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**STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)**

**Drafting Group on Freedom of Expression
(CDDH-EXP)**

Draft preliminary study taking stock of existing instruments

1st meeting

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I. FOREWORD

1. The present document complements the *Draft Analysis of relevant jurisprudence of the European Court of Human Rights regarding freedom of expression*,¹ prepared by Kristīne LĪCIS (Latvia), Rapporteur of the CDDH's Drafting Group on freedom of expression and links to other human rights (CDDH-EXP). It provides further information on the relevant work of other committees and bodies of the Council of Europe as well as regional and international organisations with a view to avoiding any risk that the work to be undertaken by the CDDH on freedom of expression in the context of culturally diverse societies will duplicate or overlap work already carried out or being carried out elsewhere.

II. COUNCIL OF EUROPE

a. European Social Charter

2. The European Court of Human Rights is complemented, as regards fundamental social and economic rights, by the European Committee of Social Rights (ECSR) which makes decisions on compliance of national policies with the requirements of the *European Social Charter of 1961 and the European Social Charter (revised) of 1996*. Freedom of expression is raised in the context of Article 19² which guarantees migrant workers and their families adequate and free services to assist them in obtaining accurate information, and to take all appropriate steps, so far as national laws and regulations permit, against misleading propaganda relating to emigration and immigration.

3. Paragraph 1 of this Article guarantees the right to free information and assistance to nationals wishing to emigrate and to nationals of other Parties who wish to immigrate.³ Information should be reliable and objective and cover issues such as formalities to be completed and the living and working conditions they may expect in the country of destination (such as vocational guidance and training, social security, trade union membership, housing, social services, education and health).⁴ Another obligation under this paragraph is that States must take measures to prevent misleading propaganda relating to immigration and emigration. Such measures should prevent the communication of misleading information to nationals leaving the country and act against false information targeted at migrants seeking to enter.⁵

4. To be effective, action against misleading propaganda should include legal and practical measures to tackle racism and xenophobia as well as human trafficking. Such measures, which should be aimed at the whole population, are necessary *inter alia* to counter the spread of stereotyped assumptions that migrants are inclined to crime, violence, drug abuse or disease.⁶

¹ Document CDDH-EXP(2017)02

² Article 19 of the 1961 European Social Charter and the 1996 European Social Charter (Revised) –The right of migrant workers and their families to protection and assistance

³ Conclusions I, Statement of Interpretation on Article 19§1, p. 82.

⁴ *Conclusions III, Cyprus*, p. 87.

⁵ Conclusions XIV-1, Greece, p. 366.

⁶ Conclusion XV-1, Austria, p. 59.

States must also take measures to raise awareness amongst law enforcement officials, such as awareness training for officials who are in first contact with migrants.⁷

5. Article 21⁸ guarantees workers the right to (a) be informed regularly or at the appropriate time and in a comprehensible way about the economic and financial situation of the undertaking employing them, on the understanding that the disclosure of certain information which could be prejudicial to the undertaking may be refused or subject to confidentiality; and (b) to be consulted in good time on proposed decisions which could substantially affect the interests of workers, particularly on those decisions which could have an important impact on the employment situation in the undertaking.

6. Article 26⁹ promotes awareness, information and prevention of: (1) sexual harassment in the workplace or in relation to work and to take all appropriate measures to protect workers from such conduct; (2) recurrent reprehensible or distinctly negative and offensive actions directed against individual workers in the workplace or in relation to work and to take all appropriate measures to protect workers from such conduct.

7. Article 29¹⁰ guarantees workers' representatives the right to be informed and consulted in good time by employers who are planning collective redundancies. The collective redundancies referred to are redundancies affecting several workers within a period of time set by law and decided for reasons which have nothing to do with individual workers, but correspond to a reduction or change in the firm's activity. This is not just an obligation to inform unilaterally, but implies that a process will be set in motion, i.e. that there will be sufficient dialogue between the employer and the workers' representatives on ways of avoiding redundancies or limiting their number and mitigating their effects, although it is not necessary that agreement be reached. For this purpose, all relevant documents must be supplied before consultation starts: reasons for the redundancies, planned social measures, criteria for being made redundant, order of redundancies.¹¹

8. This right to be informed and consulted must be backed by guarantees to ensure that consultation actually takes place. If an employer fails to respect his obligations, provision must be made for minimum administrative or judicial proceedings before the redundancies take effect, to ensure that they do not take place until the obligation to consult has been fulfilled. Provision must be made for sanctions after the event, and these must be effective, i.e. sufficiently deterrent for employers.¹²

⁷ See Digest of the case law of the European Committee of Social Rights, 2008

⁸ Article 21 of the European Charter (Revised) - The right to information and consultation

⁹ Article 26 of the European Charter (Revised) – The right to dignity at work

¹⁰ Article 29 of the European Charter (Revised) – The right to information and consultation in collective redundancy procedures

¹¹ See Digest of the case law of the European Committee of Social Rights, 2008

¹² Conclusions 2003, Statement of Interpretation on Article 29, See also Digest of the case law of the European Committee of Social Rights, 2008, §652

b. Framework Convention on the Protection of National Minorities

9. Articles 7 and 9 of *Framework Convention on the Prevention of National Minorities*¹³ guarantee the right of freedom of expression, and the enjoyment of this freedom in the minority language, to those belonging to national minorities.¹⁴ The States Parties shall adopt adequate measures in order to facilitate access to the media for persons belonging to national minorities and in order to promote tolerance and permit cultural pluralism.¹⁵ The Advisory Committee on the Framework Convention has highlighted that the rights contained in Article 7 are of such specific importance to persons belonging to national minorities and that they are deemed to merit special attention.¹⁶ The Advisory Committee has further held that any measures taken by the authorities to restrict the freedom of assembly or the freedom of expression, which necessarily includes the freedom to express criticism of the government or diverging opinions, can have a direct, negative impact on the enjoyment of rights contained in the Framework Convention as they are likely to deter persons belonging to national minorities, like other members of society, from exercising their rights and to create an intimidating environment that is not conducive to the implementation of minority rights and human rights generally.¹⁷

10. On the basis of its country monitoring work the Advisory Committee has prepared a *Commentary relating to the language rights of persons belonging to national minorities under the Framework Convention (2012)*. In this Commentary, the Advisory Committee has reiterated that criminal legislation should include provisions that expressly provide for discriminatory motivations based on language, culture, ethnicity or religion to be taken into account by courts as an aggravating circumstance for all offences. Hate speech and incitement to any form of hostility based on ethnic, cultural, linguistic or religious identity must be included in criminal law provisions to ensure adequate sanctioning for such offences.¹⁸

11. Furthermore the Committee considered the issue of hate crime and noted the overlap between some of its protections and those guaranteed by the ECHR:

“In addition, the right to be effectively protected from discriminatory threats or violence contained in Article 6(2) plays an important role in complementing the enjoyment of a number of rights contained in the

¹³ ETS No.157

¹⁴ In addition, the European Charter for Regional or Minority Languages¹⁴ serves as a tool to protect and promote regional or minority languages as part of Europe’s cultural heritage. Article 6 requires that the parties shall encourage a spirit of tolerance and intercultural dialogue and take effective measures to promote mutual respect and understanding and co-operation among all persons living on their territory.

¹⁵ Article 9§4

¹⁶ Advisory Committee to the Framework Convention, *Commentary “The Framework Convention: a key tool to managing diversity through minority rights - The Scope of Application of the Framework Convention for the Protection of National Minorities”*, 27 May 2016, § 68

¹⁷ Advisory Committee to the Framework Convention, *Commentary “The Framework Convention: a key tool to managing diversity through minority rights - The Scope of Application of the Framework Convention for the Protection of National Minorities”*, 27 May 2016, § 68

¹⁸ *Commentary relating to the language rights of persons belonging to national minorities under the Framework Convention*, adopted on 24 May 2012, §29.

Framework Convention, in particular those related to political freedoms, such as the freedom of expression, by obliging states parties effectively to sanction any undue interferences or attempts at its limitation.”¹⁹

c. Additional Protocol to the Convention on Cybercrime concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems

12. With regard to the dissemination of racist and xenophobic propaganda through computer systems, the Additional Protocol to the Convention on Cybercrime defines, in Article 2, racist and xenophobic material as “any written material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or violence, against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors”.

13. According to the Additional Protocol to the Convention on Cybercrime, State Parties shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the following conduct:

- distributing, or otherwise making available, racist and xenophobic material to the public through a computer system (Article 3)
- threatening, through a computer system, with the commission of a serious criminal offence as defined under its domestic law, (i) persons for the reason that they belong to a group, distinguished by race, colour, descent or national or ethnic origin, as well as religion, if used as a pretext for any of these factors, or (ii) a group of persons which is distinguished by any of these characteristics (Article 4)
- insulting publicly, through a computer system, (i) persons for the reason that they belong to a group distinguished by race, colour, descent or national or ethnic origin, as well as religion, if used as a pretext for any of these factors; or (ii) a group of persons which is distinguished by any of these characteristics (Article 5)
- distributing or otherwise making available, through a computer system to the public, material which denies, grossly minimises, approves or justifies acts constituting genocide or crimes against humanity, as defined by international law and recognised as such by final and binding decisions of the International Military Tribunal, established by the London Agreement of 8 August 1945, or of any other international court established by relevant international instruments and whose jurisdiction is recognised by that Party (Article 6)
- aiding or abetting the commission of any of the offences established in accordance with this Protocol, with intent that such offence be committed (Article 7).

d. Committee of Ministers

14. *Recommendation No. R 97(20) of the Committee of Ministers to member States on “Hate Speech”*²⁰ indicates that the term should be understood as “covering all forms of expression

¹⁹ Advisory Committee to the Framework Convention, *Commentary “The Framework Convention: a key tool to managing diversity through minority rights - The Scope of Application of the Framework Convention for the Protection of National Minorities”*, 27 May 2016, § 48

²⁰ Adopted on 30 October 1997.

which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin”.²¹

In this Recommendation the Committee of Ministers calls on the Governments of member States to:

1. take appropriate steps to combat hate speech

[...]

4. review their domestic legislation and practice in order to ensure that they comply with the principles set out in its appendix to this Recommendation.

15. In the Appendix to the Recommendation, it is stated that the national authorities and officials “have a special responsibility to refrain from statements, in particular to the media, which may reasonably be understood as hate speech, or as speech likely to produce the effect of legitimising, spreading or promoting racial hatred, xenophobia, anti-Semitism or other forms of discrimination or hatred based on intolerance. Such statements should be prohibited and publicly disavowed whenever they occur.”²²

16. The Appendix also points out that such forms of expression may have a greater and more damaging impact when disseminated through the media. However “national law and practice should distinguish clearly between the responsibility of the author of expressions of hate speech, on the one hand, and any responsibility of the media and media professionals contributing to their dissemination as part of their mission to communicate information and ideas on matters of public interest on the other hand.”²³

e. Parliamentary Assembly of the Council of Europe (PACE)

17. The Parliamentary Assembly has adopted a number of recommendations and resolutions of relevance for the current work, most recently on attacks against journalists and media freedom in Europe and on ending cyber-discrimination and online hate.

²¹ However, at present no internationally recognised definition of hate speech exists.

²² Principle 1 of the Appendix.

²³ Principle 6 of the Appendix.

Forms of expression and the Internet

18. In PACE Recommendation 2098 (2017): *Ending cyberdiscrimination and online hate*, the Assembly observes that online hate is not an isolated phenomenon specific to certain Council of Europe member States, but a pan-European problem that can best be tackled on the basis of shared experiences and good practice among member States.²⁴ It therefore asks the Committee of Ministers to review and update its Recommendation No. R (97) 20 on “hate speech”, in order to ensure that it continues to provide an effective basis for combating all forms of this phenomenon, including online hate, and that it covers all the grounds on which victims may be targets of hate speech.²⁵

19. In its Resolution 2144 (2017): *Ending cyberdiscrimination and online hate*, the Parliamentary Assembly calls on member States to ensure, in conformity with the case law of the European Court of Human Rights, that the national law allows for the effective prosecution of online hate speech, while fully respecting freedom of expression and in particular the freedom to criticise the actions of public authorities,²⁶ and ensure that national legislation covers all forms of online incitement to violence against a person or a group of persons, bullying, harassment, threats and stalking, so that these can be effectively prosecuted under national law.²⁷ These measures should be accompanied by training, education and awareness-raising.²⁸

Freedom of expression and respect for religious beliefs and protection of religious communities

20. The Parliamentary Assembly has adopted several recommendations and resolutions on the freedom of expression and respect for religious beliefs and protection of religious communities.²⁹ More specifically, in its Recommendation 1805 (2007) on “*Blasphemy, religious insults and hate speech against persons on grounds of their religion*”, the Assembly reaffirmed the need to penalise statements that call for a person or a group of persons to be subjected to hatred, discrimination or violence on religious grounds or otherwise. The Assembly considered that national law and practice should – as far as it is necessary in a democratic society in accordance with Article 10, paragraph 2, of the Convention - penalise expressions about religious matters which intentionally and severely disturb public order and call for a person or a group of persons to be subjected to hatred, discrimination or violence. However, with regard to blasphemy, as an insult to a religion, it considered that it should not be deemed a criminal offence.³⁰

²⁴ PACE Recommendation 2098 (2017): *Ending cyberdiscrimination and online hate*, §2

²⁵ *Ibid.*, §3.1

²⁶ PACE Resolution 2144 (2017): *Ending cyberdiscrimination and online hate*, §7.2.1.

²⁷ *Ibid.*, §7.2.2.

²⁸ *Ibid.* §§ 7.3 and 7.4

²⁹ PACE Resolution 1510 (2006): *Freedom of expression and respect for religious beliefs*; PACE Recommendation 1804 (2007): *State, religion, secularity and human rights*; PACE Resolution 1928(2013): *Safeguarding human rights in relation to religion and belief and protecting religious communities from violence*; PACE Recommendation 2061 (2015) and Resolution 2031(2015): *Terrorist attacks in Paris: together for a democratic response*;

³⁰ PACE Recommendation 1805 (2007) on “*Blasphemy, religious insults and hate speech against persons on grounds of their religion*”, §§4 and 17.2.

Hate speech

21. In particular concerning hate speech the PACE has also established the No Hate Parliamentary Alliance, an alliance of parliamentarians who commit to taking open, firm and pro-active stands against racism, hatred and intolerance on whatever grounds and however they manifest themselves.

f. European Commission against Racism and Intolerance (ECRI)

22. On the basis of its country monitoring work, the European Commission against Racism and Intolerance (ECRI) has elaborated a series of General Policy Recommendations addressed to all member States. A number of them are relevant to the freedom of expression, in particular *General Policy Recommendation N°6: Combating the dissemination of racist, xenophobic and antisemitic material via the internet*, and *General Policy Recommendation N°7: National legislation to combat racism and racial discrimination*.

Hate speech

23. *General Policy Recommendation No.15: Combating Hate Speech* is the most recent recommendation on this issue and was adopted due to the increasing concern within member States, the Council of Europe and other organisations about the use of hate speech in Europe's culturally diverse society, as well as about its role in undermining self-respect of the members of vulnerable groups, damaging cohesion and inciting others to commit acts of violence, intimidation, hostility or discrimination. This concern has been exacerbated by many incidents in which individuals, institutions, memorials and property have been subjected to actual violent attacks on account of a hostility to them founded on one or more of the grounds enumerated above. Therefore there should be a prompt response to hate speech making use of the large spectrum of measures suggested by the Recommendation in order to avoid the development of negative attitudes towards, in particular, minority groups, leading to their loss of self-respect and endangering their integration into mainstream society.³¹

24. ECRI also noted the lack of comparable data on the instances of hate speech, resulting from complaints either not being recorded, or the varying criteria by which member States regard such use as having occurred. It also highlighted the issue of lack of reporting by victims, possibly attributed to a lack of faith in the reporting system, and the lack of actual follow up being taken to investigate claims.³² ECRI further notes that hate speech is both more visible and more readily spread as a result of the widespread availability of electronic forms of communication.³³

25. In its country monitoring ECRI noted there been instances of political parties and other groups and organisations cultivating and disseminating racist, xenophobic and neo-Nazi ideas, but that the use of hate speech has not been limited to ones that are extremist and outside the mainstream. Thus, the employment of a rude tone in many parliaments and by state officials has been found to contribute to a public discourse that is increasingly offensive and intolerant. Such

³¹ ECRI *General Policy Recommendation No.15*, Explanatory Memorandum, § 22

³² ECRI *General Policy Recommendation No.15*, Explanatory Memorandum, § 23

³³ ECRI *General Policy Recommendation No.15*, Explanatory Memorandum, § 23

discourse has been exacerbated by some high-level politicians not being inhibited from using hate speech in their pronouncements. Furthermore it has noted attempts by public figures to justify the existence of prejudice and intolerance regarding particular groups, which only tends to perpetuate and increase hostility towards them.³⁴

26. ECRI also found and remarked on the use of “coded language” to disseminate prejudice and hatred, and the sensational or partial coverage of particular events as able to spread misinformation and give rise to fear, creating prejudice for those belonging to the minority that might be involved in them.³⁵

g. European Commission for Democracy through Law (Venice Commission)

27. In addition to its main work of providing advice and guidance to specific countries the Venice Commission has prepared a number of studies and reports³⁶ related to freedom of expression.³⁷

Freedom of expression of judges

28. In its report from 2015 on *Freedom of Expression of Judges*³⁸ the Venice Commission has commented that judges, and civil servants, are covered by Article 10. But, the specificity of the duties and responsibilities which are incumbent to judges and the need to ensure impartiality and independence of the judiciary are considered as legitimate aims in order to impose specific restrictions on the freedom of expression, association and assembly of judges including their political activities. However, the Venice Commission recalls that the ECtHR has considered, having regard in particular to the growing importance attached to the separation of powers and the importance of safeguarding the independence of the judiciary, that any interference with the freedom of expression of a judge calls for close scrutiny.³⁹

29. Also concerning criticism of judges, the Venice Commission notes that the public interest must be carefully balanced. It recalls that the ECtHR has noted the judiciary’s need for public confidence may require protection from destructive attacks.⁴⁰ The Venice Commission has also

³⁴ ECRI *General Policy Recommendation No.15*, Explanatory Memorandum, § 24

³⁵ ECRI *General Policy Recommendation No.15*, Explanatory Memorandum, § 25

³⁶ CDL-AD(2008)026 Report on the relationship between Freedom of Expression and Freedom of Religion: the issue of regulation and prosecution of Blasphemy, Religious Insult and Incitement to Religious Hatred adopted by the Venice Commission at its 76th Plenary Session (Venice, 17-18 October 2008); CDL-AD(2005)009 Report on Electoral Rules and Affirmative Action for National Minorities' Participation in decision-making process in European countries adopted by the Council for Democratic Elections at its 12th meeting (Venice, 10 March 2005) and the Venice Commission at its 62th Plenary Session (Venice, 11-12 March 2005); CDL-AD(2007)001 Report on Non-citizens and Minority Rights adopted by the Venice Commission at its 69th plenary session (Venice, 15-16 December 2006)

³⁷ The [Compilation of opinions and reports concerning Freedom of Expression and Media](http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2016)011-e) provides an overview of the general standards and principles considered by the reports of the Venice Commission alongside country-specific observations and recommendations. Available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2016\)011-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2016)011-e)

³⁸ Document CDL-AD(2015)018 Engl.Only

³⁹ Venice Commission, CDL-AD(2015)018, *Report on the freedom of expression of judges*, §§80-81

⁴⁰ Venice Commission, CDL-AD(2013)038, *Opinion on the legislation on defamation of Italy*, §§21-22

considered the issue of transparency of justice in court proceedings, and the possible impact public disclosure may have on the justice system.⁴¹ It notes that in placing limitations on public court proceedings or information, the consideration should be on the damage to the normal course of justice being immediate, easily identifiable and serious enough to justify a ban on public disclosure.⁴²

Freedom of expression, religious freedom and blasphemy, personal information

30. In its 2008 *Report on the relationship between Freedom of Expression and Freedom of Religion: the issue of regulation and prosecution of Blasphemy, Religious Insult and Incitement to Religious Hatred*⁴³, the Venice Commission expressed the view that “in a true democracy imposing limitations on freedom of expression should not be used as a means of preserving society from dissenting views, even if they are extreme. Ensuring and protecting open public debate should be the primary means of protecting inalienable fundamental values such freedom of expression and religion at the same time as protecting society and individuals against discrimination. It is only the publication or utterance of those ideas which are fundamentally incompatible with a democratic regime because they incite to hatred that should be prohibited”.⁴⁴ The report concludes:⁴⁵

- a) That incitement to hatred, including religious hatred, should be the object of criminal sanctions [...]
- b) That it is neither necessary nor desirable to create an offence of religious insult (that is, insult to religious feelings) simpliciter, without the element of incitement to hatred as an essential component.
- c) That the offence of blasphemy should be abolished (which is already the case in most European States) and should not be reintroduced.

31. As concerns the question of to what extent criminal legislation is adequate and/ or effective for the purpose of bringing about the appropriate balance between the right to freedom of expression and the right to respect for one’s beliefs, the Venice Commission reiterated that, in its view, criminal sanctions are only appropriate in respect of incitement to hatred (unless public order offences are appropriate).⁴⁶ Notwithstanding the difficulties with enforcement of criminal legislation in this area, there is a high symbolic value in the pan-European introduction of criminal sanctions against incitement to hatred. It is essential however that the application of legislation against incitement to hatred be done in a non-discriminatory manner.⁴⁷

⁴¹ Venice Commission, CDL-AD(2009)055, *Opinion on the Draft Law about obtaining information on activities of the Courts of Azerbaijan*, §§27, 47-48

⁴² Venice Commission, CDL-AD(2016)008, *Opinion on the Law on the Protection of Privacy and on the law on the Protection of Whistleblowers of “the former Yugoslav Republic of Macedonia”*, §83

⁴³ Document CDL-AD(2008)

⁴⁴ CDL-AD(2008)026, *Report on the relationship between Freedom of Expression and Freedom of Religion: the issue of regulation and prosecution of Blasphemy, Religious Insult and Incitement to Religious Hatred*, adopted by the Venice Commission at its 76th Plenary session (Venice, 17-18 October 2008), §46.

⁴⁵ *Ibid.*, §89.

⁴⁶ *Ibid.*, §90.

⁴⁷ *Ibid.*, §91.

32. The prohibition of defamation also raises the issue of the appropriate balance to be struck between freedom of expression, as protected by Article 10 ECHR, and the right to respect for private and family life, as protected by Article 8 ECHR. The Venice Commission has reiterated that ‘personality rights’ of individuals do not automatically prevail over the freedom of the press, and that it is up to Courts to balance competing interests and decide which of them prevails in the specific circumstance of the case.⁴⁸

33. The Venice Commission recalls the test to be applied in defamation cases: in the case of *Karakó v. Hungary* the Court held that the Convention protects, through Article 8, ‘core’ aspects of one’s reputation; it gives protection from ‘factual allegations [...] of such a seriously offensive nature that their publication had an inevitable direct effect on the applicant’s private life’ and not merely on ‘the external evaluation of the individual’.⁴⁹ However this protection is not absolute and is subject to a balancing expertise with Article 10 with various criteria such as truth, public interest, public status and prior conduct of person concerned, truth defence, the content, seriousness of allegation, source, status of the information, tone, among others.⁵⁰

34. The Venice Commission has commented in detail on the “public figure criteria” and that the limits of acceptable criticism are wider as regards public or political figures than as regards a private individual. In a democratic society, the government’s action must be subject to the close scrutiny not only by the legislative and judicial authorities but also by the press and public opinion.⁵¹

35. The issue of disclosure of personal information has also been commented on in a number of contexts. In relation to the disclosure of unlawfully obtained information, the Venice commission highlighted the need to reconcile between preventing and punishing illegal methods of obtaining information, such as wiretapping, and the impact of such laws on journalists acting in good faith.⁵² Furthermore it has considered the question of the publication of information that is both highly personal and a matter of public interest, and the matter of whistleblowers, in both cases remarking on the need for balance between competing rights, but that the matter of public

⁴⁸ Venice Commission, CDL-AD(2015)015, *Opinion on Media Legislation (Act CLXXXV on Media Services and on the Mass Media, Act CIV on the Freedom of the Press, and the Legislation on Taxation of Advertisement Revenues of Mass Media) of Hungary*, §26

⁴⁹ Venice Commission CDL-AD(2014)040 *Amicus Curiae Brief for the Constitutional Court of Georgia on the question of the defamation of the deceased*, §16

⁵⁰ Venice Commission CDL-AD(2014)040 *Amicus Curiae Brief for the Constitutional Court of Georgia on the question of the defamation of the deceased*, §23,

⁵¹ Venice Commission, CDL-AD(2016)008, *Opinion on the law on the protection of the privacy and on the law on the protection of whistleblowers of “The former Yugoslav Republic of Macedonia”*, §24 ; Venice Commission, CDL-AD(2016)002, *Opinion on Articles 216, 299, 301 and 314 of the Penal Code of Turkey*, §68 ; Venice Commission, CDL-AD(2013)038, *Opinion on the legislation on defamation of Italy*, §20; Venice Commission, CDL-AD(2013)024, *Opinion on the Legislation pertaining to the Protection against Defamation of the Republic of Azerbaijan*, §78

⁵² Venice Commission, CDL-AD(2016)008, *Opinion on the law on the protection of the privacy and on the law on the protection of whistleblowers of “The former Yugoslav Republic of Macedonia”*, §§36-42

interest plays a powerful factor and overly restrictive or burdensome laws suppress freedom of expression.⁵³

36. The Venice Commission has noted that there exist several forms of sanction on freedom of expression, including: administrative fines; civil law remedies, including liability for damages; restraints on publication of periodicals, magazines, newspapers or books, or on art exhibitions; criminal sanctions, both fines and imprisonment.⁵⁴ Criminal sanction is considered by the Venice Commission as only appropriate to prevent incitement to hatred, and Courts are the ideal arbiters of whether damage has been suffered and, if so, the extent of such damage.⁵⁵ It has expressed opinions on sanctions in such contexts as defamation, hate speech and disclosure of classified information, prior restraints or blocking of publications, among others.⁵⁶

Inflammatory speech or obscenities

37. The Venice Commission points out that the European approach to freedom of expression differs from others, such as the United States, as it does allow more room for content-based restrictions. However these are still to be strictly interpreted or applied. For example “Seditious” speech cannot be prohibited if it lacks incitement to violence.⁵⁷ Hate speech however is in contradiction with the Convention’s underlying values, notably tolerance, social peace and non-discrimination’ and, by virtue of Article 17 ECHR, may not benefit from the protection afforded by Article 10 ECHR.⁵⁸ The Commission has cautioned that when speech incites violence against an individual or sector of the population, the State authorities enjoy a wider margin of appreciation, that even political journalism has its limits, and that States have an obligation to fight hate crime.⁵⁹ However, as always, a balance and due assessment must be applied and blanket provisions or vague terminology in prohibitions of hate speech will risk applying to instances that fall short of “hate speech” and so violate Article 10.⁶⁰

⁵³ Venice Commission, CDL-AD(2016)008, Opinion on the Law on the Protection of Privacy and on the law on the Protection of Whistleblowers of “the former Yugoslav Republic of Macedonia”, §49-50 and §§52-54 ; §§77-79 and §84

⁵⁴ Venice Commission, CDL-AD(2008)026, *Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred*, §54

⁵⁵ Venice Commission, CDL-AD(2008)026, *Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred*, §§ 74-75

⁵⁶ Venice Commission, Compilation of opinions and reports concerning Freedom of Expression and Media, pp. 36 – 44

⁵⁷ Venice Commission, CDL-AD(2015)015, *Opinion on Media Legislation (Act CLXXXV on Media Services and on the Mass Media, Act CIV on the Freedom of the Press, and the Legislation on Taxation of Advertisement Revenues of Mass Media) of Hungary*, §23, with reference to CDL-AD(2014)010, §73 and CDL-AD(2014)043, §49

⁵⁸ Venice Commission, CDL-AD(2015)015, *CDL-AD(2013)024, Opinion on the legislation pertaining to the protection against defamation of the Republic of Azerbaijan*, §42;

⁵⁹ Venice Commission, CDL-AD(2015)004, *Opinion on the draft Amendments to the Media Law of Montenegro*, §12

⁶⁰ Venice Commission, CDL-AD(2013)012, *Opinion on the Fourth Amendment to the Fundamental Law of Hungary*, §5

Considering obscenities or insults, the Venice Commission notes that morality is a quickly evolving concept and its content is often uncertain,⁶¹ and so interferences with freedom of expression on these grounds are at risk of violating Article 10, which covers information and ideas which offend, shock or disturb.⁶²

h. Council of Europe Commissioner for Human Rights

38. Freedom of expression is covered by the mandate of the Commissioner as so features in his work encouraging improvement in the area of human rights promotion and protection.

Freedom of expression and the internet

39. The Commissioner has published an issue paper on *the Rule of law on the Internet and in the wider digital world* (2014) in which he examines how global digital environment that has created new means for local, regional and global activities, including new types of political activism, cultural exchanges and the exercise of human rights. Restrictions on access to the Internet and digital media, and attempts to monitor online activities or e-communications, interfere with fundamental rights to freedom of expression and information, freedom of association, privacy and private life (and possibly other rights such as freedom of religion and belief, or the right to a fair trial). While human rights to a large extent today are exercised using the Internet and the wider digital environment, they can be breached using these very same means. While there is general agreement that human rights should be enjoyed online as they are offline in practice, however, the actors who ensure enjoyment of human rights are not exactly the same in the two environments. In particular, the disproportionate influence and control that certain States and certain private companies exercise on the Internet and its physical infrastructure at the global level, are two essential elements of this difference. On the basis of the issues raised in this paper the Commissioner for Human Rights formulates a number of recommendations.

Freedom of expression and respect for belief

40. In connection with the debate in many European countries on the prohibition of religious clothing, such as the *burqa* and the *niqab*, the Commissioner for Human Rights referred in 2011 to a general ban on such attire as constituting an ill-advised invasion of individual privacy.⁶³ In his view the political challenge for Europe is to promote diversity and respect for the beliefs of others whilst at the same time protecting freedom of speech and expression. “If the wearing of a full-face veil is understood as an expression of a certain opinion, we are in fact talking here about the possible conflict between similar or identical rights – though seen from two entirely different angles.”

⁶¹ Venice Commission, CDL-AD(2015)004, *Opinion on drafts amendments to the media law of Montenegro*, §§35-3

⁶² Venice Commission, CDL-AD(2013)024, *Opinion on the Legislation pertaining to the Protection against Defamation of the Republic of Azerbaijan*, §48

⁶³ Viewpoint on “Burqa and privacy” published on 20 July 2011, see *Human rights in Europe: no grounds for complacency. Viewpoints by Thomas Hammarberg, Council of Europe Commissioner for Human Rights*, pp. 39-43.

III. UNITED NATIONS

Legal framework

Freedom of expression

41. Article 19 of the Universal Declaration of Human Rights and Article 19(1) of the International Covenant on Civil and Political Rights (ICCPR) guarantees everyone's right to hold opinions without interference and to seek, receive and impart information and ideas of all kinds, regardless of frontiers and through any media, including in the form of art.

42. Article 19(3) ICCPR proclaims that the exercise of the right to freedom of expression "carries with it special duties and responsibilities". Any restrictions upon that right shall be provided by law and be necessary and proportionate to protect: (a) the respect of the rights or reputations of others; (b) national security, public order, public health or morals.

43. Additionally, Article 20.2 ICCPR prohibits incitement to hatred. Freedom of expression is also addressed in the International Convention on the Elimination of All Forms of Racial Discrimination, Article 5(d) (viii), while Article 4 prohibits the dissemination of ideas or propaganda in favour of racial discrimination.

44. Regarding cultural diversity, Article 27 ICCPR states that in States where "ethnic, religious or linguistic minorities exist" the persons belonging to those communities shall not be denied the right "to enjoy their own culture...".

45. The Human Rights Committee, the monitoring body of the ICCPR's implementation, has adopted a number of General Comments in respect of freedom of expression. *General Comment No. 34*⁶⁴ analyses the scope of Article 19 ICCPR and elaborates that "it includes political discourse, commentary on one's own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse."⁶⁵

46. Particular to the role of media, General Comment No. 34 points out that a free, uncensored and unhindered media is essential in any society, a prerequisite for the enjoyment of other Covenant rights and "constitutes one of the cornerstones of a democratic society".⁶⁶

47. Persons should be informed about their rights under the ICCPR by the States. The right of access to information held by public bodies has a broad scope. It is granted not only to individual persons but also to minorities protected by Article 27 ICCPR. In General Comment No. 34 it is confirmed that "State party's decision-making that may substantively compromise the way of life and culture of a minority group should be undertaken in a process of information-sharing and consultation with affected communities".⁶⁷

⁶⁴ UN Human Rights Committee (HRC), *General comment no. 34, Article 19, Freedoms of opinion and expression*, 12 September 2011, CCPR/C/GC/34.

⁶⁵ *Ibid*, para. 11.

⁶⁶ *Ibid*, para. 13.

⁶⁷ *Ibid*, para. 18, citing Communication No. 1457/2006, *Poma v. Peru*, Views adopted on 27 March 2009 [7.6.].

48. Any restriction that States may impose on freedom of expression should be in compliance with the requirements of the tripartite test in Article 19 (3) ICCPR, that is provided by law, pursuing a legitimate aim and being necessary. The Human Rights Council is adamant that no limitation could serve “as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights”.⁶⁸ The relation between right and restriction and between norm and exception must not be reversed. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated. When the legitimate ground for restriction is “for respect the rights and reputations of others”, the term “others” may relate to persons individually or as members of a community. Any restrictions on internet-based dissemination of information should also be imposed in compliance with Article 19 (3). Generic bans on web-sites are forbidden. Restrictions should always be content-specific.

Prohibition of propaganda and incitement to discrimination, hostility or violence

49. The relationship between freedom of expression (Article 19 ICCPR) and the prohibition of propaganda and incitement to discrimination, hostility or violence (Article 20 ICCPR) is complementary, as those acts fall in the ambit of Article 19(3) ICCPR and therefore are subject to restriction. Article 20 may be considered as *lex specialis*, indicating what should be the response of the States towards those particular acts – they should explicitly prohibit them in their national legislation. That is fully based on the conclusions made in *General Comment No. 11: Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20)*.⁶⁹

50. The Committee on the Elimination of Racial Discrimination (CERD), which is tasked with monitoring the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination, has stressed the vital importance of combating hate speech and has noted throughout the years that hate speech is recurrent in the media, including the internet, in political discourse and other areas of public life, as well as in social life. The Committee has specifically issued *General Recommendation No. 35 (2013) on Combatting racist hate speech*.

UN General Assembly

51. In its Resolution on *Promotion of interreligious and intercultural dialogue, understanding and cooperation for peace (2013)*⁷⁰ the General Assembly “welcomes the efforts by the media to promote interreligious and intercultural dialogue”, encourages the further promotion of that dialogue among the media from all cultures and civilizations. It emphasizes that everyone has the right to freedom of expression, and reaffirms that the exercise of this right carries with it special duties and responsibilities and may be subject to certain restrictions. It also

⁶⁸ Ibid, para. 23, citing Communication No. 458/91, *Mukong v. Cameroon*, Views adopted on 21 July 1994.

⁶⁹ UN Human Rights Committee (HRC), *CCPR General Comment No. 11: Article 20 Prohibition of Propaganda for War and Inciting National, Racial or Religious Hatred*, 29 July 1983.

⁷⁰ UN General Assembly, *Promotion of interreligious and intercultural dialogue, understanding and cooperation for peace : resolution / adopted by the General Assembly*, 26 March 2013, A/RES/67/104. Similar Resolutions were adopted by the UN General Assembly in 2007, 2008, etc.

points out the relevance of the Internet for the promotion of intercultural and interreligious dialogue.

52. The General Assembly notes in its Resolution on *Combating intolerance, negative stereotyping, stigmatization, discrimination, incitement to violence and violence against persons, based on religion or belief (2015)*⁷¹ the exercise of freedom expression can play an important role for the strengthening of democracy and combating religious intolerance. There is an explicit reference to Article 19 ICCPR that expression carries also certain duties and responsibilities.

Human Rights Council Special Rapporteurs

Special Rapporteur on freedom of religion or belief

53. In his 2016 *Report* focusing on “Two closely interrelated rights: freedom of religion or belief and freedom of opinion and expression”, the Special Rapporteur considers that these rights are not in opposition to each other, which is a misconception.⁷² They are closely related in law and practice, and they both protect unconditionally a person’s inner realm of thinking and believing without any restrictions. He further underlines “that the open public debate of ideas, as well as interfaith and intercultural dialogue, at the local, national and international levels can be among the best protection against religious intolerance”.⁷³ In underlining the importance of intercultural dialogue he explicitly refers to the *Rabat Plan of Action on the Prohibition of the use of National, Racial or Religious Hatred*.⁷⁴ It highlights *inter alia* that political and religious leaders should refrain from using messages of intolerance, that they have critical role to speak out firmly and promptly against intolerance. In order to deal with the roots of intolerance governments should adopt different types of policies which in the area of intercultural dialogue are aimed at encouraging reciprocal knowledge and interaction, furthering education on pluralism and diversity, and empowering minorities and indigenous people to exercise their right to freedom of expression.⁷⁵ In addition, States are encouraged to introduce human rights values and intercultural understanding as part of the school curriculum; to train law enforcement agents on issues of prohibition of incitement to hatred, etc.

Special Rapporteur on freedom of expression

54. In his 2016 annual report to the General Assembly the *Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*⁷⁶ focused on the

⁷¹ UN General Assembly, *Combating intolerance, negative stereotyping, stigmatization, discrimination, incitement to violence and violence against persons, based on religion or belief: resolution / adopted by the General Assembly*, 3 March 2016, A/RES/70/157.

⁷² The previous Special Rapporteur Mr. Bielefeldt explained that some problematic restrictions include blasphemy laws, unclear anti-hatred laws and criminalization of ill-defined superiority claims.

⁷³ *Ibid*, para 32.

⁷⁴ The Rabat Plan is high level expert meeting workshop that was subsequently included in the UN Human Rights Council, *Annual report of the United Nations High Commissioner for Human Rights: Addendum Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred*, 11 January 2013, A/HRC/22/17/Add.4.

⁷⁵ *Ibid*, para. 37.

⁷⁶ UN General Assembly, *Promotion and protection of the right to freedom of opinion and expression*, 6 September 2016, A/71/373.

contemporary challenges to freedom of expression listed under the following headings which also concern European States:

- Legality, and more precisely that of legislation designed to combat terrorism, which raises concerns of vagueness; legislative processes not giving adequate time for public engagement or fail to address human rights obligations of the State; laws not providing courts or other independent third-party reviews with the authority necessary to evaluate claims of violations⁷⁷
- Surveillance and individual security online
- Internet shutdowns
- Preventing or countering terrorism and violent extremism
- Undermining the right to information
- Hate speech restrictions pursuant to article 20(2)
- The criminalization of criticism
- The assault on reporting
- Restrictions on expression relating to religion and belief
- The singling out of groups

55. At the same time the Special Rapporteur highlights a number of positive steps taken by States, including European States, to promote freedom of expression. In his conclusions he *inter alia* urges States to be particularly mindful of the context of digital rights, the integrity of digital communications and the roles of intermediaries, regardless of frontiers. In his view it will be particularly critical for States to avoid adopting legal rules that implicate digital actors — including, but not limited to, data localisation standards, intermediary liability and Internet security — that undermine the freedom of expression. There is a current deterioration of online rights and the coming years will show how strong the States' commitment is when it comes to the protection of freedom of expression online.⁷⁸ The earlier report of the Special Rapporteur submitted to the Human Rights Council in May 2016 focuses on Freedom of expression, States, and the private sector in the digital age.

56. A series of joint Declarations by Special Rapporteurs have also been issued in relation to different aspects of freedom of expression⁷⁹, the most recent one concerns freedom of expression

⁷⁷ §§14-16

⁷⁸ §56

⁷⁹ 2001 on countering terror, on broadcasting and on the internet ; 2004 on access to information and on secrecy legislation ; 2005 on the internet and on anti-terrorism measures ; 2006 on publishing confidential information, on openness of national and international public bodies, on freedom of expression and cultural/religious tensions, and on impunity in cases of attacks against journalists ; 2010 on Ten Key Challenges to Freedom of Expression In the Next Decade ; 2010 on right to know: An Entitlement for All, Not a Favour ; 2011 on freedom of expression and the internet ; 2012 on crimes against freedom of expression ; 2014 on universality and the right to freedom of expression; 2015 on freedom of expression and the internet freedom of expression and responses to conflict situations

and countering violent extremism⁸⁰ and on freedom of expression and “fake news”, disinformation and propaganda.⁸¹

Special Rapporteur on minority issues

57. In her 2015 report to the General Assembly on *Hate speech and incitement to hatred against minorities in the media*, the Special Rapporteur on minority issues identifies and analyses the (new) role of the media in preventing and combating hate speech and fostering social cohesion.⁸² In her opinion, the root causes of hatred often lie beyond purely ethnic or religious difference. Hateful messages spread much faster and endure where there are wider social, economic and political problems and divisions (structural inequalities). This is further accelerated by the Internet and social media platforms. The Special Rapporteur recommends a coordinated response which includes legal steps based on the international standards in the field of freedom of expression and non-discrimination that *inter alia* recognise the risks of misapplication of anti-hate speech legislation. Furthermore, the Special Rapporteur emphasises the need to adopt non-legal social responses that would engage majority communities, politicians, public figures as well as ordinary people concerned about the effects of discrimination. The report includes a variety of innovative measures and good practices for building tolerance, preventing and addressing hate speech for example:

- Education (initiatives) on human rights, respect for diversity, media literacy and responsible use of the internet and social media by citizens, particularly children and young people;
- Establishment of specialised institutions that would monitor and respond to hatred targeted against minorities and would reinforce stability;
- Promotion of ethical standards, regulatory bodies and facilitating participation of minorities in media outlets;
- Civil society initiatives aimed at addressing hate speech (including tracking and monitoring hate speech websites), working closely with governmental agencies and Internet providers for reporting hateful message; providing online education materials and training programmes.⁸³

IV. ORGANISATION FOR SECURITY AND CO-OPERATION IN EUROPE (OSCE)

Media rights

58. The OSCE has adopted the *Amsterdam Recommendations: Freedom of the Media and the Internet*, and the *Bishkek Declaration on Media in Multi-Cultural and Multi-Lingual Societies*.

⁸⁰ 2016 Joint declaration by the UN, OSCE, OAS & ACHPR Special Rapporteurs on Freedom of Expression and Countering Violent Extremism, 3 May 2016.

⁸¹ 2017 Joint declaration by the UN, OSCE, OAS & ACHPR Special Rapporteurs on freedom of expression and “fake news”, disinformation and propaganda, 3 March 2017

⁸² UN General Assembly, *Hate speech and incitement to hatred against minorities in the media*, 5 January 2015, A/HRC/28/64.

⁸³ *Ibid*, Chapter V.

59. Furthermore the *OSCE Representative on Freedom of the Media* plays a role in observing media developments as part of an early warning function, and helping participating States abide by their commitments to freedom of expression and free media. This includes efforts to ensure the safety of journalists; assist with the development of media pluralism; promote decriminalisation of defamation; combat hate speech while preserving freedom of expression; provide expert opinions on media regulation and legislation; promote Internet freedom; and assist with the process of switching from analogue to digital broadcasting.

60. The OSCE [Representative on Freedom of the Media](#) published in 2013 a Social Media Guidebook,⁸⁴ which provides an assessment of the potential and the challenges of social media and how it relates to the rights of free expression and free media. In various expert articles and specific case studies, the Guidebook lays out the field of social media and its effect on journalism.

Freedom of religion and belief and links to freedom of expression

61. In consultation with the Council of Europe's Venice Commission, the Panel of Experts on Religion and Belief of the Office of Democratic Institutions and Human Rights (ODIHR/OSCE) prepared Guidelines for Review of Legislation Pertaining to Religion or Belief which address freedom of expression in relation to freedom of religion.

V. EUROPEAN UNION

Legal framework

62. The Charter of Fundamental Rights commits the European Union to respect the freedom of expression. With the entry into force of the Lisbon Treaty, the Charter is legally binding on European Union institutions and on member states to the extent that they implement European Union law.

63. Freedom of expression guaranteed under Article 11 of the Charter is not an absolute right and may be restricted under specific a necessity/proportionality test envisaged under Article 52 (1). The test is similar although not identical to the test envisaged in Article 10 (2) ECHR.⁸⁵ It should be born in mind that since the Charter has become binding legal instrument, the Court of Justice has established that the Charter may provide for higher standard (level) of protection than the ECHR.⁸⁶ However, the Charter shall not be interpreted in a way “as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the

⁸⁴ Social Media Guidebook published on 13 February 2013

⁸⁵ The test for limitation of the fundamental rights consists of three different elements – procedural rule (“provided by law”), a rule on the justifications for limiting rights (“objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others”), and interconnected rules on the balancing test to be applied as between rights and limitations (obligation to “respect the essence of the rights”, “principle of proportionality” and necessity).

⁸⁶ Article 52(3) EUCFR. See Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] ECJ

Union or all the member States including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.”⁸⁷

64. Regarding cultural diversity, the Charter’s Article 22 proclaims that “The Union shall respect cultural, religious and linguistic diversity.” It is not entirely clear to establish the exact scope and meaning of that provision. Nevertheless, it is related to the core values of the Union.⁸⁸ On the other hand, it is to be noted that decision-making in the area of culture remains in the exclusive competence of the Member States. However, the Union shall encourage cooperation between the Member States in the area of culture and may “carry out actions to support, coordinate or supplement the actions of the Member States”.⁸⁹

65. Most of the secondary EU law instruments concerning the intersection of the right to freedom of expression and cultural diversity relate to broadcasting/audiovisual media services, electronic communications, and the establishment and financing of the Creative Europe programme.

66. The *Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law*⁹⁰ provides for the approximation of laws and regulations of EU countries on offences involving certain manifestations of racism and xenophobia and that serious manifestations of those offences are punishable by effective, proportionate and dissuasive penalties.

67. The Framework Decision contains a definition of the conduct of hate speech - (a) public incitement to violence or hatred directed against a group of persons or a member of such a group defined on the basis of race, colour, descent, religion or belief, or national or ethnic origin; (b) when carried out by the public dissemination or distribution of tracts, pictures or other material; or (c) publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes. Furthermore, this instrument establishes that the instigating, aiding or abetting in the commission of the above offences is also punishable.

68. In a subsequent Report of the Commission on the implementation of *Decision 2008/913/JHA* it was outlined that “Racist and xenophobic attitudes expressed by opinion leaders may contribute to a social climate that condones racism and xenophobia and may therefore propagate more serious forms of conduct, such as racist violence.”⁹¹

⁸⁷ Article 53 EUCFR.

⁸⁸ Article 3 (3) TEU states that the Union “shall respect its rich cultural and linguistic diversity, and shall ensure that Europe’s cultural heritage is safeguarded and enhanced”.

⁸⁹ Article 6 (1)(c) TFEU. According to Article 167(1) TFEU “The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.”

⁹⁰ European Union: Council of the European Union, *Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law*, 28 November 2008.

⁹¹ Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law, document COM(2014) 27 final, p. 9

Jurisprudence of the European Court of Justice

69. The jurisprudence of the European Court of Justice (CJEU), in the field of freedom of expression in the context of cultural diversity, is mainly in the area of broadcasting services and media pluralism.⁹² In *Google Spain v. Mario Costeja González*, the Court compelled Google under the Data Protection Directive of the European Union to delist search results based on web pages that identified González, even though the original publication of those pages was itself not subject to takedown.⁹³ This decision raises questions about the appropriate balance between the rights to privacy and protection of personal data on one hand, and the right to seek, receive and impart information containing such data on the other.

Guidelines on freedom of expression online and offline

70. The *EU Human Rights Guidelines on Freedom of Expression Online and Offline*⁹⁴ explain the international human rights standards on freedom of opinion and expression and provide political and operational guidance to officials and staff of the EU Institutions and EU Member States for their work in third countries and in multilateral fora as well as in contacts with international organisations, civil society and other stakeholders. The Guidelines also provide officials and staff with practical guidance on how to contribute to preventing potential violations of freedom of opinion and expression, how to analyse concrete cases and to react effectively when violations occur in order to protect and promote freedom of opinion and expression in the EU's external action. They also outline how and in what strictly prescribed circumstances the freedom of opinion and expression can be limited. The Guidelines refer to a great variety of international human rights legal instruments, among them the ICCPR and the ECHR.⁹⁵

Code of conduct on countering illegal speech online

71. The Commission (DG *Justice, Consumers and Gender Equality*) and the IT Companies (Twitter, Youtube, Facebook, Microsoft) drafted the *Code of conduct on countering illegal speech online (2016)*⁹⁶ aimed at guiding the IT Companies' own activities as well as sharing best practices with other internet companies, platforms and social media operators. The Code of conduct points out that the assessment of what is protected by the right to freedom of expression and what will be deemed as illegal hate speech will be based on the jurisprudence of the ECtHR

⁹² Since the Lisbon Treaty entered into force there is only one judgment in that area - Case C-134/10 *European Commission v Kingdom of Belgium* [2011] ECR I-01053. In para. 44 the CJEU finds *inter alia* that "According to the well-established case-law of the Court, and as the Commission acknowledges in the present case, a cultural policy may constitute an overriding requirement relating to the general interest which justifies a restriction of the freedom to provide services (see, to that effect, *United Pan-Europe Communications Belgium and Others*, paragraph 41 and the cited case-law)."

⁹³ Judgment of the European Court of Justice (Grand Chamber), case C-131/12 (13 May 2014).

⁹⁴ Council of the European Union, Foreign Affairs, *The EU Human Rights Guidelines on Freedom of Expression Online and Offline*, Brussels 12 May 2014.

⁹⁵ In footnote 2 of the Guidelines, they refer to the relevant sources - Articles 2, 6, 21, 49 of TEU and articles 7, 8, 10, 11, 22 of the EUCFR, ICCPR, ECHR. A useful source of guidance for interpreting Article 19 ICCPR is the UN Human Rights Committee's general comment 34 (UNHRC/GC34).

⁹⁶ European Commission, *Code of conduct on countering illegal speech online* (Brussels, 31 May 2016).

and on *Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law*.⁹⁷

72. In December 2016 the Commission presented the results of a first monitoring exercise to evaluate the implementation of the *Code of Conduct*. The grounds for reporting hatred were the following: race, colour, national origin, ethnic origin, descent, religion, anti-Muslim hatred, Antisemitism, sexual orientation or gender-related hatred. A large number of cases corresponded to some form of anti-migrant speech identified on the grounds of anti-Muslim hatred, ethnic origin or race, depending on the context of the message.⁹⁸ This evaluation was followed by the EU Commission observation that only 40 % of all notifications were reviewed under 24 hours, while the aim of the code of conduct is to review the majority within 24 hours.

Annual colloquium on fundamental rights

73. In November 2016 the second Annual Colloquium on Fundamental Rights in Brussels was held with main topic "Media Pluralism and Democracy". All of the main speakers at the Colloquium addressed the rising issues of misleading news, propaganda and populism in Europe.⁹⁹ The conclusions of the Colloquium mention the necessity of key actions in the field such as protection of media freedom and independence from political pressure; safeguarding the financial independence of the media in the European Union; protection of journalists and their freedom of expression; protection of journalists and new media actors from hate speech; protection of whistleblowers and investigative journalism;¹⁰⁰ promotion of a healthy political debate and lasting political engagement through media literacy, media ethics and media pluralism. Subsequently, the EU Commission confirmed that it will take measures in support of these six key actions.¹⁰¹

74. As a contribution to the Colloquium, the EU Fundamental Rights Agency (FRA) presented two research studies. The first study focuses on the issue of "incitement" in media and in the public discourse of the EU, *Incitement in media content and political discourse in EU Member States*.¹⁰² In this study, the FRA observes that in the situation of a large number of migrants and asylum seekers arriving in EU combined with reactions to the terrorist attacks has resulted in more opened manifestations of racism, xenophobia and intolerance in the public discourse. Particular emphasis is placed on the growing reliance on the Internet as a main source of information for many people. That "enables the fast spread of (unverified) statements that

⁹⁷ The *Code of conduct* refers also to Directive 2010/13/EU (*Audiovisual Media Services Directive*) and the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (*'Directive on electronic commerce'*, OJ L 178, 17.7.2000) .

⁹⁸ A full *factsheet* summarizes the main findings.

⁹⁹ Ibid, page 3 'A strong digital media sector, combined with media freedom and with a real plurality of views, as well as high levels of media literacy, can truly empower citizens and protect our democracy from populism'.

¹⁰⁰ In the Conclusions of the Colloquium there is an explicit deference to the role of the Council of Europe Committee of Ministers Recommendations for the protection and non-disclosure of journalistic sources; for the protection of whistle-blowers and for guaranteeing the independence of public service media.

¹⁰¹ http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=51071

¹⁰² The *study* refers to the relevant legal framework in the EU, Council of Europe (including ECtHR jurisprudence) UN and OSCE. Further, it provides a list of examples with cases of incitement before national courts and complaints before the national electronic media councils.

could incite to hatred” which can go viral, and their challenge/complete removal is difficult. The second study focus on the safety of journalists in the EU, *Violence, threats and pressures against journalists and other media actors in the European Union*. In this second study, the FRA presents evidence of the diverse threats encountered by journalists and media actors in the EU; outlines the legal and policy frameworks relevant to ensuring their safety; and scrutinises particular issues encountered by women, who are often targeted because of their gender. Highlighting that safety is a serious concern even within the EU, this FRA paper underlines that there is no room for complacency when it comes to protecting freedom of expression.

VI. CONCLUSIONS

75. Several sectors within the Council of Europe as well as in other international and regional organisations, namely the UN, OSCE and the EU, have in their recent work addressed the challenges of guaranteeing freedom of expression. Despite the existence of legal standards addressing a number of aspects concerning this freedom, reports released in recent years (UN and FRA) indicate that such challenges are far from being won. Most notably the Secretary General’s Reports on the State of Democracy, Human Rights and the Rule of Law in Europe of 2015 and 2016, focusing on a number of key areas relating to freedom of expression, identified a number of serious concerns and threats such as violence against journalists, at times without adequate investigation or prosecution of the perpetrators; unjust and politically motivated prosecution and criminal investigation of journalists; excessive or abused defamation laws, hate speech; use/misuse of blasphemy laws. The Secretary General also stressed on the challenges of the exercise of freedom of expression that arise as concerns the internet. His report in 2017 will also address topics linked to freedom of expression such as populism and the threat to democracy; ‘fake news’ used to spread propaganda messages or to disseminate information to manipulate public opinion; migration issues; and the prevention of terrorism such as the attack on *Charlie Hebdo*’s office Paris.

Freedom of expression

76. The exercise of the freedom of expression offline and in particular online is often restricted, sometimes without justification in international human rights law. An indication of this is the large number of cases before the European Court of Human Rights regarding Article 10. Furthermore, the UN Special Rapporteur expressed in his most recent report disappointment by the fact that many States with strong histories of support for freedom of expression — in law and in their societies — have considered measures (often to enhance surveillance or to limit Internet which constitute abuse in their own countries or to misuse when applied elsewhere). Attacks on security on the Internet pose long-term threats not only to freedom of expression but also to national security and public order itself.

77. Freedom of expression in the digital age will imply new challenges for States since they will need to adopt legal rules that affect digital actors – including, but not limited to, data localisation standards, intermediary liability and Internet security — that undermine the freedom of expression. There is indeed a need to reaffirm that rights offline be respected online.

78. Hate speech continues to cause a problem in particular because European human rights law lacks an adequate definition of the concept. This issue was also raised by the *Delfi v. Estonia* judgment in the context of prohibition of incitement. Most recently the Parliamentary Assembly recommended that the Committee of Ministers' recommendation on hate speech be reviewed and updated.

Human rights in culturally diverse societies

79. The CDDH has conducted work on the protection and promotion of human rights in culturally diverse societies and produced a manual on hate speech in 2008.

80. A few years ago the CDDH prepared a Compilation of Council of Europe standards relating to the principles of freedom of thought, conscience and religion and links to other human rights, in particular freedom of expression. The recent Committee of Ministers' Guidelines on the protection and promotion of human rights in culturally diverse societies highlight fundamental freedoms such as the freedom of thought, conscience and religion, freedom of expression and freedom of assembly and association.

a. Guide to good national practices

81. The current work to prepare a guide to good national practices on reconciling freedom of expression with other rights and freedoms, in particular in culturally diverse societies would thus build on the CDDH's past work in this field. It would be based on the analysis of the relevant case-law of the European Court of Human rights as well as standards developed by other committees and bodies within the Council of Europe as well as by other international and regional organisations.

82. The CDDH's current work on preparing a guide to good practices could well focus on specific aspects of freedom of expression. One such aspect could for example be the concept of hate speech both off- and online. This could help to clarify the definition of hate speech on the basis of good national practices and the international human rights standards developed in the Court's case-law as well as the relevant ECRI General Policy Recommendation.

83. The CDDH is invited to express its views on how to conduct the work on the drafting of a guide to good national practices on freedom of expression. A methodology for the selection of good practices would need to be determined (e.g. would it require a questionnaire?) and it might be necessary to decide on specific areas of focus. The present preliminary analysis of existing standards already allows the identification of some issues such as the concept of hate speech, in relation to racial violence or as opposed to permissible criticism of a religion, which is still an issue of conflict in culturally diverse societies.

b. Cyber security and human rights

84. The right to freedom of expression on the Internet is an issue of increasing interest and importance as the rapid pace of technological development enables individuals to use new information and communication technologies. Individuals enjoy the full range of other rights online, such as privacy, religious belief, association and peaceful assembly, education, culture and freedom from discrimination. States have both a negative obligation to refrain from violating rights and a positive obligation to ensure enjoyment of those rights. These positive obligations

may require public authorities to take steps to protect individuals from the actions of private parties. Disruption and even blocking of Internet platforms and the shutting down of telecommunications infrastructure are persistent threats, for even if they are premised on national security or public order, they tend to block the communications of often millions of individuals and jeopardise freedom of expression online.

85. The topic is connected to the work of other bodies and committees within the Council of Europe such as the Steering Committee on Media and Information Society (CDMSI) and the Council of Europe Commissioner for Human Rights. Many of the issues that this work would raise are of technical nature and require a multi-stakeholder approach. The topic is directly linked to the Committee of Ministers' Recommendation on human rights and business prepared by the CDDH as a follow up to the UN Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework endorsed by the Human Rights Council. A high-level seminar on the implementation of this recommendation will take place in June this year in connection with the plenary meeting of the CDDH.

86. The CDDH is invited to express its view on the usefulness to of starting work on cyber security and human rights, which could possibly lead to the preparation of a new draft recommendation on the topic. It would in any event be essential that the CDDH cooperate and coordinate any future work on this topic with the other relevant bodies and committees in the Council of Europe, in particular the CDMSI.