



**EU SUGGESTED BEST PRACTICE DOCUMENT: CRITICAL
ANALYSIS AND POLICY RECOMMENDATIONS FOR EU-WIDE
HATE CRIME LAWS**

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The Daphne III programme aims to contribute to the protection of children, young people and women against all forms of violence and attain a high level of health protection, well-being and social cohesion.

Its specific objective is to contribute to the prevention of, and the fight against all forms of violence occurring in the public or the private domain, including sexual exploitation and trafficking of human beings.

It aims to take preventive measures and provide support and protection for victims and groups at risk.

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It is appropriate to subject the various EU hate crime provisions to critical policy analysis that weighs up their pros and cons, and defends aspects of them from inappropriate forms of critique, and then draw some policy conclusions based on a sense of best practice. The aim of identifying best practice is to generate reform suggestions in the form of detailed model legislation. This is contained in the final section of this document.

A key point to make at the start concerns the narrow definition of protected groups under current EU measures. The restrictions to racist forms of hate crime and genocide denial contained in the Framework Decision is not central to the political and constitutional cultures of all member states. Indeed, it has not prevented the criminal law implementation measures of some EU Member States from including a number of other grounds, such as disability, anti-Semitism, or sexual orientation.¹ Certain EU bodies have even encouraged this expansive approach to national implementation, with the FRA stating: ‘In the spirit of non-discrimination, it is certainly preferable to widen criminal law provisions to include equally all grounds of discrimination covered by Article 14 of the ECHR or Article 21 of the Charter of Fundamental Rights of the European Union.’² This criticism would, in practice, suggest a need for Member State supplementing these categories with one or more of the following: gender, social origin, genetic features, language, political or any other opinion, membership of a national minority, birth, property or other status, disability, age or sexual orientation.

¹ Such extension by EU Member States to a wider range of categories of discrimination has occurred in Austria, Belgium, Croatia, Finland, Latvia, Lithuania, Malta, the Netherlands, Romania and Spain. Others, including Denmark, Hungary, Sweden and the UK, have included at least sexual orientation as an additional category. See FRA Report 2012, 25.

² FRA Report 2012, 25.

Whilst supporting an expansion of the range of groups covered, the following paragraphs issues a cautionary warning against a massive extension to cover all these groups on grounds of both principle and practical consequences.

One clear difficulty with the FRA's proposed proliferation of protected categories is that it may create a situation where the specific differences demanding recognition and concrete response by particular victim groups are merged together into a general and relatively abstract category, such as 'all members of any group.' It is arguable that each of the currently recognised groups encounter different issues and, not surprisingly, expect their particular and distinctive concerns to be both heard and responded to effectively by tailor-made measures. This contention is supported by the fact that representatives of each of the victim groups tends to campaign independently on those hate crime issues that are of particular relevance to their members, rather than merge forces on a common programme of action, including law reform.

The creation of such an abstract category as a result of proliferation, followed by later consolidation, could, therefore, prove counterproductive by failing to recognise the distinctive and specific issues faced by particular groups subject to hate crime victimisation, such as persons with disabilities.³ It would also frustrate efforts to render visible currently hidden dimensions of discrimination, including by reference to successful prosecutions. Furthermore, such consolidation would probably inhibit criminal courts from adapting their sentencing practices to specific local or regional factors. These could include a sudden rise in attacks on persons with disabilities that demand an effective and swift judicial response to concrete issues through well-publicised deterrent sentences. These would need to send out a clear message as to both the unacceptability of such abuse, and its possible legal consequences for perpetrators.

³ FRA Report 2012, 25

Contrary to the FRA's suggestion, it also remains questionable whether, for example, 'social origin, property or other status' are appropriate categories. Although probably appropriate for general human rights standards enforced by non-criminal administrative sanctions, it is doubtful whether they either can or ought to form the basis of distinctly criminal prosecutions or sanctions for incitement. For example, these could embrace comparatively routine public expressions of class-based resentment against, for example, the super-rich, bankers or large property owners. Such extended incitement laws could even apply to public and parliamentary debate over proposals for redistributive legislation involving the nationalisation and reallocation of land and other assets at the expense of large private landowners, who could then claim they are being singled out on grounds of status, birth or property.

In addition, the proposed inclusion of 'political opinion' within the protected categories could be problematic. In practice, aspects of the 'political opinions' of extremist far-right groups promoting fascistic racism, and less clearly certain forms of political Islam and Communist, are already subject to various legal restrictions at the national level at least. The legal validity of these restrictions have been upheld by the ECtHR in various cases involving genocide denial by neo-Fascists and anti-Semites on the basis that these expressions infringe the rights of others.⁴ In short, to include all types of 'political opinions' as a protected category as the FRA propose would, therefore, generate redundancies and contradictions. Even from a purely anti-discriminatory perspective, these could prove counterproductive, not

⁴ Marais; Keegstra; R. v. Krymowski [2005] 1 S.C.R. 101; R. v. Zundel [1992] 2 S.C.R. 731; Lehideux v. France (case no. 55/1997/839/1045, application no. 24662/94, Publication 1998-VII, no. 92; Garaudy v. France, 2003-IX Eur. Ct. H.R. 333, 339-41; X. v. Federal Republic of Germany, European Commission of Human Rights 16 (July 1982); Faurisson v France, 2 BHRC UN Doc. CCPR/C/58/D/550/1993, 1 (United Nations Human Rights Committee 1996); Chauvy v France (2005) 41 E.H.R.R. 29; Witzsch v Germany (App. No.41448/98, April 20, 1999. For analysis of how expressions of denial fall outside Art 10 protections, see Hannes Canni, Dirk Voorhoof, 'The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection,' 29 Neth. Q. Hum. Rts. 54 (2011); Cooper and Marshall-Williams, 'Hate Speech, Holocaust Denial and International Human Rights, [1999] E.H.R.L.R. 693; Sionaidh Douglas-Scott, 'The Hatefulness of Protected Speech: A Comparison of the American and European Approaches,' 7 *Wm. & Mary Bill Rts. J.* 305, 327 (1999).

least with respect to genocide denial.

The following subsections develop a critical policy analysis of the provisions regulating hate crime contained in the EU's Framework Decision, then the Additional Protocol to the Cyber-Crime Convention.

Criticisms of the Additional Protocol

Arguably, the Additional Protocol failed to reach a substantial international agreement on racist speech standards, and such an agreement is unlikely to be reached in the foreseeable future.⁵ What is more, it is doubtful whether this measure does in fact give full effect to the specific and relevant international and human rights measures and instruments it appeals to in its justification. Although it would exceed the scope of the present study to devise and then apply consolidated criteria of assessment of the Protocol based on these various measures, it is difficult to accept that this measure would fully meet such a yardstick, not least because of the scope of the various reservations. In addition, this measure, particularly its reservation (or 'opt out') provisions can be seen as only a weak and partial response to existing Council of Europe conventions on co-operation in the penal field.

Other objections are more general. Using criminal legislation enacted under the CoE Cyber-crime protocol against individuals risks making those individuals 'martyrs' in the eyes of their communities. It could also serve to further polarise communities and exacerbate tensions and intolerance.⁶ In addition, these questions of law enforcement trespass upon civil liberty concerns and interests in that they require an unacceptable level of State intrusion and censorship into interpersonal communications. Liberals typically argue that censorship is the enemy of democratic values: there are dangerous implications and undercurrents for our hard

⁵ Rorive, 2009 op cit, 422.

⁶ McMenemy, D., Poulter, A. and O'Loan, S., 2005 op cit 501.

won liberties.

It is also possible to question whether current legal approaches to cyber hate crime are practical and appropriate, and the extent to which the transposition of 'real life' regulation through criminal law can be effectively imposed upon 'virtual life' regulation.⁷ Difficulties also concern problem of veracity and authenticity of Internet content.⁸ Furthermore, countries that are safe havens for hosting hate material might have acquired an additional sense of security.

In terms of effectiveness, it is arguable that the project of ever greater alignment of national criminal laws in relation to web-content may not be feasible at least in the short term because of the moral, cultural, economic, and political differences between the CoE Member States, and divergent interpretations of the meaning and proper limits of constitutionally protected "freedom of expression." There are likely to be disparities in the willingness of different nation states to take action against ISP's and the limited experience of attempting prosecutions in this area under national criminal law is mixed to say the least with some convictions in Germany being overturned on appeal.⁹ Although, it is not possible to predict how effective any regional transnational initiative effort like the Additional Protocol involving the criminalisation of acts of a racist and xenophobic nature committed through computer systems is likely to be. Even if the project of 'harmonisation' succeeds in the formal sense of all member states of the CoE both signing and ratifying this measure, it is

⁷ Audrey Guicharda, 'Hate crime in cyberspace: the challenges of substantive criminal law,' *Information & Communications Technology Law*, Volume 18, Issue 2, 2009: 201-234.

⁸ Candida Harris, Judith Rowbotham & Kim Stevenson, 'Truth, law and hate in the virtual marketplace of ideas: perspectives on the regulation of Internet content,' *Information & Communications Technology Law* Volume 18, Issue 2, 2009, 155-184.

⁹ See, for example, the Criminal case of Somm, Felix Bruno, File No: 8340 Ds 465 JS 173158/95, Local Court (Amtsgericht) Munich. An unofficial English translation of this case is now available at www.cyberrights.org/isps/somm-dec.htm. Other prosecutions have had mixed results. See 'Ex-CompuServe Executive Convicted,' Associated Press (Berlin), 28 May, 1998. However, the conviction was later quashed in November 1999: see. 'Germany clears Net chief of child porn charges,' *The Independent*, 18 November 1999. See also the prosecution of Frederick Toben, a German-born Australian Holocaust revisionist who possessed an Australian passport, who denied by the German Bundesgerichtshof (German Federal High Court). Toben's website was published and maintained in Australia. See Chidi, G., 'Web law blocks growth When in Rome,' *InfoWorld*, Vol. 23, Issue 10, March 5, 2001; Gold, S., 'German Landmark Nazi Ruling,' *Newsbytes*, December 12, 2000.

unlikely that the problem of internet related hate crime itself will be fully or substantially suppressed. Whether the language of ‘combating’ racism, which implies the possibility of such a complete ‘victory’ and ‘surrender,’ is appropriate, as opposed from acting pragmatically to reduce the identified harm and risks to the lowest realistic levels possible, remains an open question. Much depends on whether racism itself is interpreted as a contingent and potentially temporary deviation from what is presumed to be an otherwise "normal" state of affairs of universal mutual respect and affirmation of difference.

Alternatively, is it more realistic to interpret racism as a more deep-seated phenomenon linked, to a greater or lesser extent, to European cultural identity formation itself in which the affirmation of one sense of shared cultural identity involves the negation of another, its distinctive other?

Criminalisation is but one of a series of options available to address the risks and problems of transnational internet-based racism in a global society. Despite the possible symbolic value of acts of criminalisation as a policy gesture as arguably the ‘strongest’ response, there is still the policy issue of identifying the pros and cons of each of these policy responses on the basis of the best available empirical evidence of the effectiveness of similar domestic measures introduced in the past. One of the fruitful contributions of legal expertise is to identify not only the possibilities but also the likely limits of legal responses deploying criminalisation based on prior national experiences, and to ascertain what is the optimal role for such responses as one part of a wider package of such measures. This package includes: ISP self-regulation, self-regulation subject to the threat of economic state sanctions if it proves ineffective in practice, co-regulation, and information and education campaigns,¹⁰ which their

¹⁰ The Declaration on Freedom of communication on the Internet adopted by the COE's Committee of Ministers on 28 May 2003 (840th meeting of the Ministers' Deputies and explanatory note, H/Inf (2003)7.) advocates self-regulation and co-regulatory initiatives concerning Internet content, which develops . similar proposals contained in a CoE Recommendation (2001) on self-regulation concerning cyber-content: Recommendation Rec(2001)8 was adopted by the Committee of Ministers on 5 September 2001 at the 762nd meeting of the Ministers' Deputies. See the Explanatory Memorandum to 7

liberal supporters argue can be less costly, more flexible and more effective than resort to State legislation.¹¹

A further question is whether it is realistic to posit the goal of "harmonisation" of the legal regulation of a truly global entity, such like the internet, within the context of a regional institution whose member states' constitutions subscribe to divergent attitudes to providing constitutional protection for politically defined 'freedom of expression.' Jurisdictional issues related to the practicalities of enforcement and its evasion, which require close legal analysis, cannot be ignored. Outside the COE, states such as the USA are likely to continue to provide safe havens for genocide web-sites engaged in practices of genocide denial and trivialisation prohibited by the protocol owing to their liberal fundamentalistic interpretation of the meaning of 'freedom of expression.' The difficult question arise as to whether having internet regulation of hate crime by criminal laws whose implementation is, in practice, weakened, even mocked, by the existence of such safe havens is still better than none at all?¹² On the one hand, there is the symbolic re-affirmation that racist hate crime through words is contrary to European values and identity. On the other hand, the very idea of what counts as 'European' here may be skewed towards the officially-recognised political cultures of Central and Western European states.¹³

Recommendation (2001) 8 of the Committee of Ministers to member States on self-regulation concerning cyber content: 'Self-regulation and user protection against illegal or harmful content on new communications and information services.' The European Commission's Action Plan on promoting safer use of the Internet was extended to cover EU candidate countries, and includes research into technical means to address harmful content, as well as information and education campaigns.

¹¹ Dr. Yaman Akdeniz, *An Advocacy Handbook for the Non Governmental Organisations: The Council of Europe's Cyber-Crime Convention 2001 and the additional protocol on the criminalisation of acts of a racist or xenophobic nature committed through computer systems*, www.cyber-rights.org; First Published: December 2003 (Updated and revised in May 2008)

¹² Recommendation 1543 (2001) on Racism and xenophobia in cyberspace, text adopted by the CoE's Standing Committee, acting on behalf of the Assembly, on 8 November 2001.

¹³ The practices of certain Eastern European states may strike many Western Europeans as highly problematic. For example, the Czech Republic has only recently (May 2012) and following EU objections stopped its policy of 'phallometric testing' for asylum procedures consisting of testing the physical reaction to heterosexual pornographic material of gay men who had filed a claim for asylum on the basis that they had been persecuted for their sexual orientation. Not all Member States acknowledge same-sex marriage. See Cecilia Malmström (European Commissioner responsible for Home Affairs) 'A need for strong European leadership to combat discrimination': SPEECH/12/358: Brussels, 15 May 2012: http://europa.eu/rapid/press-release_SPEECH-12-358_en.htm?locale=en. Possible accession states from this region are

Criticisms of the Framework Decision

The range of possible second major and more general provisions of the EU's Framework Decision, which the details and limitations of which will now be discussed, starting with the provisions for penalty enhancement. This policy is problematic insofar as the enhancement is not itself clearly identified, such that media publicity to individual cases can note the extent to which the penalty was enhanced and thereby send out a symbolic message concerning the especially problematic nature of hate crime relative to parallel offences lacking bias motivation. There are objections to how enhancement works in practice. Arguably, it sends a message not that bias or bigotry is intolerable in itself but that it is only intolerable in those who commit already established crimes. Furthermore, it also implies that those who do not commit this type of crimes are outside or absolved of responsibility for the reiteration of bias and bigotry in those who do. This is a counterproductive message given that all members of society need to take some responsibility for combatting racism and xenophobia

Whilst defending some aspects of the Decision, it is impossible to ignore the difficulties of other parts of this EU measure. Without reducing the criminal law response to hate crimes to little more than an enforcement mechanism of European-wide human rights standards, particularly 'freedom from discrimination,' it is possible to identify various problems and difficulties with the Framework Decision.

Part of its stated rationale is the '*harmonisation*' of national responses through 'a common criminal-law approach in the European Union to this phenomenon in order to ensure that the same behaviour constitutes an offence in all Member States and that effective, proportionate

identified as having particular issues involving the non-prosecution of hate crimes and related hate speech. See 'Key findings of the progress reports on Albania, Montenegro, Bosnia and Herzegovina, Serbia, and Kosovo.' MEMO/09/450: Brussels, 14 October 2009: http://europa.eu/rapid/press-release_MEMO-09-450_en.htm?locale=en

and dissuasive penalties are provided for natural and legal persons having committed or being liable for such offences.’¹⁴ Given this objective, it is remarkable that member states are given so many opportunities through both reservation provisions and alternative options to "cherry pick" which aspects they find it expedient to introduce into their domestic law.

This would be less of an issue if these reservations were confined to fringe issues but they are not. The ability to limit incitement to commit hate crimes to contexts where ‘public disorder’ is likely to result, or to opt out of such provisions altogether on the grounds of domestic freedom of expression guarantees, is closer to a complete negation of a core element of the overall legislative scheme. Even if every States Parties implement the Decision as fully they are required to do, the presence of the various reservations means that it would be possible for there to exist many different versions within EU Member States. Of course, such sources of variability may have been the price that had to be paid to secure sufficient measure of political agreement, particularly that of states with emphatic and entrenched ‘freedom of expression’ provisions in their constitutions, which cannot be straightforwardly altered. Nevertheless, any such explanation should not be confused with a justification of its practical results.

It is questionable whether one of the alternatives contained in the Decision should ever have been authorised: the ‘aggravated circumstances’ option. Indeed, it is possible to identify four major problems with this alternative:

1/. Official statistics typically refer only to the specific type of crime and the penalty ultimately applied. As a result, even where judges factor in the bias motivation to their decision, this will not become visible or recorded.

2/. Insofar as such motivation is reduced to just one aggravating circumstance among many

¹⁴ The full section of the preamble states: ‘Racism and xenophobia constitute a threat against groups of persons which are the target of such behaviour. It is necessary to define a common criminal-law approach in the European Union to this phenomenon in order to ensure that the same behaviour constitutes an offence in all Member States and that effective, proportionate and dissuasive penalties are provided for natural and legal persons having committed or being liable for such offences ... Since the Member States’ cultural and legal traditions are, to some extent, different, particularly in this field, full harmonisation of criminal laws is currently not possible.’

others, neither court proceedings nor police reports are likely to address this element in its own right. In turn, this can result in such motivation being underplayed in legal decision-making.

3/. The *deterrent value* of this option as a way of protecting an individual's human dignity is also insufficient. This is because, unlike an enhanced penalty, the increase in sentence length attributable to the bias motivation is typically not made clear.¹⁵

4/. If a state's legal situation leaves it to the individual judge's discretion to decide whether or not to take the 'bias motivation' that forms the 'aggravating circumstance' of a hate crime into account, this fails to give full effect to the unconditional obligation to 'unmask' such motivation as ECtHR decisions on the implications of Article 14 require.

EU legislation prohibits unequal treatment on the basis of, among other grounds, sexual orientation in many areas. But combating hate crimes based on sexual orientation or gender identity, remains curiously neglected. This generates the curious result that a discriminatory failure to secure a minor promotion is taken more seriously by EU law in its specifics than, say, a discriminatory motivated hate crime. (Of course, national laws, and criminal justice responses may well not always be characterised by this discriminatory response to the experience of discrimination but that is not the central point in the present context.)

There is also the difficult question of whether those provisions concerned with the denial of genocides or related atrocities, which specify authorities such as the ICC, are appropriate and competent for this task? Arguably, it is entirely appropriate to criminalise genocide / Holocaust denial given the role this activity plays in violent and extremist racist movements eager to rehabilitate Nazism, and to insist the final decisions of properly constituted international criminal courts on the factual existence of such genocide be accepted. Here, we have a decision by an authorised and competent body establishing that, following a review and critical testing of relevant trial evidence, genocide (in the distinctly legal sense) has in

¹⁵ The FRA recently argued 'Legislators should look into models where enhanced penalties for hate crimes are introduced to stress the added severity of these offences. This would serve to go beyond including any given bias motivation as an aggravating circumstance in the criminal code. The latter approach is limited in its impact because it risks leading to the bias motivation not being considered in its own right in court proceedings or in police reports. Courts rendering judgments should address bias motivations publicly, making it clear that these lead to harsher sentences.' FRA 2012 op cit, 11.

fact been committed.

A difficulty could arise, however, where it is a *purely national* court state of an EU member state that makes this decision without equivalent authorisation or justification. Recall that Article 1(4) authorises Member States on their adoption of the Decision to issue a statement that it will punish the "denial" and "trivialization" of genocide and related international crimes where their factual existence is accepted by a national court of the Member State in question. However, because of what may well be a drafting omission, these states cannot include in this statement that they will also punish the "condoning" of the same crimes as included in other articles because this word is not mentioned in the text of 1(4). Where, to ensure consistency with the overall spirit and implementation of the Decision, a Member State includes "condoning" with other states taking a more literal approach to interpretation, then this will prove problematic. It would add to existing issues of inconsistency between European States in responding to the same type of racist abuse of the memory of victims of mass atrocities. If the activities of "denial" and "trivialization" of a historical genocide were more or less equivalent to, or included "condoning," (such that the inclusion or exclusion of this phrase is practically redundant), then this would not be a practical issue at all. However, on any credible interpretation, "condoning" a past genocide, such as the Holocaust or the Rwandan massacres, exhibits a different, and arguably more negative and potential harmful attitude, than expressions of outright denial of its very existence.

In addition to deliberately malicious examples, denial could also stem from a perpetrator's ignorance alone, or from exposure to religious indoctrination, and could perhaps be combined with a stance of refusing to accept anything one has not experienced at firsthand. By "condoning" a genocide, a racist perpetrator accepts or admits that the historical acts of genocide did, in fact, occur but then either positively approves, or at least refuses to condemn, this atrocity as an unjustified activity. Arguably, this "condoning" can extend into

the present from an initial reference to the past, and thereby exhibit a particularly threatening message for current members of the victim group in question. This is because its implied message can be interpreted as: "all X deserved to die, and continue to merit death because of the fixed nature of what it intrinsically means to be X." Of course, it is possible to substitute for X the words, homosexual, Jew, Armenian, Bosnian Moslem, Roma etc.

Given the attribution of responsibility for some genocides (in the lay sense of this term) remains a politically-contested issue, including with respect to Bosnia, Northern Cyprus and the Armenians, then a Member State's decision on specific example could generate negative reactions and counter-reactions. Some of these might concern EU member states past questionable activities, particularly in some of their former colonies. For example, a decision by a national court of an EU member state recognising the 1915-1922 events in Armenia as constituting 'genocide,' might generate extreme reactions in specific Islamic circles within Europe which are sympathetic to Turkey's long-standing (but historically untenable) denial of this historical atrocity by an Islamic regime against a Christian minority. In turn, this reaction to a Member State's act of recognition could, perhaps, spark religious and cultural tensions in parts of Europe that work against the Decision's wider policy goal of combating racism and xenophobia by, in the eyes of some Muslims, "inciting" these very phenomena within EU countries.

Some sense of the emotive potential of this issue, together with the "academic freedom" dimension, was apparent during the reaction to the writings of Bernard Lewis, an established, if controversial, Princeton academic historian. He had recognised the *brutal facts* of the Armenian massacre. However, he also questioned whether this massacre had, in fact, been expressly ordered by state officials, which is a precondition for the legal identification of a genocide under current international criminal law. In response to this questioning, he faced a successful civil law action against him for which he was ordered to pay a nominal

compensation for his alleged lack of 'objectivity.'¹⁶

As we have already shown, there are a number of ECtHR cases which highlight both the value but also various difficulties in criminalising those types of hate speech that take the form of denying or grossly trivialising an already legally recognised genocide, including the Holocaust.¹⁷ They largely succeed in striking a reasonable balance between the general "freedom of expression" protections, and various countervailing qualifications, duties and responsibilities. As already discussed, article 10(2) states that these relate to:

'Formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of ... 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 ...'

The positive value of these decisions, which are consistent with the Framework Decision, include:

- 1/. Combating incitement to hatred and serious forms of racial defamation.
- 2/. Counteracting the rehabilitation of the Nationalist-Socialist regime.
- 3/. Preventing racist accusations against the victims of genocide that they have themselves falsified history.
- 4/. Defending from subversion the values on which the fight against racism and anti-Semitism are based
- 5/. Combating serious threats to public order.
- 6/. Safeguarding wider reciprocal respect for the standards of democracy and human rights infringed by such denial contained in Article 17 of the ECHR.¹⁸

¹⁶ A Paris court fined Mr. Lewis in 1995 to pay 1 (one) French Frank for having denied the Armenian genocide. The court further decided that Professor Lewis should also pay the amount necessary for the publication of the full court decision in the French daily newspaper *Le Monde*. See 'Lewis receives adverse civil judgment,' *Le Monde* 21 June 1995: 'Les actions engagées par les parties civiles arméniennes contre 'le Monde' déclarées irrecevables par le tribunal de Paris' *Le Monde*, 27 Novembre 1994: <http://www.voltairenet.org/article14133.html>; See also 'Lewis Replies,' *Princeton Alumni Weekly*, June 5, 1996 http://www.princeton.edu/~paw/archive_old/PAW95-96/16_9596/0605let.html#story3.

¹⁷ See *Garaudy vs France case* (Application no: 65831/01, Decision on admissibility of 24 June 2003); The Garaudy and Lebidoux and Isorni cases were prosecuted under the 'Loi Gayssot' (Law no: 90-615 of 13 July 1990).

¹⁸ ECHR Article 17 - Prohibition of abuse of rights: 'Nothing in this Convention may be interpreted as implying for any

In *Chauvy vs France*, the ECtHR discussed the difficulties for a criminal court to decide upon genuinely contested historical issues where genuine historical research into events associated with genocide could reach different conclusions. There is an important distinction between acts of *outright denial* of judicially-determined facts of genocide, and the activity of debating the significance and implications of specific pieces of evidence. In this case, the Court insisted that:

‘it is an integral part of freedom of expression to seek historical truth and it is not the Court’s role to arbitrate the underlying historical issues, which are part of a continuing debate between historians that shape opinion as to the events which took place and their interpretation. As such, and regardless of the doubts one might have as to the probative value or otherwise of the document known as ‘Barbie’s written submission’ or the ‘Barbie testament’, the issue does not belong to the category of clearly established historical facts - such as the holocaust whose negation or revision is removed from the protection of Article 10 by Article 17 of the Convention.’¹⁹

If we re-examine the *precise wording* of the relevant provisions of Article 1 of the Framework Decision, it is doubtful whether the language adequately respects the hard-won and vital legal distinctions just discussed. That is distinctions between the justifiable denial of judicially-established fact that a past genocide took place, and debate over the meaning and implications of specific details of these or associated events. The Decision criminalises:

‘c) publicly condoning, denying or grossly trivialising 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 ... d) ... Article 6 of the Charter of the International Military Tribunal ... 4. Any Member State may, on adoption of this Framework Decision or later, make a statement that it will make punishable the act of denying or grossly trivialising the crimes referred to in paragraph 1(c) and/or (d) only if the crimes referred to in these paragraphs have been established by a final decision of a national court of this Member State and/or an international court, or by a final decision of an international court only.’

The vital phrase ‘crimes of ...’ and ‘the crimes referred to....’ and ‘crimes ... established by

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.’

¹⁹ *Chauvy vs France case* (Application no: 64915/01, Judgement of 29 June 2004), para.60.

a final decision of ...' are at least potentially ambiguous. On one literal reading, they relate to "questions of law" in the sense of judicial findings on the *meaning and scope of the offence of genocide*. Here, the offences would embrace debates between academics concerning whether a programme of "ethnic cleansing" does or does not cross the legal threshold from "crimes against humanity" to the more narrowly-defined offence of "genocide." If one party to this academic controversy argues that the most recent judicial decision of, say, the ICC misclassifies as "genocide" what ought - to be consistent with past judicial precedents - more properly be recognised as another offence, then this argument would, on a literal reading, constitute "genocide denial." However, on another more purposive reading, the terms 'crimes' refer to judicially-established historical 'facts' relevant to the proof of the offences listed, and to 'crimes' in the sense of instances of proven responsibility for objectively ascertained past events. There is little doubt that the purposeful interpretation is preferable and almost certainly the one intended. It certainly covers denials or gross trivialisation of facts by, for example, racist individuals most of whom presumably have no notion whatsoever as to the distinctly legal meaning of the categories of genocide and crimes against humanity etc., and whose hate crimes consist of absurdly claiming that the victims of racist genocide have falsified the historical facts and duped the Courts.

In short, our criticism on this point is that the wording of the Decision is that it fails to adequately build upon the results of relevant ECtHR decisions containing vital and useful distinctions for combating racist expressions whilst still avoiding excessive restrictions upon legitimate historical research and debate, or doctrinal controversies between international criminal lawyers concerning the meaning and scope of the international law categories in question. In other words, the Framework Decision does not adequately incorporate the ECtHR's clear distinction between historical events that were sanctioned with the final decision of an authorized international court, which are properly removed by Article 17 from

the protection that ECHR Article 10 provides to legitimate expression,²⁰ and other historical events that are still open to rival interpretations and legitimate disputes by historians for example. The relation between the EU and the ECHR needs to be more clearly explained if this argument is to remain. Why should the EU incorporate the distinction made by the ECtHR?

Our next objection concerning this aspect of the Framework Decision refers to the question of the dubious consistency of the genocide denial provisions with the prior legal obligations of EU states under the Genocide Convention 1948. This Convention establishes very precise institutional procedures and requirements for determining whether or not an incident constitutes ‘genocide.’²¹ Yet, on one reading, and in conflict with their obligations under the prior 1948 Convention to which Member States are still party, the Decision modifies the previous criteria established by this Convention. This is because it gives EU Member States the option of authorising their own *national courts*, rather than an International Criminal Court, to make decisions concerning whether or not a past event is to be legally recognised as an instance of ‘genocide.’²² This gives those States which choose this option, the authority to punish the denial or gross trivialisation of a past event which only its own Courts have determined to amount to genocide. In practice, many states will not exercise this option, preferring their national legislation to respect the decisions of authorised International Courts.

²⁰ Oetheimer, M. (2009), ‘Protecting freedom of expression: the challenge of hate speech in the European Court of Human Right’s case law’, *Cardozo Journal of International and Comparative Law*, Vol. 17, No. 3, 427-443.

²¹ The authorities that will be entitled to determine whether or not an act will be legally recognised as one of genocide are set out in articles 6 and 9 of the Genocide Convention: ‘Article 6 - Persons charged with genocide or any of the other acts enumerated in Article 3 shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.’ ‘Article 9 - Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article 3, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.’

²² Article 1 (d) 4 states: ‘Any Member State may, on adoption of this Framework Decision or later, make a statement that it will make punishable the act of denying or grossly trivialising the crimes referred to in paragraph 1(c) and/or (d) only if the crimes referred to in these paragraphs have been established by a final decision of a national court of this Member State and/or an international court, or by a final decision of an international court only.’ of the Framework Decision. While ‘condoning’, ‘denial’ and ‘trivialisation’ are characterised as punishable acts in paragraphs 1(c) and 1(d), a different approach is adopted in the Article 1(4) where, possibly by accident or omission, the word ‘condoning’ does not appear.

Nevertheless, it remains problematic that this alternative was ever provided in the first place.

The prospect that multiple and different national determinations of what counts as genocide, and thus what constitutes its denial or gross trivialisation possibly reflecting the different historical experiences, interests and cultural traditions of the Member States, is the opposite of what the stated policy of ‘harmonisation’ demands. The negative practical consequences of such divergences, and their implications for European-wide political debate, are clear. If Turkey joined the EU, then its domestic criminal law prohibiting recognition of the Armenian tragedy as a genocide could come into conflict with one of fellow European States purely national judicial determination that these events of 1915-22 did in fact constitute genocide.²³ Turkish citizens who either affirm or deny the Armenian genocide would be in violation of either domestic or European-based criminal law.

One could easily multiply examples of such divergence and conflict. However, the key point is that allowing national authorities to make such determinations without regard to the position in international criminal law, or even the determinations of other Member States, is surely the opposite of what is needed to secure the EU's stated goal of ensuring similar punishments for the same expressions of racism and xenophobia in each of these States. Furthermore, the fact that all EU states decided to become parties to a Genocide Convention, one of whose central aims was to ensure common transnational determinations of genocide, means that they are subscribers to two sharply incompatible legal measures relating to its judicial recognition. The lofty universalism of uniform practice valid for all states central to

²³ This is not fanciful. On 29 January 2011, the French parliament adopted on a law that characterised as genocide the mass killings of Armenians in Ottoman Turkey during 1915-22. Although this law recognises the Armenian genocide, it does not provide for any sanction for those who deny it. On 15 July 2010, a group of socialist senators tabled a draft law that provided for the punishment of the denial of this genocide. However, the Legal Affairs Committee of the French Senate firmly opposed the inclusion of this draft law onto the agenda of the plenary session of the Senate. On 26 May 2011 the French Senate supported this refusal on the grounds that such a measure contradicted France's constitutional provisions on the freedom of expression. <http://www.assemblee-nationale.fr/13/pdf/rap-info/i1262.pdf>. When adopting the Framework Decision, France stated that it will seek the final decision of an international court before punishing a person for the denial or ‘gross trivialisation’ of genocide or the other international crimes referred to in the Framework Decision.

the 1948 Convention, which is reiterated by International Criminal Court provision, conflicts with the particularism of this aspect of the Decision.

It also sets a questionable precedent that certain non-EU states, who are also party to the Genocide Convention may decide to follow for purely nationalistic even racist and xenophobic reasons, which the EU will hardly now be in a position to challenge without accusations of gross hypocrisy. As a former Turkish foreign minister has threatened:

It [the EU] seems to be willing to develop its own criteria for the definition of genocide. If the EU does so, it may not be easy to prevent the Arab League, ASEAN, Islamic Conference Organization or other international organizations to develop their own criteria in their turn.²⁴

Worse still, given the colonial histories of many central EU states, if any one of their national courts made a determination that infuriated the nationalistic sensitivities of another state, such as Turkey, Greece or Poland, then there could be retaliation. This could occur through the purported legal recognition of atrocities committed by European imperialists and colonialists as past acts of genocide. Given the politically-contested nature of specific genocides, including those stemming from the internal conflict in the former Yugoslavia, the Turkish invasion of Northern Cyprus and those associated with WW2, this element of the Framework Decision could, unfortunately, provide an issue around which renewed nationalistic xenophobia in some Member States could express itself and mobilise.²⁵ A rather sinister, if not necessarily inaccurate, manifestation of this is exemplified by the following claim by Yakis:

‘There are more than 4 million Turks or ethnic Turks in various EU Member States. If the national court of one of the EU Member States takes a decision that characterizes the 1915 events as genocide such a decision may set the floor for the

²⁴ Yaçar Yakic, ‘A European Union Framework Decision on the Offence of Denying a Crime,’ 23 *Review of Armenian Studies*, 2011, 63, 86.

²⁵ Between 2010 and Spring 2011, there was conflict on this issue within the Turkey-EU Joint Parliamentary Commission (JPC) between Greek and Greek Cypriot members and those of Turkey who were promoting the French position of allowing determinations of genocide to be decided by international courts. For a partisan nationalistic discussion from the Turkish perspective. Yakic, 2011 op cit, 84-5.

rise of ethnic tension. It will not be unconceivable that one or more Turks or ethnic Turks state that they do not consider the 1915 events as genocide. If the public prosecutors or other zealous officials take a legal action against such a person this may open 'Pandora's Box.' In other words an initiative that started in 1990s with the best intention to combat racism and xenophobia may become a good recipe to do just the opposite and to incite racism and xenophobia in the EU countries and a race for retaliation among EU countries and their former colonies.²⁶

A different problem is that the Framework Decision is confined to race and xenophobia, rather than covering the remainder of what even a conservative definition of the scope of groups subjected to hate crimes would require. This measure addresses neither homophobic, transphobic violence or religious sectarian violence, nor incitement to hatred based on sexual orientation or gender identity. It also fails to embrace the other discrimination grounds recognised in Article 19 TFEU. There can be little argument that, say, for persons experiencing disabilities the prevalence of hate crime restricts their capacity, in practice, to enjoy other rights in a non-discriminatory as EU principles and law generally maintain is the 'fundamental right' of all citizens. ECtHR case law addressing failures by legal authorities to investigate, unmask and punish bias motivation, as required by Article 14, has adopted an expansive approach by embracing religious as well as racial motivations for hate crime.²⁷ It has also extended this to both disability²⁸ and sexual orientation.²⁹

Although only 'preventing and combating racism and xenophobia' is mentioned explicitly in Article 67 (2) TFEU, it does not follow that this needs to be treated as exhaustive of the competences specified in the EU Treaty.³⁰ Indeed, given the more extensive reforms of many

²⁶ Yakic 2011 op cit, 92.

²⁷ See ECtHR Milanović v. Serbia, No. 44614/07, 14 December 2010, where this court extended its case law to cover violence motivated by the victim's religious affiliation, in this case, a Hare Krishna belief. The ECtHR considers 'that, just like in respect of racially motivated attacks, when investigating violent incidents state authorities have the additional duty to take all reasonable steps to unmask any religious motive and to establish whether or not religious hatred or prejudice may have played a role in the events.' Para. 96-97.

²⁸ Concerning disability as a ground under Article 14 of the ECHR, see ECtHR, Glor v. Switzerland, No. 13444/04, 30 April 2009, para. 80.

²⁹ The ECtHR has held found that it is 'undoubtedly' covered by Article 14. In a case concerning incitement to hatred, the Court emphasised that 'discrimination based on sexual orientation is as serious as discrimination based on 'race, origin or colour''. ECtHR, Salgueiro da Silva Mouta v. Portugal, No. 33290/96, 21 December 1999, para. 28; ECtHR, Vejdeland and Others v. Sweden, No. 1813/07, 9 February 2012, para. 55.

³⁰ Peers, S., *EU Justice and Home Affairs Law*, 2nd ed., Oxford University Press, Oxford, 2006: 383 and 387.

EU States, an extension to disability, sexual orientation and gender identity could be justified in EU law terms one aspect of as: 'judicial cooperation in criminal matters'. There is a strong case for reforming the existing restrictive range of protected groups by exploiting the provision of Article 83(1) TFEU that: 'on the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament.' The same article, opens up the possibility of adding fresh criminal provisions to harmonise measures taken before, 'to ensure effective implementation'.³¹ It could be argued in the European Council that, far from leading initiatives in hate crime and steering Member States in a progressive direction consistent with core European values, including even the free movement of European citizens, the currently restrictive response to the range of hate crime victim groups lags behind developments in many member states. For example, the national criminal law of 12 EU Member States contain provisions making it a specific criminal offence to incite to hatred, violence or discrimination on grounds of sexual orientation. Ten States make the homophobic intent an *aggravating factor* in the commission of common crimes.³²

In this respect, the EU policy of harmonisation and the 'approximation' of national criminal law in a progressive direction is being frustrated by the EU's own Framework Decision. This means that instead of looking to the Decision as the ground for encouraging EU states to update their national laws in a broadly consistent way, reform proposals - even from EU bodies such as the FRA - are forced to refer to a growing number of such laws as blueprints

³¹ Article 83(1) TFEU sub (2).

³² See European Union Agency for Fundamental Rights (FRA), *Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States: Part I - Legal Analysis*, FRA, Vienna, 2008; 117 and 121. See also FRA, *Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States; Part II - The Social Situation*, FRA, Vienna, 2009.

for future EU reform to ‘play catch up.’³³ This remarkable situation is the opposite of the EU's self-image in this area as a central institutional driver of coordinated and progressive law reform. The Decision also mocks the logic of any credible ‘harmonisation agenda. This is because the Decision's restrictive protections have, for understandable domestic political reasons,³⁴ prompted uncoordinated processes of law reform at the national level, which in turn multiplies both ‘legal uncertainty’ and fragmentation.

Once again, this restrictive definition of protected groups seems to send the unintended message that gender-based, religious or disability-related hate crime is being placed towards the bottom of a clear *hierarchy of victim groups*.³⁵ And, ironically, this is being carried out by a policy agenda acting in the name of EU anti-discrimination values. This curious hierarchy is not confined to hate crime measures but rather extends across EU anti-discrimination measures more generally. The term ‘equality hierarchy’ is appropriate in that it recognises how EU anti-discrimination law more generally itself discriminates between the various grounds of discrimination.³⁶ These include with respect to not only the material scope of the ban on discrimination but also in the various permitted exceptions and the rigor of required

³³ ‘Following the model of (...) framework decision on racism and xenophobia (...), the European Commission should consider proposing similar EU legislation to cover homophobia. This EU legislation needs to cover homophobic hate speech and homophobic hate crime and approximate criminal legislation in the Member States applicable to these phenomena. Homophobic hate speech and hate crime are phenomena which may result in serious obstacles to the possibility for individuals to exercise their free movement rights and other rights in a non-discriminatory manner. These phenomena need to be combated across the European Union ensuring minimum standards of effective criminal Legislation.’ FRA, *Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States: Part I - Legal Analysis*, op cit, 156. Unfortunately, the FRA does not discuss the possible legal avenues open to the EU to implement this laudable reform suggestion, albeit one that omits both gender identity and disability where surely the same points apply with equal force?

³⁴ The contradiction of national legislators introducing discriminatory forms of anti-discriminatory measures cannot be expected to go unnoticed by the campaigning efforts of those NGO groups subject to hate crime who fall outside the privileged category of ‘race’ of by wide-awake parliamentarians themselves. Even instrumental pressures, such as limitations of parliamentary time and already overcrowded legislative programmes encourage nation parliaments to introduce more comprehensive measures than the Framework Decisions requires them to do so in order to avoid having to revisit the issue in a predictable way in later years. The pragmatics of this comparative constitutional dimension require future comparative research.

³⁵ There have been criticisms from the European Parliament and NGOs of both this differentiate response and associated fragmentation. On the later, see ‘Written Response by ILGA-Europe to the European Commission Consultation:’ www.ilga-europe.org/europe/news/. (ILGA-Europe is the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association.) Commission Communication ‘Non-discrimination and equal opportunities for all - A Framework Strategy’ (COM(2005)224 final. For the consultation material more generally, see: http://ec.europa.eu/employment-social/fundamental-rights/index_en.htm.

³⁶ Bell, M., *Anti-Discrimination Law and the European Union*, Oxford University Press, Oxford, 2002: 52-53, 211-212.

enforcement mechanisms.

At the top of the overall ‘equality hierarchy’ is race discrimination for which current EU legislation offers the fullest and most elaborate protection covering employment, social security, social protection, health care, social advantages, education and access to goods and services, including housing. Next comes protection against sex discrimination with EU sex equality legislation now covering access to goods and services. Towards the bottom are other ‘new’ legal grounds for recognising discrimination referring to religion or belief, disability, age and sexual orientation, which are only covered by general prohibitions of discrimination.³⁷

The practical result of the equality hierarchy is that different groups subject to hate crime victimisation enjoy a different standard of legal protection against discrimination. In turn, this hierarchy of *different grades* of legally recognised discrimination reinforces the questionable political message that unequal treatment by not only hate crime perpetrators but also official bodies is only to be expected, even within EU ‘equality measures.’ It also reaffirms the all-too familiar message that some types of discriminatory victimisation by perpetrators are inherently *more serious* than others. Furthermore, this difference is based not only upon the extent of the harm inflicted on hate crime victims but depend rather upon which particular ‘protected group’ they are identified as belonging to. Consider, for example, the situation of a black disabled person who has been subjected to a clearly discriminatory pattern of verbal and physical abuse by a gang of young people speaking a foreign language she does not understand.

To make sense of the legal significance of her situation requires references to a cluster of

³⁷ As Joke Swiebel and Dennis van der Veur recognise: ‘the EU sends out the message that discrimination on the basis of sexual orientation and homophobic hate crimes are of lesser importance than racial discrimination and racist hate crimes. Needless to say, this state of affairs in no way reflects the reality of the problems as encountered in daily life throughout Europe.’ ‘Hate crimes against lesbian, gay, bisexual and transgender persons and the policy response of international governmental organisations,’ 27 *Neth. Q. Hum. Rts.* 485 (2009) 502.

different EU provisions and offence categories. Is she supposed to accept that any racist dimension is, from a criminal justice and policy standpoint, so much more important than hostility to her disability because criminal measures define it as such? Here, there is a risk of undermining not only the quality of legislation and the institutional administration of justice that apply it, but also citizens' sense of the transparency of their basic right not to be victimised on a discriminatory basis. On the other hand, it has to be frankly acknowledged that certain East European states, such as Poland, reject concepts such as 'homophobia' - understood as a violation of basic rights demanding criminal law protection - as supposedly incompatible with Europe's Christian tradition and self-understanding.³⁸

It is also questionable whether this Decision respects some of the key differences between transnational and national criminal law imperatives and institutional requirements concerned with criteria for proving individual liability through an institutional process respectful of 'due process' requirements, which inevitably places suspects and offenders at centre stage, and a European human rights agenda. The latter focuses far more upon the violation of individual rights of victims and victim-groups whose definition and scope often exceeds any equivalent interests protected by criminal law.³⁹ It is increasingly being recognised within EU legal circles that the harmonisation of the criminal justice systems needs to respect various specific features of this form of legal regulation, which is perhaps more closely tied to distinctive and divergent cultural traditions than other areas of regulation.⁴⁰

³⁸ In January 2006, the Polish Parliament (Sejm) responded to an EP Resolution that: "identifying with Europe's Judeo-Christian heritage, the Sejm of the Republic of Poland may not approve of the introduction into European Union documents of such notions as 'homophobia'. Resolution of the Sejm of the Republic of Poland of 23 June 2006 regarding the European Parliament resolution of 15 June 2006 on 'the increase in racist and homophobic violence in Europe'.

³⁹ Consider for example the following statement by the FRA: 'One effect of applying restrictive criminal law definitions and interpretations of hate crime is that official data collection mechanisms pertaining to hate crime are 'unable to capture the full range of victimisation experiences'. The net effect is that official data collection mechanisms often tend to under-record the incidence of hate crime, which can translate into low numbers of prosecutions, thereby limiting opportunities for victims of hate crime to seek redress and to experience that justice is done.' 2012 report, 29.

⁴⁰ See Christoph J.M. Safferling, 'Europe as Transnational Law - A Criminal Law for Europe: Between National Heritage and Transnational Necessities,' 10 *German Law Journal*, (2009) 1383: 'In many respects, criminal law stands out from other areas of law. Availing itself of the most severe and most dissuasive tool of social control - punishments - it delineates the outer limits of acceptable behaviour and in that way protects the values held dearest by the

The idea of extending legal protection to those who face discrimination on grounds of, say, property status or subscription to an unconventional political belief may appear entirely reasonable to a the universalistic human rights agenda championed, for example, by the FRA. Here, the issue could be defined as why should individuals *not* receive the same legal protection for these types of discrimination as they do for racial discrimination? However, this agenda reserves to itself alone the definition of rights relevant to discrimination, and reduces the role of criminal law to that of mere enforcement and implementation. Yet, we would argue that this self-evident sense of reasonableness is far from the case whenever the issue is viewed from a criminal law perspective concerned with both the practicalities and desirability of imposing state sanctions, including imprisonment, for purely verbal statements. These expressions could be made during the course of political debates relating, for example, to the selective partial or full nationalisation of remnants of feudal property ownership that advocate ‘singling out’ only large landowners for negative institutional treatment. The idea that such clearly ‘discriminatory’ messages ought to be criminalised as instances of ‘incitement’ to hate crime, perhaps even framed as a ‘strict liability’ offence that does not even require proof of intent, is incongruous to say the least.

So too are proposals from a ‘fundamental rights perspective’ that vague and open-ended phrases, such as ‘other status,’ can provide a legitimate basis for the imposition of legal sanctions, including deprivation of liberty through imprisonment. Criteria of ‘legal specificity’ are clearly central for a criminal law approach receptive to the rights of suspects who are presumed innocent until found guilty by prosecutors succeeding in meeting high requirements of evidence and proof of charges. Furthermore, criminal law agendas typically insist that interpretive ambiguities in legal definitions must be interpreted in favour of

community at large. As an expression essentially of the common will, criminal penalties reflect particular social disapproval and are in that respect of a qualitatively different nature as compared with other punishments such as administrative sanctions. Thus, more so than other fields of law, criminal law largely mirrors the particular cultural, moral, financial and other attitudes of a community and is especially sensitive to societal developments.’

defendants. Yet, such concerns risk being characterised negatively by advocates of a Fundamental Rights approach as ‘restrictive criminal law definitions.’

Fortunately, the Decision itself does not promote or require the measures just set out. But because of its failure to clarify distinctions of approach, an august body such as the FRA, is able to criticise it for ‘failing’ to fully adopt its own ‘fundamental rights’ approach, at the expense of a ‘restrictive’ criminal law one, that could well include such problematic outcomes.

The Decision promotes new offences of publicly inciting to violence or hatred on the basis of race (in a broad sense), also by public dissemination of tracts, pictures and the like, as well as publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes. Member States may choose to punish only conduct which is either carried out in a manner likely to disturb public order or which is threatening, abusive or insulting. For other offences, racist and xenophobic motivation will be an aggravating factor.

The authors of the Decision wisely avoided calls to reduce European criminal law to little more than an enforcement mechanism for ‘fundamental rights.’ However, there are a range of objections and challenges facing both the offences individually, the various reservations to which the overall package of criminalisations is subject, and the practical implementation of the Decision. There is still some way to go before the EU's legal and policy response to hate crimes could be considered coherent and consistent both within itself and, in particular, when placed in the context of wider EU initiatives combating already recognised grounds of discrimination, including disability, gender identity and sexual orientation.

Conclusions

So far, policy responses to hate crime differ widely across European states and EU measures have had to make all manner of concessions to national differences by means of various reservations that do not bode well for the realisation of 'harmonisation' in the EU's response to hate crimes. This undesirable diversity weakens the effectiveness of pan-European laws in this area by relying too heavily on effective national responses. That is because the effectiveness of policy and legal responses on national levels is often determined by cultural and historical factors, such as level of tolerance of hate crime - and one sometimes subsidiary or related element of this - hate speech, that, in turn, has been shaped by specific social and historical contexts, including differences stemming from the cold war polarisations. For instance, low social awareness and sensitivity to hate speech/crime in some countries might contribute to the reluctance of the victims to report them, rendering the incidents of such crimes less visible, underreported and, often, unprosecuted. It seems that only a coherent pan-European hate crime framework could force through a more coordinated responses on national level. In turn, this could influence national cultures towards raising social awareness and sensitivity to such crimes. This issue seems to acquire a great urgency in the light of the division of Europe that ended only recently. Here we need to recognise that countries of Central and Eastern Europe, which joined the EU and CoE only in the last two decades, followed a different trajectory of political and social development than that of the Western core, and that harmonisation is perhaps likely to be achieved only if these differences are more fully understood, openly acknowledged, and taken into account.

In terms of the specific measures themselves. Our study has identified a series of both technical and policy difficulties with both the Additional Protocol and the Framework Decision. Some of these are curious and internally inconsistent omissions, such as the weak provision on securing the interests and needs of victims (and other witnesses) within the

reaction of the Criminal Justice System relative to other comparable EU initiatives. The constant complaints of ‘underreporting’ need to examine the reasons why the majority of hate crime decide not to report this ordeal to the authorities, including the perceived deterrent effect of various legal institutions. However, perhaps the most damaging, internally incoherent and potentially counterproductive of these relate to the option contained in the Decision of allowing each Member State to make its own determinations of the legal status of past genocidal atrocities because this has the potential to intensify xenophobia.

Our paper has also argued that the availability of so many potentially far-reaching ‘reservations’ and exceptions have the potential to re-affirm some of the obstacles to enhanced ‘harmonisation’ in this area rather than overcome them. It maybe that, for political reasons, stemming in part from the divergent cultural traditions of the Eastern European Member States, some of whom such as Poland, resist the very idea of ‘homophobic hate crime’, that a further consolidation measure will ultimately be required. Hopefully this will not include such extensive reservations, and will reserve to international courts alone the competence to decide on questions of genocide. In additional such a measure will need to integrate the various *ad hoc* provisions contained in, for example the Additional Protocol, into a single criminal measure, and resolve the tension between that strand of EU analysis wedded to a ‘fundamental rights’ agenda on hate crime and other more pragmatic perspectives that take better account of the distinctive and pragmatic imperatives governing the fair trial and punishment of offenders. First, however, the universalistic tendency of ‘fundamental rights’ agenda to relegate European criminal law to little more than an after the fact implementation device for its own independent definitions of anti-discrimination measures needs to be better acknowledged and resisted if a range of difficulties and counterproductive outcomes identified in this paper are to be avoided. The idea of criminalising discrimination on grounds of ‘other status’ or ‘property’ is a classic example of

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this difficulty.

The truth of the matter is the topic of EU responses to hate crime is an interdisciplinary field of inquiry where the contributions of European history, human rights (including those of victims and perpetrators), European policy, transnational security imperatives (including combating political extremism), and the relative autonomy of European and International Criminal Law each need to be given their due weight. The reductionist tendency to prioritise any one of these strands and agendas at the expense of all the others is unlikely to be fruitful. Finally, there is a tendency in existing debate and scholarship to assume that the EU has unlimited sovereignty in this area, and to disregard the specific constitutional limitations of this Treaty-based institution and its distinctive - if somewhat 'indirect' - form of law-making in this area, which we have also sought to highlight and counter.

PRINCIPLES FOR EU-WIDE HATE CRIME LEGISLATION

There clearly is a radical difference between some typical European and American approaches to the regulation of hate speech and crime crimes more generally.⁴¹ It is pointless, possibly even counterproductive, to seek to devise out universal principle grounded in general values of a sufficiently abstract nature to apply to every conceivable historical, national and regional context. On the contrary, the starting point has to be whatever can be shown to be contextually appropriate for a European-wide system of regulation, possibly respectful as far as possible of a "margin of appreciation" to accommodate strictly national differences and legal / constitutional traditions. This may require a limited range of reservations or opt outs under specific conditions.

There is no need to engage in policy debates with liberal fundamentalist approaches rooted in and emerging from the radically different political and constitutional culture of the USA, whose historical circumstances, ideology and political culture differ markedly from that of Europe. The United States did not suffer the dictatorships that blighted much of Europe, particularly during the 1920s and 1930s, some of which promoted a widespread anti-Semitism and other xenophobic orientations as a populist strategy of spurious legitimization. (Dictatorial actions in the USA were largely directed at indigenous subsections of the population). Only Continental Europe has had to deal with the immediate fall out of the break up and implosion of the Soviet Empire and Comecon from 1989 onwards. Among these has been mass migration, particularly to a newly re-united Germany, accompanied by an

⁴¹ There are of course high powered US based critics of liberal fundamentalism in this area whose orientation overlaps with that of European approaches: Owen M. Fiss, *The Irony of Free Speech* (1996); Catharine A. MacKinnon, *Only Words* (1993); Cass R. Sunstein, *Democracy and the Problem of Free Speech* (1993); Richard Delgado, 'Words That Wound: A Tort Action for Racial Insults, Epithets and Name-Calling,' 17 *Harv. C.R.-C.L. L. Rev.* 133 (1982); Mari J. Matsuda, 'Public Response to Racist Speech: Considering the Victim's Story,' 87 *Mich. L. Rev.* 2320 (1989).

aggressive reaction from sectors of resident populations. On Europe's eastern side, there has been genocidal forms of ethnic conflict in Bosnia during the early 1990's, and in addition an apparent upsurge in racism, xenophobia, and hate crimes in Europe. Furthermore, there have been aggressively nationalist reactions against the movement toward a united European Union with open borders that is seen as diluting or subverting the exclusivity of longstanding historical national identities to which local populations have grown accustomed. Given these contextual factors, and well-founded concerns to minimise the repetition of genocidal and less extreme forms of collective conflict and hostility, legal restrictions on hate crime including hate speech may be seen, therefore, as justifiable attempts to prohibit such hostility and send out a symbolic message of disapproval.

As we have seen both from the case studies and from the overview, the typical European approach is not typically committed to the liberal fundamentalist principle of value-neutrality, and the associated constitutional prohibition on state setting limits upon public discourse based on largely agreed values and standards. The one-sided ideological hostility and suspicion of state interventions, now generalised from an earlier dissent from an established state religion in the name of "freedom of conscience" into a *generic and atomistic individualism*, is not a "founding moment" of European democracies as it is in the USA, where the presumed intentions of the "founding fathers" have achieved an enduring mythic status.⁴² Here, the framework revolves around a simplistic opposition between "the state" (of any kind) and "the private individual" deemed to be outfitted with "natural rights," including virtually unregulated "freedom of expression," even in areas as socially damaging as genocide denial, incitement to genocide and extreme pornography.⁴³

By contrast a statement of the German Constitutional Court sums up a crucial difference

⁴² Mary Ann Glendon, *Rights Talk* 109-70 (1991). In one respect, the immediate postwar reconstruction of Europe developed in part in deliberate opposition to the Nazi era could be viewed as key, particularly in Germany

⁴³ Cf. Ronald Dworkin, 'Should Wrong Opinions Be Banned?' *Independent* (London), May 28, 1995, 27 or more generally his *Liberty and Pornography*, N.Y. Rev. Books.

when it emphasised the primacy of the relationship of socially embedded citizenship: "The concept of man in the Basic Law is not that of an isolated sovereign individual; rather the Basic Law resolves the conflict between the individual and the community by relating and binding the citizen into the community, but without detracting from his individuality."⁴⁴

Instead, our survey of criminal responses to hate crime shows that the European tradition continues to be more concerned with working through the distinction between constitutionally legitimate and illegitimate forms of state power. In turn, this means recognising that all of us wake up every day into a pluralistic social world where important shared values conflict with each other, including "freedom of expression" and the equally important right not to suffer from discrimination, sectarian abuse and genocide.

In such pervasive contexts, the only appropriate response is to guard against affording any single particularistic value an absolute status. This applies as much as to the concern not to have one's religious and political faith criticised, ridiculed and attacked, as it does to the perceived right to express strong and critical opinions on religious and political matters.

The European tradition generally recognises that tolerance of difference, the right to live one's individual and group life differently from a contingent and socially projected "norm," together with the right to question the actions of both public officials and those operating within civil society, represent key ingredients of democracy to be constitutionally defended. And yet part of this defence is to set limits, enforced by the criminal law, to those expressions of discriminatory intolerance which work against the practical fulfilment of these aspects of democratic life. The key phrase in the ECHR that determines the limits of hate speech and which justifies their limitation through state intervention is: "necessary in a democratic society." Related to this is the impressive deployments of Article 17 of the European Convention concerning the refusal of the ECtHR to allow one convention right, such as

⁴⁴ BVerfGE 30, 1 (20).

"freedom of expression," to be used to potentially undermine the possibility of individuals and groups benefiting from other instances of such basic entitlements, including the right not be discriminated against through unregulated hate speech. The vital move here, which may be almost incomprehensible to a liberal fundamentalist perspective, is to interpret state interventions banning, say, Holocaust denial, as instances of *the fulfilment of rights*. In other words, to interpret such criminal law prohibitions as democratic obligations applicable to a modern European state concerned to protect the well-being of all its citizens. Whereas a liberal fundamentalist can only see the prohibition of such denial in terms of "censorship" and hence the denial of individual rights to "free speech," Europe's constitutional culture has shown itself to be far more sophisticated. Faced with the prospect of, say, authorities intervening to ban a neo-Nazi rally in a predominantly Jewish neighbourhood, the constitutional and legal issues become one of where to strike a difficult balance.

It is necessary to counterbalance claims stemming from "freedom of expression," association and demonstration on the one hand, and the resident's equally important individual and collective right not be gratuitously and wilfully insulted, defamed and threatened (at least at the symbolic level) on the other.

Another related feature of the European tradition is a pragmatic concern for the *practical consequences* of the deployment of hate crime legislation and similar administrative regulation. If we consider the neo-Nazi scenario just discussed, a key issue is whether the harm done to association and expression rights by insisting that a demonstration avoids a particularly sensitive neighbourhood, or becomes subject to a complete ban, is outweighed by the benefits to all other actually and potentially affected parties? In any particular case, it may be necessary to make fine judgments involving questions of the meaning and scope of established legal rules (including as previously interpreted and applied), general constitutional principles and a more concrete "weighing up" of the likely practical consequences of the

different options. In some cases, it may be necessary to rely on the "lesser evil" idea of minimising the damage to competing rights. However, in others, such as the prohibition of outright genocide denial and incitement to genocide, illiberal legal measures are typically understood as both a necessary and welcome expression and enhancement of political freedom, a *net gain* to a post-liberal conception of human rights.

These considerations, which probably cannot be generalised beyond the European context, mean that a key issue arises as to the borders of speech and the need to keep open the possibility of supporting and defending "illiberal" exercises of state regulation. For present purposes, the relevant context here is situations where individuals and groups are being confronted with situations and actions, including hate crimes, where their felt-entitlement to dignity, protection of personal identity and equal rights is being attacked, abused and undermined.

Hate speech, including genocide denial and incitement to group hatred, as well as hate crimes more generally, can, therefore, be interpreted by European political culture in a manner that emphasises their potential to damage the very core of the identities of members of targeted groups. The enforcement through criminal law of concepts of "group defamation," which are applicable even where no single individual has been specifically targeted for discriminatory abuse, or where there is no evidence an immediate threat of lawless physical violence, form an integral part of this culture. In other words, the European approach generally recognises a different and wider sort of harm caused by citizen's abuse of their powers of communication than the danger of imminent lawless action required under, for example, the criminal law of the USA shaped by liberal ideologies.

The problem identified with verbal forms of hate crime includes but surpasses a public order or "breach of the peace" dimension which addresses only "fighting words" provoking violent reaction among an audience with presumed sensibilities and physical capabilities for

violence. Whilst, as we have seen, certain British and German hate crime measures include a public order dimension sensitive to the prospect of, say, race riots that damage a wide variety of personal, commercial and proprietary interests in an affected area, they are not confined to a narrow definition of public order considerations. In addition, they address the harm inflicted by discriminatory abuse upon individual members where these refuse to be provoked into a violent reaction, or are physically incapable of such a response or are too frightened to react. In other words, the definition of harm includes damage to equality rights, including those relating to the "dignity" and "honour" of the core identities of individual and groups, and their right to freely express and develop their personalities and identities without fear of discriminatory reactions. Whereas a liberal fundamentalist approach to such offensive abuse is to tell its victims not to listen or watch, and thereby placing the responsibility for the harm caused by, say, racist or disablist abuse upon those to whom it is targeted,⁴⁵ the European approach restores responsibility, and thus legal accountability, to the human source of such abuse.

This approach adopts a more protective, interventionist orientation towards citizens who are not abandoned to their own isolated subjectivity and particular susceptibility to particular harms from others, which of course vary considerably within and between different groups. The European approach, of which German serves as an emphatic example, is protective of the group identities of its citizens. By contrast, under the liberal model individual citizens have an "autonomy" status forced upon them irrespective of their own decisions, orientation or commitments, which of course can be individualistic, group-oriented or collectivist: that free speech promotes certain key values such as individual autonomy and democracy (in that people should be able to decide for themselves which political and

⁴⁵ In *Cohen v. California*, 403 U.S. 15, 21 (1971), the US Supreme Court held that individuals should "avert their eyes" in cases of offensive expression.

societal views should prevail).

SUGGESTED LEGISLATIVE POLICY BASED ON BEST PRACTICE.

Our earlier analysis of the EU Member States ‘Laws on hate crime, including hate speech and genocide denial, suggested that best practice would require a modification of aspects of Germany’s current legislation. Part of this modification involves an expansion of the range of individuals and groups that can be specifically protected by reformed EU-wide criminal law. The British system certainly reflects a wider and more targeted criminal legislation but it is spread out over too many specific measures with incompatible criteria. Rwanda has provided us with perhaps the most draconian system but one which in many respects violates European expectations of strict legality and a concern for the human rights of defendants as well as the victims of hate crime and discrimination more generally. The broad and poorly defined categories in Rwanda’s provisions could not be recommended for transplantation into EU law. Furthermore, many of the provisions could be successfully challenged under the ECHR not least with respect to freedom of expression and freedom of association.

The following “model legislation” draws upon a combination of the wider scope contained in the British system with respect to protected groups, whilst taking over a number of the categories and concepts from the German system including those that identify connections between hate speech and threats to democracy. Our measures continue the tradition of “militant democracy.” That is, a rejection of liberal notions of state neutrality in favour of provisions that reflect the need for a democratic society to be willing to protect itself and to refuse to allow its established systems of rights and freedoms to be turned against it in pursuit

of totalitarian or theocratic political agendas.

Specific offences

1. Discriminatory subversion of the preconditions for democratic practice

It is an offence to publicly promote, distribute or otherwise disseminate defamatory beliefs, ideas and theories whose discriminatory content and orientation can be shown to substantially impede and damage the possibility of citizens being able to freely express, preserve, sustain and develop their identity as a group member (as defined in this measure) as well as that of a citizen more generally. The public glorification through words, images or symbols of the ideology and practices of past dictatorships that have been judicially recognised as having practiced institutional persecution and discrimination against existing groups as a matter of state policy, specifically falls within the scope of this offence.

A/. This measure against hate speech is not intended to criminalise the holding or expression of non-democratic beliefs, ideas or theories as such, or acts of questioning the value of democracy as a form of government, where these lack any specifically discriminatory and clearly socially damaging content or implications.

B/. This measure imposes purely individual liability, and provides no basis for the prescription of any specific organisations or bodies as such.

C/. This measure is not designed to impede public discourse, free debate between conflicting beliefs, historical research or to restrict controversy within an educational and media context, or restrict the general description and evaluation of discriminatory ideas, beliefs and theories as a topic of public interest and concern. Nor does it aim to impose any orthodoxy that inhibits open dialogue, education and the publication of historical research within established academic publishing outlets subject to independent refereed quality controls prior to publication. The restriction on rights to expression contained in this section is only applicable where expressions of discriminatory ideas, beliefs and theories are being actively promoted as claimed justifications for current or future discriminatory practices of persecution directed against a specific group as defined and recognised in this measure, and in a manner clearly amounting to an abuse of one or more of that group's legally recognised basic rights.

D/. Any prosecutions under this section must also be shown to be strictly necessary for the collective self-defence of democratic society and democratic institutions, and also strictly proportionate to the aims of such self-defence.

E/. Nothing in this measure requires citizens to adopt, support and express any particular system of beliefs, ideas or theories as a precondition for citizenship and/or nationality or other public entitlements.

F/. It is a defence to show that a public statement expressing a discriminatory belief that would otherwise be prohibited under this measure positively contributed to public debates over the nature and direction of government policy regarding, for example, immigration and asylum provisions, such that its prohibition would not, on balance, serve the purpose of free democratic deliberation and debate.

G/. This offence of discriminatory subversion is normally punishable with imprisonment only in the case of a repeat offender, unless the initial statement is of such an extreme and clearly damaging kind as to warrant imprisonment.

H/. It is not necessary to show that an accused subjectively intended to commit the conduct prohibited under this measure, or possessed a discriminatory motivation. Liability attaches to

conduct that would appear to a reasonable third person to amount to negligent, reckless or deliberate acts. Only expressions that are shown from the circumstances to be outside the remit of liability for negligence and to be purely accidental and lacking any measure of individual responsibility are exempt from liability.

I/. Those who personally edit or otherwise control the content of publicly available expressions are liable for all prohibited materials published within their media unless it can be shown that reasonable and effective steps and due diligence measures were already in place to monitor and prevent such publication. Liability attaches to what is reasonably interpretable as deliberate, reckless or negligent acts and omissions by such owners, controllers and editors. However, there is a legal obligation under this provision to remove prohibited content as soon as reasonably possible once made aware of its existence.

2. Genocide Denial

It is an offence to deny, grossly trivialise, approve, justify or condone genocide or other international crimes judicially recognised as such by the final decision of international courts. The prohibited discriminatory material must also have the quality of being contemptuous of, or degrading to, a group who have been judicially recognised by international court as having been victimised by current or past atrocities.

A/. Member States must ensure that this ban is specifically authorised under certain clearly defined provisions of criminal law, preferably a single section of a criminal code that is specifically targeted against this prohibited type of expression.⁴⁶

B/. This offence is to be interpreted and applied as a positive affirmation and legal enforcement of the basic right of historically victimised groups not to have aspects of their shared group identity defamed and insulted, or to have to witness any encouragement or specific incitement of a repetition of such victimisation. again, what about possibly new groups/change over time?

C/. Liability under this offence does not preclude prosecution for other less specific offences relating, for example, to incitement to other criminal acts.

D/. An offence is committed where the denial, grossly trivialisation, approval, justification or condoning is expressed in the linguistic form of a statement of fact, opinion or a combination of the two. E/. Only the decisions of transnational, not purely domestic, courts are relevant to the question of whether a particular factual atrocity legally constitutes a genocide, crime against humanity or other international crime. The appropriate determination needs to stem from a final decision of a transnational court, as opposed to judicial decisions still subject to a later further appeal.

H/. The definition of international crimes is derived from judicially recognised sources of international criminal law and leading authoritative expert commentaries upon them.

⁴⁶ By contrast, in Germany, the "Auschwitzlölge" offense (literally, "lie of Auschwitz" offense) is criminalised under two sections of the German Penal Code: sections 130 and 194.

Discriminatory insults, threats and incitement to hostility based on perceived group identity

1/. An unlawful difference of treatment is discriminatory for the purpose of this measure if it cannot be shown to have an objective and reasonable justification, and does not pursue a legitimate aim. Actions which take the form of harassment fall within the definition of "discrimination" where unwanted conduct related to group membership takes place with the purpose or effect of violating the dignity of a person and creating for members of that group an intimidating, hostile, degrading, humiliating or offensive environment. Whether the treatment is discriminatory, or not in law, has to be determined in the light of the specific circumstances of the case. 2/. Verbal abuse directed against either specifically targeted individuals or against all members of a group that is based on the ascription of what are widely defined in the relevant cultural context as negative stereotypical qualities to that group as a whole should be punishable as a specific offence namely insult.

a/. An "insult" is defined by reference to whatever a third person adult citizen would likely identify as both "seriously insulting" in those specific circumstances, and in addition, as clearly damaging to the established reputation, honour and dignity of the group as a whole and each of its members. Insults must be directed toward a person, or a group of persons because it appears they have been singled out as belonging to the group in question.

B/. The notion of insult here refers to any seriously offensive, degrading, contemptuous or invective expression, made available to the public, or a subsection of it, which violates the established reputation, honour and dignity of the group as a whole and thereby each of its members.

(1) The insult must be directly connected with the insulted individual's perceived belonging to that group.

(2) The insult must also expose members of the insulted group to a risk of likely hatred, contempt or ridicule from others.

(3) The insult does not need to be expressed in the presence of a member of the targeted group as long as it is distributed or made available by any means to one or more other persons.

Discriminatory threats

3. Discriminatory threats of harm expressed in either private or public statements are offences.

A/. A threat exists in any situation which a third person adult citizen would likely identify as "seriously threatening" to the targeted individual in the specific circumstances of the case having regard to any specific susceptibilities to harm stemming from those circumstances themselves. In this respect, the perpetrators of hate speech have to take their victims as they find them and cannot rely upon the defence that such victims ought not to have interpreted the statement as a threat to be taken seriously.

B/. A threat for the purpose of this measure can include, but not be limited to, threats of unlawful physical violence or intimidation directed towards an individual or members of his or her family which would likely result in tangible harm to their well-being.

C/. A victim is also threatened when he or she is introduced through a communication to a menace creating fear that the persons targeted, or their families, will become the victim of a recognised criminal offence for which the punishment can include imprisonment.

- i/. The threat itself can be expressed verbally, in writing or via any other media.
- ii. To constitute an offence under this section either the content or the circumstances of the threat must clearly arise from, and be related to, the victim's actual or apparent membership of a distinct social group, as opposed to his or her purely personal qualities, past actions or reputation.
- iii/. The content and circumstances of the threat must potentially, or by implication, be reasonably interpretable as a threat to all members of the group as a whole. for example, a private letter sent to a family who have recently moved in to an area that has not previously had residents of that group, menacing them with violence constitutes a threat not only to the individual family, but by implication to all other members of that group who might be considering moving in to that particular neighbourhood.
- iv. Where the content and circumstances of the threat are ambiguous concerning whether or not a threat is discriminatory, then this doubt must be interpreted in favour of the accused.

Incitement to discriminatory hostility

4/. It is an offence to directly and publicly incite hostility towards any individual or group based on negative stereotypical qualities ascribed to that group as a whole. Incitement includes the direct and public advocacy and promotion of discriminatory hostility, -against a group

A/. The offence contained in section 4 is an inchoate one that is fully complete when expressed, irrespective of any subsequent effect or influence upon others, intended or otherwise. It is therefore no defence for a newspaper to claim that, although its content incites hostility to, for example, persons with a disability, there is no available evidence of any of its readers acting in a hostile manner to persons with a disability as a direct result of reading this content.

B/. Discriminatory Hostility is defined as any act which a third person adult citizen would be likely to identify as an encouragement to create or sustain a hostile environment for a specifically targeted group, in the specific circumstances of both the expression and its reception, paying due regard to relevant linguistic and cultural factors determining its interpretation by an audience. It is not an offence to attempt to incite discrimination but to fail to do so, because what is expressed in the statement lacks the necessary inciting quality as defined in this section. There is no liability for the intention to incite where this is not in fact translated into a legally identifiable act of incitement (as defined above.)

C/. Incitement of discriminatory hostility can include (1) propaganda for imminent war or other forms of collective violence within or between states, with a sectarian quality and that is not legally justified, as for example, an act of national self-defence permitted by the UN Charter; and (2) advocacy of hatred between distinct social groups that is likely to result in tangible material harm or harms, such as those recognised as crimes against humanity, genocide and war crimes. The offence established by 4c(1) above is suspended during periods of inter-state armed conflict when two or more states are openly at war

D/. The content of the inciting message can include any written material, image or any other representation of ideas or theories, capable of being communicated from one person to another.

E/. Expressing beliefs and opinions that simply encourage, affirm or celebrate the positive qualities of a particular group as a source of pride and identity for its members is not in itself an offence. This is providing that this expression contains no direct or indirect discriminatory ascription of negative qualities to other specified groups denigrating their members as essentially inferior in ways that fall within this measure's definition of incitement, insult and

threat. For example, a statement affirming that it is the best thing to belong to a particular religion, sexual orientation or ethnic group, and to be proud of this, is not an act of hostility directed towards other groups.

F/However, where this affirmation involves holding public meetings or marches in areas where this presence is likely to be interpreted as deliberately inflammatory, sectarian and divisive, and where other routes or locations are equally available, then this section becomes inapplicable. This qualification is designed to protect local affected persons (whether resident or otherwise) from what could reasonably be interpreted as gratuitously insulting and threatening forms of expression, relating to their group identity. In cases where the type of expression involves clear assertions of religious, ethnic, national, racial superiority there is a presumption that these fall outside the scope of this section

G/. It is not an offence to read or be in possession of material containing discriminatory incitements provided there is no attempt, successful or otherwise, to distribute these materials to others, and the individual concerned reveals its source

H/. In cases of ambiguity in the application of this section, judges may obtain guidance from the established doctrine of international criminal law on direct and public incitement to genocide wherever this suggests a possible resolution of such ambiguity.

5/ Discriminatory damage or destruction of property.

It is an offence to commit any property related crime (as already defined by a Member State's criminal code) in circumstances that would suggest to a third party that the act exhibits discriminatory overtones. Where this is proven, an enhanced penalty of between 6 months and two years must be imposed.

Under this measure there is liability for instigation, incitement, conspiracy and aiding and abetting, with a maximum enhancement of 12 months imprisonment.

6/ Discriminatory Offences against the Person.

It is an offence to commit any offence against the person (as already defined by a Member State's criminal code) in circumstances that would suggest to a third party that the act exhibits discriminatory overtones. Where this is proven, an enhanced penalty of between 6 months and two years must be imposed.

Under this measure there is liability for instigation, incitement, conspiracy and aiding and abetting with a maximum enhancement of 12 months imprisonment.

7/. Intent and defences

In cases of proven discriminatory insults, discriminatory threats or incitement to discriminatory hostility, it is no defence that a perpetrator mistook the group membership of the victim or his or her subjective identity.

A/. Because these offences are designed to punish behaviour that is widely recognised as socially damaging, the content of the subjective perceptions or beliefs of either individual offenders or their victims are irrelevant to the definitions of these three offences. The determination of guilt or innocence is independent of evidence of subjective feelings, beliefs and the extent of any offence taken. The legal test relates to the likely external impact of the

statements themselves as determined from a third person perspective.

B/. For criminal liability, it is sufficient to establish that the insulting, threatening or expression of incitement was carried out as a deliberate act whatever the underlying subjective motivation or intention behind it. It is sufficient that a person has used for example, clearly racist words and symbols without having to establish that their motivation was partly or wholly a racist one.

(1) There is no need to show that there was any specific subjective intent or motivation to insult, threaten or incite in the sense of these terms defined in this statute.

(2) Where the court is satisfied that the act in question itself amounts to an offence, a presumption arises that it was carried out deliberately, which then transfers the onus of proof on to the accused to demonstrate that the conduct was accidental and that no blame can reasonably be ascribed to him or her. Only where the act in question itself is shown on the balance of probabilities to have been entirely involuntary and accidental, such that no guilt can be reasonably ascribed to the accused, will there be a complete defence in law. In particular, internet service providers are not liable for purely accidental examples of prohibited conduct where, despite evidence of due diligence, they have unknowingly hosted a website or newsroom containing unlawful material. However, there is a legal obligation on ISPs to remove this illegal content immediately once made aware of it in order to avoid liability for aiding and abetting the primary offence.

(3) Where the content of a discriminatory insult, threat or incitement expressed by an individual is merely reported upon and published, then this repetition is not in itself unlawful unless the context suggests that it is likely to add to the damage caused by the original statement.

(4) Where the reporting itself includes an expressly critical commentary highlighting the discriminatory nature of the original statement in ways that cannot be reasonably interpreted as denying, condoning, justifying or trivialising its implications when considered as a whole, then this creates a presumption against liability for journalists, academic researchers, educators and other commentators.

(5) Only where the repetition would be recognised by a third party as representing a continuation of the specific discriminatory programme contained in and endorsed by the original statement will there be liability. The intentions, motivations and beliefs of such commentators are irrelevant to their liability.

(6) It is a complete defence if the action was legally authorised in the sense of carried out under valid legal authority. Conduct prohibited by this measure may be legal or justified where principles or interests, such as law enforcement, court reporting, journalism or academic research, exclude criminal liability. Hence, the offences of discriminatory insult, threat or incitement only cover acts carried out without legislative, executive, administrative and judicial authority, where such authority clearly serves a public interest, and is consistent with international and European anti-discrimination measures and standards.

8/. Definition of a group.

For each offence, the necessary element of discrimination relates to a group rather than purely individual identity. There must be evidence that the prohibited discriminatory acts defined above must be directed not against any individual or collection of individuals only as such, but mainly or exclusively for the reason that they were identified as belonging to a legally recognised protected group, as set out below.

A/. To constitute an offence the group refers to a clearly identifiable, widely recognised and

established section or subsection of a population. These may include, for example, groups distinguished by prevailing conceptions of race, skin colour, descent or national or ethnic origin, sexuality, disability, gender and religion into which children can be borne and acquire the group identity, without necessarily exercising individual choice, but can also include other clearly identifiable, widely recognised and established groups that meet the criteria contained in this section. Only exceptionally will groups established on the basis of temporary fashion, leisure affiliations or criminal association be recognised as such for the purposes of this measure.

B/. Group membership must be capable of being identified by specific qualities widely recognised as distinctive and internal to it, not an absence of qualities that are irrelevant to its group identity, such as anyone who is not a member of X group.

C/. There is a presumption that groups based on sporting affiliations are excluded from this measure without prejudice to liability under other laws. Where the insulted group in question comprises a form of identity based upon support for a local, regional or national sports team, then the provisions on insults based on that group identity alone, which are a well-established aspect of partisan spectator involvement in that type of sporting event, will not constitute offences.

D/. Where discriminatory insults, threats or incitement is directed expressly at a group that falls outside the protection of this measure but where the circumstances suggest that this is being used as a pretext for insulting, threatening or inciting acts of discrimination directed against members of another group that is protected, then an offence is committed.

E/ It is no defence to claim that only a subsection of the targeted group, such as adult females, were threatened, insulted or subjected to discriminatory incitement of hostility, as distinct from the group as a whole. Also it is no defence to claim that only members of a group living in a particular region were singled out for discriminatory threats, insults or incitement.

9/. Sentencing

For each offence, where the group is one that has been judicially recognised as suffering from historical persecution in the specific local, regional, national or international context in which the offence was carried out, a minimum level of enhanced sentence ranging from 6 to 12 months imprisonment is mandatory.

a/. Where the insult, threat or incitement expresses or disseminates ideas clearly based on racial, ethnic or religious superiority or hatred, then an enhanced sentence ranging from 6 to 12 months imprisonment should be mandatory.

b/. The same level of sentencing enhancement should apply to a repeat offender irrespective of whether the case meets the criteria for the other sentencing enhancements.

c/. Where applicable, in a single instance all three forms of mandatory enhancement can be imposed cumulatively yielding a maximum total of three years in addition to the pre-enhanced sentence.

d/. Both individual victims of the offences of denial, insult and threat, and representatives of organisations speaking for the group as a whole, are entitled to provide to the court a victim impact statement prior to the determination of sentence.

e/. This statement will summarise the perceived material impact of the offence upon both the individual victim or victims, and the group as a whole.

f/. Where a sentence enhancement is awarded, it must be clearly and specifically identified as such during sentencing and expressly reported on in all official records of the trial.

g/. A sentence may be modified from that which would otherwise be imposed where the

offence has arisen in a context of a continuing pattern of hostility between two or more groups to which each has contributed discriminatory insults, threats or incitement. Depending on the circumstances, this provision authorises both deterrent sentencing of ringleaders, planners, organisers and instigators of group hostility where this is necessary to end group conflicts, and mitigation of sentence in the case of other offenders whose insults, threats and incitements formed part of pattern of group self-defence.

h/. With respect only to the offence of genocide denial, trivialisation, condoning, and approval, where a particular instance can be shown to be particularly damaging to democratic values and practices, or to amount to a particularly acute form of persecution, or to contribute to the programme of a potentially genocidal political or sectarian movement, then the sentence can be enhanced by 24 months additional imprisonment.

i/ Sentencing should as far as possible, be based on evidence-based judicial identification of specific threats and levels of threat.

10/ Jurisdictional questions

Where the insult, threat or incitement is accessible through the internet, then the offence is committed in any jurisdiction where the statement in question is available, and constitutes a crime of universal jurisdiction.

a/. The phrase universal jurisdiction has the meaning and scope attached to it by international criminal law.

b/. This measure is designed to offset the possibility of comparative safe havens existing for perpetrators based on purely jurisdictional considerations.

11/ Victim Compensation

Following a conviction, perpetrators will also be potentially liable for a criminal compensation order to the individual victim or victims, or where the offence is directed to the group as a whole, then in favour of a charity or other welfare body supportive of all members of that group who meet general eligibility criteria.

A/. Compensation may be restricted or refused where the victim has already been convicted of an offence under this measure within the past five years, and where the current offence has arisen in a context of a continuing pattern of hostility between two or more groups to which each has contributed discriminatory insults, threat or incitements.

B/ Only where such an order would cause suffering to the perpetrator's family members will there be an exception.

12/ Related Offences

In addition to liability for the primary offence, there are the following forms of liability:

- 1/. Attempt
- 2/. Conspiracy
- 3/. Aiding and abetting.
- 4/. Instigation

Each of these categories is to be given the meaning or meanings that they currently have within international criminal law.

13/ Interpretive Guidelines

Nothing in this measure should be interpreted as positively requiring citizens to adopt any specific orientation or belief system as a precondition for their citizenship.

A/. This measure recognises that freedom of expression is a vital element of the free development of individual personality, the dignity and equality of the person, and rights to

political association, and democratic practices of self-determination.

B/. Expressions can only be restricted through the criminal sanctions contained in this measure where this is clearly necessary to combat demonstrable harms stemming from overt forms of discriminatory conduct, as defined above, and which are clearly, actually or potentially damaging to the well-being of other citizens.

C/. In any case of ambiguity in the interpretation and application of this measure, the implications of transnational and international measures related to unlawful forms of discrimination to which the majority of European states have subscribed can be consulted wherever this is needed to resolve conflicts of interpretation.

D/. Ambiguities should be judicially resolved in favour of whichever interpretation is more consistent with the implications of these transnational and international standards providing this does not create manifest injustice in any particular case by, for example, imposing a retrospective form of criminal liability or violating other standards of strict legality.

E. When interpreting what is necessary in a democratic society the case law of the ECHR can be consulted where this is necessary to resolve an interpretive issue.

14/. Reservations

EU members' states can opt out of the measures if but only if:

a/. They can demonstrate that they provide citizens with other equally or more effective civil or administrative remedies; and

b/. The wording of pre-existing and entrenched constitutional measures of these states are manifestly inconsistent with its provisions, and that this inconsistency is of such a fundamental nature that it cannot, in principle, be resolved through judicial re-interpretation.

c/ States exercising a reservation under this section commit themselves to amending the incompatible part of their pre-existing Constitution in such a way as to resolve the contradiction.