RESOLVING THE TENSION BETWEEN FREE SPEECH AND HATE SPEECH: ASSESSING THE GLOBAL CONVERGENCE HYPOTHESIS

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INTRODUCTION

In January 2015 two armed gunman stormed the offices of *Charlie Hebdo*, a satirical magazine that frequently featured cartoons of the Prophet Muhammad.[1] In the wake of the attack almost two million protestors took to the streets waving pencils in a show of support for free expression.[2] But, simultaneously, French authorities cracked down on hate speech[3]—in the week following the attacks alone fifty-four people were arrested for violating hate speech laws.[4] Over fifty organizations responded with an open letter condemning increased restrictions on free expression and declaring that "[u]nder international law, the right to freedom of expression also protects speech that some may find shocking, offensive or disturbing."[5] Debate about the relationship between the right to freedom of expression and the right to freedom from incitement to racial discrimination is only increasing in the wake of similar attacks in Copenhagen, Denmark[6] and Garland, Texas.[7]

The tension between these two rights illustrates a problem that goes to the foundation of international human rights law. Human rights are universal—they are "for all persons in all societies."[8] Although a variety of objections have been put to that proposition,[9] it remains a normative pillar of the international human rights movement. The universality of human rights suggests that every individual is entitled to every human right by virtue of his or her personhood. Accordingly, a state should, as a conceptual matter, be able to assure all individuals every human right

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1. Charlotte Alfred, *France in Shock After Brutal Attack on Satirical Newspaper Charlie Hebdo*, WORLD POST (Jan. 7, 2015), http://www.huffingtonpost.com/2015/01/07/charlie-hebdo-attack_n_6429058.html.

2. Liz Alderman, *Huge Show of Solidarity in Paris Against Terrorism*, NEW YORK TIMES (Jan. 11, 2015), http://www.nytimes.com/2015/01/12/world/europe/paris-march-against-terror-charlie-hebdo.html?_r=1.

3. *French Comedian Dieudonne to Stand Trial Over Facebook Post on Paris Attacks*, HUFFINGTON POST (Jan. 14, 2015), http://www.huffingtonpost.com/2015/01/14/dieudonne-trial-charlie-hebdo_n_6472480.html.

4. *Id.*

5. *Not in Our Name: World Press Freedom Day 116 Days After Charlie Hebdo*, GUARDIAN (May 1, 2015), http://www.theguardian.com/media/2015/may/01/not-in-our-name-world-press-freedom-day-116-days-after-charlie-hebdo.

6. *Deadly Shooting at Copenhagen Free Speech Event*, WORLD POST (Feb. 14, 2015), http://www.huffingtonpost.com/2015/02/14/copenhagen-shooting_n_6683792.html.

7. William J. Gorta, *'Draw Muhammad' Contest Shooting: Two Suspects Dead, Guard Shot in Texas*, NBC NEWS (May 4, 2015), http://www.nbcnews.com/news/us-news/shooting-outside-draw-muhammad-contest-texas-n352996.

8. Louis Henkin, *International Human Rights as "Rights,"* 1 CARDOZO L. REV. 425, 433 (1979).

9. *See, e.g.*, R.J. VINCENT, HUMAN RIGHTS AND INTERNATIONAL RELATIONS 37–38 (1986) (describing cultural relativism).

without compromising any other. Indeed, it would be antithetical to universality if states were forced to secure selective protections because of two rights' mutually exclusive content.

Yet, the potential for a "rights-clash" is often glaring, as in the case of the right to freedom of expression and the right to freedom from incitement to racial discrimination. Both rights are secured by treaties.[10] And while the two are not necessarily mutually exclusive, the potential for incompatibility is clear. Take, for example, the *Charlie Hebdo* cover depicting the Prophet Muhammad and promising "100 lashes if you don't die of laughter!"[11] Because the cover implicitly villainizes Shari'a law it arguably conflicts with the right of Muslim individuals to live free from incitement to racial discrimination. If, however, this statement is protected expression, it would seem impossible for a state to both protect Muslim individuals from incitement and, simultaneously, vouchsafe the right to free speech.

Scholars have pointed to such conflicts between human rights as a threat to the entrenched vision of "basic rights as forming a stable system made up of mutually compatible elements."[12] Some have even voiced concern that such conflicts are intractable.[13] But others have pointed out that incompatibility is avoidable—it is a matter of interpretation.[14] There are a variety of interpretive mechanisms international courts and treaty bodies can employ to avoid or mitigate such conflicts. Statements inciting racial discrimination may be deemed to fall outside the scope of the freedom of expression. In *Pavel Ivanov v. Russia*, for example, the European Court of Human Rights held that pamphlets inciting ethnic hatred toward Jewish people were not protected by the freedom of expression because of their hateful content.[15] Alternatively, the two rights could be reconciled using a proportionality balancing analysis. A court employing a proportionality balancing analysis would, on a case-by-case basis, weigh the interest in freedom of expression against the interest in freedom from

10. *See, e.g.*, European Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Nov. 4, 1950, 213 U.N.T.S. 221, 231 [hereinafter ECHR] (securing the right to freedom of expression); International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), art. 4, U.N. Doc. A/6014 (Dec. 21, 1965) [hereinafter ICERD] (securing the right to freedom from discrimination).

11. Miriam Krule, *Charlie Hebdo's Most Controversial Religious Covers, Explained*, SLATE (Jan. 7, 2015), http://www.slate.com/blogs/browbeat/2015/01/07/charlie_hebdo_covers_religious_satire_cartoons_translated_and_explained.html.

12. REX MARTIN, RAWLS AND RIGHTS 129 (1985).

13. Xiaobing Xu & George Wilson, *On Conflict of Human Rights*, 5 PIERCE L. REV., 31, 33–34 (2007) (discussing, but not adopting, this position).

14. *See generally id.* (exploring various techniques for reconciling human rights conflicts).

15. *See generally* Cannie & Vorhoof, *infra* note 190, at 62 (discussing Pavel Ivanov v. Russia, App. No. 35222/04, Eur. Ct. H.R. (2007)).

incitement to racial discrimination. Each of these approaches would enable states to ratify instruments protecting both rights without fear of an irreconcilable conflict. More broadly, these interpretative methodologies would provide a normatively more desirable reconciliation of competing human rights. Reconciliation is not only more consistent with universality; it would also facilitate the simultaneous protection of a greater variety of human rights.

If international judicial bodies do indeed employ such strategies, one would expect to observe a trend toward greater legal consistency or even convergence over time, as courts and treaty bodies review a growing array of situations and rights clashes in different treaties. This Note tests whether such convergence has in fact emerged using racist speech as a case study. It focuses on three treaty provisions. The first two provisions protect the potentially conflicting rights at hand. Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") secures the right to freedom of expression.[16] Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD") secures the freedom from incitement to discrimination based on race, nationality, or ethnicity.[17] The third relevant provision, Article 17 of the ECHR, forbids interpreting any right in the ECHR as implying a right to limit or destroy any other ECHR guarantee.[18]

Examining the interaction between ECHR Article 10 and ICERD Article 4 is particularly salient because eighteen states in Europe[19] have ratified both ICERD and the ECHR. The potential difficulties for these dual ratification countries are exemplified by *Jersild v. Denmark*, in which the European Court of Human Rights (ECtHR) held that Denmark's attempt to comply with ICERD Article 4 resulted in a violation of ECHR Article 10.[20] The rights clash in *Jersild* is illustrative of a wider set of treaty conflicts that arise whenever a state is required to protect both freedom of expression and freedom from incitement to racial discrimination.[21]

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16. ECHR, *supra* note 10, art. 10.

17. ICERD, *supra* note 10, art. 4.

18. ECHR, *supra* note 10, art. 17.

19. As of March 27, 2015, Bosnia and Herzegovina; Croatia; Czech Republic; Denmark; Estonia; Germany; Greece; Latvia; Lithuania; Moldova; Montenegro; Netherlands; Portugal; Serbia; Slovakia; Slovenia; Macedonia; and Ukraine have all ratified both ICERD and the ECHR.

20. *See* discussion *infra* Section III.

21. There is, for example, potential for a clash between ICERD Article 4 and Article 13 of the American Convention on Human Rights, which protects a "freedom of thought and expression" that includes the "freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice." Organization of American States [OAS], American Convention on Human Rights art. 13, Nov.

This study finds that the ECtHR did, temporarily, use its interpretation of Article 17 to bring its application of Article 10 in line with the ICERD Committee's reading of Article 4. After *Jersild* was decided, the ECtHR began applying Article 17 to place racist hate speech outside the freedom of expression's protections.[22] That interpretation made the ECtHR's interpretation of Article 10 consistent with the ICERD Committee's position that states must categorically prohibit racist speech notwithstanding the right to free expression.[23] And once the ECtHR made that change, the ICERD Committee began relaxing its approach to accommodate free expression.[24]

But the case study does not bear out a linear progression toward convergence. Once the ICERD Committee relaxed its position, the ECtHR once again began taking a hardline approach to free expression.[25] And, after the ECtHR did so, the ICERD Committee returned to its early, categorical stance.[26] In light of these developments dual signatories now face the same problems that Denmark confronted in *Jersild*.

This Note explores that puzzling competition, which exists alongside, but also in tension with, the use of interpretation to avoid a "rights-clash." Specifically, it argues that the shift resulted because the ICERD Committee and ECtHR did not approach the human rights at issue as part of an integrated set of universal protections. Instead, both bodies vied to abandon more accommodating positions once the conflict "abated" because they viewed interpretive compromises as temporary fixes—fixes that stood in the way of maximally protecting each tribunal's preferred interpretation of the right. This Note argues, in light of the recent return to a jurisprudential impasse, that truly maximizing human rights protections requires approaching interpretive compromises as a desirable *solution*. Specifically, it argues that the ICERD Committee and the ECtHR should adopt a proportionality balancing analysis that recognizes the protection of potentially conflicting rights as a legitimate aim with the potential to justify restricting the primary right at issue. This balancing approach would

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22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123. ICERD Article 4 also presents the potential for conflict with the protection provided for free expression under Article 9 of the African Charter on Human and Peoples' Rights. OAU Doc. CAB/LEG/67/3/Rev.5 (1981), reprinted in 21 I.L.M. 58 (1982), 27 REV. INT'L COMMISSION JURISTS 76 (1981).

22. *See infra* Section III.B.1.

23. *See infra* Section III.A.

24. *See infra* Section III.A.

25. *See infra* Section III.B.2.C.

26. *See infra* Section III.B.2.C.

reflect a more circumspect view of what it means to protect human rights—one that meaningfully credits universality.

Before exploring these issues, however, this Note addresses several important threshold matters. First, Section I describes the evolutive approach to treaty interpretation employed by the ECtHR and the ICERD Committee. This is critical because if the meaning of either treaty were static, tracking their interpretation over time in search of convergence would be futile. Next, Section II establishes that the text of both Article 4 of ICERD and Article 10 of the ECHR leave room compatibility with the other. Section III tracks the interpretation of both provisions. Notably, Section III(A), which discusses ICERD, makes a novel contribution to the literature on hate speech—it is the first comprehensive survey of the ICERD Committee's Article 4 jurisprudence. Section IV examines the interpretation of the two provisions in conjunction, documenting and analyzing the temporary move toward consistency and subsequent return to conflict described above. Finally, Section V concludes.

I. THE EVOLUTIONARY INTERPRETATION OF TREATIES

According to the evolutionary approach to treaty interpretation, the meaning of treaty text is not static; rather, it changes with time.[27] The ICJ elaborated on the nature of and justifications for evolutive interpretation in *Navigational and Related Rights*.[28] There the ICJ emphasized that the focus on the parties' intent does not "signify that, where a term's meaning is no longer the same as it was at the date of conclusion, no account should ever be taken of its meaning at the time when the treaty is to be interpreted for purposes of applying it."[29]

Rather, there are two situations in which the meaning of treaty text is relevant to the parties' intent and, thereby, to interpretation. First, under Article 31(b) of the Vienna Convention on the Law of Treaties ("VCLT"),[30] subsequent practice may embody the parties' tacit agreement to depart from original meaning.[31] Second, the parties may have intended the meaning of a treaty's terms to evolve at its conclusion "so as to make

27. *See generally* EIRIK BJORGE, THE EVOLUTIONARY INTERPRETATION OF TREATIES (2014) (endorsing and analyzing the evolutionary approach to interpreting treaties).

28. Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicar.), Judgment, 2009 I.C.J. 213, ¶¶ 63–64 (July 13) [hereinafter Navigational Rights].

29. *Id.*

30. Vienna Convention on the Law of Treaties art. 31(b), May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention].

31. Navigational Rights, 2009 I.C.J. ¶ 64.

allowance for, among other things, developments in international law."[32] Since the ICJ's decision in *Navigational Rights*, the evolutive approach has become a well-established mode of interpretation.

Both the court and treaty body at the heart of this case study apply the evolutionary approach to interpreting the human rights treaties examined herein. The Committee on the Elimination of Racial Discrimination ("ICERD Committee") employs the evolutionary approach when interpreting ICERD. In *Hagan v. Australia* the Committee stated that "the Convention, as a living instrument, must be interpreted and applied taking into [account] the circumstances of contemporary society."[33] Accordingly, the Committee expressed that "its duty" in *Hagan* was to analyze the use of the term "nigger" in light of modern sensitivities, regardless of evidence that, "as a nickname probably with reference to a shoeshine brand, [the term] was not designed to demean or diminish its bearer, Mr. Brown, who was neither black nor of aboriginal descent."[34]

Similarly, the ECtHR has long applied an evolutionary approach when interpreting the ECHR.[35] In *Tyrer v. The United Kingdom* the Court stated that it "must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions."[36] The Court has continued to apply the evolutionary approach in cases including *Dudgeon v. United Kingdom*.[37] In *Dudgeon* the Court assessed whether a law prohibiting intimate homosexual relations violated the right to private life guaranteed by Article 8.[38] Notably, the Court did so in light of "the marked changes which have occurred in . . . the domestic law of the member States."[39] The Court reasoned that the law did violate Article 8, emphasizing that "[a]s compared with the era when that legislation was enacted, there is now . . . an increased tolerance, of homosexual behaviour."[40] The fact that the evolutive approach is not only consistent with the VCLT, but employed by both the ECtHR and the ICERD Committee confirms that the meanings of ICERD and the ECHR are not static. Therefore, convergence is possible and proceeding to

32. *Id.*

33. Hagan v. Australia, U.N. GAOR, Comm. on the Elimination of Racial Discrimination, 62d Sess., ¶ 7.3, U.N. Doc. CERD/C/62/D/26/2002 (Mar. 20, 2003).

34. *Id.* ¶ 7.2, 7.3.

35. ED BATES, THE EVOLUTION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 328–33 (2010).

36. Tyrer v. United Kingdom, App. No. 5856/72, ¶ 31, Eur. Ct. H.R. (1978).

37. Dudgeon v. United Kingdom, App. No. 7525/76, at 23, Eur. Ct. H.R. (1981).

38. *Id.* ¶ 34.

39. *Id.* ¶ 60.

40. *Id.*

examine the decisions of these bodies for converging interpretations of the provisions at issue is appropriate.

However, there is a well-recognized limit on evolutionary interpretation: the meaning of a treaty cannot evolve to contradict its text.[41] For example, if a treaty stated: "Freedom of expression does not protect racist statements," it could not[42] be interpreted as providing such protection, no matter how appropriate doing so may seem in light of modern circumstances. Accordingly, it is necessary to conduct a textual analysis of both ICERD Article 4 and ECHR Article 10 to determine whether their respective texts permit international judges and treaty body members to interpret the two provisions consistently. As Section II illustrates, they do.

II. TEXTUAL ANALYSIS: ROOM FOR CONSISTENCY

A. ICERD Article 4: The Freedom From Incitement to Racial Discrimination

The International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD") is the most comprehensive international instrument condemning racial discrimination.[43] ICERD defines discrimination broadly, prohibiting any "distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing" the equal recognition, enjoyment or exercise of "human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."[44] Thus, the text frames the freedom from discrimination as a threshold condition for the enjoyment of every other human right.

Article 4 is at the heart of ICERD. Article 4 not only contains several negative obligations,[45] but also requires that States take detailed positive

41. *See* BATES, *supra* note 35, at 328–30 (explaining that in interpreting a treaty, one must keep in mind the treaty's object, purpose, principles, and context at the time it was made).

42. However, the Court has indicated that this may not hold in all circumstances. For example, in *Al-Saadoon and Mufdhi v. United Kingdom*, the Court revisited, in dicta, its holding in *Soering v. United Kingdom*. Al-Saadoon & Mufdhi v. United Kingdom, App. No. 61498/08, at 51–61, Eur. Ct. H.R. (2010). The Court in *Al-Saadoon* suggested that the wide ratification of Article 6 could be read as a de facto modification of Article 2, which states that capital punishment is permitted in certain, narrow circumstances. *Id.*

43. Onder Bakircioglu, *Freedom of Expression and Hate Speech*, 16 TULSA J. COMP. & INT'L L. 1, 27 (2008).

44. ICERD, *supra* note 10, art. 1(1).

45. These include the obligation to "condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin,

measures to eradicate and prevent racial discrimination.[46] Under Article 4(a), States are required to declare punishable by law: (i) dissemination of ideas based on racial superiority; (ii) dissemination of ideas based on racial hatred; (iii) incitement to racial discrimination; (iv) acts of racial violence; (v) incitement to acts of racial violence; and, finally, (vi) assisting racist activities financially or otherwise.[47] Additionally, Article 4(b) requires that States declare the existence of organizations and propaganda activities that promote and incite racial discrimination illegal and punish participation in such organizations and activities.[48]

But ICERD contains a limit on the positive measures a state may be required to enact that makes compatibility with free speech possible. ICERD states that positive measures to eradicate incitement to or acts of discrimination must be undertaken "with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention."[49] This clause indicates that protecting freedom of speech is, in at least some instances, consistent with the positive obligations in Article 4 because both the UDHR,[50] and ICERD Article 5[51] protect the freedom of expression.

Whether consistency with freedom of expression is possible within ICERD hinges on the meaning of the "due regard" clause. This Note employs a helpful typology developed by Onder Bakircioglu, which distinguishes three possible readings of the influence of the due regard clause on states' duties under Article 4.[52] Some countries, including the United States and the United Kingdom, assert that the due regard clause prohibits the adoption of any measure that would limit or impair the freedom of expression or any other right guaranteed in UDHR.[53] Others,

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or which attempt to justify or promote racial hatred and discrimination in any form" and the obligation to prohibit public authorities and institutions from promoting or inciting racial discrimination. *Id.* art. 4.

46. *Id.* art. 4(a)–(b).

47. *Id.* art. 4(a).

48. *Id*. art. 4(b).

49. *Id.* art 4.

50. Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 19, U.N. Doc. A/RES/217/(III) (Dec. 10, 1948) (protecting, among other rights, the "freedom of opinion and expression") [hereinafter UDHR].

51. ICERD, *supra* note 10, art. 5(d)(viii) (stating that the right to "freedom of opinion and expression" is among the civil rights that States Parties agree to guarantee even as they pursue the eradication of racial discrimination under Article 4).

52. Bakircioglu, *supra* note 43, at 28.

53. *Id.* On signature the United States filed a reservation declaring that: "The Constitution of the United States contains provisions for the protection of individual rights, such as the right of free speech, and nothing in the Convention shall be deemed to require or authorize legislative action by the United States of America incompatible with the provisions of the Constitution." 20 GAOR, 20th Sess., 1318th

including Canada, Austria, Italy and France, argue that the clause requires that a balance be struck between securing the freedom from discrimination and protecting the freedom of expression.[54] Under a third view, the due regard clause has no influence on states parties' obligations, meaning that protecting civil rights is not a valid reason for failing to enact, or diluting, the positive measures Article 4 requires.[55]

Because it does not accommodate freedom of expression whatsoever, a conflict between the freedom of expression and freedom from discrimination is inevitable under the third view. And, if discriminatory speech is covered by the freedom of expression, the first view is similarly unsatisfactory because it effectively nullifies the freedom from discrimination. But, simultaneous protection of the two rights is possible, as a textual matter, under either the second view or a version of the first where discriminatory speech falls outside the scope of freedom of expression. Accordingly, accommodating the freedom of expression is possible given the text of ICERD Article 4.

B. ECHR Article 10: The Freedom of Expression

Article 10 of the ECHR sets forth the right to freedom of expression and the permissible limitations on that right. Article 10(1) states that every individual has the freedom of expression,[56] which includes the freedom "to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."[57] Standing alone, Article 10(1) is inconsistent with the freedom from discrimination. Opinions can, after all, be discriminatory.

However, the ECHR contains two textual routes to reconciliation with the freedom from discrimination. The first is Article 10(2), which qualifies the freedom of expression, stating that because its exercise carries with it "duties and responsibilities," it is subject to certain restrictions.[58] Those restrictions must meet several requirements. Specifically, they must be

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mtg., ¶ 59, U.N. Doc. A/C.3/SR.1318 (1965); *see also* NATAN LERNER, THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION 53 (rev. ed. 2015) (discussing the United Kingdom's position).

54. *See* Bakircioglu, *supra* note 43, at 28 (referencing a balancing between the Convention and all fundamental freedoms). The critical issue, on this view, is whether any right receives primacy in the balancing inquiry.

55. *Id.* Notably, this view also fails to account for the fact that Article 30 of UDHR does not permit the destruction of any right through the exploitation of a limiting clause.

56. ECHR, *supra* note 10, art. 10(1).

57. *Id.*

58. *Id.* art 10(2).

proscribed by law,[59] necessary in a democratic society in order to secure one of several enumerated interests,[60] and, finally, proportionate to achieving the relevant interest.[61]

Where it is proscribed by law, the right to live free from discrimination could be construed as one of the "rights of others" that justify restricting the freedom of expression. The inquiry would then hinge on whether prohibiting the hate speech at issue was a necessary and proportionate means for pursuing the legitimate interest in protecting others' rights. Because the Court's jurisprudence illustrates that the analysis under Article 10(2) is highly malleable and fact-specific, that conclusion is certainly possible.

Alternately, the Court could employ Article 17. That provision forbids employing any of the rights in the Convention in a way that will destroy any of the other rights or freedoms it guarantees.[62] Where expression rises to the level of hate speech Article 17 arguably necessitates that it fall outside of the protections for free speech, given that the ECHR guarantees the freedom from discrimination. Accordingly, compatibility between the freedom of expression protected by Article 10 and the freedom from incitement to racial discrimination protected by Article 4 of ICERD is, again, possible as a textual matter.

III. EVOLUTIVE INTERPRETATION: IN SEARCH OF GLOBAL CONVERGENCE

Having established that the evolutive approach to interpretation applies to both treaties and that their texts do not necessarily conflict, this Section examines the interpretation of both provisions in practice. Section A tracks the interpretation of ICERD Article 4, focusing on the construal of the "due regard" provision. Next, Section B examines the interpretation of ECHR Article 10 for convergence with the interpretation of ICERD Article 4 outlined in Section A. Neither analysis purports to be exhaustive; rather, each reflects pivotal developments in the interpretation of the relevant provision.

59. *Id.*

60. *Id.*

61. Though this requirement is not stated in Article 10(2) the jurisprudence of the ECtHR, discussed in Section (III)(B) below, makes clear that the necessity requirement entails a proportionality requirement.

62. ECHR, *supra* note 10, art. 17.

A. ICERD Article 4

ICERD was adopted by the U.N. General Assembly on December 21, 1965, and entered into force on January 4, 1969.[63] Although the need to eliminate racial discrimination had already been addressed by both the UDHR and the International Convention on Human Rights ("ICHR"), it was believed that a more detailed treatment was necessary in light of apartheid and the widespread revival of anti-Semitism.[64] The ICERD was adopted to meet that need.[65]

The analysis that follows reveals that the Committee has zigzagged in its approach to reconciling Article 4's ban on hate speech with arguments invoking the right to freedom of expression. Prior to 2007, the ICERD Committee took an expansive approach to interpreting Article 4. Although the Committee made use of balancing language during that period, the reasoning in its decisions evidences that it was, in fact, embracing the third approach described in Section I. Under that approach, the Committee rejected the argument that freedom of expression provides reason to deviate from the requirements of Article 4 because it considered a complete ban on hate speech to be consistent with the right to freedom of expression.

Between 2007 and 2010, however, the Committee softened its position. Specifically, it began accommodating the freedom of expression by giving more latitude to national courts and tightening its standard of review. However, in the wake of the Committee's 2013 decision in *T.B.B. v. Germany* there is little doubt that this trend toward accommodation is coming to an end —setting up the possibility of future conflict with the freedom of expression. The discussion that follows parses the Committee's categorical decisions and recommendations from its balance-oriented ones, clarifying the evolution of the Committee's jurisprudence. As noted in the Introduction, this is the first comprehensive treatment of the ICERD Committee's Article 4 decisions.

The Committee first provided guidance about the implications of the due regard clause in the 1983 report, *Positive Measures Designed to*

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63. G.A. Res. 2106 (XX), Annex, 20th Sess., Supp. No. 14, at 47, U.N. Doc. A/6014, 660 U.N.T.S. 195, entered into force Jan 4, 1969.

64. *See id.* ("Alarmed by manifestations of racial discrimination still in evidence in some areas of the world and by governmental policies based on racial superiority or hatred, such as policies of apartheid, segregation or separation. . . .").

65. *Id.* The ICERD Committee, the treaty body provided for in ICERD Article 8, is part of its enforcement machinery. The Committee examines both interstate and individual communications submitted under Article 14, which provides that individuals can lodge complaints claiming a violation of their rights under the Convention. The analysis here focuses on Committee decisions under Article 14 that address Article 4; however, it also draws on general comments, reports and concluding remarks issued by the Committee in response to periodic reports submitted by states parties.

Eradicate all Incitement to, or Acts of, Racial Discrimination.[66] Much of that Report seems to endorse the second view of the "due regard" clause, which requires that states strike a balance between protecting the freedom of speech and the freedom from incitement to racial discrimination.[67] The Report points, for example, to the clause's legislative history as evidence that it represents a compromise.[68] Because the United Kingdom would not accept a provision that imposed punishment for "the bare expression of an idea or mere incitement," the original draft of Article 4(a) required punishing "all incitement to racial discrimination resulting in or likely to cause acts of violence."[69] But the Committee rejected that proposal, opting to accommodate both positions by coupling broad language banning the act of dissemination with the "due regard" clause.[70]

At first blush, this seems inconsistent with the third view discussed in Section I, under which states cannot cite protecting the freedom of expression as a reason for diluting the positive obligations enumerated in Article 4. After all, if balance is critical, it seems intuitive that vouching safe the freedom of expression sometimes justifies the modification of states' Article 4 duties. But the Report characterizes the contention that the full application of Article 4 will jeopardize the freedom of expression as "extreme,"[71] taking the position that the enumerated obligations in Article 4 do not jeopardize the freedom of expression. Indeed, the Report emphasizes at length that the "due regard" clause does not dilute states' responsibilities under Article 4(a) and 4(b).[72] For example, it contrasts the duties imposed under those provisions with the general Article 4 obligation "to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, discrimination," which, it states, follows the general trend of vesting states "ample discretion to adopt such measures as they may deem appropriate to achieve the objectives of the Convention."[73]

General Recommendation No. 15, issued in 1993, clarified the Committee's position on the relationship between the freedom of

66. *See generally* U.N. Comm. on the Elimination of Racial Discrimination, Positive Measures to Designed to Eradicate all Incitement to, or Acts of, Racial Discrimination, U.N. Doc. CERD/2, U.N. Sales No. E.85.XIV.2 (1983) [hereinafter 1983 Report].

67. For example, the Report characterizes Article 4 as "a compromise" between States that wished to protect freedom of speech and those that wished to penalize the mere dissemination of ideas based on racial superiority. *Id.* ¶ 2.

68. *Id.* ¶¶ 2–4.

69. *Id.* ¶ 2.

70. *Id.* ¶¶ 3–4.

71. *Id.* ¶ 225.

72. *See id.* ¶ 218.

73. *Id.* ¶ 217.

expression and the freedom from discrimination. The Recommendation argues for the complete consistency of Article 4 and the freedom of expression, illustrating that proposition using other international instruments, including the UDHR.[74] Article 29, paragraph 2 of the UDHR states that limits "determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others" are acceptable restrictions on the freedom of expression.[75] The Recommendation emphasizes that the obligation not to disseminate racially discriminatory ideas is among the most important measures for securing others' rights and freedoms.[76]

The ICERD Committee first set out a framework for evaluating alleged violations of Article 4 in *Oslo v. Norway*, which was decided in 2005.[77] Under that framework, the Committee must first discern whether the statement at issue falls within any of the categories of "impugned speech" in Article 4.[78] If so, the Committee determines whether or not the statement falls within the ambit of the "due regard" clause.[79] If it does, the statement is protected by freedom of expression.[80] But, if it does not, the Committee will find a violation of Article 4.[81]

Oslo illustrates that the Committee's early approach was categorical, despite its use of balancing language.[82] In *Oslo*, the Committee deemed the anti-Semitic remarks at issue impugned speech,[83] but held that they did not fall within the due regard clause because of their "exceptionally/manifestly offensive character."[84] The Committee emphasized its recognition in General Recommendation 15 that "the prohibition of all ideas based upon

74. *See generally* U.N. Comm. on the Elimination of Racial Discrimination, 42nd Sess., General Recommendation 15, On Article 4 of the Convention, U.N. Doc. A/40/18 (Mar. 17, 1993) [hereinafter General Recommendation 15].

75. UDHR, *supra* note 50, art. 29(2).

76. General Recommendation 15, *supra* note 74, ¶ 4. The UDHR illustration is particularly significant in light of the fact that ECHR Article 10 contains nearly identical language. The ECHR provides that measures "prescribed by law" for the "protection of the reputation or rights of others" are among the viable limits on the freedom of speech. ECHR, *supra* note 10, art. 10(2). It stands to reason, given that similarity, that the ICERD Committee would also interpret Article 10(2) as taking the position that prohibiting hate speech is consistent with the freedom of expression.

77. Jewish Cmty. of Oslo v. Norway, Comm. on the Elimination of Racial Discrimination, Commc'n No. 30/2003, U.N. Doc. CERD/C/67/D/30/2003 (2005) [hereinafter Oslo].

78. *Id.* ¶ 10.4.

79. *Id.*

80. *Id.*

81. *Id.* ¶ 10.5.

82. *See id.* ¶ 2.1.

83. *See id.* ¶ 10.4.

84. *Id.* ¶ 10.5.

racial superiority or hatred is compatible with the right to freedom of opinion and expression."[85] That statement and the complete absence of balancing from the analysis suggest that hate speech falls outside of the freedom of expression's scope. But the Committee's language was unclear. The decision also noted that other international bodies have afforded freedom of expression less protection in hate speech cases.[86] That language implies that hate speech is, in some instances, protected expression.[87]

However, the lack of interpretive latitude afforded Norway in *Oslo* is consistent with the position that the Committee did not, in fact, employ the balancing approach explained in Section I. Norway submitted that the Committee should defer to the Norwegian Supreme Court's decision in *Sjolie*, which held that the same speech at issue in *Oslo* was protected expression, emphasizing that states parties should be afforded deference in striking a balance with the freedom of expression.[88] The Committee agreed that states were owed deference, but responded that it, nonetheless, had "the responsibility to ensure the coherence of the interpretation of the provisions of [A]rticle 4 of the Convention as reflected in its [General Recommendation No. 15]."[89] Given the intensity of the Committee's subsequent analysis, it is unclear what latitude, if any, Norway actually enjoyed.

In *Gelle v. Denmark* the Committee more expansively applied the categorical approach to Article 4.[90] The statement at issue, by a politician, characterized asking Somali organizations what they thought about laws banning genital mutilation as akin to asking the "association of [p]edophiles" whether they objected to banning child sex.[91] The Danish Prosecutor did not pursue the case on the grounds that because the

85. *Id.*

86. *Id.*

87. Notably, the puzzling combination of balance-oriented and categorical language in Committee decisions predates even the establishment of a clear methodology for interpreting Article 4. *Quereshi v. Denmark* is illustrative. In *Quereshi*, which was decided in 2003, the Committee drew "the attention of the State Party to the need to balance freedom of expression with the requirements of the Convention to prevent and eliminate all acts of racial discrimination." The idea that "balance" is consistent with the complete prohibition and eradication of racist statements seems inconsistent with any typical meaning of the term. Rather, the Committee seemed to employ a categorical analysis that paid lip service to freedom of expression. *See* Kamal Quereshi v. Denmark, Comm. on the Elimination of Racial Discrimination, Commc'n No. 27/2002, ¶ 9, U.N. Doc. CERD/C/63/D/27/2002 (2003).

88. Oslo, *supra* note 77, ¶ 10.3.

89. *Id.*

90. *See generally* Mohammed Hassan Gelle v. Denmark, Comm. on the Elimination of Racial Discrimination, Commc'n No. 34/2004, U.N. Doc. CERD/C/68/D/34/2004 (2006) [hereinafter Gelle].

91. *Id.* ¶ 2.1.

comment was not necessarily discriminatory[92] no criminal act had been committed.[93] Because there were no issues of fact, the State argued that the Prosecutor, in making the relevant decision of law, had carried out his Article 4 duty to effectively implement Denmark's hate speech laws.[94] But the Committee disagreed, holding that the existence of a non-discriminatory reading did not dispose of the matter because the comment *could* be understood as degrading an entire group of people on the basis of their ethnicity.[95] Given that possibility, the Committee reasoned, it was inappropriate for the Prosecutor to deem the anti-discrimination law inapplicable without further investigation.[96] The opinion clarified that decisions not to prosecute based on non-discriminatory interpretations of a statement need to be grounded in evidence that the non-discriminatory meaning was, indeed, intended.[97]

The Committee also rejected the argument that because the statement was political speech it was exempt from the application of Article 4.[98] The Committee clarified that, under General Recommendation 30, the State has a particular duty to prevent discriminatory speech by politicians.[99] In doing so, it foreclosed using political speech as a safe harbor.[100] Thus, *Gelle* made clear that the Committee would reject attempts to accommodate free expression by limiting the categorical approach's application.

In more recent decisions, however, the Committee appeared to change course. For example in *Er v. Denmark*, decided in 2007, the Committee indicated that it would afford more leeway to states attempting to vouch safe the freedom of expression by approaching admissibility restrictively.[101] In *Er*, the applicant claimed both that Danish legislation did not effectively protect victims of ethnic discrimination and that Danish Courts did not interpret national legislation incorporating Article 4 in accordance with the Convention.[102] The Committee held that both claims were too abstract,

92. *See id.* ¶ 2.4. The Prosecutor noted that the comment did not refer to Somalis as equal to rapists or pedophiles, but "only" took issue with the fact that Somalis were being consulted about the criminalization of an act common in their country of origin.

93. *Id.*

94. *Id.* ¶ 4.4.

95. *Id.* ¶ 7.4.

96. *Id.*

97. *Id.*

98. *Id.* ¶ 7.5.

99. *Id.* ¶ 7.6.

100. *See id.*

101. *See generally* Murat Er v. Denmark, Comm. on the Elimination of Racial Discrimination, Commc'n No. 40/2007, U.N. Doc. CERD/C/71/D/40/2007 (2007).

102. *Id.* ¶ 3.3.

emphasizing that it was the Committee's task to determine whether there was a violation in a particular case, not to assess the general consistency of national legislation with the Convention.[103]

Second, and more significantly for this inquiry, the Committee narrowly construed the admissibility standard. The Committee seized the opportunity to emphasize that it could only review the interpretation of national law by national courts if the "decisions were manifestly arbitrary or otherwise amounted to a denial of justice."[104] The Committee found that standard was not met in *Er* because both the High Court of Copenhagen and the High Court of Eastern Denmark had examined the statements in light of laws that dealt specifically with discrimination and issued reasoned decisions grounded in those laws.[105] Thus, the Committee appeared to take the position that it could not review a complaint so long as national authorities had issued a reasoned decision under laws that dealt, specifically, with hate speech. This appeared a significant move toward compatibility with the freedom of expression.

Sinti and Roma v. Germany, decided in 2008, seemed to confirm that more permissive trajectory.[106] In *Sinti* the petitioners argued that both the existing legal framework in Germany[107] and the failure to initiate legal proceedings left the Sinti and Roma without protection in violation of Article 4.[108] The Committee responded by reiterating that its sole task is determining whether the application of a particular provision in the case before it "was manifestly arbitrary for a denial of justice."[109] It then rejected both claims, holding that it could not examine abstract objections to the consistency of state laws with the Convention[110] and that the decision not to prosecute did not satisfy the high admissibility standard.[111]

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103. *Id.* ¶ 7.2.

104. *Id.*

105. *Id.*

106. *See generally* Zentralrat Deutscher Sinti und Roma v. Germany, Comm. on the Elimination of Racial Discrimination, Commc'n No. 38/2006, U.N. Doc. CERD/C/72/D/38/2006 (2008) [hereinafter Sinti].

107. *Id.* ¶ 3.

108. *Id.* ¶ 2.7. The German Prosecutors had dismissed the case on the grounds that the constitutive elements of the relevant offense were not satisfied. *Id.* ¶ 2.4. The German Supreme Court then rejected an appeal on the grounds that the petitioner-associations were affected only indirectly by the defendants' allegedly discriminatory conduct. *Id.* ¶ 2.6.

109. *Id.* ¶ 7.7.

110. *Id.*

111. *Id.*

The State emphasized that, particularly where national legal standards are concerned, discretion in assessing their interpretation is appropriate.[112] Unlike in *Oslo*, the Committee granted the state meaningful deference and, in doing so, made an important observation. The Committee noted that "the article in 'The Criminalist' has carried consequences for its author, as disciplinary measures were taken against him."[113] The Committee thereby appeared to endorse a more flexible vision of compliance with Article 4, under which states' decisions of law not to prosecute alleged instances of discrimination would be respected, particularly where sanctions besides criminal punishment were imposed.

The softening of the Committee's position to accommodate freedom of speech seemed to continue in the 2009 decision *Jama v. Denmark* where it conducted an "impugned speech" analysis that deviated significantly from that in *Gelle*.[114] *Jama* concerned remarks by a political leader who, recalling an attack on her person, stated: "Suddenly they came out in large numbers from the Somali clubs . . . I could have been killed . . . [i]t was rage for blood."[115] In its assessment the Committee reiterated that Article 4 implicitly requires the effective implementation of provisions criminalizing discrimination by competent national authorities.[116] But, it found no violation of Article 4 because the statement was not impugned speech.[117]

The Committee held that the statement, "despite its ambiguity, cannot necessarily be interpreted as expressly claiming that persons of Somali origin were responsible for the attack in question."[118] Because the statement was not necessarily discriminatory, the Committee held that it could not find a violation of Article 4.[119] This decision marked a significant departure from *Gelle*, where the Committee found that the existence of an alternate, non-discriminatory reading did not end the inquiry.[120] Accordingly, it seemed that the Committee was expressing a new willingness to safeguard expression by adopting non-discriminatory readings where possible.

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112. *Id.* ¶ 4.5.

113. *Id.* ¶ 7.7.

114. *See generally* Ahmed Farah Jama v. Denmark, Comm. on the Elimination of Racial Discrimination, Commc'n No. 41/2008, U.N. Doc. CERD/C/75/D/41/2008 (2009).

115. *Id.* ¶ 2.1.

116. *Id.* ¶ 7.3.

117. *Id.* ¶ 7.4.

118. *Id.*

119. *Id.*

120. Gelle, *supra* note 90, ¶ 7.4.

However, the Committee appeared to step back toward a more restrictive approach in *Adan v. Denmark*.[121] In *Adan* the Committee addressed the approval of Mr. Espersen, another member of the Danish People's Party, of the remark at issue in *Gelle*.[122] As explained in *Gelle*, the remarks with which Mr. Espersen agreed were not necessarily racially discriminatory.[123] But, as in *Gelle*, the Committee noted that the statement could be understood to violate Article 4.[124] Therefore, the Committee held that the national authorities' failure to carry out an "effective investigation" into the remarks violated Article 4.[125] The decision can be read as an abrupt return to the position that investigating the viability of potential non-discriminatory meanings is necessary. But it should be read as relatively insignificant, given that the result was dictated by the *Gelle* case.

At a thematic discussion on hate speech, hosted by the ICERD Committee in 2012, a number of panelists addressed the problems caused by the tension between the freedom of expression and the freedom from discrimination.[126] Some panelists fully endorsed the ICERD Committee's categorical approach. For example, Mr. Diaconu, the rapporteur of the ICERD Committee, approvingly noted the Committee's repeated emphasis that prohibiting hate speech is consistent with the freedom of expression.[127] But other speakers were clearly concerned about the divide between the ICERD Committee's standard and that applied by the ECtHR.

Mr. Franco, a representative of Amnesty International, explicitly encouraged the Committee to adopt a view of the due regard clause consistent with other international human rights treaties.[128] Specifically, he advocated for punishing only intentional racist speech and only insofar as necessary and proportionate to the legitimate aim of preventing racial discrimination in a particular case—the very analysis applied by the ECtHR.[129] And Mr. de Gouttes, another member of the ICERD Committee, echoed those sentiments. Mr. de Gouttes pointed out that striking "a balance between respect for the right to freedom of expression and the

121. *See generally* Saada Mohamad Adan v. Denmark, Comm. on the Elimination of Racial Discrimination, Commc'n No. 43/2008, U.N. Doc. CERD/C/77/D/43/2008 (2010).

122. *Id.* ¶ 2.1.

123. *Id.* ¶ 7.5.

124. *Id.*

125. *Id.* ¶ 7.7.

126. *See generally* Comm. on the Elimination of Racial Discrimination, 81st Sess., Day of Thematic Discussion on Racist Speech, U.N. Doc. CERD/C/SR. 2196 (Sept. 4, 2012).

127. *Id.* ¶ 30.

128. *Id.* ¶ 58–64.

129. *Id.* ¶ 62.

provisions of Article 4"[130] required "bearing in mind" that restrictions on the freedom of expression "were only permissible if they were necessary, legitimate and proportionate."[131]

But the Committee's most recent Article 4 decision *T.B.B. v. Germany* shows that the analysis in *Sinti*, *Er,* and *Jama* did not mark a turning point in the Committee's jurisprudence. It also confirms that the Committee did not elect to embrace the necessity and proportionality analysis that several participants in the thematic discussion endorsed.[132] In *T.B.B.* the Committee considered an interview with the cultural journal *Lettre International* in which Mr. Sarrazin, the interviewee, remarked negatively on the lower classes' productivity and intelligence, focusing specifically on migrant workers.[133] In its decision the Committee departed from its more accommodating precedents by declining to either restrictively apply its admissibility standard or credit non-discriminatory readings of the statement at issue.

Germany argued—"referring to the jurisprudence of the European Court of Human Rights"—that deference to the state was appropriate because "domestic authorities have the advantage of evaluating the facts . . . ."[134] And the Committee began its review of the merits by reiterating that it could not "review the interpretation of facts and national law made by domestic authorities, unless the decisions were manifestly arbitrary or a denial of justice."[135] But, in the very next sentence, the Committee undercut the thrust of that restrictive standard, stating that, regardless, it must assess whether the speech at issue is "impugned" within the meaning of Article 4 and whether it is covered by the "due regard" clause.[136] This marked a departure from cases including *Sinti*, where the Committee ended its analysis after finding the admissibility standard unmet.[137] Thus, the Committee neutralized the admissibility standard's potential to accommodate the freedom of speech by declining to make admissibility a condition precedent to further inquiry.

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130. *Id.* ¶ 43.

131. *Id.* ¶ 44.

132. *See generally* TBB-Turkish Union in Berlin/Brandenburg v. Germany, Comm. on the Elimination of Racial Discrimination, Commc'n No. 48/2010, U.N. Doc. CERD/C/82/D/48/2010 (2013) [hereinafter T.B.B. Majority].

133. *Id.* ¶ 2.1.

134. *Id.* ¶ 6.2.

135. *Id.* ¶ 12.5.

136. *Id.*

137. *See generally* Sinti, *supra* note 106.

Nor did the Committee facilitate consistency with the freedom of speech by considering alternative, non-discriminatory readings. The majority opinion did not even address the possibility. The dissent argued that the majority erred in assuming that Mr. Sarrazin's statements, which could be construed otherwise, violated Article 4.[138] Ms. Sarrazin's statements, according to the dissent, may just have easily stood for the non-discriminatory assertion that cultural factors may contribute to a lack of economic success.[139] In support of that point the dissenting opinion canvassed the work of respected scholars who asserted a link between certain groups' cultural characteristics and their lack of economic success.[140] The Committee's refusal to credit those viable non-discriminatory readings marked a return to the position it adopted in *Gelle* and a radical departure from its decision in *Jama*.

And the Committee's "due regard" analysis in *T.B.B.* wholly embraced the categorical approach to ICERD Article 4. After deciding that Mr. Sarrazin's remarks were "impugned speech" within the meaning of Article 4, the Committee determined that Ms. Sarrazin's statements did not qualify for the "due regard" clause's protection.[141] In its perfunctory analysis the ICERD Committee emphasized that among the "duties and responsibilities" that attach to exercising the freedom of speech is a duty to protect the population "from acts of racial discrimination by dissemination of ideas based upon racial superiority or hatred."[142] The Committee found that the statements at issue disseminated ideas based on racial superiority and, therefore, fell outside the scope of the "due regard" clause.[143]

The decision did not reflect any effort to "balance" the Article 4 right against the freedom of expression. Rather, the Committee stated, without further analysis, that "[w]hile acknowledging the importance of the freedom of expression, the Committee considers that Mr. Sarrazin's statements amounted to dissemination of ideas based on racial superiority . . . ."[144] The dissent, on the other hand, clearly advocated for embracing the necessity and proportionality analysis employed by the ECtHR. In support of the contention that the Committee owed the state

138. Individual Opinion of Comm. Member Carlos Vazquez (dissenting), Comm. on the Elimination of Racial Discrimination, Commc'n No. 48/2010, ¶ 7, U.N. Doc. CERD/C/82/3 (2013) [hereinafter T.B.B. Dissent].

139. *Id.* ¶ 8.

140. *Id.* ¶ 11.

141. T.B.B. Majority, *supra* note 132, ¶ 12.8.

142. *Id.* ¶ 12.7.

143. *Id.* ¶ 12.8.

144. *Id.*

more deference than was shown, the dissent remarked that "such a policy would appear to be required by the principle that any restriction on the right to free speech must conform to the strict tests of necessity and proportionality."[145] The dissent also highlighted that the majority overlooked the drafting history of the "due regard clause," which was introduced to accommodate states who objected to the dissemination clause on the ground that it conflicted unacceptably with the freedom of speech.[146]

The dissent also went on argue that, even if the statements Mr. Sarazzin disseminated contained ideas of racial superiority, it did not follow that declining to prosecute violated Article 4.[147] That position would trample prior statements about the Committee's respect for the principle of expediency and the deference states are owed.[148] Instead, the dissent argued, states should be able to prosecute only the most serious violations.[149] The dissent pointed out, specifically, that that position appeared "to be required by" the position the ECtHR adopted in *Soulas and Others v. France*.[150] The majority did not place a similar emphasis on adopting a position that accommodated states' other international human rights obligations, nor did it address the principle of expediency.

In sum, canvassing the ICERD Committee's interpretation of Article 4 reveals that its jurisprudence turned away from and, later, back toward, a categorical approach to the relationship between the freedom of expression and freedom of speech. Section B, which follows, analyzes the ECtHR's interpretation of Article 10. Section B focuses on the Court's use of Article 17, which marked a movement—albeit a temporary one—toward consistency with the ICERD Committee's interpretation of Article 4.

B. ECHR Article 10

In *Handyside v. United Kingdom*, the ECtHR referred to the freedom of expression as "one of the essential foundations of a [democratic] society, one of the basic conditions for its progress and for the development of every man."[151] Because this statement identifies the freedom of expression as foundational to realizing other human rights, it stands in stark contrast with the 1983 ICERD Report, which frames the elimination of racial discrimination as a threshold condition for enjoying all other fundamental

145. T.B.B. Dissent, *supra* note 138, ¶ 13.
146. *Id.* ¶ 5.
147. *Id.* ¶ 10.
148. *Id.*
149. *Id.* ¶ 13.
150. *Id.*
151. Handyside v. United Kingdom, App. No. 5493/72, ¶ 49, Eur. Ct. H.R. (1976).

rights, stating that "the eradication of racial discrimination has become a peremptory norm of international law (*jus cogens*)."[152]

The Court has not, however, uniformly prioritized the freedom of expression over the freedom from discrimination. In *Erbakan v. Turkey*, for instance, the Court acknowledged that because the equality of all people is a foundation of democracy, it "may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance."[153] The Court's decisions are marked by attempts to parse genuine extremism from exercises of the right to freely express views that "shock and disturb" others. This Note focuses on cases decided after 2008, when the Court began focusing on hate speech and propaganda as opposed to speech glorifying violence.[154]

Section 1 contextualizes Article 17 by distinguishing cases where it is employed "directly" to remove hate speech from Article 10's protections.[155] Section 2 then discusses *Jersild v. Denmark*, which, this Note asserts, catalyzed the increased direct application of Article 17. Accordingly, the discussion of *Jersild* herein focuses not on the case, but on Denmark's interaction with the ICERD Committee over the "rights-clash" it presented. Section A examines the applications of Article 17 that preceded *Jersild*, setting up the contrast with the post-*Jersild* applications of Article 17 discussed in Section B. Section C then discusses the extent to which the increased direct application of Article 17 marked movement toward consistency with ICERD Article 4 and offers an explanation for the absence of convergence.

1. Article 17: Hate Speech that Destroys Rights and Freedoms

Article 17 provides: "Nothing in this Convention may be interpreted as implying . . . 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

152. 1983 Report, *supra* note 66, ¶ 232.

153. Erbakan v. Turkey, App. No. 59405/00, ¶ 56, Eur. Ct. H.R. (2006).

154. *See generally* Françoise Tulkens, *When to Say Is to Do: Freedom of Expression and Hate Speech in the Case-Law of the Court, in* FREEDOM OF EXPRESSION 279, 288–95 (Josep Casadevall et al. eds., 2012) (distinguishing between hate speech cases, which largely followed 2008, and an earlier period during which the Court's cases primarily involved restrictions on speech glorifying violence).

155. The ECtHR uses two jurisprudential methods to strike a balance between freedom from discrimination and freedom of expression in hate speech cases. Under the first, the Court recognizes that discriminatory speech is "expression" under Article 10(1), but employs the restrictions in Article 10(2) to justify its limitation. Under the second, the Court employs Article 17 to categorically exclude racist speech from the scope of Article 10(1). David Keane, *Attacking Hate Speech Under Article 17 of the European Convention on Human Rights*, 25 NETH. Q. HUM. RTS. 641, 642–43 (2007).

or at their limitation to a greater extent than is provided for in the Convention."[156] The Court explained in *Lawless v. Ireland* that Article 17 prevents individuals or groups from deriving from the Convention a right to engage in any activity or perform any act that would destroy any of the rights and freedoms the Convention protects.[157] The Court has taken two distinct approaches to applying Article 17 in hate speech cases.[158] This Note considers only cases in which Article 17 was applied directly to bar the admissibility of an application.[159] In such cases, Article 17 is deployed to place some expression, categorically, outside of the scope of Article 10.[160]

2. *Jersild v Denmark*: A Catch Twenty-Two

In *Jersild* the applicant, a journalist, made a television documentary that contained an interview with a group of young people who called themselves the "Green jackets."[161] In the segment, some of the interviewees made derogatory comments about immigrants and ethnic groups in Denmark.[162] The applicant was convicted of aiding and abetting the dissemination of those racist remarks and appealed to the ECtHR alleging a violation of his Article 10 right to freedom of expression.[163] The Court found a violation of Article 10 by a thin margin of twelve votes to seven, emphasizing that Mr. Jersild only sought to expose, analyze, and explain the views of the Green jackets, which were a matter of "great public concern."[164] The Court focused on the public right to access, and the press's obligation to disseminate, information at the center of important public debates.[165]

During the proceedings, Denmark explicitly raised its concern about the conflict between the requirements of ECHR Article10 and its

156. ECHR, *supra* note 10, art 17.

157. *See* Tulkens, *supra* note 154, at 282–83.

158. *See generally* Mark E. Villiger, *Article 17 ECHR and Freedom of Speech in Strausberg Practice, in* FREEDOM OF EXPRESSION, *supra* note 154, at 321, 324–29.

159. *Id.* at 324.

160. *Id.* Alternatively, the Court sometimes applies Article 17 indirectly as part of the balancing test conducted under Article 10(2). *Id.* at 325. Specifically, the Court considers Article 17 in determining whether a given restriction is "necessary in a democratic society." *Id.* This Note focuses on the direct application of Article 17 because the indirect applications are, essentially, one with the traditional Article 10(2) analysis.

161. *See generally* Jersild v. Denmark, App. No. 15890/89, Eur. Ct. H.R. (1994).

162. *Id.* ¶ 11.

163. *Id.* ¶ 14.

164. *Id.* ¶ 33.

165. *Id.* ¶ 35.

obligations under ICERD.[166] In *Jersild*, the State did not argue that Article 10 was inapplicable. Rather, it contended that the Court's application of Article 10(2) should ensure that Article 10 is not interpreted so as to "limit, derogate from, or destroy the right to protection against racial discrimination under the U.N. Convention."[167]

Beginning its analysis, the Court emphasized that it was bearing in mind the State's obligations "under the U.N. Convention and other international instruments to take effective measures to eliminate all forms of racial discrimination."[168] But, in the very next sentence, the Court stated that "an important factor in the Court's evaluation will be whether the item in question, when considered as a whole, appeared from an objective point of view to have had as its purpose the propagation of racist views and ideas."[169] This criteria clearly conflicts with the ICERD Committee's position that considerations of intent should have no part in Article 4 analysis.

Although *Jersild* was the first decision in which the ECtHR directly addressed the relationship between states' obligations under ICERD and the ECHR, the Court did not grapple with the substantive issues. After stressing that it was not the Court's place to interpret the "due regard" clause, the Court simply observed that "its interpretation of Article 10 of the European Convention in the present case is compatible with Denmark's obligations under the U.N. Convention."[170] But, as the analysis above illustrates, that statement seems flatly incorrect, particularly in light of the Committee's announcement in General Recommendation 15 that completely prohibiting the dissemination of racist statements is consistent with the freedom of expression.

The case against *Jersild* was a topic of particular interest during Denmark's 1991 periodic report to ICERD.[171] Denmark emphasized, when questioned by Committee members, that the "Danish Supreme Court interpreted the Danish Law 266(b) so as to stress the objective fact of dissemination and to exclude consideration of the intent of the broadcasters."[172] This position aligned with the Committee's repeated

166. *Id.* ¶ 27.

167. *Id.*

168. *Id.* ¶ 31.

169. *Id.*

170. *Id.* ¶ 30.

171. *See generally* Ninth Periodic Report of Denmark to the U.N. Comm. on the Elimination of Racial Discrimination, U.N. Doc. CERD/C/184/Add.2 (Aug. 16, 1989) [hereinafter 9th CERD Report].

172. *Id.*

pronouncements that Article 4 prohibited the mere act of dissemination.[173] The Report noted that some Committee members "welcomed this decision as the clearest statement yet, in any country, that the right to protection against racial discrimination took precedence over the right to freedom of expression."[174] Though the Report also mentions that some Committee members believed a balance with the freedom of expression was necessary,[175] the development of the Committee's position outlined above seems to evidence that the former members won the day.

Denmark brought the *Jersild* decision to the attention of the ICERD Committee in its Twelfth Periodic Report, which was published in 1996, after the ECtHR found a violation.[176] Mr. Jersild was convicted under § 266(b) of the Danish Penal Code, which codified Denmark's obligations under Article 4. Therefore, Denmark specifically mentioned that "The European Court of Human Rights held . . . by 12 votes to 7 that the journalist's right to freedom of expression in accordance with article 10 . . . had been violated."[177] And, in reaction to that conviction, Denmark clarified that § 226(b) would no longer be applied to "statements which . . . otherwise form part of a serious debate."[178]

In its Fourteenth Period Report before the Committee in 2000, Denmark explained that in present legal practice under Article 4 the "courts assess the consideration of freedom of expression and freedom of the press as opposed to the consideration of protection against racist statements."[179] Thus, as a result of the rights-clash in *Jersild*, Denmark was on track to dilute its obligations under ICERD to the point of *de facto* nullification. A response by the Court was clearly necessary. This Note posits that the Court responded using Article 17, directly applying the provision to bring its practice in line with the Committee's interpretation of ICERD. The contrast between the application of Article 17 before and after *Jersild*, which is explored in the following sections, supports that thesis. But, as discussed in Section C, that move toward consistency was only temporary.

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173. *Id.*

174. *Id.*

175. *Id.*

176. *See generally* Twelfth Periodic Report of Denmark to the U.N. Comm. on the Elimination of Racial Discrimination, ¶ 6, U.N. Doc. CERD/C/280/Add.1 (May 3, 1995) [hereinafter 12th CERD Report].

177. *Id.* ¶ 6.

178. *Id.* ¶ 32.

179. Fourteenth Periodic Report of Denmark to the U.N. Comm. on the Elimination of Racial Discrimination, ¶ 138, U.N. Doc. CERD/C/362/Add.1 (July 12, 1999) [hereinafter 14th CERD Report].

a. Article 17 Before *Jersild*

Both pre-*Jersild* applications of Article 17 indicate that the provision is only relevant in a narrow set of circumstances. Language in both decisions seems to cabin the potential efficacy of Article 17 to place anti-democratic speech outside of the scope of the freedom of expression.[180] This perspective on Article 17 gives Article 10 a wide berth, requiring that most speech be subjected to the Article 10(2) balancing inquiry.

The first such application occurred in the *German Communist Party*, which was issued in 1957.[181] There the applicants alleged that the seizure of the Communist Party's assets violated Article 10, among others.[182] But the Commission emphasized that because the party's goal was reinstating dictatorship, allowing an appeal to Article 10 would undermine the Convention's goal of "safeguarding the free functioning of democratic institutions" in violation of Article 17.[183]

The second such application of Article 17 came two decades later in *Glimmerveen and Hagenbeek v. Netherlands*.[184] This was the first that dealt with hate speech.[185] In *Glimmerveen*, the Commission held that the statements at issue, which advocated the removal of all non-white people from the Netherlands, fell outside the scope of Article 10.[186] The Commission reasoned that allowing the protection of such statements undermined the overarching values of the Convention.[187] Seemingly seeking to foreclose any broad construal of the decision, the Commission then specified that the "general purpose of Article 17 is preventing totalitarian groups from exploiting . . . the principles enunciated by the Convention."[188] But although both cases seem to emphasize that hate speech unrelated to undemocratic aims does not fall under Article 17,[189] Section B shows that the Court grew more liberal in applying Article 17 to place hate speech outside of Article 10's protections after *Jersild*.[190]

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180. ANNE WEBER, MANUAL ON HATE SPEECH 23–24 (2009).

181. *Id.*

182. Villiger, *supra* note 158, at 324.

183. *Id.*

184. Keane, *supra* note 155, at 644–43.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *See generally* Hannes Cannie & Dirk Vorhoof, *The Abuse Clause and Freedom of Expression*, 29 NETH. Q. HUM. RTS. 54 (2011) (discussing the ECtHR's increasingly expansive position on the Article 17 "abuse clause" in contrast with its narrow origins).

b. Article 17 After *Jersild*

The possibility of applying Article 17 directly to accommodate ICERD's requirements was foreshadowed in *Jersild*. Though the youths in *Jersild* were not parties, the Court stated in dicta that their remarks "were more than insulting to members of the targeted group and did not enjoy the protection of Article 10."[191] Immediately thereafter, the Court cited, to the first hate speech case in which Article 17 was applied to bar the admissibility of an application.[192] Given the uncertainty of characterizing *Jersild* as consistent with ICERD, and the thin margin by which it was decided, the mention of Article 17 appears a sort of concession. Having emphasized that it would take a strong stand where the freedom of the press was at issue, the Court seemed to indicate its willingness to place statements and writings by those who advocate racist views outside the scope of Article 10— a position more consistent with ICERD.

Following *Jersild*, the Committee of Ministers of the Council of Europe issued a Recommendation[193] on hate speech that developed just such a distinction.[194] The Committee recommended that all of the member states ratify ICERD immediately after recognizing "the need to reconcile the fight against racism and intolerance with the need to protect freedom of expression."[195] However, the Committee simultaneously took particular note of the need to respect the role of the media in communicating controversial information at the center of public debates.[196] And, to that end, it called on nations to ensure that their laws distinguish between journalists reporting on racist statements and the actual authors of those statements.[197]

But, where lay people were concerned, the Committee made a significant concession in the name of preventing hate speech, expressing willingness to recognize that, per Article 17, some hate speech falls outside of the scope of Article 10.[198] Specifically, the Recommendation stated that Article 17 should apply directly "where hate speech is aimed at the destruction of the rights and freedoms laid down in the Convention or at

191. Jersild v. Denmark, App. No. 15890/89, ¶ 35, Eur. Ct. H.R. (1994).

192. *Id.*

193. The Parliamentary Assembly of the Council of Europe adopted Recommendation 1805 in 2007, but it deals exclusively with discrimination based on religion.

194. *See generally* Council of Europe, Recommendation No. R (97)20 of the Committee of Ministers to Member States on "Hate Speech" (Oct. 30, 1997).

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

their limitation to a greater extent than provided herein."[199] That characterization of Article 17's application was far more expansive than in previous decisions.

The ECtHR first discussed the direct application of Article 17 after *Jersild* in *Lehideux v. France*, decided in 1998.[200] There, the Court elected to apply Article 17 indirectly as part of the balancing test conducted under Article 10(2). However, it also clarified where Article 17 would apply to summarily reject free speech claims at the admissibility stage. While some scholars have cited *Lehideux* for the proposition that Article 17 applies directly only in cases involving revisionism and Holocaust denial,[201] the opinion's language invites a broader application. For example, the decision to apply Article 17 only indirectly appears rooted in the Court's reasoning that because "the advertisement which had given rise to the applicants' conviction did not contain any terms of racial hatred or other statements calculated to destroy or restrict the rights and freedoms guaranteed by the Convention," direct application was inappropriate.[202]

Such a characterization of Article 17 is manifestly not limited to instances of Holocaust denial and revisionism. Judge Jambrek, recognizing that fact, wrote a concurrence seemingly committed foreclosing the broader direct application of Article 17.[203] In his concurring opinion, the Judge carefully reframed the discussion of Article 17, emphasizing that its application should be cabined by the historical context that gave rise to its inclusion—one marked by the firm rejection of totalitarianism.[204] Thus, the Judge implicitly recognized that the Court's statement that the facts at issue did "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" did not cabin the potential applications of Article 17.[205]

Subsequent cases illustrate that the Court did not adopt the reading Judge Jambrek proposed and, instead, elected to apply Article 17 more broadly.[206] The ECtHR first directly applied Article 17 to bar the admissibility of an application in *Garaudy v. France*, which was decided in

199. *Id.*
200. WEBER, *supra* note 180, at 23–24.
201. *See, e.g.*, Keane, *supra* note 155, at 647–51.
202. Lehideux v. France, App. No. 24662/94, ¶ 37, Eur. Ct. H.R. (1998).
203. *Id.*
204. *Id.* ¶¶ 1–2.
205. *Id.* ¶ 47.
206. *See generally* Cannie & Vorhoof, *supra* note 190.

2003.[207] There, Mr. Garaudy, who was convicted of denying crimes against humanity, publishing racially defamatory statements and incitement to racial hatred, appealed to the Court alleging a violation of his Article 10 freedom of expression.[208] The Court held that the claim was inadmissible under Article 17.[209] But, notably, the Court's admissibility discussion did not end after it noted that the real purpose of Mr. Garaudy's book was to "rehabilitate the Nationalist-Socialist regime."[210] Instead, the Court went on to cite the fact that Mr. Garaudy had endorsed "one of the most serious forms of defamation of Jews"—Holocaust denial—as an additional reason for invoking Article 17.[211] In doing so, the Court characterized Article 17 more broadly than in *Glimmerveen*, stating that the acts in question were incompatible with the Convention because they infringed the rights of others.[212]

The Court applied a similarly generous approach to Article 17 in *Pavel Ivanov v. Russia*, a 2007 decision that dealt with ethnic hatred.[213] In that case, the applicant published articles that identified the entire Jewish ethnic group as having plotted against the Russian people and ascribed Fascist ideology to Jewish leaders.[214] The applicant appealed his conviction for public incitement to ethnic hatred, alleging a violation of his rights under Article 10.[215] But the Court held that the claim was inadmissible because such a general attack on the Jewish ethnic group was contrary to values at the heart of the Convention and, therefore, violated Article 17.[216]

In *Leroy v. France*, which was decided in 2008, the applicants alleged that their conviction for complicity in condoning terrorism violated their Article 10 rights.[217] The applicant, a cartoonist, had drawn the attack on the Twin Towers and included in the caption "We have all dreamt of it . . . Hamas did it."[218] But the Court declined to apply Article 17 directly for several reasons.[219] First, the Court held that the cartoon was not of a kind

207. *Id.* at 61–62 (discussing Garaudy v. France, App. No. 65831/01, Eur. Ct. H.R. (2003)).

208. Garaudy v. France, App. No. 65831/01, Translation Extract, at 1, Eur. Ct. H.R. (2003).

209. *Id.* at 20.

210. *Id.* at 23.

211. *Id.*

212. *Id.*

213. Pavel Ivanov v. Russia, App. No. 35222/04, Eur. Ct. H.R. (2007).

214. *Id.* at 1–2.

215. *Id.*

216. *Id.* at 5.

217. Press Release, Registrar of the Eur. Ct. H.R., Chamber Judgment: *Leroy v. France* (Oct. 2, 2008), http://hudoc.echr.coe.int/eng?i=003-2501837-2699727.

218. *Id.*

219. Tulkens, *supra* note 154, at 292–93.

with the racist remarks in previous cases that negated fundamental rights and struck directly against the values underlying the Convention.[220] Second, the Court noted that the drawing was not an unequivocal attempt to justify terrorist acts.[221] Finally, the Court observed that the offense caused the victims had to be examined in light of the freedom of expression.[222]

In *Feret v. Belgium*, which was decided in 2009, the Court again declined to apply Article 17 directly.[223] There, the applicant, a Member of Parliament and chairman of an extreme right-wing party, disseminated leaflets containing racist and xenophobic speech.[224] He appealed under Article 10 after being convicted of public incitement to discrimination and racial hatred.[225] Though the State argued that Article 17 should apply, and the case be declared inadmissible, the Court declined to apply the provision.[226]

The Court reached a similar conclusion in *Paksas v. Lithuania*, which was decided in 2011.[227] In *Paksas* the Court stated that: "the Article is applicable only on an exceptional basis and in extreme circumstances."[228] The Court also provided an unequivocal characterization of the narrow purpose of Article 17, stating that it exists to: "prevent individuals or groups with totalitarian aims from exploiting in their own interest the principles enunciated in the Convention."[229]

In sum, the foregoing analysis reveals that prior to 2003 Article 17 was seldom applied and, even then, was only in cases involving threats to democratic government. However, following *Jersild* and the ensuing Council of Europe Recommendation, the Court began directly applying Article 17 far more frequently and in a wider variety of circumstances. But beginning in 2008, the Court decided a series of cases that ran against that trend by refusing to place all hate speech within the purview of Article 17. Section C, which follows, analyzes the ECtHR's temporary move toward consistency with the ICERD Committee's interpretation of Article 4 and seeks to explain its subsequent abandonment of that compromise.

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220. *Id.*

221. *Id.*

222. *Id.*

223. Press Release, Registrar of the Eur. Ct. H.R., Chamber Judgment: *Feret v. Belgium* (July 16, 2009), http://hudoc.echr.coe.int/eng?i=003-2800730-3069797.

224. *Id.*

225. *Id.*

226. Tulkens, *supra* note 154, at 292–93.

227. *See generally* Paksas v. Lithuania, App. No. 34932/04, Eur. Ct. H.R. (2011).

228. *Id.* ¶ 87.

229. *Id.*

IV. ARTICLE 17: PRODUCING COMPETITION RATHER THAN CONVERGENCE

This sub-section analyzes the decisions of the ICERD Committee and ECtHR in conjunction. Given the lack of direct evidence that these bodies did, in fact, consider each other's case law, this sub-section draws reasonable inferences from shifts in their respective positions. The analysis that follows does not confirm the thesis that a trend toward convergence emerges as international courts and treaty bodies interpret rights that present the potential for conflict. Instead, it reveals a complex reality marked by a noteworthy unintended consequence—a sort of competition between the ICERD Committee and the ECtHR.

The case study does demonstrate the use of interpretation to create inter-body consistency. The trajectory of both sets of decisions invites the inference that ECtHR's increasingly broad and frequent applications of Article 17 responded to the conflict between ICERD Article 4 and ECHR Article 10 Denmark faced in *Jersild*. But that move toward consistency did not begin a march toward convergence. Instead, the case study indicates the emergence of a puzzling "competition" between the bodies—a competition in tension with the goal of avoiding a "rights-clash" through interpretation. This sub-section draws out and explains those two threads of the case study.

As the discussion above illustrates, the ICERD Committee took a fairly categorical approach to the application of Article 4 before 2007. The Committee's decisions and recommendations focused heavily on the 1983 Report's statement that the complete prohibition of racist speech is consistent with the freedom of expression. And the outcomes of the Committee's decisions and thrust of its recommendations during this period illustrate that any balancing language that the Committee included was little more than an impotent nod to free speech concerns.

This characterization is supported by the Committee's refusal to adopt other strategies that would have better accommodated the freedom of speech. For example, in *Oslo* the Committee paid mere lip-service to the idea of deference to national courts, conducting stringent review of the Norwegian Supreme Court's decision that no violation of the hate speech law at issue had occurred.[230] And, in *Gelle,* the Committee rejected both the argument that a non-discriminatory reading of alleged hate speech should

230. Oslo, *supra* note 77, ¶ 10.3.

be adopted where possible[231] and the argument that political speech ought to be afforded special protection.[232]

It was during this same period that the ECtHR considered and handed down its decision in *Jersild*. As discussed in Section III(B)(2) above, a concerned Danish government brought the prosecution to the ICERD Committee's attention in 1991, while the case was still under consideration before the ECtHR.[233] But Denmark did not receive a unified response about how to handle the "rights-clash" between the freedom of expression and freedom from discrimination. While some Committee members welcomed the prosecution as an appropriate manifestation of Denmark's treaty obligations,[234] others cautioned that Denmark ought to take care in striking a balance with freedom of expression.[235]

Once the ECtHR handed down its decision in *Jersild*, an understandably frustrated Denmark announced that it would not prosecute as hate speech any expression related to matters of public concern.[236] This was seemingly in clear contravention of the ICERD Committee's position that prohibiting all hate speech was consistent with the freedom of expression. But, notwithstanding Denmark's announcement, the ICERD Committee continued to apply a categorical approach in the *Quereshi*, *Oslo* and *Gelle* decisions discussed above.

Denmark's reaction and the Committee's refusal to adopt a more nuanced approach were problematic for several reasons. First, Denmark's *de facto* nullification of its obligations under ICERD Article 4 set a dangerous precedent for compliance. Second, the fact that Denmark faced such a conflict seemed likely to disincentivize other states from ratifying both treaties for fear of facing a similar impasse. And, finally, the very fact of the conflict between ECHR Article 10 and ICERD Article 4 cut clearly against the fundamental notion of the universality of human rights discussed in the Introduction.

In contrast with the relative silence of the ICERD Committee, the ECtHR took clear note of the problems that *Jersild* presented. First, the ECtHR noted the ICERD Committee members' divergent responses to the prosecution in the *Jersild* opinion itself.[237] The ECtHR also made explicit mention in the opinion of *Jersild*'s purported consistency with Denmark's

231. Gelle, *supra* note 90, ¶ 7.4.
232. *Id.* ¶ 7.5.
233. *See generally* 9th CERD Report, *supra* note 171.
234. Jersild v. Denmark, App. No. 15890/89, ¶ 21, Eur. Ct. H.R. (1994).
235. *Id.*
236. 14th CERD Report, *supra* note 179, ¶ 138.
237. *Jersild*, App. No. 15890/89, ¶ 21.

obligations under ICERD.[238] The ECtHR was clearly concerned about the issues Denmark raised before the ICERD Committee in its 1991 periodic report. And given that the Committee was continuing to take a categorical approach, seemingly refusing to meaningfully accommodate the freedom of expression, the ECtHR was forced to act.

When faced with a surge of hate speech cases in 2008, the ECtHR began employing Article 17.[239] The direct application of Article 17 is consistent with the approach taken by the ICERD Committee. Where it is directly applied, Article 17 completely removes the speech at issue from the scope of Article 10's protections. And that is exactly what the ICERD Committee's decisions circa-2007 appeared to require.[240] By positing that the freedom of expression and freedom from discrimination were completely consistent, the Committee clearly indicated that hate speech ought not receive any protection as free expression. This position was at odds with the traditional approach under ECHR Article 10(2), which presumes that hate speech is covered by the freedom of expression and proceeds to selectively disqualify some instances from its protections using proportionality balancing.[241]

The stark contrast between the early and later applications of Article 17 creates a reasonable inference that the ECtHR's re-imagination of the provision was an effort at consistency. Before *Jersild*, Article 17 was employed sparingly—indeed, it was only directly applied twice.[242] And although Article 17 was applied to hate speech in one of those two early cases, it was used only where the facts presented speech advocating the anti-democratic extermination of a race.[243] The ECtHR's decisions between 1994 and 2007 removed Article 17 from this narrow context and, instead, employed the provision to categorically exclude more generic hate speech from the protections of ECHR Article 10 in cases including *Garaudy* and *Pavel*. This move toward consistency brought the application of ECHR in line with ICERD.

During period that followed—between 2007 and 2010—the ICERD Committee began softening its approach, making meaningful room for

238. *Id.*

239. While several scholars, including those cited in Sections III.B.2.A–B have discussed the divide between the cases in which Article 17 was applied as part of the Article 10(2) balancing inquiry and those in which it was applied to categorically exclude hate speech from the ambit of Article 10, this is the first article to explain that shift.

240. *See supra* Section III.A.

241. ECHR, *supra* note 10, art 10.

242. *See supra* Section III.B.2.A.

243. *Id.*

balance in its decisions. Why, exactly, this shift occurred is unclear. But it is fair to infer that the Committee responded in kind to the ECtHR's efforts because it recognized that such compromises were necessary to avoid a "rights-clash." The ICERD Committee's concessions took several forms including tightening the admissibility standard[244] and expressing willingness to credit non-discriminatory interpretations of alleged hate speech where possible.[245] These parallel developments between the ICERD Committee's jurisprudence and that of the ECtHR evidence movement toward consistency in interpretation. But these changes did not mark the start of a linear progression toward convergence. Quite the opposite.

The ICERD Committee's concessions did not go unanswered by the ECtHR. Instead, during this same period, there was a marked decline in the frequency with which the ECtHR directly applied Article 17. In a series of cases including *Leroy* and *Feret* the Court began declining to do so until, in *Paksas*, it explicitly cabined the potential relevance of Article 17 to instances of hate speech advocating totalitarianism. Specifically, the *Paksas* decision stated: "the Article is applicable only on an exceptional basis and in extreme circumstances."[246] It stands to reason that the Court began taking this more stringent approach in light of the concessions made by ICERD. Sensing that the danger of a clash was receding in light of the changes in the ICERD Committee's approach, the ECtHR likely saw itself as returning its primary focus to maximizing the protection afforded the right under its charge—the freedom of expression.

But, in 2013, the trajectory of the ICERD Committee's jurisprudence shifted. In *T.B.B.* the Committee reverted to taking a categorical view of the relationship between the freedom of expression and the freedom from discrimination. The Committee also declined to apply its admissibility standard restrictively or to credit non-discriminatory readings of the allegedly racist statements at issue. Both of those changes evidenced refusal to cabin the reach of the categorical approach. The dissent railed against this shift, urging the Committee to continue observing the more permissive precedent it had recently established and even stating explicitly that the majority's approach was contrary to recent judgments of the ECtHR.[247] In light of the evident discord between the *T.B.B.* and *Paksas* decisions, nations that have ratified both treaties once again find themselves facing the same problems that confronted Denmark in *Jersild*.

244. *See supra* Section III.A.

245. *Id.*

246. Paksas v. Lithuania*,* App. No. 34932/04, ¶ 87, Eur. Ct. H.R. (2011).

247. *See generally* T.B.B. Dissent, *supra* note 138.

While it is unclear why, exactly, the ICERD Committee's jurisprudence took this turn, it is plausible that the Committee was responding to the fact that the ECtHR foreclosed the direct application of Article 17 to hate speech cases generally. Given the ECtHR's return to a less permissive approach, the Committee may have seen itself as faced with the possibility of being forced to bear the entire burden of compromise. And, absent the sort of direct conflict that it faced in *Jersild*, the Committee likely perceived more benefit in returning to maximizing the protection of the right that it, in particular, was charged with interpreting and administering than in continuing to meet the ECtHR halfway.

This outcome has important implications for universality. As noted in the Introduction, the expectation of a trend toward convergence is grounded in that fundamental principle. Specifically, in the reasonable assumption that courts and treaty bodies' interpretations will trend toward inter-instrumental convergence because these bodies view discrete human rights as part of a set of properly universal protections. But the outcome of this case study undermines that assumption. As noted above, once the ICERD Committee began taking a more permissive approach, the ECtHR started declining to accommodate the ICERD Committee's interpretation of ICERD Article 4 using ECHR Article 17. And the ICERD Committee then returned to taking a categorical position on the relationship between the freedom of speech and the freedom of expression. Those parallel developments indicate that both bodies approached interpretive compromises not as solutions, but as temporary measures. Rather than aiming to maximize protections by ensuring lasting inter-instrumental consistency through convergence, each sought to abandon compromise once the threat of conflict had "passed" in the interest of "maximizing" the protection of the specific right under its charge.

But, as the case study illustrates, that position was shortsighted. It produced competition as both bodies vied to retreat from positions of interpretive compromise. And that competition resulted in a counterproductive return to the very positions that contributed to the conflict in *Jersild*. Thus, this approach perpetuated the "rights clash." And, as discussed above, such clashes not only discourage compliance, but future dual ratification – in short, they are inimical to the universal protection of human rights. To halt this cycle, the ICERD Committee and ECtHR must come to see interpretive measures aimed at consistency as *solutions*, which, in turn, requires looking beyond the four corners of any one instrument to the broader goal of inter-instrumental consistency

CONCLUSION

This analysis demonstrates that the ECtHR did, indeed, move toward consistency by using Article 17 to accommodate the interpretation of Article 4. But it also demonstrates that this move toward consistency did not mark progression toward convergence. Rather, tracking parallel developments in the jurisprudence of the ECtHR and the ICERD Committee reveals that the ECtHR employed Article 17 as a temporary solution. The return to an impasse in *T.B.B.* and *Paksas* illustrates the danger in approaching interpretive compromises as necessary evils to be abandoned. In the case of related rights that present the potential for a rights-clash, it is critical that treaty bodies and courts see convergence as a lasting solution. Otherwise, conflicts deleterious to universality will continue to present themselves.

In order to resolve this cycle of discord courts and treaty bodies charged with interpreting and administering related international instruments ought to take a comprehensive view of what it is to protect human rights, eschewing a myopic focus on the rights under their charge. If they do so, these institutions will come to see compromises and interpretations that avert rights clashes, like that Article 17 represents, as pivotal tools for maximizing the protection of human rights. This, in turn, will help secure the broadest human rights protections possible by removing barriers to widespread treaty ratification and compliance.

To this end, both the ECtHR and ICERD should employ a proportionality balancing analysis when presented with conflicts between the freedom of expression and the freedom from incitement to racial discrimination. Typically, a proportionality balancing analysis proceeds in three steps.[248] First, the court assesses whether a measure that restricts a right is designed to further a legitimate aim. Second, the court determines whether the measure at issue is necessary to further that legitimate aim. And, finally, the court decides whether the measure is a proportionate method for furthering the relevant aim. If these three criteria are met, a measure that infringes on a protected right will, nonetheless, be upheld.

Imagine that the ECtHR is confronted with a law that restricts the freedom of expression in the name of ensuring the freedom from incitement to racial discrimination.[249] The ECtHR would, first, determine whether the

248. Jonas Christoffersen, *Human Rights and Balancing: The Principle of Proportionality*, *in* RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY 19, 19 (Christophe Geiger ed., 2015).

249. Although this Conclusion uses hypothetical application of proportionality balancing by the ECtHR for purposes of illustration, the ICERD Committee could apply a similar analysis.

law was designed to further the legitimate aim of ensuring freedom from incitement to racial discrimination.[250] In other words, the ECtHR would decide if the law bore a rational relationship to the legitimate aim of ensuring the freedom from incitement to racial discrimination. True, that legitimate aim is not explicitly enumerated in the ECHR; however, the ECtHR could locate the freedom from incitement to racial discrimination in its existing Article 17 jurisprudence. And it ought to, given that recognizing the protection of a conflicting right as a legitimate aim is critical to achieving reconciliation. Indeed, the very possibility of a proportionality analysis depends on it.

Second, the ECtHR would assess whether the law ensuring the freedom from incitement to racial discrimination unnecessarily impeded the freedom of expression.[251] Put simply: the ECtHR would decide whether the law unnecessarily infringed the freedom of expression. This highly fact-specific overbreadth inquiry would be conducted on a case-by-case basis. Notably, because two human rights are at issue, the traditional "least restrictive means"[252] standard does not seem appropriate. Applying the relatively draconian least restrictive means standard to measures taken to prevent speech inciting racial discrimination would effectively privilege the freedom of expression over the freedom from incitement to racial discrimination. Accordingly, a least restrictive means analysis is in tension with the goal of resolving the competition between the ECtHR and ICERD discussed above.

Third, and finally, the ECtHR would look for "fit" between the intrusion on the freedom of expression and the resultant benefit to those protected from speech inciting racial discrimination.[253] This prong of the analysis is extremely fact-specific. To determine whether such "fit" exists the ECtHR would, first, assess the intensity of the infringement on the freedom of expression in the case before it. Second, the ECtHR would assess the importance of pursuing the legitimate aim of ensuring freedom from racial discrimination in the case before it. Notably, the ECtHR could facilitate compromise at this stage of the inquiry by assigning special significance to the fact that a measure was enacted to the end of fulfilling a nation's obligations under ICERD. The Court would, ultimately, determine whether the importance of pursuing the legitimate aim outweighed the severity of the infringement.

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250. Vicki C. Jackson, *Being Proportional about Proportionality*, 21 CONST. COMMENT. 803, 805 (2004) (discussing the widely adopted Canadian account of proportionality analysis).

251. *Id.*

252. *Id.*

253. *Id.*

Adopting this proportionality balancing approach would afford a margin of appreciation to states implementing potentially conflicting treaty obligations. That margin of appreciation is critical. In its absence, states would likely shy away from signing and ratifying even *potentially* inconsistent human rights treaties for fear of a Hobson's choice like that Denmark faced in *Jersild*. That hesitation would, in turn, result in a normatively undesirable under protection of human rights in tension with the fundamental idea of universality. A proportionality balancing approach would prevent that parade of horribles by facilitating the reconciliation of competing rights.