



Statement for the OSCE Guaranteeing Media Freedom on the Internet Seminar
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Dear Mr. Haraszti,

There is nothing novel about the fight against racism and xenophobia. There are international instruments such as the Universal Declaration of Human Rights, and the 1966 International Convention on the Elimination of All Forms of Racial Discrimination which acknowledge and try to address the problem. The Council of Europe also published a Recommendation on hate speech in October 1997¹ which called upon member states to take appropriate steps to combat hate speech by ensuring that any initiative form part of a comprehensive approach to the phenomenon which also targets its social, economic, political, cultural, and other root causes.

At the same time, “as technological, commercial and economic developments bring the people of the world closer together, racial discrimination, xenophobia and other forms of intolerance continue to exist in our societies.”² It is also beyond doubt that “the emergence of international communication networks like the Internet provide certain persons with modern and powerful means to support racism and xenophobia and enables them to disseminate easily and widely expressions containing such ideas.”³

Harmonisation and Concerns for Freedom of Expression

With the advancement of new technologies and the Internet, the cultural, moral, and legal differences are more evident than ever.

Differing views on the limits to freedom of expression have produced varied legal responses to racist and xenophobic discourse in North America (especially the United States) and in Europe. The recent prosecution of Yahoo in France (Tribunal de Grande Instance de Paris)⁴ and the subsequent court case in San Jose (United States District Court for the Northern District of California)⁵ are good examples of the differences in legal approaches and protection provided to expression. While such differences are legitimate and acceptable, enforcement of such local and national standards to a person or Internet Service Provider or company based in another

jurisdiction remains problematic. Within this context, “states within Western Europe should especially avoid pandering to the lowest common denominator where the least tolerant [such as France and Germany] can set the pace.”⁶

The Internet is not a lawless place but if the international norms are developed by adhering to the rules and laws of the lowest common denominator, then such actions (including cases like Yahoo) will have a chilling effect on cyber-speech.

Margin of Appreciation

Article 10 of the ECHR recognises the right to freedom of expression, which includes the freedom to hold opinions and to receive and impart information and ideas. Article 10 of the ECHR is applicable not only to information and ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.⁷ The European Court of Human Rights has held that the State’s actions to restrict the right to freedom of expression are properly justified under the restrictions of paragraph 2 of Article 10 of the ECHR, in particular when such ideas or expressions violate the rights of others.

It should also be noted that the European Court of Human Rights has consistently held that:

“the Contracting States enjoy a certain margin of appreciation in assessing the need for an interference, but this margin goes hand in hand with European supervision, whose extent will vary according to the case.”⁸

Where there has been an interference with the exercise of the rights and freedoms guaranteed in Article 10(1), the supervision must be strict, because of the importance of the rights in question. Therefore, the necessity of restricting them must be convincingly established. At the same time there is little scope for restrictions under Article 10(2) on political speech or on debate of matters of public interest.⁹ The criminalisation of speech which incites violence against an individual or a public official or a sector of the population is deemed to be compatible with article 10.¹⁰ In such cases the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression, and it does remain open for competent state authorities to adopt measures, even of a criminal law nature, intended to react appropriately to such remarks.

However, political speech regardless of its disturbing, shocking, or offending nature should remain protected. The state action should clearly distinguish the categories of speech that could be affected by provisions such as those provided within the CoE Additional Protocol.

Effectiveness of International Regulation & Alternatives to International Regulation

Provisions involving the criminalisation of acts of a racist and xenophobic nature committed through computer systems were left out of the Cyber-Crime Convention 2001 as there was no consensus on the inclusion of such provisions. While European states such as France and Germany strongly supported inclusion, the United States of America which has been influential in the development of the main Convention opposed the inclusion of speech related provisions apart from child pornography. The issue was tackled as part of an Additional Protocol to the Cyber-Crime Convention and was opened for signature in Strasbourg, on 28 January 2003.

The CoE Additional Protocol carries political significance but will it have an impact upon reducing the problem of racism and xenophobia on the Internet?

Although state legislation is still a strong option and may be preferred in most instances, problems associated with the Internet may require the careful consideration of alternatives to state regulation. Due to the global and decentralised nature of the Internet, government regulation may not be the best option to tackle such global problems.

The Yahoo case is an example of the nation-states' desire to enforce and apply their national laws to a global and multi-national medium such as the Internet with regards to racism and hate speech. The French approach in that sense is similar to the German approach in which CompuServe¹¹ was found liable under German criminal law for the distribution of illegal content over the Internet (mainly child pornography).¹² While there is more consensus on the issue of child pornography as illegal content, the same is not true for content that is categorised as hate speech. Harm criterion is different within different European states, and individual states decide what is legal or illegal. Such concepts as harmful and offensive do not always fall within the boundaries of illegality in all European States.

The steps taken by Belgium, France, Germany, and Switzerland at the national level have shown their limitations, and an international regulatory initiative such as the CoE Additional Protocol aimed at punishing racism on the Internet will have no effect unless every state hosting racist sites or messages is a party to it as rightly stated by a CoE Recommendation 1543(2001) on Racism and xenophobia in cyberspace.¹³ The global, and decentralised nature of the Internet certainly have an impact upon how it is regulated. The alignment of national criminal laws in relation to content (speech) regulation generally seems not to be a feasible option due to the moral, cultural, economic, and political differences between the member states.

It is difficult to speculate how effective a regional international effort such as the CoE Additional Protocol will be. Even if all member states of the CoE sign and ratify the Additional Protocol, the problem may not disappear. This also reflects the true nature of the Internet which includes risks. But how should we deal with such risks? The "one for all" rules advocated by the likes of the CoE remain problematic and countries with strong constitutional protection for freedom of expression such as the USA will not be queuing to sign and ratify such international agreements and conventions. In other words there will always be safe havens to host and carry content deemed to be illegal by the CoE Additional Protocol.

It is of course not suggested that nothing should be done to tackle the problem of racism and xenophobia on the Internet. There are other options available to tackle such risks and problems in a global society and the role of individual governments and supranational, and international organisations is still crucial. But this should not be limited to developing international conventions, and adopting laws. Regulation is often designed to reduce risk but alternative methods can be less costly, more flexible and more effective than prescriptive government legislation. These include the option "to do nothing", self-regulation, co-regulation, and information and education campaigns.

Within the context of racism and xenophobia on the Internet, "to do nothing" does not seem to be an appropriate option as the problem does not seem to disappear. In fact it was growing concerns

over the availability of such content over the Internet that triggered the Council of Europe to develop the Additional Protocol.

On the other hand, the Declaration on Freedom of communication on the Internet adopted by the Committee of Ministers of the Council of Europe on 28 May 2003 encouraged self-regulation and co-regulatory initiatives regarding Internet content. Similar recommendations were also made in a CoE Recommendation (2001)8 on self-regulation concerning cyber-content.¹⁴ Within this context the no rush to legislation approach adopted by the European Commission with its Action Plan on promoting safer use of the Internet should be applauded which is now extended to cover EU candidate countries. The Action Plan includes research into technical means to tackle both illegal and harmful content, and information and education campaigns.

So there is more to be done to tackle the problem of racism and xenophobia on the Internet. Internet censorship is one option which should be avoided at all costs.

¹ CoE Recommendation No. R (97)20 on Hate Speech, 30 October, 1997.

² *Explanatory Report of the Additional Protocol to the Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, as adopted by the Committee of Ministers on 7 November 2002, at <http://conventions.coe.int/Treaty/en/Reports/Html/189.htm>, para 2.*

³ *Ibid.*, para 3.

⁴ *League Against Racism and Antisemitism (LICRA), French Union of Jewish Students, v Yahoo! Inc. (USA), Yahoo France*, Tribunal de Grande Instance de Paris (The County Court of Paris), Interim Court Order, 20 November, 2000.

⁵ *YAHOO! Inc. v. La Ligue Contre Le Racisme Et, L'antisemitisme*, Case Number 00-21275 JF, United States District Court For The Northern District Of California, San Jose Division, 145 F. Supp. 2d 1168; 2001 U.S. Dist. LEXIS 7565; 29 Media L. Rep. 2008, June 7, 2001, Decided; *YAHOO!, Inc. v. La Ligue Contre Le Racisme Et L'antisemitisme*, Case Number C-00-21275 JF [Docket No. 17], United States District Court for the Northern District of California, SAN JOSE DIVISION, 169 F. Supp. 2d 1181; 2001 U.S. Dist. LEXIS 18378, November 7, 2001, Decided.

⁶ Brackets added by the author. Walker, C., & Akdeniz, Y., "The governance of the Internet in Europe with special reference to illegal and harmful content," [1998] *Criminal Law Review*, December Special Edition: Crime, Criminal Justice and the Internet, pp 5-19, at p 14.

⁷ *Castells v. Spain*, App. no.11798/85, Ser.A vol.236, (1992) 14 EHRR 445, § 42. See also *Lingens v Austria*, App. no.9815/82, Ser. A vol.103, (1986) 8 EHRR 407; *Demicoli v Malta*, App. no.13057/87, Ser.A vol.210, (1992) 14 EHRR 47; *Oberschlick v Austria* App. no.11662/85, Ser.A vol.204, (1995) 19 EHRR 389; *Jersild v Denmark*, App. no.15890/88, Ser. A vol.298, (1995) 19 EHRR 1

⁸ *Autronic AG* judgment of 22 May 1990, Series A No. 178, § 61.

⁹ *Erdogdu and Ince v. Turkey*, 8 July 1999, Application Nos. 25067/94 and 25068/94 (ECtHR); *Surek and Ozdemir v. Turkey*, 8 July 1999, App. Nos. 23927/94 & 24277/94 (ECtHR).

¹⁰ See cases such as *Sener v. Turkey*, 18 July 2000, Application No. 26680/95 (ECtHR).

¹¹ See the Criminal case of Somm, Felix Bruno, File No: 8340 Ds 465 JS 173158/95, Local Court (Amtsgericht) Munich. An English version of the case is available at <http://www.cyber-rights.org/isps/somm-dec.htm>.

¹² "Ex-CompuServe Executive Convicted," *Associated Press* (Berlin), 28 May, 1998. But the decision was eventually quashed: "Germany clears Net chief of child porn charges," *The Independent*, 18 November 1999. Another related case is the prosecution of Frederick Toben, a German-born Australian Holocaust revisionist (with an Australian passport) who denied the Holocaust, by the German Bundesgerichtshof (German Federal High Court). This was despite the fact that Toben's website was published and maintained in Australia. See Gold, S., "German Landmark Nazi Ruling," *Newsbytes*, December 12, 2000.

¹³ CoE Recommendation 1543(2001) on Racism and xenophobia in cyberspace, 8 November 2001.

¹⁴ CoE Rec(2001)8, 5 September, 2001.