

**ECRI GENERAL POLICY  
RECOMMENDATION NO. 15**

**ON  
COMBATING HATE SPEECH**

**ADOPTED ON 8 DECEMBER 2015**

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COUNCIL OF EUROPE



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## **The European Commission against Racism and Intolerance (ECRI):**

Reaffirming the fundamental importance of freedom of expression and opinion, tolerance and respect for the equal dignity of all human beings for a democratic and pluralistic society;

Recalling, however, that freedom of expression and opinion is not an unqualified right and that it must not be exercised in a manner inconsistent with the rights of others;

Recalling moreover that Europe derives from its history a duty of remembrance, vigilance and combat against the rise of racism, racial discrimination, gender-based discrimination, sexism, homophobia, transphobia, xenophobia, antisemitism, islamophobia, anti-Gypsyism and intolerance, as well as of crimes of genocide, crimes against humanity or war crimes and the public denial, trivialisation, justification or condonation of such crimes;

Recalling that this duty of remembrance, vigilance and combat is an integral part of the protection and promotion of universal and indivisible human rights, standing for the rights of every human being;

Taking note of the differing ways in which hate speech has been defined and is understood at the national and international level as well as of the different forms that it can take;

Considering that hate speech is to be understood for the purpose of the present General Policy Recommendation as the advocacy, promotion or incitement, in any form, of the denigration, hatred or vilification of a person or group of persons, as well as any harassment, insult, negative stereotyping, stigmatization or threat in respect of such a person or group of persons and the justification of all the

preceding types of expression, on the ground of "race",<sup>1</sup> colour, descent, national or ethnic origin, age, disability, language, religion or belief, sex, gender, gender identity, sexual orientation and other personal characteristics or status;

Recognising that hate speech may take the form of the public denial, trivialisation, justification or condonation of crimes of genocide, crimes against humanity or war crimes which have been found by courts to have occurred, and of the glorification of persons convicted for having committed such crimes;

Recognising also that forms of expression that offend, shock or disturb will not on that account alone amount to hate speech and that action against the use of hate speech should serve to protect individuals and groups of persons rather than particular beliefs, ideologies or religions;

Recognising that the use of hate speech can reflect or promote the unjustified assumption that the user is in some way superior to a person or a group of persons that is or are targeted by it;

Recognising that the use of hate speech may be intended to incite, or reasonably expected to have the effect of inciting others to commit, acts of violence, intimidation, hostility or discrimination against those who are targeted by it and that this is an especially serious form of such speech;

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<sup>1</sup> Since all human beings belong to the same species, ECRI rejects theories based on the existence of different races. However, in this Recommendation ECRI uses this term "race" in order to ensure that those persons who are generally and erroneously perceived as belonging to another race are not excluded from the protection provided for by the Recommendation.

Aware of the grave dangers posed by hate speech for the cohesion of a democratic society, the protection of human rights and the rule of law but conscious of the need to ensure that restrictions on hate speech are not misused to silence minorities and to suppress criticism of official policies, political opposition or religious beliefs;

Conscious of the particular problem and gravity of hate speech targeting women both on account of their sex, gender and/or gender identity and when this is coupled with one or more of their other characteristics ;

Recognising that the use of hate speech appears to be increasing, especially through electronic forms of communication which magnify its impact, but that its exact extent remains unclear because of the lack of systematic reporting and collection of data on its occurrence and that this needs to be remedied, particularly through the provision of appropriate support for those targeted or affected by it;

Aware that ignorance and insufficient media literacy, as well as alienation, discrimination, indoctrination and marginalisation, can be exploited to encourage the use of hate speech without the real character and consequences of such speech being fully appreciated;

Stressing the importance of education in undermining the misconceptions and misinformation that form the basis of hate speech and of the need for such education to be directed in particular to the young;

Recognising that an important means of tackling hate speech is through confronting and condemning it directly by counter-speech that clearly shows

its destructive and unacceptable character;

Recognising that politicians, religious and community leaders and others in public life have a particularly important responsibility in this regard because of their capacity to exercise influence over a wide audience ;

Conscious of the particular contribution that all forms of media, whether online or offline, can play both in disseminating and combating hate speech;

Conscious of the harmful effects suffered by those targeted by hate speech, the risk of alienation and radicalisation ensuing from its use and the damage to the cohesion of society from failing to tackle it;

Recognising that self-regulation and voluntary codes of conduct can be an effective means of preventing and condemning the use of hate speech and that their use needs to be encouraged;

Stressing the importance of those targeted by hate speech being themselves able to respond to it through counter-speech and condemnation as well as through bringing proceedings in the competent courts and authorities;

Recognising that criminal prohibitions are not in themselves sufficient to eradicate the use of hate speech and are not always appropriate, but nevertheless convinced that such use should be in certain circumstances criminalised;

Bearing in mind the six-point threshold test in the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence and being convinced that

criminal prohibitions are necessary in circumstances where hate speech is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination against those targeted by it;

Stressing the importance of not supporting organisations that facilitate the use of hate speech and the need to prohibit ones that do so when this is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination against those targeted by it;

Stressing the need for a prompt and effective investigation into complaints about hate speech and avoiding unduly restrictive interpretations of provisions concerning its use;

Recalling that the duty under international law to criminalise certain forms of hate speech, although applicable to everyone, was established to protect members of vulnerable groups and noting with concern that they may have been disproportionately the subject of prosecutions or that the offences created have been used against them for the wrong reasons;

Recalling that the work of ECRI focuses on hate speech on the grounds of “race”, colour, language, religion, nationality, national or ethnic origin, gender identity or sexual orientation but recognising that hate speech can also be based on all the other considerations already noted, and that the recommendations contained in this text should be applied *mutatis mutandis* to them;

Recommends that the governments of member States:

1. **ratify the Additional Protocol to the Convention on Cybercrime, concerning criminalisation of acts of a racist and xenophobic nature committed through computer systems, the Framework Convention for the Protection of National Minorities and Protocol No. 12 to the European Convention on Human Rights, if they have not yet done so;**
2. **withdraw any reservations to Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination and to Article 20 of the International Covenant on Civil and Political Rights and recognise the competence of the Committee on the Elimination of Racial Discrimination to receive and consider communications from individuals or groups of individuals under Article 14;**
3. **seek to identify the conditions conducive to the use of hate speech as a phenomenon and the different forms it takes, as well as to measure its extent and the harm that it causes, with a view to discouraging and preventing its use and to reducing and remedying the harm caused, and accordingly:**
  - a. develop reliable tools for this purpose;
  - b. ensure that there are public authorities designated for the purpose of using these tools and that this is done properly;

- c. ensure that the gathering of data on hate speech is not limited to the criminal justice sector;
- d. ensure that the data gathered is appropriately disaggregated;
- e. support the monitoring of hate speech by civil society, equality bodies and national human rights institutions and promote cooperation in undertaking this task between them and public authorities;
- f. support research that seeks to analyse the conditions conducive to the use of hate speech and its forms ;
- g. disseminate, on a regular basis, data about the incidence of hate speech, as well as its forms and the conditions conducive to its use, both to the relevant public authorities and to the public; and
- h. draw on the results of the monitoring and the research to develop strategies to tackle the use of hate speech;

**4. undertake a vigorous approach not only to raising public awareness of the importance of respecting pluralism and of the dangers posed by hate speech but also to demonstrating both the falsity of the foundations on which it is based and its unacceptability, so as to discourage and prevent the use of such speech, and accordingly:**

- a. promote a better understanding of the need for diversity and dialogue within a framework of democracy, human rights and the rule of law;
- b. promote and exemplify mutual respect and understanding within society;
- c. facilitate and exemplify intercultural dialogue; and
- d. combat misinformation, negative stereotyping and stigmatisation;
- e. develop specific educational programmes for children, young persons, public officials and the general public and strengthen the competence of teachers and educators to deliver them;
- f. support non-governmental organisations, equality bodies and national human rights institutions working to combat hate speech; and
- g. encourage speedy reactions by public figures, and in particular politicians, religious and community leaders, to hate speech that not only condemn it but which also seek to reinforce the values that it threatens;
- h. encourage perpetrators to renounce and repudiate the use of hate speech and help them to leave groups that use it;

- i. coordinate all such efforts, where appropriate, with those undertaken by other States and international organisations;

**5. provide support for those targeted by hate speech both individually and collectively, and accordingly:**

- a. endeavour to help them, through counselling and guidance, to cope with any trauma and feeling of shame suffered;
- b. ensure that they are aware of their rights to redress through administrative, civil and criminal proceedings and are not prevented from exercising them through fear, ignorance, physical or emotional obstacles or lack of means;
- c. encourage and facilitate their reporting of the use of hate speech, as well as the reporting of it by others who witness such use;
- d. sanction detrimental treatment or harassment of any person complaining about or reporting on the use of hate speech; and
- e. show solidarity with and provide long-term support for persons targeted by hate speech;

**6. provide support for self-regulation by public and private institutions (including elected bodies, political parties, educational institutions and cultural and sports organisations) as a means of combating the use of hate speech, and accordingly:**

- a. encourage the adoption of appropriate codes of conduct which provide for suspension and other sanctions for breach of their provisions, as well as of effective reporting channels;
- b. encourage political parties to sign the Charter of European Political Parties for a non-racist society;
- c. promote the monitoring of misinformation, negative stereotyping and stigmatisation;
- d. encourage the unambiguous condemnation of breaches of these codes;
- e. support appropriate training as to the meaning and negative effects of hate speech, as well as about the ways in which its use can be challenged; and
- f. promote and assist the establishment of complaints mechanisms;

- 7. use regulatory powers with respect to the media (including internet providers, online intermediaries and social media), to promote action to combat the use of hate speech and to challenge its acceptability, while ensuring that such action does not violate the right to freedom of expression and opinion, and accordingly:**
- a. ensure effective use is made of any existing powers suitable for this purpose, while not disregarding self-regulatory mechanisms;
  - b. encourage the adoption and use of appropriate codes of conduct and/or conditions of use with respect to hate speech, as well as of effective reporting channels;
  - c. encourage the monitoring and condemnation of the use and dissemination of hate speech;
  - d. encourage the use, if necessary, of content restrictions, word filtering bots and other such techniques;
  - e. encourage appropriate training for editors, journalists and others working in media organisations as to the nature of hate speech, the ways in which its use can be challenged;
  - f. promote and assist the establishment of complaints mechanisms; and
  - g. encourage media professionals to foster ethical journalism;
- 8. clarify the scope and applicability of responsibility under civil and administrative law for the use of hate speech which is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination against those who are targeted by it while respecting the right to freedom of expression and opinion, and accordingly:**
- a. determine the particular responsibilities of authors of hate speech, internet service providers, web fora and hosts, online intermediaries, social media platforms, online intermediaries, moderators of blogs and others performing similar roles;
  - b. ensure the availability of a power, subject to judicial authorisation or approval, to require the deletion of hate speech from web-accessible material and to block sites using hate speech;
  - c. ensure the availability of a power, subject to judicial authorisation or approval, to require media publishers (including internet providers, online intermediaries and social media platforms) to publish an acknowledgement that something they published constituted hate speech;
  - d. ensure the availability of a power, subject to judicial authorisation or approval, to enjoin the dissemination of hate speech and to compel the disclosure of the identity of those using it;



- e. provide standing for those targeted by hate speech, equality bodies, national human rights institutions and interested non-governmental organisations to bring proceedings that seek to delete hate speech, to require an acknowledgement that it was published or to enjoin its dissemination and to compel the disclosure of the identity of those using it; and
  - f. provide appropriate training for and facilitate exchange of good practices between judges lawyers and officials who deal with cases involving hate speech;.
- 9. withdraw all financial and other forms of support by public bodies from political parties and other organisations that use hate speech or fail to sanction its use by their members and provide, while respecting the right to freedom of association, for the possibility of prohibiting or dissolving such organisations regardless of whether they receive any form of support from public bodies where their use of hate speech is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination against those targeted by it;**
- 10. take appropriate and effective action against the use, in a public context, of hate speech which is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination against those targeted by it through the use of the criminal law provided that no other, less restrictive, measure would be effective and the right to freedom of expression and opinion is respected, and accordingly:**
- a. ensure that the offences are clearly defined and take due account of the need for a criminal sanction to be applied;
  - b. ensure that the scope of these offences is defined in a manner that permits their application to keep pace with technological developments;
  - c. ensure that prosecutions for these offences are brought on a non-discriminatory basis and are not used in order to suppress criticism of official policies, political opposition or religious beliefs;
  - d. ensure the effective participation of those targeted by hate speech in the relevant proceedings;
  - e. provide penalties for these offences that take account both of the serious consequences of hate speech and the need for a proportionate response;
  - f. monitor the effectiveness of the investigation of complaints and the prosecution of offenders with a view to enhancing both of these;
  - g. ensure effective co-operation/co-ordination between police and prosecution authorities;

- h. provide appropriate training for and facilitate exchange of good practices by law enforcement officers, prosecutors and judges who deal with cases involving hate speech; and
- i. cooperate with other States in tackling the transfrontier dissemination of hate speech, whether in a physical or electronic format.

# Explanatory Memorandum

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## A. Introduction

1. This general policy recommendation (hereafter: the Recommendation) focuses on the phenomenon of hate speech and the damaging consequences of its use for individuals, certain groups of persons and society as a whole. These consequences have been noted particularly in the course of ECRI's country monitoring but are more generally appreciated. The Recommendation thus sets out ECRI's understanding of what constitutes hate speech and identifies the measures that can and need to be taken to combat its use. In so doing, it builds upon and strengthens certain aspects of General Policy Recommendations (GPR) Nos. 5, 6, 9 10 and 13, but especially GPR No. 7.
2. The starting point for the Recommendation is the recognition of the fundamental importance of freedom of expression, tolerance and respect for equal dignity, all of which are guaranteed under numerous international instruments accepted by member States of the Council of Europe. ECRI is aware, in particular, that any efforts to tackle hate speech should never exceed the limitations to which freedom of expression, as a qualified right, can legitimately be subjected. It is also aware that in some cases hate speech can be effectively responded to without restricting freedom of expression. For this reason, the Recommendation has a graduated approach to the measures that need to be undertaken. In particular, the view that the use of criminal sanctions should not be the primary focus of action against the use of hate speech reflects not only the importance of respecting the rights to freedom of expression and association but also an appreciation that addressing the conditions conducive to the use of hate speech and vigorously countering such use are much more likely to prove effective in ultimately eradicating it.
3. A definition of hate speech for the purpose of the Recommendation is set out in the recitals. In the operative part, the Recommendation first addresses the need, where this has not already occurred, for certain treaties to be ratified, as well as for a number of reservations to two other treaties to be withdrawn. In both cases, this is to reinforce the commitment to take appropriate measures against the use of hate speech and to ensure that there are no legal inhibitions on them being taken. It then underlines the need for various steps to be taken to increase understanding of the conditions conducive to the use of hate speech and the different forms it can take as this is recognised to be a prerequisite for any measures against such use to be effective.
4. The specific measures against the use of hate speech that ECRI considers to be necessary comprise efforts that involve: raising public awareness; countering any use of hate speech; providing support to those targeted by such use; promoting self-regulation; taking regulatory action; imposing administrative and civil liability; withdrawing support from particular organisations and prohibiting others; and imposing criminal sanctions in some very specific and limited circumstances.
5. The Recommendation is addressed to the governments of Council of Europe member States. However, its effective implementation will clearly require the involvement and commitment of a wide range of private and non-governmental actors, in addition to the public ones. It will, therefore, be essential to ensure that appropriate steps are taken to secure their active participation in the process of implementation.

6. Although the Recommendation is particularly concerned with the use of hate speech falling within ECRI's work, its provisions are envisaged as being applicable to all forms of such speech, i.e., on grounds additional to "race", colour, language, religion, nationality, national or ethnic origin, gender identity or sexual orientation.

## **B. Definition(s)**

### ***Terminology***

7. For the purposes of this Recommendation, the following definitions shall apply:
- a. "**advocacy**" in connection with denigration, hatred or vilification shall mean the explicit, intentional and active support for such conduct and attitudes with respect to a particular group of persons;
  - b. "**alienation**" shall mean the withdrawal of a person from the society in which he or she lives and of his or her commitment to its values;
  - c. "**anti-Gypsyism**"<sup>2</sup> shall mean racism which is directed against Roma/Gypsies;
  - d. "**antisemitism**" shall mean prejudice against, hatred of, or discrimination against Jews as an ethnic or religious group;
  - e. "**condonation**" shall mean the excusing, forgiving or overlooking of particular conduct;
  - f. "**crimes against humanity**" shall mean any of the acts listed in Article 7 of the Rome Statute of the International Criminal Court when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack;
  - g. "**denigration**" shall mean the attack on the capacity, character or reputation of one or more persons in connection with their membership of a particular group of persons;
  - h. "**discrimination**" shall mean any differential treatment based on a ground such as "race", colour, language, religion, nationality or national or ethnic origin, as well as descent, belief, sex, gender, gender identity, sexual orientation or other personal characteristics or status, which has no objective and reasonable justification<sup>3</sup>;
  - i. "**gender**" shall mean the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men<sup>4</sup>;
  - j. "**gender identity**" shall mean each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modifications of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerism<sup>5</sup>;

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<sup>2</sup> ECRI's GPR No. 13 defines anti-Gypsyism as a specific form of racism, an ideology founded on racial superiority, a form of dehumanisation and institutional racism nurtured by historical discrimination, which is expressed, among others, by violence, hate speech, exploitation, stigmatisation and the most blatant kind of discrimination.

<sup>3</sup> GPR No. 7. This does not explicitly cover discrimination on grounds of descent, belief, sex, gender, gender identity and sexual orientation but the grounds listed are not exhaustive and the GPR's provisions can be applied mutatis mutandis to discrimination based on other personal characteristics or status.

<sup>4</sup> Article 3 of the Council of Europe Convention on preventing and combating violence against women and domestic violence.

<sup>5</sup> Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity.

- k. **“genocide”** shall mean any of the acts listed in Article 6 of the Rome Statute of the International Criminal Court committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group;
- l. **“glorification”** shall mean the celebrating or praising of someone for having done something;
- m. **“hatred”** shall mean a state of mind characterised as intense and irrational emotions of opprobrium, enmity and detestation towards the target group<sup>6</sup>;
- n. **“Holocaust denial”** shall mean the act of denying, questioning or admitting doubts, in whole or in part, with the respect to the historical fact of the genocide of Jews during the Second World War;
- o. **“homophobia”** shall mean prejudice against, hatred towards, or fear of homosexuality or of people who are identified or perceived as being bisexual, gay, lesbian or transgender;
- p. **“hostility”** shall mean a manifestation of hatred beyond a mere state of mind<sup>7</sup>;
- q. **“incitement”** shall mean statements about groups of persons that create an imminent risk of discrimination, hostility or violence against persons belonging to them;
- r. **“Islamophobia”** shall mean prejudice against, hatred towards, or fear of the religion of Islam or Muslims;
- s. **“marginalisation”** shall mean the making of a group of persons feel or be isolated or unimportant and thereby limiting their participation in society;
- t. **“media literacy”** shall mean the knowledge, skills and attitude required to engage with all forms of media, including, in particular, an understanding of its role and functions in democratic societies and the ability both to critically evaluate media content and to engage with media for the purpose of self-expression and democratic participation;
- u. **“negative stereotyping”** shall mean the application to a member or members of a group of persons of an generalised belief about the characteristics of those belonging to that group that involves viewing all of them in a poor light regardless of the particular characteristics of the member or members specifically concerned;
- v. **“radicalisation”** shall mean the process whereby someone adopts extreme political, religious or social values which are inconsistent with those of a democratic society;
- w. **“racism”** shall mean the belief that a ground such as “race”, colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons<sup>8</sup>;
- x. **“Roma”** shall mean not only Roma but also Sinti, Kali, Ashkali, “Egyptians”, Manouche and kindred population groups in Europe, together with Travellers<sup>9</sup>;
- y. **“sex”** shall mean a person’s biological status;
- z. **“sexual orientation”** shall mean each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual

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<sup>6</sup> Principle 12.1 of the Camden Principles on Freedom of Expression and Equality.

<sup>7</sup> Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/67/357, 7 September 2012, para. 44.

<sup>8</sup> GPR No. 7. Although religion is not included in the definition of racial discrimination in Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination, the Committee on the Elimination of Racial Discrimination recognises, in the light of the principle of intersectionality, that racist hate speech extends to speech “targeting persons belonging to certain ethnic groups who profess or practice a religion different from the majority, including expressions of Islamophobia, anti-Semitism and other similar manifestations of hatred against ethno-religious groups, as well as extreme manifestations of hatred such as incitement to genocide and to terrorism”. *General Recommendation No. 35 on Combating racist hate speech*, CERD/C/GC/35, 26 September 2013, para. 6.

<sup>9</sup> GPR No. 13.

- relations with, individuals of a different gender or the same gender or more than one gender<sup>10</sup>;
- aa. “**status**” shall mean a person’s legal or factual situation, covering not only having a particular marital, migrant or professional status but also factors such as birth outside marriage, disability, financial position, health, imprisonment, membership of a trade union or other body and place of residence;
  - bb. “**stigmatisation**” shall mean the labelling of a group of persons in a negative way;
  - cc. “**transphobia**” shall mean prejudice against, hatred towards, or fear of transsexuality and transsexual or transgender people, based on the expression of their internal gender identity;
  - dd. “**trivialisation**” shall mean the making of something seem unimportant or insignificant;
  - ee. “**vilification**” shall mean the abusive criticism of one or more persons in connection with their membership of a particular group of persons;
  - ff. “**violence**” shall mean the use of physical force or power against another person, or against a group or community, which either results in, or has a high likelihood of resulting in, injury, death, psychological harm, maldevelopment or deprivation<sup>11</sup>;
  - gg. “**vulnerable groups**” shall mean those groups who are particularly the object of hate speech, which will vary according to national circumstances but are likely to include asylum seekers and refugees, other immigrants and migrants, Black and Jewish communities, Muslims, Roma/Gypsies, as well as other religious, historical, ethnic and linguistic minorities and LGBT persons; in particular it shall include children and young persons belonging to such groups;
  - hh. “**war crimes**” shall mean any of the acts listed in Article 8 of the Rome Statute of the International Criminal Court; and
  - ii. “**xenophobia**” shall mean prejudice against, hatred towards, or fear of people from other countries or cultures.

#### ***Definition of hate speech***

- 8. As already indicated, the understanding of hate speech for the purpose of the Recommendation is set out in its recitals. It reflects the different contexts, aims and effects of the use of hate speech and is matched by the **varying responses** appropriate to it. This reflects an appreciation that **member States may give effect to it through a combination of existing and new measures**.
- 9. Hate speech for the purpose of the Recommendation entails the use of one or more particular forms of expression – namely, the advocacy, promotion or incitement of the denigration, hatred or vilification of a person or group of persons, as well any harassment, insult, negative stereotyping, stigmatization or threat of such person or persons and any justification of all these forms of expression – that is based on a non-exhaustive list of personal characteristics or status that includes “race”, colour, language, religion or belief, nationality or national or ethnic origin, as well as descent, age, disability, sex, gender, gender identity and sexual orientation.

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<sup>10</sup> Yogyakarta Principles.

<sup>11</sup> Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/67/357, 7 September 2012, para. 44.



10. The significant elements in the Recommendation's understanding as to what constitutes hate speech that differ from those found in many other documents are its application to:
- advocacy, promotion or incitement, in any form, of the denigration, hatred or vilification as well as; harassment, insult, negative stereotyping, stigmatisation or threat;
  - use that is not just intended to incite the commission of acts of violence, intimidation, hostility or discrimination but also such use that can reasonably be expected to have that effect; and
  - grounds that go beyond "race", colour, language, religion or belief, nationality national or ethnic origin and descent.
11. "**Expression**" is understood in the Recommendation to cover speech and publications in any form, including through the use of electronic media, as well as their dissemination and storage. Hate speech can take the form of written or spoken words, or other forms such as pictures, signs, symbols, paintings, music, plays or videos. It also embraces the use of particular conduct, such as gestures, to communicate an idea, message or opinion.
12. In addition, the forms of expression coming within the scope of the Recommendation can also include the public denial, trivialisation, justification or condonation of crimes of genocide, crimes against humanity or war crimes which have been found by courts to have occurred and the glorification of persons for having committed such crimes. The condition that the crimes involved must actually have been found by courts to have occurred is intended to ensure that loose accusations about particular conduct do not then form the basis for claims that certain statements amount to hate speech. Moreover, the glorification of persons who have committed such crimes only amounts to hate speech where this is specifically concerned with them having done this and does not extend to positive assessments of any other, unrelated activity by the persons concerned.
13. At the same time, the Recommendation specifically excludes from the definition of hate speech any form of expression – such as **satire or objectively based news reporting and analysis** - that merely offends, hurts or distresses. In doing so, the Recommendation reflects the protection for such expression which the European Court of Human Rights has found is required under Article 10 of the European Convention on Human Rights<sup>12</sup>. Nonetheless, it is recalled that the European Court has also recognised that incitement to hatred can result from insulting, holding up to ridicule or slandering specific groups of the population where such forms of expression are exercised in an irresponsible manner – which might entail being unnecessarily offensive, advocating discrimination or using of vexatious or humiliating language or might involve an unavoidable imposition on the audience<sup>13</sup> - and these forms would also come within the scope of the Recommendation's definition.

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<sup>12</sup> See, e.g., *Jersild v. Denmark* [GC], no. 15890/89, 23 September 1994, *Sürek and Özdemir v. Turkey* [GC], no. 23927/94, 8 July 1999, *Giniewski v. France*, no. 64016/00, 31 January 2006, *Alves da Silva v. Portugal*, no.41665/07, 20 October 2009 and *Fáber v. Hungary*, no. 40721/06, 24 July 2012.

<sup>13</sup> See, e.g., *Féret v. Belgium*, no. 15615/07, 16 July 2007 and *Vejdeland and Others v. Sweden*, no. 1813/07, 9 February 2012.

14. The Recommendation further recognises that, in some instances, a particular feature of the use of hate speech is that it may be intended to incite, or can reasonably be expected to have the effect of inciting, others to commit acts of violence, intimidation, hostility or discrimination against those targeted by it. As the definition above makes clear, **the element of incitement** entails there being either a clear intention to bring about the commission of acts of violence, intimidation, hostility or discrimination or an imminent risk of such acts occurring as a consequence of the particular hate speech used.
15. Intent to incite might be established where there is an unambiguous call by the person using hate speech for others to commit the relevant acts or it might be inferred from the strength of the language used and other relevant circumstances, such as the previous conduct of the speaker. However, the existence of intent may not always be easy to demonstrate, particularly where remarks are ostensibly concerned with supposed facts or coded language is being used.
16. On the other hand, the assessment as to whether or not there is a risk of the relevant acts occurring requires account to be taken of the specific circumstances in which the hate speech is used. In particular, there will be a need to consider (a) the context in which the hate speech concerned is being used (notably whether or not there are already serious tensions within society to which this hate speech is linked); (b) the capacity of the person using the hate speech to exercise influence over others (such as by virtue of being a political, religious or community leaders); (c) the nature and strength of the language used (such as whether it is provocative and direct, involves the use of misinformation, negative stereotyping and stigmatisation or otherwise capable of inciting acts of violence, intimidation, hostility or discrimination); (d) the context of the specific remarks (whether or not they are an isolated occurrence or are reaffirmed several times and whether or not they can be regarded as being counter-balanced either through others made by the same speaker or by someone else, especially in the course of a debate); (e) the medium used (whether or not it is capable of immediately bringing about a response from the audience such as at a “live” event); and (f) the nature of the audience (whether or not this had the means and inclination or susceptibility to engage in acts of violence, intimidation, hostility or discrimination).
17. The different circumstances relevant for this risk assessment reflect many aspects of the text in the Rabat Plan of Action for expressions to be considered as criminal offences<sup>14</sup>. However, they go beyond them – and also the scope of the Recommendation in paragraph 18 of GPR No. 7 with respect to the criminal law<sup>15</sup> - in one respect, namely, in recognising that intent to incite the commission of acts of violence, intimidation, hostility or discrimination is not essential for this especially serious form of hate speech. Rather, it is considered also to be capable of being used where the commission of those acts can reasonably be expected to be the effect of using the hate speech concerned. Where this effect can reasonably be expected from a particular use of hate speech, it would thus be reckless for it to be used.

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<sup>14</sup> For the content of the Rabat Plan of Action, see para. 59 below.

<sup>15</sup> “The law should penalise the following acts when committed intentionally: a) public incitement to violence, hatred or discrimination, b) public insults and defamation or c) threats against a person or a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin”.

18. This approach is consistent with rulings of the European Court of Human Rights that have upheld the compatibility with Article 10 of the European Convention on Human Rights of the imposition of criminal sanctions for remarks made where it should have been appreciated that these were likely to exacerbate an already explosive situation<sup>16</sup>.
19. Nonetheless, the imposition of restrictions other than criminal sanctions where there is a reasonable expectation of a particular use of hate speech having the effect of inciting others to commit acts of violence, intimidation, hostility or discrimination against those targeted by it could, in the specific circumstances, be a more proportionate response to the pressing social need which this use creates.
20. The definition of hate speech is not restricted to expressions **used in public**. However, the use of hate speech in this context is a consideration that is especially relevant for certain of its forms, such as the denial, trivialisation, justification or condonation of crimes of genocide, crimes against humanity or war crimes. Moreover, it may also be a significant factor in determining whether or not a particular use of hate speech can reasonably be expected to have the effect of inciting others to commit acts of violence, intimidation, hostility or discrimination against those targeted by it. Furthermore, the existence of a public context is an essential requirement when it is recommended that criminal sanctions be imposed on certain uses of hate speech as this limits the extent of interference with the right to freedom of expression. An expression should be considered to have been used in public where this occurred in any physical place or through any electronic form of communication to which the general public have access.
21. Hate speech is, as has been seen, concerned with various forms of expression directed against a person or group of persons on the ground of the personal characteristics or status of the person or group of persons and action against it does not necessarily entail the imposition of criminal sanctions. However, when hate speech takes the form of conduct that is in itself a criminal offence – such as conduct that is abusive, harassing or insulting – it may also be referred to as hate crime<sup>17</sup>.

### **C. Context**

22. The Recommendation has been adopted at a time when there is increasing concern within member States, the Council of Europe and other organisations about the use of hate speech in Europe's diverse society, as well as about its role in undermining self-respect of the members of vulnerable groups, damaging cohesion and inciting others to commit acts of violence, intimidation, hostility or discrimination. This concern has been exacerbated by many incidents in which individuals, institutions, memorials and property have been subjected to actual violent attacks on account of a hostility to them founded on one or more of the grounds enumerated above. Therefore there should be a prompt response to hate speech - making use of the large spectrum of measures suggested by the Recommendation - in order to avoid the development of negative attitudes towards, in particular, minority groups, leading to their loss of self-respect and endangering their integration into mainstream society.

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<sup>16</sup> See, e.g., *Zana v. Turkey* [GC], no. 18954/91, 25 November 1997 and *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, 8 July 1999.

<sup>17</sup> Hate crime is a criminal act motivated by bias or prejudice towards a particular group of people; <http://hatecrime.osce.org/what-hate-crime>.

### **Data**

23. The actual extent to which hate speech is being used remains uncertain, even though the impression is that, as the Recommendation notes, this is becoming more commonplace. This uncertainty is attributable to the **absence of comprehensive and comparable data** regarding complaints about the use of hate speech, resulting from complaints either not being recorded or the varying criteria by which member States regard such use as having occurred. Moreover, it is evident that those targeted by hate speech do not always report it, often for lack of confidence in the justice system or for fear of action being taken against them. Furthermore, it does not seem that all complaints made about its use are investigated. In addition, there is no systematic monitoring of all fora in which such speech might be used. Nonetheless, there is no doubt that the use of hate speech is both more visible and more readily spread as a result of the widespread availability of electronic forms of communication. Furthermore, the use of hate speech has been a notable feature of the situation that has been found to exist in many member States in the course of ECRI's 4<sup>th</sup> and 5<sup>th</sup> monitoring cycles.

### **ECRI's country monitoring findings**

24. Thus, amongst the findings of ECRI's country monitoring in these two cycles have been the explicit publication in certain media of clearly racist content, the praise of Nazism and the denial of the Holocaust, the use of offensive language and stereotypes in connection with particular minorities and the making of derogatory comments about persons belonging to them on the streets, in schools and in shops, as well as actual calls for the use of violence against them and certain campaigns against the use of minority languages. Although there have certainly been instances noted of political parties and other groups and organisations cultivating and disseminating racist, xenophobic and neo-Nazi ideas, the use of hate speech has not been limited to ones that are extremist and outside the mainstream. Thus, **the employment of a rude tone in many parliaments and by state officials** has been found to contribute to a public discourse that is increasingly offensive and intolerant. Such discourse has been exacerbated by some high-level politicians not being inhibited from using hate speech in their pronouncements. Furthermore, attempts by public figures to justify the existence of prejudice and intolerance regarding particular groups, which only tends to perpetuate and increase hostility towards them, have also been noted.
25. Not all the hate speech in use is so explicit, with some publications relying on **"coded" language** to disseminate prejudice and hatred. For example, reference is made to people who don't work and survive on state benefits when a particular minority is intended and protests against such a minority are reported as being by the "good people" of the country when this is by a neo-Nazi group. In addition, it has been observed that the sensational or partial coverage of particular events can spread misinformation and give rise to fear, creating prejudice for those belonging to the minority that might be involved in them.
26. The use of hate speech has been noted to be a particular feature of some electronic forms of communication, with web pages, forums and social networks forums having that as a primary purpose and some using such speech even when they are hosted by local government bodies<sup>18</sup>.

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<sup>18</sup> See, e.g., C. Bakalis, *Cyberhate: An issue of continued concern for the Council of Europe's Anti-Racism Commission* (Council of Europe, 2015).

27. There have been many instances noted where no action had been taken against the use of hate speech, sometimes because of the restricted reach of national legislation but also because of its narrow interpretation, a reluctance to act in the absence of a specific complaint, the lack of a thorough investigation and the ruling out too readily of bringing proceedings against alleged perpetrators. Where such proceedings have been brought, the sanctions imposed have tended not to be a significant deterrent to repetition or emulation. Self-regulatory mechanisms have also not always proved to be effective.
28. Furthermore, the use of hate speech and the failure to tackle such use has **adverse consequences** both for those to whom it is specifically addressed and for society as a whole.
29. The former, as has been seen in ECRI's country monitoring, do not just suffer distress, hurt feelings and an assault upon their dignity and sense of identity. In addition, the use of hate speech also contributes to those targeted by it being subjected to discrimination, harassment, threats and violence as a result of the antipathy, hostility and resentment towards them that this use can engender or strengthen. Such attitudes and conduct can then lead to them feeling afraid, insecure and intimidated. Ultimately, the use of hate speech can lead to those targeted by it withdrawing from the society in which they live and even ceasing to be attached to its values. There has been concern, in particular, about the use of hate speech leading to the early dropping out of school of pupils, who then face problems in accessing the labour market and this in turn reinforces the separation of those concerned from society.
30. The use of hate speech is also damaging for society as a whole. It is not just that it has a negative impact on the character of public discourse. Of greater significance is the resulting climate of hostility and intolerance, together with a readiness to accept or excuse discrimination and violence, which is divisive, undermines mutual respect and threatens peaceful co-existence. The pluralism that is an essential requirement for a democratic society is thus being put at risk.
31. Those found in the ECRI country monitoring to be particularly affected by the use of hate speech have been immigrants, Jews, Muslims and Roma but it has not been restricted to them. Moreover, ECRI has also seen hate speech directed against persons on account of their sex, gender identity or sexual orientation. Furthermore, women can be subject to an aggravated form of hate speech in that this can be directed at them on account not just of their "race", religion or some other personal characteristic or status but also of their sex and/or gender identity.

#### ***Lessons from the past***

32. The use of hate speech is by no means just a current problem. It has been a significant element in the commission of crimes of genocide, crimes against humanity and war crimes. Such crimes have been a particular feature of recent European history. What happened in the past remains a stark warning of the dangers posed by allowing bigotry, hatred and prejudice to flourish unchallenged. Moreover, it has prompted the establishment of various commemorations, such as **International Holocaust Remembrance Day** proclaimed by the United Nations General Assembly in resolution 60/7 of 1 November 2005. Such commemorations are, however, intended to go beyond remembrance and to ensure that the lessons of the past are applied to the present. Furthermore, like resolution 60/7, the Recommendation recognises that the danger lies not in one particular form of intolerance but in

any form that questions the enjoyment of human rights and fundamental freedoms by everyone without distinction.

***United Nations treaties***

33. While this duty of remembrance is a prompt for taking action against the use of hate speech, more specific requirements to do so are found in Article 20(2) of the **International Covenant on Civil and Political Rights** (“Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”) and Article 4 of the **International Convention on the Elimination of All Forms of Racial Discrimination** (“States Parties ... (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof; (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognise 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”).
34. The failure to give effect to these requirements or to do so in an effective manner has been the subject of adverse comment by the United Nations Human Rights Committee and the Committee on the Elimination of Racial Discrimination respectively in their concluding observations on the periodic reports submitted by certain States Parties pursuant to the treaties concerned.
35. However, although legal prohibitions are required for the specific forms of expression addressed in Article 20 of the International Covenant on Civil and Political Rights, the Human Rights Committee has underlined that these must still be compatible with the restrictions on freedom of expression that are authorised by Article 19(3) (*General comment No. 34 Article 19: Freedoms of opinion and expression*, CCPR/C/GC/34, 12 September 2011, paras. 50-52).
36. At the same time the Committee on the Elimination of Racial Discrimination, while considering that “as a minimum requirement, and without prejudice to further measures, comprehensive legislation against racial discrimination, including civil and administrative law as well as criminal law, is indispensable to combating racist hate speech effectively”, has emphasised that the “relationship between proscription of racist hate speech and the flourishing of freedom of expression should be seen as complementary and not the expression of a zero sum game where the priority given to one necessitates the diminution of the other. The rights to equality and freedom from discrimination, and the right to freedom of expression, should be fully reflected in law, policy and practice as mutually supportive human rights” (*General Recommendation No. 35 Combating racist hate speech*, CERD/C/GC/35, 26 September 2013, paras. 9 and 45). This echoes the Committee’s earlier statement that “the prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression” and that the latter right “carries special duties and responsibilities, specified in article 29, paragraph 2, of the Universal Declaration, among which the obligation not to disseminate racist ideas is of particular importance” (*General Recommendation XV on article 4 of the Convention*, para. 4).

37. In its case law the United Nations Human Rights Committee has upheld as consistent with freedom of expression a conviction for challenging the conclusions and the verdict of the International Military Tribunal at Nuremberg in circumstances where the statements concerned were, read in their full context, of a nature to raise or strengthen antisemitic feelings<sup>19</sup>. It has similarly considered that the dismissal of a schoolteacher for statements denigrating the faith and belief of Jews and calling upon Christians to hold those of the Jewish faith and ancestry in contempt as an admissible restriction on freedom of expression for the purpose, amongst others, of protecting the right to have an education in the public school system free from bias, prejudice and intolerance<sup>20</sup>. However, a complaint about the alleged failure to take effective action against a reported incident of hate speech against Muslims was considered inadmissible as the author had not established that the statements had specific consequences for him or that such consequences were imminent and so he could not be regarded as a victim of a violation of Article 20(2) of the International Covenant on Civil and Political Rights<sup>21</sup>.
38. The Committee on the Elimination of Racial Discrimination has found violations of Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination where there was a failure to ensure that statements in a public speech that contained ideas based on racial superiority or hatred and which incited, at least, to racial discrimination were not protected by the right to freedom of expression<sup>22</sup>. It has also found a violation of this provision where there was a failure to carry out an investigation into whether certain statements made in a radio broadcast - which generalised negatively about an entire group of people based solely on their ethnic or national origin and without regard to their particular views, opinions or actions regarding the subject of female genital mutilation – amounted to racial discrimination<sup>23</sup>. In addition, the Committee has found a violation of Article 4 arising from a failure to carry out such an effective investigation in respect of statements depicting generalised negative characteristics of the Turkish population in Germany and calling for their denial of access to social welfare and for a general prohibition of immigration influx since it considered that the former contained ideas of racial superiority and the latter involved incitement to racial discrimination<sup>24</sup>.

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<sup>19</sup> *Faurisson v. France*, Communication No. 550/1993, Views of 8 November 1996. Referring to this case, the Human Rights Committee has, however, stated that “Laws that penalize the expression of opinions about historical facts are incompatible with the obligations that the Covenant imposes on States parties in relation to the respect for freedom of opinion and expression. The Covenant does not permit general prohibition of expressions of an erroneous opinion or an incorrect interpretation of past events. Restrictions on the right of freedom of opinion should never be imposed and, with regard to freedom of expression, they should not go beyond what is permitted in paragraph 3 or required under article 20”; with the restrictions on freedom of expression that are authorised by Article 19(3) (*General comment No. 34 Article 19: Freedoms of opinion and expression*, para. 49).

<sup>20</sup> *Ross v. Canada*, Communication No. 736/1997, Views of 18 October 2000.

<sup>21</sup> *A W P v. Denmark*, Communication No. 1879/2009, Decision of 1 November 2013. There was also considered to be a failure to substantiate the facts in respect of an alleged violation of Article 20(2) in *Vassilari v. Greece*, Communication No. 1570/2007, Views of 19 March 2009 but there were dissenting opinions on this issue by Abdelfattah Amor, Ahmad Amin Fathalla and Bouzid Lazhari.

<sup>22</sup> *The Jewish Community of Oslo et al. v. Norway*, Communication No. 30/2003, Opinion of 15 August 2005.

<sup>23</sup> *Adan v. Denmark*, Communication No. 43/2008, Opinion of 13 August 2010. A failure to carry out an investigation was similarly considered in *Gelle v. Denmark*, Communication No. 34/2004, Opinion of 6 March 2006 to entail a violation of Article 4

<sup>24</sup> *TBB-Turkish Union in Berlin/Brandenburg v. Germany*, Communication No. 48/2010, Opinion of 26 February 2013.

### ***The European Convention on Human Rights***

39. **The European Convention on Human Rights** guarantees freedom of expression under Article 10 and prohibits discrimination – in relation to other rights and freedoms under Article 14 and more generally pursuant to Article 1 of Protocol No. 12 – but it does not contain any provision directed specifically to the use of hate speech. Nonetheless, the European Court of Human Rights (and the former European Commission of Human Rights) has had to address such use when considering complaints about the imposition of criminal sanctions and other restrictions on certain statements. In doing so, it has either regarded the remarks in question as entirely outwith the protection afforded by the right to freedom of expression under Article 10 – relying on the prohibition in Article 17 on acts and activity aimed at the destruction of any of the rights and freedoms in the European Convention - or it has sought to judge whether the measures concerned were a restriction on the exercise of that freedom that could be regarded as serving a legitimate aim - such as for the protection of the rights of others - and as being necessary in a democratic society..
40. The former approach can be seen with regard to vehement attacks on a particular ethnic or religious group<sup>25</sup>, antisemitic statements<sup>26</sup>, the spreading of racially discriminatory statements<sup>27</sup> and Holocaust denial<sup>28</sup>. The latter approach has been followed in cases involving statements alleged to stir up or justify violence, hatred or intolerance. In respect of such cases, particular account has been taken of factors such as a tense political or social background, a direct or indirect call for violence or as a justification of violence, hatred or intolerance (particularly where there are sweeping statements attacking or casting in a negative light entire ethnic, religious or other groups), the manner in which the statements were made and their capacity – direct or indirect – to lead to harmful consequences. In all of them, the European Court has always been concerned about the interplay between the various factors rather than any one of them taken in isolation. Also material considerations for the Court in determining such cases will be whether or not the measures taken in respect of the statements concerned were disproportionate and whether or not civil or other remedies might have been used to deal with them<sup>29</sup>.

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<sup>25</sup> See, e.g., *Pavel Ivanov v. Russia* (dec.), no. 35222/04, 20 February 2007 and *Norwood v. United Kingdom* (dec.), no. 23131/03, 16 November 2004.

<sup>26</sup> See, e.g., *W P v. Poland* (dec.), no. 42264/98, 2 September 2004 and *M'Bala M'Bala v. France* (dec.), no. 25239/13, 20 October 2015

<sup>27</sup> See, e.g., *Glimmerveen and Hagenbeek v Netherlands* (dec.), no. 8438/78, 11 October 1979. See also *Jersild v. Denmark* [GC], no. 15890/89, 23 September 1994, at para. 35.

<sup>28</sup> See, e.g., *Honsik v. Austria* (dec.), no. 25062/94, 18 October 1995, *Marais v. France* (dec.), no. 31159/96, 24 June 1996, *Lehideux and Isorni v. France* [GC], no. 24662/94, 23 September 1998, at para. 47, *Garaudy v. France* (dec.), no. 65831/01, 24 June 2003, *Witzsch v. Germany* (dec.), no. 7485/03, 13 December 2005 and *M'Bala M'Bala v. France* (dec.), no. 25239/13, 20 October 2015. Cf. *Perinçek v. Switzerland* [GC], no. 27510/08, 15 October 2015, in which the European Court of Human Rights found there was no international obligation to prohibit genocide denial as such and that a criminal conviction for such denial was not justified in the absence of a call for hatred or intolerance, a context of heightened tensions or special historical overtones or a significant impact on the dignity of the community concerned (para. 280).

<sup>29</sup> See, the cases cited at footnotes. 11-13 as well as *Hennicke v. Germany* (dec.), no. 34889/97, 21 May 1997, *Incal v. Turkey* [GC], no. 22678/93, 9 June 1998, *Lehideux and Isorni v. France* [GC], no. 24662/94, 23 September 1998, *Witzsch v. Germany* (dec.), no. 41448/98, 20 April 1999, *Karataş v. Turkey* [GC], no. 23168/94, 8 July 1999, *Erdoğdu and İnce v. Turkey* [GC], no. 25067/94, 8 July 1999, *Özgür Gündem v. Turkey*, no. 23144/93, 16 March 2000, *Şener v. Turkey*, no. 26680/95, 18 July 2000, *Le Pen v. France* (dec.), no. 55173/00, 10 May 2001, *Osmani v. "the former Yugoslav Republic of Macedonia"*, no. 50841/99, 11 October 2001, *Gunduz v. Turkey* (dec.), no. 59745/97, 13 November 2003, *Gunduz v. Turkey*, no. 35071/97, 4 December 2003, *Seurot v. France* (dec.), no. 57383/00, 18 May 2004, *Maraşlı v.*



41. In addition, the European Court has recognised that there is a positive obligation for member States to protect those targeted by the use of hate speech from any violence or other interferences with their rights which such use may actually incite others to attempt<sup>30</sup>. Furthermore, discriminatory conduct is capable of amounting to a violation of the prohibition on inhuman and degrading treatment under Article 3 and such conduct could be regarded as ensuing from passivity – including the failure to enforce criminal provisions effectively – in the face of interferences with rights and freedoms under the European Convention<sup>31</sup>. Moreover, the European Court has also accepted that a failure to provide redress for insulting expression, notably in the form of negative stereotyping, that is directed to a particular group of persons could entail a violation of the positive obligation under Article 8 to secure effective respect for the right to private life of a member of that group on account of this expression amounting to an attack on his or her identity<sup>32</sup>.

#### **Other Europeans treaties**

42. Three other **Council of Europe treaties** deal specifically with the use of hate speech.
43. Thus, the **Additional Protocol to the Convention on Cybercrime**, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems requires member States to adopt legislative and other measures as may be necessary to establish as criminal offences the dissemination of racist and xenophobic material through computer systems and the use of computer systems to make racist and xenophobic motivated threats and insults and to deny, grossly minimise, approve or justify genocide or crimes against humanity.
44. Furthermore, the **European Convention on Transfrontier Television** requires that programme services shall not in be likely to incite to racial hatred. In addition, the Council of Europe **Convention on preventing and combating violence against women and domestic violence** refers to forms of violence against women that can also be manifestations of online/offline sexist hate speech: sexual harassment (Article 40) and stalking (Article 34) and requires that Parties take the necessary legislative or other measures.

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*Turkey*, no. 40077/98, 9 November 2004, *Dicle v. Turkey*, no. 34685/97, 10 November 2004, *Gumus and Others v. Turkey*, no. 40303/98, 15 March 2005, *Alinak v. Turkey*, no. 40287/98, 29 March 2005, *İ A v. Turkey*, no. 42571/98, 13 September 2005, *Han v. Turkey*, no. 50997/99, 13 September 2005, *Koç and Tambaş v. Turkey*, no. 50934/99, 21 March 2006, *Aydin Tatlav v. Turkey*, no. 50692/99, 2 May 2006, *Erbakan v. Turkey*, no. 59405/00, 6 July 2006, *Güzel v. Turkey (No. 2)*, no. 65849/01, 27 July 2006, *Düzgören v. Turkey*, no. 56827/00, 9 November 2006, *Yarar v. Turkey*, no. 57258/00, 19 December 2006, *Üstün v. Turkey*, no. 37685/02, 10 May 2007, *Birdal v. Turkey*, no. 53047/99, 2 October 2007, *Nur Radyo Ve Televizyon Yayıncılığı A Ş v. Turkey (dec.)*, no. 6587/03, 27 November 2007, *Demirel and Ateş v. Turkey*, no. 10037/03, 29 November 2007, *Özgür Radyo-Ses Radyo Televizyon Yayın Yapım Ve Tanıtım A.Ş. v. Turkey*, no. 11369/03, 14 December 2007, *Soulas, and Others v. France*, no. 15958/03, 10 July 2008, *Balsytė-Lideikienė v. Lithuania*, no. 72596/01, 4 November 2008, *Leroy v. France*, no. 36109/03, 2 October 2008, *Özer v. Turkey*, no. 871/08, 26 January 2010, *Willem v. France*, no. 10883/05, 16 July 2009, *Dink v. Turkey*, no. 2668/07, 14 September 2010 and *Perinçek v. Switzerland [GC]*, no. 27510/08, 15 October 2015.

<sup>30</sup> See, e.g., *Ouranio Toxo and Others v. Greece*, no. 74989/01, 20 October 2005, *Begheluri and Others v. Georgia*, no. 28490/02, 7 October 2014, *Karahmed v. Bulgaria*, no. 30587/13, 24 February 2015 and *Identoba and Others v. Georgia*, no. 73235/12, 12 May 2015.

<sup>31</sup> See, e.g., *Opuz v. Turkey*, no. 33401/02, 9 June 2009.

<sup>32</sup> *Aksu v. Turkey [GC]*, no. 4149/04, 15 March 2012. See also *Church of Scientology v. Sweden (dec.)*, no. 8282/78, 14 July 1980.

### ***Other European and international standards***

45. In addition to these particular treaty obligations requiring or authorising action to be taken against the use of hate speech of a particular character or in certain contexts, there are various other **European and international standards** relevant to the taking of such action. They are comprised of Recommendations of the Committee of Ministers of the Council of Europe, Recommendations and Resolutions of the Parliamentary Assembly of the Council of Europe, a report of the European Commission for Democracy through Law (Venice Commission), two European Union measures, the *Durban Declaration and Programme of Action of September 2001* and the *outcome document of the Durban Review Conference of April 2009* and the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, 5 October 2012, as well as reports to the United Nations General Assembly and the Human Rights Council of the United Nations Special Rapporteurs on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, on minority issues and on the promotion and protection of the right to freedom of opinion and expression, as well as of the United Nations High Commissioner for Human Rights.
46. Many of the **Recommendations of the Committee of Ministers of the Council of Europe** and the **Recommendations and Resolutions of the Parliamentary Assembly of the Council of Europe** have been concerned with particular forms of hate speech, such as aggressive nationalism, extremism, neo-Nazism, ethnocentrism and racial hatred. Others have focused on those targeted against specific groups of persons, such as those concerned with anti-Gypsyism, antisemitism, xenophobia, Islamophobia, homo/transphobia, migrant status and religious affiliation. Some others have addressed its use in particular contexts, notably, in cyberspace, online media, political discourse and video games.
47. Recommendation No. R (97) 20 of the Committee of Ministers to member states on "Hate Speech" defines this term as covering "all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, antisemitism or other forms of hatred based on intolerance, including intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin". It recommends that member states' legislation and practice be guided by a number of principles in combatting hate speech. Similarly other Recommendations and Resolutions have called for various administrative, civil and criminal measures to be adopted to tackle the use of such speech, while respecting the right to freedom of expression. In addition, they have sought to promote a culture of tolerance, emphasising the role of various forms of media in this regard<sup>33</sup>.
48. The **Venice Commission Report** was particularly concerned with incitement to religious hatred<sup>34</sup>. Having examined European legislation on blasphemy, religious insult and incitement to religious hatred, the report concluded that incitement to hatred, including religious hatred, should be the object of criminal sanctions and that it would be appropriate to have an explicit requirement of intention or recklessness. It also concluded that it was neither necessary nor desirable to create an offence of religious insult, i.e., just insult

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<sup>33</sup> See the Annex for a list of the various recommendations and resolutions.

<sup>34</sup> *Report on the Relationship between Freedom of Expression and Freedom of Religion: the Issue of Regulation and Prosecution of Blasphemy, Religious Insult and Incitement to Religious Hatred*, CDL-AD(2008)026, 23 October 2008.

to religious feelings without the element of incitement to hatred as an essential component. Moreover, the report concluded that the offence of blasphemy should be abolished and not reintroduced.

49. The two **European Union measures** with respect to hate speech are the Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law (Framework Decision) and Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive).
50. The **Framework Decision** provides that “racism and xenophobia are direct violations of the principle of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principles upon which the European Union is founded and which are common to the Member States”. Although acknowledging that combating racism and xenophobia requires various kinds of measures in a comprehensive framework and may not be limited to criminal matters, the measures that the Framework Decision requires Member States to take are limited to combating particularly serious forms of racism and xenophobia by means of criminal law. Thus, it requires that public incitement to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin be punishable where such conduct is intentional. In the same way the law should punish any intentional public condonation, denial or gross trivialisation of crimes of genocide, crimes against humanity and war crimes directed against such a group of persons or member of such a group when the conduct is carried out in a manner likely to incite to violence or hatred against it or them. At the same time, the Framework Decision makes it clear that it does not require the taking of measures in contradiction to fundamental principles relating to freedom of association and freedom of expression.
51. The **Audiovisual Media Services Directive** requires Member States to ensure that such services provided by media services providers do not contain any incitement to hatred based on race, sex, religion or nationality. In addition, Member States should ensure that media service providers comply with the requirement that audiovisual commercial communications shall not prejudice respect for human dignity or include or promote any discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation.
52. The World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, which had been convened by the United Nations General Assembly<sup>35</sup>, adopted the ***Durban Declaration and Programme of Action*** in 2001. This affirmed that racism, racial discrimination, xenophobia and related intolerance constituted a negation of the purposes and principles of the Charter of the United Nations and recognised that failure to combat and denounce all these forms of intolerance by all, especially by public authorities and politicians at all levels, was a factor encouraging their perpetuation. It urged the adoption of a wide range measures, legislative, judicial, regulatory and administrative but also self-regulatory, to prevent and protect against racism, racial discrimination, xenophobia and related intolerance and to promote respect and tolerance. In particular, it urged

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<sup>35</sup> Pursuant to resolution 52/111, 18 February 1998.

States “to implement legal sanctions, in accordance with relevant international human rights law, in respect of incitement to racial hatred through new information and communications technologies, including the Internet”<sup>36</sup> and it encouraged the denunciation and active discouragement of the transmission of racist and xenophobic messages through all communications media<sup>37</sup>.

53. The **Durban Review Conference** was convened by the United Nations General Assembly<sup>38</sup> to review progress towards the goals set by the World Conference. Its **outcome document** expressed concern over the rise of acts of incitement to hatred, which have targeted and severely affected racial and religious communities and persons belonging to racial and religious minorities, whether involving the use of print, audio-visual or electronic media or any other means, and emanating from a variety of sources. It resolved, “as stipulated in Article 20 of the International Covenant on Civil and Political Rights, to fully and effectively prohibit any advocacy of national, racial, or religious hatred that constituted incitement to discrimination, hostility or violence and to implement it through all necessary legislative, policy and judicial measures”<sup>39</sup>. In addition, it urged States to take measures to combat the persistence of xenophobic attitudes towards and negative stereotyping of non-citizens, including by politicians, law enforcement and immigration officials and in the media<sup>40</sup>. Furthermore, it urged States to punish violent, racist and xenophobic activities by groups that are based on neo-Nazi, neo-Fascist and other violent national ideologies and called upon them to declare illegal and to prohibit all organizations 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 national, racial and religious hatred and discrimination in any form, and to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination<sup>41</sup>.
54. The **Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance** has emphasised the centrality of legislative measures in any strategy to combat and prevent racism, ethnic and xenophobic hatred on the Internet and social media and has thus encouraged States that have not enacted legislation to consider doing so. At the same time the Special Rapporteur has also emphasised the important role of the private sector and of education in addressing the challenges of racism and incitement to racial hatred. In addition the Special Rapporteur has underlined the need to counter extremist political parties, movements and groups and to strengthen measures to prevent racist and xenophobic incidents at sporting events<sup>42</sup>.
55. Furthermore, the **Special Rapporteur on minority issues** has issued a report focused on hate speech and incitement to hatred against minorities in the media. This report acknowledges that the root causes of hatred need to be better understood but underlined the importance of engaging majority communities to join marginalised and disadvantaged minorities in demanding

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<sup>36</sup> Paragraph 145.

<sup>37</sup> Paragraph 147(d).

<sup>38</sup> Pursuant to resolution 61/149, 19 December 2006.

<sup>39</sup> 24 April 2009, para. 69.

<sup>40</sup> *Ibid*, para. 75.

<sup>41</sup> *Ibid*, paras. 60 and 99

<sup>42</sup> See, e.g., the following reports: A/HRC/26/50, 10 April 2014, A/HRC/26/49, 6 May 2014 and A/HRC/29/47, 13 April 2015.

human rights, equality and human dignity for all. The Special Rapporteur called for legislation that prohibited advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, while fully respecting the right to freedom of expression. In addition, the Special Rapporteur called for the adoption of the Rabat Plan of Action<sup>43</sup> when implementing or revising their domestic legal framework on hate speech. The report emphasised the need for democratic political parties to find effective tools and outreach strategies to counterbalance hate messages spread by extremist forces and parties.

56. The Special Rapporteur underlined the importance of media outlets maintaining the highest standards of ethical journalism, avoiding stereotyping of individuals and groups and reporting in a factual and impartial manner. The report encouraged the establishment of national, independent regulatory bodies, including representatives of minorities, with powers to monitor hate speech in the media, receive reports from the public in relation to hate speech, receive and support complaints, and make recommendations. It also stated that internet service providers should establish detailed terms of service, guidelines and notice-and-takedown procedures regarding hate speech and incitement, in line with national legislation and international standards, and ensure transparent implementation of those policies. Furthermore, the report emphasised the need for education and training with, in particular, the key functions of media literacy being included in school curricula at all stages with a special focus on the online environment. This was seen as essential for providing youth and adults with adequate tools and resources to develop critical thinking in order to question the accuracy, bias and impact of the information provided by the media<sup>44</sup>.
57. Concern about hate speech has also been the focus of a specific report by the **Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression**<sup>45</sup>. This report recognised that the right to freedom of expression can and should be restricted in extreme cases, such as incitement to genocide and incitement to hatred in accordance with international norms and principles but it also emphasised that this right contributed to exposing harms caused by prejudice, combating negative stereotypes, offering alternative views and counterpoints and creating an atmosphere of respect and understanding between peoples and communities around the world. The Special Rapporteur thus emphasised that laws to combat hate speech must be carefully construed and applied by the judiciary not to excessively curtail freedom of expression<sup>46</sup>. In addition, the Special Rapporteur underlined the need for such laws to be complemented by a broad set of policy measures to bring about genuine changes in mind-sets, perception and discourse. In order to prevent any abusive use of hate speech laws, the Special Rapporteur recommended that only serious and extreme instances of incitement to hatred – involving severity, intent, content, extent, likelihood or probability of harm occurring, imminence and context - be prohibited as criminal offences<sup>47</sup>.

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<sup>43</sup> See para. 59 below.

<sup>44</sup> See A/HRC/28/64, 5 January 2015.

<sup>45</sup> A/67/357, 7 September 2012.

<sup>46</sup> *Ibid.*, para. 76.

<sup>47</sup> *Ibid.*

58. In a report on discrimination and violence against individuals based on their sexual orientation and gender identity, the **Office of the United Nations High Commissioner for Human Rights** has set out various measures that it recommended States take to address such violence. One of the recommendations was the prohibition of incitement to hatred and violence on grounds of sexual orientation and gender identity and the holding to account of those responsible for related hate speech<sup>48</sup>.
59. The adoption of the **Rabat Plan of Action** was the culmination of an exercise initiated by the Office of the United Nations High Commissioner for Human Rights “to conduct a comprehensive assessment of the implementation of legislation, jurisprudence and policies regarding advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence at the national and regional levels, while encouraging full respect for freedom of expression, as protected by international human rights law”<sup>49</sup>. It recommends that a clear distinction be made between (a) expression that constitutes a criminal offence, (b) expression that is not criminally punishable, but may justify a civil suit or administrative sanctions and (c) expression that does not give rise to any of these sanctions but still raises concern in terms of tolerance, civility and respect for the rights of others<sup>50</sup>. In this connection it drew attention to a six-part threshold test for expressions to be considered as criminal offences, namely, one concerned with the particular context, speaker, intent, content and form, extent of the speech act and likelihood (including imminence)<sup>51</sup>. In addition, its other recommendations include efforts to combat negative stereo-typing and discrimination, to promote intercultural understanding, to handle complaints about incitement to hatred and to guarantee systematic collection of data<sup>52</sup>.

#### ***ECRI standards***

60. **ECRI’s previous GPRs** relating to hate speech concern:
- the encouragement of debate within the media and advertising professions on the image which they convey of Islam and Muslim communities and on their responsibility in this respect to avoid perpetuating prejudice and biased information<sup>53</sup>;
  - the taking of measures to act against the use of the Internet for racist, xenophobic and antisemitic aims<sup>54</sup>;
  - the taking of all necessary measures to combat antisemitism in all of its manifestations, including ensuring that criminal law in the field of combating racism covers antisemitism<sup>55</sup>;
  - the taking of measures to combat racism and racial discrimination at school<sup>56</sup>;

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<sup>48</sup> A/HRC/29/23, 4 May 2015, para. 78.

<sup>49</sup> Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred, A/HRC/22/17/Add.4, 11 January 2013, para. 6.

<sup>50</sup> *Ibid.*, para. 12.

<sup>51</sup> *Ibid.*, Appendix, para. 29.

<sup>52</sup> *Ibid.*, Appendix, paras. 42-47.

<sup>53</sup> GPR No. 5, *Combating intolerance and discrimination against Muslims*.

<sup>54</sup> GPR No. 6, *Combating the dissemination of racist, xenophobic and antisemitic materiel via the internet*.

<sup>55</sup> GPR No. 9, *The fight against antisemitism*.

<sup>56</sup> GPR No. 10, *Combating racism and racial discrimination in and through school education*.

- the taking of measures to combat anti-Gypsyism and discrimination against Roma<sup>57</sup>; and
- the criminalisation of certain forms of hate speech<sup>58</sup>.

61. GPR No. 7 recommends that the following conduct should be criminal offences:

- intentional public incitement to violence, hatred or discrimination against a person or a grouping of persons on the ground of their “race”, colour, national/ethnic origin, citizenship, religion or language;
- intentional public insults and defamation against such a person or grouping; intentional threats against the same target; 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 ground, inter alia, of their “race”, colour, national/ethnic origin, citizenship, religion or language; and
- the public denial, trivialisation, justification or condoning, with a racist aim, of crimes of genocide, crimes against humanity or war crimes<sup>59</sup>.

#### ***Concerns about application***

62. There is thus a clearly well-founded basis under international and regional human rights law for imposing restrictions on the use of hate speech. Nevertheless, there is also concern on the part of bodies responsible for supervising the implementation of States’ obligations in this regard that such restrictions can be unjustifiably to **silence minorities** and to **suppress criticism, political opposition and religious beliefs**.

63. Thus, for example, the Committee on the Elimination of Racial Discrimination, when reviewing reports of States Parties to the International Convention on the Elimination of All Forms of Racial Discrimination, has recommended that the definitions in legislation directed against 'extremism' be amended so as to ensure that they are clearly and precisely worded, covering only acts of violence, incitement to such acts, and participation in organizations that promote and incite racial discrimination, in accordance with Article 4 of that Convention. Similarly, the United Nations Human Rights Committee has expressed concern that such legislation could be interpreted and enforced in an excessively broad manner, thereby targeting or disadvantaging human rights defenders promoting the elimination of racial discrimination or not protecting protect individuals and associations against arbitrariness in its application. In addition, concerns about the use of hate speech restrictions to silence criticism and legitimate political criticism have also been voiced by ECRI and others such as the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Advisory Committee on the Framework Convention on National Minorities.

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<sup>57</sup> GPR No. 13, *Combating anti-Gypsyism and discrimination against Roma*.

<sup>58</sup> GPR No. 7, *National legislation to combat racism and racial discrimination*.

<sup>59</sup> This formulation was essentially followed in GPR No. 9 except that it refers to “Jewish identity or origin” rather than “race”, colour”, etc. and also includes the public denial, trivialisation, justification or condoning of the Shoah and the desecration and profanation, with an antisemitic aim, of Jewish property and monuments. In addition both GPRs recommend that there be offences with respect to the public dissemination or public distribution, or the production or storage aimed at public dissemination or public distribution, of written, pictorial or other material containing manifestations covered by the offences noted in the text above and also with respect to the creation or the leadership of a group which promotes racism or antisemitism, support for such a group and participation in its activities with the intention of contributing to the offences noted in the text above.

64. Linked to these concerns is another one, namely, that **hate speech prohibitions** may have been **disproportionately or unjustifiably used** against those whom they are intended to protect and the importance of avoiding any possible misuse of them. The basis for this concern may be no more than impressionistic – resulting from the prominent reporting given only to certain proceedings and the lack of comprehensive data - rather than one that can be substantiated. Nonetheless, while it is important to ensure that all action against the use of hate speech be well-founded and that such action never be undertaken on a selective or arbitrary basis, the Recommendation is clear that any criminal prohibition of hate speech must be of general application and not be directed just to certain types of perpetrators.

### ***Conclusion***

65. The different measures envisaged in the Recommendation are all ones that are either required under international law or ones which it permits to be taken in order to secure the universality of human rights.

## **D. Ratifications, reservations and recourse**

### ***Recommendation 1***

#### **Ratifying treaties**

66. The three treaties which recommendation 1 proposes should be ratified if member States have not already done this, as GPR Nos 13 and 14 have also previously recommended, entail the making of commitments to adopt various measures that are crucial to fulfilling the goals of the Recommendation.
67. The measures required by the **Additional Protocol to the Convention on Cybercrime** are concerned with the criminalisation of acts of a racist and xenophobic nature committed through computer systems. They have already been noted above<sup>60</sup> and are important because of their specific focus on hate speech. Those required by the other two treaties - the **Framework Convention for the Protection of National Minorities** (the Framework Convention) and **Protocol No. 12 to the European Convention on Human Rights** (Protocol No. 12) – are, however, equally important.
68. Thus, the Framework Convention not only requires a guarantee of the right of equality before the law and of equal protection of the law to persons belonging to national minorities but it also requires (a) the encouragement of tolerance and intercultural dialogue, (b) the promotion of mutual respect, understanding and co-operation and (c) the protection of persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity. Furthermore, Protocol No. 12 strengthens the prohibition on discrimination in the European Convention on Human Rights by requiring that the enjoyment of any right set forth by law - and not just the specific rights and freedoms already guaranteed by the latter instrument - be secured without discrimination.
69. Recommendation 1 has not, however, included the European Convention on Transfrontier Television in the list of treaties to be ratified as this one now requires an updating Protocol to take account of various media developments since its adoption. Ratification of the unamended treaty would thus be futile.

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<sup>60</sup> See para. 43 above.



## ***Recommendation 2***

### **Withdrawing reservations**

70. The first point in this recommendation, namely, that **reservations** in favour of the rights to freedom of assembly, association and expression to Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination and to Article 20 of the International Covenant on Civil and Political Rights be withdrawn, is made because of concern that their maintenance could impede effective action to prohibit organisations which promote or incite racism and racial discrimination, propaganda for war and the advocacy of national, racial or religious hatred.

### **Providing recourse**

71. The second point in the recommendation 2 – acceptance of the **competence of the Committee on the Elimination of Racial Discrimination** to receive and consider communications from individuals or groups of individuals claiming to be victims of violations of rights in the International Convention on the Elimination of All Forms of Racial Discrimination – has been made as a safeguard against failures to tackle hate speech at the national level since such acceptance will allow them then to be challenged at the international level.

## **E. Causes and extent**

### ***Recommendation 3***

72. The specific object of this recommendation is that appropriate steps should be taken to establish the range of circumstances that can give rise to the use of hate speech and to this taking particular forms, as well as to measure both the extent of such use and the impact which it has. The need to address the present limited understanding of this phenomenon and the lack of certainty as to its extent and effects is considered to be essential. Without such an understanding, effective action cannot be taken both to discourage and prevent the use of hate speech and to reduce and remedy the harm which such use causes. Improving the level of understanding and dispelling the uncertainty will, however, require various tools to be developed and used.
73. It may well be that certain conditions are likely to be especially conducive to the use of hate speech and to this taking particular forms. Such conditions are likely to embrace the existence of a range of economic, political and social factors, as well as the transmission without reflection of negative stereotypes and prejudice from one generation to the next. However, it does not seem that the fulfilment of these conditions – either alone or in certain combinations – will always lead to the use of hate speech.

### **Undertaking research**

74. In order to have a much better understanding both of the conditions that are relevant and the specific ways in which they operate, there is a need for **suitable research projects** to be directed particularly to current circumstances and the considerations that lead to differing levels of response to individual conditions. Such research should take the form of surveys and field studies and, where practicable, should also be comparative in nature.
75. Research on the conditions conducive to the use of hate speech and its different forms need not be carried out by public authorities themselves. Nonetheless, it is important that they not only provide the necessary support for this to occur but also ensure that such research is undertaken. Furthermore, comparative research is likely to be best pursued through research entities in different member States working together. Their

collaboration in this regard should therefore be specifically encouraged and facilitated.

### **Shortcomings in data gathering**

76. Although specific instances of the use of hate speech have been noted in the course of ECRI's monitoring and in other studies, sometimes with the impressionistic inference or conclusion that this is increasing, the actual picture regarding the extent of such use still remains unclear. This is a consequence of various considerations noted in the monitoring, most notably: the differing ways in which hate speech is defined (with only certain of the personal characteristics and status on which it can be grounded being covered); the adoption of different approaches to classification by the various authorities concerned; the limitation of data collection to only those instances in which the use of hate speech potentially constitutes a criminal offence; the failure of particular instances in which hate speech has been used to be either noted by or reported to relevant public authorities; and, occasionally, there being either a complete absence of any data collection regarding such use or a failure to publish all or any of the data that has been collected.
77. In some instances, the failure to gather data is a reflection of concerns about the possibility of this being inconsistent with obligations relating to data protection. Furthermore, not all data that has been gathered is appropriately taken into account. This is especially so as regards the outcome of monitoring by civil society. In addition, such data as is gathered is not always analysed with a view to then allowing conclusions to be drawn as to the response which the use of hate speech thereby revealed requires. Finally, there is a need to ensure that the data gathered goes beyond examining the extent to which hate speech is used and establishes its impact on those targeted by it.

### **Requirements for data gathering**

78. **Data collection and analysis** regarding the actual use of hate speech thus needs to be undertaken on a much more consistent, systematic and comprehensive basis.
79. This means, first, that data should be gathered in all instances by reference to the understanding as to what constitutes hate speech for the purpose of the Recommendation.
80. Secondly, data protection guarantees should not be invoked to limit or preclude the collection of data with respect to the use of hate speech. Certainly, these guarantees do not bar the gathering and processing of data on identifiable persons where: this is for a lawful purpose; that data is adequate, relevant and not excessive for that purpose; it is accurate and kept up to date; and is not retained for longer than necessary. Moreover, data protection guarantees have no application to any data which is rendered anonymous in such a way that it is not possible to identify any individuals concerned by the use of hate speech and that should be the case for all statistical analyses of the use of hate speech.
81. Thirdly, the data being collected should not be limited to those instances where the expression concerned is either alleged or has been found to constitute an offence as that necessarily excludes the majority of the situations in which hate speech is being used and needs to be tackled.
82. Fourthly, the relevant public authorities should have an explicit responsibility to report in a statistical format all complaints of instances in which the use of hate speech contrary to administrative, civil or criminal law is alleged to have

occurred, as well as the outcome of any action taken with respect to such complaints.

83. Fifthly, data collection should not be limited to recording complaints about the use of hate speech but should also seek to capture the experience of those who are affected by such use and who may be reluctant to report the fact of its occurrence. Monitoring – whether conducted in real time or retrospectively through analysis of archived material or involving discourse and content analysis<sup>61</sup> - can most usefully be undertaken by civil society and equality bodies/national human rights institutions, with the latter being authorised to do this according to the focus of their specific activities and priorities where this has not already occurred.
84. There will, however, be a need to ensure that appropriate support is provided for such monitoring, which can require the financing for either the human analysts required or the hardware and software necessary to undertake automated techniques of analysis. Equality bodies/national human rights institutions and other competent bodies should also be able to undertake or commission surveys of those who may be targeted by hate speech in order to establish its frequency especially in circumstances where such occurrence may not be readily monitored or reported. Good examples are the general European Survey on Crime and Safety<sup>62</sup> and also the survey undertaken by the European Union Agency for Fundamental Rights specifically with respect to lesbian, gay, bisexual and transgender persons<sup>63</sup>. Such surveys can also be used to establish the consequences of this use for persons in these groups, particularly as regards the possibility of them feeling fear, isolation and shame, withdrawing from society and being reluctant to complain or being deterred from doing so<sup>64</sup>.
85. Sixthly, it is important that the data being gathered through these different techniques is collated and appropriately analysed, using modern processing technology for this purpose, so that the overall scale of the phenomenon to be addressed can be discerned. In particular, whenever data has been gathered from two or more sources and put together or “aggregated” into an anonymised statistical format to illustrate the incidence of particular uses of hate speech – such as those contrary to administrative, civil or criminal law – it should still be capable of being broken down into small information units so that issues relating to particular groups (such, as disability, gender, religion or belief) and factors (such as the type of user or the location of the use) can be identified. This would ensure that the emergence of certain trends or the particular vulnerability of certain targets of hate speech becomes more evident. Such considerations could then be factored into the adoption of responses to tackle the use of hate speech.
86. Seventhly, the data that is being gathered and its analysis should be widely disseminated. It should thus be provided not only to all those bodies and individuals that have formal responsibilities for tackling the use of hate

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<sup>61</sup> See B. Lucas, *Methods for monitoring and mapping online hate speech*, GSDRC Helpdesk Research Report 1121, 2014.

<sup>62</sup> See J. van Dijk, J. van Kesteren and P. Smit, *Criminal Victimisation in International Perspective: Key Findings from the 2004-2005 Icvts and EU ICS*, 2007.

<sup>63</sup> Such as the harassment revealed through the European Union Agency for Fundamental Rights’ *EU LGBT survey - European Union lesbian, gay, bisexual and transgender survey - Main results*, 2014.

<sup>64</sup> “Reports on subjectively experienced discrimination are valuable as an indicator, particularly when they are assessed against the background of other kinds of information, such as unemployment statistics, police records, complaints filed etc.”, GPR No. 4, para.9.

speech but also to politicians, religious and community leaders and others in public life who are in a position to make it clear that the use of hate speech is unacceptable in a democratic society. Furthermore, it is important that the data and its analysis should also be presented in a format that is accessible for further dissemination through media outlets. This will enable the public to appreciate what is occurring and the harm that the use of hate speech causes.

87. Finally, a specific public authority should be designated as having the responsibility for ensuring that these requirements for more consistent, systematic and comprehensive data collection and analysis are actually being fulfilled by the various bodies and institutions concerned.

## **F. Raising awareness and counter-speech**

### ***Recommendation 4***

88. This recommendation is directed to discouraging and preventing hate speech through demonstrating the danger that it poses and through counter-speech, i.e., the reaffirmation of the values that its use threatens and challenges to the assumptions on which this use relies. It recognises that this entails drawing upon a wide range of actors but especially public figures and officials, educators and teachers, non-governmental organisations, equality bodies and national human rights institutions. However, the emphasis on the need for the active engagement with the public in general on this matter reflects the fact that respecting and securing the inherent dignity and the equal and inalienable rights of all members of the human family is the responsibility of everyone in a democratic society.
89. At the same time, recommendation 4 requires certain persons to be the object of particular efforts in which both the unacceptability of the use of hate speech is asserted and the values threatened by this use are reinforced. Such efforts should be directed not only to those who may be particularly susceptible to the influence of misinformation, negative stereotyping and stigmatisation but also to those who have either already succumbed to that influence or are seeking to exercise it. Past experience has shown that democracy and pluralism can be undermined and swept aside where calls to deny some their right to equality and dignity are listened to and acted upon.
90. Thus, the maintenance of pluralism and democracy is understood to require concessions by individuals and groups of individuals, limiting some of their freedoms so as to ensure the greater stability of society as a whole.

### **Raising awareness**

91. However, these ideals will not be safeguarded and valued solely by the imposition of restrictions on what people can say and do. It is also essential that there be an appreciation of **the importance of respect for diversity** within society and a shared commitment to securing it. At the same time, there is a need for steps to be taken to remove those barriers between various groups in society that can impede the development of mutual respect and understanding and that can be exploited to promote disharmony and hostility. These goals can be achieved in various ways.
92. In the first place, it is important to keep alive knowledge about what happened in the past. This can be achieved through the commemoration of the Holocaust and other onslaughts against democracy, pluralism and human rights perpetrated in Europe and elsewhere in the course of our common history. Such commemoration can be undertaken through marking these events on special days or anniversaries, as well as by the erection of

monuments to mark their occurrence, and through ongoing programmes that raise awareness and understanding about what occurred and why reflecting on these events remains relevant today. In particular, it would be useful to draw attention to the similarities between the goals and activities of organisations that are currently promoting hatred and intolerance and ones that have previously done so with disastrous consequences.

93. Secondly, efforts should be made to ensure that there is a much wider appreciation of what human rights standards require and of why their observance is fundamental for a democratic society. In particular, these issues – with a particular focus on the nature and effect of discriminatory practices - should be included in the general education which everyone receives. Teachers and professors should thus receive appropriate training and the necessary teaching materials so that they can provide this. It is important within the school context that this education be applied in the way pupils treat each other<sup>65</sup>. In this context, ECRI has recommended in its country monitoring the adoption of measures to promote mutual tolerance and respect in schools regardless of sexual orientation and gender identity. However, it has been noted that the responsibility given to certain institutions for developing appropriate curricula in this regard has not always been discharged and, in some instances, courses have not been delivered because of a failure to adopt the necessary implementing arrangements for them. There is a need, therefore, to ensure that necessary support is given for the development and delivery of such courses and that action in respect of both of these is duly monitored. Moreover, information and awareness-raising about human rights should not just be a matter for formal education programmes. It should also be the focus of recurrent discussion in the media and information programmes for the public in general.
94. Thirdly, initiatives to engender respect for diversity through promoting greater awareness of the “other” or “others” in society should be undertaken or supported. These initiatives might take the form of art and film festivals, concerts, culinary events, drama and role plays, exhibitions, lectures and seminars and special projects involving schools as well as broadcasts and publications. At the same time, it could be useful for persons with a migration background – including but not limited to those who may be prominent in fields such as culture, the economy and sport – to take part in programmes demonstrating their successful integration while maintaining their identity. It is, however, unlikely that all these promotional activities will be successful unless mutual respect and understanding is also exemplified by all public authorities in the way they carry out their different functions.

#### **Removing barriers to understanding**

95. Fourthly, intercultural dialogue – involving an open and respectful exchange of views between individuals and groups belonging to different cultures – should be facilitated so that a deeper understanding of each other’s perspectives can be gained. Such dialogue should take account of the guidelines in the *Council of Europe White Paper on Intercultural Dialogue “Living Together as Equals in Dignity”*<sup>66</sup>. In particular, it could be effected through undertaking shared cultural events and research projects, the provision of language courses, the establishment of scholarship and student exchange programmes and the holding of workshops to explore particular issues of concern. In the case of communities whose relations have been

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<sup>65</sup> See measures proposed in GPR No. 10, parts II and III.

<sup>66</sup> Launched by the Council of Europe Ministers of Foreign Affairs at their 118th Ministerial Session, 7 May 2008.

marked by conflict in the past, the support for dialogue between them may need to be linked to measures to promote conflict prevention, mediation and reconciliation. It will again be important for all public authorities to play an active part in this dialogue so that their example can be an encouragement for others to follow.

96. Fifthly, the links between different communities could also be strengthened through support for the “creation of collaborative networks to build mutual understanding, promoting dialogue and inspiring constructive action towards shared policy goals and the pursuit of tangible outcomes, such as servicing projects in the fields of education, health, conflict prevention, employment, integration and media education”<sup>67</sup>. The establishment of **mechanisms to identify and address potential areas of tension between members of different communities, and the provision of assistance with conflict prevention and mediation could also be helpful**<sup>68</sup>.
97. Sixthly, there should be particular efforts to **combat misinformation, negative stereotyping and stigmatisation** as these can provide the foundation on which the use of hate speech is based. For example, the police and the judiciary should only disclose the ethnic origin of alleged perpetrators of an offence when this is strictly necessary and serves a legitimate purpose as such disclosure can unjustifiably reinforce prejudices, while their subsequent acquittal may be overlooked or not reported. However, it is not enough to correct “facts” and contradict supposed characteristics which have been wrongly ascribed to a specific person or group of persons since this may never get the same circulation or attention as the statements being corrected or contradicted. There is a need for efforts also to be made to disseminate as widely as possible alternative, comprehensible narratives about those subject to misinformation, negative stereotyping and stigmatisation which portrays them in a positive light that is well-founded and provides a compelling challenge to the adverse portrayal of the person or group of persons concerned. This could include steps to promote the participation and acceptance of persons from minorities in mixed sporting teams. **In addition, there should be a clear prohibition on the use of profiling** – i.e., the use of stereotypical assumptions based on membership of a particular group<sup>69</sup> – as the basis for measures taken in respect of counter-terrorism, law enforcement and immigration, customs and border control<sup>70</sup>. Although all such efforts may not affect the outlook of all those who employ misinformation, negative stereotyping and stigmatisation, they can contribute to preventing others being influenced by it.

#### **The importance of counter-speech**

98. Finally, these efforts should be linked with specific, prompt and unqualified condemnations of the actual use of hate speech. The clear condemnation of the use of hate speech is necessary not simply because its use is entirely unacceptable in a democratic society but also because this serves to reinforce the values on which such a society is based. Such **counter-speech** should thus not just say that the use of hate speech is wrong but underline

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<sup>67</sup> As recommended in Human Rights Council Resolution 16/18 Combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence, violence against, persons based on religion or belief, (24 March 2011), para. 5(a).

<sup>68</sup> *Ibid.*, para. 5(b).

<sup>69</sup> Racial profiling is, according to GPR No. 11 (para. 1), “The use by the police, with no objective and reasonable justification, of grounds such as race, colour, language, religion, nationality or national or ethnic origin in control, surveillance or investigation activities”.

<sup>70</sup> On the need to preclude profiling see, e.g., *Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance*, A/HRC/29/46, 20 April 2015.

why it is anti-democratic. It is important that no one stands by and allows hate speech of any kind to be used without challenging it. Such challenges are especially practicable in online media which provide various means of reacting to what is disseminated. All users of the media in any form should thus be encouraged to draw attention to instances in which hate speech is being used and to make clear their objection to such instances. However, while challenging the use of hate speech is the responsibility of everyone, public figures can make an especially important contribution in this regard because the esteem in which they are held gives their voice a considerable influence over others. It is, therefore, crucial that all public figures, notably politicians and religious and community leaders but also personalities in the arts, business and sport speak out when they hear or see hate speech being used as otherwise their silence can contribute to legitimising its use. In the monitoring cycles it has been noted that equality bodies, ombudspersons and national human rights institutions have often been particularly vocal in condemning the use of hate speech. This is undoubtedly valuable but such condemnation needs to be mainstreamed so that it is a much more general response by public figures rather than just a few lone voices. Such counter-speech might also take the form of withdrawing from activities and organisations in which persons using hate speech are actively involved.

99. Although many of the steps suggested above are ones of general application, recommendation 4 underlines that there is a special need for them in relation to children, young persons and public officials. In the case of the first two this is because their age may not only make them especially susceptible to the influence of hate speech but also because this may allow education to more readily free them from the prejudices that sustain its use. In the case of public officials the proposed steps are needed both because of the scope for positive influence over others arising from their position and because that position will make any use of hate speech by them especially serious given its apparent endorsement of the State.
100. Recommendation 4 also envisages the taking of steps to encourage those who use hate speech both to repudiate this use and to help them to end their association with groups using it. It is appreciated that this is not an easy task, not least because of engrained prejudices that can make resort to the use of hate speech almost habitual. Nonetheless, changing behavioural patterns is not impossible and various projects directed to this goal have been noted in the monitoring cycles. It would be appropriate, therefore, for these to be more widely emulated and supported, drawing also upon the experience gained from the programmes which Article 16(1) of the Council of Europe Convention on preventing and combating violence against women and domestic violence requires to be adopted to teach perpetrators of domestic violence to adopt non-violent behaviour in interpersonal relationships.
101. The steps envisaged by recommendation 4 are ones to be taken not just by individuals but also by a wide range of specific actors. However, recommendation 4 recognises that a particular contribution in this regard can be, and is often being, made by non-governmental organisations, equality bodies and national human rights institutions, whether individually or in cooperation with one another. In some instances this may require the latter two entities to be given specific authorisation to work against hate speech but all three of them will also need to be given the resources required to undertake such work.

102. Furthermore, recommendation 4 places special emphasis on educational work in raising public awareness about the dangers posed by the use of hate speech and in reinforcing the commitment to pluralism and democracy. This will require the capacity of teachers and educators to be enhanced so that they can deliver the necessary educational programmes<sup>71</sup>. Appropriate support should thus be provided for the training that this will entail, as well as for the production of the materials to be used in these programmes.
103. Although all these different efforts can be undertaken in isolation, they are likely to have an even more significant impact where they are undertaken against a background of greater cooperation and coordination on the part of the different stakeholders involved. This can entail, as has been noted in the monitoring cycles, the adoption of national strategies and action plans to fight extremism, racism, xenophobia, antisemitism and related intolerance, homophobia and transphobia. Such strategies and plans should have concrete tasks for ministries, municipalities and police and be drawn up and evaluated annually. It would also be appropriate to adopt action plans to integrate minority communities, with those communities participating in all stages of their design, monitoring and evaluation. In any event, it is crucial that all these efforts involve a continuing and not an ad hoc process and that they address all forms of hate speech.

## **G. Support for those targeted**

### ***Recommendation 5***

104. This recommendation focuses on the need to provide various forms of support for those who are targeted by hate speech. This reflects a recognition not only that the use of such speech may have an adverse effect on them emotionally and psychologically but also that they may be either unaware of their rights to take action against it or deterred from doing so on account of these effects or of various forms of pressure not to exercise those rights.
105. The use of hate speech can lead to those targeted by it feeling not only afraid and insecure but also – without any justification - guilty or ashamed and humiliated, leading to a loss of self-confidence and self-esteem. Moreover, these feelings can also result in physical symptoms such as loss of sleep and headaches, as well as mental and physical health problems of a more serious nature. As a result, such feelings can have consequences for every aspect of the life of those concerned, whether at work, school, or home, but their impact on family relations and the willingness to participate in society is especially serious<sup>72</sup>.

### **Provision of counselling and guidance**

106. There is a need, therefore, to ensure that **appropriate support** is made available for those who suffer any of these consequences of the use of hate speech or are at risk of doing so. In particular, there is a need for this support to be provided both as soon as possible after they have experienced the use of hate speech and thereafter throughout the various official responses to it, including any criminal proceedings. Appropriately trained counsellors are required for the provision of such support. In particular, they should be able

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<sup>71</sup> See, in this connection, the detailed recommendations in part III of GPR No. 10.

<sup>72</sup> See, e.g. the review of the literature in I. Dzelme, *Psychological Effects of Hate Crime – Individual Experience and Impact on Community (Attacking Who I am) A qualitative study*, Latvian Center for Human Rights, 2008. This is also recognised in the provisions of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.



to ask about the person's feelings and fears, as well as to establish whether there is a need for any medical attention. In addition these counsellors need to provide the reassurance that the person targeted by the use of hate speech is not at fault and to help him or her regain some sense of control and confidence. It also needs to be recognised that the process of recovery can take some time and the period can vary according to the particular experience and the character of the individual affected. The provision of this form of support for those targeted by hate speech needs to be organised on a systematic basis and to be available whatever form the use of hate speech may take.

### **Exercising the right to redress**

107. At the same time, those targeted by the use of hate speech have the right both to respond to it through **counter-speech and condemnation** and through seeking recourse through proceedings brought before the competent courts and authorities. However, having such rights is not sufficient. It is also important that they be aware of such possibilities and that they are not deterred from exercising them.
108. There are various measures that can be adopted in order to ensure that those targeted by the use of hate speech are **aware of their rights**. These include publicity campaigns making it clear not only that the use of hate speech is unacceptable but also setting out the different ways in which those targeted by it can respond or seek redress. In addition, such campaigns should emphasise that, as well as dealing with the particular situation of the individual concerned, making complaints is a crucial part of the wider efforts to tackle the use of hate speech. Such campaigns might often be general in nature. However, in some instances it could be particularly useful to focus them on persons belonging to particular groups, such as visible minorities or LGBT persons through the NGOs or media outlets that they especially use.
109. In addition, information about the various possibilities of taking action against the use of hate speech might be disseminated through central and local government offices used by the public, advice centres, lawyers and non-governmental organisations.

### **Removing obstacles to redress**

110. Furthermore, even when there is an awareness of the rights, there are various factors that may discourage those targeted by the use of hate speech from exercising them. These can include a sense that doing so is too complicated, too expensive or is not worth the trouble involved, particularly if it is believed that complaints will not be believed or taken seriously. In addition, persons may be deterred from taking action because of fear of repercussions from those using hate speech as well as actual threats issued by them. All of these factors seem to lead to the under-reporting of instances of the use of hate speech that has been noted in the monitoring cycles.
111. Concerns about the **complexity and expense of making complaints** – particularly those involving legal proceedings - in respect of the use of hate speech can best be addressed by making the requirements for them as straightforward and user-friendly as possible and ensuring that appropriate assistance is available for submitting and pursuing them. Such assistance can take the form of support for organisations – whether non-governmental ones or equality bodies and national human rights institutions - to provide advice and representation in relevant proceedings and/or the extension of legal aid schemes to the making of complaints, especially where legal proceedings are involved. It would not be appropriate for public authorities or private organisations to charge a fee for their handling of complaints made to

them about the use of hate speech. Furthermore, any fee payable for legal proceedings brought in respect of such use should not be set at a level that makes bringing them impracticable. Moreover, all those tasked with receiving complaints, whether in public authorities or in private organisations, should have appropriate training to ensure that the manner in which those complaints are received is not in itself off-putting to those who are complaining.

112. Notwithstanding such support for making complaints, it is unlikely that they will be lodged where there is a strong feeling that these are not expected to make a difference, whether to the person concerned or the group of persons to which he or she belongs. It is vital, therefore, that the positive impact of a complaint – namely, a remedy for the individual instituting the process and/or action to prevent repetition - can be demonstrated. This requires not only that complaints be properly investigated and determined but also that their outcome is widely disseminated. The latter could usefully be an element in the steps taken to ensure that those targeted by the use of hate speech are aware of their rights.
113. Furthermore, those who are targeted by the use of hate speech should not be deterred by fears about the consequences that might follow from their having complained or provided evidence about such use. Thus, there should be a specific criminal prohibition on any **retaliatory action** – such as dismissal from a job or harassment – being taken against them. For example ECRI has recommended in its country monitoring that migrants in an irregular situation should be able to complain about hate crime without risking immediate expulsion.

## **H. Self-regulation**

### ***Recommendation 6***

114. This recommendation is concerned with the ways in which the use of hate speech can be tackled through the efforts of some of the bodies, institutions and other organisations to which those using it either belong or are otherwise connected. Although the use of hate speech is a matter of general public concern and occurs in a wide variety of different fora, those using it will in many instances have particular affiliations – including as employees and users of facilities – with one or more different bodies, institutions and organisations. These can be both public and private entities and will include parliaments and other elected bodies at the national, regional and local level, ministries and other public bodies, the civil or public service, political parties, professional associations, business organisations and schools, universities and other educational institutions, as well as a very wide range of cultural and sporting organisations.

### **A matter of responsibility**

115. Notwithstanding that the problems posed by the use of hate speech may not be a particular focus of the activities pursued by every one of such bodies, institutions and organisations, they all have the common responsibility of everyone in a democratic society to respect and secure the inherent dignity and the equal and inalienable rights of all members of the human family. Thus, insofar as possible within their competence, these bodies, institutions and organisations should make it clear that the use of hate speech by persons affiliated with them is entirely unacceptable and they should take action to prevent or sanction such use. Furthermore, they should seek to ensure that any use of hate speech by persons affiliated with them is brought to their attention. In addition, they should provide training so that those persons

appreciate why the use of hate speech is unacceptable and so that others can speak out against and condemn such use.

#### **Essential features**

116. The emphasis placed by this aspect of the Recommendation on **self-regulation** is a reflection of the need to ensure that any control exercised over freedom of expression is as limited as possible. In addition, it embodies a recognition that these bodies, institutions and organisations are often best-placed to identify certain uses of hate speech and to prevent their continuation, whether by the exercise of persuasion or the imposition of some form of sanction. In many instances, therefore, the use of self-regulation can be the most appropriate and most effective approach to tackling hate speech. However, it is also appreciated that **the nature of these bodies, institutions and organisations can vary significantly and that this will have a bearing on the exact way in which they can discharge their particular responsibility to tackle hate speech**. This should, therefore, be borne in mind in the provision of support by governments for the self-regulation undertaken by these bodies, institutions and organisations. In particular, any such support should not be conditional on a single model of self-regulation being adopted; **for this reason self-regulation involving the media is more specifically addressed in recommendation 7**.
117. Nonetheless, recommendation 6 identifies certain features that can be useful to include in all self-regulatory schemes, namely, the adoption of **codes of conduct** (or ethics) accompanied by certain sanctions for non-compliance with their provisions, arrangements for the monitoring of statements and publications to preclude the use of negative stereotyping and misleading information, the provision of training and the establishment of complaints mechanisms.

#### **Codes of conduct**

118. The existence of such codes is all the more important where the position of the speaker may entail an immunity – such as in the case of judges and parliamentarians – since that may preclude any other forms of action being taken against the use of hate speech by the person concerned.
119. It is clear from the monitoring of ECRI that various bodies, institutions and organisations have already adopted codes of conduct (or ethics) and similar sets of standards – including rules of procedure - that can be used to tackle hate speech by those affiliated with them in some way. Those found in various member States include ones adopted for judges, ministers, members of legislatures, members of professional organisations, those involved in sporting organisations and staff and students in universities and colleges. In addition, there are a number of international or regional codes or charters that are applicable to bodies, institutions and organisations operating within member States such as the Disciplinary Code of the International Federation of Football Association (FIFA), the guidelines of the European Union Football Association (UEFA) and the Charter of European Political Parties for a non-racist Society. In some instances the reach of these codes can be quite wide, notably in the case of those connected with sporting activities. Thus, these can apply not only to those engaged in the sport itself or involved in its organisation and management but they also apply to those attending or supporting the activities both where it these take place and elsewhere (such as in the course of travelling to the venue concerned). Certain codes governing parliamentarians also apply wherever the impugned speech takes place and so are not limited to proceedings within the legislature.

120. However, the provisions found in these codes do not always address the use of hate speech in specific terms. Instead they can be concerned with various forms of conduct which may come within its scope, such as the use of insulting, offensive or threatening language, or they may refer only to the requirement to respect dignity and equality in very general terms. Unfortunately, not all forms of hate speech are treated in practice as being embraced by such formulations and, as a result, no action is taken against some users of hate speech, including those who use racist and homo- and transphobic speech. The use of codes to tackle hate speech is likely to be more effective if the conduct being proscribed is explicitly formulated by reference to the understanding of hate speech in this Recommendation. In particular, they should be concerned about all forms of hate speech and not just those which might attract criminal sanctions. Furthermore, the codes should make clear the commitment of those adopting them to equality and dignity and leave no doubt to their view that the use of hate speech is unacceptable. In all cases the formulations used in codes should be clear and accessible so that there can be no uncertainty about the conduct considered unacceptable. This is important both for those who may be subject to sanctions and for those targeted by the use of hate speech. Moreover, the codes need not only to be disseminated to and drawn to the attention of those to whom they apply but should also be made publicly available so that anyone with an interest in ensuring the observance of their requirements is in a position to act accordingly.
121. Recommendation 6 specifically calls for political parties to be encouraged to sign the **Charter of European Political Parties for a non-racist society** as acceptance of it by such parties will not only entail an acknowledgement by them of their particular responsibilities of such parties as actors in a democratic political process but will also provide leadership for others in demonstrating the need to adopt codes to tackle the use of hate speech<sup>73</sup>.

#### **Implementation**

122. Although the adoption of codes in itself reflects a commitment to the values embodied in them, their effectiveness also requires some arrangement to ensure that their provisions are respected. This can best be achieved through a combination of **monitoring and complaints mechanisms**.
123. Monitoring techniques can vary. In some instances, they will involve no more than listening to speeches and reviewing publications of those affiliated with the body, institution or organisation concerned and then making an appropriate response to it. However, there ought still to be someone with the clear responsibility for such monitoring, even if others are also able to draw attention to particular uses of hate speech. Furthermore, as recommendation 6 indicates, it will be particularly important for those monitoring to watch out for the use of negative stereotyping and misleading information as the former can be a less obvious form of hate speech and the latter can reinforce the prejudices that sustain such use. In the context of sporting venues, particular attention needs to be paid to the scrutiny of those attending events so as to prevent them from distributing or selling in their proximity any material in which hate speech is used, as well as to prevent access to those who display or carry banners, leaflets and symbols on which hate speech is used and to suspend or stop an event when hate speech is used by those attending it<sup>74</sup>.

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<sup>73</sup> See also ECRI Declaration on the use of racist, antisemitic and xenophobic elements in political discourse (adopted on 17 March 2005).

<sup>74</sup> See GPR No. 12 *Combating racism and racial discrimination in the field of sport*.

124. Complaints mechanisms can provide a means of determining whether the provisions of the codes have been breached even where internal monitoring or reports by others have not pointed to this having occurred. In addition, where such a breach is found, they can decide what sanctions should be imposed. Such mechanisms should be open not just to those who are affiliated with the relevant body, institution or organisation but also to those who have grounds for considering that they have been targeted by an affiliated person's use of hate speech. They should embody clear, fair and transparent procedures and should be readily accessible, such as by means of a telephone hot-line or some on-line arrangement. Bodies, institutions and organisations with complaints mechanisms should make particular efforts to encourage those targeted by the use of hate speech to come forward with complaints. They should also monitor how such complaints are dealt with so that they can provide a genuine remedy for those affected by such use.
125. Most of the existing codes also make provision for the imposition of sanctions in the event of breach of their provisions. These vary in character but they can include the imposition of fines, the removal of a minister from a government post and a judge from his or her appointment, the suspension of a member of parliament from the legislature's proceedings, the expulsion and barring of persons from sporting venues, the withdrawal of points in sporting competitions and the requirement to hold sporting events behind closed doors. It is important that any sanctions imposed genuinely reflect the gravity of the use of hate speech, otherwise this could give the impression of endorsing such use. Certainly, the imposition of appropriate and well-publicised sanctions for the use of hate speech can send a clear anti-hate speech message and demonstrate that unfettered freedom of expression is unacceptable. Thus, where a particular use of hate speech has been sanctioned, it will be important for the leadership of the body, institution or organisation concerned to draw this fact to the attention of both those affiliated with it and the wider public, together with an explicit reaffirmation that the use of hate speech is entirely unacceptable.
126. The effective implementation of codes is very much dependent upon the provision of **appropriate training** for those with responsibilities in this regard. In particular, there is a need for such persons to understand what constitutes hate speech, including its use in coded or less obvious formats, how to respond to its use and how to handle those using it, as well as how to undertake monitoring and operate complaints mechanisms appropriately. As this is not something that can be easily achieved by all the bodies, institutions and organisations for which the adoption of codes dealing with hate speech would be appropriate, the provision of support by governments is likely to be especially helpful. This might be done directly or through facilitating its provision by entities with particular skills in this field.
127. In addition, the implementation of codes will only be effective if **sufficient funding** is provided for the various monitoring and complaints mechanisms involved. This needs, therefore, to be a factor to be taken into account both at the time of their adoption and in subsequent reviews of their operation.
128. Furthermore, in order to facilitate the adoption and application of codes of conduct (or ethics) to tackle the use of hate speech, it would be helpful if governments also provided support for **exchanges of information** between all the bodies, institutions and organisations concerned as to the strengths and weaknesses of those codes that have been in operation for some time.

### **Relationship to other forms of redress**

129. In many instances self-regulation in general and internal complaints mechanisms in particular can be expected to deal effectively with the use of hate speech, including the provision of appropriate satisfaction for those targeted by it. However, this will not always be the case, especially where a specific use of hate speech is such that the payment of compensation or the imposition of a criminal sanction might be the response required. Thus, although self-regulatory arrangements will often preclude the need to pursue other forms of redress under the law, they should never be or become a barrier to seeking such forms of redress.

#### **I. Media and the Internet**

##### ***Recommendation 7***

130. The use of hate speech in the vast majority of cases takes place through the media and the Internet, with the connected opportunities afforded by the latter often enhancing the reach and the immediacy of such use. At the same time, the media and the Internet are also amongst the primary means not just for communicating and reinforcing the values which the use of hate speech seeks to undermine but also for exercising the right to freedom of expression which is fundamental to a democratic society. Thus, the specific focus in this recommendation on both regulation of and self-regulation by the media and the Internet reflects the recognition of their particular significance for hate speech – as a vehicle both for using it and challenging this - and also of the need to ensure that any control exercised over freedom of expression is as limited as possible. While some regulation of the media and the Internet is not inconsistent with the right to freedom of expression, the placing of greater reliance on self-regulation to tackle the use of hate speech will in many instances be not only more effective but also more appropriate.

##### **Recognising diversity**

131. The term “**media and the Internet**” is one that embraces many forms of communication with vastly different characteristics and impact. Thus, it covers print media (such as newspapers, journals and books, as well as pamphlets, leaflets and posters) but also audiovisual and electronic media (such as radio, television, digital recordings of sound and image, web sites, apps, emails and a vast array of social media and video games) and undoubtedly other forms of communication that may yet be developed. Moreover, some things spoken, published or otherwise communicated will be truly individual initiatives, while others will be the product of substantial business enterprises. Some such communications will be subject to varying forms of editorial control but others will appear without being reviewed by anyone other than their originator and indeed appear without the prior knowledge of the person providing the particular means of communication. In many instances the author of a communication will be identifiable but in others he or she can remain anonymous. Some communications will reach an audience almost instantaneously but others will depend on the willingness to listen, read or otherwise access what is being communicated. Some will be widely disseminated and/or enduring but others will be barely noticed and/or fleeting in their existence. All these differences need to be taken into account when determining the scope of regulatory action and self-regulation, as well as whether expectations as to what they can achieve are realistic.
132. Apart from the requirements applicable to statements and publications (including broadcasts) under the general law (discussed in the following section), the degree of specific regulation to which the media and the internet are subject varies from one member State to another. In some instances

there is a requirement to obtain a licence or franchise to operate. There may also be a requirement to abide by certain standards, with the imposition of sanctions – including the permanent or temporary loss of the licence or franchise being possible – where these are breached. In other instances there may only be a requirement to observe certain standards and the existence of some power to enjoin the particular material from being put into circulation, as well as the possibility of exercising indirect influence through the grant of subsidies in cash or in kind that are subject to the fulfilment of certain conditions. Yet in others there are no particular requirements to be observed apart from those under the generally applicable law.

### **Basic requirements**

133. All **regulatory action** with respect to the media and the Internet – including that directed to the use of hate speech – must be consistent with the right to freedom of expression and afford the safeguards against misuse of power applicable to all legal measures affecting the exercise of this right (considered in the following section). Recommendation 7 does not suggest that any new regulatory powers should be adopted but does indicate that effective use should be made of all existing ones – including the full range of available sanctions – that might be relevant to tackling the use of hate speech. For this purpose, however, it is important – as it has been already observed – that the understanding of hate speech relied upon should be as wide as the one found in the Recommendation. In addition, such powers as exist will only be useful if the relevant bodies both actively monitor the entities that they are meant to regulate – including taking the initiative to look at the way certain groups of persons are being portrayed – and respond promptly to instances where the use of hate speech is drawn to their attention.
134. Moreover, the regulatory bodies should ensure that there is sufficient public awareness of their role so that such instances are actually drawn to their attention. Regrettably, it is recalled that in the monitoring cycles it has been noted that the relevant bodies sometimes only exist on paper as they have not actually been properly constituted and this clearly needs to be remedied for any regulatory action to occur. However, consistent with the need to respect the right to freedom of expression, those with regulatory roles should appreciate the desirability of giving preference to using such powers as they have to encourage effective self-regulation of the use of hate speech rather than seeking themselves to intervene directly with the operation of the media and the Internet.
135. The elaboration in recommendation 6 on **self-regulation** as regards the adoption of appropriately formulated codes of conduct (or ethics), monitoring, complaints mechanisms and training is generally applicable to the operation of self-regulation by the media and the Internet. It is not, therefore, repeated in this section but certain aspects of especial relevance to the media and the Internet are highlighted.

### **Codes of conduct**

136. As has been noted in the monitoring cycles, various codes of conduct (or ethics) containing provisions on hate speech have already been adopted by many media professionals and organisations, including the Internet industry<sup>75</sup>. Some have been adopted by professionals themselves and others are internal documents of particular organisations but many apply across specific

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<sup>75</sup> Such as The Best Practices for Responding to Cyberhate, of the Anti-defamation League (ADL), to which Facebook, Google, Microsoft, Soundcloud, Twitter, Yahoo, YouTube and other social networks have signed up.

sectors. In some instances they are entirely the initiative of those adopting them but often they have been prompted by regulatory pressures. However, although these codes often specifically provide that hatred should not be incited and that discrimination should not be propagated, they do not generally cover all the aspects of hate speech as this is understood in the Recommendation, including its more coded forms. Moreover, in some member States the only codes that do exist are limited – whether formally or in practice - to just print media and they may not even apply to companion websites on which hate speech may be posted.

137. There is a need, therefore, to encourage the adoption of codes that cover the widest possible range of media and internet use. Furthermore, such codes – or conditions of use – should govern everyone and not just media professionals and organisations, although it might not be possible for these to cover all individual initiatives (such as self-publishing). This does not mean that there should just be one code as that could make it difficult, if not impossible, to take account of the different forms of communication being used. However, the conduct proscribed in these codes should explicitly use the understanding of hate speech found in the Recommendation.
138. Moreover, given the influence that can be exercised by or through the media and the Internet, it would be appropriate for these codes not only to proscribe the use of hate speech in all its forms but also to indicate ways of presenting information that does not unnecessarily strengthen the attitudes that sustain the use of hate speech, to require that proper account be given of the perspective of those targeted by the use of hate speech in reporting events and to encourage the coverage of events that challenge negative perceptions about particular groups of persons. Thus, the inclusion in news reports of the ethnic origin of the alleged perpetrator of an offence is not generally relevant but this fact can often be remembered despite the person concerned having been subsequently acquitted. There is also a need for care to be exercised in reporting some events, particularly those involving extremists or terrorists, since sensationalising them and focusing on drama can inadvertently strengthen prejudices and inflame passions.
139. In addition, consideration should be being given to whether or not certain events involving those frequently stigmatised are only being reported because those reporting them share the negative perceptions of them, as well as to whether persons hostile to such groups are effectively given privileged access to certain outlets. Similarly, the conditions of use for web fora and similar services might preclude the use of anonymous comments. In addition, they might also preclude access at night-time where this possibility is seen to facilitate the posting of offensive comments. Moreover, reports concerning events involving or of concern to persons who are frequently targeted by the use of hate speech – such as those reporting their involvement in some alleged disorder or dispute – often do not give their view on the circumstances concerned and thus allow the reinforcement of misinformation and negative stereotyping to go unchallenged. Furthermore, such stereotyping and stigmatisation could also be challenged by the publication of reports showing persons belonging to groups of persons targeted by hate speech in a positive light, such as ones dealing with their successful integration or explaining the values underpinning particular traditions. Reporting of this kind could be facilitated by encouragement for the development of tools such as the glossary for journalists on integration that explains certain key terms, which was noted in a monitoring cycle. In this



way, the codes could encourage the media to develop counter narratives to the 'rationale' that underpins the use of hate speech<sup>76</sup>.

### **Monitoring**

140. A crucial aspect of self-regulation is the monitoring of what is being communicated by media and through the Internet. This is of general importance but it is especially necessary where this has not been subject to any form of editorial control. Even where there are codes of conduct (or ethics), monitoring is not always undertaken systematically. This is notably so in respect of the use of hate speech on the Internet. However, as some services on the Internet have shown, there are various automatic techniques available to search for hate speech and these can be complemented by specific facilities to report its use and the material in question can then be removed in accordance with the service's conditions of use. Such schemes should be emulated and, wherever possible, they should be encouraged by regulatory authorities. In addition, research into enhancing their effectiveness should be encouraged by regulatory bodies. Furthermore, individual users should be encouraged to report uses of hate speech and non-governmental organisations should be supported in the undertaking of monitoring or the operation of contact points or hot-lines so that such uses of hate speech can be identified. Monitoring will, however, only be worthwhile if this also leads to the timely deletion of uses of hate speech that are identified and the commitment to do so has already been made by some social platforms that have undertaken both these approaches. Consideration should also be given, in particular cases, to whether or not it would be appropriate for persistent uses of hate speech to entail the blocking of access to internet services where this occurs.

### **Complaints mechanisms**

141. The impact of the complaints mechanisms that exist seems to be variable. Although there are certainly instances in which complaints about the use of hate speech are considered and upheld, there are many others where this does not occur. In addition, as already noted, some are limited to print media and in particular newspapers and journals. Moreover, even these mechanisms are not applicable to all such publications because they are based on voluntary membership and some do not choose to join it. In addition, some of the mechanisms are entirely internal bodies of a given media or internet entity. Furthermore, some do not attract many complaints despite the extent of the use of hate speech occurring and this seems partly attributable to the fact that the mechanisms are not very well-known and, where this is not the case, lack of confidence that they will be effective. Certainly, any rulings that are adopted – which usually just entail the publication of the specific finding by the mechanism – are not generally binding and are not always acted upon.
142. There is a need, therefore, for either complaints mechanisms that apply to particular sectors of the media and the Internet - and are thus not merely internal bodies – to have a wider remit to embrace sectors that are not currently covered or for similar bodies to be established for those sectors. Moreover, confidence in such mechanisms could be enhanced by ensuring that they were better known, they enjoyed clear independence from the influence of those whose conduct was being considered, and their role and rulings were more widely accepted, with the latter being given sufficient prominence so that any condemnation of the use of hate speech is obvious

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<sup>76</sup> See further Council of Europe Commissioner for Human Rights, *Ethical journalism and human rights*, (CommDH (2011)40, 8 November 2011).

to all concerned. Steps in this direction should, therefore, be encouraged by regulatory bodies.

### **Preserving freedom of expression**

143. At the same time, self-regulatory action should not lead to unjustified interferences with the right to freedom of expression. Thus, the barring and deletion of material from, for example, social platforms would only be justified where the actual use of hate speech is involved. However, it is certainly possible that the application of codes of conduct and conditions of use leading to the barring and deletion of material may in fact involve a mistaken or overbroad interpretation as to what can amount to hate speech, resulting in particular instances of the exercise of freedom of expression being unjustifiably stifled. There is a need, therefore, for decisions that have the effect of barring or deleting material to be subject to appeal and ultimately to challenge in the courts. Without such remedies, there will not be adequate protection for the right to freedom of expression.

### **Provision of training**

144. As with other forms of self-regulation, there is also a need to ensure that **appropriate training** is provided for those involved in its operation. In particular, media professionals should not only have a deeper understanding of what constitutes hate speech but also appreciate how, in what they write and publish, they can both avoid facilitating its use and combat the conditions that give rise to such use through promoting tolerance and better understanding between cultures.

## **J. Administrative and civil liability**

### ***Recommendation 8***

145. This recommendation is concerned with the imposition of administrative and civil liability for the use of hate speech. In particular, it deals with the clarification of the different responsibilities that may arise in respect of such use, taking into account the various ways in which such use may occur and the degree of involvement in this that particular actors may have. In addition to the need for redress for the particular harm which should be arranged in the light of the recommendations in paragraphs 10-13 and 15 of GPR No. 7, recommendation 8 identifies the need for specific powers to require the deletion of certain hate speech, the blocking of sites using hate speech, and the publication of an acknowledgement that hate speech had been published, as well as to enjoin the dissemination of hate speech and to compel the disclosure of the identities of those using it. These powers are proposed only for the more serious instances in which the use of hate speech occurs and requires their use to be subject to judicial authorisation or approval in order to ensure that the right to freedom of expression is respected.
146. In order to ensure that appropriate action is taken against these more serious instances of the use of hate speech, it is also recommended that the standing to bring the relevant proceedings be extended not only to those targeted by the use of the hate speech concerned but also to equality bodies, national human rights institutions and interested non-governmental organisations. In addition, the effective use of these powers is recognised to entail the training of the judges, lawyers and officials involved, as well as the exchange of good practices between those involved in the exercise of such powers.

### Clarifying the basis for liability

147. The harm that results from the use of hate speech will in most instances be of a moral kind. However, there could well be instances in which those targeted by this use can also demonstrate that this has also caused them to suffer material loss, such as where it can be linked to the denial of an employment opportunity or the loss of the capacity to work through ill-health. There is a need, therefore, for the law to clarify the particular circumstances in which **compensation might be payable** and the basis under administrative or civil law on which this compensation can be sought, whether as in some member States pursuant to the protection of personality and reputation or by reference to some other administrative or civil wrong. Moreover, the use of hate speech can also be damaging to the reputation of a whole community or group of persons. However, while specific individual loss will not necessarily be significant in all such cases, the ability to seek a declaration that the reputation of persons belonging to that community or group of persons has been damaged and/or some token award could be appropriate and should be provided for in the law.
148. Furthermore, in order to ensure that there is no unjustified interference with the right to freedom of expression, any liability should be limited to the more serious uses of hate speech, namely, those which are intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination against those targeted by it. Thus, it should not be enough to demonstrate damage or loss as a result of a particular use of hate speech for any liability to be imposed; the particular use must also be of such gravity – namely, where there is the intention to incite or an imminent risk of this occurring – that its imposition is warranted.

### Recognising different responsibilities

149. At the same time, clarification will also be necessary in respect of those who might actually be found liable in this way on account of the use of hate speech. This is of crucial importance since, as recommendation 8 notes, many different kinds of entity and means of communication could become involved where hate speech is being used. An appropriate legal framework governing their **respective responsibilities**, if any, as a result of the use of hate speech messages should thus be established.
150. While the initial author of a particular use of hate speech might have some responsibility for this use, the determination of the degree to which this is shared – if at all – by others will need to take account of factors such as whether or not they took an active part in its dissemination, whether or not they were aware that their facilities were being used for this purpose, whether or not they had and used techniques to identify such use and those responsible for it and whether or not they acted promptly to stop this from continuing once they became aware that this was occurring. In this connection it should be noted that the European Court of Human Rights has considered the right to freedom of expression not to have been violated where a company was found liable to those targeted by hate speech posted on its internet news portal<sup>77</sup>. It did so, having regard to the extreme nature of the comments, the absence of means of identifying the person who had posted the comments so that he or she could be pursued, the company's failure to prevent or promptly remove the comments and the fact that the economic consequences of liability were not substantial for the company

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<sup>77</sup> *Delfi AS v. Estonia* [GC], no. 64569/09, 16 June 2015.

since the award was proportionate and had not affected its business operations<sup>78</sup>.

151. Furthermore, in some instances, the ability for certain facilities to be exploited for the use of hate speech may reflect a failure to comply with regulatory requirements. In such cases, when imposing any consequential **administrative sanctions**, such as a fine or loss of a licence or franchise, account would also need to be taken of the particular circumstances involved, including whether or not any previous warnings about the failures concerned have been given. A failure to take these circumstances into account could lead to a disproportionate response, which would be inconsistent with the right to freedom of expression

#### **Remedies other than compensation**

152. In addition to the payment of compensation and the imposition of administrative sanctions, recommendation 8 envisages the need for several **other remedies** to be available to deal with instances in which hate speech has been used. The remedies concerned – deletion, blocking of sites, publication of acknowledgements, enjoining dissemination and compelling disclosure – all entail significant interferences with the right to freedom of expression. Nonetheless, their use will not necessarily entail a violation of Article 10 of the European Convention on Human Rights as this has been considered appropriate in particular sets of circumstances by the European Court of Human Rights<sup>79</sup>. Thus, there is a need to ensure that they are only used where the use of hate speech involved is of the gravity required by recommendation 8 – namely, where it is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination against those targeted by it – and that this is not only actually required to remedy the situation in question but is also no wider in effect than that requires<sup>80</sup>. For example, there would be no need to require deletion or the publication of an acknowledgement where this had already occurred.

#### **The importance of judicial control**

153. Furthermore, the requirement that any exercise of such powers be subject to judicial authorisation or approval is a reflection of the fundamental importance of the courts being able to exercise a supervisory role and thereby provide a safeguard against the possibility of any unjustified interference with the right to freedom of expression. In most cases the exercise of such powers should require the prior approval of a court but it is also recognised that there can be urgent situations in which it is not appropriate to wait to seek such approval before acting and so judicial control can only occur after a particular power has been exercised.

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<sup>78</sup> Cf. *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, no. 22947/13, 2 February 2016 in which the fact that no hate speech was used was a factor in finding that the imposition of liability on a company for a posting on its internet portal did amount to a violation of the right to freedom of expression.

<sup>79</sup> See, e.g., *Andreas Wabl v. Austria*, no. 24773/94, 21 March 2000, *Nordisk Film & TV A/S v. Denmark*, no. 40485/02, 8 December 2005, *Keller v. Hungary* (dec.), no. 33352/02, 4 April 2006 and *Peta Deutschland v. Germany*, no. 43481/09, 8 November 2012.

<sup>80</sup> Cf. the overbroad blocking measures found in *Yildirim v. Turkey*, no.3111/10, 18 December 2012 and *Cengiz and Others v. Turkey*, no. 48226/10, 1 December 2015 to violate Article 10.

### **Standing to sue**

154. The ability to seek the use of these powers should certainly be vested in those who are targeted by the use of hate speech concerned. Indeed, there are already possibilities in some member States for someone whose personality has been violated by the use of hate speech to seek the discontinuation of this unlawful interference with it and/or the removal of its effects. Furthermore, given that judicial proceedings will be an intrinsic part of the process, it is essential that **legal aid** be made available to enable such persons to take part in them. However, recommendation 8 also envisages **a role for equality bodies, national human rights institutions and interested non-governmental organisations** in seeking the exercise of the powers to require deletion, blocking of sites and publication of acknowledgements, as well as those to enjoin dissemination and to compel disclosure. This reflects the recognition that these entities can all play a role in monitoring the use of hate speech. As a result, these entities may be especially well-placed to substantiate the need for the exercise of these powers and to initiate the process leading to this occurring. Making specific provision for them to act in this way is likely to ensure that these powers will not merely be theoretical remedies for the use of hate speech but will be ones that are practical and effective.

### **The need for training**

155. Finally, as with other measures to be taken to tackle the use of hate speech, there will be a need to ensure that the judges, lawyers and officials involved in the provision of the various administrative and civil remedies for such use have **appropriate training**. This is important to enable them to appreciate whether or not a use of hate speech has occurred or is occurring is of sufficient gravity to warrant the use of these remedies, as well as whether or not a specific use of a particular remedy is consistent with the right to freedom of expression. In addition to this training, these goals could be facilitated by the exchange of good practices between those who have to deal with the sort of cases where administrative and civil remedies might be sought. Such exchanges should not be limited to ones between judges, lawyers and officials within their particular member State but should extend to those in other member States to ensure that the benefits of experience are more widely shared. All such exchanges should be facilitated by member States.

## **K. Administrative and other sanctions against organisations**

### ***Recommendation 9***

156. This recommendation is particularly concerned with the appropriate response to the use of hate speech by political parties and other organisations, as well as by those who belong to them. It envisages a two-fold response to their use of hate speech. Firstly, there should be a withdrawal of financial and other forms of support by public bodies where any form of hate speech is used by them or, in the case of their members, such use is not sanctioned. Secondly, there should be provision for prohibiting or dissolving political parties and other organisations – regardless of whether they are in receipt of such support - where the use of hate speech by them is of a more serious character, namely, it is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination.
157. The two forms of response being recommended build on the similar ones found in paragraphs 16 and 17 of GPR No. 7. In particular, recommendation 9 is concerned with the use of hate speech in general and not just the promotion of racism dealt with in GPR No. 7. Moreover, the **requirement to**

**withdraw support by public bodies** extends to all its forms. Thus it would cover not only grants, loans and other forms of financing for the activities of the political parties and other organisations concerned but also the making available to them of facilities or premises, the possibility to use staff and any other kind of practical assistance. Although directed to the withdrawal of all these forms of support, it is also implicit in recommendation 9 that no such support should be granted to political parties and other organisations where the specified conditions are seen to be met at the time this is requested. The measures envisaged in recommendation 9 are ones to be taken with respect both to political parties and organisations that have a formal legal status and those having a more informal or *de facto* character. However, it is recognised in recommendation 9 that all such measures must always be applied in a manner consistent with the requirements of the right to freedom of association.

#### **Rationale**

158. The use of hate speech by various organisations, as well as the failure to sanction such use by their members, has been a concern noted in the monitoring cycles. In particular, this has involved the cultivation and dissemination by them of neo-Nazism, racism and xenophobia. In many instances, the entities concerned have been political parties – including those represented in the legislature – and other campaigning organisations. However, the use of hate speech by other organisations – including student fraternities within universities and football supporters’ associations – has also been noted. In a number of instances, the organisations using hate speech have at the same time been receiving various forms of public support, usually financing in the case of political parties and the provision of facilities where other entities are involved.

#### **Current practice**

159. The monitoring cycles have noted that certain elements of the measures that are now being recommended already exist in some member States. Thus, there is the possibility of discontinuing public funding for political parties that are found to be hostile towards the rights and freedoms guaranteed under the European Convention on Human Rights. In addition, in many member States there are powers to prohibit or dissolve organisations, notably, ones that support racial or national hatred, incite violence and are a threat to democracy. However, it has also been noted that the arrangements to discontinue public funding for political parties have not always worked, particularly because of difficulties in fulfilling procedural requirements and the strict interpretation being given to the substantive ones. Moreover, where there are powers to prohibit or dissolve organisations that promote racism, it has noted that no action has in fact been taken. This can be because of the failure of the relevant authorities to be sufficiently active in gathering the evidence that would be required for the relevant proceedings or of a self-imposed requirement that such evidence should also be sufficient to substantiate the conviction of one or more of those belonging to them. Furthermore, in a number of member States there is still no power to prohibit or dissolve organisations which promote racism.

#### **Justification for measures**

160. The withdrawal of support from political parties and other organisations undoubtedly has the potential to infringe the right to freedom of association of those founding and belonging to them. This is even more so in the case of measures that result in their **prohibition and dissolution**. However, the right to freedom of association is guaranteed under Article 11 of the European Convention on Human Rights and Article 22 of the International Covenant on Civil and Political Rights. Both these guarantees of the right

provide that it can be subject to limitations where these are necessary in a democratic society for the protection of various objectives, most notably, the rights and freedoms of others. In addition, both treaties specifically provide that nothing in their provisions “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 recognised” in them or at their limitation to a greater extent than they provide<sup>81</sup>. Moreover, Article 20(2) of the Covenant additionally provides that “Any advocacy of national, racial or religious hatred that constitutes incitement to any discrimination, hostility or violence shall be prohibited by law”.

161. Furthermore, Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination provides that 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 ... 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”.
162. In several of its general recommendations, the Committee on the Elimination of Racial Discrimination has underlined the need for States Parties to fulfil their obligations under Article 4(b) of the International Convention on the Elimination of All forms of Racial Discrimination to declare illegal and prohibit organisations that promote or incite racial discrimination. It has done so most recently in *General Recommendation No. 35 Combating racist hate speech*, in which it also made it clear that it considered that “the reference in Article 4 to “organized...propaganda activities” implicates improvised forms of organization or networks, and that “all other propaganda activities” may be taken to refer to unorganised or spontaneous promotion and incitement of racial discrimination” (CERD/C/GC/35, 26 September 2013, para. 21). This approach is consistent with the view that the associations to which the guarantee of the right to freedom of association applies covers both those with and without any discrete legal personality from their members<sup>82</sup>.
163. Furthermore, in its concluding observations on the periodic reports submitted pursuant to the International Convention on the Elimination of Racial Discrimination, the Committee has also expressed the need for certain States Parties – including member States - to adopt specific legislation criminalizing racist organisations and participation in such organisations, as well as to penalise organisations that propagate racist stereotypes and hatred towards persons belonging to minorities. In addition, it has commented on the need for existing prohibitions both to be strengthened and used. In particular, the Committee has expressed concern about certain cases of no action being taken to prohibit organisations involved the

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<sup>81</sup> Article 17 and 5 respectively.

<sup>82</sup> See European Commission for Democracy through Law (Venice Commission) and the OSCE Office for Democratic Institutions and Human Rights, *Guidelines on Freedom of Association* (2014), para. 48.

dissemination of ideas of ethnic superiority or hatred, or of the use of defamatory language or the advocacy of violence based on such ideas despite those cases having been widely reported in the country concerned.

164. Moreover, the need for bans to be imposed on racist associations has also been the subject of certain recommendations in the Universal Periodic Review.
165. In the context of the limitations on the right to freedom of association discussed above, it is thus not surprising that both the United Nations Human Rights Committee and the European Court of Human Rights have respectively concluded that such measures as those which recommendation 9 envisages being taken against political parties and other organisations - including those involving their prohibition or dissolution - are not necessarily inconsistent with the right to freedom of association. This has been particularly the case where the entity concerned was promoting fascism<sup>83</sup>, advocating racially motivated policies together with the use of large-scale coordinated intimidation<sup>84</sup>, inciting hatred and discrimination<sup>85</sup> or otherwise pursuing goals that were inconsistent with pluralism and thereby undermining democratic principles<sup>86</sup>.
166. In addition, in its concluding observations on periodic reports submitted by States Parties to the Covenant, the United Nations Human Rights Committee has also called for specific legislation criminalising racist organisations and expressed the need for effective steps to be taken to combat hatred, violence and discrimination and to impose on all actors and political forces rules of conduct and behaviour that are compatible with human rights, democracy and the rule of law. Similarly, in its concluding observations on periodic reports submitted pursuant to the International Convention on the Elimination of All forms of Racial Discrimination, the Committee on the Elimination of Racial Discrimination has recommended the adoption of legal and policy measures with the aim of preventing the registration and disbanding of the activities, as necessary, of organisations that have been involved in repeated attacks against foreigners and members of “visible minorities”.

#### **Requirements to be observed**

167. However, the European Court of Human Rights and the two Committees are also conscious of the potential for the measures envisaged in the recommendation 9 to entail violations of the right to freedom of association. Thus, both Committees have expressed concern in their concluding observations to periodic reports about the possibility of legislation directed against 'extremism' being interpreted and enforced in an excessively broad manner, thereby targeting or disadvantaging human rights defenders promoting the elimination of racial discrimination or not protecting individuals and associations against arbitrariness in its application. Moreover, there have been many instances where the prohibition on the formation of political parties and other organisations or their enforced dissolution has been found by the European Court of Human Rights to be unjustified<sup>87</sup>. Thus, all

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<sup>83</sup> E.g., *M. A. v. Italy*, Communication No. 117/1981, 10 April 1984.

<sup>84</sup> E.g., *Vona v. Hungary*, no. 35943/10, 9 July 2013.

<sup>85</sup> *Association nouvelle des Boulogne Boys v. France* (dec.), no. 6468/09, 22 February 2011.

<sup>86</sup> E.g., *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], no. 41340/98, 13 February 2003 and *Kalifatstaat v. Germany* (dec.), no. 13828/04, 11 December 2006.

<sup>87</sup> E.g., *Sidiropoulos and Others v. Greece*, no. 26695/95, 10 July 1998, *The United Macedonian Organisation Ilinden and Others v. Bulgaria*, no. 59491/00, 19 January 2006, *Tourkiki Enosi Xanthis and*



measures affecting both the existence of political parties and other organisations and their ability to operate must be supported by relevant and sufficient reasons and be proportionate in their scope.

168. The withdrawal by public bodies of various forms of support for political parties and organisations using hate speech or failing to sanction their members for having done so is, in principle a restriction compatible with the right to freedom of association. However, such a withdrawal is unlikely to be regarded as a proportionate measure unless there is a clear institutional commitment to the use of hate speech. This will undoubtedly exist where it figures in policy documents and pronouncements and by leading personalities in the political party or organisation concerned but also where it is used repeatedly by individual members without any objection being made to this. On the other hand, it will be less evident where such use entailed no more than an isolated incident of remarks by an individual member.
169. The requirements for the prohibition or dissolution of a political party or other organisation are even more exacting given the gravity of such a measure<sup>88</sup>. This is reflected in the limitation by the recommendation 9 of the use of such measure to situations in which the hate speech concerned is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination. There will, therefore, be a need to establish that there is plausible evidence either that such an intention exists or that there was an imminent likelihood of the acts concerned occurring. Moreover, where the use of hate speech involved the speeches or other conduct of individuals as opposed to more formal policy documents or pronouncements, there will also be a need to establish that these were imputable to party or organisation concerned and that they gave a clear picture as to the approach which it supported and advocated<sup>89</sup>. This will most often be the case with the speeches and conduct of leading figures in a party or organisation. Thus, it may be appropriate to place less emphasis in this context on the activities of individual members, including former leaders, where these have not been endorsed in an explicit or tacit manner<sup>90</sup>.
170. The withdrawal of any form of support from a political party or other organisation should always be open to challenge in an independent and impartial court. Moreover, the prohibition or dissolution of a political party or other organisation should only be capable of being ordered by a court and such an order should be subject to prompt appeal, The observance of these requirements are essential safeguards for the right to freedom of association<sup>91</sup>.

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*Others v. Greece*, no. 26698/05, 27 March 2008 and *Association of Citizens Radko & Paunkovski v. the former Yugoslav Republic of Macedonia*, no. 74651/01, 15 January 2009.

<sup>88</sup> See European Commission for Democracy through Law (Venice Commission) and the OSCE Office for Democratic Institutions and Human Rights, *Guidelines on Political Party Regulation* (2011), paras.89-96 and European Commission for Democracy through Law (Venice Commission) and the OSCE Office for Democratic Institutions and Human Rights, *Guidelines on Freedom of Association* (2014), paras. 247-256.

<sup>89</sup> See *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], no. 41340/98, 13 February 2003, at paras. 101 and 111-115.

<sup>90</sup> See, e.g., the conclusion in *Socialist Party and Others v Turkey* [GC], no. 21237/93, 25 May 1998 that the speeches of a former chairman did not provide evidence of the party's inadmissible objectives and thus justify its dissolution.

<sup>91</sup> See, e.g., paragraphs 10 and 74 of Recommendation CM/Rec(2007)14 of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe.

## L. Criminal liability and sanctions

### *Recommendation 10*

171. This recommendation is concerned with the circumstances in which criminal sanctions ought to be imposed for the use of hate speech. Their imposition is only considered appropriate in limited circumstances because of the potential risk they pose for violating the right to freedom of expression. However, even then there should be no resort to criminal sanctions where a particular use of hate speech can be effectively dealt with through a measure of a less restrictive nature. Furthermore, it addresses the manner in which the relevant offences are defined since this is important both to avoid the risk of a violation of freedom of expression and to ensure that their scope keeps pace with technological developments relating to the use of hate speech. Moreover, recommendation 10 highlights the danger of the offences being misused through prosecutions that target criticism of official policies, political opposition or religious beliefs rather than any actual use of hate speech. In addition, it recognises the importance of those targeted by a particular use of hate speech being able to participate in the relevant proceedings.
172. Recommendation 10 underlines the need for the sanctions made available for these offences to reflect the serious consequences that can result from the use of hate speech. At the same time, it emphasises the need for any specific penalty imposed in a particular case to reflect the principle of proportionality since a failure in this regard can itself be a basis for violating the right to freedom of expression. Although recommendation 10 envisages the imposition of criminal sanctions as exceptional, it also recognises that their imposition in appropriate circumstances should not be frustrated by failings in the handling of investigations or prosecutions. It thus underlines the need for the effectiveness of these to be monitored. As such effectiveness will often turn on good cooperation and coordination between the authorities involved (including those in other States) and on those working for them being appropriately trained, recommendation 10 highlights these matters requiring the particular attention of member States.

### **Circumstances warranting criminal responsibility**

173. The relevant factors for a particular use of hate speech to reach **the threshold for criminal responsibility** are where such use both amounts to its more serious character - namely, it is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination - and the use concerned occurs in a public context. As the paragraphs above dealing with the definition of hate speech make clear<sup>92</sup>, the former factor goes beyond the formulation used in paragraph 18 a-f of GPR No. 7 in that it envisages responsibility being imposed where there is an element of recklessness as to violence, intimidation, hostility or discrimination being a consequence of a particular use of hate speech and not just that this is intended. Moreover, although threats – as opposed to the other conduct covered by GPR No. 7 are not required to be made in public for the purpose of attracting criminal responsibility, recommendation 10 requires a public context for a use of hate speech to attract such responsibility.
174. It is a matter for the criminal law of each member State as to how such responsibility is to be imposed. In particular, it might sometimes be possible to rely on **provisions of more general character**, such as those dealing with insult, rather than ones specifically concerned with the use of hate speech. However, it is crucial that, in addition to requiring compliance with

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<sup>92</sup> See paras. 14-18 above.

the two factors just discussed, there actually be a provision or provisions enabling responsibility to be imposed for each of the different elements of what constitutes hate speech for the purpose of the Recommendation. In this connection, it is recalled that the monitoring cycles have shown that this has not always been the case with regard to criminal responsibility for the different acts with which paragraph 18 of GPR No. 7 is concerned. As a result of lacunae in the legislation, there have been instances in which it was not possible to prosecute persons who appeared to have committed some of those acts. Moreover, it is important that, if offences other than those specifically dealing with the use of hate speech are the basis for a prosecution in respect of such use, this does not lead to the significance of the conduct concerned being diminished either in terms of the seriousness with which it is viewed or the level of the sanction that can be imposed. Although sanctioning serious uses of hate speech is desirable in itself, such a measure also has the additional benefit of underlining its unacceptability in a democratic society. This benefit should not, therefore, be lost by an inappropriate qualification of the conduct concerned

### Drafting the offences

175. The need to ensure that the relevant provisions are drafted in a clear and precise manner is of the utmost importance. Without such **clarity and precision**, there is likely an absence of legal certainty as to scope of the conduct that is prohibited. This would then sustain claims that there is an interference with freedom of expression that is not prescribed by law and so - notwithstanding that the imposition of a criminal sanction would otherwise be consistent with the right to freedom of expression - a violation of Article 10 of the European Convention on Human Rights (as well as potentially of the prohibition in Article 7 on punishment without law). Thus, when framing the relevant provisions, due account should be taken of the definitions given above for the various terms used in the understanding of what constitutes hate speech for the purpose of the Recommendation<sup>93</sup>.
176. Furthermore, particular attention should also be paid when drafting the relevant provisions to setting out clearly the **considerations appropriate for imposing a criminal sanction** on a given use of hate speech. These considerations are whether (a) there actually exists an intent to incite acts of violence, intimidation, hostility or discrimination or a likelihood of this being incited<sup>94</sup> and (b) whether there are other less restrictive but still effective means of responding to the use of hate speech (such as through the imposition of civil and administrative liability<sup>95</sup>).
177. Moreover, in drafting the relevant provisions, it is also crucial to **avoid introducing further requirements** for the imposition of criminal responsibility to those which have already been outlined, such as the disruption of public order, the size of the audience for the hate speech used or the extent of its dissemination. These requirements may well be relevant to the assessment of the risk of whether any incitement can reasonably be anticipated but their separate specification as an element of criminal liability

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<sup>93</sup> See paras. 8-21 above.

<sup>94</sup> See the finding of the European Court of Human Rights in *M'Bala M'Bala v. France* (dec.), no. 25239/13, 20 October 2015 that a blatant display of hatred and antisemitism disguised as an artistic production was as dangerous as a head-on and sudden attack and so did not deserve protection under Article 10 of the European Convention on Human Rights.

<sup>95</sup> See the finding of the European Court of Human Rights in *Lehideux and Isorni v. France* [GC], no. 24662/94, 23 September 1998 that, "having regard to the existence of other means of intervention and rebuttal, particularly through civil remedies" (para. 57), a criminal conviction was disproportionate.

has been seen in the monitoring cycles as adding further obstacles to securing convictions.

178. Finally, although clarity and precision is essential, the particular language used to specify the different forms of expression through which hate speech is used should be sufficiently open to **accommodate technological developments**. This language should not, therefore, be anchored in the known forms of expression (such as the print or social media) but should focus more on the essential nature of expression and thus be capable of embracing other forms that might emerge.
179. In addition to imposing criminal responsibility on the basis set out above, it would also be appropriate to impose **certain additional bases for responsibility**. These are the ones set out in paragraph 18g and paragraph 20 of GPR No. 7, namely, the imposition of responsibility for creating or leading a group which promotes or supports the use of hate speech, participating in the activities of such a group with the intention of contributing to the use of hate speech for which criminal sanctions can be imposed and intentionally instigating, aiding or abetting the use of such hate speech or attempting to use it. The imposition of responsibility in such cases would reflect both the breadth of the understanding for the purpose of the Recommendation and the liability for inchoate acts that normally accompanies the creation of criminal offences. Also following, paragraph 22 of GPR No. 7, it should be made clear that the foregoing criminal responsibility can arise for both natural and legal persons. The potential responsibility of the latter is important since corporate organisations can be the vehicle through which hate speech is disseminated<sup>96</sup>.

#### **Measures to prevent abusive prosecutions**

180. Recommendation 10 takes account of the concern already noted about the risk of criminal responsibility being unjustifiably **used to suppress criticism of official policies, political opposition and religious beliefs**<sup>97</sup>. The unacceptability of such use should be evident from the requirements set out above for the imposition of criminal responsibility. However, it would be appropriate to reinforce this point by including in the relevant laws an explicit stipulation that the offences are not applicable to such criticism, opposition or beliefs. Furthermore, given the concern about hate speech prohibitions possibly being disproportionately used against those whom they are intended to protect<sup>98</sup>, it would also be appropriate to develop guidelines for law enforcement officials and prosecutors that draw attention to this potential risk and require consideration on a periodic basis as to whether there is any difference in the approach to the institution of criminal proceedings according to the particular characteristics of those accused of using hate speech. The objective should be to ensure that these characteristics have no bearing on the institution of such proceedings

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<sup>96</sup> Thus, e.g., in *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, 8 July 1999 the European Court of Human Rights did not accept the argument that the owner of a review should be exonerated from any criminal liability for the content of the letters it published on account of having only a commercial and not an editorial relationship with it. In its view, the owner had, as such, the power to shape the editorial direction of the review and so “was vicariously subject to the “duties and responsibilities” which the review’s editorial and journalistic staff undertake in the collection and dissemination of information to the public and which assume an even greater importance in situations of conflict and tension” (para. 63).

<sup>97</sup> See paras. 62-64 above.

<sup>98</sup> See para. 64 above.

### Involving those targeted

181. Recommendation 10 also underlines the importance of the possibility of **effective participation** for those targeted by the use of hate speech in any criminal proceedings instituted with respect to such use. This participation should run from the investigation stage following a complaint through to the conclusion of proceedings in court. It is particularly important that such persons be kept informed of the progress of an investigation and of any difficulties encountered in the course of it. In addition, they should be able to comment before any decision is taken to end an investigation or to drop charges that have been made against someone for using hate speech. This is vital not only to ensure that the relevant authorities have all the information material to such a decision but also to give confidence to those targeted by the use of hate speech in the operation of the justice system. Furthermore, those targeted by the use of hate speech should be notified in good time of any relevant court hearing and their dignity should be assured when they give evidence as a witness. Insofar as there is any possibility for private prosecutions to be brought, such as for attacks upon honour of a person or for defamation, it is also important that there be clarity as to who has standing to institute such a prosecution. Furthermore, the rules on standing need to be applied in a consistent manner.

### The penalties

182. In both **prescribing and imposing particular penalties** following a conviction for the use of hate speech, recommendation 10 identifies two relevant considerations to be taken into account, namely, the serious consequences flowing from such use and the principle of proportionality.
183. The former comprise not only the ones suffered by those who are the particular targets of the use of hate speech concerned but also the impact that such use has on others in the group of persons to which they belong and the damaging effect that it can have on the cohesion of society generally. The specific penalties made available thus need to reflect the significance of these consequences. They should thus be - as paragraph 23 of GPR No. 7 specified - both **effective and dissuasive** so that they reflect the damage already done and discourage its recurrence. Such penalties might involve imprisonment or the imposition of fines, as well as the seizure and forfeiture of the publications involved. However, they could also be influenced more specifically by the conduct found objectionable. Thus, for example, they could involve a temporary loss of political rights, a requirement to visit one or more memorials to the Holocaust or a requirement to undertake some form of practical reparation for the group of persons targeted by the particular use of hate speech.
184. Nonetheless, the actual imposition of sanctions also needs to take account of the risk that a particular penalty – in the specific circumstances of the case - could entail an **undue interference with freedom of expression**. Although no objection in principle has been raised by the European Court of Human Rights to the imposition of fines, prison sentences, forfeiture and the loss of political rights<sup>99</sup>, the imposition of at least the first two has also been the basis for it concluding in some cases that there had been a disproportionate

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<sup>99</sup> See, e.g., *Zana v. Turkey* [GC], no. 18954/91, 25 November 1997 (one year's imprisonment), *Hennicke v. Germany* (dec.), no. 34889/97, 21 May 1997, *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, 8 July 1999 ("a relatively modest fine"; para. 64), *Incal v. Turkey* [GC], no. 22678/93, 9 June 1998 (forfeiture, although this was not applied in this case) and *Féret v. Belgium*, no. 15615/07, 16 July 2007 (loss of the right to stand for election for ten years but the dissenting judges considered this to be disproportionate).

interference with freedom of expression<sup>100</sup>. Each case clearly has to be addressed on its merits but prison sentences and substantial fines are unlikely to be considered compatible with the right to freedom of expression under Article 10 of the European Convention on Human Rights except with respect to the most serious uses of hate speech. Conversely, relatively small but not inconsequential fines and other penalties that could prompt a change of attitude – such as a requirement to undertake some work for those who were targeted by the use of hate speech – are unlikely to be considered disproportionate and thus objectionable in the majority of cases.

### **Ensuring effective investigation and prosecution**

185. The importance attached by recommendation 10 to the monitoring of the effectiveness of **the investigation of complaints and of the prosecution of offenders** reflects the shortcomings found in this regard in the course of the monitoring cycles. Although some instances of effective law enforcement measures against those using hate speech, there have also been many in which criminal action has been ruled out too easily, with the result that very few of the cases initiated by a complaint to the authorities ever reaching the courts. In addition, where cases do actually get brought to court, the actual conviction rates often seem to be low and the specific penalties imposed are not always commensurate with the use of hate speech concerned. Various factors lie behind such apparently limited success in the use of the criminal law to tackle the use of hate speech where this would be an appropriate response. They include: (a) the failure of some police officers to take the offences seriously and to act expeditiously; (b) a lack of competence in gathering and assessing evidence; (c) an overly expansive view of the protection afforded by the right to freedom of expression (which is not consistent with the approach of the European Court of Human Rights and/or an overly strict interpretation of what constitutes elements of the offence (such as incitement to hatred); (d) unsuccessful attempts to establish requirements for a conviction that are no longer applicable; (e) the failure to undertake sufficient, systematic and effective investigation of the use of hate speech; (f) the devotion of resources to investigating religious fundamentalists rather than extremists motivated by racism and other aspects of hate speech; (g) territorial disputes as to which authority has authority over a particular case; (h) the reclassification of the offences as ordinary criminal offences so as not to prejudice targets for success rates for achieving convictions; (i) the immunity enjoyed by politicians; and (j) a possible lack of impartiality amongst members of juries determining the cases.
186. Certain of these shortcomings have also been the basis for the finding of violations by the Committee on the Elimination of Racial Discrimination of Article 4 and 6 of the International Convention on the Elimination of All forms of Racial Discrimination. In particular, they have included the failure to

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<sup>100</sup> See, e.g., *Karataş v. Turkey* [GC], no. 23168/94, 8 July 1999 (imprisonment for one year, one month and ten days, with a fine of TRL 111,111, 110), *Aydın Tatlav v. Turkey*, no. 50692/99, 2 May 2006 (a fine of TRL 2, 640, 000) and *Sürek and Özdemir v. Turkey* [GC], no. 23927/94, 8 July 1999 (the seizure of copies of the review in which the impugned publications appeared).

investigate complaints with due diligence and expedition<sup>101</sup> and the failure to take account of the limitations on the right to freedom of expression<sup>102</sup>.

187. All these shortcomings with respect to the handling of complaints about the use of hate speech that might constitute hate speech inevitably sends a strong message to the public that **hate speech is not being taken seriously** and can be engaged in with impunity. It is, therefore, not enough to establish offences with respect to the use of hate speech. There is also a need to monitor carefully and continually the manner in which complaints about their alleged occurrence are investigated, prosecuted and adjudicated so that appropriate adjustments can be made to the approach being pursued, with a view to ensuring that prosecutions are brought and convictions secured in all appropriate cases.
188. The **essential purpose of any investigation** should be to secure the effective implementation of the relevant law and to ensure the accountability of those who may be responsible for committing an offence. Such an investigation should be undertaken once a matter has come to the attention of the authorities and thus should not necessarily be dependent upon a formal complaint. This is particularly important in cases involving the use of hate speech since those targeted by this may well be reluctant to complain. Any investigation should be adequate in that it must be capable of establishing whether or not an offence has been committed and of identifying those responsible. There is a need to take all reasonable steps to secure the evidence, including eyewitness testimony and relevant documents or electronic material. This should be undertaken promptly and conducted with reasonable expedition. Furthermore, there is a need to ensure that the investigation and its results are subject to public scrutiny so as to secure accountability and to maintain public confidence. This includes – as previously noted<sup>103</sup> – keeping that any complainant informed of the progress of the investigation and giving him or her the opportunity to comment before any decision is taken to end it or to drop charges. Finally, the investigation's conclusions and any prosecution decision should be based on a thorough, objective and impartial analysis of all the material available.
189. **Approaches to enhance effective investigation and prosecution** of the use of hate speech could include: (a) the introduction of a tool that allows the online reporting of the use of hate speech; (b) regular analysis of the follow-up to complaints about the use of hate speech from the time of their recording by the police to assess whether complainants received an adequate response; (c) the undertaking of systematic monitoring of the online use of hate speech so that investigations are no longer just based on complaints; (d) the creation of specialist units, having appropriate technical and human resources, with responsibility for the investigation and prosecution of cases involving the use of hate speech; (e) a firm response to instances in which politicians and other public figures use hate speech so that members of the general public do not feel encouraged to follow their example; (f) the lifting of any immunity for politicians in respect of the use of hate speech; and (g) the development of a dialogue, mutual trust and

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<sup>101</sup> *L K v. Netherlands*, Communication No. 4/1991, Opinion of 16 March 1993, *Gelle v. Denmark*, Communication No. 34/2004, Opinion of 6 March 2006, *Adan v. Denmark*, Communication No. 43/2008, Opinion of 13 August 2010 and *TBB-Turkish Union in Berlin/Brandenburg v. Germany*, Communication No. 48/2010, Opinion of 26 February 2013.

<sup>102</sup> *The Jewish Community of Oslo et al. v. Norway*, Communication No. 30/2003, Opinion of 15 August 2005. And *TBB-Turkish Union in Berlin/Brandenburg v. Germany*, Communication No. 48/2010, Opinion of 26 February 2013.

<sup>103</sup> See para. 179 above.

cooperation with groups of persons who are targeted by the use of hate speech so as to gain their confidence and to increase awareness of their rights.

190. Recommendation 10 also recognises that the effectiveness of criminal proceedings instituted with respect to the use of hate speech is also dependent upon three other factors.
191. Firstly, the various actors - and in particular the police and prosecution authorities - having in place both suitable good arrangements for **cooperation and coordination** of their individual activities. There are various ways in which this can be achieved. However, such cooperation and coordination will be more readily achieved through the establishment of good communication channels between the authorities. Moreover, there ought to be a common indication from those in leadership positions that working together to tackle the use of hate speech through criminal proceedings – where this is appropriate – is a high priority for each of the authorities concerned.
192. Secondly, all those involved in the criminal justice system ought to be provided with **appropriate training** to enable them to determine whether particular remarks involve the use of hate speech and, if so, whether – having regard to the right to freedom of expression – imposing a criminal sanction would be the appropriate response. In addition, this training should provide those concerned with a more general appreciation of the impact of such use for those targeted by it and of the dangers which such use poses for society as a whole. In addition, depending upon their particular responsibilities, efforts should be made to enhance their capacity to gather and evaluate any evidence relevant to the institution and adjudication of criminal proceedings concerned with the use of hate speech. Furthermore, guidance should be provided for judges as to the approach required when determining which particular penalties to impose following a conviction. In all cases, such training and capacity development is likely to be enhanced by the exchange of good practices, particularly where certain actors in the criminal justice system have more experience than others in dealing with cases that involve the use of hate speech.
193. Thirdly, the dissemination of hate speech is not restricted to national borders. As a result, proceedings in respect of this can sometimes be frustrated because this originates outside the territory and jurisdiction of a particular member State. This is particularly so with respect to dissemination occurring online. It is recognised that there are no easy solutions in such cases, especially where internet servers may be based in countries that do not have similar requirements governing the use of hate speech to those in the Recommendation. Nonetheless, cooperation with the authorities in those States may prompt action to limit the capacity for such **transfrontier dissemination**. In addition, it may yield information which would enable any appropriate criminal proceedings to be brought against those persons in the member State concerned who have had some role to play in this dissemination. It is, therefore, crucial that all member States – following the lead of some of them - put in place appropriate arrangements to facilitate cooperation relating to the transfrontier use of hate speech that involves not only each of them but also any non-member States of the Council of Europe who are prepared to join in efforts to tackle such dissemination.



## Annex

The following Recommendations of the Committee of Ministers of the Council of Europe and the Recommendations and Resolutions of the Parliamentary Assembly of the Council of Europe relating to the use of hate speech have been adopted:

### *Committee of Ministers*

Recommendation No. R (92) 19 of the Committee of Ministers to member states on video games with a racist content;

Recommendation No. R (97) 20 of the Committee of Ministers to member states on "Hate Speech";

Recommendation No. R (97) 21 of the Committee of Ministers to member states on the media and the promotion of a culture of tolerance;

Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity.

### *Parliamentary Assembly*

Recommendation 1277 (1995) Migrants, ethnic minorities and media;

Recommendation 1543 (2001) Racism and xenophobia in cyberspace;

Recommendation 1706 (2005) Media and terrorism;

Recommendation 1768 (2006) The image of asylum-seekers, migrants and refugees in the media;

Recommendation 1805 (2007) Blasphemy, religious insults and hate speech against persons on grounds of their religion;

Recommendation 2052 (2014) Counteraction to manifestations of neo-Nazism and right-wing extremism.

Resolution 1345 (2003) Racist, xenophobic and intolerant discourse in politics;

Resolution 1510 (2006) Freedom of expression and respect for religious beliefs;

Resolution 1563 (2007) Combating anti-Semitism in Europe;

Resolution 1577 (2007) Towards decriminalisation of defamation;

Resolution 1605 (2008) European Muslim communities confronted with extremism;

Resolution 1728 (2010) Discrimination on the basis of sexual orientation and gender identity;

Resolution 1743 (2010) Islam, Islamism and Islamophobia in Europe;

Resolution 1754 (2010) Fight against extremism: achievements, deficiencies and failures;

Resolution 1760 (2010) Recent rise in national security discourse in Europe: the case of Roma;

Resolution 1846 (2011) Combating all forms of discrimination based on religion;

Resolution 1877 (2012) The protection of freedom of expression and information on the internet and online media;

Resolution 1928 (2013) Safeguarding human rights in relation to religion and belief, and protecting religious communities from violence;

Resolution 1948 (2013) Tackling discrimination on the grounds of sexual orientation and gender identity;

Resolution 1967 (2014) A strategy to prevent racism and intolerance in Europe;

Resolution 2011 (2014) Counteraction to manifestations of neo-Nazism and right-wing extremism;

Resolution 2069 (2015) Recognising and preventing neo-racism;

Resolution 2069 (2015) Recognising and preventing neo-racism.

