EUROPEAN STRATEGIES TO COMBAT RACISM AND XENOPHOBIA AS A CRIME
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ENAR

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A. The current standards of protection through criminal legislation in the EU Member States: A general overview
   I. Scope of Criminal law legislation against Racism and Xenophobia
   II. The International Legal Framework: The UN Convention on the Elimination of All Forms of Racial Discrimination (CERD)
   III. Country-to-Country overview
   IV. Conclusions: Shortcomings and not so bad practices

B. The Council of Europe: Combating Racism and Xenophobia
   I. The European Convention on Human Rights and Fundamental Freedoms
   II. European Commission against Racism and Intolerance

C. A Framework for EU action to Combat Racism and Xenophobia as a crime
   I. National Standards
   II. The Council of Europe
   III. Tools to address our needs
   IV. The United Nations
   V. EU Standards

D. European Union Strategies to Combat Racism and Xenophobia as a Crime
   I. Article 29 and the EU Treaty
   II. Framework Decisions and the EU Treaty
   III. The Commission Proposal for a Framework Decision on Combating Racism and Xenophobia
   IV. The Council and the Framework Decision
   V. The Framework Decision and EU policy on combating racism

E. General Conclusions: the way forward
Preface

Racism is not an opinion but a crime

As the prelude to the UN World Conference Against Racism, a preparatory European Conference was held in Strasbour in October 2000. At this important event interior ministers from different European countries took to the podium one by one and talked about eradicating racism, discrimination and related intolerance from their respective societies. The Danish Minister Karen Jesspersen was unfortunately an exception. She flatly refused to acknowledge that there was racism in Denmark. She called it “Cultural conflicts”.

We, the representatives of NGO communities working against racism, were a bit sceptical of those lofty promises but thrilled too that so many powerful politicians across the continent were committed to the cause of creating such just societies in Europe where a person's colour, ethnicity, religion or culture would not be held against him/her.

Our optimism was partly based on the sincerity of the speakers as well as the introduction of Article 13 in the Amsterdam Treaty, EU discussions regarding anti-discrimination directives and, above all, an upbeat mood among the grassroots.

In the end of August 2001, the World Conference Against Racism, Xenophobia and Related Intolerance, held in Durban, South Africa, also sent a clear message to the world. Racism should not be treated as an opinion but in its violent forms as a crime and dealt with as such. This was a good news and the EU followed suit.

Following a Spanish initiative, on 21 December 2001 the European Council received a proposal from the Commission for a Council Framework Decision on Combating Racism and Xenophobia, which will acknowledge a clear message that incitement to racism is a criminal act throughout the European Union. This common approach should have been finalised in December 2002 under the Danish EU Presidency. But neither the Greek nor the Italian Presidencies were willing to move on with it.

This is why ENAR has taken this initiative to look at the whole question of Racism and Xenophobia as a criminal offence in the EU, what common judicial remedies are available and what sort of strategies are being developed at the EU level. The most significant contribution ENAR can make in the future is to suggest some clear, useable and costeffective strategies from an NGO perspective. The purpose of this publication is precisely to help ENAR in discussing such strategies.

NGOs can not afford to criticise only. We are professional enough to analyse the situation in a rational manner and come up with constructive and targetoriented solutions. The goal will be to influence EU policies in those directions.

We hope that tools provided by ENAR, will help NGOs and EU institutions to coordinate their efforts to tackle the evil of racism – not only by words but also through actions. Victims of racial hatred need not only legal protection but also assurances that justice will be done. I often hear that laws can not make people love each other or treat one another with respect and dignity.

Asked the same question, Dr. Martin Luther King Jr. Replied “Law can not make a bigot love me, but it can surely stop him lynching me”.

Bashy Quraishy
Chair – ENAR
pending the adoption of any necessary provisions, to European societies are multicultural and multi-
derogate from the principle of double criminality for such ethnic, and their diversity is a positive and enriching factor. Unfortunately, racist and xenophobic forms of conduct persist around the world. Events in different parts of Europe show the continuing existence of racist and xenophobic attitudes. This chapter tries to explore what the standards are, and why and to what extent the perpetrators of racist offences may benefit from different standards of criminal liability and criminal prosecution in the Member States of the European Union. Additionally, it will use some representative examples of Member State legislation to evaluate the international fora, such as the Council of Europe, some existing level of protection against racism and xenophobia difficulties have still been experienced regarding judicial cooperation and therefore there is a need for further improvement of Member States’ criminal laws in order to ensure the implementation of a comprehensive and clear legislation to combat racism and xenophobia effectively.”

1. Scope of Criminal law legislation

Criminal law legislation may cover a wide range of racism and discrimination causes severe problems throughout Europe. Since the 1990s, the EU Member States have been progressively aware of a growing need to address criminal law legislation. Although dealing with racism or xenophobia has to cope with a number of difficulties: Should the motives of offenders be punished as such (“racism” as a crime), or should they be taken as an aggravating circumstance? Should specific actions not covered by general criminal law provisions such as hate speech or the dissemination of anti-Semitic and revisionist printing materials be punishable? Is there a need to criminalize discriminations such as the denial of access to bars or discotheques on the grounds of ethnic belonging? The answers to these questions depend to a high degree upon the underlying philosophy of respective legislation.

A. The current standards of protection through criminal legislation in the EU Member States: A general overview

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B. The standards of criminal prosecution of racist and xenophobic acts. Thus, equal treatment and non-discrimination in its memorandum for the proposal for a Council Framework Decision on combating racism and xenophobi

Key concepts of legislation against racism and xenophobia measures are an important tool in this field. Indeed, apart from their punitive aspect, criminal law measures have a General criminal law provisions such as statutory punishments of killings or violent attacks cover all kinds of actions regardless of the motives of the offenders. Thus, legislation Similarly, at the EU level, the Council adopted on 15 July 1996 a so-called “Joint Action” concerning action to combat racism and xenophobia. The Joint Action stressed the need to prevent the perpetrators of such offences from benefiting from the fact that they are treated differently in the Member States by moving from one country to another to avoid prosecution. Member States were asked to ensure that a number of racist and xenophobic behaviours listed in the Joint Action be punishable as criminal offences or, failing that, and upon the underlying philosophy of respective legislation.
A. The current standards of protection through criminal legislation in the EU Member States: A general overview

Rainer Nickel

“European societies are multicultural and multi-ethnic, and their diversity is a positive and enriching factor. Unfortunately, racist and xenophobic forms of conduct persist around the world. Events in different parts of Europe show the continuing existence of racist and xenophobic attitudes.”

“According to the evaluation of the 1996 Joint Action [of the European Council] and work carried out in other international fora, such as the Council of Europe, some difficulties have still been experienced regarding judicial cooperation and therefore there is a need for further improvement of Member States’ criminal laws in order to ensure the implementation of a comprehensive and clear legislation to combat racism and xenophobia effectively.”

Commission of the European Communities, Proposal for a Council Framework Decision on combating racism and xenophobia

Introduction

The European Union Member States and the EU institutions have acknowledged in various documents, statements, and treaties that racism, xenophobia, and racial discrimination cause severe problems throughout Europe. Since the 1990s, the EU Member States have been progressively aware of a growing need to address racism and xenophobia systematically. Among possible means which have been identified to be effective to combat racism and xenophobia are criminal law and criminal prosecution of racist and xenophobic acts. Thus, in its memorandum for the proposal for a Council Framework Decision on combating racism and xenophobia the Commission stresses that adequate criminal law measures are an important tool in this field. Indeed, apart from their punitive aspect, criminal law measures have a significant dissuasive force.

Similarly, at the EU level, the Council adopted on 15 July 1996 a so-called “Joint Action” concerning action to combat racism and xenophobia on the basis of article K.3 (now article 34) of the Treaty on the European Union. Its main objective was to ensure effective legal cooperation between Member States in combating racism and xenophobia. The Joint Action stressed the need to prevent the perpetrators of such offences from benefiting from the fact that they are treated differently in the Member States by moving from one country to another to avoid prosecution. Member States were asked to ensure that a number of racist and xenophobic behaviours listed in the Joint Action be punishable as criminal offences or, failing that, and pending the adoption of any necessary provisions, to derogate from the principle of double criminality for such behaviours, thus facilitating the extradition of perpetrators.

This chapter tries to explore what the standards are, and why and to what extent the perpetrators of racist offences may benefit from different standards of criminal liability and criminal prosecution in the Member States of the European Union. Additionally, it will use some representative examples of Member State legislation to evaluate the existing level of protection against racism and xenophobia through criminal law in the EU Member States.

For this purpose, Part I outlines the general scope of such legislation and the known shortcomings in terms of implementation and effectiveness. Part II examines the 1966 Convention for the Elimination of all forms of Racial Discrimination (CERD), which was used by a significant number of Member States as a blueprint for legislation. In Part III, a selected number of Member States and their legislation are scrutinized, and a conclusive Part IV tries to evaluate the findings and to define “good practises” in this area.

I. Scope of Criminal law legislation against Racism and Xenophobia

Criminal law legislation may cover a wide range of actions, from violent acts based on racial motivations over statements and publications of individuals or groups inciting racial hatred to violations of the human right to equal treatment and non-discrimination.

Key concepts of legislation against racism and xenophobia

General criminal law provisions such as statutory punishments of killings or violent attacks cover all kinds of actions regardless of the motives of the offenders. Thus, legislation dealing with racism or xenophobia has to cope with a number of difficulties: Should the motives of offenders be punished as such (“racism” as a crime), or should they be taken as an aggravating circumstance? Should specific actions not covered by general criminal law provisions such as hate speech or the dissemination of anti-Semitic and revisionist printing materials be punishable? Is there a need to criminalize discriminations such as the denial of access to bars or discotheques on the grounds of ethnic belonging?

The answers to these questions depend to a high degree upon the underlying philosophy of respective legislation.
Theoretically there are at least three basic concepts of legislation dealing with racism and xenophobia possible:

1. A **maximum** concept tries to cover all possible forms of expression of racism and xenophobia and may even cover “racism” as such as a punishable attitude wherever this attitude is expressed, and in whatever way. The European Commission against Racism and Intolerance, an expert panel of the Council of Europe, seems to tend into this direction. In its Policy Recommendation No. 7 ECRI defines the term “racism” and suggests that public expressions of racist attitudes – in a broad sense – should be penalized. A maximum concept would also define direct and indirect discrimination as criminal offences.

2. A **minimum** concept avoids detailed provisions, for the sake of the freedom of expression and other fundamental rights such as the freedom of association (Articles 10 and 11 of the European Convention on Human Rights). The criminalization of racist attitudes is viewed as a criminalization of motifs, thus violating the fundamental principle of criminal law, which demands the punishment of harmful social actions only, and not of unwanted motifs. As a background assumption, this concept holds that beyond acts covered by common legislation, the marketplace of opinions is the right place to defeat racism and xenophobia.

3. A **medium** concept acknowledges the need for detailed legislation, but only with regard to certain forms of actions. It tries not to overburden criminal law with expectations that this field of law cannot fulfill. The concept views criminal law as an inadequate instrument for comprehensive social engineering. On the contrary, criminal law would be a flexible means to react on dangerous trends within society, and also a means to prevent violent crimes and protect the freedoms and the dignity of persons affected by racism and xenophobia.

The concepts of protection against racism and xenophobia through criminal legislation in the EU Member States vary to a very high degree. This finding certainly reflects significant differences in the legal traditions and the legal thinking behind the Member States’ respective legal systems, and different political approaches towards the phenomenon of racism and xenophobia.

Of course, none of the Member States follows one of the above described maximum or minimum concepts in a clear fashion, but there are certainly trends towards one or the other side of the underlying philosophies: Some of the Member States (e.g. Denmark) concentrate on few or only one special criminal law provision against certain racist or xenophobic behaviour, thus providing only for a minimum standard of criminal law protection, whereas others (e.g. France) have detailed and comprehensive provisions which cover a whole range of actions.

Several States have also extended criminal law to the field of discrimination, so that discrimination (e.g. in cases of denial of access to bars and restaurants) is defined as criminal offences. The latter practice of introducing legislation against discrimination is undoubtedly in many cases (e.g. France, Belgium, the Netherlands) an effect of the 1966 UN Convention for the Elimination of all Forms of Racial Discrimination (CERD), which demands in article 2 that the contracting states ban every form of racial discrimination committed by persons or institutions by all means necessary. It also specifies in article 5(f) that the states have to guarantee the right of access “to any place or service intended for use by the general public, such as transportation, hotels, restaurants, cafes, theatres and parks.” Instead of using civil rights legislation (like the United States in its 1964 Civil Rights Act or Great Britain in its Race Relations Act) or private law regulations, some EU Member States such as France and Denmark decided to use criminal law in order to fulfill their duties under the CERD.

**Legislative approaches in the Member States**

Member States’ criminal law covers a whole range of actions and activities that express racism or xenophobia, or discriminate on the grounds of racial or ethnic origin. Four major fields can be distinguished:

- Racist or xenophobic insults and defamation,
- public incitement to violence, hatred or discrimination,
- discriminatory actions,
- and public denial, trivialisation, justification or condoning of crimes of genocide (especially concerning the Holocaust), or of crimes against humanity or war crimes.

The range of actions covered by the legislation does not automatically reveal how effective these regulations are with regard to the fight against racism and xenophobia. For example, in most Member States public incitement to violence, hatred or discrimination is forbidden, and also public insults and defamation or threats usually are banned by criminal law. The real differences lie in the details of the provisions and their applications. Whereas all Member States have, to a certain extent, criminal legislation against insults, only few expressly include certain forms of racist insults into the wording of their norms. As a result, the courts have to define whether certain insults or insulting actions are to be seen as criminal offences, or whether they did not reach that level. In Germany, for example, paragraph 185 of the Criminal Code only states: “The insult is punished with prison up to one year, or with a fine”. The Code does not contain any definition about what an “insult” is. Only a look into commentaries reveals what the courts and legal scholars...
view as “insulting”, and only by case law the shape of what is “insulting” in the light of paragraph 185 has become somewhat clearer.

Many Member States provide for detailed provisions dealing with the dissemination of racist or antisemitic and xenophobic propaganda. Whereas these Member States introduced respective legislation covering actions of individuals, only some of them focus also on groups and associations who direct the production and publication of these propaganda tools. Thus, German\textsuperscript{10} and Austrian\textsuperscript{11} laws allow, under certain conditions, to ban racist, xenophobic, or anti-semitic associations, and Irish\textsuperscript{12} and Greek\textsuperscript{13} laws prohibit the establishment of, and the membership in organisations which organize propaganda and activities aimed at racial discrimination.

“Common offences” with a racist or xenophobic background

The Council of Europe and its subdivision dealing with racism and xenophobia, the European Commission against Racism and Intolerance (ECRI) repeatedly stress an additional aspect of criminal law approaches: the relation between “common offences” and a racist motivation to commit them. Thus, in its reports, ECRI demands the modification of punishments in cases where a racist or xenophobic background motivated the committing of “common” offences such as killings, arsons, or violent attacks against individuals.

For example, in its second country-by-country report on Belgium from the year 2000, ECRI points out that prosecution of crimes which may be racially-motivated is carried out on the basis of the ordinary offence, and the racist intention is consequently lost. ECRI consequently states that it “is concerned at this situation and urges the authorities to consider the introduction of racist motivation as a specific aggravating factor. This should be coupled with additional efforts on the side of the prosecuting authorities to place before the courts any evidence tending to show that a specific offence has been committed on racial grounds”.\textsuperscript{14}

Similarly, ECRI’s second report on France from the year 2000 criticises the absence of specific legislation: “In its general policy recommendation N°1 on combating racism, xenophobia, antisemitism and intolerance ECRI recommends that member States ensure that racist and xenophobic acts are stringently punished through methods such as defining common offences but with a racist or xenophobic nature as specific offences or enabling the racist or xenophobic motives of the offender to specifically taken into account. However, in France racist offences are not defined as specific offences nor is a racist motivation expressly mentioned as a specific aggravating circumstance”.\textsuperscript{15}

Only three Member States – namely Austria, Italy, and most recently the United Kingdom – provide for expressive legislation of such kind. Section 33 (para. 5) of the Austrian Criminal Code cites racist or xenophobic motivation as a particular aggravating circumstance of any crime\textsuperscript{16}. Section 3 of the Italian Law N. 205/1993 introduces a general aggravating circumstance for all offences committed with a view to discriminate on racial, ethnic, national or religious grounds or in order to help organizations with such purposes.\textsuperscript{17} Finally, the UK Crime and Disorder Act 1998 gives statutory force to the case-law requiring judges to consider evidence of racist motivation for any offence as an aggravating factor in sentencing.\textsuperscript{18}

Some other Member States provide for at least partial consideration of racist or xenophobic motifs:

- In Portugal, homicide perpetrated for motives of racial or religious hatred is punishable as aggravated homicide under Article 132.d of the Criminal code, resulting in a heavier penalty. Such aggravating circumstances may also apply in cases of assault causing bodily harm, under Article 146 of the Criminal Code.\textsuperscript{19}

- In the Netherlands, internal policing regulations apply. Concerning prosecution of crimes under general law but with a racist motivation, the guidelines for discrimination cases for the police and public prosecution service stipulate that, in such cases, the public prosecution must emphasize the racist motivation in the closing remarks and take it into account when deciding what sentence to demand.\textsuperscript{20}

- In Germany, the Federal Crime Court regards racist motivation as an aggravating factor in case of killing.\textsuperscript{21}

Negative effects of fractured legislation in the EU Member States: Some Aspects

 Whereas, as already mentioned above, one of the major reasons for the diversity of standards of criminal law protection is the heterogeneous understanding of law and its function within society, another major reason is certainly that lawmakers usually react to certain social and/or political problems when reshaping or reforming criminal law. Thus, different standards have emerged for historical reasons, reasons which explain why, for example, Member State legislation may collide when an extradition is at stake.

In many EU Member States specific criminal legislation has been the consequence of specific incidents forcing the legislators to act. For example, the first German provisions against the publication and spreading of anti-semitic or racist prints (books, newspapers, and so on) date back to the year 1960. They were created as a reaction to a number of incidents in the late 1950’s with an anti-semitic
background. Other countries, such as Denmark, may not have had similar incidents, or may have a different approach to the suppression of right-wing or neo-Nazi groups and ideologies due to their understanding of the freedom of expression and freedom of association. As a result, the spreading of neo-Nazi propaganda or revisionist literature is banned in Germany, but legal in Denmark. This fact has lead to the effect that many German neo-Nazis organize their propaganda from Denmark in order to avoid German prosecution sometimes successful, as the following case shows:

In 1988, the Regional Tribunal for the West of Denmark refused to extradite a German citizen living in Denmark to Germany. The person had published articles in a German publication, in which he doubted that the Holocaust occurred, and in which he implied that the Jews exaggerated the number of victims in order to be able to "press more money out of the Federal Republic of Germany". The Danish minister of justice gave his accord to the extradition, stating that the condition of double liability to punishment was fulfilled because the articles fell into the scope of article 266b of the Danish Criminal Code. The Regional Tribunal reversed this decision and found that the case was not severe enough to fall under article 266b. As a result, the Danish authorities refused to extradite the accused, and Denmark subsequently became a major safe haven for German revisionists and neo-Nazis.

Additionally, racist and xenophobic organisations are not prohibited in Denmark. Thus, German organisations fleeing from criminal prosecution in Germany are able to re-organize in Denmark, and even to co-operate with respective Danish organizations. This effect certainly hinders an effective implementation of German or other Member States’ criminal law in the fields of organised neo-Nazism and revisionism.

Common problems with the regulations and their application

Although legislation in the EU Member States providing for legal measures against racism and xenophobia has been largely extended during the last three decades, the Council of Europe subdivision ECRI, in its country-by-country reports, regularly identifies a number of aspects which still hinder an effective enforcement of the laws. Among these aspects many do concern practical hurdles rather than the density of legislation:

- In several cases, a narrow interpretation of provisions by courts and public prosecutors lead to the effect that these provisions do not give much rise for case law, or that only narrowly defined “severe cases” are processed to and tried before the courts.
- Additionally, procedural hurdles severely hinder the practical implementation of the laws. Some Member State legislation demands that a criminal complaint has to follow strict procedural rules. For example, victims of incitement to racial hatred, slander and libel sometimes have to employ the right legal definition of the acts they report, otherwise - in case the indictment is wrong - the court cannot find as to the existence of a different offence, as it may in ordinary criminal cases.

- Special conditions for proceedings may also hinder effective implementation of otherwise more or less comprehensive legislation. In one Member State, for example, press-related complaints (including complaints about any written and reproduced document containing criminally relevant parts) fall into the sole competence of jury courts. Given the cumbersome nature of the relevant procedure and the adverse effects of the publicity surrounding such procedures, such offences are rarely prosecuted.

- The special need to petition for criminal proceedings generally represents another important hurdle for the effective implementation of respective laws. A number of ECRI country reports state an insufficient attention and experience on the part of the police and the public prosecution service in handling cases involving racial discrimination. As a result, there is a certain understandable reluctance on the part of the victims to report incidents to the police.

- Another aspect considers a certain imbalance between the offences committed and the punishments the legislation provides. On the one hand, too high penalties might create a psychological hurdle and a serious obstacle to an effective enforcement of the legislation. Yet, on the other hand, too limited sanctions might devalue the effects intended when introducing criminal legislation. Thus, in its report on Finland, ECRI states that in the field of legislation covering discrimination "the fines imposed are somewhat low so that some alleged discriminators may rather choose to pay a fine and continue to discriminate.

- Finally, a general lack of information on the side of the authorities, particularly police and public prosecutors, leads to a generally low level of prosecution and indictment. All ECRI reports on the Member States of the EU expressly mention this aspect.

Additionally, it has to be stressed that this observation is not limited only to criminal legislation against discrimination, but it is valid also for many legislative acts covering, for example, incitement to hatred, racism, or xenophobia. As a result, even the most comprehensive legislation has only limited effects if the authorities do not enforce the laws.

However, ECRI also reports that there are some positive examples of EU Member States who actively address the above mentioned shortcomings of the implementation of their legislation. Especially the Netherlands, Sweden, and
Germany have increased their efforts to enhance the effectiveness of their respective criminal provisions in a systematic and/or institutional manner.\textsuperscript{31}

**II. The International Legal Framework: The UN Convention on the Elimination of All Forms of Racial Discrimination (CERD)**

The existing international legal framework, the UN Convention on the Elimination of all forms of Racial Discrimination (CERD), is of primary importance within the context of legislation against racism and xenophobia, and it has had particularly great impacts on the legislation of the Member States. The CERD, in force since 1969, has been signed by all EU Member States, thus delivering a binding frame for legislation. It includes general standards and objectives to be met in order to meet the aims of the Convention. Article 2 CERD provides that “States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races”. Additionally, the CERD includes detailed provisions demanding, among other, that the contracting states use the means of criminal law to fight racism. Article 2 paragraph (d) states as follows: “Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization”.

Article 4 (a) of the Convention clarifies this duty by stating that States Parties “shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as actions 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”. Paragraph (b) of the same article demands that States Parties “shall declare illegal and prohibit organisations, and also organised and all other propaganda activities, which promote and incite racial discrimination, and shall recognise participation in such organisations or activities as an offence punishable by law”.

The Convention has been ratified by all EU Member States, but some Member States have entered reservations on Article 4, which refer to the conciliation of obligations imposed by this Article with the right to freedom of expression and association.\textsuperscript{32} However, all but one Member State namely Finland, whose legislation seems not to meet the obligations set forth in this article\textsuperscript{33}, have adopted legislation covering the full scope of Article 4 (a). By contrast, only some EU Member States provide for specific legislation fully covering their duties as laid out in Article 4 (b) CERD, which deals with organizations promoting racial hatred.\textsuperscript{34}

Finally, Article 5 contains specifications concerning discrimination It demands that “States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: […]

(e) Economic, social and cultural rights, in particular: (i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration; (ii) The right to form and join trade unions; (iii) The right to housing […]”

A majority of Member States has chosen to use criminal law as a means to achieve the goals set forth in Article 5 (e) and (f), whereas some Member States such as the United Kingdom use civil law in order to fight discriminations, and others such as Germany did not introduce any specific legislation covering the full scope of Article 5 (e) and (f) CERD yet.\textsuperscript{35}

**III. Country-to-Country overview**

In the following paragraphs, some but not all Member States’ legislative concepts are described in a more detailed manner.\textsuperscript{36} The decision to choose Belgium, Denmark, France, Germany, the Netherlands, and the United Kingdom can be justified as follows: France, Germany and the United Kingdom are the countries with the highest numbers of immigrants or descendants of immigrants; Belgium represents the group of countries which have formally adopted the CERD duties regarding criminal law and other recommendations, but lack, to a certain extent, a comprehensive legal and procedural concept for a successful application of these provisions; Denmark represents a group of countries whose constitutional provisions seem to hinder the ban of certain racist or xenophobic behaviour; and the Netherlands can be seen as a rather positive example of comprehensive legislation and accompanying measures safeguarding the effectiveness of criminal law against racism and xenophobia.

**Belgium**

In 1981, Belgium introduced specific legislation, which aims at repressing acts of racism or xenophobia. The Act of 30 July 1981, modified in 1993 and 1994, contains provisions against certain acts or the incitements of such...
acts inspired by racism or xenophobia. The amendment of 1994 inserted a definition of discrimination and a provision concerning racial discrimination in employment into the Act. Although, by introducing this special legislation, Belgium formally fulfilled some of its main duties as laid out in the CERD, the European Commission against Racism and Intolerance criticised in its first report from 1997 mainly the weak effectiveness of the Belgian legislation.\textsuperscript{37} ECRI highlighted some difficulties in the application of this law, especially in the field of press-related offences, which could contribute to explaining the very reduced use currently made of the provisions contained therein. In its second report from 2000,\textsuperscript{38} ECRI also noted that apart from the problems relating to the question of prosecution of racist offences committed through the press, the difficulties encountered in proving the intention to incite to racial hatred still appear to play a primordial role in this context.

With respect to press related offences, ECRI stated that since these offences according to Belgian law (article 150 of the Belgian Constitution) fall into the sole competence of jury courts (Cours d’Assises), such offences are rarely prosecuted given the cumbersome nature of the relevant procedure and the adverse effects of the publicity surrounding such procedures.\textsuperscript{39} In addition, the jurisprudence of the Belgian courts contains a wide definition of the term “press related offences” covering all written, reproduced and diffused documents. This wide definition and the procedural obstacles, ECRI concludes, lead to a “virtual impunity enjoyed by authors of racist tracts”.\textsuperscript{40}

In its second report, ECRI also noted that, in the majority of cases, the phenomenon of racism manifested itself through an ordinary offence such as homicide, arson or assault. In these cases, the Act of 30 July 1981 is not applied, as this Act deals mainly with incitement to racial discrimination, hatred or violence, and therefore requires, for its application, the proof of the intention of the perpetrator of the offence to incite the public to hatred or violence; a proof that is extremely difficult to produce. Prosecution of crimes which may be racially motivated is therefore carried out on the basis of the ordinary offence, and the racist intention is consequently lost.\textsuperscript{41}

With regard to the “current virtual impunity enjoyed by authors of racist tracts”, ECRI suggested the introduction of a more flexible procedure before the jury courts, or that certain clearly-defined press-related offences be brought before the criminal courts.\textsuperscript{42} More generally, ECRI considered that “further initiatives are needed in Belgium to raise the awareness of public prosecutors of the issues pertaining to the implementation of anti-racist legislation, in order to enhance the priority devoted to the fight against racism within the framework of Belgian criminal policy”.

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**Denmark**

Criminal law provisions against incitement to racial hatred in Denmark are rather narrowly interpreted. ECRI reports that although the Criminal Code contains a provision (Article 266b) prohibiting certain forms of racially derogatory speech, this provision has not given rise to much case law since it is rather narrowly interpreted based on respect for the freedom of expression as enshrined in the Constitution, and the Director of Public Prosecution is rather reluctant to bring charges in such cases. However, given that the obligation to respect the freedom of expression exists alongside an obligation to protect minority groups against discrimination, which might be fuelled by racist or derogatory statements uttered publicly, particularly on the part of politicians, the 1999 country report of ECRI suggests that Denmark might consider initiating a more offensive policy in this area, for example by encouraging prosecutors to routinely accept complaints made not only by individuals but also by organisations.\textsuperscript{43}

Denmark has also passed criminal legislation in the field of combating racial discrimination. Sections 1 and 2 of The Act Prohibiting Discrimination on the Basis of Race make it an offence to discriminate on the basis of race, colour, national or ethnic origin, religion or sexual inclination when offering a commercial or nonprofit service or in granting access to a public place. In its report, ECRI stated, however, that provisions are applied very rarely, despite the fact that discrimination has been reported to constitute a real problem in access to housing and public places such as discotheques and bars.\textsuperscript{44} In a period of approximately two years monitored recently by the Danish authorities, charges were brought under the Act in five cases (resulting in three cases of conviction and two cases of acquittal), two cases were settled with out-of-court fines and a further nineteen cases were concluded without anybody being indicted. The main difficulties in application, as in most other countries, are related to the proof of the intention to commit a discriminatory act. The police and prosecuting authorities have also been criticised for being reluctant to enforce the Act, even hesitating to investigate complaints.

In conclusion, ECRI’s second country report urges the Danish authorities to closely monitor the implementation of this Act and to consider possible ways to improve its effectiveness. The report recommends specific instructions and training given to police and prosecuting authorities with respect to the investigation of complaints under the Act.\textsuperscript{45}

**France**

French criminal legislation contains several provisions which aim at combating racism and intolerance. They cover incitement to racial hatred, slander and libel as well
as discriminatory practices. The second country report of ECRI\textsuperscript{46} notes an increase in the number of condemnations. Moreover, harsher sentences for these crimes have been registered in 1998, especially concerning discriminatory practices. This could be explained in terms of better general implementation of the relevant provisions and a shift in government policy towards racism and xenophobia. However, it is generally acknowledged that the number of cases of this type brought before the courts does not reflect the real extent of the phenomena of discrimination and racist expression in society and that implementation of such provisions is still insufficient. Furthermore, ECRI concluded that the relevant legislation in this field could still be "fine-tuned".

As concerns incitement to racial hatred, slander and libel, ECRI noted in its first report\textsuperscript{47} that the legislative framework for the repression of racist and xenophobic messages is given by the law on the press, which establishes strict procedural rules for the prosecution of the crimes contained therein. ECRI expressed concern over the very brief prescriptive period to initiate legal proceedings and the binding nature of the indictment used (i.e. victims have to employ the right legal definition of the acts they report, otherwise - in case the indictment is wrong - the court cannot find as to the existence of a different offence, as it may in ordinary criminal cases). This is problematic, since the lines between defamation, abuse and incitement to hatred are often very thin.

ECRI also noted the obligation for courts to make reference to a "specific ethnic group or religion" when passing sentence for racist expressions, which implies that expressions concerning, for example, the "inequality of races" cannot be prosecuted, as they do not refer to a specific group. ECRI expressed its wish that a bill (projet de loi Toubon) addressing some of these questions which was to be discussed by Parliament, be rapidly adopted. However, this item was never discussed before Parliament and appears to have been dropped from the agenda. The French authorities have stated that, in this field, priority is currently being given to improving the implementation of existing legislation rather than changing legislation. In accord with this objective, the Ministry of Justice issued a circular directive\textsuperscript{48} in July 1998 aimed at improving the effectiveness of the prosecution of racist offences, as concerns both incitement to racial hatred and discriminatory acts. However, while this circular directive is important, ECRI stressed in its Second report that it thinks that a legislative reform is still necessary.\textsuperscript{49}

With respect to the provisions prohibiting discrimination, most of the areas of discrimination in public life, such as refusal to provide goods and services and discrimination in employment, are addressed in the French Penal Code. Article 225-2 of the Criminal Code covers the refusal to supply goods, services or accommodation, hindering the normal exercise of economic activity, refusal to recruit, dismissal, and making the supply of goods, services or jobs subject to a discriminatory condition. These provisions are, however, applied very rarely: in 1997, for example, only four sentences were pronounced on the basis of Article 225-2 (ten in 1996), none of which concerned discrimination in employment. Despite the above-mentioned recent developments indicating a comparatively more frequent use of these provisions, ECRI holds in its report that implementation still needs to be improved. The main difficulties in application, as in most other countries, are related to the proof of the intention to commit a discriminatory act.

As regards racial attacks and harassment, their number and gravity is reported to have decreased in recent years. People of North African origin appear to be the most frequent targets of such acts. The significance of these statistics may be affected by reluctance on the side of the victims to file complaints as well as by the inability of the prosecuting authorities and the police to put forward the racist motivation of such offences since there is no general legislative basis in French criminal law for doing so. In France, neither are racist offences defined as specific offences, nor is racist motivation expressly mentioned as a specific aggravating circumstance.

**Germany**

The German Criminal Code contains provisions aimed at combating racism and intolerance. Additionally, in contrast to many other Member States, the German legal system from its very beginning in 1949 not only concentrated on individual criminal actions, but also on political parties, groups, and associations.

For obvious historical reasons, the German constitution contains two articles (article 21.2 and 9.2 of the Grundgesetz) providing for legal means against certain parties and organisations whose aim is to abandon fundamental principles of the Constitution. The Criminal Code complements this Constitutional legislation prohibiting certain associations and parties by penalising the continuation of their activities (Sections 84 and 85 of the Criminal Code). The dissemination of propaganda and use of the symbols of unconstitutional organisations (especially of the Nationalist Social Workers Party, or neo-Nazi organisations which were banned by means of administrative law) is also prohibited. (Section 86).

As mentioned before, the Constitution allows in Article 21 chapter 2, under certain strict conditions, the ban of a party if it is actively fighting against the fundamental principles of the constitution. In the year 2000, the Federal Government, the Parliament (Bundestag) and the State Chamber (Bundesrat) initialized party-ban proceedings\textsuperscript{51}.
before the Federal Constitutional Courts, seeking the ban of the extreme right-wing “National Democratic Party of Germany”. After recognizing that the motions in the party-ban proceedings against the NPD were partly based on evidence provided by secret informants (members of the party who were supervised and paid by the secret-services of the States and the Federal Government), and after suspending the decision to hold the substantive hearing because of this information, the Federal Constitutional Court finally squashed the party-ban proceedings in March 2003. A relevant number of judges stated that the surveillance methods of the secret services put into doubt whether there still was a possibility for the NPD to enjoy a fair trial according to Article 6.1 of the European Convention on Human Rights. As a result, it had become impossible to reach the 2/3 majority of judges necessary for a decision banning the NPD.52

The Criminal Code also contains very comprehensive provisions aimed at hate speech and the approval, denial or playing down of the genocide committed under the National Socialist regime (Section 130). Such crimes committed via the medium of the internet may also be prosecuted. In the case of killing, the Federal Supreme Court regards racism as an aggravating motive (Section 211). The Criminal Code also penalises the crime of genocide (Section 220a).

In its first report,53 ECRI noted that the German authorities adopted firmer measures to combat racial violence in the wake of the arson attacks in Mölln and Solingen. These measures included improving police methods for monitoring and combating violent right-wing extremists, police surveillance of right-wing groups, banning of several neo-Nazi organisations and investigations by the federal prosecutor on attacks against members of minority groups. Despite such efforts, ECRI stated that racially motivated and antisemetic crimes continue to be a serious problem in Germany.54

ECRI also reported that as it was the case with previous violence, one dimension upon which the German authorities are concentrating their efforts is the enforcement of criminal legislation.55 Relevant authorities at the Federal and Länder levels have been meeting in order to consider this matter. A primary focus is on further methods to enable the police to more effectively survey right-wing organisations and act quickly in response to incidents and attacks. A development which has recently been announced is a more active role by the Federal Border Guard (BGS), particularly with respect to the activities of right-wing extremists in and around railway facilities. A Federal Border Guard hotline has been established to this end, available countrywide, intended to provide additional information to the BGS about right-wing activities. The BGS are to pass all information gathered to responsible state police authorities and assist state police forces in need of help in dealing with right-wing violence. Possible changes of procedural rules enhancing the role of the Federal Prosecutor General in pursuing such cases in order to emphasise their importance have also been considered. Internet surveillance has also been stepped up, as the German authorities consider that this is an important tool for right-wing groups.56

**The Netherlands**

The Netherlands provide for comprehensive legislation against racism and xenophobia. Additionally, anti-discrimination laws were introduced in the Criminal Code in fulfilment of the Netherlands’ obligations under the CERD. The Dutch Criminal Code contains several provisions aiming at combating racism and intolerance. In accordance with Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination, Article 90quarter of the Dutch Criminal Code defines discrimination as any distinction, any exclusion restriction or preference, 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. The Dutch Criminal Code penalises: insults expressed publicly for the purpose of discriminating on racial and other grounds (Article 137c); incitement to hatred, discrimination and violence on grounds of, inter alia, race (Article 137d); and publicising or disseminating these expressions, other than for objective publication (Article 137e). Article 137f penalises the participation in or support of activities with the purpose of discriminating on racial or other grounds. Furthermore, racial discrimination in the exercise of a public service, profession or trade (Article 137g) and discrimination in the exercise of one’s office, profession or business (429quarter) is penalized.

As already noted by ECRI in its first report, relatively few cases have been brought based upon these articles. ECRI states that several reasons may explain this situation, including a certain reluctance on the part of the victims to report incidents to the police, the difficulties encountered in proving racial discrimination and the insufficient attention and experience on the part of the police and the public prosecution service in handling cases involving racial discrimination.57 To address some of these problems, a National Discrimination Expertise Centre, attached to the public prosecution service, was established in the autumn 1997 and started work in 1998. The aim of the Centre is to improve the public prosecutor service’s enforcement of criminal law in relation to racial discrimination through, inter alia: training; provision of information and advice to local public prosecutors offices;
organisation of regular consultation between public prosecutors and advocates-general with special responsibility for discrimination matters.

In its Second report on the Netherlands, ECRI noted “with interest” the stress put by the Dutch authorities on the need for close cooperation between the police, the public prosecution service and the local anti-discrimination centres to try and ensure an effective enforcement of criminal law in relation to racial discrimination. In this framework, it noted in particular the “Partnership Training Programme”, which aims to achieve partnerships at regional level between the police, the public prosecution service, the anti-discrimination centres and the municipal authorities. Additionally, in order to help addressing the problem of the reluctance of the victims to bring discrimination cases, as mentioned above, ECRI stressed the need to ensure adequate involvement of the organisations representing minority groups in these and similar initiatives.\footnote{58}

**United Kingdom**

The United Kingdom does not provide for a maximum concept of criminal legislation, but rather for a variety of different approaches towards racism, xenophobia, and discrimination.\footnote{59}

Criminal law concerning racism and xenophobia is laid down in the Public Order Act (POA). Provisions which penalise conduct specifically because it is racist or racially-inflammatory are to be found in Part III of the POA, the conduct covered being essentially incitement to racial hatred. In 1994 a new offence of causing intentional harassment was created which, although applicable to harassment on any grounds, was intended to deal more effectively with cases of racially offending behaviour, particularly serious and persistent ones (Sec. 4A POA). Simultaneously, the publication and distribution of written material intended or likely to stir up racial hatred (Sec. 19 POA) has been made an arrestable offence.\footnote{60} The Crime and Disorder Act 1998 created new offences of racially aggravated violence and harassment.\footnote{61}

As concerns incitement to racial hatred, which is penalised under Part III of the POA, under section 27 of the POA the Attorney General's consent is necessary for the prosecution of offences of incitement to racial hatred. It is obvious that this procedure may endanger the effectiveness of the respective legislation. Consequently, as in its First report, ECRI reiterates in its Second report on the United Kingdom “that the more usual procedure in sensitive cases whereby the consent of the Director of Public Prosecutions must be obtained would be more appropriate for prosecutions under Part III”.\footnote{62}

On 31 July 1997, the Home Secretary announced a judicial inquiry into the death of Stephen Lawrence, a young black man who was murdered in Greenwich in April 1993. Stephen Lawrence’s death prompted unprecedented debate on racism at the national level. The terms of reference of the inquiry were “to enquire into the matters arising from the death of Stephen Lawrence on 22 April to date, in order particularly to identify the lessons to be learned for the investigation and prosecution of racially motivated crimes”. The Inquiry Report, published on 24 February 1999, found that “institutional racism” played a part in the flawed investigation by the [London] Metropolitan Police Service of the murder of Stephen Lawrence, notably in the treatment of the family of the victims; in the failure of officers to recognise the murder as a racially motivated crime; and in the lack of urgency and commitment in some areas of the investigation. In order to evaluate the evidence and arguments they had heard, the Inquiry committee developed a definition of institutional racism, which is described as “the collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture or ethnic origin. It can be seen in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people”.

The Inquiry report shed light on the fact that apart from other procedural obstacles, institutional racism may represent an additional factor with respect to a lacking effectiveness of anti-racist and anti-xenophobic legislation. As it is highly improbable that the other fourteen Member States of the European Union are completely free from institutional racism, as defined in the Inquiry report, the report again stresses the importance of adequate institutional conditions for the effective application of criminal legislation within the EU Member States.

**IV. Conclusions: Shortcomings and not so bad practises**

Criminal law against racism and xenophobia appears to be a difficult instrument with mixed results. Although most Member States provide for more or less comprehensive legislation concerning racist and xenophobic acts, ECRI’s series of country-by-country reports suggests that for different reasons these provisions remain ineffective to a significant degree. Possible reasons for this result may be found in two different fields: Fragmented and incomplete legislation, on the one hand, may be responsible for certain shortcomings. On the other hand, procedural obstacles and institutional preconditions seem to play an equally important role. In the following conclusive remarks, both aspects will be scrutinized.
The limited use of overly extensive criminal legislation

An appropriate concept of criminal law against racism and xenophobia should balance necessary penalization and fundamental freedoms.

(1) As a consequence, discrimination (e.g. in cases of denial of access to bars and restaurants) should not—at least not exclusively—be defined as a specific criminal offence. Ineffective (and thus only symbolic) legislation frustrates the expectations of the victims of discrimination. Furthermore, substantiveless legislation harms and delegitimizes the concept of anti-discrimination legislation as a whole.

Although a vast majority of EU Member States provide for criminal legislation covering discrimination, the country-by-country reports of ECRI repeatedly state that there are only very few cases reaching the courts. ECRI concludes in its reports and in its Policy Recommendations No. 7 that a “shift” of the burden of proof is necessary in order to facilitate the proof of racist intentions. As ECRI repeatedly stresses in its reports, in almost all cases of discrimination the intention to discriminate is impossible to prove, because intentions can usually be proved only by circumstantial evidence (unless the perpetrator admits racist intentions, which seems to be a very rare exception). However, in criminal law there is only limited room for circumstantial evidence—facts leading to a conviction have to be proved “beyond reasonable doubt”. Therefore, easing the burden of proof in this respect, thus giving room for doubts, does conflict with the principle of due process of law, which is one of the major achievements of the rule of law since the Magna Charta. Moreover, this suggestion clearly tends to conflict with the human right to a fair trial as laid down in article 6.1 of the European Convention on Human Rights. It also conflicts with constitutional rights of defendants in most, if not all Member States of the EU.

In contrast, civil law allows a more flexible handling of cases of discrimination. Less strict rules in civil law on the necessary level of proof give room for a lowering or even a shift of the burden of proof. Thus, instead of insisting upon ineffective and potentially harmful criminal law provisions, the introduction of comprehensive civil law regulations seems to be a more appropriate approach towards the phenomenon of discriminations.

(2) Another focus of attention of ECRI is the definition of racist or xenophobic motifs as specific aggravating factor leading to higher sentences, an aspect repeatedly stressed by ECRI. Although ECRI does not present a sound reasoning why racist or xenophobic offences should be privileged against, for example, offences with a homophobic background, there are aspects which back its position. For example, higher sentences in cases of killing or bodily assault because of a racist or xenophobic intent of the perpetrator certainly send a clear message to the public and to possible perpetrators. For this reason, Member State legislation should at least provide for counting racist or xenophobic motifs as aggravating factors in some areas of criminal law to ensure that the racist background of these criminal acts does not get lost.

(3) A closer analysis of Member State legislation in the field of incitement to racial hatred, and of organisations supporting such acts and the distribution of written material containing such acts, has revealed that legal standards vary to a significant degree. In order to prevent perpetrators from avoiding national prosecution by moving into another Member State, and for the sake of the human right to equal treatment and non-discrimination, the ever greater free movement of persons within the EU should be balanced by introducing safeguards ensuring a EU-wide minimum standard of criminal law protection.

(4) Finally, further special concern should be given to the activities of racist and xenophobic organizations and associations. Too few Member States provide for specific legislation, thus leaving an important legislative gap which these groups may use to further establish themselves, and to strengthen cross-border alliances and activities.

Institutional and procedural measures for a better implementation of criminal legislation

ECRI’s country-by-country reports overwhelmingly prove that effective criminal legislation depends to a very high degree upon institutional and procedural measures safeguarding its implementation. Practical shortcomings of the institutional and procedural design of many Member States’ criminal law system hinder the effectiveness of legislation, thus threatening the establishment of an “area of freedom, security, and justice” at least to a similar degree as a lack of common standards of legislation.

(1) First of all, it has to be acknowledged that police forces and some of the groups typically targeted by racism and xenophobia—immigrants and refugees—are generally involved in a difficult relationship. Indeed, a significant number of complaints about discriminatory practices concern public authorities, and especially the police forces. Additionally, the police and the judicial system do not establish a sphere completely free
from bias, racism and discrimination. In fact, they represent a part of the population, which describes itself according to the latest Eurostat statistics as being to a significant degree racist or xenophobic. In the reports delivered by ECRI, the police and prosecuting authorities in many Member States have often been criticised for being reluctant to enforce legislation, even hesitating to investigate complaints. Thus, the phenomenon of institutional racism and its harmful effects have to be taken into account when discussing legal strategies against racism and xenophobia.

(2) Additionally, the surveys on Member State legislation and its actual application suggest that rather than efforts to extend and to maximize legislation, in most Member States a stricter application of existing laws is necessary. Actual procedural hurdles have to be eased, and special conditions for proceedings should be abandoned.65

(3) In the recent past, substantial efforts have been taken, especially in the United Kingdom, the Netherlands, and Germany, with regard to a better institutional design. These efforts reveal that there is substantial room for reform:

- As already stated above, the United Kingdom has focused on a multi-agency approach to racial incidents as a way to develop an effective response to these incidents. This approach involves close co-operation at local level between the police, local authorities and housing, education, and social services departments, the Crown Prosecution Service, local Racial Equality Councils and voluntary organizations. Similarly, the Netherlands have established a bottom-up approach. According to ECRI, Dutch authorities stress the need for close co-operation between the police, the public prosecution service and the local anti-discrimination centres to ensure an effective enforcement of criminal law.66

- Additionally, Germany, and to a certain extent also France,67 have stepped up their efforts for a better top-bottom control on the effectiveness of criminal legislation, including more precise statistics, and a better system of supervision of public authorities such as the police and public prosecutors.

These examples underline that a more comprehensive approach is needed to ensure effective protection against racism and xenophobia. Instead of focusing mainly on a maximum degree of criminal legislation, legal means against racism and xenophobia have to be embedded into a general government policy against these phenomena.

1 Johann Wolfgang Goethe-University Frankfurt am Main, Institute for Public Law. Most information on Member State legislation mentioned in this article is taken from the country-by-country-reports of the European Commission against Racism and Intolerance (ECRI), a subdivision of the Council of Europe. The reports are available at the website of the Council of Europe: www.coe.int


3 See e.g. the explanatory memorandum for the Commission’s proposal for a Council Framework Decision on combating racism and xenophobia (Footnote 2), p. 2-6.


6 The European Union expressly acknowledged the status of the right to equal treatment and non-discrimination as a human right in the considerations on the Equal Treatment Directive 2000/43/EC (consideration 3).

7 For a detailed description of ECRI, its function and its scope, see Chapter B, sub II.

8 See the catalogue in Part IV, no. 18-23 of the Policy Recommendation No. 7, reprinted here in Chapter B, sub II p.22-23.


10 The German Criminal Code complements Constitutional legislation prohibiting certain associations and parties by penalising the continuation of their activities (Sections 84 and 85 of the Criminal Code). The dissemination of propaganda and use of the symbols of unconstitutional organisations (especially Nazi symbols such as the swastika) are also prohibited (Section 86).

11 The Austrian Prohibition Statute penalises the establishment, support and promotion of National Socialist organisations which aim to undermine the sovereignty of the State or jeopardise public order; participation in such organisations; and acts committed as a means towards furthering the aims of such organisations, including the denial or trivialisation of National Socialist crimes using means which are accessible to many people. See ECRI’s Second report on Austria, CRI (2001) 3, p. 6.


13 Section 1, chapter 2 of Law No. 927/1979 as supplemented by Law No. 1419/1984, see ECRI, Second report on Greece, CRI (2000) 32, p. 6.


22 See ECRI’s general report on Legal measures to combat racism and intolerance in the member States of the Council of Europe, CRI (95) 2, p. 94.

24 Roughly speaking, two legislative “waves” can be distinguished in this respect: In a first wave, many Member States introduced legislation corresponding with some of the requirements of the CERD (see below, subchapter II). In a second wave, which was provoked by a number of violent racial incidents throughout Europe and a general notion of rising tensions within European societies, almost all Member States adopted additional legislation, especially concerning incitement to racial hatred, hate speech, and discrimination.
25 One example is Denmark, see below (subchapter III).
26 This tendency is reported to exist in Greece, see ECRI, First country report on Greece, CRI (97) 52, p. 6-7.
27 This is currently the case in France, see below (subchapter III).
28 This effect is reported for Belgium, see below (subchapter III).
29 See, among others, the Second reports on Denmark, Finland, France, and the Netherlands.
31 For a more detailed description, see the concluding subchapter IV of this contribution.
32 Austria, Belgium, France, Ireland, Italy, and the United Kingdom have made reservations concerning Article 4 of the CERD.
33 According to ECRI’s Second Report on Finland, the Committee for the Elimination of Racial Discrimination considers that the Finnish Criminal Code “does not currently conform to Article 4 of the CERD which calls for the penalization of dissemination of ideas based on racial superiority or hatred and the prohibition of organisations inciting to or encouraging racial hatred”. See CRI (2002) 20, p. 8.
34 See the subchapter I “Legislative approaches of the Member States”, above.
35 In its statements to the respective UN Committee, Germany regularly stresses that especially the non-discrimination Article 3.3 in its constitution provides for the necessary legal means against discrimination.
36 Most information used here is taken from the reports of the Council of Europe’s European Commission against Racism and Intolerance (ECRI), either from the general report on “Legal measures to combat racism and intolerance in the member States of the Council of Europe”, document CRI (95) 2, or from the country-by-country reports of ECRI. All country reports can be found at the website of the Council of Europe: www.coe.int
37 CRI (97) 49, p. 6.
38 CRI (2000) 2, p. 6
39 CRI (97) 49, p. 6.
40 CRI (97) 49, p. 6.
41 CRI (2000) 2, p. 6
42 CRI (97) 49, p. 6
43 CRI (99) 1.
47 CRI (98) 47.
48 A “circular directive” is an internal administrative instruction.
B. The Council of Europe: Combating Racism and Xenophobia

Andrea Coomber

"Leaving through the annals of the Court, an observed would be justified to conclude that, for over fifty years democratic Europe has been exempted from any suspicion of racism, intolerance or xenophobia. The Europe projected by the Court's case-law is that of an exemplary haven of ethnic fraternity, in which peoples of the most diverse origin coalesce without distress, prejudice or recrimination".

Judge Bonello, Anguelova v Bulgaria

Introduction

The Council of Europe has long been concerned with the problems caused by racism, xenophobia and racial discrimination in Europe. Over the years, it has developed a multiplicity of programmes covering aspects of racism on themes as diverse as migration, education, media and sport, with an emphasis on the principle of non-discrimination. Not until recently, however, has the Council of Europe focused on the treatment of 'racism' as a crime.

At the European Conference against racism in 2000, the Council of Europe underlined "the importance of combating impunity, including for crimes with a racist or xenophobic motivation, also at international level." Responding to this appeal, the adoption by the European Commission against Racism and Intolerance (ECRI) of General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination (Recommendation No. 7) on 13 December 2002 marks a welcome development in the Council of Europe's approach to racism. Calling for the strengthening of legal tools against racism at a national level, the measures suggested by Recommendation No. 7 include the prohibitions-sanctioned by criminal penalty of a range of activities characterised as 'racist'.

From the outset, it should be noted that the Council of Europe's primary international human rights instrument, the European Convention on Human Rights and Fundamental Freedoms (the Convention), is not specifically concerned with racism as a crime, nor has the jurisprudence that has emerged from its application and interpretation directly dealt with this issue. As an instrument of international law, the Convention's aim is to guarantee and protect certain important rights and freedoms of the individual against interference by the State, not to prohibit the individual from engaging in particular forms of conduct. However, a State may breach the rights protected by the Convention by engaging in racist activities itself, or by failing to protect its citizens from racist activities of others. It should be noted also that a successful claim under the Convention at the European Court of Human Rights (the Court) will not result in the direct criminal punishment of an individual, but in judgement against a State under international human rights law. Nevertheless, the case-law of the Court sheds light on how racism and the national criminal laws that prohibit racist activity are viewed from the perspective of human rights.

This chapter examines the historic approach of the Council of Europe to combating racism and racial discrimination as a crime, and the implications of the new initiatives to criminalise racism. Part I considers the jurisprudence under various articles of the Convention. It notes the development of Article 14 – the Convention's non-discrimination provision – and the implications of the Court's approach to Article 14 for the prevention of criminal manifestations of racism. Part I then examines the Court's jurisprudence with respect to key rights in which racism has tended to be considered, such as freedom of expression and association. Part II outlines and critiques the proposals provided in Recommendation No. 7 for the prohibition of racism and racial discrimination in national criminal law.

I. The European Convention on Human Rights and Fundamental Freedoms

The Convention aims to protect and guarantee a range of civil and political rights, including the right to life, freedom from torture, the right to a fair trial, freedom of expression and freedom of association, and includes a limited prohibition on discrimination. In addition, the Convention establishes one of the most evolved and effective individual complaints and enforcement procedures of any international law instrument. In 1999, the dual system of a European Commission of Human Rights and a European Court of Human Rights was replaced by one full time court.

As an international treaty, the Convention is addressed to States, not individuals. Each State Party to the Convention is liable for violations of the Convention by means of legislation or by acts of all public authorities, including the courts, and must ensure the protection of those rights within its jurisdiction. In addition, under Article 1, States are required to "secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of the
Convention”. This provision has been interpreted by the Court to require States to take measures designed to ensure that individuals within their jurisdiction are not subjected to violations of the rights guaranteed by the Convention. A State may be liable, therefore, for breach of the enumerated rights of its citizens by engaging in racist activities itself or by failing to protect its citizens against racist activities by other individuals or groups.

For example, an individual convicted of a crime by a racist jury may have a claim for breach of their right to a fair trial (i.e. an impartial tribunal) by the State under Article 6 of the Convention. A failure by a State to act, by passing laws, adopting policies or administrative practices, taking executive action or, most frequently in the case-law, launching an investigation, may result in a claim against the State rather than any individual responsible for the violation. The murder of an individual by racist thugs, for example, may result in a claim under Article 2 (the right to life) of the Convention if the State fails to investigate the incident or prosecuted the offenders.

In order for the Court to consider racist activities, there must have been some action or inaction by the State. Cases before the Court in respect of racism have generally fallen into one of two categories:

- In the first case, the State makes certain ‘racist’ activities a criminal offence and an individual applicant prosecuted by the State or prevented from taking part in such activity claims before the Court that his or her rights have been infringed. Examples have included prohibitions on racist publications, pro-Nazi revisionism and the establishment of organisations with racist purposes. Most of these cases concern Article 10 (freedom of expression) and Article 11 (freedom of assembly and association) of the Convention. They provide an insight into the Court’s standard of review of national measures to combat racism, particularly as it concerns freedom of the press.

- In the second category, the State, by action or failure to act, breaches the individual applicant’s rights under the Convention. In this category, the concerns of racism and xenophobia must be viewed through the prism of the rights and freedoms set forth in the Convention. Applicants to the Court have recognised this in trying to ‘fit’ their claims, which factually may indicate a crime motivated by racism, under the protection of one or other of the rights and freedoms guaranteed by the Convention. This is because the Court rarely looks at whether an abuse of rights has occurred because the applicant was a gypsy, a member of the nationalist community in Northern Ireland, a Kurd in Turkey, an immigrant worker or a member of any of the other minority groups that periodically take cases to the court in Strasbourg. The Court focuses more on the violation of the applicant’s rights as a victim whose rights are violated due to their membership of a minority group. This reality is most evident in an analysis of the jurisprudence of Article 14 – the core non-discrimination provision in the Convention – in respect of discrimination on the ground of race.

### I.1 Racial Discrimination

Most cases before the Court that allege racist treatment are brought under Article 14, which is the only provision in the main body of the Convention that deals specifically with discrimination on grounds of race. It is important to understand the operation of Article 14 in order to appreciate the limitations of the Court’s consideration of the criminal aspects of racism.

#### Scope and operation of Article 14

In its application, Article 14 is limited expressly to the ‘enjoyment of the rights and freedoms set forth in the Convention’. Any claim brought under Article 14 must be linked to a right or freedom guaranteed by another article in the Convention. Although Article 14 prohibits discrimination on protected grounds such as race, it does not prohibit all inequalities of treatment. To do so would prohibit ‘affirmative action’ or other approaches designed to further factual equality (as opposed to purely formal or legal equality) or remedy past inequalities.

In order to assess what differential treatment constitutes prohibited discrimination and what differential treatment constitutes acceptable distinction, the Court asks (i) whether the treatment pursues a legitimate aim and (ii) whether the means employed are proportionate to the legitimate aim. The question of whether a measure is deemed proportionate will also depend on the subject matter, background and circumstances of the case. States are allowed greater flexibility and wider choice of action in regulating particular areas by introducing laws that provide for differential treatment of individuals. This is known as the ‘margin of appreciation’ doctrine and it stems from the Court’s cognisance of its limited understanding and experience of local policy matters.

Despite its narrow scope, Article 14 has been pleaded frequently by applicants, albeit with very limited success. This lack of success is due to the fact that, in many cases, the Court does not determine whether there has been a violation of Article 14 if it has already considered that there has been a violation of the substantive right pleaded in conjunction with Article 14 because it is the practice of the Court to consider first if there has been a violation under the substantive article alone. If it finds such a violation, it tends not to go on separately to consider a claim of
discrimination brought under Article 14 in conjunction with that substantive article. If the Court finds no violation of the substantive article alone, it will go on to consider the Article 14 claim as long as (i) the facts of the case fall within the “ambit” of one of the substantive articles and an (ii) inequality of treatment in the enjoyment of such substantive rights is a “fundamental aspect” of the case.

The Court has thus forsaken many opportunities to scrutinise national law and policy in a manner conducive to the protection of the rights of minority groups, leading to criticism of its approach by certain judges in dissenting opinions.

**Burden and Standard of Proof**

According to the practice of the Court, the applicant has to establish that he or she has been less favourably treated than others in comparable circumstances, and that the basis of such differential treatment is a prohibited ground. Once this is established, the burden then shifts to the government to establish that there is an “objective and reasonable justification” for the treatment.

The standard of proof required of the applicant under the Convention is ‘proof beyond reasonable doubt’, a standard usually associated with obtaining a criminal conviction. This standard has been criticised in some quarters for being unreasonably high and erecting a further barrier in the way of applicants pursuing claims of racial discrimination. Even in situations where there is a well-documented history of racial abuse, the standard is not lowered. By contrast, other international and national human rights bodies apply standards more closely approximating the “civil” standard of proof where once a prima facie case of discrimination is established, the burden shifts to the State.

**Impact of Article 14 on racism as a crime**

The Court's consideration of racial discrimination is extremely limited due to the structure and interpretation of Article 14. On those occasions when the Court has been in a position to consider criminal acts, such as torturing and murder, against racial minorities, it has failed to consider the racial motivations of the acts committed. Perhaps the most damning indictment of the Court's approach was issued by Judge Bonello in a partly dissenting individual opinion in the case of Anguelova v Bulgaria. Anguelova v Bulgaria involved the death in police custody of Anguel Zabchekov, a Roma youth. The investigations conducted by the prosecution authorities concluded that the death was the result of an accidental injury that predated Mr. Zabchekov's arrest. While the Court held unanimously that there had been a violation of Articles 2 (right to life), 3 (torture), 5 (liberty and security) and 13 (right to an effective remedy) of the Convention, the majority of judges held that there was no violation of Article 14 of the Convention.

Drawing attention to racial slurs used by the investigating police, the applicant argued that the acts of the police and the investigative authorities had to be considered in the “broader context of systematic racism and hostility which law-enforcement bodies in Bulgaria had repeatedly displayed.” The Government submitted that there was no evidence of any racially motivated act on the part of the authorities. The Court held that while the applicants complaint was based on “serious arguments”, it was unable to conclude based on proof “beyond reasonable doubt” that the authorities had been motivated by racial prejudice.

Calling on the Court to abandon its proof “beyond reasonable doubt” evidentiary test, Judge Bonello's individual opinion eloquently summarises the practice of the Court with respect to the treatment of racial and ethnic minorities:

… I consider it particularly disturbing that the Court, in over fifty years of pertinacious judicial scrutiny, has not, to date, found one single instance of violation of the right to life (Article 2) or the right not to be subjected to torture or other degrading or inhuman treatment or punishment (Article 3) induced by the race, colour or place of origin of the victim. Leafing through the annals of the Court, an uninformed observer would be justified to conclude that, for over fifty years democratic Europe has been exempted from any suspicion of racism, intolerance or xenophobia. The Europe projected by the Court's case-law is that of an exemplary haven of ethnic fraternity, in which peoples of the most diverse origin coalesce without distress, prejudice or recrimination. The present case energises that delusion…

Frequently and regularly the Court acknowledges that members of vulnerable minorities are deprived of life or subjected to appalling treatment in violation of Article 3; but not once has the Court found that this happens to be linked to their ethnicity. Kurds, coloureds, Islamics, Roma and others are again and again killed, tortured or maimed, but the Court is not persuaded that their race, colour, nationality or place of origin has anything to do with it. Misfortunes punctually visit disadvantaged minority groups, but only as the result of well-disposed coincidence.

Judge Bonello went on the examine evidence of systematic ill-treatment of Roma people in Bulgaria, and found a violation of Article 14.

As outlined by Judge Bonello, the current approach of the Court severely limits the ability to reflect the realities of racism in Europe. The Court avoids consideration of discrimination where it has found a violation of an article and the standard of proof it applies mitigates against the
finding of violations. Combined, these factors mean that the rights enshrined in the Convention are seldom considered in terms of the often minority status of the victims of abuses, or the often prejudiced motivation of the perpetrators. This approach means that the reality of racism in Europe is not reflected in the judgements of the Court.

**Protocol No. 12**

In response to criticisms of the weakness of Article 14 of the Convention and to recommendations of bodies such as ECRI, Protocol No. 12 was introduced on 4 November 2000. Protocol No. 12 will come into force three months after it has been ratified by ten contracting States. However at the time of writing, it has been ratified by four States only.

Protocol No. 12 is intended to extend the prohibition of discrimination to the enjoyment of rights granted under national law, rights inferred from public authority obligations under national law, public authority discretionary power and any act or omission by public authorities. The prohibition of discrimination will apply whether the right is derived from legislation, common law rules or international law. Protocol No. 12 would also extend the prohibited grounds for discrimination significantly and makes the list of comparators non-exhaustive.

By extending the prohibition on non-discrimination it is hoped that Protocol 12 will increase the Court's focus on issues of equality and will pave the way for more forceful jurisprudence on discrimination. A major flaw of Protocol No. 12 is that it does not address the weakness of the proportionality test in protecting vulnerable groups, nor the high standard of proof required of applicants in order to establish a prima facie case. Until Protocol No. 12 enters into force, Article 14 remains the only serviceable prohibition against discrimination.

### 1.2 Political freedoms and racist activities under the Convention

**Freedom of expression and racist speech**

One of the primary ways in which the Court encounters the issue of racism as a crime is through allegations that racist speech violates the right to freedom of expression.

Article 10 of the Convention protects freedom of speech as a basic right and as “one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man.” Freedom of expression under Article 10 includes the freedom to hold opinions and receive and impart information and ideas without interference by the State and covers expression through any medium and with any content, including racist speech or propaganda, public insults and the denial or trivialization of genocide.

At first glance, this would suggest that the State may not restrict racist activities that involve public expression. However, Article 10(2) is clear that along with this right – so fundamental to modern liberal democracies – come duties and responsibilities. This means that freedom of expression is not absolute. It may be subject to certain limitations and penalties in order to justify the intervention of public authorities to prevent crime and protect, for example, public safety, or the rights of others. The regulation of this right by the Court involves a delicate balancing of freedom of expression and the rights purportedly infringed (or public safety threatened) by allowing the expression or publication at issue. The balance is particularly delicate in light of the temptation for many State authorities to abuse those limitations.

Although racist expression is covered by Article 10 and limitations on freedom of expression are strictly and conservatively construed, the Court has frequently declared inadmissible applications from individuals regarding restrictions placed on racist activities. Such applications tend to be excluded based on the limitations set forth in Article 10(2) in the public interest or held to be manifestly unfounded under Article 17 (prohibition of abuse of rights) rather than because they are not protected speech.

The Court has consistently found State restrictions on racist activity, including criminal prohibitions, to be justified because of the effects of such activity on the democratic system and the rights of those who suffer because of such activity. Article 17 was designed in order to prevent provisions of the Convention from being invoked in favour of activities contrary to its text or spirit, in particular, Nazism and other forms of totalitarianism or political ideologies that threaten the liberal democratic structure of the State.

In cases originating in Austria, Germany and France the Court has upheld the State’s prosecution of Nazism, for activities including the publication of racist material, insulting remarks about Jews and Zionism, incitement to racial hatred, glorification of the Germanic race, denial of the sovereignty of Austria and denial of the Holocaust. The Court has even upheld a prosecution for the vague speech that of Article 14 on the basis of systematic abuse of rights) by classifying such expressions as ‘hate speech’.

The intention or motive for the alleged racist communication is not absolute. It may be subject to certain limitations...
The intention or motive for the alleged racist communication may be something the Court takes into account in its analysis. For example, in Jersild v. Denmark, the Court decided that the conviction of a journalist for aiding and abetting in the dissemination of racist views in a televised interview he had conducted with members of an extreme right-wing group amounted to a violation of his freedom of expression, as protected in Article 10 of the Convention. The Court was satisfied that the objective of the journalist in question was not to put forward racist views, but rather to address a matter of public interest. Also, in the case of Lehideux and Isorno v. France, a conviction for “public defence of war crimes or the crimes of collaboration” following the appearance in a national daily newspaper of an advertisement presenting in a positive light certain acts of Philippe Pétain was held to violate Article 10.

In conclusion, the Court will not in general protect ‘racist’ speech against restrictions imposed by States. However, it will do so on the basis of an examination whether such restrictions are “necessary in a democratic society for the protection of the rights of others”, not based on their exclusion from the realm of protected speech.

**Freedom of assembly and association and racist organisations**

Manifestations of racism have also been considered by the Court with respect to the right to freedoms of association and assembly. These rights, protected under Article 11 of the Convention, are closely associated with freedom of expression under Article 10 and the jurisprudence of the Court draws on common principles of analysis. The protection of opinions and the freedom to express them is one of the objectives of the freedoms of assembly and association under Article 11. Like Article 10, Article 11 also protects a demonstration that may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote.

Under Article 11(2), organisations whose activities aim at stirring racial, national, ethnic or religious hatred may be restricted (or prosecuted) by States in the public interest without breaching the rights of the individuals involved under the Convention. Such restrictions may even be applied in a discriminatory manner as the problems caused by racist activities provide an ‘objective and reasonable justification’ for such differential treatment. An essential factor will be whether the association in question has called for the use of violence, an uprising or any other form of rejection of democratic principles. If there is such incitement then the State will enjoy a greater margin of appreciation to intervene in respect of the organisation’s activities. The case-law on racist organisations, such as Nazi organisations, has followed that of Article 10. In fact, many applicants who have been prosecuted for racist activities made claims both under Article 10 and 11.

It should be noted that States have been known to abuse the limitations on political freedoms to suppress nationalist or minority opinion, despite that fact that the Court has recognised the entitlement of the inhabitants of a region from associations to assert a minority consciousness. For example, the Court has examined numerous cases from Turkey where the State has prosecuted Kurds for expressing nationalist sentiment (or even just support for Kurdish civil rights) by classifying such expressions as ‘hate speech’.

Similar State action has occurred in France, regarding Basque nationalism, in Greece, regarding the Turks of Thrace and in Bulgaria, regarding ‘Macedonian’ nationalists.

**Investigations and criminal justice**

Finally, racism has been considered by the Court in relation to matters concerned with investigation and criminal justice. These have ranged in scope from racist juries to the retrospective conviction of war criminals.

As noted above, the Convention requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to violations of the rights guaranteed by the Convention. Under Article 13, States must provide an effective remedy for breach of the rights of its citizens. If the State fails to investigate violations against individuals, for example, because of institutionalised racism, it may be liable for a breach of rights under the Convention.

In the Anguelova and Velikova cases, the Court judged that a State (in this case, Bulgaria) had violated Article 2 of the Convention, in failing to investigate the death of Roma in police custody. However, as lamented by Judge Bonello, in both cases the Court failed to find a violation of Article 14 on the basis of systematic discrimination against a generally persecuted minority group.

In respect of criminal processes, on numerous occasions the Court has held racism to impede the right of an accused to a fair trial. An accused person in national court whose case has been decided by a racist jury may be able to claim a violation of his or her right to a fair trial under Article 6 of the Convention on the grounds that the jury was not impartial.

Finally, in a series of cases before the Court, World War II war criminals challenged their convictions in national courts for ‘crimes against humanity’ on the grounds that such a crime was not recognised in national laws at the time committed. They argued that their punishment constituted a retroactive criminal penalty contrary to Article 7 of the Convention. However, the Court held that Article 7(2) excludes from the prohibition against retroactive criminal penalties, punishment for crimes under the
II. European Commission against Racism and Intolerance

Given the limited ability of the Court to provide leadership with respect to racism as a crime, strong domestic legislation on racism is all the more important. In this regard, Recommendation No. 7 provides an important basis for domestic action.

ECRI is the primary organ of the Council of Europe to combat racism and related intolerance. It consists of a pan-European commission composed of experts appointed by the governments of the Member States of the Council of Europe, supported by a secretariat. ECRI's objectives are:

- to review member states’ legislation, policies and other measures to combat racism, xenophobia, antisemitism and intolerance, and their effectiveness;
- to propose further action at local, national and European level;
- to formulate general policy recommendations to member states; and
- to study international legal instruments applicable in the matter with a view to their reinforcement where appropriate.  

Its programme of activities is comprised of three aspects, set forth expressly in its founding statute. It produces detailed country reports examining the situation in each of the Member States and follows up with suggestions and proposals as to how the problems of racism and intolerance identified might be resolved. It conducts studies and activities on general questions and produces policy recommendations and examples of good practices. Finally, it attempts to use the vehicle of civil society institutions such as NGOs to publicise its message. From the perspective of implementation, ECRI’s role is quite limited – it undertakes studies and submits proposals; it is not a monitoring or enforcement system. Hence, its recommendations generally consist of broad guidelines or minimum standards rather than detailed and specific proposals for implementation by the member States of the Council of Europe.

ECRI is currently completing a second round of country reports on each of the member States. The new reports include a general description of the situation in each State, an update on the implementation of previous proposals and an in-depth analysis of problems of particular concern. In the area of national criminal law, they detail the measures taken by the States to combat racism as a crime, pinpoint gaps, difficulties or failures in such measures and suggest ways to improve legislation, enforcement and public and institutional awareness. By identifying particular areas of concern, the country reports have provided an important rationale and context for general recommendations, such as Recommendation No. 7.

**ECRI General Policy Recommendation No. 7**

Recommendation No. 7 seeks to set forth the key elements to be included in national legislation to combat racism and racial discrimination. Its specific recommendations reflect in large part the experiences of the member States as outlined in the country reports (by flagging common issues) and suggest an attainable minimum standard for measures to combat racism. Although Recommendation No. 7 takes into account measures at the European and international level, including the Convention, it is aimed squarely at the introduction of appropriate legislation at national level in all branches of the law, including constitutional law, civil and administrative law and criminal law.

Uniquely among international instruments, Recommendation No. 7 defines “racism” as “the belief that a group such as race, colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons.”

Part IV of Recommendation No. 7 sets out the following for States with regard to national criminal law:

18. The law should penalise the following acts when committed intentionally:
   a) public incitement to violence, hatred or discrimination,
   b) public insults and defamation or
   c) threats against a person or a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin;
   d) the public expression, with a racist aim, of an ideology which claims the superiority of, or which depreciates or denigrates, a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin;
   e) the public denial, trivialisation, justification or condemning, with a racist aim, of crimes of genocide, crimes against humanity or war crimes;
   f) the public dissemination or public distribution, or the production or storage aimed at public dissemination or public distribution, with a racist aim, of written, pictorial or other material containing manifestations covered by paragraphs 18 a), b), c), d) and e);
g) the creation or the leadership of a group which promotes racism; support for such a group; and participation in its activities with the intention of contributing to the offences covered by paragraph 18 a), b), c), d), e) and f);

h) racial discrimination in the exercise of one’s public office or occupation.

19. The law should penalise genocide.

20. The law should provide that intentionally instigating, aiding, abetting or attempting to commit any of the criminal offences covered by paragraphs 18 and 19 is punishable.

21. The law should provide that, for all criminal offences not specified in paragraphs 18 and 19, racist motivation constitutes an aggravating circumstance.

22. The law should provide that legal persons are held responsible under criminal law for the offences set out in paragraphs 18, 19, 20 and 21.

23. The law should provide for effective, proportionate and dissuasive sanctions for the offences set out in paragraphs 18, 19, 20 and 21. The law should also provide for ancillary or alternative sanctions."

Part IV contemplates the criminalisation of a whole range of activities that have been flagged in country reports or have arisen in cases before the Court under the Convention. These include racist expression, ideology and propaganda, violence, defamation and public insult, racist organisation and its supporters, the denial of war crimes and discrimination. Its broad proposals extend to the punishment of criminal complicity, and racist motivation as an aggravating circumstance in prosecutions for common offences. Companies, public authorities or other legal persons should not escape criminal prosecution either (although there are obvious problems with enforcement).

It is clear from the breadth of activities covered and the lack of detail regarding the means of implementation (other than that sanctions be “effective proportionate and dissuasive”) that Recommendation No. 7 is intended as a guideline only. Its purpose is to provide a yardstick against which national governments can assess their measures to combat racism as a crime. By contrast with the country reports where ECRI provides specific proposals for member States, Recommendation No. 7 consists of a skeleton set of objectives for all member States informed by current practice in some or all of the States. Where country reports identify problems with current practice, Recommendation No. 7 suggests general objectives as solutions to those problems. In that, it provides a useful contribution to the effort to combat racism as a crime in Europe.

Recommendation No. 7’s proposals regarding discrimination, if adopted by all member states of the Council of Europe, will apply to 45 States as compared with the 25 current and pending members of the European Union in the case of the proposed Directive on racism as a crime.

As is clear from the above, Recommendation No. 7 is limited.

First, the definitions provided by Recommendation No. 7 are feeble in comparison to approaches adopted by similar instruments. In the drafting of other international instruments, such as the International Convention on the Elimination of All Forms of Racial Discrimination and the EC Directive 2000/43, the drafters avoided defining racism. ECRI’s attempt at a definition indicates why it is perhaps wiser to define unlawful conduct rather than ambiguous concepts such as “racism”. Moreover, by linking such activities to an ambiguous standard based on the ‘belief’ of the person, Recommendation No. 7 introduces a concept that is difficult for any legal system to prosecute. According to ECRI’s own country reports, many Council of Europe Member States have experienced difficulties with the determination of “intention” in criminal discrimination cases.

Substantively, Part IV is also problematic in some regards. The introduction of legislation by Member States to criminalise the activities mentioned in Recommendation No. 7 will clash with the many of the rights under the Convention. Specifically, the prohibition of hate speech will raise issues under Article 10, while the criminalisation of “the creation or leadership of a group which promotes racism” may violate the right to freedom of association under Article 11.

Indeed in their absolute nature, the provisions of Recommendation No. 7 relating to racist speech seem to override freedom of expression. Unlike the absolutist approach taken in the United States of America, as noted above Article 10 and Court adopt a proportionality test in respect of free speech. In casting rights against hate crimes in absolute terms, ECRI’s approach to racist speech fails to conform with the Court’s jurisprudence.

Finally, it is a maxim of criminal law that crimes should be stated with specificity. Yet throughout, Recommendation No. 7 provides such broad guidelines that how they could actually be prohibited in practice is unclear. For example, the prohibition on the denial of genocide is unworkable. If an individual was to say – as many do – that they did not think there was genocide in the former Yugoslavia, Recommendation No. 7 would criminalise that expression. The recommendation fails to even state who, if anyone, decides whether genocide has occurred.

While it is clear that Recommendation No. 7 is intended as a minimum standard, by offering limited and confusing definitions of discrimination and conduct to be criminalised ECRI may not be moving the Council of Europe Member States towards particularly strong or enforceable legislation on racism as a crime. Although it would be
ideal if the principles criminalising racist conduct in Part IV were able to be realised in practice, the realities of human rights protection require the balancing of competing claims to human rights. With respect to the issues highlighted above, it seems that ECRI has chosen to balance racism against other rights in a laudably anti-racist, but perhaps legally unsustainable fashion. The adoption legislation along the lines of ECRI's recommendation, may risk bringing States anti-racism laws into conflict with Strasbourg jurisprudence on freedom of expression and association, rather than being reinforced by it.

Conclusion

The European Conference against racism called for an end to impunity for "crimes with a racist or xenophobic motivation". To date the operating framework and methods of the European Court of Human Rights have mitigated against the lifting of the veil of impunity for racially-motivated human rights violations. It can only be hoped that as more discrimination cases are pleaded before the Court – particularly from Central and Eastern Europe – the Court will seize the opportunities that have been identified by dissenting judges to acknowledge and address racial and ethnic prejudice in Council of Europe Member States.

In the mean time, the strong country-by-country reports produced by ECRI reinforce the need for protection against racism on a national level, and act as useful advocacy tools for NGOs and lawyers seeking legislative change. Recommendation No. 7 provides a basis in this regard, although it should be remembered that it represents a minimum standard only. In EU Member States, the definitions provided by the EC Directive 2000/43 provide a stronger foundation for race legislation than Recommendation No. 7. In respect of the criminalisation of racist speech and associations, proposals for domestic legislation would best be tempered by the jurisprudence of the European Court of Human Rights.

While the Court provides an imperfect forum for the consideration of racism as a crime, it is only with the consistent advancing of strong cases and well-reasoned arguments that the Court will change its approach to questions of racism. Dissenting judgments provide inspiration and guidance in this regard. Complementing litigation, standard-setting also provides avenues for addressing racism as a crime. Protocol No. 12 should put discrimination issues more firmly on the Court's agenda, however much more lobbying is required to bring this instrument into force. At the same time, national standard-setting initiatives – such as that undertaken by ECRI – should reinforce protection at the domestic level, where the responsibility for human rights protection ultimately lies.

1 Legal Officer for the Equality Programme at The International Centre for the Legal Protection of Human Rights (INTERIGHTS), London. The author gratefully acknowledges the research and drafting assistance of Kevin Kilching.
3 See European Commission against Racism and Intolerance, Activities of the Council of Europe with Relevance to Combating Racism and Intolerance, CRI (99) 56 final rev.
4 Many initiatives are operated through inter-governmental committees and conferences in the Council of Europe itself, e.g., the European Conference against Racism, the European Committee on Migration (CDMG) and the ad hoc Committee of Experts on legal aspects of territorial asylum, refugees and stateless persons (CAHAR). Other agencies and institutions operate programmes at lower levels within the Council of Europe organisation and in co-operation with other international institutions, e.g., treaty institutions, such as the European Court of Human Rights or the European Committee of Social Rights and organs such as the European Commission against Racism and Intolerance.
6 A number of socio-economic rights, namely rights to education and property are also protected by Protocols to the Convention.
7 For the purpose of this chapter, the relevant decision-making body will be referred to as the Court, whether the body involved was the European Court of Human Rights or the European Commission on Human Rights at the time.
8 See, for example, the case of A. v. The United Kingdom (Application no. 25599/94), Judgment of 23 September 1998, paragraph 22. In the Anguelova case at paragraph 136 (see Note 1 above) the Court stated the duty of a State to investigate violations of rights and freedoms defined in the Convention in the following terms:
   "Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 … requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force."
9 See the Anguelova case (Note 1 above) and the case of Assenov and others v. Bulgaria (Application no. 24760/94), Judgment of October 28, 1998.
10 There have been a series of unrelated cases on freedom of the press where the applicant, usually a journalist, loses a defamation case in national court for accusing someone of being 'racist' or involved in racist activities and claims that this violates his freedom of expression. See, for example, Lunde v. Norway (Application no. 38318/97), Admissibility Decision of February 13, 2001, Unabhängige Initiative v. Austria (Application no. 28525/95), Judgment of February 26, 2002, Peer v. the Netherlands (Application no. 34328/96), Admissibility Decision of November 17, 1998, Verlagsgruppe News GmbH v. Austria (Application no. 62763/00), Admissibility Decision of January 16, 2003, Lopes Gomes da Silva v. Portugal (Application no. 37698/97), Judgment of September 28, 2000 and Oberschlick v. Austria (No. 2) (Application no. 20834/92), Judgment of July 1, 1997.
11 Article 3 has also been mooted as a kind of anti-discrimination provision. In East African Asians v. The United Kingdom, Decision of 15 December 1973, 3 EHRR 76, the Commission indicated that "publicly to single out a group of persons for differential treatment on the basis of race might, in certain circumstances constitute a special form of affront to human dignity" amounting to degrading treatment under Article 3. However, the Court has never since found such circumstances to exist.
12 Article 14 provides that: "The enjoyment of the rights and freedoms set
forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”


14 Lithgow and others v. The United Kingdom, Judgement of 8 July 1986, paragraph 177. See also Inez v. Austria (Application no. 8695/79), Judgement of 28 October 1987, paragraph 41.

15 HUDOC, the on-line database of the case-law of the Court lists 133 judgements in which Article 14 has been pleaded and almost 1700 admissibility decisions.

16 Although this is not a per se rule, it has been the practice of the Court in almost all such cases. See, e.g., Open Door and Dublin Well Woman v. Ireland (Application nos. 14234/88 and 14235/88), Judgment of October 29, 1992, para. 81. See also Chassagnou and others v. France (Application nos. 25088/94, 28331/95 and 28443/95), Judgement of 29 April 1999, at paragraph 89.

17 See, e.g. Inez v. Austria (see Note 13 above) (discrimination against an illegitimate child heir in relation to inheritance fell, on the facts, within the ambit of article 1 of the first protocol).

18 See, e.g., the dissenting opinions of Judge Petitti in Buckley v. The United Kingdom (Application no. 20348/92), Judgement of September 25, 1996 and Judge Matscher in Dudgeon v. The United Kingdom (Application no. 7525/76), Judgment of October 22, 1981.

19 See the comments above of Judge Bonello in the Anguelova case (see Note 1 above), paragraphs 10 and 13.

20 Ibid., paragraphs 11 and 12.

21 See Note 1 above.

22 Ibid., paragraph 164

23 Ibid., paragraph 168

24 Ibid., partly dissenting individual opinion of Judge Bonello, paragraphs 2 and 3

25 The text of the main substantive article reads, as follows:

"Article 1 General prohibition of discrimination
1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1."

26 Georgia, Cyprus, Croatia and San Marino.

27 Article 10 provides that

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."


29 Handyside is the key case of the Court on freedom of expression. In paragraph 49 of the judgment, the Court said:

"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 favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society""


31 Article 17 provides, as follows:

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


39 Ibid., in paragraph 3, the Court said:

There is no doubt that, like any other remark directed against the Convention’s underlying values (see, mutatis mutandis, the Jersild v. Denmark judgement of 23 September 1994, Series A no. 298, p. 25, § 35), the justification of a pro-Nazi policy could not be allowed to enjoy the protection afforded by Article 10. In the present case, however, the applicants explicitly stated their disapproval of “Nazi atrocities and persecutions” and of “German omnipotence and barbarism”. Thus they were not so much praising a policy as a man, and doing so for a purpose namely securing revision of Philippe Pétain’s conviction whose pertinence and legitimacy at least, if not the means employed to achieve it, were recognised by the Court of Appeal.

40 Article 11 reads as follows:

"1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of
European Strategies to combat Racism and Xenophobia as a Crime

... others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."


42 Plattform "Arte für das Leben" v. Austria (Application no. 10126/82), Judgement of 21 June 1988, Series A, no. 139, paragraph 32.

43 See OZDEP case (Note 41 above).


48 See, for example, the case of A. v. The United Kingdom (see Note 7 above), paragraph 22. In the Anguelova case at paragraph 136 (see Note 1 above) the Court stated the duty of a State to investigate violations of rights and freedoms defined in the Convention in the following terms: "Article 2 of the Convention, read in conjunction with the State's general duty under Article 1... requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force."

49 See, for example, Assenov v. Bulgaria (see Note 8 above), Kaya v. Turkey (Application no. 22729/93), Judgment of February 19, 1998, Anguelova (see Note 1 above) and Velikova v. Bulgaria (Application no. 41488/98), Judgment of May 18, 2000.

50 ibid.

51 See, for example, Sander v. The United Kingdom (Application no. 34129/96), Judgment of May 9, 2000, Gregory v. The United Kingdom (Application no. 22299/93), Judgment of February 25, 1997 and Remli v. France (Application no. 16839/90), Judgment of April 23, 1996.


53 Appendix to Resolution (2002) 8, Statute of the European Commission against Racism and Intolerance (ECRI), Article 1, adopted by the Committee of Ministers on 13 June 2002 at the 799th meeting of the Ministers' Deputies.

54 See ECRI's website at www.coe.int/ecri.

55 See paragraph 1 of the Recommendation.

56 The requirement of "belief" also ignores the important issue of "institutional racism" that the Stephen Lawrence enquiry in the United Kingdom acknowledged could include "unwitting prejudice, ignorance, thoughtlessness and racist stereotyping" in the context of collective failure of an organisation to provide an appropriate and professional service; The Stephen Lawrence Inquiry, Report of an Inquiry by Sir William Macpherson of Cluny, February 1999, volume I, paragraph 6.34.

57 Other aspects of the definitions are also weak. For example, ECRI adopts its own definition of direct discrimination, which is considerably weaker than that in EC Directive 2000/43. ECRI provides for claims of direct discrimination to be countered by reference to an objective and reasonable justification, despite the fact that it is largely accepted in Europe that direct discrimination, especially on the ground of race, can never be justified.
C. A Framework for EU action to Combat Racism and Xenophobia as a crime

Karima Zahi & Tansy Hutchinson, NICEM

Introduction

The intention of this chapter is to provide a summary of the previous discussions, and to set the context for the development of an effective European response to racist and xenophobic crime on the basis of existing human rights and equality standards. To do this it will attempt to draw some initial conclusions in relation to what our needs are, and how we can use the available tools at the levels of the EU, Council for Europe and the United Nations to address them.

I. National Standards

Rainer Nickel has given us a very good overview of the national legal standards, and it is appropriate here to draw out some of the key strands from his conclusions.

The main question is of "why and to what extent the perpetrators of racist offences may benefit from different standards of criminal liability and criminal prosecution in the member States of the European Union". From the earlier discussion in the paper, we can see that the response at national level in Member States is patchy to say the least. We can also see that some states take a minimalist approach, with very little criminal legislation to combat racism and xenophobia, while other States have a more comprehensive coverage. However, even in those States with comprehensive legislation, the end result for the victim may not always be satisfactory, and more work needs to be done in terms of ensuring the effective interpretation and application of the laws. The reason for the existence of fractured legislation in the EU Member States is largely due to historical reasons, whereby lawmakers have responded to certain social and/or political problems. This is understandable, and is a part of the diversity within the EU. However, it has created certain negative effects, which in recent times have come to overtake the historical reasons for differences in the laws. This is particularly so in relation to extradition, as well as offences with a cross border dimension and the use of new technologies, such as the Internet.

The second area that is highlighted by Rainer Nickel is the limited use of overly extensive criminal legislation. The main difficulties here relate to:

1. The use of the criminal law to combat discrimination (e.g. in cases of denial of access to bars and restaurants), particularly in relation to the burden of proof. Rainer Nickel thus proposes that the criminal law should not be used as an exclusive mechanism for combating these forms of discrimination, rather than comprehensive civil law regulations would be more effective. This fits with the developments at the EU level, where the Race Equality Directive and the proposal for a Framework Decision on combating racism and xenophobia provide the beginnings for just such a regime;

2. The need to ensure that the racist background to offences does not get lost, racist or xenophobic motives need to be counted as aggravating factors in some areas of criminal law;

3. Too few member States provide for specific legislation in relation to racist or xenophobic organisations, leaving an important legislative gap.

The third area highlighted is the institutional and procedural measures needed for a better implementation of criminal legislation. He highlights the fact that "Practical shortcomings of the institutional and procedural design of many Member States' criminal law system hinder the effectiveness of legislation, thus threatening the establishment of an "area of freedom, security and justice" at least to a similar degree as a lack of common standards in legislation."

From Rainer's analysis, we can therefore identify the following needs:

1. The need for some states to legislate more effectively to combat racism and xenophobia through the criminal law;

2. The need for consistency across the EU in the use of the criminal law in this area including the need to complement existing EU laws;

3. The need for measures to ensure the effective application and interpretation of existing laws;

4. The need for action to be taken across the EU to prevent, as well as punish, racist crime, including at the institutional level; and

5. Measures to tackle racist and xenophobic organisations.

The conclusion is drawn that "...a more comprehensive approach is needed to ensure effective protection against racism and xenophobia. Instead of focusing mainly on a maximum degree of criminal legislation, legal means against racism and xenophobia have to be embedded into a general government policy".
II. The Council of Europe

We can also see from the earlier discussion the importance of a European-wide strategy that meets minimum standards of protection. The Council of Europe has recognised this through ECRI’s recommendation no 7.6 Nevertheless, as seen earlier, care must be taken to ensure that these minimum requirements, on the one hand, do not undermine progress already achieved,7 while, on the other hand, strike a balance with other human rights such as freedom of expression and association. In relation to the later point, the jurisprudence of the ECHR gives us some important pointers on striking this balance, but suffers from the limited use of positive requirements for action by the Member States and the failure of the Court to adequately consider the dimension of racism within findings of violations, even where positive obligations have been found to exist.8

Thus there are two additional needs that can be identified here:

1. Non-regression and the need for minimum standards; and
2. The need for the balance of competing rights to be a fair one.

III. Tools to address our needs

So where do we look for tools that can assist in developing a European Strategy to meet these needs? There are three important sources, the Council of Europe, and United Nations and existing and potential EU standards.

The previous chapter provides an important analysis of the Council of Europe standards, particularly in relation to ECRI and the ECHR.9 An additional important source of standards is the Council of Europe is the Framework Convention for the Protection of National Minorities (FCNM).

The FCNM came into force in 1998, and as the minority rights convention of the Council of Europe, it is the first and only legally binding European level Convention to provide specifically for the protection of National Minorities. One factor that makes it a powerful tool is that through the application of the Copenhagen Criteria, it has been given a particular status in the EU enlargement process.10

Nevertheless, there are limitations, some existing Member States are yet to ratify11 and there is no definition of what constitutes a ‘national minority’, with some States applying a limited interpretation. However the Advisory Group responsible for examining the position of States in relation to implementation of the FCNM has consistently been prepared to challenge this in a constructive manner.12

Despite these limitations, the FCNM contains important provisions, many of which are more detailed than CERD 13. It also contains provisions relating to the ‘equal protection of the law and protection against hostility or violence’,14 which can easily be interpreted to require the State to take measures to protect minorities from racist and xenophobic crime. Another provision that may prove useful is Article 18(1), which refers to the need to conclude agreements with other States in order to ensure the protection of persons belonging to the national minority. This may be useful when arguing that the protection of minorities is an area that requires Union action, and should not remain exclusively with Member States.

IV. The United Nations

There are a number of international instruments that contain provisions relating to the fight against racism and xenophobia. These range from provisions relating to broader human rights agendas15, to those with a specific focus on racism.16 We have seen in earlier sections the limitations of the ECHR approach, particularly the historic refusal to consider discrimination as a cause of the violation of human rights such as the right to life, as well as the potential advantages, particularly in relation to enforcement through the Court.17 The other standard we have seen is ECRI, which has the disadvantage of not having the court, but has useful, albeit general minimum standards.18

Two other sources of tools, which can complement those already identified, are the UN Convention on the Elimination of all forms of Racial Discrimination, which has already been touched upon by Rainer Nickel, and the Declaration and programme for Action arising from the World Conference Against Racism in 2001. These are useful lobbying tools in their own right, particularly in relation to the individual country reports. However, they can also be used as ‘levers’ at the EU level, as they constitute internationally recognised standards of human rights protection.

The United Nations Convention on the Elimination of all form of Racial Discrimination (CERD)

As has been mentioned in Chapter A, CERD has already been used by many member states of the EU as a basis for legislation to combat racism and xenophobia.19 In relation to the prohibition of discrimination20, it is apparent from the discussion in chapter A that comprehensive civil law measures are the more appropriate mechanism. In the recent hearing of the CERD Committee to examine the UK government, the Race Directive was directly cited. Thus CERD could be very useful in terms of
measuring and lobbying on the implementation of EU standards, and the measures used by the Member States in doing so.

There is also scope for the use of CERD in lobbying for the setting of standards within the criminal law:

Article 4 provides that States must adopt ‘immediate and positive measures’ to combat racism, “declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof”, declare illegal and prohibit organisations which promote and incite discrimination, and prohibit promotion or incitement of racial discrimination by public authorities.

As well as providing minimum standards of protection, the interpretation of Article 4 can assist in overcoming some of the problems in relation to the balance between competing rights in relation to protection from racism and xenophobia, and the right to freedom of expression and association.21 In addition, Article 5 (b) refers to States obligation to protect individuals against violence or bodily harm.

**World Conference Against Racism, Xenophobia and Related Intolerance in 2001**

The final source of tools to be considered in this section is the Durban declaration and platform for Action, arising out of the World Conference Against Racism, xenophobia and related intolerance in 2001 (WCAR). The WCAR applies to all the member states of the EU, and contains important commitments for both the legislative and the practical level. These include measures relating to the police force, to reduction of racist violence, including through education, community involvement, a multi-agency approach, strong enforcement of laws, monitoring and collection of data, and assistance to victims.22

In addition, the Programme for Action “Urges States to adopt effective measures to combat criminal acts motivated by racism”23, including in relation to sentencing, and calls upon States to promote measures to deter the emergence of and to counter neo-fascist, violent nationalist ideologies.24 Gender-based violence was another element of the fight against racism and xenophobia as a crime that was highlighted as important by the world conference against racism. This is an area that has also been highlighted by the CERD committee.25 Thus the WCAR clearly envisages a holistic approach to the combating of racist crime, and it is important that any EU response is consistent with this.

**V. EU Standards**

Crucial tools also exist or are being drafted within the EU itself, particularly in relation to the Draft EU Constitution and the EU Charter of Fundamental Rights. These will be considered in the following chapter, but there are three aspects which need to be highlighted here. Firstly, the draft constitution makes it possible that further, and stronger, standards may be developed in the future; secondly, the Draft Constitution may also mean that the Charter is given a stronger legal status than it currently has. The third point is that, while the Charter does not legally bind the member states of the EU, rather it is “addressed to the institutions and bodies of the Union…and to Member States only when they are implementing Union law”26, this does not mean that it is not an important tool. A recent report highlights the potential of the Charter as a tool for mainstreaming of human rights throughout the EU, in order to create a ‘genuine fundamental rights policy’.27

**Conclusions**

It is clear that effective action to combat racist and xenophobic crime is necessary at the EU level. This is evident from the patchy approach at the national level and the difficulties that such inconsistencies create in terms of effective protection across the EU, conflicting with EU objectives, such as the establishment of an area of freedom, security and justice.

There are a number of themes that run through the earlier discussion. Firstly, effective action requires protection against racist violence, prohibition of the dissemination of ideas based on racial superiority or hatred, and of organisations which promote and incite racial discrimination. Secondly, action must take into account multiple identities, such as the intersection between race and gender. The international human rights and equality standards provide a clear obligation on States to act in order to achieve these objectives. Another area that comes through is the potential of a mainstreaming approach to further the protection of human rights, including protection against racist crime and discrimination more generally.

The earlier discussion provides a framework for action at the EU level, particularly in relation to the needs at national level and the requirements of international human rights standards. Any proposals from the EU must be on the basis of such a framework.
European Strategies to combat Racism and Xenophobia as a Crime

1. They are part of the organisation NICEM (Northern Ireland Council for Ethnic Minorities). Tansy Hutchinson, Research and Development Officer, Karima Zahri, Policy and Research Development Worker

2. See Rainer Nickel, Chapter A

3. See Rainer Nickel, Chapter A

4. See Rainer Nickel, Chapter A

5. Rainer Nickel, chp A, p. 18

6. Andrea Coomber, chapter B

7. Such as the definition of direct discrimination, which in recommendation number 7 is weaker than that contained in the Race Equality Directive (see Andrea Coomber Chapter B)

8. See Andrea Coomber, Chapter B

9. Andrea Coomber, Chapter B

10. "The EU has stated that how States implement the FCNM will be an important factor in considering how the EU accession criteria on minority rights (1993 Copenhagen criteria) are met" Minority Rights Group International, FCNM: From Analysis to Action, protecting minorities in Europe, 2002

11. MRG press release 15/04/2003 'EU Accession Exposes Double Standards on Minority Rights'. At that date there were 5 EU member States yet to ratify the FCNM.

12. It is interesting to note that the UK government has adopted the definition under the Race Relations Act 1976, which is fairly comprehensive and open ended.

13. This is particularly so in relation to education and cultural rights.

14. At articles 4(1) and 6(2),

15. Such as the ECHR and the ICCPR

16. Such as the FCNM, CERD and WCAR

17. See Andrea Coomber, Chapter B

18. See Andrea Coomber, Chapter B

19. See Rainer Nickel Chapter A

20. Article 2 CERD

21. "...The prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression. The citizen's exercise of this right carries special duties and responsibilities...among which the obligation not to disseminate racist ideas is of particular importance" (CERD Committee General Recommendation XV on Article 4, at para 4)

22. Para 74 of the Durban Declaration and programme of Action 2001

23. ibid Para 84

24. ibid Para 86


D. European Union Strategies to Combat Racism and Xenophobia as a Crime

Mark Bell

Introduction

European Union policy against racism and xenophobia is most associated with the actions taken under the auspices of Article 13 of the EC Treaty. This provision was introduced into the EC Treaty by the 1999 Treaty of Amsterdam and it paved the way for the adoption of the Racial Equality Directive, which entered into force on 19 July 2003. However, the Treaty of Amsterdam also added Article 29 to the EU Treaty, which charged the Union with the objective of ‘preventing and combatting racism and xenophobia’ in the field of ‘police and judicial cooperation in criminal matters’. Article 29 EU Treaty resulted in a Commission proposal on 28 November 2001 for a Framework Decision on combating racism and xenophobia. This chapter examines the nature of a Framework Decision; the background to this proposal; and the shaping of its content by the Council. Before proceeding to this discussion, a brief introduction to the EU Treaty, and its difference from the EC Treaty, is provided.

I. Article 29 and the EU Treaty

The European Union is currently built on a complex legal framework of three founding Treaties: the Treaty establishing the European Community; the Treaty establishing the European Atomic Energy Community; and the Treaty on European Union. The latter, the EU Treaty, was created in 1993. Whilst parts of the EU Treaty establish general principles for the organisation as a whole, it provides primarily the legal framework for two policy areas: the common foreign and security policy, and police and judicial cooperation in criminal matters. The reasons for separating these policies from the normal procedures of the EC Treaty were essentially political. The sensitivity of the Member States to a possible loss of sovereignty in relation to foreign policy or matters of law enforcement resulted in a departure from the ‘Community method’ and the establishment of new institutional structures.

The institutional balance of power enshrined in the EU Treaty is quite different from that found in the EC Treaty. Its main features are the following:

- The Commission shares its right to propose legislation with all of the Member States;
- The European Parliament only enjoys the right to be consulted on legislative proposals and the Council is not obliged to follow its recommendations;
- The Council generally makes decisions by unanimous agreement of all Member States.

Furthermore, the jurisdiction of the Court of Justice is subject to a number of limitations. Most significantly, Member States can choose whether to permit national courts to refer questions concerning the interpretation of instruments adopted under the EU Treaty to the Court of Justice. At the entry into force of the 1999 Treaty of Amsterdam, the UK, Ireland, Denmark and France were the only states not to have accepted this aspect of the Court’s jurisdiction.

The opaque nature of the arrangements under the EU Treaty was frequently criticised and a consensus emerged in the Convention that fundamental reorganisation was required. Notably, the draft Constitution would remove the distinction between the EU and EC Treaties. This would have a number of practical benefits: for example, the Court’s jurisdiction to receive references from national courts would cease to be optional.

Title VI of the EU Treaty governs ‘police and judicial cooperation in criminal matters’. The objectives of this policy are established in Article 29:

‘Without prejudice to the powers of the European Community, the Union’s objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among Member States in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia.’

Article 29 places the fight against racism and xenophobia at the heart of the Union’s objectives. It specifies further that these objectives are to be pursued through close cooperation between police and judicial organs and ‘approximation, where necessary, of rules on criminal matters in the Member States, in accordance with the provisions of Article 13(e)’. This latter Treaty article provides for the adoption of ‘measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking’. Article 34 extends to the Union four possible instruments for the fulfilment of the objectives set down in Article 29:
II. Framework Decisions and the EU Treaty

Article 34(2)(b) EU: ‘Framework Decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect.’

The first part of this definition is self-explanatory and it is similar to the balance of roles found within a Directive. For example, the Racial Equality Directive sets the Member States the objective of creating a body for the promotion of equal treatment, but leaves them free to determine its precise form. However, the exclusion of direct effect from Framework Decisions is a significant difference from Directives. Direct effect is the legal principle that, once the time limit for implementation of the Directive has expired, those provisions of the Directive that are clear, precise and unconditional can be enforced directly by individuals in their national courts against emanations of the State. This has the important practical advantage of allowing individuals to enforce rights conferred by Directives even where Member States have not implemented the Directive or have failed to do so correctly. It has proven crucial to the successful enforcement of the existing EU sex equality legislation. The exclusion of direct effect in respect of Framework Decisions means that an individual could not invoke the (proposed) Framework Decision on racism and xenophobia in order to challenge racist conduct contrary to its provisions, even where a Member State had failed to transpose the Framework Decision into its national law within the required period of time. This contrasts with the rights conferred by the Racial Equality Directive, which may be relied upon directly by individuals.

In addition, the Commission has no power to initiate infringement proceedings in respect of measures adopted under the EU Treaty. Therefore, no legal procedure exists through which the Commission can compel a Member State to implement a Framework Decision even where it has manifestly failed to comply with its obligations.

Notwithstanding the inability of individuals or the Commission to enforce Framework Decisions, their significance should not be under-estimated. First, they represent an overt political commitment between states to take the actions specified. This is normally supplemented by a duty on states to report on the steps taken to implement the Framework Decision to the Commission and the Council. Secondly, in the majority of Member States, national courts can refer questions concerning the validity and interpretation of a Framework Decision to the Court of Justice. Naturally, the response of the Court will guide the subsequent interpretation of national implementing provisions.
The draft Constitution would abolish the Framework Decision instrument and replace this with a single set of legal instruments for all areas of EU law. The primary instrument for the approximation for criminal law would become the 'European framework law. This is essentially the same instrument as a 'Directive' under the current EC Treaty.\textsuperscript{19} Therefore, it would be binding upon the Member States and the Commission could bring infringement proceedings where a Member State failed to implement fully the provisions of a European framework law. In addition, there is no exclusion of the principle of direct effect and the standard jurisdiction of the Court of Justice would apply.

III. The Commission Proposal for a Framework Decision on Combating Racism and Xenophobia

For more than a decade, there has been clear evidence of difficulties arising within the EU internal market linked to differences in the substance of Member States’ criminal law provisions on racism and xenophobia. For example, Ireland adopted the Prohibition of Incitement to Hatred Act 1989 following evidence that racist materials were being produced in Ireland, where this was not an offence, with the intention of exporting these publications to other Member States, where such dissemination was a criminal act.\textsuperscript{20} Alternatively, problems were identified in the mid-1990s with the distribution in the Netherlands of leaflets denying the Holocaust. The leaflets were produced in Belgium, where this was not previously an offence, but then exported to the Netherlands in contravention of Dutch law.\textsuperscript{21}

In an initial response to such cases, the Council adopted a ‘Joint Action on action to combat racism and xenophobia’.\textsuperscript{22} Joint Actions were a predecessor to the Framework Decision instrument, but were even weaker. In particular, the Court of Justice had no jurisdiction to interpret a Joint Action. The Joint Action aimed to promote ‘effective judicial cooperation’ in relation to a range of offences linked to racism and xenophobia. Member States had two options under the Joint Action,\textsuperscript{23} either they could ensure that the offences listed were penalised in their national legislation or alternatively they could derogate from the principle of double criminality in respect of those offences. The principle of double criminality stipulates that the behaviour must be contrary to the legislation of both the requesting and the receiving state in order to permit actions such as the seizure and confiscation of materials in one state at the request of prosecutors elsewhere.

The 2001 proposal for a Framework Decision on combating racism and xenophobia was a logical next step from the Joint Action. First, the changes to Title IV EU introduced by the 1999 Treaty of Amsterdam provided for new, stronger instruments subject to the jurisdiction of the Court. Secondly, the 1996 Joint Action had not resolved the difficulties experienced in judicial cooperation on racist offences,\textsuperscript{24} as well as failing to address specifically the distribution of racist material via the Internet.\textsuperscript{25} Finally, the proposal formed part of a wider package of measures to construct the EU Area of Freedom, Security and Justice. The Tampere European Council called ‘for the fight against racism and xenophobia to be stepped up’.\textsuperscript{26}

The Commission proposal identified six conducts that should be punishable as a criminal offence in all Member States:

\begin{itemize}
  \item public incitement to violence or hatred for a racist purpose;
  \item public insults or threats for a racist purpose;
  \item public condoning for a racist purpose of crimes of genocide, crimes against humanity and war crimes;
  \item public denial or trivialisation of the Holocaust in a manner liable to disturb the public peace;
  \item public dissemination or distribution of tracts, pictures or other material containing expressions of racism;
  \item directing, supporting or participating in the activities of a racist group.\textsuperscript{27}
\end{itemize}

The instigation, aiding, abetting and attempt of these offences should also be punishable,\textsuperscript{28} and the maximum sentence for commission of any of the offences should not be less than 2 years of imprisonment.\textsuperscript{29}

Additionally, the Commission proposed that racist or xenophobic motivation in any other criminal offence should be deemed an aggravating circumstance and a factor to be taken into account in determining the penalty.\textsuperscript{30} Liability for the offences should extend to legal persons in certain circumstances and specific sanctions could be taken in response; for example, a judicial winding-up order.\textsuperscript{31} Importantly, the proposal required Member States to establish extraterritorial jurisdiction in specific cases, particularly with regard to offences committed via information systems.\textsuperscript{32} Finally, the initial proposal contained provisions dealing specifically with extradition issues.\textsuperscript{33}

IV. The Council and the Framework Decision

Since its submission, the Commission’s proposal has been subject to scrutiny from the European Parliament, national parliaments and NGOs. Moreover, it has been substantially altered during the deliberations in the committees of the Council of Ministers.\textsuperscript{34} The most detailed discussions have taken place within the Council Working Party on...
The following section examines in more detail the key contents of the proposal and how these have evolved during the negotiation process. As the Council discussions are ongoing at the time of writing, it is possible that the final text will depart from that considered below.

(a) The concept of racism and xenophobia

The Commission proposed to define ‘racism and xenophobia’ as:

- the belief in race, colour, descent, religion or belief, national or ethnic origin as a factor determining aversion to individuals or groups.\(^{35}\)

The breadth of this definition was significant, not least because it contrasts with the Racial Equality Directive, which only applies to discrimination on grounds of ‘racial or ethnic origin’. Most notably, the Commission sought to include prejudices linked to ‘religion or belief within the concept of racism and xenophobia, whereas discrimination on grounds of religion or belief has been treated as distinct from racial discrimination in the Directives adopted under Article 13 EC. Such discrimination falls within the scope of the Framework Directive on Equal Treatment and Occupation,\(^{36}\) not the Racial Equality Directive. It is not surprising then that this aspect of the proposal has proven highly contentious in the Council.

A number of states, including the UK, Austria and the Netherlands, raised questions on the inclusion of religion in the draft Framework Decision.\(^{37}\) Whilst France\(^{38}\) and Spain\(^{39}\) have supported its inclusion, the Council drafts now appear settled on adding a qualification in relation to religiously motivated offences. Although religion remains in the definition of offences, this is subject to a provision in Article 8(1) that:

> A Member State may exclude from criminal liability conduct … where the conduct is directed against a group of persons or a member of such a group defined by reference to religion and this is not a pretext for directing acts against a group of persons or member of such a group defined by reference to race, colour, descent, or national or ethnic origin.\(^{40}\)

This complex exception indicates that Member States understand that the total omission of religion would make it easy for offenders to avoid the scope of the law by framing racist statements or publications by reference to religious communities. There is clearly a desire to ensure that, for example, racist publications targeted at the Pakistani community cannot be given legal immunity through focusing on hostility to Islam. At the same time, some Member States wish to be able to treat certain aspects of incitement to religious hatred as not racist in nature. For instance, incitement to hatred of Scientologists would probably fall outside the scope of the Framework Decision as it is currently formulated. However, many borderline areas will remain: for example, it is doubtful that the Framework Decision would prohibit incitement to hatred of converts to Islam.

Furthermore, considerable debate has surrounded the description of religion in the Framework Decision. The Commission’s reference to ‘religion or belief, drawing on the Article 13 EC terminology, has been reduced to ‘religion’. A new provision in the preamble of the Framework Decision states that “religion” broadly refers to persons defined by reference to their religious convictions or beliefs.\(^{41}\) This is presumably designed to emphasize that any offences created only pertain to convictions and beliefs of a religious nature, and not beliefs in general (for instance, political beliefs).

(b) Offences concerning racism and xenophobia

As discussed earlier, the Commission identified six offences that should be subject to criminal sanctions in all states. These have been reduced to four by the Council and made subject to a number of additional qualifications.

The two offences specifically removed by the Council were: (1) making public insults and threats towards individuals or groups for a racist or xenophobic purpose; and (2) directing, supporting or participating in the activities of a racist group. Whilst the Council documents do not indicate the reasons for the deletion of the first of these offences, it should be noted that some concern was expressed in the European Parliament report over the balance struck in the draft Framework Decision with regard to freedom of expression.\(^{42}\) In relation to the second offence, this was deleted following a clear lack of support from all delegations, except for Germany.\(^{43}\)

The Council now proposes that Member States ensure that the following activities are criminal offences:

(a) ‘public incitement to discrimination, violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin;’

(b) the commission of an act referred to in a) by public dissemination or distribution of tracts, pictures or other material;

(c) public condoning, denial or gross trivialisation of

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(b) the commission of an act referred to in a) by public dissemination or distribution of tracts, pictures or other material;

(c) public condoning, denial or gross trivialisation of
crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin;

(d) public denial or gross trivialisation of the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 April 1945, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin.  

A number of observations can be made. In relation to (a), its scope has been broadened to include ‘public incitement to discrimination’. This addition reflected surprise on the part of some Member States that discrimination was absent from the Commission proposal. However, the Commission Legal Service has taken the view that matters pertaining to discrimination fall within the scope of Article 13 EC and cannot be regulated under the EU Treaty. This legalistic argument is important because the potential exists for the Commission to bring a legal challenge to the validity of this part of the Framework Decision; indeed, the Commission has issued a declaration stating that if the text is adopted as it stands, ‘the Commission reserves all the rights conferred on it by the Treaty.’  

The offence defined in (b) is now more restricted than the Commission draft. This should alleviate concerns expressed by the European Parliament that the Commission proposal would have had the effect of criminalising even the use of racist literature as part of an academic course of study; for example, an examination of political propaganda during the 1930s. This problem arose because the Commission draft appeared to criminalise any dissemination of racist material, whereas the Council version limits this to cases where dissemination is intended to incite discrimination, violence or hatred.  

The Council has broadened the scope of (c) to include public denial and trivialisation (as opposed to just ‘condoning’). However, in both (c) and (d) the offence has been restricted to instances of ‘gross’ trivialisation. The offence of Holocaust trivialisation is derived from German law and questions have been raised elsewhere about its necessity (as opposed to the offence of Holocaust denial). The potential breadth of this provision provoked concerns on the part of both the European Parliament and some Member States. The addition of ‘gross’ is an attempt by the Council to limit this provision to more serious incidents of Holocaust trivialisation, although this term has been criticised for its ambiguity.  

The new list of offences must be read alongside a number of exceptions and derogations that have been added to the draft Framework Decision. A broad exception in relation to constitutional principles of free expression has been inserted. This has received broad support, but was particularly welcomed by Sweden, France, Belgium, Greece, Austria and the Netherlands. The latest text states:

This Framework Decision shall not have the effect of requiring Member States to take measures in contradiction to their constitutional rules and fundamental principles relating to freedom of association, freedom of press and the freedom of expression in other media or rules governing the rights and responsibilities of and the procedural safeguards for the press or other media where these rules relate to the determination or limitation of liability.  

The breadth of this exception and its indeterminate nature raise serious concerns over its impact on the coherence of the Framework Decision. The attempt in Article 1 to establish common definitions of racist offences will be undermined if these are then subject to an open-ended range of exceptions based on fundamental principles and rules located at the national level. This makes it very difficult to anticipate the overall effect in practice of such an exception.

More specific derogations have been also introduced in Article 8. These originate in objections from a number of Member States, but particularly the UK and Germany. Article 8 allows Member States to exclude certain conduct from criminal liability, including:

- ‘conduct which relates to discrimination which is not carried out in a manner likely to incite to violence or hatred’;
- ‘in relation to Holocaust and war crimes denial/ trivialisation, conduct which is not carried out in a manner likely to incite to violence or hatred’;
- ‘any conduct which is not threatening, abusive or insulting’.

In relation to the first two categories, the necessity of these exceptions will be reviewed by the Council two years after the implementation of the Framework Decision.

Summary  

The Council has reduced the range of offences addressed by the Framework Decision. Those remaining have been generally subjected to more restrictions. Some of these new limitations reflect legitimate concerns raised by the European Parliament and NGOs regarding the need to define precisely any new criminal offences and to have due regard to the freedom of expression. Yet, the simultaneous introduction of wide and sometimes ambiguous exceptions threatens to undermine the common minimum standards that the Framework Decision was designed to accomplish.
(c) Penalties and sanctions

The Commission proposal included a general requirement that sanctions be 'effective, proportionate and dissuasive', a formula also found in the Racial Equality Directive. The Council has retained this, yet other proposals by the Commission on sanctions have been deleted. Most notably, there is no longer any provision regarding non-custodial sanctions, whereas the Commission draft highlighted the role for community service, training courses or fines in the form of payments to charitable organisations. The current draft simply provides that: 'each Member State shall take the necessary measures to ensure that the conduct referred to in Article 1 is punishable by criminal penalties of a maximum of at least between 1 and 3 years of imprisonment.' This is also a reduction from the Commission draft, which suggested that the maximum imprisonment sentence should be no less than 2 years.

(d) Aggravating circumstances

The Commission made two proposals regarding aggravating circumstances. First, where the offences specified in the Framework Decision took place during the exercise of a professional activity, on which the victim was dependent, the sentence could be increased. This provision clearly lacked support as it disappeared from some of the earliest drafts under discussion at the Council. In contrast, the Member States have endorsed the Commission's proposal that racist motivation be taken into account when determining the sanctions to be applied. This does not apply to the specific offences introduced by the Framework Decision (which are, by definition, racist in nature), but any other criminal law offence. Article 4 states:

'Each Member State shall take the necessary measures to ensure that racist and xenophobic motivation is considered an aggravating factor, or, alternatively that such motivation may be taken into consideration by the courts in the determination of the penalties.'

This is a very significant innovation, not least because it will mainstream the fight against racism throughout the system. It sends a clear signal that racism, in any form, is particularly unacceptable to society and worthy of special penalisation. In practice this means that crimes such as damage to property, physical assaults or murders conducted with a racist motivation can be subject to heavier penalties.

(e) Liability of Legal Persons

In order to enhance the effective implementation of the Framework Decision, the Commission submitted that liability should be extended, in certain circumstances, to legal persons. The Council has retained this approach, albeit subject to minor modifications.

'Legal person' is defined as 'any entity having such status under the applicable national law, except for States or other public bodies in the exercise of State authority and for public international organisations.' This is a broad definition with regard to the private sector, however, the omission of public bodies is potentially problematic. For example, situations could be foreseen where a state authority under the control of an extreme right-wing political movement published material likely to incite racial hatred or adopted public resolutions of this nature. Where such bodies have a responsibility for educational material, there is again the risk of publications contravening the Framework Decision – for example, gross trivialisation of the Holocaust.

Legal persons can be held liable where the offences created by the Framework Decision are 'committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person.' However, this will not exclude simultaneous individual liability for the natural person. It will be further necessary to show that the natural person's conduct was based on:

'(a) a power of representation of the legal person, or
(b) an authority to take decisions on behalf of the legal person, or
(c) an authority to exercise control within the legal person.'

For example, this would appear sufficiently broad to extend liability to a publishing house, where the chief editor has taken the decision to publish material inciting racial hatred. Presumably the role of chief editor would constitute a 'leading position' for the purposes of Article 5 and such an officer would have authority to take decisions on behalf of the publishing house. Moreover, liability can be additionally derived in cases where 'the lack of supervision or control ... has made possible the commission of the conduct.' It is notable that in this context the Framework Decision anticipates the imposition of criminal penalties for omissions as well as intentional actions.

With regard to sanctions for legal persons, the Council has accepted five of the six penalties foreseen in the Commission draft. All states must provide for criminal or non-criminal fines for legal persons breaching the Framework Decision. In addition, states may choose to provide for the following sanctions:

- exclusion from entitlement to public benefits or aid;
- temporary or permanent disqualification from the practice of commercial activities;
- placing under judicial supervision;
- a judicial winding-up order.

The Council has deleted the further option of imposing a sanction of temporary or permanent closure of the establishment.
(f) Jurisdiction

The Council has essentially maintained the jurisdictional rules proposed by the Commission. Each Member State must accept jurisdiction where the conduct has been committed 'in whole or in part within its territory'. Member States may select whether to accept also jurisdiction over offences committed elsewhere by one of their nationals or for the benefit of a legal person that has its head office in the territory of that Member State. Nonetheless, where a Member State does not yet extradite or surrender its own nationals, it must accept jurisdiction for offences committed by one of its own nationals outside its territory.

The initial Commission draft contained further provisions on extradition, but the European Arrest Warrant has superseded these. This replaces extradition within the European Union with a simplified process of inter-country transfer of suspects or convicts. Problems with extradition have been linked previously to the principle of double criminality, which requires that the behaviour must be contrary to the legislation of both the requesting and the receiving state. However, the European Arrest Warrant Framework Decision explicitly provides that the principle of double criminality does not apply in respect of 'racism and xenophobia' where the maximum period of custodial sentence for the offence is at least 3 years under national law. In this context, it is potentially problematic that the Framework Decision on combating racism will permit states to impose a maximum penalty of less than 3 years.

Importantly, the Council have endorsed the Commission's attempt to address racist offences occurring via the Internet. Article 10(2) provides that Member States must establish jurisdiction in cases where the conduct is committed through an information system and:

(a) the offender commits the conduct when physically present in its territory, whether or not the conduct involves material hosted on an information system in its territory;

(b) the conduct involves material hosted on an information system in its territory, whether or not the offender commits the conduct when physically present in its territory.

Paragraph (a) covers situations where, for example, a person residing in Italy posts racist material on a website hosted by an Internet Service Provider (ISP) in the USA. Paragraph (b) addresses cases where the material is posted onto an ISP based in the European Union, but where the author is residing elsewhere. There may be barriers in practice, though, to pursuing an offender residing outside the Union and who is not an EU citizen.

(g) Initiation of prosecutions

With a view to enhancing the effective implementation of the Framework Decision, the Commission submitted that the investigation or prosecution of offences created thereto should not be dependent on 'the report or accusation made by a victim'. This is practically very important given evidence that victims are often reluctant to report such offences to the police. The Council have supported this idea, but have altered the Commission's text. Whereas the Commission sought to apply this rule only to selected offences under the Framework Decision, the Council text makes this a rule of general application. At the same time, this wider scope is balanced by a new requirement that Member States may restrict this power to 'the most serious cases where the conduct has been committed in its territory'. There is no further explanation as to how this 'most serious cases' standard is to be interpreted in practice.

V. The Framework Decision and EU policy on combating racism

The Framework Decision is not an isolated initiative, but part of a range of measures being taken by the Union to combat racism. Of prime importance in this wider strategy is the Racial Equality Directive and it is worth considering further the relationship between these two instruments.

It is easy to criticise the Framework Decision for its weakness in comparison to the Racial Equality Directive. The latter confers rights on individuals and these are enforceable before national courts. Moreover, the Racial Equality Directive places greater emphasis on practical enforcement; for example, the requirement to create equal treatment bodies to assist individuals and the extension of legal standing in discrimination cases in order to permit associations to bring cases on behalf of victims. In contrast, the Framework Decision focuses its obligations on states and it may not result in new rights directly enforceable by individuals. Moreover, whilst the Member States swiftly agreed the Racial Equality Directive, the negotiation of the Framework Decision has been protracted and difficult. This has resulted in significant departures from the original proposal, often in the direction of more limited offences, as well as additional exceptions. It is clear, therefore, that the impact of the Framework Decision is likely to be considerably less than that of the Racial Equality Directive.

Nonetheless, the Framework Decision constructively attempts to fill some of the gaps in the European legal framework on racism and xenophobia. Manifestly, it is concerned with behaviour not already regulated under the Racial Equality Directive. If nothing else, it should improve the standards of protection already foreseen in the 1996...
Joint Action. Moreover, the changes to the EU and EC Treaties proposed in the draft Constitution raise the prospect of new opportunities in the future for further and stronger action on racism through EU criminal law. Consequently, the Framework Decision may come to be seen as an interim measure rather than an endpoint to EU strategies to combat racism and xenophobia as a crime.

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1 University of Leicester
4 The fourth Treaty on the European Coal and Steel Community expired in 2002.
5 Art 34(2).
6 Art 39(1).
7 Art 34(2).
8 Art 35(2).
12 Art III-274, ibid.
14 Art III-172(1), ibid.
15 Art II-21(1).
16 Art II-11.
17 Art 13, Directive 2000/43/EC.
18 See further P. Craig and G. de Búrca, EU law text, cases and materials (Oxford: OUP, 3rd edn, 2002).
19 Art 32(1).
23 Title I(A).
28 Art 5.
29 Art 6(3).
30 Art 8.
31 Arts 9 and 10.
32 Art 12.
33 Arts 13 and 14.
E. Conclusions: the way forward

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Introduction

In addition to the various international instruments mentioned in previous chapters, European Member States seeking to develop policies and strategies against racism have in recent years been inspired and driven by two landmark events: the European Conference against Racism where member States of the Council of Europe adopted a Political Declaration1 and the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (WCAR)2 and subsequent Declaration and Programme of Action adopted by the same States.

In the Political Declaration, the Council of Europe’s member States committed themselves to take the necessary steps to implement a catalogue of legal, policy and educational and training measures with a strong emphasis on gender mainstreaming3 "to prevent and eliminate racism, racial discrimination, xenophobia, anti-Semitism and related intolerance, and to monitor and evaluate such action on a regular basis". Conclusions and recommendations made at the same conference are equally useful in this context4. There were further commitments from Member States, also reiterated at the WCAR, to work in partnership with ethnic minorities and NGOs representing their interests on national action plans detailing strategies to combat racism and racial discrimination. At national level a number of racially-motivated attacks, the inadequate responses from police forces and the death of ethnic minorities in police custody resulted in increased public awareness on this issue. In addition, these incidents highlighted the issues of institutional racism and systematic discrimination by key public authorities who failed to recognise and respond to racist crime as a daily reality which affects individuals and communities alike. Finally, racist and xenophobic crime and violence can also be seen to conflict with the right to free movement of persons within the EU, in so far as, unlike other types of crime, the impact is not solely on the victim but on entire communities. Consequences of the widespread fear, intimidation and alienation of these communities has proved to be counterproductive in the context of building social cohesion and can lead to counter-attacks and contribute to social disturbances.

It must be reiterated that in many European Member States where legislation to combat racial discrimination has been in place for several decades, it still exists as a prevailing problem which is aggravated by the fact that often there is no real effective implementation of such mechanisms. Strategies to remedy this situation have entailed the enactment of stronger and better enforceable legislation with varying results with respect to having dissuasive effects.

I. Key areas for a strategy to lobby on the development and implementation of European measures/legislation to combat racism and xenophobia as a crime

Much of this paper has focused on the need for effective legislation to combat racism and xenophobia as a crime. Later sections of this chapter will deal with measures necessary to complement this, but it is appropriate at this point to highlight the extent to which current proposals for the development of such legislation at the EU level meet this need.

1.1 The Draft Framework Decision on racism and xenophobia as a crime

Proposals for a Framework Decision on racism and xenophobia have the potential to be an important tool in meeting the need for many Member States to legislate more effectively to combat racism and xenophobia. This is particularly by implementing the EU commitment to combating Racism and xenophobia, and to meeting the international commitments outlined earlier.

An initial point is that the proposals have the potential to complement existing EU standards, particularly in relation to the Race Equality Directive, and the European Arrest Warrant Framework decision. However, for this to be effective, there are two changes needed. Firstly, the Framework Decision needs to have the same enforceability as the Race Equality Directive, particularly in relation to direct effect and powers of the Commission. It is possible that the proposals in the draft EU Constitution may remedy this, and this is an area for consideration in the future. Secondly, for complementarity with the European Arrest Warrant Framework decision, the maximum penalties provided for in the Framework decision need to be revised, particularly in relation to the permitting of states to impose maximum penalties of less than 3 years.

The proposal to ensure that racist and xenophobic motivation is taken into account either as an aggravating
factor or in the determination of penalties satisfies the need identified earlier by Rainer Nickel of counting racist or xenophobic motives as aggravating factors in some areas of criminal law to ensure that the racist background of these criminal acts does not get lost.

In relation to the need for consistency across the EU in the use of the criminal law, there may be difficulties in relation to the definition of ‘racism and xenophobia’ adopted, and the coverage of offences. In relation to the definition, it is possible that it may fall short of that contained in ECRI’s recommendation no 7, which is far broader. However, Andrea Coomer highlights difficulties with the ECRI recommendation that need to be considered.

With regard to the range of offences covered Mark Bell points out that “The Council has reduced the range of offences addressed by the Framework Decision. Those remaining have been generally subjected to more restrictions. Some of these new limitations reflect legitimate concerns raised by the European parliament and NGOs regarding the need to define precisely any new criminal offences and to have due regard to freedom of expression. Yet, the simultaneous introduction of wide and sometimes ambiguous exceptions threatens to undermine the common minimum standards that the Framework Decision was designed to accomplish.” The introduction of broad exceptions in relation to freedom of expression, and in relation to conduct that does not “incite to violence or hatred”, may well lead to a situation where the Framework decision does not meet the minimum standards set in Article 4 CERD, as well as significant inconsistencies across the EU. In relation to penalties and sanctions, it is unfortunate that the Commission proposals for non-custodial sanctions have been removed. These are essential to any strategy for tackling racist and xenophobic crime, as was seen from the WCAR.

Nevertheless, there are positive aspects in relation to the need for consistency, particularly the liability of legal persons, and the Internet. While the prohibition of racist organisations has been removed from the list of offences, legal persons, including organisations, can be prosecuted under the current proposals, and this goes some way towards closing the legislative gap. In addition, provisions in relation to offences occurring via the Internet should prove extremely useful in prosecuting such offences, where often in the past offenders have avoided liability.

Finally, there is a proposal that initiation of prosecution in ‘the most serious cases’ should not be dependant on ‘the report or accusation made by a victim’, an important recognition of the barriers faced by victims of racist and xenophobic crime. However, there is no guidance as to where and when this should apply, and it consequently leaves a significant amount of discretion to the member state and the prosecuting authorities.

1.2 Beyond the Framework Decision: a strategy for the future

It is clear that there are a number of very positive proposals within the Framework Decision that can assist in enhancing the fight against racist and xenophobic crime at the EU level. However, there are a number of difficulties, not least the broad exception for freedom of expression. In this context it is necessary to develop a strategy for the future, which recognises that the current proposals for a Framework Decision are likely to be at best an interim measure which can be further built upon for the next stage (possibly post constitution). In addition, it is important not to focus exclusively on one tool. There are a number of other areas that need to be considered if a holistic approach is to be taken. In particular, it is important to utilise the various Human Rights Instruments, at UN, Council of Europe and EU level. The standards they contain need to provide the basis of any proposals, as well as the development of a more holistic strategy. In this regard, ECRI, the Framework Convention for the Protection of National Minorities and the EU Charter of Fundamental Rights are likely to carry significant weight at the EU level.

It is also important not to forget other European institutions that can assist in the development of other avenues and common standards of protection. It is useful to remember Andrea Coomer’s recommendation to lobby for the ratification of protocol 12 ECHR, in order to increase the European Court of Human Rights’ focus on issues of equality and pave the way for more forceful jurisprudence on discrimination. As well as this, the development of a litigation strategy bringing cases in relation to protection (or the lack thereof) against racist crime under the ECHR has an important place in any strategy. Dissenting judgments provide inspiration and guidance in this regard. These two proposals are particularly important considering that the ECHR is likely to be given a special status within the EU by virtue of the proposals for a EU Constitution.

II. Practical Measures: Policy and Practice Strategies

Institutional, procedural and preventative measures for a better implementation of criminal legislation

Previous sections in this paper have mainly focused on the key elements of national legislation to combat racism and xenophobia with provisions in all branches of the law,
as absolutely necessary tools to combat racist crime effectively. It has also been established that criminal legislation depends to a very high degree upon institutional and procedural measures to safeguard its implementation. Practical shortcomings in this regard hinder the effectiveness of legislation in many Member States, thus threatening the establishment of an “area of freedom, security, and justice” at least to a similar degree as a lack of common standards of legislation. Thus, institutional, procedural and preventative measures are needed for a better implementation of criminal legislation. These include:

1. The phenomenon of institutional racism and its harmful effects have to be taken into account when discussing legal strategies against racism and xenophobia, particularly with reference to the police and criminal justice agencies.

2. In most Member States a stricter application of existing laws is necessary. Actual procedural hurdles have to be eased, and special conditions for proceedings should be abandoned.\(^7\)

3. Focus should be on a multi-agency approach to racial incidents as a way to develop an effective response to these incidents. This approach involves close co-operation at local level between ethnic minority communities, the police, local authorities and housing, education, and social services departments, the prosecution authorities, specialised bodies and voluntary organisations.

Therefore, as it is recognised that using legal tools alone would be insufficient\(^8\), these need to be complemented by a range of policies and practical strategies which can lead to more effective practices and satisfactory outcomes. This is particularly relevant to the issue of the limited number of cases that actually reach the courts.

This background establishes the framework to explore six strategic areas where concrete action can be taken. These include (1) Seeking public recognition; (2) Identifying and documenting racist crime; (3) Preventative measures; (4) Capacity building of BME; (5) Networking and lobbying; and (6) European identity and integration.

**II.1 Seeking public recognition: perpetrator or victim?**

This strategy is of particular significance because it focuses public attention on the issue of racist and xenophobic crime experienced by ethnic minorities as a widespread societal problem which is often met with inadequate measures, if any at all. The Stephen Lawrence Inquiry in the UK\(^9\) for example, demonstrates how the attitudes, behaviours and actions, or lack of action, of police officers were largely informed by racist stereotypes and racial prejudice, within the context of institutional racism and systematic discrimination.

Although the Inquiry did not look into the possible causes of racially motivated crime, it produced a number of valuable recommendations and findings, such as recognising institutional racism as an obstacle to the effective implementation of anti-racist and anti-xenophobic legislation, emphasising the extent and depth of the issue mainly in relation to the policing of racist incidents. The other significant finding is the acknowledgement of the racial motivation behind the murder of Stephen Lawrence and the failure of the [London] Metropolitan Police Service to recognise it as such. In spite of these obstacles, the resilience and concerted efforts of the victim’s family, lawyer (Imran Khan) and human rights groups eventually resulted in raising the awareness of the public and the media. Perhaps, more importantly, there has been subsequent better understanding of and support for combating racist and xenophobic crime, and indeed, hopefully racism and xenophobia. Furthermore, the case was instrumental in amending and improving the UK anti-racist legislation so that it extends to the police and imposed positive duties on public authorities.

The law enforcement authorities are not alone in describing themselves as being to a significant degree racist or xenophobic, according to the Eurostat statistics. Assumptions about black and minority ethnic people being perpetrators of crime, rather than victims of racially motivated crime, extend to most countries across Europe where public opinion has tended to reflect similar racial attitudes and prejudice. This phenomenon is demonstrated in the EUMC\(^10\) survey report in which a significant proportion, 58%, agreed with the opinion that BME are more frequently involved in criminal acts than the average, although this was an improvement (of 6%) compared with the 1997 figures.

**II.2 Identifying and documenting the problem: Research, study and data collection\(^11\)**

Research establishing the origins and treatment of racially motivated crime and determining the profile of the perpetrator is very limited. This lack of information often bears consequences on the degree to which measures to combat racist and xenophobic crime can provide an effective solution, particularly in the context of adopting a preventative approach to this issue\(^12\). In many cases, the perpetrators of racist violence, who are actually apprehended, remain unidentified, not just by name but also by profile, and the root causes of their action remain unexplored. Criminological theory is often used to ascertain the identity of perpetrators in a more general way, rather than specifically with emphasis on the racial dimension to the
offence. It must equally be acknowledged that the absence of such research has hindered progress in work carried out with perpetrators which itself has been confined to the area of the criminal justice system and the use of punitive methods.

Runnymede in the UK recently published a research report on the issue which favours a holistic approach. The report highlights arguments put forward in the Sibbitt’s Home Office Research Study No. 176, in three areas. Firstly, identification and effective action against perpetrators; secondly, identification of potential perpetrators and the development of strategies to divert them from actually becoming perpetrators; and thirdly, development of a range of strategies for consistently addressing the perpetrator’s community’s general attitudes towards ethnic minorities.

Social, economic and educational disadvantage are often common factors for both perpetrators and victims of racist and xenophobic crime. This seems to indicate that much work can be done with individuals as well as communities who experience such disadvantage and tend to blame ethnic minorities for their isolation from society and neglect from government. Evidence of the latter is found in the EUMC Eurobarometer 2000 where 52% thought that ethnic minorities abuse the social welfare and 33% thought that they were given preferential treatment by the authorities, an increase of 6% compared with 1997. The latter perception is particularly reflected in the portrayal of asylum seekers by the media. Lastly, it is equally important to continue and intensify research on the victim too and ensure that monitoring of racist and xenophobic crime is carried out.

II.3 Preventative Measures: extra-judicial initiatives

“Changes in the law are of little real value to the people they are supposed to protect unless they are effectively implemented. That means the police and judiciary must be aware of and sensitive to race issues, they must treat racially motivated crime with the seriousness it deserves, and must aim to eradicate racism from their own ranks.”

The necessity to monitor policies and programmes aimed at combating racial discrimination, but also targeted surveys to ascertain the experience and perception of racism was agreed at the European Conference against Racism. For monitoring to be used as a systematic mechanism and performance indicator, it is paramount that victims come forward with their case to the police who should record the racial motivation of the crime. However, in many cases both victims and police fail to take such steps, mainly because of the difficult relationship and lack of trust that may exist between the police and ethnic minorities. Focusing on remediing this issue thus becomes a priority when considering short and long-term preventative measures which may include:

II.3.1 Reporting issues:

There is a need to modify the initial police response to possible criminal offences and police disposition/attitude to the victim, as this is pre-eminent in any confidence building exercise. Managing the victim’s distress in a non-victimising manner is fundamental. It is essential to have efficient recording of events with investigative proceedings following a clearly delineated management pathway/protocol which incorporates access to interpretation service and support of individual reporting by a representative from the community of origin. Crime stoppers numbers will only be useful if language needs are met.

II.3.2 Educational and action-oriented policy:

At the ECR Ministers committed themselves to such measures including to “…ensure that adequate training and awareness-raising programmes are implemented for public officials such as the police and other law enforcement officers, judges, prosecutors, personnel of the prison system and of the armed forces, customs and immigration officers as well as teachers and health and social welfare services personnel.”

The main purpose of such training and awareness raising is to ensure fair and impartial application of the law. Effective training for public bodies needs to be continuous and developed with clear delineation of objectives and arrangements for long-term co-ordination for action. This can be achieved with the participation of ethnic minority NGOs in the design, implementation and evaluation of the programmes. Their role would then be extended to the development and implementation of action plans detailing policies and practices which are aimed at achieving targeted outcomes and cultural change within the organisation. For example, the plan could include provision for increased representation of ethnic minorities in the different professional groups involved in the administration of justice, the development of codes of conduct, etc.

In order to deal effectively with racist and xenophobic bullying and young offenders, tailor-made measures need to be developed for local area community groups, youth clubs and schools, including review of curricula, anti-racist education and awareness-raising programmes. More specifically in the case of young perpetrators of racist or xenophobic crime, action plans developed through the judicial process could include anti-racism peer training and community work schemes developed in partnership with ethnic minority and other community groups. Courts
need to be empowered to impose, in addition to the main penalty, ancillary penalties such as fines or community service, to allow complainants to opt for mediation and systematically prosecute acts of a racist or xenophobic nature.

There is also a strong need for public awareness campaigns against racism and xenophobia, with the support of the media and to inform the broader public about legislation against racist and xenophobic crime, as well as to take various actions against political leaders who foster racist and xenophobic sentiments.

II.4 Capacity building

“Capacity building of Black and minority ethnic individuals and communities is an essential part of any process dealing with racist and xenophobic crime. They need to be empowered to participate in any decision-making process on the issue and benefit from adequate information and support, so as to develop the necessary skills and confidence to seek legal redress against the perpetrators. For example, access to the national legal, administrative and judicial remedies could be facilitated by training programmes on the legal instruments available.”

Legal advocacy services delivered by anti-racist and human rights organisations is an important element in capacity and confidence building for ethnic minorities. This needs to be complemented by legal assistance, including legal aid. In addition, independent specialised bodies, such as equality centres, human rights commissions and police ombudsmen, at national, regional and local levels have wide ranging responsibilities and a specific role to play with respect to the implementation of effective measures to deal with racist and xenophobic crime, provided they have adequate financial resources, competence and capacity.

II.5 Networking and lobbying:

Action NGOs, specialised bodies and other relevant agencies can take at national level

Non-governmental organisations and specialised bodies have important roles to fulfil with respect to lobbying strategies in the area of racist and xenophobic crime. First, it is paramount that they ensure that international human rights instruments have been integrated into national legislation and in some cases that the State has actually signed and/or ratified them. For example, they can approach a number of committees who oversee the implementation by States of their human rights obligations. This is done by way of submitting shadow reports outlining what measures the State can adopt to effectively combat racist and xenophobic crime specifically, and racism and xenophobia generally. Some important Committees include those under CERD, the FCNM, CEDAW and the Convention on the Rights of the Child.

One area in particular that cannot be ignored, and would be an ideal mechanism to develop strategies against racism and xenophobia, is the development of a National Action Plan against Racism (WCAR) with the participation of ethnic minorities, government agencies, NGOs and other relevant partners.

II.6 European identity and integration:

a holistic approach

The European Commission recognises that “racism and xenophobia are obstacles to migrants’ sense of belonging and participation.” The construction of a European identity based on the inclusion and respect of the diversity of all residents can substantially contribute to combating racism and xenophobia. Integration policies need to take into account not just the socio-economic exclusion of ethnic minorities in the EU, but also the isolation and sense of alienation which can result from racially motivated crime against individuals and communities, and often inadequate provisions which are meant to combat it. Although it would be difficult to measure the impact of this strategy on a short-term basis, it can be argued that, for example, granting third-country nationals voting rights would foster a greater sense of belonging, encourage participation and integration, and political influence in the longer term.

The Commission stated that there are “…a number of principles which need to underpin integration policies… The most important being the need for a holistic approach which takes into account not only the economic and social aspects of integration but also issues related to cultural and religious diversity, citizenship, participation and political rights.”

Conclusion

This paper demonstrates that the extent and depth of the problem of racist and xenophobic crime and violence in the EU has been inadequately recognised. Adequate recognition must be the driving force of any strategies for change, as illustrated in the Stephen Lawrence Inquiry.

In Recommendation number 7, ECRI recommends the use of all branches of the law in order to achieve an integrated approach. Such an approach would equip Member States to address racism in an exhaustive, effective and satisfactory manner from the point of view of the victim. This can be achieved at the EU level by recognising and building on the complementarity of the Race Directive and the proposals for a Framework Decision, as well as practical measures such as those Member States of the EU committed themselves to in the WCAR’s Declaration and Pro-
gramme for Action and Political Declaration of the European Conference against Racism. If this complementarity is to work, the Framework Decision must contain similar common minimum standards to those laid out in the Race Directive, as well as complement other EU standards. Action must also be based on the human rights and equality standards of the UN, Council of Europe and the EU itself.

It is evident that there is a need for a more comprehensive approach to ensure effective protection against racism and xenophobia. To this end, legal means including the use of criminal legislation against racism and xenophobia have to be embedded into general government policy and practice. The exchange of models of good practice developed at local and national levels would be valuable in forming a common EU approach. The development of a mainstreaming approach, which both acts as a check on proposed action, and as a pro-active strategy to achieve change, is an important mechanism through which these objectives can be achieved and contribute to combating racist and xenophobic crime, with meaningful results for ethnic minorities and benefits for the wider community in the EU.

1 On 13 October 2000

2 In Durban, South Africa in 2001
3 ECR Proceedings p 16 to 18
4 ECR Proceedings p 16
5 ECR Proceedings, p 21
6 Details in Chapter A, Rainer Nickel
7 For a closer description and analysis, see the chapter “Common problems with the regulations and their applications”, above under I.
8 ECR Recommendation number 7, page 17, para. 1
9 Details in Chapter A, Rainer Nickel, para 3
10 EUMC, “Attitudes Towards Minority Groups in the EU”, 2001, p 52
11 WCAR para 84 to 89 on prosecution of perpetrators of racist acts and para 147 b & c on incitement to racial hatred or violence through IT, para. 62 violence against women and girls
12 See WCAR para 92 to 98
14 EUMC, “Attitudes Towards Minority Groups in the EU”, 2001, p 52
15 Kirsty Hughes on behalf of Anna Diamantopoulo, Commissioner for Employment and Social Affairs, European Commission, ECR Proceedings, COE, 2000
16 ECR Proceedings, COE, 2000, p 29 para 25
17 ECR Proceedings, COE, 2000, p 17
18 ECR Proceedings, COE, 2000, p 23
19 ECR Proceedings, COE, 2000, p 16 & 26
20 COM (2003) 336 Final, p 21
22 ECR General Policy Recommendation No. 7, 13/12/2002, page 17, para. 3
In Durban, South Africa in 2001, action was taken by the European Conference against Racism (ECR) Proceedings p16 to 18. If this complementarity is to work, the Framework Decision must contain similar common minimum standards to those laid out in the Race Directive, as well as complement other EU equality standards.

For a closer description and analysis, see the chapter “Common standards. Action must also be based on the human rights problems with the regulations and their applications”, above under I.

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