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RACIAL DISCRIMINATION AND HATE SPEECH: A COMPARISON OF THE
APPROACHES OF THE COMMITTEE ON THE ELIMINATION OF ALL FORMS OF
RACIAL DISCRIMINATION AND THE EUROPEAN COURT OF HUMAN RIGHTS

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INTRODUCTION

Hate speech and racial discrimination are not new phenomena. Racial discrimination can, for instance, already be noticed as early as in times of slavery (1492-1776), where millions of people were forcibly taken from Africa to the New World to cultivate cotton, sugar and coffee plantations, often in harsh weather conditions.¹ In addition, slaves were denied their basic humanity, such as their own names, which led these four hundred years of persecution to cause generations of exploitations, which were recently described by the United Nations (UN) as among the ‘worst violations of human rights in human history’.² However, slavery resulted in today’s persistent anti-Black racism and racial discrimination.³ After the times of slavery, racial discrimination has continued to exist in various forms, such as colonization, which also carries today direct causality with modern forms of racism and racial discrimination.⁴ On its side, hate speech is seen as being one of the starting points of atrocity crimes, including genocide.⁵ In history, hate speech was indeed the starting point of the Holocaust, the genocide in Rwanda, Bosnia and Herzegovina and Cambodia.⁶ Moreover, in the recent years, hate speech has been strongly linked with violence resulting in mass killings, notably in the Central African Republic, Sri Lanka, New Zealand and the United States.⁷ Therefore, both racial discrimination and hate speech have a long-standing history and were proven to be the main factors of what were later classified as the worst atrocity crimes.

The relevance of this research lies in the fact that there exists no universally accepted definition of hate speech⁸. Moreover, the approaches of hate speech are disseminated through various international instruments and case-law, but there is again no universal consensus such approach, therefore leading to disparities regarding the way it is tackled with. Finally, the various

¹ United Nations, ‘UN Resolution Urges Reparations for Slavery’s ‘Historical Wrongs’ <<https://news.un.org/en/story/2026/03/1167199#:~:text=Results%20following%20the%20vote%20in,the%20Gravest%20Crime%20Against%20Humanity>>, accessed 11 April 2026.

² *Ibid.*

³ *Ibid.*

⁴ United Nations Human Rights Office of the High Commissioner, ‘Racism, Discrimination are Legacies of Colonialism’ <<https://www.ohchr.org/en/get-involved/stories/racism-discrimination-are-legacies-colonialism>> accessed 11 April 2026.

⁵ United Nations, ‘Hate Speech and Human Rights’ <<https://www.un.org/en/hate-speech/understanding-hate-speech/hate-speech-and-real-harm>> accessed 11 April 2026.

⁶ United Nations, ‘Secretary-General Launches United Nations Strategy and Plan of Action against Hate Speech, Designating Special Adviser on Genocide Prevention as Focal Point’ <<https://press.un.org/en/2019/pi2264.doc.htm>> accessed 11 April 2026.

⁷ *Ibid.*

⁸ Anne Weber, Manual on Hate Speech’ <<https://rm.coe.int/1680665b3f>> accessed 11 April 2026.

international or regional instruments addressing hate speech have divergent focuses, which also deepen the disparities in the ways this issue is legally tackled with. In addition, this thesis brings novelty since there exists a clear lack of research containing a substantive comparative analysis on how hate speech is dealt with across these different international legal frameworks. Only one of them, Alkiviadou, has operated a thorough study regarding how hate speech impacts social media⁹ and how the European Court of Human Rights (ECtHR) approaches it.¹⁰ However, even though Alkiviadou somewhat mentions the International Committee on the Elimination of Racial Discrimination (CERD) in her literature,¹¹ her work focuses more on offering a critique of the discrepancies of the ECtHR's jurisprudence regarding hate speech and therefore fails to provide an objective and purely comparative approach on the matter.¹²

This thesis further focuses on the urgent issues that racial discrimination and hate speech constitute. First of all, racial discrimination is still present in today's world, influenced by the past slavery and colonization times. Studies have indeed shown that racial discrimination is substantively present in our societies, with one in six persons experiencing general discrimination and racial discrimination being the most common ground for hate speech.¹³ Then, on its side, combatting hate speech is necessary since it has been on the rise over the past few years, targeting specifically marginalized communities.¹⁴ More specifically, antisemitism, which has also never left our societies, has seen a sudden spike since the 2023 war between Israel and Hamas, since 31% of all Western attacks in 2024 were motivated by antisemitism¹⁵ and since antisemitism was found in three quarters of European Union classrooms by the UNESCO.¹⁶ Finally, hate speech and racial discrimination are closely related, since the former includes the call to violence against a specific

⁹ Natalie Alkiviadou, 'Hate Speech on Social Media Networks: Towards a Regulatory Framework' (2019) 28 Info & Comm Tech L 19.

¹⁰ Jacob Mchangama & Natalie Alkiviadou, 'Hate Speech and the European Court of Human Rights: Whatever Happened to the Right to Offend, Shock or Disturb?' (2021) 21 Hum Rts L Rev 1008.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ United Nations, 'Reduced inequalities' <<https://unstats.un.org/sdgs/report/2023/goal-10/>> accessed 11 April 2026.

¹⁴ Geneva International Centre for Justice, 'The Exponential Rise in Hate Speech: A Report in Commemoration of the International Day for Countering Hate Speech' <https://www.gicj.org/GICJ_REPORTS/The_Exponential_Rise_in_Hate_Speech.pdf#:~:text=Across%20different%20platforms%2C%20there%20has%20been%20an,have%20risen%2050%25%20since%20the%20year%202022> accessed 11 April 2026.

¹⁵ Vision of Humanity, 'Gaza Conflict Leads to Rise in Antisemitism and Islamophobia' <<https://www.visionofhumanity.org/gaza-conflict-leads-to-rise-in-antisemitism-and-islamophobia/>> accessed 11 April 2026.

¹⁶ UNESCO, 'UNESCO survey finds antisemitism present in three quarters of EU classrooms' <<https://www.unesco.org/en/articles/unesco-survey-finds-antisemitism-present-three-quarters-eu-classrooms>> accessed 11 April 2026.

group on grounds which can be religious beliefs, race, ethnicity, etc, while the other consists in the rejection of a group or person on the same basis. This work will therefore focus on hate speech and racial discrimination interrelatedly, since both are addressed in the ICERD and CERD, which are at the core of this comparative research.

This paper further aims to compare how hate speech and racial discrimination are approached and tackled with under the CERD and ECtHR, the former being the formal international body specifically addressing the issue of racial discrimination, and the latter being the European regional instrument handling the respect for human rights in general. In addition, this research has the goal to seek how hate speech as well as racial discrimination can be combatted, legally condemned and in the longer term eliminated from our societies, while still preserving the freedom for everyone to express their thoughts and opinions. To that end, the objective of this thesis is to answer the following questions: How is hate speech defined under the International Convention Against all Forms of Racial Discrimination (ICERD) and the European Convention on Human Rights (ECHR)? How is hate speech dealt with under the CERD and ECtHR's frameworks? Specifically, what are their approaches to this notion? What are the principles, doctrine they follow? And how are these approaches implemented in practice in the specific case of antisemitism?

To answer these questions, this research will analyze in its first chapter how hate speech is defined under both the CERD and ECtHR's frameworks. Here, it will focus on the prevalence of freedom of expression in the ECHR, treating the prohibition of hate speech as an exception to freedom of expression. It will also focus on the broad definition of hate speech contained in the ICERD, which however lacks a definition of what speech entails to encompass a larger amount of forms of expressions as potentially qualifying for hate speech. The second chapter will analyze the CERD's approach to hate speech and racial discrimination, highlighting a vigilant monitoring of State parties' compliance with the ICERD, therefore controlling their criminalization of hate speech and reducing their margin of appreciation in approaching and combatting it. Moreover, this chapter will reflect the CERD's targeted approach towards hate speech, particularly focusing on key groups and sectors targeted by this issue, and further requiring State parties to take not only defensive but preventive measures in order to tackle with the problem of hate speech and racial discrimination from the root. The third chapter will logically analyze the approach of the ECtHR towards hate speech and will therefore reflect the subsidiarity role that it carries, together with a doctrine of balancing of rights, margin of appreciation and contextuality. However, for the case of racist hate

speech, this paper will demonstrate that the Court takes a whole different approach, treating it as a real threat to democratic societies and therefore requiring Member States to take positive actions. Finally, the fourth chapter of this research will propose a practical comparative analysis of how antisemitism is dealt with under the ECtHR and CERD. Specifically, it will reflect how the ECtHR's approach, when confronted with speech promoting the Nazi ideology, goes further than the loose threshold identified for cases dealing with racial discrimination and uses article 17 ECHR, therefore bypassing the traditional proportionality test it usually applies. In other words, this chapter will focus on how the ECtHR automatically unprotects speech propagating the Nazi ideology (and consequently antisemitism) without determining the proportionality of the restriction to the aim targeted. However, it will further aim to analyze the discrepancy between the treatment of antisemitism and Islamophobia cases and between the negation of the Holocaust's existence and the denial of other genocides' occurrence. This chapter will finally turn to the CERD and determine its consistent approach to antisemitism, therefore showing similarities with the ECtHR's on the matter. However, it will also demonstrate that, contrary to the ECtHR, the CERD does not give a special assessment on the Nazi ideology and antisemitism but treats them as any other form of racial discrimination and therefore proceeds to the same evaluation and the same recommendations to criminalize them.

Methodologically, this research follows both a comparative as well as an analytical approach. It effectively compares how two instruments define, approach, regulate, criminalize and balance hate speech and racial discrimination through their legal frameworks and practice. Moreover, this paper offers an analysis of how these mechanisms work, in theory and in practice, and how their approaches to hate speech is effectively implemented through their case-law, sometimes reflecting discrepancies or legally questionable practice.

For transparency purposes, AI (Google Gemini) was used in chapter 3 for the strict purpose of assisting the author in structuring her analysis and notes. All citations were thoroughly checked to meet the OSCOLA guidelines and the text provided is the author's.

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Chapter 1: Hate speech's definitions and current legal framework

In order to conduct this research, it is necessary to define the concepts analyzed in this paper. Therefore, this thesis will first analyze the definition of hate speech under the ECHR framework, in the practice of the ECtHR. Then, it will turn to the CERD Committee's definition of hate speech contained in the ICERD. It is to be noted that the first difference appearing between the two institutions is that the definition of hate speech contained in the practice of ECtHR is linked with the freedom of expression. On the contrary, the definition of hate speech of the ICERD is more general. As a result, this chapter will also cover the definition of freedom of expression under the ECHR.

1.1.The freedom of expression-based definition of hate speech under the European Court of Human Right's framework

The purpose of the ECHR is to regroup all the human rights that should be guaranteed to everybody in jurisdiction of the Member States of the Council of Europe (CoE). More precisely, this instrument serves as the legal framework of the ECtHR and gives binding effect to the rights contained in the Universal Declaration on Human Rights.¹⁷ Those rights are divided between two main categories: absolute rights to which Member States cannot derogate (such as the right to life or the prohibition of torture) and qualified rights that can be restricted if provided by their national law and if necessary in a democratic society. Freedom of expression is part of the second category of rights, which means that it can be restricted and therefore have exceptions making it unapplicable.¹⁸ As briefly mentioned previously, the ECHR ensures human rights are upheld across its jurisdiction, effectively requiring Member States to stay true to their democratic commitments. One of the most fundamental values of a democracy is freedom of expression, which enables every citizen to express their opinions freely without facing State repression. The ECtHR has held in a case *Handyside v. United Kingdom* that 'freedom of expression constitutes one of the essential foundations of [democratic] society, one of the basic conditions for its progress and for the development of every man.'¹⁹ Therefore, it is essential to first focus on the definition of freedom of expression and its scope under the ECHR in order to understand how hate speech itself is treated.

¹⁷ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III).

¹⁸ Council of Europe, 'The European Convention on Human Rights: A Living Instrument' <https://www.echr.coe.int/documents/d/echr/Convention_Instrument_ENG> accessed 3 March 2026.

¹⁹ *Handyside v United Kingdom* (1976) 1 EHRR 737.

1.1.1. Freedom of expression, one of the most fundamental principles of the European Convention on Human Rights

The definition of freedom of expression is contained in article 10 (1) ECHR, which states that:

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.²⁰

This therefore means that freedom of expression is the right to hold diverse opinions and express them and to obtain and communicate information and ideas without interference from public authorities.²¹ Freedom of expression ensures that everyone's beliefs can be expressed and result in a free debate among the population.²² It is also a protective tool for the media. Freedom of expression makes States accountable for their attempt to restrict speech and therefore ensures that the press remains free to report on potential States' violations of rights or State corruption, which is essential in a democratic society.²³ Moreover, it is to be clarified that freedom of expression does not only cover speech such as general information or ideas, but also any sort of speech that offends, shocks or disturb.²⁴ This inclusion of 'offensive speech' as protected under freedom of expression was established in *Handyside v. United Kingdom*, where the ECtHR stated that:

Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to 'information' or 'ideas' that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.²⁵

²⁰ European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221.

²¹ Human Rights Guide, 'Freedom of Expression' (2012) <<https://www.inimoigustegiid.ee/en/rights/freedom-of-expression>> accessed 3 March 2026.

²² *Ibid.*

²³ *Ibid.*

²⁴ European Court of Human Rights, 'Guide on Article 10 of the European Convention on Human Rights: Freedom of Expression' <<https://rm.coe.int/guide-on-article-10-freedom-of-expression-eng/native/1680ad61d6>> accessed 3 March 2026.

²⁵ *Handyside v United Kingdom* (1976) 1 EHRR 737.

This therefore means that freedom of expression is a largely extensive rule which not only protects neutral speech but also speech that may offend others, therefore enabling debate, critical thinking and the notion of tolerance in societies.

Freedom of expression under article 10 ECHR entails different ways through which a human being can express themselves. Visual expression is covered, including pictures, photographs, images or videos.²⁶ Moreover, audio expression is also protected under article 10 ECHR and includes music, expressed words in all sorts of manners.²⁷ Finally, non-verbal or non-illustrative forms of expression are also covered by this article, such as performance or actions made by an individual.²⁸

As noted before, freedom of expression is not an absolute right. Article 10(2) ECHR also contains the limitations of freedom of expression and states that:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.²⁹

The ECtHR provides three criteria for freedom of expression to be lawfully restricted by the Member States. First of all, the restriction should be provided by the Member States' national law.³⁰ Then, the restriction to freedom of expression should have a legitimate aim, meaning that it should be made either in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals and of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining

²⁶ Human Rights Guide, 'Freedom of Expression' (2012) <<https://www.inimoigustegiid.ee/en/rights/freedom-of-expression>> accessed 3 March 2026.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221.

³⁰ Human Rights Guide, 'Freedom of Expression' (2012) <<https://www.inimoigustegiid.ee/en/rights/freedom-of-expression>> accessed 3 March 2026.

the authority and impartiality of the judiciary.³¹ Finally, the restriction should be necessary in a democratic society and proportionate to the aim pursued.³²

As a result, freedom of expression can be defined as the right for individuals to express in various ways their opinions, including the ones that may shock or offend others. Moreover, while restrictions may be put in place by Member States, they should respect certain criteria and remain the exception to the rule. The next subsection will therefore focus on the definition of one of the grounds on which freedom of expression can be restricted – hate speech.

1.1.2. Hate speech as one exception to the principle of freedom of expression

Hate speech is one of the justifications under which freedom of expression can be limited by the Member States of the CoE. However, no universal definition of hate speech exists, and every regional/global institution/company has its own definition of it. For instance, Alkiviadou points out how YouTube's policy targets 'speech which attacks or demeans a group based on race or ethnic origin, religion, disability, gender, age, veteran status and sexual orientation/gender identity.'³³

The ECHR itself does not mention hate speech and instead justifies restrictions on freedom of expression either under article 10 or 17 ECHR. However, none of them explicitly mentions the notion of hate speech. It is only through the CoE Committee of Ministers and the jurisprudence of the ECtHR that hate speech was defined or attempted to be defined. These two institutions followed the principle that hate speech needs to go beyond types of expression that shock, offend or disturb.³⁴ The CoE Committee of Ministers defines hate speech as 'all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.'³⁵ Moreover, the term 'hate speech' appeared first in the jurisprudence of the ECtHR in the case *Gündüz v. Turkey*, where it stated that 'there can be no doubt that concrete expressions constituting hate speech, which may be insulting to particular individuals or groups, are not protected by Article 10 of the Convention.'³⁶ No precise definition of it was given, except that hate speech can be

³¹ *Ibid.*

³² *Ibid.*

³³ Natalie Alkiviadou, 'Hate Speech on Social Media Networks: Towards a Regulatory Framework' (2019) 28 Info & Comm Tech L 19, 24.

³⁴ *Ibid.*, 23.

³⁵ Council of Europe Committee of Ministers, Recommendation No R (97) 20 of the Committee of Ministers to Member States on 'Hate Speech' (adopted 30 October 1997).

³⁶ *Gündüz v. Turkey* (2003) 41 EHRR 5, para 41.

characterized as something that may be insulting to a particular group of individuals. However, the concept of insult was not defined either by the ECtHR and therefore remains vague.³⁷ In *Ibragim and Others v. Russia*, the ECtHR held that ‘merely because a remark may be perceived as offensive or insulting by particular individuals or groups does not mean that it constitutes hate speech. Whilst such sentiments are understandable, they alone cannot set the limits of freedom of expression. The key issue in the present case is thus whether the statements in question, when read as a whole and in their context, could be seen as promoting violence, hatred or intolerance.’³⁸ In this case, the ECtHR took a first step towards defining hate speech, which can, taken together with the *Gündüz* case, be understood as a form of speech which can be insulting towards specific individuals or a group and that promote violence, hatred or intolerance. However, the ECtHR made a precision in the case *Atamanchuk v. Russia*, where it held that ‘inciting hatred does not necessarily involve an explicit call for an act of violence, or other criminal acts. Attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favor combating xenophobic or otherwise discriminatory speech in the face of freedom of expression exercised in an irresponsible manner’.³⁹ Therefore, in the *Ibragim and Others v. Russia*, mere insult was not sufficient to prohibit speech, whereas in the *Atamanchuk v. Russia*, not only could insult be prohibited, but it was also incorporated in the framework of inciting hatred, without the link between insult and hatred being defined by the Court. The differential element of the cases was that in *Atamanchuk v. Russia*, speech was directed against a particular group characterized by a particular characteristic - ethnicity.⁴⁰ The ECtHR was then seen as lowering its hate speech threshold in *Gündüz v. Turkey* and held that ‘it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression that spread, incite, promote or justify hatred based on intolerance (including religious intolerance), provided that any ‘formalities,’ ‘conditions,’ ‘restrictions’ or ‘penalties’ imposed are proportionate to the legitimate aim pursued’.⁴¹ This is therefore rather broad since it also includes justification of hatred and not only incitement to it.

The ECtHR can at times appear inconsistent in its handling of comparable cases, largely due to the absence of a clear normative and/or legal framework specifying when, where, and how restrictions

³⁷ Jacob Mchangama & Natalie Alkiviadou, ‘Hate Speech and the European Court of Human Rights: Whatever Happened to the Right to Offend, Shock or Disturb?’ (2021) 21 Hum Rts L Rev 1008.

³⁸ *Ibragim and Others v. Russia* (2018) 66 EHRR 8, para 115.

³⁹ *Atamanchuk v. Russia* ECHR, para 52.

⁴⁰ *Ibid.*

⁴¹ *Gündüz v. Turkey* (2003) 41 EHRR 5, para 40.

on freedom of expression may be imposed, as well as the lack of a sufficiently developed definition of hate speech.⁴² The closest conceptual understanding of hate speech was in *Lilliendahl v. Iceland*, where the Court adopted a hierarchal categorization where the ‘gravest forms of hate speech’ are excluded from any protection through Article 17 ECHR (without defining what falls under this category) and where the ‘less grave forms of hate speech’ do not fall outside of the scope of Article 10 ECHR but which the Court ‘has considered permissible for the Contracting States to restrict.’⁴³ Here, the Court incorporated not only calls for violence or other criminal acts but also insults, ridicule and slander in order to combat ‘prejudicial speech within the context of permitted restrictions on freedom of expression.’⁴⁴ This 2020 position therefore suggests that the ECtHR sets a relatively low threshold, given that even insults may be restricted, and the reference to ‘prejudicial’ speech reinforces this interpretation.⁴⁵ Moreover, the Court stated that identifying hate speech depends on evaluating both the content of the expression and the way it is conveyed.⁴⁶ As our jurisprudential analysis indicates, the ECtHR frequently relies on these criteria in a manner that aligns with State determinations regarding whether speech falls within or outside protection, operating within a broad margin of appreciation.

As a result, hate speech is defined by the jurisprudence of the ECtHR’s itself and not by the ECHR, which only defines freedom of expression. Such a definition took a few cases in order to be established and is still to that day not written in stone. The ECtHR follows the principle according to which the ECHR is a living instrument and can evolve with time in order to best adapt to society changes. Therefore, in one of its numerous cases, the ECtHR reached in 2020 the conclusion that hate speech is any prejudicial speech, meaning that it can be as broad as insults, that spread, incite, promote or justify hatred. It can be concluded here that such a broad definition of hate speech is aimed to give a wide margin of appreciation to Member States to regulate expression, within the threshold of restriction provided by the ECHR. The next section will therefore aim to analyze how hate speech is defined under the ICERD.

⁴² Jacob Mchangama & Natalie Alkiviadou, ‘Hate Speech and the European Court of Human Rights: Whatever Happened to the Right to Offend, Shock or Disturb?’ (2021) 21 Hum Rts L Rev 1008.

⁴³ *Lilliendahl v Iceland* App no 29297/18 (ECtHR, 12 May 2020), para 35.

⁴⁴ *Ibid.*, para 36.

⁴⁵ Jacob Mchangama & Natalie Alkiviadou, ‘Hate Speech and the European Court of Human Rights: Whatever Happened to the Right to Offend, Shock or Disturb?’ (2021) 21 Hum Rts L Rev 1008.

⁴⁶ *Ibid.*

1.2.The definition of racist hate speech under the Committee on the Elimination of Racial Discrimination’s framework

The ICERD is one of the United Nations (UN) treaties which has the aim to eradicate racial discrimination on a global scale. It was elaborated in the 1960s in a period of colonialism, apartheid as well as systematic racism in some parts of the world. It was adopted in 1965 and entered into force in 1969. The Convention now counts 182 State parties, therefore giving showing its wide acceptance and also binding most of the world’s countries to combat racial discrimination. The ICERD contains a broad and inclusive definition of racial discrimination, addressing both intentional as well as unintentional forms of racial discrimination.⁴⁷ The Convention moreover obliges States to eliminate discriminatory laws, policies and practices and to encourage measures aimed to provide an equal enjoyment of rights.⁴⁸ However, the Convention, even though prohibiting all forms (intentional and non-intentional) of racial discrimination, including racist speech, does not give a definition of such speech. The following subsections are therefore aimed to analyze definition of racist speech as well as the absence of definition of speech itself.

1.2.1. The broad qualification of racist hate speech differing from the European Court of Human Right’s jurisprudence

First of all, article 1(1) of the ICERD is the foundational one of the Convention, since it defines what racial discrimination is. It reads as follows: ‘In this Convention, the term ‘racial discrimination’ shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.’⁴⁹ The definition of racial discrimination is therefore broad and extensive, reflecting the will to include as many forms of racial discrimination as possible.

On the same note, regarding hate speech, article 4 of the ICERD defines the speech itself as ‘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

⁴⁷ 60 Years of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)’ <<https://ehrc.org/60-years-of-the-international-convention-on-the-elimination-of-all-forms-of-racial-discrimination-icerd/>> accessed 04 March 2026.

⁴⁸ *Ibid.*

⁴⁹ International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 art 1.

and discrimination in any form'.⁵⁰ It defines as well the concept of hate speech as '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'.⁵¹ Finally, the ICERD explicitly calls for States to ban hate speech, as well as hate speech actors.⁵²

Finally, we can already observe that the purpose of the speech characterizing hate speech is the same as the ECtHR's jurisprudence. The ECtHR recognized incitement to hatred, violence or intolerance as a speech's purpose for it to be categorized as hate speech. However, the differences lie in the category of speech described and the broadness of speech covered. The ECtHR qualified insults or words to be potentially qualifying as hate speech. Moreover, for such a speech to qualify as hate speech, it needs to have the specific effect to be insulting towards a group of individuals prejudicially. On its side, the ICERD considers racist speech very broadly, since it includes 'all propaganda and all organizations'. Propaganda as well as organizations are way broader than just speech. When we think of speech itself, we would spontaneously think of words written or pronounced in all their forms. But in this case, propaganda and organizations sound like more than simply words. However, the ICERD does not contain a clear definition of what racist hate speech is in itself, which will be discussed in the next subsection.

1.2.2. The lack of a proper definition of speech to characterize racist hate speech

As mentioned in the previous subsection, the ICERD does not define what racist speech exactly is and refers to 'propaganda' and 'all organizations', which are very general terms which can cover a multitude of words, behaviors, actions, etc. Moreover, the definition of racist hate speech is not contained in any of the General Recommendations of the CERD. Recommendation 15 of the CERD on Article 4 of the Convention does not give any definition either of what this speech is, but rather focuses on the implementation of Article 4.⁵³ On its side, General Recommendation 35 of the CERD on Combating Racist Speech defines what incitement and gives a descriptive as well as flexible definition of what racist hate speech is.⁵⁴ However, despite such a lack of a definition from

⁵⁰ *Ibid.*, art 4.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ UN Committee on the Elimination of Racial Discrimination, 'General Recommendation No 15' (1993) UN Doc A/48/18.

⁵⁴ UN Committee on the Elimination of Racial Discriminations, 'General Recommendation No 35' (2013) UN Doc CERD/C/GC/35.

the ICERD's side, the content of it has been clarified in practice. To that end, General Recommendation 35 mentioned that it had 'not impeded the Committee from identifying and naming hate speech phenomena and exploring the relationship between speech practices and the standard of the Convention.'⁵⁵ The closest the Recommendation got to defining racist speech was in its remark that 'Racist hate speech can take many forms and is not confined to explicitly racial remarks. As is the case with discrimination under article 1, speech attacking particular racial or ethnic groups may employ indirect language in order to disguise its targets and objectives.'⁵⁶ Even though this remark does not constitute in itself a definition, it still demonstrates the broad spectrum and low threshold of speech granted by the Committee.⁵⁷ It considers that speech which even secretly seeks to perpetuate hatred is to be banned.⁵⁸

As a result, these broad qualifications of racist hate speech, the absence of a definition of what type of speech can characterize hate speech, as well as the broad inclusion of any speech that, even disguised, has the aim to perpetuate hatred is a blatant demonstration of the CERD's practice. It can be deducted that the CERD purposefully refrained from defining speech in order to encompass as many forms of speech as possible. This differs from the ECtHR's practice, where publicity of the speech is required for it to be categorized as hate speech.⁵⁹ Moreover, only certain forms of expression enter the category of speech that can be perceived as constituting hate speech under the ECtHR's jurisprudence, while the CERD considers any form of expression as qualifying to constitute hate speech.

This broad interpretation of hate speech by the CERD is the illustration of the larger aim of the Committee – erasing all forms of racist discrimination worldwide and binding signatory states into taking all measures possible to reach that goal. The next chapter of this research will therefore analyze the severe practice of the CERD regarding the condemnation of hate speech.

⁵⁵ *Ibid.*, para 5.

⁵⁶ *Ibid.*, para 7.

⁵⁷ Natalie Alkiviadou, 'The Legal Regulation of Hate Speech: The United Nations Framework as the Common Denominator for Europe and Asia' (2020) 10 European-Asian Journal of Law and Governance 22, 29.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

Chapter 2: The restrictive and interventionist supervisory practice of the Committee on the Elimination of Racial Discrimination regarding racist hate speech

First of all, the CERD deals with racist hate speech, not general hate speech. Therefore, hate speech which would have any other aim but to incite to racist hatred, that is to say hatred based on race, color, descent, or national or ethnic origin,⁶⁰ does not fall under the ICERD and therefore is not monitored by the CERD. It does not mean however that the CERD does not condemn hate speech as a whole, but it is just outside of its scope since it works based on the ICERD which itself treats only racial discrimination.

Then, the purpose of this chapter is to analyze the approach of the CERD regarding racist hate speech. It has shown a particularly strict as well as vigilant approach towards racist hate speech, since it operates a systematic scrutiny of State parties' compliance with the ICERD and reduced their margin of appreciation in tackling the issue, therefore leaving them no choice but to actively condemn and even take preventive measures to combat racist hate speech. This comes from the aim of the CERD to combat and erase hate speech from its State parties, starting from the sectors where hate speech is the most prone to occur, such as education or media, among others.

2.1.A practice characterized by vigilant monitoring and proactive intervention

The CERD, in its aim to eliminate racial discrimination, acts as a supervisory body, therefore, even though non-binding, requiring State parties to actively cooperate with it and report to it all the measures they took to criminalize racist hate speech. This approach is also coexisting with the practice from the CERD which reduces the margin of appreciation of State parties to decide whether to criminalize hate speech based on their domestic legislation, doctrines, practices, etc. Instead, the CERD adopted a strict approach which does not tolerate any form of hate speech under any circumstance, and which does not account for contextual justifications.

2.1.1. The systematic scrutiny of State compliance

First of all, General Recommendation 35 on combating racist hate speech is the foundation of this practice of the CERD to closely monitor State parties' compliance with actively combatting racist hate speech. To begin with, the CERD sets the obligation for State parties to take all measures necessary to combat all forms of racist hate speech. In paragraph 7 of Recommendation 35, the

⁶⁰ International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 art 1.

CERD states that ‘racist hate speech can take many forms and is not confined to explicitly racial remarks. As is the case with discrimination under article 1, speech attacking particular racial or ethnic groups may employ indirect language in order to disguise its targets and objectives. In line with their obligations under the Convention, States parties should give due attention to all manifestations of racist hate speech and take effective measures to combat them.’⁶¹ This is therefore through this obligation given on States that the CERD fixes itself the aim to monitor State parties’ in their compliance with the ICERD and in their concrete national actions to combat all forms of racist hate speech. Then to implement this obligation, the CERD reserves itself the possibility to intervene in the event where State parties fail to act against racist hate speech or take measures that the CERD judges manifestly arbitrary or ineffective. Paragraph 17 of Recommendation 35 states that:

The Committee reiterates that it is not enough to declare the forms of conduct in article 4 as offences; the provisions of the article must also be effectively implemented. Effective implementation is characteristically achieved through investigations of offences set out in the Convention and, where appropriate, the prosecution of offenders. (...) In this and other respects under the Convention, the Committee recalls that it is not its function to review the interpretation of facts and national law made by domestic authorities, unless the decisions are manifestly absurd or unreasonable.⁶²

Such a position can also be seen in other General Recommendations. General Recommendation 34 on Racial Discrimination Against People of African Descent also calls for State parties to implement prevent racist hate speech against people of African descent through the adoption of measures which ‘prevent racially motivated acts of violence against them; ensure prompt action by the police, prosecutors and the judiciary for investigating and punishing such acts; and ensure that perpetrators, be they public officials or other persons, do not enjoy impunity.’⁶³

After establishing its supervisory power over State parties’ compliance with the ICERD’s articles regarding racist hate speech, the CERD applied such a power in practice. For example, in the fifth periodic report of Turkmenistan, the CERD expressed deep concern that ‘since independence, no

⁶¹ UN Committee on the Elimination of Racial Discrimination, ‘General Recommendation No 35’ (adopted 26 September 2013) UN Doc CERD/C/GC/35, para 7.

⁶² *Ibid.*, para 17.

⁶³ UN Committee on the Elimination of Racial Discrimination, ‘General Recommendation No 34’ (adopted 3 October 2011) UN Doc CERD/C/GC/34, para 28.

case of racial discrimination has been referred to the courts.’⁶⁴ Moreover, as mentioned in the introduction of this subsection, the CERD suspects that such absence of racial discrimination cases comes from the ‘fear of reprisals and the lack of confidence in the police and judicial authorities.’⁶⁵ Finally, the request from the CERD for Turkmenistan to show statistics on resettled populations and minority representation demonstrates its insistence on practical verification of State parties’ actions and not just on their national laws. Another illustration of this practice can be seen in the 6th and 7th periodic reports of Estonia. The CERD expressed concerns ‘that very few acts of racial discrimination have been prosecuted and punished in the State party.’⁶⁶ The CERD tied this lack of prosecution and punishment to the fact that anti-discrimination laws are of insufficient numbers and that the chancellor of justice has limited powers to solve this issue.⁶⁷ The CERD again asked Estonia for follow-up measures, reports and statistics on the matter and did not rely purely on Estonia adopting new laws against racial discrimination. The CERD took the same approach regarding the 20th and 21st periodic reports of France. Regarding racist hate speech, the CERD has pointed out the gaps between the legislation and the practice of the French authorities regarding racist hate speech in the political sphere and on the internet.⁶⁸ The CERD therefore asked France not only to strengthen its laws on the matter, but also to take and document concrete measures to combat racist hate speech, such as ensuring that all racist hate speech cases are thoroughly investigated by the French authorities and that their authors are punished accordingly.⁶⁹ Finally, the *Jewish Community of Oslo et al. v. Norway* as well as the *Kjuus and Sjølie* cases are also examples of the CERD intervening against Norway’s inaction regarding antisemitism and requesting it to make a report on the measures it took to resolve the situation and not protect such speech under freedom of expression.⁷⁰

Such an approach by the CERD can be seen as strict and even intruding towards State parties, especially since the CERD does not have any binding power upon the State parties and only issues recommendations to them. However, it can still be concluded that such an approach works.

⁶⁴ UN Committee on the Elimination of Racial Discrimination, ‘Concluding observations of the Committee on the Elimination of Racial Discrimination: Turkmenistan’ (2007) UN Doc CERD/C/TKM/CO/5, para 21.

⁶⁵ *Ibid.*

⁶⁶ UN Committee on the Elimination of Racial Discrimination, ‘Concluding observations of the Committee on the Elimination of Racial Discrimination: Estonia’ (2006) UN Doc CERD/C/EST/CO/7, para 19.

⁶⁷ *Ibid.*

⁶⁸ UN Committee on the Elimination of Racial Discrimination, ‘Concluding observations of the Committee on the Elimination of Racial Discrimination: France’ (2015) UN Doc CERD/C/FRA/20-21.

⁶⁹ *Ibid.*

⁷⁰ Sindre Bangstad, ‘Failing to Protect Minorities against Racist and/or Discriminatory Speech’ (2012) 30 Nordic J Hum Rts 483.

For instance, after the requests made by the CERD to Norway after the *Jewish Community of Oslo et al. v. Norway*⁷¹ and the *Kjuus*⁷² and *Sjølief*⁷³ cases, not only did Norway comply with these requests, but it also saw its jurisprudence getting much stricter in terms of calls for discrimination.⁷⁴ They therefore constitute the proof that this strict monitoring of State compliance by the CERD works, since even if the Norwegian police and institutions were reluctant to find a violation of the Norwegian law on racial discrimination, the Norwegian Supreme Court still found a violation and therefore did not protect antisemitic speech.

The next subsection will therefore aim to analyze the narrow margin of appreciation of State parties allocated by the CERD, as opposition to the broad margin given to Member States by the ECtHR. This narrow margin of appreciation is part of the CERD's vigilant monitoring and active intervention in States measures to erase racial discrimination as a whole and racist hate speech in particular.

2.1.2. The restriction of the State parties' margin of appreciation when dealing with racist hate speech

The CERD, even though never mentioning margin of appreciation directly, still deals with it and actively limits the freedom of expression when it intersects with hate speech.⁷⁵ The CERD emphasizes where that racially discriminatory ideas or speech cannot be protected, even if justified under freedom of expression.

In its practice, it can indeed be seen that the CERD Committee restricts the margin of appreciation of State parties by putting on them the obligation to eliminate racial discrimination and make punishable the dissemination of ideas based on racial superiority or hatred contained in ICERD.⁷⁶ Moreover, the CERD concluded that the principle of freedom of speech is afforded a lower level of protection in cases of racist and hate speech and that the prohibition of all ideas based on racial superiority or hatred are incompatible with the right to freedom of opinion and expression.⁷⁷ In addition, the CERD has further required that States specifically prohibit hate speech, not only

⁷¹ *Jewish Community of Oslo et al v Norway* (2005) Communication No 030/2003 CERD/C/67/D/30/2003.

⁷² Høyesterett - Kjennelse [1997] Rt 1821.

⁷³ *Sjølief* [2002] Rt 1618.

⁷⁴ *Ibid.*

⁷⁵ Carola Lingaas, 'Hate Speech and Racialised Discrimination of the Norwegian Sami: Legal Responses and Responsibility' (2021) 8 Oslo L Rev 88, 99.

⁷⁶ *Ibid.*, 107.

⁷⁷ *Ibid.*, 99.

general racial discrimination.⁷⁸ Moreover, State parties must address structural conditions enabling hate speech, not just individual violations.⁷⁹ Therefore, this supports the idea that the CERD gives little margin of appreciation for States to interpret racist hate speech and condemn it as they see fit and following their own internal context and history, but rather to actively take measures and not only criminal laws not only to erase racist hate speech, but on the bigger picture racial discrimination as a whole.

After establishing the obligations on State parties to prohibit racist hate speech and to take all preventive and active measures to erase racial discrimination from their territory, not merely banning them through criminal laws, therefore reducing their margin of appreciation on what may or may not be characterized as racist speech, the same obligations can be seen in the CERD's practice. For example, in the fifth periodic report of Turkmenistan, the CERD expresses its concern regarding reported cases of racist hate speech targeting national and ethnic minorities, including remarks attributed to senior government officials and public figures that appear to endorse an approach promoting Turkmen ethnic purity.⁸⁰ The CERD therefore requested Turkmenistan to abide by its obligations under article 4 of the ICERD and therefore to ban such speech by public authorities. Here, we can see that the CERD does not leave to Turkmenistan any margin of appreciation regarding the condemnation of hate speech by its own government and applies strictly the obligations of State parties to prohibit any form of racist hate speech.

Moreover, the CERD applied the same approach in cases presented in front of it. In *TBB v. Germany*, the CERD overrode the decision taken by the national authorities of Germany which justified under national legislation promoting freedom of expression some statements made by M. Sarrazin against Turks.⁸¹ Here, the CERD therefore substituted its own assessments for national authorities and therefore did not leave Germany any margin of appreciation concerning the application of its national laws regarding freedom of expression. Instead, it asked Germany to punish this speech which it declared in violation of article 4 of the ICERD. The case *Jallow v. Denmark* is also an illustration of this no margin of appreciation approach from the CERD. In this case, the prosecutor of Denmark conducted a thorough investigation on the case and found no

⁷⁸ Jacob Mchangama & Natalie Alkiviadou, 'Hate Speech and the European Court of Human Rights: Whatever Happened to the Right to Offend, Shock or Disturb?' (2021) 21 Hum Rts L Rev 1008, 1011.

⁷⁹ *Ibid.*

⁸⁰ UN Committee on the Elimination of Racial Discrimination, 'Concluding observations of the Committee on the Elimination of Racial Discrimination: Turkmenistan' (2007) UN Doc CERD/C/TKM/CO/5.

⁸¹ *TBB-Turkish Union in Berlin/Brandenburg v Germany* (2013) Communication No 048/2010 CERD/C/82/3.

violation of article 266(b) of the Danish Criminal Code, since the pictures displayed by M. Jallow were not ‘threatening, humiliating or degrading.’⁸² However, the CERD disregarded the national laws of Denmark and found a violation of article 4 of the ICERD because Denmark still failed to provide an effective response.⁸³ Therefore, even diligent domestic decision-making is not enough if the result is not enough, meaning that the CERD reviews outcomes and not only the application of a State’s domestic laws. This is a proof of a substantially narrow margin of appreciation of State parties. Finally, in the *Jewish Community of Oslo et al v. Norway* case, the CERD also intruded the national legislation of Norway and criticized its interpretation of free speech, therefore forcing the hand of Norway to modify its laws.⁸⁴ This shows that the CERD can effectively reshape domestic balancing tests, which can only happen when an international body assumes a strong supervisory authority.

To conclude the first section of this chapter, the CERD’s practice is shown to be strict, since over the years, the Committee has demonstrated a substantial monitoring attitude towards State parties. The CERD not only asks States to comply with article 4 of the ICERD, but also to take all preventive and effective measures possible to prevent such racist hate speech to occur. Moreover, the CERD sometimes substitutes itself with the national legislation of the State parties by giving them a substantially low margin of appreciation in considering what belongs to racist hate speech and can therefore be condemned and what belongs to freedom of expression. The CERD, even though possessing no binding power on State parties, still found a way to substantially influence them and force them in the prohibition of all racist hate speech, disregarding national laws on the matter.

The next subsection will aim to demonstrate further the strictness of the CERD’s approach regarding the prohibition of racist hate speech by focusing on the targeted recommendations and the persistent follow-ups demanded by the CERD to State parties through its focus on vulnerable groups and sectors as well as its preventive and forward-looking logic in the ICERD’s enforcement.

⁸² Straffeloven (Danish Criminal Code) s 266b.

⁸³ *Jallow v Denmark* (2022) Communication No 62/2018 CERD/C/108/D/62/2018.

⁸⁴ *Jewish Community of Oslo et al v Norway* (2005) Communication No 030/2003, CERD/C/67/D/30/2003.

2.2.The targeted recommendations and the preventive logic of the Committee on the Elimination of Racial Discrimination

The CERD gives a particular attention in its combat against racist hate speech on key sectors where hate speech occurs the most as well as on minorities, which are the ones being the most victims of hate speech. Moreover, the CERD not only aims to combat and eliminate hate speech by requiring State parties to criminalize it, but it also requires them to take preventive measures for racist hate speech to stop occurring at all. This therefore reflects the clear goal from the CERD to tackle the issue to the root, going from a defensive approach to a preventive one.

2.2.1. The Committee on the Elimination Racial Discrimination's focus on vulnerable groups and key sectors where racist speech occurs

The CERD specifically addresses sectors where racist hate speech disproportionately affects minorities, such as education, media, employment and public life.

First of all, General Recommendation 35 comments on article 7 ICERD which deals with the root causes of racist hate speech. Article 7 ICERD states that ‘States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.’⁸⁵ It therefore identifies the key sectors where racist hate speech mostly occurs (precisely teaching, education, culture and information) and puts on State parties a particular obligation to take effective measures in these fields. Then, General Recommendation 35 in its comment on article 7 ICERD, elaborates on these key sectors and advises States to promote tolerance through their educating systems by teaching minorities’ history, culture and traditions, offering bilingual education and allow commemorations of atrocities which happened to a particular group.⁸⁶ This therefore confirms the impact that the CERD wants to have on State parties not only to prohibit racist hate speech but also to eliminate its root causes. As a result, the CERD can be seen here again as showing a strict approach regarding hate speech, since

⁸⁵ International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 art 7.

⁸⁶ UN Committee on the Elimination of Racial Discrimination, ‘General Recommendation No 35’ (2013) UN Doc CERD/C/GC/35.

it not only aims to deter the actions themselves but also wants to treat the problem of racial discrimination from its root. Finally, it demonstrates the control the CERD has on State parties to the ICERD since it not only gives them the obligation to prohibit racist hate speech but also to prevent it from happening on their territories.

Then, as mentioned in the previous paragraph, the CERD showed a special concern about minorities being the most targeted by racist hate speech and therefore asks for State parties to provide preventive measures to protect these groups. In the 6th and 7th periodic reports of Estonia, the CERD expressed concerns regarding the high unemployment rate of minorities, especially Russian-speakers.⁸⁷ It therefore recommends Estonia to ensure the application of its anti-discrimination laws and to take further measures to reduce the unemployment rate of minorities in Estonia ‘by focusing on professional training and providing high-quality and subsidized language training.’⁸⁸ In addition, in the 19th and 21st periodic reports of the Netherlands, the CERD also focused on minorities and found that this State party was failing to provide a high enough number of minority persons in their law enforcement system, that minorities had a bigger unemployment rate and lower educational achievements.⁸⁹ It therefore recommended the Netherlands to take measures on these matters.

Finally, in its jurisprudence, the CERD has also put a strong accent on the protection of minorities against racist hate speech. In *TBB v. Germany*, the minority dimension was decisive in the Committee’s decision since the statements targeted Turkish communities as a group and therefore transforming what appeared as political analysis into a racialized stigmatization which could have conducted into social exclusion.⁹⁰ Moreover, in *Gelle v. Denmark*, the court held that stereotyping Somalis as inherently criminal was harmful because it generalized negative traits to an entire ethnic group. The ruling emphasizes that such speech is uniquely dangerous to vulnerable minorities, as it can normalize systemic discrimination in policing, housing, and employment.⁹¹ Finally, in the *Jewish Community of Oslo et al v. Norway* case, the Committee ruled that hate speech is especially dangerous when used in political rallies and organized movements. The decision wasn’t just about offensive words but focused on how antisemitic rhetoric can rally extremist groups and threaten

⁸⁷ UN Committee on the Elimination of Racial Discrimination, ‘Concluding observations of the Committee on the Elimination of Racial Discrimination: Estonia’ (2006) UN Doc CERD/C/EST/CO/7.

⁸⁸ *Ibid.*

⁸⁹ UN Committee on the Elimination of Racial Discrimination, ‘Concluding observations of the Committee on the Elimination of Racial Discrimination: Netherlands’ (2015) UN Doc CERD/C/NLD/19-21.

⁹⁰ *TBB-Turkish Union in Berlin/Brandenburg v Germany* (2013) Communication No 048/2010 CERD/C/82/3.

⁹¹ *Gelle v Denmark* (2006) Communication No 034/2004 CERD/C/68/D/34/2004.

the actual safety of the Jewish community. Because minorities are more vulnerable, the CERD treats this type of speech as a structural threat to their equality and security, rather than just a personal insult.⁹²

As a result, this research showed how focused the CERD is in its approach to racist hate speech on the key sectors from which hate speech rises and the most impacted groups. Such a precise focus enables the Committee to strengthen its strict approach towards hate speech as well as its control over State parties to take measures to not only prohibit hate speech once it occurred but also in term to prevent racist hate speech from occurring within these States. The next subsection will therefore further analyze this preventive and forward-looking logic of the CERD in the enforcement of the ICERD.

2.2.2. The preventive and forward-looking logic of the Committee on the Elimination of Racial Discrimination in the International Convention on the Elimination of All Forms of Racial Discrimination's enforcement

The practice of the CERD demonstrates that the regulation of racist hate speech is conceived not as a reactive sanctioning system but as a preventive set of obligations requiring anticipatory State action. The CERD consistently demands State parties to adopt structural, legislative and institutional measures before racist hate speech occurs.

First of all, in General Recommendation 35, the CERD expressively states that ‘in line with their obligations under the Convention, States parties should give due attention to all manifestations of racist hate speech and take effective measures to combat them.’⁹³ Further, the same Recommendation not only asks States parties to adopt legislation in order to combat racist hate speech and that these laws have to be effective in practice and not only formally enacted and as mentioned before, but also to take all political, educational training and monitoring measures to prevent racist hate speech from happening in the future.⁹⁴

Then, in its practice, the CERD also calls for preventive measures to be adopted by State parties in order to prevent racist hate speech from occurring. In the 5th periodic report of Turkmenistan, the Committee requires the State parties to take specific steps to make sure ethnic groups are not left

⁹² *Jewish Community of Oslo et al v Norway* (2005) Communication No 030/2003 CERD/C/67/D/30/2003.

⁹³ UN Committee on the Elimination of Racial Discrimination, ‘General Recommendation No 35’ (2013) UN Doc CERD/C/GC/35.

⁹⁴ *Ibid.*

behind or ignored. Particularly, it urges authorities not to promote or tolerate racial discourse by public officials, condemns assimilation policies, or ‘Turkmenization’, as grave violations and demands protection of minority identity, recommends reopening minority-language schools and ensuring media access, and requires training of judges and law-enforcement officials.⁹⁵ Here the measures required by the CERD are all of preventive nature, therefore demonstrating the forward-looking logic of the Committee. Moreover, in the 6th and 7th periodic reports of Estonia, the CERD calls for comprehensive anti-discrimination legislation, not only criminal provisions and requires labor-market reforms and language-training measures to prevent discriminatory exclusion.⁹⁶ It also urges measures to increase Roma school attendance through recruitment of minority staff and intercultural education and does not interpret the lack of reported racist hate speech cases as an absence of discrimination,⁹⁷ demonstrating the significant control that the CERD exercises on State parties, since even the absence of cases is still being investigated by the Committee.

Finally, the CERD applied the same approach in its jurisprudence. In *Jewish Community of Oslo et al v. Norway*, the CERD did not base its finding of a violation of the ICERD on the occurrence of violence but on the risk inherent in allowing such rhetoric to circulate without consequence.⁹⁸ The speech created an atmosphere of hostility and exclusion towards a historically persecuted minority. Once again, this is a demonstration that the CERD does not only intervene to incite State parties to prohibit racist hate speech, but to take measures to prevent it from even occurring in the first place. Another illustration of this jurisprudential practice is the case *TBB v. Germany*. Here, no violence or discriminatory act followed the publication of the interview. The violation was therefore rooted in the State’s tolerance of speech capable of reinforcing racial hierarchies.⁹⁹ This decision was therefore not taken only to prohibit a racist speech, but also to prevent a potential reinforcement of racial hierarchies that this speech could induce. Finally, in the Danish cases *Gelle v. Denmark* and *Jallow v. Denmark*, the CERD refined its doctrinal criteria designed to identify risks before discrimination escalates. To that end, the CERD does not consider whether the speech caused harm but only focuses on the effects that such a speech caused. In *Gelle v. Denmark*, statements associating Somali individuals with criminality were found to harm not only the complainant but

⁹⁵ UN Committee on the Elimination of Racial Discrimination, ‘Concluding observations of the Committee on the Elimination of Racial Discrimination: Turkmenistan’ (2007) UN Doc CERD/C/TKM/CO/5.

⁹⁶ UN Committee on the Elimination of Racial Discrimination, ‘Concluding observations of the Committee on the Elimination of Racial Discrimination: Estonia’ (2006) UN Doc CERD/C/EST/CO/7.

⁹⁷ *Ibid.*

⁹⁸ *Jewish Community of Oslo et al v Norway* (2005) Communication No 030/2003 CERD/C/67/D/30/2003.

⁹⁹ *TBB-Turkish Union in Berlin/Brandenburg v Germany* (2013) Communication No 048/2010 CERD/C/82/3.

also the broader Somali community. The Committee emphasized that generalizations based solely on ethnic origin contribute to negative stereotyping and social marginalization.¹⁰⁰ In *Jallow v. Denmark*, the CERD explicitly put in place a double-level harm analysis with an individual dimension and a collective dimension. The individual dimension corresponds to depictions of Mr. Jallow in a lynching context conveyed intimidation and potential incitement to violence.¹⁰¹ The collective dimension means that racist hate speech sends a message of hostility to all members sharing the targeted identity, fostering stigmatization and social isolation.¹⁰² Therefore here, the Committee does not require proof that violence occurred, since the harm is already present in the mere fact that the racist speech in question contributed to the normalization of racial discrimination.

To conclude this section, the CERD's practice and jurisprudence showed its targeted approach regarding racist hate speech. The Committee identifies the root causes of such speech, which gives it the capacity to strictly approach cases and therefore broadly condemn any speech that not only has the intent to cause harm but also that has the effect to cause racial discrimination. All of this leading to the call for preventive measures by the State parties in order not only for racist hate speech to be condemned but also for the bigger aim of the CERD to be achieved, which is that racial discrimination be erased from State parties.

This chapter can therefore conclude that the CERD applies a very strict approach regarding the prohibition of racial discrimination in general and racist hate speech in particular. Not only it closely monitors its State parties by asking them to provide detailed reports and statistics on their evolution towards the deletion of racial discrimination within their territory, but it also does not let them justify their lack of measures by the mere respect of their domestic law. The CERD has a very precise aim to find the root causes of general racial discrimination, be it education, culture, politics, etc and stands firm to not only repair damages but also prevent them from ever happening again. The CERD's approach is therefore proactive, not reactionary and puts the elimination of racial discrimination as a rule and freedom of expression as allowed only if not carrying any discriminative aspect. This contradicts the ECtHR's approach, as the next chapter will study.

¹⁰⁰ *Gelle v Denmark* (2006) Communication No 034/2004 CERD/C/68/D/34/2004.

¹⁰¹ *Jallow v Denmark* (2022) Communication No 62/2018 CERD/C/108/D/62/2018.

¹⁰² *Ibid.*

Chapter 3: The European Court of Human Rights' contradictory approach to hate speech and racial discrimination

The ECtHR's approach may appear as contradictory in that it generally possesses a role which consists in evaluating whether Member States acted in respect to the ECHR. To that end, it acts following the concepts of contextuality and margin of appreciation, which will be the objects of the next sections, and which mean that the ECtHR will adapt its protection of speech based on contextual factors and State's national legislations. On the other hand, when it comes to hate speech targeting vulnerable groups, the Court takes a whole different approach and tends to systematically condemn such speech, regardless of the context, aim and consequences of it. Going further, the Court progressively gave Member States positive obligations to condemn discriminatory hate speech, therefore shifting from the negative obligations approach where the Court told States what to refrain from (in that case refrain from banning speech where unnecessary). This therefore modifies the first vision of the Court where freedom of expression was considered as the rule and the unprotection of speech as an exception, therefore getting closer to the CERD's approach when it comes to fighting racial discrimination.

3.1.The European Court of Human Rights' supervisory role and contextual assessment of racist hate speech

The ECtHR operates as a supervisory body, meaning that it has the role to overview whether States complied with the ECHR in their actions and procedures. Subsequently, its role is to control whether speech was restricted following certain criteria set by the ECHR. To that end, regarding hate speech, the Court operates a contextual evaluation which consists in determining in what area the hate speech took place and the breadth of the audience of such speech. Moreover, in its supervisory role, the Court leaves a significant autonomy to States in protecting or not hate speech. States indeed have a margin of appreciation to assess whether or not certain speech should be condemned or not.

3.1.1. The central role of contextual factors in determining whether racist hate speech may be restricted

The ECHR does not contain an *expressis verbis* ban on hate speech. However, article 10 ECHR provides States the right to limit freedom of expression in certain conditions.¹⁰³

The ECtHR's role is supervisory.¹⁰⁴ The Court primarily examines whether States have restricted expression in accordance with democratic principles, rather than determining independently whether speech should be prohibited. Its main task is to verify whether restrictions were prescribed by law, pursued a legitimate aim and were necessary in a democratic society.¹⁰⁵ Moreover, following the principle of subsidiarity, the Court does not act as an appeal court and is not there to re-judge the facts of a case in order to determine if States applied the Convention properly, but only judges whether national laws and procedures were in accordance with the Convention.

In its supervisory role, the ECtHR has based itself on contextual evaluations in order to assess racist speech in political discourse, which has the strongest protection under article 10 ECHR. In *Lingens v. Austria*, the Court emphasized that 'freedom of political debate is at the very core of the concept of a democratic society.'¹⁰⁶ Moreover, in *Wingrove v. UK*, the Court has stated that 'there is little scope under article 10 for restrictions on political speech.'¹⁰⁷ On the other hand, the ECtHR has also recognized that political speech may involve provocative language, polemical argumentation, satire or exaggeration and even statements that 'offend, shock or disturb', as recognized in *Handyside v. UK*.¹⁰⁸ As a result, even though political speech enjoys a strong protection under the ECHR, the ECtHR still applies restrictions where political speech is considered capable of promoting discrimination or hostility towards minority groups.

The first type of contextual approach that the ECtHR took in assessing racist hate speech in political discourse is the electoral context. Since *Féret v. Belgium*, the Court has repeatedly emphasized that political speech may have heightened impact during election campaigns, which can justify stronger regulation. In this case, the Court ruled that the statements in question carried the 'inevitable risk of arousing feelings of distrust, rejection and even hatred towards foreigners'.¹⁰⁹ The Court also

¹⁰³ European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 art 10.

¹⁰⁴ *Ibid.*, preamble.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Lingens v Austria* (1986) 8 EHRR 407, para 42.

¹⁰⁷ *Wingrove v United Kingdom* (1997) 24 EHRR 1, para 58.

¹⁰⁸ *Handyside v United Kingdom* (1976) 1 EHRR 737, para 49.

¹⁰⁹ *Féret v Belgium* App no 15615/07 (ECtHR, 16 July 2009), para 49.

emphasized several contextual elements. First, the electoral campaign period, during which political speech may have greater influence over voters.¹¹⁰ Then, the political status of the speaker, whose statements carry additional authority.¹¹¹ Finally, the potential impact of the speech in question in a democratic society.¹¹² The Court in this case also importantly emphasized that incitement to hatred does not necessarily need to call to violence in order to be criminally condemned.¹¹³ This significantly lowers the threshold for restricting speech, since harmful societal effects can justify restrictions even in the absence of explicit violence.

Then, the second type of contextual approach of the Court is the means used to disseminate the speech. The Court evaluates how speech is communicated, including the mean used, the size of the audience and the potential reach of the expression. The comparison between the *Karataş v. Turkey* and *Soulas and Others v. France* illustrates this approach. In *Karataş*, the Court emphasized that poetry is a form of artistic expression that generally appeals to a limited audience and which therefore has reduced potential for widespread social impact.¹¹⁴ However, in *Soulas*, the Court emphasized that the book was written in accessible language, targeted a wide audience and its ideas could therefore contribute to hostility against immigrant communities.¹¹⁵ These cases therefore demonstrate that the ECtHR evaluates the dissemination capacity of a speech when determining if it constitutes hate speech.

These cases therefore illustrate the case-by-case methodology of the Court, which rather than developing clear legal tests to recognize racist hate speech, conducts a contextual analysis that considers political environment, identity of the speaker, means and audience of the speech, the vulnerability of the targeted group and the potential societal impact of the speech. This approach has been criticized because it is based on rhetorical references to democratic values rather than a coherent analytical framework.¹¹⁶ This means that similar forms of expression might be treated differently depending on contextual factors, which reinforces the subsidiarity principle of the ECHR and the margin of appreciation given to State parties, studied in the next subsection.

¹¹⁰ *Ibid.*, para 76.

¹¹¹ *Ibid.*, para 75.

¹¹² *Ibid.*, para 73.

¹¹³ *Ibid.*

¹¹⁴ *Karataş v Turkey* App no 23149/94 (ECtHR, 8 July 1999), para 49.

¹¹⁵ *Soulas and Others v France* App no 15956/03 (ECtHR, 11 October 2005), para 39.

¹¹⁶ Jacob Mchangama & Natalie Alkiviadou, 'Hate Speech and the European Court of Human Rights: Whatever Happened to the Right to Offend, Shock or Disturb?' (2021) 21 Hum Rts L Rev 1008, 1034.

3.1.2. The Court's reliance on the margin of appreciation in regulating racist hate speech

Margin of appreciation allows national authorities discretion in determining how to balance freedom of expression contained in article 10 ECHR and the protection of social harmony, minority dignity and democratic stability. As mentioned in the previous subsection, this is part of the principle of subsidiarity, following which the ECtHR only acts a supervisor of national authorities' action in accordance with the ECtHR. The margin of appreciation has been a foundational element of the Court's jurisprudence since *Handyside v. UK*, where the Court reasoned that national authorities are better positioned to assess the necessity of restrictions, particularly where issues concern morality, public order or social sensitivities.¹¹⁷ This doctrine therefore means that the Court may give discretion to State parties to determine whether a certain speech caused harm, provided that the restriction falls within the proportionality requirement.

Because the ECHR does not explicitly define hate speech, States keep a significant discretion in determining what speech should be restricted. The ECtHR's jurisprudence demonstrates that the Court often allows States to prohibit expression that they classify themselves as hate speech even though the Convention itself does not require to criminalize such speech.¹¹⁸ The Court's role is therefore a reactive one, rather than a prescriptive one, since it reviews only the proportionality of national restrictions instead of establishing an independent European definition of hate speech. This approach therefore contributes to the absence of a clear doctrinal hate speech threshold, as discussed in the previous subsection.

The Court, in its jurisprudence, frequently relies on the margin of appreciation when reviewing restrictions on racist or xenophobic political speech. In *Féret v. Belgium*, the Court upheld the decision of the national Belgian courts to punish the political speech in question, based on their assessment that such a speech displayed during electoral campaigns and carrying the risk of influencing public opinions constituted hate speech.¹¹⁹ The Court here relied on Belgian authorities' assessment of the societal risk posed by the speech, which illustrates the margin of appreciation that it gives to the State parties. Moreover, the margin of appreciation can expend based on a country's specific historical trauma. In *Nix v. Germany*, the Court acknowledged that 'States which have experienced of the Nazi horrors may be regarded as having a special moral

¹¹⁷ *Handyside v United Kingdom* (1976) 1 EHRR 737, para 48.

¹¹⁸ Jacob Mchangama & Natalie Alkiviadou, 'Hate Speech and the European Court of Human Rights: Whatever Happened to the Right to Offend, Shock or Disturb?' (2021) 21 Hum Rts L Rev 1008, 1034.

¹¹⁹ *Féret v Belgium* App no 15615/07 (ECtHR, 16 July 2009), paras 73 –76.

responsibility to distance themselves' from such atrocities.¹²⁰ This gave Germany a wide margin of appreciation to impose a blanket ban on Nazi symbols, even when the speaker did not intend to spread totalitarian ideas nor to incite to violence. However, while the margin of appreciation often gives States a wide discretion in penalizing hate speech or not, the Court has indicated that this discretion may become narrower when the rights of particularly vulnerable groups are at stake. The Court has recognized that some minority groups have historically suffered systemic discrimination and social exclusion, such as the Sami of Norway,¹²¹ or the Roma.¹²² In such cases, the Court is therefore more likely to demand stricter justification for any failure to protect these groups.¹²³ The Court has also emphasized that State parties must consider bias-motivated hostility seriously, since it is essential to combat discrimination. In *Identoba and Others v. Georgia*, the Court stated that 'without such a strict approach from the law-enforcement authorities, prejudice-motivated crimes would unavoidably be treated on an equal footing with ordinary cases without such overtones, and the resultant indifference would be tantamount to official acquiescence to or even connivance with hate crimes.'¹²⁴ The EU therefore recommends making hate crimes more visible and increasing their accountability and that the legislators create harsher punishments for hate crimes and courts should address bias motivations publicly in order to raise awareness and break impunity.¹²⁵

In conclusion, this section has analyzed that the ECtHR seems to operate as a supervisory body that opts for the principle of subsidiarity as well as a case-by-case contextual approach instead of a rigid and universal doctrinal definition of hate speech.¹²⁶ This approach therefore gives States a wide margin of appreciation to judge the pressing social need for restrictions based on national particularities, such as Germany's moral to distance itself from Nazi atrocities.¹²⁷ However, this discretion gets narrower when the rights of particularly vulnerable or historically marginalized groups, like the Sami or the Roma, are targeted. The States are therefore required to adopt a stricter approach to uncover bias-motivated hate speech in order to avoid official acquiescence to hate crimes.¹²⁸ As the next section will study, when it comes to racist hate speech, the ECtHR developed

¹²⁰ *Nix v Germany* App no 35285/16 (ECtHR, 13 March 2018), para 47.

¹²¹ Carola Lingaas, 'Hate Speech and Racialised Discrimination of the Norwegian Sami: Legal Responses and Responsibility' (2021) 8 Oslo L Rev 88, 100.

¹²² *D.H. and Others v Czech Republic* (2008) 47 EHRR 3, para 182.

¹²³ *Ibid.*

¹²⁴ *Identoba and Others v Georgia* App no 73235/12 (ECtHR, 12 May 2015), para 77.

¹²⁵ European Union Agency for Fundamental Rights, *Making Hate Crime Visible in the European Union: Acknowledging Victims' Rights* (Publications Office of the European Union 2012), para 11.

¹²⁶ Jacob Mchangama & Natalie Alkiviadou, 'Hate Speech and the European Court of Human Rights: Whatever Happened to the Right to Offend, Shock or Disturb?' (2021) 21 Hum Rts L Rev 1008, 1032–1034.

¹²⁷ *Nix v Germany* App no 35285/16 (ECtHR, 13 March 2018), para 47.

¹²⁸ *Identoba and Others v Georgia* App no 73235/12 (ECtHR, 12 May 2015), para 77.

a more controlling approach based on the defense of pluralism and has even required State parties to take action against discriminatory speech, therefore undermining the wide margin of appreciation initially analyzed.

3.2.From subsidiarity and margin of appreciation principles to a more controlling approach on towards State parties' actions regarding racist hate speech

This is where the Court may appear in contradiction to the approach studied in the first section of this chapter. When it comes to discriminatory hate speech targeting vulnerable groups, the ECtHR seems to take a stricter approach. First of all, the Court gives a particular treatment to discriminatory hate speech targeting vulnerable groups in that it views it as a direct threat to democratic pluralism and minority protection. To that end, the ECtHR therefore reduces its threshold to qualify speech as unprotected hate speech and for instance does not require speech to call to violence anymore to be categorized as such. Then, the Court also applies the positive obligations rule coming from the ECHR in a stricter way, therefore requiring States to actively condemn discriminatory hate speech targeting vulnerable groups. The Court in these cases views silence from domestic authorities as an agreement to the speech in question, regardless of their margin of appreciation and domestic laws.

3.2.1. The Court's recognition that racist hate speech threatens democratic pluralism and minority protection

The ECtHR bases itself on the principle that a democratic society requires more than a majority rule but also necessitates a balance which ensures the fair treatment of minorities.¹²⁹ To achieve this, the Court uses in its jurisprudence the principles of pluralism, tolerance and broadmindedness,¹³⁰ which therefore shows that freedom of expression is a qualified right carrying specific duties and responsibilities under article 10(2) ECHR.¹³¹ As studied in the previous section, the Court acts as a supervisor to ensure that State parties act according to these democratic principles, and when racist speech occurs, the Court often views it as a 'silencing mechanism' that conducts vulnerable minorities out of the public sphere.¹³² Unlike the CERD, which categorically

¹²⁹ *Young, James and Webster v United Kingdom* (1981) 4 EHRR 38, para 63.

¹³⁰ *Handyside v United Kingdom* (1976) 1 EHRR 737, para 49.

¹³¹ European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 art 10.

¹³² Anne-Marie Beliveau, 'Hate Speech Laws in the United States and the Council of Europe: The Fine Balance between Protecting Individual Freedom of Expression Rights and Preventing the Rise of Extremism and Radicalization through Social Media Sites' (2018) 51 Suffolk U L Rev 565, 575-577.

refuses to protect hate speech, the ECtHR attempts to operate a balance between protecting freedom of expression and prohibiting extreme forms of hatred.¹³³

To analyze this balance between freedom of expression and pluralism, the Court often prioritizes social peace over individual provocation. For example, in *Šimunić v. Croatia*, the Court did not focus on whether the applicant intended to incite a riot with their fascist slogan, but it examined the contextual weight of the slogan and its impact on a sports event intended to promote unity.¹³⁴ The Court held that the fine ‘struck a fair balance between the applicant’s interest in free speech, on the one hand, and the society’s interests in promoting tolerance and mutual respect at sports events as well as combating discrimination through sport on the other hand’.¹³⁵ This case therefore shows that the ECtHR considers hate speech as a breach of peace. Even if no violence occurs, the use of symbols associated with the destruction of pluralism is seen as a threat to such a pluralism and as a consequence to democracy.

To go further, the Court went from a vision where speech that ‘shocks, offends or disturbs’ should be protected,¹³⁶ to a racism exception rule, where incitement to hatred does not necessarily require a call to a specific act of violence in order to be considered as hate speech.¹³⁷ The Court has argued that insults, ridicule or defamation aimed at specific population groups are sufficient grounds for restriction, since they pose a threat to the dignity and safety of those targeted.¹³⁸ Therefore, by allowing States to criminalize ridicule, the Court acknowledges that psychological harm can be just as destructive to democracies as physical threats. However, the Court’s approach in these cases is often criticized as ‘ill-reasoned paternalism’.¹³⁹ In *Norwood v. UK*, the Court used article 17 to remove protection for a poster linking Islam to terrorism, calling it a ‘vehement attack’ on a religious group that was incompatible with the ECHR’s values.¹⁴⁰ Therefore, whenever a political leader presents a community as disturbing or hostile, the Court views this as ‘arousing feelings of

¹³³ *Ibid.*, 573.

¹³⁴ Jacob Mchangama & Natalie Alkiviadou, ‘Hate Speech and the European Court of Human Rights: Whatever Happened to the Right to Offend, Shock or Disturb?’ (2021) 21 Hum Rts L Rev 1008, 1028.

¹³⁵ *Šimunić v Croatia* App no 20373/17 (ECtHR, 22 January 2019), para 48.

¹³⁶ *Handyside v United Kingdom* (1976) 1 EHRR 737, para 49.

¹³⁷ *Féret v Belgium* App no 15615/07 (ECtHR, 16 July 2009), para 73.

¹³⁸ Jacob Mchangama & Natalie Alkiviadou, ‘Hate Speech and the European Court of Human Rights: Whatever Happened to the Right to Offend, Shock or Disturb?’ (2021) 21 Hum Rts L Rev 1008, 1030–1031.

¹³⁹ *Ibid.*, 1030.

¹⁴⁰ *Norwood v United Kingdom* App no 23131/03 (ECtHR, 16 November 2004).

distrust and rejection' among the least informed members of the public, which creates social tension posing a threat to the consolidation of civil society.¹⁴¹

To further analyze this democracy protection of the ECtHR, one must determine how the Court evaluates the danger of how speech is delivered. The Court does not consider words themselves but also how many people will hear them, as studied in the previous section. The Court views art as less threatening than mass media. However, this distinction is inconsistent, since it leaves the door for open arbitrary decisions based on whatever national authorities claim to be a pressing social need.¹⁴² Finally, the Court's protection of pluralism is often criticized for being selective, creating a hierarchy of significance regarding victims.¹⁴³ In *Vajnai v. Hungary*, the Court protected the display of the Red Star on the basis that it could not justify a pressing social need, since the Red Star itself was not only a symbol of Communism and since the communist era of Hungary was over a long time ago.¹⁴⁴ However, in *Nix v. Germany*, the ECtHR abandoned this approach and allowed a conviction for the use of Nazi symbols, even when the applicant had no intent to spread totalitarianism nor intimidate.¹⁴⁵ The Court justified this by calling for a State's moral responsibility to distance itself from Nazi atrocities.¹⁴⁶ This therefore creates a deep contradiction and makes one question why the crimes committed under Communism are treated differently than those created by Nazism.

As a conclusion, not only did the Court come to the conclusion that racist hate speech is a strong enough ground for freedom of expression's restrictions, but also it is evolving towards imposing positive obligations on State parties to combat racist hate speech, therefore moving away from the margin of appreciation and contextual-based approach towards a more controlling one, closer to the CERD.

3.2.2. The gradual emergence of positive obligations to address racist hostility

Historically, the ECHR was viewed as a treaty of negative obligations which determined what State parties could not do towards their citizens. Under article 10 ECHR, State parties were expected to refrain from censorship. However, the Court's jurisprudence made a shift towards positive

¹⁴¹ Jacob Mchangama & Natalie Alkiviadou, 'Hate Speech and the European Court of Human Rights: Whatever Happened to the Right to Offend, Shock or Disturb?' (2021) 21 Hum Rts L Rev 1008, 1030.

¹⁴² *Ibid.*

¹⁴³ *Ibid.*, 1028.

¹⁴⁴ *Vajnai v Hungary* App no 33629/06 (ECtHR, 8 July 2008), paras 49–52.

¹⁴⁵ *Nix v Germany* App no 35285/16 (ECtHR, 13 March 2018), para 51.

¹⁴⁶ *Ibid.*, para 47.

obligations. Here, the Court went from the view of *Handyside v. UK*, where the Court established that the primary duty of Member States was to refrain from interference unless necessary,¹⁴⁷ to a view where Member States should have positive obligations when it comes to racist hate speech targeting vulnerable groups. This shift started when the ECtHR started reading article 10 together with articles 8 (right to respect for private and family life) 14 (prohibition of discrimination) and can be illustrated in the case *Budinova and Chaprazov v. Bulgaria*, where the Court stated that ‘by refusing to afford redress to the applicants in respect of Mr Siderov’s discriminatory statements, the domestic authorities failed to comply with their positive obligation to respond adequately to discrimination on account of the applicants’ ethnic origin and to secure respect for the applicants’ private life’.¹⁴⁸ In the context of racist hate speech, the Court now considers State parties to have a proactive duty to protect individuals from interferences of other citizens. This evolution comes from the idea that if a State remains passive regarding racist hate speech, it is therefore failing in its duty to protect the rights of the targeted groups. If racist hate speech acts a silencing mechanism, then the State must act as a counterweight. This transition therefore switches State parties’ roles from neutral arbiters of the marketplace of ideas to a mandated guardian of social dignity. This implies that the Court’s role is no longer to establish a clear and uniform definition of hate speech but review the proportionality of States’ restrictions on freedom of expression, which often results in allowing them to prohibit speech which the ECHR itself does not ban.¹⁴⁹

The first reason of such a shift is the application of article 8 in conjunction with article 14 ECHR, which respectively protect the right to respect for private and family life and prohibit discrimination. The Court has expanded the definition of private life to include an individual’s ethnic, racial or social identity.¹⁵⁰ Therefore, an attack on a person’s identity through racist hate speech is treated as an attack against their moral integrity. When such attacks occur, the Court argues that the State’s failure to condemn them constitutes a violation of the ECHR. The *Beizaras and Levickas v. Lithuania* case is an illustration of this new approach of the Court. The ruling of the Court in this case was revolutionary, since not only did it rule that the State could have intervened, but it ruled that the State was required to intervene and stated that ‘the very same discriminatory state of mind was at the core of the failure on the part of the relevant public

¹⁴⁷ *Handyside v United Kingdom* (1976) 1 EHRR 737, para 50.

¹⁴⁸ *Budinova and Chaprazov v Bulgaria* App no 12567/13 (ECtHR, 16 February 2021), para 95.

¹⁴⁹ Anne-Marie Beliveau, ‘Hate Speech Laws in the United States and the Council of Europe: The Fine Balance between Protecting Individual Freedom of Expression Rights and Preventing the Rise of Extremism and Radicalization through Social Media Sites’ (2018) 51 *Suffolk U L Rev* 565, 577.

¹⁵⁰ *S and Marper v United Kingdom* App nos 30562/04 and 30566/04 (ECtHR, 4 December 2008), para 66.

authorities to discharge their positive obligation to investigate in an effective manner whether the comments regarding the applicants' sexual orientation constituted incitement to hatred and violence; by downplaying the seriousness of the comments, the authorities at the very least tolerated them'.¹⁵¹ This therefore established that when hate speech reaches a certain level of severity, the margin of appreciation allocated to States disappears and gives space to an obligation of States to act against discriminatory speech. As a consequence, the State bears a duty to investigate and punish the perpetrators, regardless of the provocative behavior of the victims.¹⁵²

The Court has later refined this State obligation to act approach with the duty to unmask bias. In *Identoba and Others v. Georgia*, the Court stated that 'without such a strict approach from the law-enforcement authorities, prejudice-motivated crimes would unavoidably be treated on an equal footing with ordinary cases (...) and the resultant indifference would be tantamount to official acquiescence to or even connivance with hate crimes'.¹⁵³ Therefore, here, non-action from state authorities is seen as a form of connivance where the State becomes a silent partner to the hate speech by refusing to acknowledge its existence. This is the application of a French saying '*qui ne dit mot consent*', meaning that 'who does not speak agrees'. If States do not explicitly prosecute actors of racist hate speech, they consequentially agree with such speech. States must then make anti-hate speech measures visible in their domestic legal systems by, first, creating harsher punishments specifically for crimes motivated by bias on a legislative level.¹⁵⁴ Then, by addressing bias motivations publicly in courts in order to raise awareness and break the cycle of impunity.¹⁵⁵ Finally, by recognizing bias in cases of bias-motivated crimes in order to avoid treating them on the same footing as ordinary cases.¹⁵⁶

This emergence of positive obligations creates a significant gap with the traditional protection of freedom of expression. Critics argue that when the State is forced to prosecute hate speech to avoid being condemned by the ECtHR, it creates a chilling effect on public debate and constitutes an unsatisfactory basis to restrict freedom of expression.¹⁵⁷ State parties are no longer balancing freedom of expression and social peace at their own discretion, but are acting under the threat of a

¹⁵¹ *Beizaras and Levickas v Lithuania* App no 41288/15 (ECtHR, 14 January 2020), para 129.

¹⁵² *Ibid.*, para 152.

¹⁵³ *Identoba and Others v Georgia* App no 73235/12 (ECtHR, 12 May 2015), para 77.

¹⁵⁴ Carola Lingaas, 'Hate Speech and Racialised Discrimination of the Norwegian Sami: Legal Responses and Responsibility' (2021) 8 Oslo L Rev 88, 104.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Identoba and Others v Georgia* App no 73235/12 (ECtHR, 12 May 2015), para 77.

¹⁵⁷ Jacob Mchangama & Natalie Alkiviadou, 'Hate Speech and the European Court of Human Rights: Whatever Happened to the Right to Offend, Shock or Disturb?' (2021) 21 Hum Rts L Rev 1008, 1041.

condemnation. This can therefore lead to over-regulation where national authorities choose to criminalize even borderline cases of offensive speech to ensure that they will not be afterwards accused of acquiescence.¹⁵⁸ And this is where the case-by-case approach analyzed in the previous section becomes problematic, since no clear definition of where offense ends and hate starts exists and State may therefore feel pressured to adopt the strictest possible interpretation to protect themselves from the Court's condemnation.¹⁵⁹

The ECtHR has moved far beyond its supervisory role analyzed in the first section of this chapter. By establishing positive obligations on State parties, the ECtHR has created a mandatory minimum on how States should condemn racist hate speech. Prohibition against discrimination has therefore become as fundamental as freedom of expression. This shows that the ECtHR's system, even though slower and more contextual than the CERD, has eventually reached a point where it imposes the criminalization of the most severe forms of racist hate speech. The margin of appreciation is therefore no longer a protection behind which State parties can hide in order to ignore hate speech and discrimination. The next chapter will therefore aim to compare both the ECtHR and CERD's approaches to a specific form of racist hate speech – antisemitism and will aim to assess whether both institutions keep a coherent approach regarding it, compared to the one studied in chapters 3 and 4. It will also aim to distinguish which approach is the most viable in the concrete and recurrent topic that antisemitism is.

¹⁵⁸ *Identoba and Others v Georgia* App no 73235/12 (ECtHR, 12 May 2015), para 77.

¹⁵⁹ Jacob Mchangama & Natalie Alkiviadou, 'Hate Speech and the European Court of Human Rights: Whatever Happened to the Right to Offend, Shock or Disturb?' (2021) 21 Hum Rts L Rev 1008, 1034.

Chapter 4: The conflict of approaches to tackle the issue of antisemitism and Holocaust denial

This final chapter aims to give a concrete and direct comparative analysis between the CERD's and ECtHR's approach regarding hate speech, and more specifically in the case of antisemitism. To achieve this goal, the first section of this chapter will analyze how the ECtHR's approaches antisemitism and no longer applies its contextual approach and significantly lowers its threshold, allowing for broad condemnations of speech disseminating this ideology. This therefore leads the Court to recourse to Article 17 on the antisemitism cases brought in front of it, erasing the proportionality test from its evaluation of whether speech could be legitimately restricted or not. On its side, the CERD's approach in the context of antisemitism remains unchanged since it prohibits Nazism as any other ideology and propaganda based on racial discrimination and therefore asks any State party to modify their national legislation in order to ban and condemn this ideology.

4.1. The European Court of Human Right's unique treatment of antisemitism and Holocaust denial as an approach similar to the Committee on the Elimination of All Forms of Discrimination

In cases of antisemitism, and specifically in Holocaust denial ones, the ECtHR goes far beyond the stricter approach it takes when it comes to racist hate speech targeting vulnerable groups. The Court uses article 17 ECHR, which serves as a speech ban without evaluation needed, that is to say without the traditional proportionality test required to restrict speech under article 10. The Court goes also beyond speech that has an impact on a wide audience but also restricts Holocaust denial speech which occurred in the private sphere. This approach from the Court has however been criticized and regarded as inconsistent, in as it does not apply to other types of religious and racial discrimination, such as Islamophobia. In those cases, the Court almost always reviews the hate speech ban under the light of the proportionality test and balancing of rights approach. The Court was also criticized as inconsistent under other genocide denial cases, as it did not use its systematic article 17 ban, as it does for Holocaust denial. These divergences in approaches from the Court differs from the CERD, as the Committee in similar cases would have almost certainly condemned all forms of religious and racial discrimination, including Islamophobia, and all cases of genocide denial, other than the Holocaust.

4.1.1. The implementation of Article 17 as normative shortcut and the complete intolerance regarding Holocaust denial creating a hierarchy of significance

The ECtHR's treatment of the Holocaust represents a unique departure from its original principles, such as the balancing of rights and the margin of appreciation for States to ban hate speech or not following what they consider as a pressing social need or not. When confronted with Nazi ideology, the Court abandons the usual proportionality test and brandishes article 17 ECHR, or the anti-abuse clause. This therefore serves as what Jacob Mchangama and Natalie Alkiviadou call a normative shortcut, which deprives the speech in question from any protection because its real purpose is to reinstitute a regime incompatible with the Convention's values.¹⁶⁰ This therefore, following their approach, creates a hierarchy of protection, where the Holocaust is afforded a level of presumed protection not granted to victims of other sorts of hate speech.¹⁶¹

The most illustrative case regarding this topic is *Garaudy v. France*, where the Court first announces that Holocaust denial belongs to this category that will now be dealt with under article 17 ECHR and no longer article 10, losing any opportunity to be left unprosecuted in any Member State.¹⁶² Moreover, the Court explicitly linked Holocaust denial to racist defamation by stating that 'denying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order.'¹⁶³ This was consolidated in the case *M'Bala M'Bala v. France*, where the Court did not examine the alleged harm in the speech in question and instead automatically unprotected it under article 17 ECHR.¹⁶⁴ The ECtHR found that 'any remark directed against the Convention's underlying values is removed from the protection of Article 10 by Article 17'.¹⁶⁵

The Court's zero-tolerance approach *vis-à-vis* Holocaust denial is so absolute that it extends even into the private sphere. In *Witzsch v. Germany*, the Court declared a private letter which denied that Hitler and the Nazi party ordered the Holocaust to happen as unprotected speech under article 17

¹⁶⁰ Jacob Mchangama & Natalie Alkiviadou, 'Hate Speech and the European Court of Human Rights: Whatever Happened to the Right to Offend, Shock or Disturb?' (2021) 21 Hum Rts L Rev 1008, 1020.

¹⁶¹ *Ibid.*

¹⁶² *Garaudy v France* App no 65831/01 (ECtHR, 24 June 2003).

¹⁶³ *Ibid.*

¹⁶⁴ Jacob Mchangama & Natalie Alkiviadou, 'Hate Speech and the European Court of Human Rights: Whatever Happened to the Right to Offend, Shock or Disturb?' (2021) 21 Hum Rts L Rev 1008, 1021.

¹⁶⁵ *M'Bala M'Bala v France* App no 25239/13 (ECtHR, 20 October 2015), para 33.

ECHR.¹⁶⁶ This therefore demonstrates that the Court does not even require a threat to public order when Holocaust denial is involved, since the ideology behind it constitutes the threat in itself. However, the Court still applies an unclear analysis when it deals with Holocaust denial. In two similar cases *Williamson v. Germany* and *Pastörs v. Germany*, both involving Holocaust denials in the course of interviews, the Court, even though it considered both applications as inadmissible, approached the former under article 10¹⁶⁷ and the latter under article 17,¹⁶⁸ without any factual explanation on why it did so. This can therefore be perceived as a lack of regularity and coherence from the ECtHR by some scholars. However, one should always keep in mind that one of the foundational principles of the ECtHR is contextuality. Moreover, the Court, as it has stated in *Pastörs v. Germany* that ‘it is not called upon to examine the constituent elements of the offences of intentional defamation and of violating the memory of the dead; nor is it called upon to examine the extent of the indemnity enjoyed by a Member of Parliament. Rather, it is in the first place for the national authorities, especially the courts, to interpret and apply domestic law’.¹⁶⁹ Therefore, even though similar in facts, the ECtHR relied on the assessment of the German domestic courts to assess the constituent elements of the offences in these two cases, which might explain why it took different approaches.

However, such a divergence in approaches may appear more difficult to justify and comprehend when it comes to other forms of ethnic and religious hate speech. While Holocaust denial almost automatically falls under the unprotection clause under article 17 ECHR, hate speech targeting Muslims is almost always dealt under article 10. For instance, in *Féret v. Belgium*, even though the Court found no violation of the ECHR for the propagation of racist ideas based on islamophobia, the Court approached the case under article 10’s framework and rejected the application of article 17.¹⁷⁰ The lack of cohesion further lies in the fact that it is through this case that the ECtHR lowered its threshold for the prohibition of hate speech by assessing that incitement to hatred is not the only requirement for hate speech to be assessed and that the insult, ridicule or defamation of a part of the population can also be characterized as such.¹⁷¹ However, the Court still approached this case under article 10 and not 17, therefore allowing a proportionality test, which it had never done in cases of Holocaust denial. Further, in the case *Le Pen v. France*, where Le Pen challenged his

¹⁶⁶ *Witzsch v Germany* App no 41448/98 (ECtHR, 13 December 2005).

¹⁶⁷ *Williamson v Germany* App no 64496/17 (ECtHR, 8 January 2019), paras 20–21.

¹⁶⁸ *Pastörs v Germany* App no 55225/14 (ECtHR, 3 October 2019), para 46.

¹⁶⁹ *Ibid.*, para 41.

¹⁷⁰ *Féret v Belgium* App no 15615/07 (ECtHR, 16 July 2009), para 82.

¹⁷¹ *Ibid.*, para 73.

conviction for Islamophobic speech, the Court found his case inadmissible under article 10 and not 17.¹⁷² The only exception to date is the case *Norwood v. UK* that the Court approached under article 17. It recognized here that the ‘the words and images on the poster amounted to a public expression of attack on all Muslims in the United Kingdom’¹⁷³ and that it therefore constituted a ‘vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, [which] is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination.’¹⁷⁴ One could therefore point out in this situation the lack of coherence of the ECtHR, which does not choose between applying its proportionality test towards every form of hate speech or not applying it in any case. The CERD in a similar pattern would not have differentiated between widespread hate speech and a more discreet one. It would have condemned both the same way, using the same article 4 ICERD.

However, one must keep in mind that the goals of both institutions are different. The CERD aims to eradicate all sorts of racial discrimination. But the ECtHR, on its side, aims to ensure the ECHR’s application by Member States through the lens of contextuality, subsidiarity and balancing of rights. It does not carry the specific role to push Member States into the modification of their national legislation and does not deal with the only right to non-discrimination but also have freedom of expression as its value.

Therefore, even though the ECtHR’s approach regarding Islamophobic speech might be perceived as inconsistent, one can still observe that the Court remains careful not to unreasonably impede on freedom of expression and therefore prohibit every racist hate speech without a proportionality test. The gravest forms of racist hate speech are therefore justifiably unprotected under article 17 and the less general ones are the objects of the Court’s proportionality test, which can be considered as logical under the ECtHR’s contextual approach. However, scholars have found this practice inconsistent towards Holocaust denial, which automatically falls under the scope of article 17, even in its less general forms.¹⁷⁵ However, this can again be seen as in line with the Court’s contextual approach. Holocaust was born on the European continent and was spread across this continent. The crimes against humanity and the genocide that occurred in this context also occurred on European soil. Moreover, as will be studied in the next section, Holocaust is the most unprecedented crime

¹⁷² *Le Pen v France* App no 18788/09 (ECtHR, 20 April 2010).

¹⁷³ *Norwood v United Kingdom* App no 23131/03 (ECtHR, 16 November 2004).

¹⁷⁴ *Ibid.*

¹⁷⁵ Jacob Mchangama & Natalie Alkiviadou, ‘Hate Speech and the European Court of Human Rights: Whatever Happened to the Right to Offend, Shock or Disturb?’ (2021) 21 Hum Rts L Rev 1008, 1022.

against humanity and genocide in Europe's history as well as the one that received the most formal condemnation from international institutions. Its particular condemnation by the ECtHR can therefore be regarded as justified under its contextual approach.

4.1.2. The inconsistency in genocide denial treatment

The inconsistency of the ECtHR's hierarchy of significance could be exposed when comparing the Nazi exception to the denial of other genocides and totalitarian symbols. In *Perinçek v. Switzerland*, the Court considered the denial of the Armenian genocide as a protected speech. First of all, the Court based its judgement on the fact that the applicant 'denied that the events of 1915 and the following years could be classified as genocide but did not dispute the reality of the massacres and mass deportations',¹⁷⁶ which therefore did not constitute the negation of established historical facts, but rather a debate on the classification of these crimes. The Court then introduced a geographical and temporal test. For the geographical test, the ECtHR argued that there was no 'direct link between Switzerland and the events that took place in the Ottoman Empire in 1915 and the following years. The sole link of this kind may come from the presence of an Armenian community on Swiss soil, but it is a tenuous one.'¹⁷⁷ The Court also stated that there was 'no evidence that at the time when the applicant made his statements the atmosphere in Switzerland was tense and could result in serious friction between Turks and Armenians there'.¹⁷⁸ As for the temporal test, the Court based itself on its previous *Lehideux and Isorni v. France* case, where it held that 'while controversial remarks concerning traumatic historical events were always likely to reopen the controversy and bring back memories of past sufferings, a lapse of time of some forty years made it inappropriate to deal with them with the same severity as ten or twenty years previously.'¹⁷⁹ Therefore, in its *Perinçek* judgement, the Court based it on the fact that 'the lapse of time between the applicant's statements and the tragic events to which he was referring was considerably longer, about ninety years, and at the time when he made the statements there were surely very few, if any, survivors of these events.'¹⁸⁰ Ultimately, the Court held that 'there is no evidence that the applicant's statements have in themselves provoked hatred towards the Armenians in Turkey, or that he has on other occasions attempted to instill hatred against Armenians there.'¹⁸¹

¹⁷⁶ *Perinçek v Switzerland* App no 27510/08 (ECtHR, 15 October 2015), para 253.

¹⁷⁷ *Ibid.*, para 244.

¹⁷⁸ *Ibid.*

¹⁷⁹ *Lehideux and Isorni v France* App no 24662/94 (ECtHR, 23 September 1998), para 55.

¹⁸⁰ *Perinçek v Switzerland* App no 27510/08 (ECtHR, 15 October 2015) (GC), para 177.

¹⁸¹ *Ibid.*, para 250.

The Court further anticipated the questions these would raise, since these geographical and temporal tests were not applied in any Holocaust denial cases nor has the Court assessed whether they constituted racial discrimination or not. The ECtHR essentially justified such a distancing from its previous Holocaust denial cases which it found inadmissible in all cases by the fact that the speech it banned in these cases were ‘casting doubt on the reality of the persecution and extermination of millions of Jews under the Nazi regime’.¹⁸² Therefore, the cases the ECtHR dealt with were not debates on the qualification of the crimes committed against the Jews during the Holocaust but on the existence of the Holocaust itself, which was directly linked to Nazi-like ideologies and therefore in themselves carrying racial hatred. This consequentially differs from the present case where the applicant does not deny the murder of Armenians during the Ottoman Empire and explains the difference in outcome.

This difference in genocide treatment was significantly unpopular among scholars as well as various ECtHR’s judges themselves. They have denounced this contrast in standards when dealing with other genocides than the Holocaust denigrates the memory of the Armenian genocide victims compared to the ones of Holocaust.¹⁸³ This was also reflected in the partly dissenting opinions of judges Vučinić and Pinto de Albuquerque who declared that ‘the suffering of an Armenian because of the genocidal policy of the Ottoman Empire are not worth less than those of a Jew under the Nazi genocidal policy. Furthermore, the denial of *Hayots Tseghaspanutyun* or *Meds Yeghern* is not less dangerous than Holocaust denial.’¹⁸⁴ Aligning with this argument, the CERD in a similar case would have likely followed this logic and condemned the speech of the applicant, since it could have found that denying Armenian genocide is also in a way denial of their past and most of all the imbalance between victims’ memory.

However, one should still consider the contextual approach of the ECtHR. As mentioned in the previous subsection, the Court considers Holocaust as the result of an ideology that was born on European’s soil, which crimes were committed on the very territory of Europe, and which victims were citizens of these European countries. This does not mean that the Armenian lives are worth less because not on the European territory, but it rather illustrates the Court’s adaptability to Member States’ history and society. The *Perinçek v. Switzerland* case illustrates this view since

¹⁸² *Ibid.*, para 209.

¹⁸³ Jacob Mchangama & Natalie Alkiviadou, ‘Hate Speech and the European Court of Human Rights: Whatever Happened to the Right to Offend, Shock or Disturb?’ (2021) 21 Hum Rts L Rev 1008, 1023.

¹⁸⁴ Vučinić and Pinto de Albuquerque, ‘Joint partly dissenting opinion’ in *Perinçek v Switzerland* App no 27510/08 (ECtHR, 17 December 2013), para 22.

the Court stated that ‘it has not been argued that there was a direct link between Switzerland and the events that took place in the Ottoman Empire in 1915 and the following years. The only such link may come from the presence of an Armenian community on Swiss soil, but it is a tenuous one’¹⁸⁵ and that there is ‘no evidence that at the time when the applicant made his statements the atmosphere in Switzerland was tense and could result in serious friction between Turks and Armenians there.’¹⁸⁶ Moreover, this case was of particular difficulty for the ECtHR, since its underlying question was whether or not the crimes committed against Armenians during the Ottoman Empire constituted genocide or not. The Court therefore did not have many options to avoid incarnating a role that is not among its attributions. The Court stated itself that it ‘is not required to determine whether the criminalization of the denial of genocides or other historical facts may in principle be justified.’¹⁸⁷ This means that if the Court took as a role to assess whether or not the speech of the applicant constituted genocide denial or not would have resulted in assessing whether the crimes against Armenians constitute or not a genocide. However, one should bear in mind the fact that the ECtHR is no such international court as the International Criminal Court or the International Court of Justice. Since none of these institutions have ruled whether the crimes committed by the Ottoman Empire constituted genocide, it would have been an even more significant slippery slope for the ECtHR to take a clear position on this matter. Finally, asking the ECtHR to treat every crime-categorization denial the same way as Holocaust may be dangerous. Not only it would constitute a demand to the ECtHR to assess whether these constitute genocide, therefore overstepping its role, but it might also bypass the search for historical truth and categorize events as genocide in a premature way. In the current context, the ECtHR might, for instance, receive a case in which a Spanish applicant contests their conviction for denying the existence of a genocide committed by Israel in Gaza. If the Court judged that such a conviction was legal, this would therefore be dangerous as it would rule on the matter before any dedicated international court did so and as a historical truth would not have been found yet.

In conclusion to this section, the ECtHR goes even further than the approach it takes in racial discrimination cases and applies an automatic ban on Holocaust denial cases, and by extension on antisemitism by having recourse to article 17 ECHR. The Court therefore bypasses the proportionality test it usually uses to evaluate the legality of speech restriction. It goes even further by prohibiting antisemitic speech which occurs in private correspondence, therefore bypassing one

¹⁸⁵ *Perinçek v Switzerland* App no 27510/08 (ECtHR, 15 October 2015), para 244.

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*, para 226.

of its traditional contextual assessments on the potentially impacted targeted audience. However, this strict approach sparked criticism regarding the consistency of the ECtHR when it comes to other forms of racial discriminations and genocide denials, where the Court either comes back to its traditional proportionality test or refuses to condemn the denial. This therefore illustrates the deep contextual nature of the ECtHR, which considers antisemitism as a unique threat since its creation and development are rooted on European soil. The next section will therefore aim to analyze the CERD's approach in the context of antisemitism and determining its similarities and disparities to the ECtHR's.

4.2.The Committee on the Elimination of All Forms of Racial Discriminations' predictable and constant approach in the context of antisemitism

The CERD appears as generally stricter in its requirements to condemn racist hate speech. However, when it comes to the prohibition of antisemitic speech, the CERD and the ECtHR approaches exhibit similarities, which lie in the absence of a proportionality test in assessing the antisemitic speech restriction. Both institutions apply an automatic recommendation or automatic unprotection. However, disparities persist, since the CERD's approach remains the rule, whereas the use of article 17 ECHR for the ECtHR remains an exception to the traditional proportionality test. In addition, the CERD applies a complete automation in its recommendations to State parties to criminalize antisemitic speech, whereas the ECtHR has one recorded exception to the use of article 17 in this context. Finally, the CERD's approach to general racial discrimination is more consistent than the ECtHR, as it equally applies the same evaluations and recommendations on all kinds of racial discriminations and on all kinds of genocide denials, without limiting itself to antisemitism or the Holocaust denial.

4.2.1. An approach generally stricter than the European Court of Human Rights' but showing similarities in the case of antisemitism

The CERD generally possesses a stricter approach than the ECtHR when it comes to tackle hate speech in the context of racial discrimination. The CERD operates as an *État social* agent.¹⁸⁸ This therefore creates a fundamental difference in approach between the two. As demonstrated in the previous chapters, the ECtHR, in general hate speech cases, operates a balancing of rights as well as a contextual approach. It therefore considers freedom of expression as the rule and its prohibition

¹⁸⁸ Eric Heinze, 'Viewpoint Absolutism and Hate Speech' (2006) 69 Mod L Rev 543, 579.

as the exception. To that end, the Court applies a proportionality test in order to determine whether speech was lawfully restricted or not. It has also set a relatively high threshold for speech to be considered as hate speech and be condemned, since even speech that ‘shocks, disturbs or offends’ is considered as protected speech under article 10 ECHR.¹⁸⁹ In addition, the Court proceeds with a contextual assessment in order to determine, for instance, in what context the problematic speech occurred or the audience targeted by the speech in question.

On its side, the CERD does not see the prohibition of racist hate speech as an exception to the rule, but the prohibition of racist speech is the foundational rule itself established in article 4 ICERD.¹⁹⁰ Unlike the ECHR that sees freedom of expression as a right that can be restricted on certain grounds, the ICERD requires the dissemination of ideas based on racial superiority to be categorically criminalized.

However, when it comes to antisemitic speech, the ECtHR and the CERD take approaches which contain similarities. As analyzed in the previous section, the ECtHR, in the case of antisemitic speech, almost automatically approaches it through the prism of Article 17, which bypasses the proportionality test. Similarly, the CERD, in antisemitism cases, also strongly recommends the State Party to modify their legislation in order to encompass a specific ban on Nazi ideologies and antisemitism by extension.¹⁹¹ This can be illustrated by the evolution of the Norwegian jurisprudence. Historically, Norway adhered to a strict *État libéral* model, therefore allowing a wide range of political expression. This can be reflected in the *Sjølie* case, where a neo-Nazi group conducted a march in honor of a former Nazi official while chanting antisemitic slogans. Initially, the Norwegian Supreme Court applied a logic similar to the right to ‘shock, offend or disturb’¹⁹² and acquitted the speaker, arguing that the protection of political debate was more essential than the harm caused by the offensive speech.¹⁹³ However, the CERD found Norway in direct violation of the ICERD.¹⁹⁴ The Committee argued that the principle of freedom of expression is afforded a ‘lower level of protection’ in cases of racist and Nazi hate speech.¹⁹⁵ To that end, the CERD does not operate any additional test in any of its recommendations nor does it aim to determine whether

¹⁸⁹ *Handyside v United Kingdom* (1976) 1 EHRR 737, para 49.

¹⁹⁰ Jacob Mchangama & Natalie Alkiviadou, ‘Hate Speech and the European Court of Human Rights: Whatever Happened to the Right to Offend, Shock or Disturb?’ (2021) 21 Hum Rts L Rev 1008, 1013.

¹⁹¹ *Jewish Community of Oslo et al v Norway* (2005) Communication No 030/2003 CERD/C/67/D/30/2003, para 2.7.

¹⁹² *Handyside v United Kingdom* (1976) 1 EHRR 737, para 49.

¹⁹³ *Sjølie* [2002] Rt 1618.

¹⁹⁴ *Jewish Community of Oslo et al v Norway* (2005) Communication No 030/2003 CERD/C/67/D/30/2003, para 10.5.

¹⁹⁵ *Ibid.*

the restriction of this type of speech by the State party will be disproportionate to right to freedom of expression. Instead, the CERD applies a systematic recommendation and automatically concludes that racist hate speech restriction is consistent with freedom of expression.¹⁹⁶ The CERD, in its General Recommendation 35, stated that:

The protection of persons from racist hate speech is not simply one of opposition between the right to freedom of expression and its restriction for the benefit of protected groups; the persons and groups entitled to the protection of the Convention also enjoy the right to freedom of expression and freedom from racial discrimination in the exercise of that right. Racist hate speech potentially silences the free speech of its victims.¹⁹⁷

In the case of antisemitic speech, the CERD and the ECtHR therefore both apply either a blanket recommendation or a blanket prohibition on this specific speech, regardless of proportionality and in the case of the CERD regardless of context. However, the next subsection will analyze the disparities which remain between these two institutions when they deal with antisemitism and other forms of racial discrimination.

4.2.2. A steady approach towards antisemitism and other forms of racial discrimination, giving coherence to the Committee on the Elimination of Racial Discrimination

As mentioned in the previous subsection, in the case of antisemitism, the CERD has one unique approach, which consists in imposing strict recommendations for State parties not to remain passive in the case of antisemitism and take concrete actions to criminalize it, regardless of context. However, even though the ECtHR, in the vast majority of cases, has tackled antisemitic hate speech through the prism of article 17 ECHR and bypassed the proportionality test, has failed to do so in the case *Ayoub and Others v. France*, where it used the traditional proportionality test of article 10 ECHR in order to assess whether the restriction in question had impeded over the rights and freedoms of others.¹⁹⁸ This therefore makes the Court's jurisprudence and approach less reliable and predictable than the CERD's. It can therefore be concluded that in the context of antisemitism, the CERD acts as a corrective institution to the ECtHR's approach and ensures that combatting

¹⁹⁶ UN Committee on the Elimination of Racial Discriminations, 'General Recommendation No 35' (2013) UN Doc CERD/C/GC/35, para 28.

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ayoub and Others v France* App no 77400/14 and 34532/15 (ECtHR, 8 October 2020), para 84.

antisemitism as a form of racial discrimination becomes a systematic responsibility which takes over States' desire for liberal neutrality.

Moreover, another limit of the similarities between the CERD and ECtHR lies in the treatment of other forms of racial discrimination as well as other cases of genocide denial. When it comes to other forms of racial discrimination, it was previously demonstrated that the ECtHR almost always (except in one exceptional case) treats them through the prism of the proportionality test contained in article 10 ECHR. However, the CERD operates the same evaluation whether the case contains antisemitic hate speech or Islamophobic hate speech. An illustration of this approach is the case *TBB v. Germany*, where the Committee, just as it did in the case *Jewish Community of Oslo et al v Norway*, operated the same assessment whether the speech in question constituted racist hate speech under article 4 ICERD and whether the State party took appropriate measures to criminalize it.¹⁹⁹ As for genocide denial cases, the previous subsection analyzed the disparity between the strict prohibition of the denial of the Holocaust operated by the ECtHR and the acceptance of the denial of the Armenian genocide. The CERD's approach therefore differs from the ECtHR in that case, since it also considers all forms of denial of genocide under the same prism and on the same footing, without providing a contextual approach within them. An illustration of this approach is the Concluding Observations on Belgium of 1997, in which the Committee stated that 'the Committee suggests that the Act of 23 March 1995 which prohibits the denial, minimization, justification or approval of the genocide committed by the German national socialist regime during the Second World War should be broadened to cover the different types of genocide'.²⁰⁰ This therefore means that the denial of all genocides should be equally criminalized, not the Holocaust solely.

As a conclusion to this chapter, the practices of the CERD and the ECtHR regarding antisemitic hate speech appear similar in their prohibition, but different in their overall approach of racial discrimination and in consistency. This is possible since the Court operates a whole new approach when it comes to Holocaust denial and does not apply its balancing of rights nor proportionality test. Instead, it almost automatically unprotects such speech under article 17 ECHR and has so far deemed all applications related to it inadmissible. This near-automation has however raised concerns regarding the consistency of the ECtHR's approach in treating similar cases. Moreover, this overall strong condemnation of the Holocaust denial on the other hand has sparked criticism

¹⁹⁹ *TBB-Turkish Union in Berlin/Brandenburg v Germany* (2013) Communication No 048/2010 CERD/C/82/3, paras 12.7–12.8.

²⁰⁰ UN Committee on the Elimination of Racial Discrimination, 'Concluding observations of the Committee on the Elimination of Racial Discrimination: Belgium' (1997) UN Doc CERD/C/304/Add.26.

as to why this crime specifically and not other genocides, such as the Armenian one. The answer is that the ECtHR's contextual approach cannot disregard the fact that Holocaust is directly linked to Europe's history since it occurred on European soil. Moreover, the Court refrains from replacing other specialized international courts in assessing whether crimes constitute genocide or not, which explains why it treats Holocaust differently, since it is an event that has been formally recognized under international law as genocide. On its side, however, not only does the CERD prohibit antisemitic hate speech without applying a proportionality test, but it also does so in a systematic way and operates the same approach in all forms of racial discrimination. The CERD's consistency can also be witnessed in its approach to other forms of genocide denials, where it recommends State parties to criminalize them in the same way as they do for Holocaust denial cases.

CONCLUSION

To conclude this thesis, the notion of hate speech under the ECtHR's framework directly comes from the freedom of expression guaranteed by the ECHR. It appears as an exception to it, that is to say, freedom of expression is the rule, and its ban the exception. Therefore, originally, hate speech was classified as a non-protected speech which could be banned by Member States only in exceptional conditions, to which the ECtHR posed a threshold. This threshold is known as the proportionality test, through which the Court evaluates whether bans of speech have a legitimate aim, are necessary to a democratic society and proportional to the aim of the prohibition. Initially, the threshold was rather high in order to remove freedom of expression's protection and condemn it. The Court, back in the time, attributed a wide space to freedom of expression and recognized the right for speech to shock, offend or disturb. Moreover, speech that constituted insult was not automatically considered by the Court as hate speech and therefore not always unprotected. However, throughout time, this threshold progressively lowered to include insults in certain contexts. This is where the role of the ECtHR has its importance within this study. The Court's role is unique in the sense that it does not act as an appeal court, nor does it directly intervene within Member States' internal procedures and domestic laws. Its role is limited to supervising and evaluating whether Member States respected the ECHR in their procedures and decisions. In its evaluation, the Court's main approach appears as contextual. This means that its decision on whether a certain speech should have been protected or not largely depends on whether the speech in question was done in a political context, on the breadth of the audience targeted and reached and on who was targeted. This therefore gave rise to a margin of appreciation allocated to States, which consists in leaving them the power to decide what speech can be protected or unprotected depending on their national legislations and historical, social, cultural context, given that the protection does not impair the rights of others and the condemnation respects the proportionality threshold discussed earlier in this conclusion. The turnover from the low threshold discussed earlier comes to the proportionality threshold that the Court operated throughout time. The Court later on went from a rather high threshold to a lower one when it came to racist hate speech targeting vulnerable groups. The Court viewed it as a particular threat to democratic principles and democracy in general and therefore allowed for more unprotection of speech targeted such vulnerable groups, which had the consequence to lower the margin of appreciation initially allocated to Member States regarding their regulations of freedom of expression. However, such an approach from the ECtHR, even though stricter regarding hate speech and racial discrimination,

diverges from its initial prioritization of freedom of expression over speech bans, but aligns with its contextual approach and role. Back in the time, after WWII and the authoritarian regimes that Europe endured, the priority went to freedom of expression and protection from States' potentially repressive regimes. However, nowadays, where democracies spread and developed, people have fortunately more freedom to express themselves and their opinions, which unfortunately carried with them racist and discriminative speech. This is the reason why today the ECtHR made this evolution and strengthened its prohibition of such speech.

On its side, the CERD appears as a more stable institution, as it does not carry the role to adapt to contextual approaches of State parties. Its role appears to solely be limited to the elimination of racial discrimination. To that end, its elements of control over State parties appear as stricter than the ones of the ECtHR. First of all, the characterization of hate speech under the ICERD includes extensive forms of speech as qualifying for such a qualification. Moreover, the very definition of hate speech includes broad types of speech – those that promote the superiority of a race over another or that call for discrimination over a group. Then, the CERD expressively asks States to actively condemn and prosecute hate speech, controls whether State parties implemented its recommendations and remarks and intervenes if States failed to take actions against hate speech. This results in States having a limited margin of appreciation in their treatment of hate speech since the CERD puts on them the obligation to condemn and prosecute racial discrimination in general and hate speech in particular, whether their national legislations prescribe otherwise and regardless of the historical, cultural, societal contexts. On the contrary, the Committee strongly recommends State parties to modify their national legislations to include bans on hate speech and racial discrimination when this is not done, regardless of their justifications against doing so. This therefore entirely differs from the ECtHR's approach which first and foremost bases itself on the national legislations of Member States. The CERD goes even further by requiring States to proactively prevent hate speech and racial discrimination in general from occurring on their soil, and not merely condemn it once it has occurred, which also witnesses the strictness of its role. Finally, the CERD and the ECtHR share a common approach in their protection of vulnerable groups, since the CERD also gives a particular attention to those minority groups and therefore requires State parties to adopt domestic laws in key sectors where these groups are most likely to face discrimination and racist hate speech.

Finally, when it comes to antisemitism, it can be concluded that the ECtHR and the CERD take similar approaches in events where the ECtHR appears as strict towards the unprotection of speech,

even though generally more liberal than the CERD. In the case of antisemitism, the ECtHR and CERD are equal in that they both are strict in condemning Nazism and antisemitism in general. However, it can still be pointed out that the ECtHR, even though more strictly condemning such hate speech by using article 17 ECHR and therefore bypassing the proportionality test of article 10, does so on a contextual basis. However, unlike the CERD, the ECtHR's outcome is not that easily predictable and the Court sometimes gives contradictory judgements, as shown in *Ayoub v. France*, for instance. The two institutions therefore meet when it comes to strict condemnations of certain categories of hate speech, such as antisemitic speech. However, the final divergence between the two lies in the fact that the CERD is not stricter regarding Nazism, unlike the ECtHR but on the opposite is equally and intensively strict against it as it is against any other racial discrimination and racist hate speech. In the context of antisemitism, the latter can consequentially be regarded as more regular and the former as stricter but with remaining contextual views.

The aim to eliminate racial discrimination on the CERD's side and the growing focus of the ECtHR towards the fight against racist hate speech as a pressing need to protect democratic values are expected to evolve. Homophobic hatred has indeed been present in Europe and worldwide and has also seen a spike under certain European regimes, such as Hungary or Poland, and under the development of online platforms and social media. However, homophobic hate speech does not enter into the category of racial discrimination nor racist hate speech, for the reason that it is not linked to an ethnicity, race nor belief. On its side, the ECtHR has nonetheless rendered a landmark case in this area and ruled in *Vejdeland and Others v. Sweden* that homophobic speech does not fall under the protection of the ECHR. The CERD, on the other hand, has not formally included homophobic speech as falling under the prohibition of racial discrimination under the ICERD. However, since the categories of hate speech already banned by the Convention already include religious beliefs, which does not strictly concerns racial identity, it would therefore be interesting to follow whether such a pressing need to protect homosexuals and transgender groups will ever fall under the protection of the ICERD, or if a separate Convention will ever emerge on this emerging and under protected matter.

Rassiline diskrimineerimine ja vihakõne: ÜRO rassilise diskrimineerimise likvideerimise komitee ja Euroopa Inimõiguste Kohtu lähenemiste võrdlus

Rassilise diskrimineerimise küsimus on aktuaalne ja eksisteerib igal pool maailmas. Lisaks kujutab see endast mitmel viisil inimõiguste rikkumist. Rassistlik vihakõne on üks rassilise diskrimineerimise väljendusviise, mis rikub muuhulgas ohvrite veendumus-, usu- ja väljendusvabadust. Seetõttu oli käesoleva magistr töö eesmärk kindlaks teha, kuidas rassistlikku vihakõnet defineeritakse ja kuidas sellega tegeldakse nii rahvusvahelisel kui ka Euroopa tasandil, kasutades ÜRO rassilise diskrimineerimise likvideerimise komitee (CERD) ja Euroopa Inimõiguste Kohtu (EIK) raamistikke. Lisaks oli eesmärk uurida nende kahe institutsiooni lähenemisviise ja praktikaid rassistliku vihakõne suhtes antisemitismi vaatenurga kaudu, et pakkuda võrdlust konkreetset liiki vihakõne alusel. Kuna rassistliku vihakõne ja rassilise diskrimineerimise teemat ei ole uuritud ei CERD-i ega EIK-i lähenemisviiside valguses, tõi käesolev töö sellesse valdkonda uudsust, analüüsides mõlema institutsiooni praktikaid läbi antisemitismi unikaalse vaatenurga, mida polnud varem tehtud. Antisemitismi spetsiifiline kontekst valiti põhjusel, et seda tüüpi rassiline diskrimineerimine on viimastel aastatel märkimisväärselt sagenenud, tuues endaga kaasa vihakõne juhtumeid.

Tööst järeldus, et Euroopa Inimõiguste Kohus (EIK) käsitleb rassistliku vihakõne keelustamist kui erandit väljendusvabaduse suhtes, viies enamasti läbi proportsionaalsuse testi ja kontekstuaalse hindamise, et hinnata kõne piiramise vajalikkust. Selle tagajärjel on vihakõne konkreetset piiritletud kõnekategooria ning vihakõneks kvalifitseerumiseks peavad olema täidetud kindlad kriteeriumid. Näiteks kõne, mis ainuüksi solvab, šokeerib või häirib, ei ole piisav, et vihakõneks kvalifitseeruda. CERD annab vihakõnele laia määratluse ja jätab teadlikult täpsustamata, millised kõneliigid kvalifitseeruvad, et hõlmata võimalikult palju kõnevorme. Praktikaks on EIK-il võrdlemisi kõrge lävi selleks, et jätta kõne väljendusvabaduse kaitseta ning seeläbi ka selleks, et kõneakti vihakõnena määratleda. Lisaks jätab see liikmesriikidele laia hindamisruumi selle küsimusega tegelemiseks, tuginedes oma otsustes üldiselt riigi vastavusele oma siseriikliku seadusandlusega. CERD rakendab vastupidist lähenemisviisi, kuna nõuab riikidelt konkreetset enda ees aru andmist ja kõigi võimalike meetmete võtmist rassistliku vihakõne kriminaliseerimiseks. Selle lävi on üsna madal, kuna kõik rassilisele ülemvõimule tuginevad propagandavormid on piisavad vihakõnena liigitamiseks. CERD ei käsitle rassistliku vihakõne kriminaliseerimist erandina väljendusvabadusest, vaid vastupidi – reeglina, mis töötab käsikäes väljendusvabadusega, kuna selle eesmärk on kaitsta rassistliku vihakõne ohvri väljendusvabadust.

Antisemitismi puhul on aga EIK-i ja CERD-i lähenemisviiside vahel näha rohkem sarnasusi, kuna EIK võtab nendel juhtudel ette hoopis teistsuguseid meetmeid. Kohus ei vii läbi proportsionaalsuse testi ja kehtestab seetõttu peaaegu automaatse ja üldise keelu holokausti eitamisele ja laiemas mõistes antisemitismile. Kuna aga EIK rakendab sellist piiravat lähenemisviisi ainult antisemitismi, mitte aga muude rassilise diskrimineerimise juhtumite, näiteks islamofobia puhul, on seda lähenemisviisi kirjeldatud ebajärjekindla ja ettearvamatuna. Samal tasandil ei kehtesta EIK muude genotsiidi eitamise juhtumite puhul samasugust keeldu nagu holokausti eitamise korral, mis on samuti panustanud kohtu ebajärjekindluse mainesse. CERD seevastu kehtestab sama range lähenemisviisi kõigile diskrimineerimise vormidele ja kõigile genotsiidi eitamise juhtumitele ning esitab riikidele samad nõuded, näidates seeläbi järjepidevust, millest EIK-il puudu jääb. Ehkki kontekstuaalne lähenemine on oluline, kuna juhtumeid tuleks käsitleda individuaalselt, on sellegipoolest oluline, et selliste inimõiguste rikkumiste puhul näidataks üles järjepidevat lähenemist kõigile vihakõne ja rassilise diskrimineerimise vormidele, jätmata muljet, justkui oleks üks vorm teisest tähtsam.

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