freedom of expression. Consequently, the Law should provide also for other remedies as for example apology, which are applicable to cases when the published information outlawed in Article 7 of the Law has been not a statement of facts, but an opinion. Such a remedy at least in some cases would allow the person to get the immediate satisfaction, as the court proceedings due to the overload of national courts might last for several months. It would also allow the media to settle the dispute before the claim has been brought to the Court. Lastly, it is not always the award

⁶²⁹ Declaration on Respect, Tolerance, and Cooperation on the Internet was adopted on 30 May 2006. The text of Declaration is accessible at: <http://www.dialogi.lv/article.php?id=2487&t=&rub=&la=3> (last visited 13.08.2006)

of financial compensation what is the most essential for the victims, but the recognition of the harm made and the apology from those responsible.

b) Law on the Radio and Television

This Law applies exclusively to broadcasting organizations. Article 3 of the Law lays down the general principles for the functioning of the electronic mass media. It stipulates that the censure of the broadcasts and programmes is prohibited. However, the Point 4 of this provision states that: *“Broadcasting organization shall be free and independent in the production and distribution of their programmes insofar as they are not restricted by the Constitution, this Law and other laws...and international agreements binding on Latvia.”*⁶³⁰ This clause sets down an obligation for the electronic mass media to observe the prohibition of the speech inciting to racial hatred or the discrimination as it is stipulated in the Constitution, the international human rights treaties binding on Latvia, and in national laws.

Apart from the reference to other legal acts, there are some restrictions on dissemination of hate speech included in the Law itself. For instance Article 17 of the law which prescribes the general principles for the production of programmes states, *inter alia*, that the programme: *“...shall not include the incitement to hatred based on nationality, race, sex or religion or to the demeaning of national honour and human dignity.”*⁶³¹ Contrary to the provisions of the Press Law and the Civil law, this provision emphasizes the defamation of dignity and honour not only in relation to some individual, but also regarding some national or ethnic group. It is essential to note that expressions inciting to racial discrimination and hatred in many cases are not targeted at one particular individual, but at the whole racial, national or religious group in abstract. The defamation laws, which refer to the violation of the honour and dignity of individuals, might be difficult to apply to these cases, since there is a need for individual to prove that by defaming the group he/she represents also his/her honour and dignity has been infringed. Furthermore, the law on the Radio and Television stipulates restrictions regarding the adverts and television shops. Article 20 of the Law *inter alia* states that the advertisement and the television shop may not include any

⁶³⁰ “The Law on Radio and Television”, adopted on 24 August 1995, Published in *Latvijas Vēstnesis* [Official Gazette], No.137 (420), 08.09.1995.

⁶³¹ Point 3, Article 17 of the Law. Ibid.

discrimination based on race, sex or nationality.⁶³² The Part 5 of the same provision might be at least partly applicable to the limitations of the speech inciting to racial hatred. It prohibits: “...to encourage behaviour which threatens human life or safety.”⁶³³ The Point 11 of the same Article also provides that the liability for the distribution of such forbidden commercial or television shop rests both on the advertiser and the broadcasting organization.

Similarly as the Press Law, the Law on the Radio and Television provides for the possibility to request retraction of the information disseminated if it was found to be false.⁶³⁴ The problems to apply retraction to value judgements expressing hatred were already discussed in the analysis of Press Law. Another remedy the Law provides is the right to claim distribution of reply.⁶³⁵ However, this remedy as well as the right to claim financial compensation for immaterial injury suffered⁶³⁶ might be invoked only in those situations when the person’s honour and dignity has been defamed through the dissemination of untrue statements of fact. The explanation for such a narrow understanding of violation of persons honour and dignity in Law lies in a practice of courts, which have applied until recently the Article 2352 (1) of the Civil Law, which provides a general basis to claim satisfaction in cases of defamation only to dissemination of false facts. As mentioned earlier, the expressions that are racially defamatory are usually conveyed in the form of opinions. Therefore, the victims of racially defamatory views, which insult the dignity and honour of person or group of persons, are left virtually without no protection under this law. In such cases there is no possibility to request apology, since the law does not provide for such remedy. However, the general provisions in civil and criminal law on liability and right to claim satisfaction for moral injury are applicable also to the communication in electronic mass media.

⁶³² “The Law on Radio and Television”, adopted on 24 August 1995, Published in *Latvijas Vēstnesis* [Official Gazette], No.137 (420), 08.09.1995.

⁶³³ *Ibid.*

⁶³⁴ Article 36 of the Law. *Ibid.*

⁶³⁵ Article 37 of the Law. *Ibid.*

⁶³⁶ Article 38 of the Law. *Ibid.*

3. Latvian legal framework and international human rights standards

After the examination of Latvian legislation and practice in previous sub-chapters, this section of thesis is devoted to the comparative assessment of domestic and international law and jurisprudence. This analysis has a practical goal. It aims to identify the areas at domestic level, where there is incompatibility with international legal obligations of the state and suggest solutions to remedy this situation. In view of the fact that Latvian jurisprudence on striking the balance between the freedom of expression and prohibition of hate speech is very scarce and in the process of development, this study involves discussion on various proposals, how the domestic legal framework could be improved. In some situations there is a need to make amendments in legislation, in others the improvements can be achieved through adjustments in the practice of courts and law enforcement authorities. Furthermore, there could be cases of conflicting interests involved when the national institutions could only minimize the risk of being found in violation of international obligations, because the various international standards, even at the same level, can sometimes point at different directions. An example to mention is the different positions of UN HRC and CERD on the generally worded restrictions on freedom of expression, like for example the prohibition of holocaust denial.⁶³⁷ In these situations the courts and other law enforcement authorities should do a very careful consideration of all interests involved and reflect that in their decision.

While the primary aim of this analysis is to achieve a maximum level of harmony between the international and national rules and practice, another equally important goal is to identify those solutions at the domestic level, which would strengthen the safeguards for various values involved in the discussion on the right of freedom of expression and its restrictions. The introduction part of this chapter already illustrated the high level of co-relation between the national and international law and the significant impact of international human rights standards on the development and enforcement of national Bill of Rights. Therefore, the international norms and rules are not only a tool to measure the national legal framework, but can also serve as source of for further development at national level, particularly in areas where there has been hardly any practice so far. Among such issues are for instance the regulation of the liability of Internet service providers and

⁶³⁷ See the Chapter II Sub-chapter 3 on comparison between the ICCPR and ICERD.

other actors connected to the free flow of information on the Internet. As the relevant UN and European standards for comparison I will use the ones binding on Latvia and analyzed in previous chapters. It includes both major UN treaties relevant for discussions on the freedom of expression and speech inciting to hatred, namely ICCPR and ICERD, and the principles settled on this issue at the European level by the ECHR and ECRI. Furthermore, I will refer also to the jurisprudence of relevant monitoring bodies, which is indispensable to understand the content of these standards and the way they have been applied in practice. I will generally make a reference to international standards and will quote specific documents only in those cases, when the rules contained therein differ substantially from other international documents. I will start with analysis of common and different elements at the national and international level and will indicate those issues where these differences are so fundamental that they infringe international obligations of the state. Afterwards, I will elaborate suggestions for future development, both to make the domestic practice in compliance with international one and to establish rules in grey areas, where there has been no practice so far.

The common and different elements at the domestic and international legal framework

There are no fundamental differences between the both levels in the way the right to the freedom of expression and the right to equality and non-discrimination has been formulated in legal acts and applied in practice. This is understandable if one takes into account that national legal framework was developed in the 90ties after the country regained independence. The acceptance of international standards was a precondition for the political goal of Latvian authorities to enter the major universal and regional organizations. However, in comparison with western democracies which in most cases were parties negotiating the major human rights treaties, Latvia had to join to established rules, which were supplemented by substantial jurisprudence of monitoring bodies developed over time.

These rules developed by HRC and CERD as well as European Court of Human Rights influenced substantially national legislation. For example, the Bill of Rights in the Latvian Constitution was adopted only in 1998 and the existing international standards played a significant role in the parliamentary discussions on the content of the fundamental rights chapter. However, various international human rights treaties and mechanisms did not provide a one common set of principles

as concerns the balance between the rights to freedom of expression and the prohibition of speech inciting hatred. Thus, also the relevant national legislation was at variance with some of the standards established by international bodies and for example does not explicitly cover all forms of hate speech. Furthermore, both domestic and international institutions at the first years of the fragile democracy were probably more concerned with the guarantees for the freedom of expression rather than prohibition of hate speech.

The jurisprudence of international human rights monitoring bodies was equally important in a subsequent application of the fundamental rights in practice by the Constitutional Court and to less extent also by ordinary courts. Furthermore, the transformation of legal thinking and the interpretation of national norms according to international rules continued to be a problem for a much longer time than adoption of the appropriate legislation. As noted earlier there were several reasons for this. Among the main ones were the lack of knowledge among the law enforcement officials about the content and interpretation of relevant international rules as well as the inherited attitude from Soviet period to consider international human rights clauses merely as declaratory norms.

However, today both the national legislation and practice has affirmed that the right to the freedom of expression might be restricted in order to safeguard other human rights. Moreover, this principle, which is reflected in human rights treaties⁶³⁸ considered in this thesis, is established at the constitutional level. The Constitution in contrast to some national laws⁶³⁹ and international treaties makes no specific reference to the speech inciting to hatred or discrimination as a basis for limitations on the freedom of expression. The explanation for this might be the fact that there is one general limitation clause, which is applicable to most basic rights guaranteed by the Constitution. However, the discussions among Latvian legal academics as well as the case-law⁶⁴⁰ of the Constitutional Court allows to conclude that the restriction of hate speech is subsumed under such generally worded legitimate aims as for example: the rights of other persons or the public order. Similar practice has been applied by the European Court of Human Rights in interpreting Article 10

⁶³⁸ See Part 3 of Article 19 of ICCPR and Part 2 of Article 10 of ECHR in the Appendix.

⁶³⁹ For example “The Law on the Press and Other Mass Media”, adopted on 12 December 1990, Published in *Ziņotājs* [Official Edition], No.5, 14.02.1991.

⁶⁴⁰ See the Judgement of The Constitutional Court of the Republic of Latvia in Case No.2000-05-01, “On the Compliance of Article 271 of the Criminal Law with Articles 91 and 100 of the Satversme [Constitution] of the Republic of Latvia”, paragraphs 24-25. Accessible at: [http://www.satv.tiesa.gov.lv/Eng/Spriedumi/05-01\(03\).htm](http://www.satv.tiesa.gov.lv/Eng/Spriedumi/05-01(03).htm) (last visited 28.04.2006)

of the ECHR, which also does not specify hate speech among the legitimate aims to restrict the freedom of expression. Contrary to this, both relevant UN human rights treaties do contain a separate provision, which not only legitimized but makes it an obligation for states to prohibit incitement to hatred and discrimination.

However, while it is a common principle that hate speech might be restricted, there are concerns that national legal framework does not cover all instances of incitement to hatred and discrimination. The types of speech required to be outlawed and groups protected differ also among international treaties. Some instruments prohibit only incitement to hatred and violence others are contain broader restriction, including public defamation and contempt of certain minority groups or individual representatives of these groups. Moreover, such vulnerable group as homosexual minorities is not expressively covered by any of the international mechanisms examined. The only legally binding document in Europe, which makes explicit reference to sexual orientation among the prohibited grounds of discrimination is EU Directive on equal treatment in employment and occupation.⁶⁴¹ But the Directive applies only to employment and occupation issues and is limited also to the member-states of EU. In addition to this EU Directive, the sexual orientation apparently is included among the list of non-discrimination grounds in Additional Protocol 12 of the ECHR, which just entered into force. While the sexual orientation is not expressly mentioned, the list of non-discrimination grounds in the Protocol is not exhaustive and as follows from the Explanatory Report to the Protocol safeguards against the discrimination apply also to this group.⁶⁴² In addition the European Court of Human Rights has even prior the adoption of Protocol No 12 declared that distinction based on person's sexual orientation is not acceptable under the Convention.⁶⁴³

⁶⁴¹ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Paragraph 12.

Accessible at: http://ec.europa.eu/employment_social/news/2001/jul/directive78ec_en.pdf (last visited 14.08.2006)

⁶⁴² Paragraph 20 of the Explanatory Report to the Protocol 12 states: "The list of non-discrimination grounds in Article 1 is identical to that in Article 14 of the Convention. This solution was considered preferable over others, such as expressly including certain additional non-discrimination grounds (for example, physical or mental disability, sexual orientation or age), not because of a lack of awareness that such grounds have become particularly important in today's societies as compared with the time of drafting of Article 14 of the Convention, but because such an inclusion was considered unnecessary from a legal point of view since the list of non-discrimination grounds is not exhaustive, and because inclusion of any particular additional ground might give rise to unwarranted a contrario interpretations as regards discrimination based on grounds not so included." Accessible at: <http://conventions.coe.int/Treaty/en/Reports/html/177.htm> (last visited 14.08.2006)

⁶⁴³ *Salgueiro Da Silva Mouta v. Portugal*, European Court of Human Rights, Judgment of 21 December 1993, Paragraph 36. Accessible at HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 13.05.2006)

Furthermore, the differences among domestic and various international instruments appear when it comes to the status of various rights involved in this discussion and the mechanism, how the limitations on freedom of expression might be applied. The *Satversme* contains both the guarantees for the right to the freedom of expression and the right to equality and non-discrimination. An additional right guaranteed by Constitution which is invoked frequently in order to restrict hate speech is the protection of personal honour and dignity. The Constitutional Court has so far only once decided on the legitimacy of restrictions on the right to the freedom of expression, when this right was allegedly threatened by the provision of Criminal Law protecting the honour and dignity of state officials. In this case the Court acknowledged that there is a conflict between the two fundamental rights. This case illustrates that the Constitutional Court does not attribute to the freedom of expression a privileged position among other human rights and would apparently follow the same reasoning if the right to freedom of expression would collide with the right to equality. Such approach is in contrast with the practice of the European Court of Human Rights, which assess only whether the limitations on the freedom of expression are legitimate.⁶⁴⁴ But the position of the European Human Rights Court might be explainable by the fact that the Convention does not openly state the guarantees for the protection of personal honour and dignity⁶⁴⁵ as well as until the adoption of Additional Protocol No 12 did not include a free-standing right to equality. However, the differences as regards the status of the freedom of expression and other fundamental rights does not necessarily lead to opposite results, because the European Court has justified restrictions on the expressions inciting to hatred and discrimination in most cases. The only additional value of recognition of both rights is that such legal framework permits to derive a positive obligation on state to restrict the speech inciting to discrimination.

The ICCPR similarly as the Latvian Constitution contains safeguards for all rights involved. The ICERD in contrast establishes strong guarantees for non-discrimination, but includes very weak counterbalancing elements to ensure also the right to the freedom of expression, when the different values collide. The Article 4 of the ICERD obliges the states to ban expressions inciting to hatred

⁶⁴⁴ For example in the Judgment of *Sunday Times v. The United Kingdom* the Court stated: “The Court is faced not with a choice between two conflicting principles but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted.” Paragraph 65. *The Sunday Times v. The United Kingdom*, European Court of Human Rights, Judgment of 26 April 1979. Accessible at the HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 19.06.2006)

⁶⁴⁵ However, the protection of the reputation could be considered as part of the concept of private life that is protected by Article 8 of the Convention. See for example the Concurring Opinion of judge Thomassen in the case of *Chauvy and others v. France*, European Court of Human Rights, Judgment of 29 June 2004. Accessible at HUDOC data base: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 30.04.2006)

and discrimination with due regard, *inter alia*, to the freedom of expression. However, the CERD in practice has never justified the abstention of states to ban certain expressions on the basis that there was a need to safeguard the right to the freedom of expression. There is weak or no assessment of the need to ensure proper guarantees for the right to the freedom of expression when the Committee considers individual petitions about the alleged violations of Article 4 of ICERD.

As stated above both the international rules and domestic laws include legitimate aims to limit the hate expressions. However, there are slight differences between international and national level as regards the third requirement for restrictions on freedom of expression, namely, the “necessity in the democratic society”. Article 116 of the *Satversme* which establishes the conditions for limitation of a number of fundamental rights guaranteed by the Constitution requires only that the restriction should be provided by law and should pursue one of the legitimate aims stated in this provision. Despite this fact, the case-law of Constitutional Court affirms that in order the restriction of basic rights could be found in compliance with constitution it should also be necessary and proportional to the legitimate aim pursued. The Court has derived this element from the notion of democracy and the Article 1 of the Constitution, which declares that “Latvia is an independent democratic republic.”⁶⁴⁶ The requirement to consider the necessity of restrictions in the democratic society is directly stated in second part of Article 10 of the ECHR. However, it has evolved only through practice also in the jurisprudence of HRC, but is not directly mentioned in Article 19⁶⁴⁷ of ICCPR. Furthermore, the Covenant apart from Article 19 contains separate provision which obliges the state to prohibit certain forms of hate speech, namely Article 20.⁶⁴⁸ It does not include any reference to assessment of the necessity of limitations. In one of the first cases⁶⁴⁹ involving hate speech the HRC in fact justified the restrictions imposed on the freedom of expression on the basis of Article 20 and did not analyze the necessity or proportionality of restrictions. But in a subsequent case the Committee abandoned this practice and examined Article 20 in conjunction with the preconditions for the legitimacy of restrictions in Article 19.⁶⁵⁰ The ICERD as noted earlier contains hardly any

⁶⁴⁶ Constitution of the Republic of Latvia. Accessible at:

http://www.saeima.lv/Likumdosana_eng/likumdosana_satversme.html (last visited 30.05.2006)

⁶⁴⁷ For the text of the relevant provision see the Appendix.

⁶⁴⁸ Ibid.

⁶⁴⁹ Communication *J.R.T. and the W.G. Party v. Canada*, No. 104/1981: Canada. 06/04/83. CCPR/C/18/D/104/1981.(Jurisprudence) Accessible at:

[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/be24fa123874d7b7c1256abe0047f366?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/be24fa123874d7b7c1256abe0047f366?Opendocument) (last visited 20.08.2006)

⁶⁵⁰ See the Communication *Ross v. Canada*, No 736/2000: Canada. 26/10/2000. CCPR/C/70/D/736/1997. (Jurisprudence) Accessible at:

counterbalancing elements to the obligation to prohibit speech inciting to hatred or discrimination. However, the CERD in examining the individual complaints as regards alleged violation of Article 4 of the Convention has referred in its decisions to such elements as the public or private scope of hate speech, seriousness of insulting expressions, which might constitute at least some components of proportionality requirement. Yet, the obligation under Article 4 of the Convention to declare as an offence and apply the criminal law to wide range of expressions covered by this provision might itself raise the issue of proportionality of restrictions, at least as regards some expressions.

4. Conclusions

There are no fundamental problems between domestic and international legal framework concerning the restrictions on hate speech, while ensuring safeguards for the freedom of expression. However, the practice of application of relevant norms, especially low number of cases as regards suppression of hate speech, has been criticized by international human rights monitoring bodies.⁶⁵¹ The existing differences in law relate to specific issues and occasionally are the result of lack of harmonized approach to this issue at the international level. There are minor shortcomings in all examined branches of domestic law, except the constitutional law. The major inadequacies to suppress hate speech expressions, however, exist in the Criminal Law. As mentioned above the necessity to prove the direct intent of the person to incite to national or racial hatred in order to apply criminal law sanctions has lead to the situation when there are few proceedings instituted and hardly any resulted in the conviction. This situation might be rectified if the authorities lower the threshold for proof of direct intent or by amending the law in a way that the existence of intent, whether direct or indirect, is sufficient to initiate proceedings. However, in view of the chilling effect of criminal sanctions on the freedom of expression less severe forms of hate speech, for example the incitement to discriminate without calls for hatred and violence against certain group,

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/29712c8ddea3414dc12569ad003d0316?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/29712c8ddea3414dc12569ad003d0316?Opendocument)

(last visited 10.09.2006)

⁶⁵¹ See Concluding observations of the Committee on the Elimination of Racial Discrimination: Latvia. 10/12/2003. CERD/C/63/CO/7. Accessible at:

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/a44f934b64de2d92c1256e0100568248?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/a44f934b64de2d92c1256e0100568248?Opendocument)

(last visited 15.07.2006)

See also ECRI Second report on Latvia, adopted on 14 December 2001. Accessible at:

http://www.coe.int/t/e/human_rights/ecri/1%2Decri/2%2Dcountry%2Dby%2Dcountry_approach/latvia/latvia_cbc_2.asp#P139_22686 (last visited 10.07.2006)

might be covered by the Administrative Penal Code. Such a balanced approach to this issue is reflected also in the Additional Protocol of the CE to the Cybercrime Convention.⁶⁵² Furthermore, Article 78 of the Criminal Law does not prohibit discrimination of such broad group as civil and political rights. One way to correct this inadequacy is through appropriate practice and interpretation of this provision according to its aim, since the title of Article 78 is “Violation of National or Racial Equality and Restriction of Human Rights.” Another solution is to amend this provision supplementing it with this group of human rights. This clause of Criminal Law covers also only limited acts of hate expressions, namely, those inciting to hatred and discrimination as well as excludes from its scope of protection certain minority groups, as for example sexual minorities. Lastly, the Criminal Law does not make the racist motive an aggravating circumstance of the offence, which would allow to use more effectively other norms of the law, for example the ones protecting the personal honour and dignity, to suppress the various manifestations of hate speech. In a number of situations the victims of hate speech can use the remedies available under the civil law to claim satisfaction for moral harm suffered. However, it is an obligation of State institutions to investigate such cases and apply sanctions to those responsible under criminal law or administrative penal law in order to prevent such acts in the future.

The situation as regards available remedies under civil law has been recently improved and Article 1635 of the Civil Law in principle can serve as a basis for victims of outlawed expressions to claim satisfaction for moral injury. The concept of moral injury applies both to physical and mental suffering caused as a result of unlawful acts committed to the non-financial rights or non-financial benefit delicts of the person. However, as regards some forms of hate speech the victims such expressions are under obligation to prove the moral injury suffered. Thus, whether the requirement of proof will not create insurmountable obstacles to claims and this provision would offer a real remedy for the ones suffered from the speech inciting to hatred and discrimination depend on the practice of courts, which is only developing. Apart from this provision Article 2352 (1) of Law, which protects the honour and dignity of person can assist victims of those expressions which are racially defamatory. While originally this provision of Civil law has been interpreted in a way as to apply only to untrue statements of fact, the recent case-law illustrates the trend that this clause of Civil Law is applicable also to expression of defamatory value judgements.

⁶⁵² Additional Protocol to the Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems. Adopted by the Council of Europe on 28 January 2003. Accessible at: <http://conventions.coe.int/Treaty/EN/Treaties/Html/189.htm> (last visited 01.07.2006).

The similar problem with accessible remedies and applicable sanctions in cases of dissemination of outlawed information is found in media law. While some provisions of laws regulating both the press and audiovisual media are directly prohibiting the publication or broadcasting of hate speech, the sanctions are provided only as regards the dissemination of untrue statements. As mentioned above the expressions inciting to hatred or defaming the person are usually conveyed in the form of value judgements and not presented like facts. The significant results in limiting the frequency of hate speech in media might also be achieved by adopting codes of conduct and establishing professional bodies to monitor them. The initiative aimed to decrease the manifestations of hate and intolerance on the Internet has recently been adopted by main national Internet portals. However, the Internet continues to represent the main area of concern as far as dissemination of hate material is concerned. While there are no special legal measures at national level aimed to tackle specific problems with the suppression of hate speech on the Internet, well elaborated and balanced rules are presented in the CE Cybercrime Convention and its Additional protocol, which the government should consider to ratify.

Conclusions and suggestions

1. The right to freedom of expression is one of the foundations of a democratic society. This right is indispensable for the functioning of democratic institutions and for the participation of citizens in the public life. The ability to freely express criticism and to exchange opinions about the government policies in different areas is essential in order to ensure that accepted solutions do not become dogmas, but their adequacy to the social developments is constantly reviewed and compared with alternatives. Furthermore, the freedom of expression is precondition for the individual progress and self-fulfilment. It allows the individuals to assess their ideas and search for truth through discussions with other members of the society

2. At the same time the right to the freedom of expression has enormous power, which might be abused. Therefore, the exercise of this right is not absolute. The expressions which encourage hatred and discrimination are among those manifestations of the freedom of expression which are restricted in the human rights treaties of the United Nations and the European human rights documents as well as legal acts of European states. Such expressions can endanger other fundamental human rights, as for example the right to equal treatment and human dignity. In some cases they might jeopardize even the right to life. Genocide and mass murders do not emerge from nothing.⁶⁵³ Prior to such crimes, political leaders usually disseminate hate speech against some minority group, in order to acquire support in the society for the ensuing violence. The history of Europe: the holocaust perpetrated by the Nazi regime and the recent tragic events in Balkans illustrate consequences, if such expressions are not limited in due time. In both cases the physical attacks were preceded by verbal ones.

3. International human rights documents do not comprise a unified approach as regards balancing the right to the freedom of expression and the prohibition of hate speech. There are different historical events which prompted their adoption. Therefore the specific aims of these legal sources vary. All the United Nations and European human rights treaties and other documents analyzed in the thesis provide the possibility to restrict the freedom of expression. Moreover, the case-law confirms that treaty monitoring and other human rights bodies are inclined to recognize the limitations on the freedom of expression in situations when the exercise of this right conflicts with the prohibition of incitement to hatred and discrimination. However, the practice diverge as regards the principles used to assess the need for restrictions and the legal remedies provided against

outlawed expressions. For example some human rights documents emphasize the need for criminalization of such expressions, other ones provide also for civil liability and self-regulatory measures. There is a need for interaction among different legal remedies in order to find the adequate balance between the analyzed interests in various situations.

4. There are two avenues in the jurisprudence of the Human Rights Committee and the European Court of Human Rights as regards assessment of the complaints on the restriction of the freedom of expression. They are examined on merits or declared inadmissible. The last approach has been often used in relation to manifestations of hate speech and it may be justified concerning such obvious manifestations of hate as for example incitement to violence. However, to avoid undue limitations in less clear situations the emphasis should be on the examination of complaints on merits. For instance, the inadmissibility decisions frequently miss the examination of the proportionality of imposed sanctions and do not contain elaborated argumentation as regards the necessity of restrictions.

5. The conflicting approaches among various human rights mechanisms in balancing the right to the freedom of expression and the prohibition of hate speech undermine the possibility to enforce international human rights law at the national level. The states may invoke the standards adopted within one treaty monitoring body in order to justify the non-compliance with their legal obligations under another treaty. It also creates the legal uncertainty, which becomes apparent in situations when national institutions have to take into account obligations established by different treaty monitoring bodies in their decision making process. To avoid violation of their international obligations various states have made reservations in relation to those articles, which oblige states to prohibit certain manifestations of hate speech. In order to ensure the broader acceptance and implementation of such provisions there is a need for closer cooperation among the analyzed United Nations and European human rights mechanisms. It is important to prevent situations when human rights monitoring bodies treat in essentially different way similar situations, unless there is a reasonable justification for that, as for example the particular historical experience of various countries and regions.

6. The states which have not made reservations or interpretative declarations cannot fully exclude that the way they balance the different interests involved might be recognized as inappropriate in any of the treaty monitoring bodies. However, the national institutions have a chance to reduce such

⁶⁵³ Wibke Kristin Timmermann, *The Relationship between Hate Propaganda and Incitement to Genocide: A New Trend in International Law Towards Criminalization of Hate Propaganda?*, *Leiden Journal of International Law*, 18 (2005), pp. 257–282.

risk. The international human rights treaties monitoring bodies often find a violation on a sole basis that the challenged expressions are not properly assessed at the national level. Therefore, it is important that national courts and law-enforcement authorities make a thorough consideration of all interests involved and display in their decision arguments which have motivated the adoption of particular solution.

7. The development in modern communication technologies, especially the emergence of the Internet, has rendered it necessary to search for a more harmonized approach to the balancing of the different interests involved. An international^[B1] internet or cyberspace law would be the most appropriate form of regulating transnational communication. However, the development of a suitable legal framework depends on the possibility of the states and various human rights institutions to approximate their positions as regards freedom of expression and its restrictions.

8. An analysis^[B2] of the situation in various European countries suggests that manifestations of hate speech within the political discourse is an increasing problem. In view of the influence of politicians on public opinion such a trend can create threats to social peace and weaken the democratic institutions in the long term. On the other hand, political speech is of particular importance in democratic society, and it is essential to ensure that various political forces have a possibility to express freely their opinion about issues of public interest. Therefore, in limiting the manifestations of hate^[B3] speech in the political discourse the emphasis should be placed on self-regulating measures and civil law remedies. Only extreme forms of hatred as for example incitement to violence ought to be criminalized. Ideally, the people would be the ones who express their position against the dissemination of hatred in the political discourse by denying the support to politicians during the elections. However, the history of Europe illustrates that this issue cannot be left just for the voters to decide.

9. The balancing of the freedom of expression and its restrictions, including the prohibition of hate speech, is a relatively new phenomenon in Latvia. Formally, human rights were formulated already in legal acts adopted by the totalitarian regime. However, the implementation of the civil and political rights, including the right to the freedom of expression, became possible only after the change of the country's political system and restoration of the independence. Similarly, the legal provisions prohibiting hate crimes were in principle of declaratory character, because the censorship in the Soviet Union made it impossible to publicize any manifestations of hatred. Thus, people got an illusion that hate crimes do not exist in the Latvian society. This heritage of the past and the lack of experience among the law enforcement officials in investigating hate crimes have lead to the

situation that the ones responsible for disseminating hate speech are rarely brought to justice. The balancing of the freedom of expression and the prohibition of hate speech in national legal practice were influenced also by a number of external factors. First, one can mention the case-law of the European Court of Human Rights, which has emphasized the importance of the right to the freedom of expression. Second, the reluctance of authorities to combat incitement to racial hatred and discrimination was influenced by the fact that Latvia has not acknowledged the right of the Committee on the Elimination of Racial Discrimination to consider individual communications from individuals under its jurisdiction.

10. The Latvian Constitution and ordinary statutes provide a balanced approach to the freedom of expression and the prohibition of hate speech. However, the national law does not cover all forms of hate speech. Moreover, the way the provisions outlawing such speech are applied in practice by law enforcement authorities frequently makes these norms ineffective. In some situations the existing shortcomings might be corrected by altering the practice of courts and law enforcement authorities in the implementation of respective provisions. This is for example the case as regards the practice of courts to apply provisions of Civil Law. However, there are situations when it is necessary to make amendments in the legislation and to draft new legal acts.

11. There are two provisions in Latvian Criminal Law which prohibit incitement to hatred and discrimination: Articles 78 and 150. These clauses contain several shortcomings. They provide protection only against those expressions which incite to hatred or discrimination against the person on such grounds as race, national or ethnic origin, and religious affiliation. However, there are other vulnerable groups in the society which would need the protection of law. For example, during the last years the representatives of sexual minorities have most frequently been the targets of hate expressions. Sexual orientation as a prohibited ground of incitement to discrimination and hatred is included in the legislation of many European countries.

Furthermore, Article 78 of the Criminal Law prohibits discrimination against the person only as regards the enjoyment of economic, political and social rights. It does not include civil and cultural rights. This deficiency might be corrected by amending the respective legal norm. Alternatively, one can consider a possibility to interpret and to apply Article 78 according to its aim, because the title of this provision is "*Violation of National or Racial Equality and Restriction of Human Rights*".

12. According to the legal doctrine and case-law, Article 78 of the Criminal Law is applicable only to those cases, where the person has disseminated outlawed expressions with direct intent to incite

to racial hatred or discrimination. The direct intent means that the accused has foreseen the consequences of the offence and has desired such. The lack of proof that the person in question has expressed for instance racist slogans with intent to instigate racial hatred is among the most common reasons why the proceedings are terminated during the pre-trial investigation. Moreover, in practice the law enforcement authorities often consider the consequences of the challenged expressions, despite the fact that Article 78 of the Criminal Law does not include such criteria. This fact and the high threshold for the proof of intent make an obstacle to combat such crimes. Besides, there are no other effective legal remedies available under Criminal Law for the protection of the targeted racial or ethnic groups. Therefore, the existing situation contradicts Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination. This provision obliges the states to criminalize dissemination of any ideas based on racial superiority or hatred, and incitement to racial discrimination. Some Latvian legal experts consider that existing deficiencies might be rectified by lowering a threshold for the proof of direct intent in practice. Others emphasize the need to amend Article 78 of the Criminal Law, namely to remove the obligation to prove the direct intent. The compliance with international standards might be achieved also by providing the Criminal Law with a clause outlawing the violation of a person's honour or dignity on the basis of his or her group affiliation. Such an article would apply to those manifestations of hate speech, which are not within the scope of Article 78, but are enough serious to be proscribed by criminal law.

13. The search for a balance between the right to freedom of expression and the prohibition of hate speech has been evident also in the laws regulating the press and other media. In view of the largeness of the accessible audience, the media could become a convenient tool for dissemination of hatred. At the same time the media has a special role of "public watchdog" in a democratic society. Therefore, any restrictions on media freedom should be carefully examined. It is essential that law enforcement officials separate the cases when journalists have informed society about the phenomenon of racism from the ones when journalists themselves have actively propagated racist ideas.

Latvian Law on the Press and Other Mass Media and Law on the Radio and Television include the prohibition to publish or broadcast different manifestations of hate speech. However, these laws neither cover all forms of hatred, nor all groups which would need the protection against such expressions. There are also obstacles as regards the possibility to enforce sanctions in cases of

unlawful acts. Therefore, certain amendments in the legislation are necessary. The dissemination of hatred in media might be reduced also by giving more weight to self-regulatory measures, like codes of ethics. However, in order such measures are effective there is a need for authoritative media professional organization, which could follow how the various media observe these professional standards and could give its opinion in the situations of conflict.

14. There are no specific national law provisions which would regulate to the public communication on the Internet. It is precisely the Internet environment, where the expressions inciting to hatred and discrimination are found most frequently. The communication on the Internet is not exempt from the rules of Civil Law and Criminal Law. However, the provisions of these laws do not provide the solution for all situations taking into account the specific factors of the communication on the Internet. For example in considering the application of criminal sanctions, it is necessary to observe the division of liability among the Internet service provider, owner of home page, the author of disputed expressions and other persons involved in the dissemination of information. The fact that the disseminators of hate speech on the Internet are usually anonymous might create obstacles to bring a civil action. In order to make the protection against incitement to hatred more effective the solution could be to elaborate a separate legal act, which would take into account the specific factors related to combating the hate speech on the Internet.

Appendix

The relevant provisions of international law and statutes of the Republic of Latvia referred to in the thesis:

International law

- **Universal Declaration of Human Rights**

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 19

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

- **International Convention on the Elimination of All Forms of Racial Discrimination**

Article 1

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

2. This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.

3. Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.

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

Article 4

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

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

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

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

Article 6

States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

Article 14 Part 1

A State Party may at any time declare that it recognizes the competence of the Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that State Party of any of the rights set forth in this Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.

- International Covenant on Civil and Political Rights

Article 2 Part 1

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 5 Part 1

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

Article 19

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

Article 20

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

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

Article 26

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

- European Convention for the Protection of Human Rights and Fundamental Freedoms

Article 10

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

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

Article 17

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

Statutes of the Republic of Latvia

- **Constitution of the Republic of Latvia**

Article 91

All human beings in Latvia shall be equal before the law and the courts. Human rights shall be realised without discrimination of any kind.

Article 95

The State shall protect human honour and dignity. Torture or other cruel or degrading treatment of human beings is prohibited. No one shall be subjected to inhuman or degrading punishment.

Article 100

Everyone has the right to freedom of expression, which includes the right to freely receive, keep and distribute information and to express their views. Censorship is prohibited.

- **Civil Law**

Article 1635

Every delict, that is, every wrongful act per se, as a result of which harm has been caused (also moral injury), shall give the person who suffered the harm therefrom the right to claim satisfaction from the infringer, insofar as he or she may be held at fault for such act.

By moral injury is understood physical or mental suffering, which are caused as a result of unlawful acts committed to the non-financial rights or non-financial benefit delicts of the person who suffered the harm. The amount of compensation for moral injury shall be determined by a

court at its own discretion, taking into account the seriousness and the consequences of the moral injury.

If the unlawful acts referred to in Paragraph two of this section are expressed as criminal offences against a person's life, health, morals, inviolability of gender, freedom, honour, dignity or against the family, or minors, it is presumed that the person who suffered the harm as a result of such acts has been done moral injury. In other cases moral injury shall be proved by the person who suffered the harm.

Note. The term act is used here within the widest meaning, including not only acts, but also the failure to act, that is, inaction.

Article 2352¹

Each person has the right to bring court action for retraction of information that injures his or her reputation and dignity, if the disseminator of the information does not prove that such information is true.

If information, which injures a person's reputation and dignity, is published in the press, then where such information is not true, it shall also be retracted in the press. If information, which injures a person's reputation and dignity, is included in a document, such document shall be replaced. In other cases, a court shall determine the procedures for retraction.

If someone unlawfully injures a person's reputation and dignity orally, in writing or by acts, he or she shall provide compensation (financial compensation). A court shall determine the amount of the compensation.

- Criminal Law

Article 78

(1) For a person who commits acts knowingly directed towards instigating national or racial hatred or enmity, or knowingly commits the restricting, directly or indirectly, of economic, political, or social rights of individuals or the creating, directly or indirectly, of privileges for individuals based on their racial or national origin,
the applicable sentence is deprivation of liberty for a term not exceeding three years or a fine not exceeding sixty times the minimum monthly wage.

(2) For a person who commits the same acts, if they are associated with violence, fraud or threats, or where they are committed by a group of persons, a State official, or a responsible employee of an undertaking (company) or organisation,
the applicable sentence is deprivation of liberty for a term not exceeding ten years.

Article 156

For a person who commits intentional defamation or demeaning of the dignity of a person orally, in writing, or by acts,
the applicable sentence is a fine not exceeding fifty times the minimum monthly wage.

Article 157

For a person who knowingly commits intentional distribution of fictions, knowing them to be untrue and defamatory of another person, in printed or otherwise reproduced material, as well as orally, if such has been committed publicly (bringing into disrepute), the applicable sentence is a fine not exceeding sixty times the minimum monthly wage.

Article 158

For a person who commits intentional defamation or bringing into disrepute in mass media, the applicable sentence is deprivation of liberty for a term not exceeding one year, or custodial arrest, or community service, or a fine not exceeding thirty times the minimum monthly wage.

- **Law on the Press and other Mass Media**

Part 1 Article 7 “Information not for Publication”

It is prohibited to publish information which is an official secret or other secret especially protected by law that promotes violence and the overthrow of the prevailing order, advocates war, cruelty, racial, national or religious superiority and intolerance, and incites to the commission of some other crime.

- **The Law on the Radio and Television**

Point 3 Article 17 “General Provisions for the Production of Programmes” states, inter alia, that:

“A programme shall not include:

...incitement to hatred based on nationality, race, sex, or religion or to the demeaning of national honour and human dignity; incitement to ... commit any other crime.”

Point 3 Article 20 “General Provisions Regarding Commercials and Teleshops”

“Commercials and teleshops may not:

~ injure human dignity; include any discrimination based on race, sex or nationality; ...encourage behaviour which threatens human health or safety....”

Part 1 Article 38 of the Law on Radio and Television “Civil Liability for Injury”

Pursuant to the provisions of The Civil Law and other laws the broadcasting organisation shall compensate for injuries, including moral injuries, caused to a natural or legal person by the provision of information in a broadcast that injures the honour or dignity of a person, if it does not prove that such information corresponds to the truth.

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