

# Assessing Hate Speech as a Crime Against Humanity of Persecution

## Abstract

The main issue this research paper aims to tackle is whether incitement to hatred, independently of direct incitement to violence should amount to the *actus reus* of persecution as a crime against humanity. Before determining whether hate speech can be treated as an international crime, this article assesses theories and current international legal standards in the field of freedom of expression in order to identify the space for such a drastic intrusion into this freedom. The most significant justification for an international criminalisation of hate speech in certain contexts is that it enables large-scale discrimination and threatens basic human rights, including the right to life, of the targeted out-group. Current international criminalisation, as interpreted by the jurisprudence of the Yugoslavia and Rwanda tribunals, still shows an overly narrow approach, excluding much of the hate propaganda that plays a vital role in the enabling of mass crimes. This article concludes that systematic incitement to hatred should be treated as a form of persecution, regardless of a call to violence, when the inciter has knowledge of the fact that his words might contribute to the commission of grave crimes or large-scale discrimination against the targeted out-group and the denial of human rights of its members.

## Key words

Freedom of Expression – Hate Speech – Incitement to Hatred – Crimes Against Humanity of Persecution

## 1. Introduction

The notion that the transcendental humanitarian principles encompassed by international law should be adhered to in all circumstances, even during armed conflict, has been echoed in various periods throughout history.<sup>1</sup> Nonetheless, historically the placing of obligations directly upon individuals in an international context had a narrow pedigree. Yet, the merge of elements

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<sup>1</sup> U.N.T.S., 'Second International peace Conference, Hague Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land', 18 October 1907, 632

of conventional international criminal law together with modern approaches to the humanitarian law has resulted in a gradual shift. Evidence of this can be observed in the major contemporary developments to the concept of Crimes Against Humanity (CAH). A definition of CAH was embodied in a uniform multilateral treaty with the introduction of the International Criminal Court (ICC)<sup>2</sup> as certain prohibited acts ‘committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.’<sup>3</sup> The authoritative list of prohibited acts embraces two designated categories of CAH; the ‘murder-type’ which refers to mass atrocities against civilians and the ‘persecution-type’ which encompasses extreme discrimination against civilians.<sup>4</sup>

Persecution is defined in the Oxford dictionary as ‘hostility and ill-treatment, especially because of race or political or religious beliefs; oppression.’<sup>5</sup> Undoubtedly, persecution crimes are more contingent on the mental state of the offender. This is because CAH-persecution is an umbrella crime which requires the additional element of the specific intent to discriminate on prohibited grounds.<sup>6</sup> In *Krnjelac*, the Appeals Chamber of the International Tribunal for the Former Yugoslavia (ICTY) upheld the Trial Chamber and noted that persecution as an offence, in addition to the general *chapeau* of all CAH, must be a culpable act or omission that denies a fundamental right which is prescribed by an international law or custom, which was carried out deliberately with that specific intention.<sup>7</sup> Additionally, given that persecution is classified as a result-based crime,<sup>8</sup> it is necessary that the action has a discriminatory effect on the victims.<sup>9</sup> This definition distinguishes the *actus reus* of persecution as a CAH and the rest of the prohibited acts.

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<sup>2</sup> David L. Nersessian, ‘Comparative Approaches to Punishing Hate: The Intersection of Genocide and Crimes against Humanity’, *Stanford Journal International Law* 24, no. 2 (2007): 221, 228

<sup>3</sup> U.N.G.A., ‘Rome Statute of the International Criminal Court’, U.N. Doc. A/CONF.183/9, 17 July 1998, art. 7

<sup>4</sup> U.N.G.A., ‘Report of the International Law Commission’, 5th Session, Supp. no. 12, UN Doc A/1316, 29 July 1950, 120

<sup>5</sup> *Oxford English Dictionary*, s.v. ‘Persecution’.

<sup>6</sup> David L. Nersessian, ‘Comparative Approaches to Punishing Hate: The Intersection of Genocide and Crimes against Humanity’, *Stanford Journal International Law* 24, no. 2 (2007): 221, 239

<sup>7</sup> *Prosecutor v. Krnjelac*, Case No. ICTY- IT-97-25-A, ICTY, Appeal Chamber, Judgement, 17 September 2003; *Prosecutor v. Krnjelac*, Case No. ICTY- IT-97-25-T, ICTY, Trial Chamber, Judgement, 15 March 2002, 143

<sup>8</sup> David L. Nersessian, ‘Comparative Approaches to Punishing Hate: The Intersection of Genocide and Crimes against Humanity’, *Stanford Journal International Law* 24, no. 2 (2007): 221, 242

<sup>9</sup> *Prosecutor v. Ruggiu*, Case No ICTR 97-32-I., ICTR, Trial Chamber, Judgement, 1 June 2000, 21

The Oxford dictionary defines ‘hate speech’ as ‘abusive or threatening speech or writing that expresses prejudice against a particular group, especially on the basis of race, religion, or sexual orientation.’<sup>10</sup> Academic literature on the subject of hate speech has almost exclusively focused on direct and public incitement to commit genocide, disregarding altogether the issue hate speech contributing to CAH and other international crimes being committed.<sup>11</sup> However, modern trends in recent case law have indicated that criminal liability could be attributed to speech which has caused the *actus reus* of other offences.<sup>12</sup> Admittedly, these suppositions have caused a great deal of confusion, globally and nationally.<sup>13</sup> This may be because despite the frequent use of the term ‘hate speech’, in the legal context or otherwise, there is no universally accepted definition.

Debates regarding the banning of hate speech blatantly reflect the split between the U.S legislative approach and European law. As will be demonstrated in this paper, the European approach correspondingly triumphs within the international sphere. In fact, the 1960’s observed a worldwide acceptance of hate speech bans as embodied within international human rights treaties.<sup>14</sup> These boundaries of freedom of speech epitomise and accentuate the prominence of the concept of universal human rights based on the philosophy that collectively human beings share a common destiny and depend on each other. They attempt to suppress hatred by identifying the circumstances and contribution that atrocity speech makes to its associated harm, whilst identifying the extent of demeanour that renders speech-mongers liable for such harm and subject to retribution.

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<sup>10</sup> *Oxford English Dictionary*, s.v. ‘Persecution’.

<sup>11</sup> Wibke K. Timmermann, ‘Counteracting Hate Speech as a Way of Preventing Genocidal Violence’, *Genocide Studies and Prevention: An International Journal* 3, no. 3 (2008): 353-374; Gregory S. Gordon, ‘Music and Genocide: Harmonizing Coherence, Freedom and Nonviolence in Incitement Law’, *Santa Clara Law Review* 50, no. 3 (2010) 607; Shannon Fyfe, ‘Tracking Hate Speech Acts as Incitement to Genocide in International Criminal Law’, *Leiden Journal of International Law* 30, no. 2 (2017) 523-548; Ines Peterson, ‘International Criminal Liability for Incitement and Hate Speech’ in Martin Böse, Michael Bohlander, André Klip and Otto Lagodny, *Justice Without Borders Essays in Honour of Wolfgang Schombourg* (Leiden: Brill Nijhoff, 2018) 335

<sup>12</sup> *Prosecutor v. Vojislav Šešelj*, Case No. MICT-16-99-A, ICTY, Appeal Chamber, Judgement, 11 April 2018, 151

<sup>13</sup> Gregory S. Gordon, *Atrocity speech Law*, (Oxford: Oxford University Press, 2017) 307; Gabriele Della Morte, ‘De-Mediatizing the *Media* Case: Elements of a Critical Approach’, *Journal of International Criminal Justice* 3, no. 4 (2005): 1019, 1033

<sup>14</sup> Eric Heinze, ‘Wild-West Cowboys versus Cheese-Eating Surrender Monkeys: Some Problems in Comparative Approaches to Hate Speech’ in *Extreme Speech and Democracy*, (Oxford: Oxford University Press 2009) 182-184

It should be borne in mind that hate speech can take several discrete forms. Yet, what is considered to be punishable as a CAH is the encouragement to take action, directed towards third parties, against members of a particular group.<sup>15</sup> Notwithstanding extensive attempts to reach a static conclusion, lack of clarity remains as to whether pure hate speech without calling for an act of violence may constitute a liability for CAH-persecution. This is because incitement law has reached a crucial crossroads as jurisprudence expresses conflicting standpoints taken by the ad hoc war crime institutions; the ICTY and the International Criminal Tribunal for Rwanda (ICTR).

In part 2, this article will analyse the morality of expressive liberty and consider the balance between the right to freedom of expression and the abuse of another's rights. The article will compare philosophical approaches in law and consider their impact on the decisions made by judges. Thereafter, in part 3 this article will evaluate the present attitudes to hate speech in both international and regional human rights instruments in light of the general protection of free speech and the prohibition of incitement to discrimination, hostility or violence. In part 4, this article will consider the merit of including incitement to hatred as a CAH of persecution. This will involve an analysis on the development of persecution as a CAH and the implications of incorporating hate speech as an *actus reus* for persecution, before finally considering the existing limitations on hate speech as a CAH.

## **2. Morality and Expressive Liberty**

### **2.1. The Right to Freedom of Speech**

The concept of liberty is surrounded by paradoxes.<sup>16</sup> Amongst these seemingly contradictory propositions, is the notion that when people are increasingly disputing about freedoms and the fundamental rights, liberty in itself may in effect also be in retreat. The introduction of international and regional human rights instruments as well as other regulations and directives is, however, leading societies in a new direction. Such development will have repercussions on

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<sup>15</sup> Alon Harel, 'Hate Speech and Comprehensive Forms of Life' in Michael Herz and Peter Molnar', *The Content and Context of Hate Speech: Rethinking Regulation and Response* (Cambridge: Cambridge University Press 2012), 306

<sup>16</sup> Daniel Overgaauw, 'The Paradoxes of Liberty: The Freedom Of Speech (Re-) Considered', *Amsterdam law forum* 2, no.1 (2009): 25

liberty in general and particularly, on freedom of expression, as this governs an area of human behaviour that involves a ‘multifarious complex of values.’<sup>17</sup> Thus, it is vital, to consider and reconsider free speech and its underpinnings as well as its consequences.

The notion of freedom of speech concerns itself with actions of expression addressed to a wide audience, conveying propositions or attitudes thought to have universal interest. However, this concept does not merely refer to dialogue and exchange of ideas which are classified as being neutral or friendly. In 1976, the European Court of Human Rights (ECtHR) set the precedent of *Handyside v. U.K.*, that the notion of ‘free expression’ also encompasses information which offends or shocks the state or a community thereof.<sup>18</sup> Furthermore, in 1991 the ECtHR held in *The Observer and The Guardian v. UK* that the concept of free expression may incorporate information previously declared confidential due to security reasons, if other means of protecting security services arise that will not infringe upon such a right.<sup>19</sup> The Court elaborated on the reduced possibilities for states to limit freedom of the press which is based on its right and duty to impart information and ideas on matters of public interest. The protection of journalists under Article 10 of the European Convention on Human Rights however applies only when the journalist is ‘acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism.’<sup>20</sup>

First and foremost, free speech is necessary on a political basis as it motivates citizen participation in democracy.<sup>21</sup> For example, the US model for freedom of speech, includes the precondition that the state remains neutral and protects public discourse as a sphere that remains equally open to all communities.<sup>22</sup> Such an approach allows for a wider and more varied marketplace of ideas in society, contrasted with one body being responsible for the perception of the political landscape by the citizens of a particular state. In the latter situation, the exercise of other fundamental rights by citizens, such as the right to an effective vote, is diminished due

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<sup>17</sup> Fredrick Schauer, ‘Must Speech Be Special?’, *Northwestern University Law Review* 78, no. 5 (1984): 1284, 306

<sup>18</sup> *Handyside v. The United Kingdom*, App. No. 5493/72, ECtHR, Judgment, 7 December 1976, 49

<sup>19</sup> *The Observer and The Guardian v. United Kingdom*, App. No. 13585/88, ECtHR, Judgment, 26 November 1991, 68-69

<sup>20</sup> *Fressoz and Roire v. France*, App. No. 29183/95, ECtHR, Judgment, 21 January 1999, 54; *Bergens Tidende and Others v. Norway*, App. No. 26132/95, ECtHR, Judgment, 2 May 2000, 37

<sup>21</sup> Council of the European Union, ‘EU Human Rights Guidelines on Freedom of Expression Online and Offline’, *FOREIGN AFFAIRS Council meeting Brussels, 12 May 2014*, (Brussels: Press, 2014), 4.

<sup>22</sup> Robert Post, ‘Hate Speech’ in Ivan Hare and James Weinstein, *Extreme Speech and Democracy*, (Oxford: Oxford University Press, 2009), 133.

to the lack of public discourse.<sup>23</sup> This was considered in *Abrams v. U.S.* by dissenting Judge Justice Holmes who stated:

good desired is better reached by free trade in ideas-that the best test of truth is the power of the thought to get itself accepted in the competition of the market... while that experiment is part of our system I think we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death.<sup>24</sup>

Justice Holmes suggested that whilst the freedom of expression is imperative to maintain the free trade of ideas, it must be regulated in order to prevent the expression of opinions that are considered immoral. Freedom of speech is also necessary for the development of an individual in terms of human autonomy and self-fulfilment.<sup>25</sup> This is necessary as the welfare of individuals is profoundly reliant on the social environment they inhabit.<sup>26</sup> Consequently, John Stuart Mill asserts that ‘the peculiar evil of silencing the expression of an opinion is that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it.’<sup>27</sup> This suggests the significance of having a liberal society is that one has a choice between opinions, which is ultimately vital to establish what is true or otherwise.

## 2.2.What is Hate Speech?

As reiterated by decisions rendered by national and international courts, the right of freedom of expression is not absolute.<sup>28</sup> Rather it must be weighed against other values, such as

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<sup>23</sup> U.N.O.H.C.H.R., ‘CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service’, 57<sup>th</sup> session, 12 July 1996, 12

<sup>24</sup> *Abrams v. U.S.* (1919) 250 U.S. 616, 630

<sup>25</sup> Council of the E.U., ‘EU Human Rights Guidelines on Freedom of Expression Online and Offline’, FOREIGN AFFAIRS, Council meeting Brussels, (Brussels: Press, 2014), 3

<sup>26</sup> Robert Mark Simpson, ‘Harm and Responsibility in Hate Speech’, (PhD thesis, Somerville College, 2013), 16, 65

<sup>27</sup> John Stuart Mill, *Utilitarianism, Liberty and Representative Government*, (London: J-M- Dent & Sons Ltd, 1910), 9

<sup>28</sup> Erwin Chemerinsky, ‘Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court’s Application’, *Southern California Law Review* 74, no. 1 (2000): 49, 61; *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*, Case No. ICTR-99-52-A, Appeals Chamber, Judgment, 28 November 2007, 18

multicultural sensitivity, the rights of racial minorities, and the prevention of violence both domestically and internationally. However, in cases where the expression is unambiguously and purposefully a call to violence or any other similar unlawful action which has the effect of destroying, humiliating or dehumanising a specific community, the underlying justifications for free speech are absent.<sup>29</sup> Instead, the right would be misused in order to destroy what it is meant to promote and protect in the first place and would amount to hate speech.

Some judicial opinions distinguish between hate speech as such and speech that incites to violence not necessarily finding the former outside of the protected freedom of expression.<sup>30</sup> Various scholars have argued that a wide definition of proscribed speech is more appropriate as it covers speech which is offensive regardless of whether it leads to more harmful results.<sup>31</sup> An extensive spectrum would cover from the mildest form, meaning the expression of animosity against individuals or groups based on national or ethnic origins, race and sexual orientation *inter alia* to the harsher action of inciting third parties to violence. Messages which encourage action towards the victim group can be either towards a non-violent or a violent act. The former category can be further sub-categorised into incitement; to hatred, to discrimination and to persecution. The latter is the most relevant in this context. It refers to the advocacy used to exclude a particular group from enjoying their civil rights in a comprehensive way. Thus, incitement to persecution refers to speech which inflicts discrimination on a broader and more systematic scale.<sup>32</sup>

Influenced by this categorisation, several international and regional bodies have adopted a comprehensive definition. The Council of Europe's Committee of Ministers defined proscribed hate speech in 1997 as encompassing:

all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including intolerance expressed

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<sup>29</sup> Robert Mark Simpson, 'Harm and Responsibility in Hate Speech', (PhD thesis, Somerville College, 2013), 16, 63

<sup>30</sup> *Prosecutor v. Nahimana*, Case No. ICTR-99-52-T, Trial Chamber, Judgement, 3 December 2003, 1000-06; *Prosecutor v. Ruggiu*, Case No. ICTR 97-32-I., Trial Chamber, Judgement, 1 June 2000, 21

<sup>31</sup> Onder Bakircioglu, 'Freedom of Expression and Hate Speech', *Tulsa Journal of Comparative and International Law* 16, no. 1 (2008): 4; Jeremy Waldron, *The Harm in Hate Speech*, (Cambridge, Mass: Harvard University Press, 2012), 107; Andrew Sellars, 'Defining Hate Speech', *Boston University School of Law* 16, no. 48 (2016): 22

<sup>32</sup> Gregory S. Gordon, 'Hate Speech and Persecution: A Contextual Approach', *Vanderbilt of Transnational Law* 46, no. 2 (2013): 304, 344

by aggressive nationalism and ethnocentrism, discrimination and hostility towards minorities, migrants and people of immigrant origin.<sup>33</sup>

The implication is that hate speech may have several negative outcomes. Firstly, it may negatively affect people's mind, thoughts and feelings. Moreover, hate speech may also trigger physical injury, directly to persons or their property. Lastly, such speech may also cause what Robert Mark Simpson refers to as 'status injury.'<sup>34</sup> Therefore, restrictions and limitations must necessarily be in course of a subsequent enquiry of freedom and other competing rights.

### **2.3. Moral Limitations on Expression**

Every facet of society is a result of the influence of particular cultural norms; cultural norms refer to attitudes and patterns of behaviour that are particular to a specific group, and thus indisputably influenced by morality. Since such norms evolve through time, the enforcement thereof which is conducted by an operation of the law, must intervene in the on-going process of historical development. Hence, laws are faced with the choice of whether to encourage or impede these evolutionary changes.<sup>35</sup> Uncertainty, however, remains as to what extent criminal sanctions can be used to punish immoral conduct, such as hate speech. Philosophers seem to uphold divergent opinions and this research paper will consider the theories of legal moralism, Mill's Harm principle, contemporary liberal theories and the critical race theory.

Legal moralism advocates James Fitzjames Stephen and Lord Patrick Devlin sustain that law is not merely a tool to protect individuals from each other and induce necessary contributions to the public good, but also to make society moral for its own sake and consequently, immorality ought to be considered a crime.<sup>36</sup> The premise of the Devlin model is that society is bound together by common moral values. Therefore, those who violate any of such values, threaten

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<sup>33</sup> Council of Europe, 'Recommendation No. R (97) 20 of the Committee of Ministers to Member States on "Hate Speech"', Joint statement of the UN Special Rapporteur on Freedom of Opinion and Expression, the OAS OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression', 607<sup>th</sup> meeting, 30 October 1997, 107. This definition was referred to by the European Court of Human rights in *Gündüz v. Turkey*, App. no. 35071/97, ECtHR, Judgment, 4 December 2003, 43, 22

<sup>34</sup> Robert Mark Simpson, 'Harm and Responsibility in Hate Speech', (PhD thesis, Somerville College, 2013), 16, 73

<sup>35</sup> Robert C. Post 'Law and Cultural Conflict', *Chicago-Kent Law Review* 78, no. 2 (2003): 485, 491

<sup>36</sup> John Kultgen, 'The Justification of Legal Moralism', *University of Arkansas Press* 13, no. 2 (1985): 123,131



and undermine society in a way that is equivalent to treason.<sup>37</sup> Consequently, laws should enforce antecedent and stable values. He asserts that the 'law is an instrument to be used by society, and the decision about what particular cases it should be used in is essentially a practical one.'<sup>38</sup> However, Devlin then refers to a set of general statements of principle, which according to him must be regarded when enacting laws enforcing morals. These include the understanding of maximum individual freedom consistent with the integrity of society, the concept that in any matter of morality the law should be slow to act and most prominently, the notion that as far as possible privacy is to be respected.<sup>39</sup> These factors are to be considered when determining the boundary between criminal and moral law. This is because according to Devlin, it is impossible to set conjectural limits to the power of the state to legislate against immorality.

Conversely, John Stuart Mill and H.L.A Hart argue that immorality should not be considered a crime and therefore not be subject to legislative restrictions,<sup>40</sup> unless this results in harm to others without justifiable cause.<sup>41</sup> However, Mill insisted that instigation would warrant punishment 'only if an overt act has followed.'<sup>42</sup> The harm principle has been incorporated into common law systems in regard to considering the balance of the autonomy of individuals against a legitimate intervention of rights by the state in order to prevent harm to society. In *Keegstra*,<sup>43</sup> the Supreme Court of Canada upheld a conviction for inciting hatred after the appellant gave anti-semitic speeches whilst teaching. The majority agreed that the infringement of the right to freedom of expression was justified in order to protect society from hateful propaganda.<sup>44</sup> This creates difficulty in considering what constitutes 'harm' and leaves the balance of such a concept to judicial creativity.

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<sup>37</sup> Jeffrie G. Murphy, *Punishment and the Moral Emotions: Essays in Law, Morality, and Religion*, (Oxford: Oxford University Press, 2015), 70

<sup>38</sup> Patrick Devlin, *The Enforcement of Morals*, (Oxford: Oxford University Press, 1965) quoting Home Office and Scottish Home Department, 'Report Of The Committee On Homosexual Offences And Prostitution', (Wolfenden Report) (1957) [England, Wales and Scotland], 13

<sup>39</sup> Patrick Devlin, *The Enforcement of Morals*, (Oxford: Oxford University Press, 1965) quoting Home Office and Scottish Home Department, 'Report Of The Committee On Homosexual Offences And Prostitution', (Wolfenden Report) (1957) [England, Wales and Scotland], 13

<sup>40</sup> John Stuart Mill, *On Liberty*, (London: Longman, Roberts & Green, 1869), 51

<sup>41</sup> John Stuart Mill, *On Liberty*, (London: Longman, Roberts & Green, 1869), 52

<sup>42</sup> Raphael Cohen-Almagor, 'J.S. Mill's Boundaries of Freedom of Expression: A Critique', *Philosophy* 92, no. 4 (2017): 78.

<sup>43</sup> *R. v. Keegstra*, (1990) 3 R.C.S. 697

<sup>44</sup> *R. v. Keegstra*, (1990) 3 R.C.S. 697 p. 705(i)

Congruently, contemporary liberal theorists such as Joel Feinberg,<sup>45</sup> claim that it is not a lawful function of the state to prohibit certain behaviour on the grounds that it might be considered immoral. This division between the above theories primarily arises as a result of the dichotomy on whether a ‘principled line,’<sup>46</sup> can be drawn between the reasons that a state presents to justify coercive constraints on certain behaviour. Needless to say, there are two distinct thoughts on what are considered to be the correct boundaries. The liberal perspective was heavily influenced by the Wolfenden Report, the Committee on Homosexual Offences and Prostitution, which laid down the function of criminal law and highlighted that ‘it is not the duty of the law to concern itself with immorality as such.’<sup>47</sup> This statement raises the question as to why does the law then protect citizens against injury and indecency *inter alia*. The logical answer suggests that the law condemns such actions because such misconduct is immoral and harmful. However, not every set back may be considered as such. Rather, the liberal school of thought suggests that some parts of morality may indeed be enforced by law, whilst others may not. Consequently, the question that follows is which parts of morality may not be enforced. Feinberg asserts that what must be enforced is the protection of autonomy and equal respect for persons.<sup>48</sup> This reflects Mill’s harm principle, which suggests that ‘if anyone does an act hurtful to others, there is a *prima facie* case for punishing him by law.’<sup>49</sup>

Contemporary legal opinion is similarly divided with regards to the constitutionality of various statutes, that forbid conduct based on the alleged right of the state to enforce moral views. In an open society, citizens should have the opportunity to express themselves even if they are wrong. To allude that freedom of expression is cardinal to an open society is not to say that expression should be unlimited. Liberty itself must be regulated in order to be effective and the extent to which boundaries are placed upon liberty are determined by the governing bodies of a particular state. Ultimately, what defines the boundaries of freedom of speech is the strength

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<sup>45</sup> Joel Feinberg, ‘Harmless Wrongdoing’ in *The Moral Limits Of The Criminal Law: Volume 4* (Oxford: Oxford University Press, 1988), 175

<sup>46</sup> Gerald Dworkin, ‘Devlin Was Right: Law and the Enforcement of Morality’, *William & Mary Law Review* 40, no. 3 (1999): 926, 928

<sup>47</sup> Patrick Devlin, *The Enforcement of Morals*, (Oxford: Oxford University Press, 1965), 131 quoting Home Office and Scottish Home Department, ‘Report of The Committee On Homosexual Offences And Prostitution’, (Wolfenden Report) (1957) [England, Wales and Scotland], 257

<sup>48</sup> Joel Feinberg, ‘Harmless Wrongdoing’ in *The Moral Limits Of The Criminal Law: Volume 4* (Oxford: Oxford University Press, 1988), 175

<sup>49</sup> John Stuart Mill, *On Liberty*, (London: Longman, Roberts & Green, 1869), 14

of society.<sup>50</sup> It would, therefore, follow that, the wider the discourse, the stronger the society. As Daniel Overgaaw argued, the institution of strict laws on free speech is not so much an expression of civility, but rather a symptom of society in decline.<sup>51</sup> Indeed, not only do individuals exposed to hate speech suffer a loss of dignity, self-esteem and sense of belonging to the community, but the targeted group also suffers estrangement from society, a loss of cultural identity, and group reputation.

**Critical Race Theory similarly highlights the harms of hate speech and the need for its restriction, specifically in the context of targeting minorities. It perceives society as a system which was built and developed to allow for white privilege in all spheres of life against people of colour and other minorities. The theory claims that equality of speech cannot exist in such a system and therefore the notion of a marketplace of ideas is not viable.**

Richard Delgado, one of its most prominent writers on freedom of expression, thus put the First Amendment openly into question.<sup>52</sup> Several other thinkers have examined the capacity of speech to perpetuate oppression and have argued that First Amendment principles need to be qualified in light of that capacity.<sup>53</sup> In other words, seeking to protect the values of the Fourteenth Amendment, i.e. equality, from those of the First, critical race theorists have argued for hate speech codes. Mari Matsuda suggested the creation of a legal doctrine to limit hate speech in cases where a) it communicated a message of racial inferiority against b) a historically oppressed group in c) an intentionally persecutory, degrading and hateful way.<sup>54</sup>

**The efforts of reforming the law along the lines of these moral principles however suffered a setback** at the Supreme Court in 1992 in the case *R.A.V. v St. Paul* which considered a city ordinance criminalising the placing of a burning cross or swastika anywhere in an attempt to arouse anger or alarm on the basis of race, colour, creed, or religion. The City of St. Paul and Justice Scalia adopted the language of critical race theorists, stating that motives of restricting hate speech include the intent to 'protect against the victimization of a person or persons who are particularly vulnerable because of their membership in a group that historically has been

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<sup>50</sup> Daniel Overgaaw, 'The Paradoxes of Liberty: The Freedom of Speech (Re-) Considered', *Amsterdam Law Forum* 2, no.1 (2009), 25

<sup>51</sup> Daniel Overgaaw, 'The Paradoxes of Liberty: The Freedom of Speech (Re-) Considered', *Amsterdam Law Forum* 2, no.1 (2009), 25

<sup>52</sup> Richard Delgado and Jean Stefancic, 'First Amendment Formalism is giving Way to First Amendment Legal Realism', *Harvard Civil Rights and Civil Liberties Law Review* 29, no. 1 (1994): 173.

<sup>53</sup> Mari J. Matsuda et al. *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment*, (Colorado: Westview Press, 1993). 151.

<sup>54</sup> *Ibid.*

discriminated against,’ and the belief that ‘only where the bias-motivated aspects of the conduct is explicitly addressed can dialogue start that will lead to reconciliation and peace among communities.’<sup>55</sup> The majority nevertheless struck down the ordinance. However, more recently in their book ‘Must We Defend Nazis?’ Delgado and Stefancic cite a 2003 Supreme Court affirmative action case, *Grutter v Bollinger* in the belief that this case gives grounds for their proposal for affirmative action speech codes for minorities to level the playing field.<sup>56</sup>

#### **2.4. Liability threshold**

Many of the outcomes associated with hate speech are consequences which hate speech contributes to, without being strictly necessary for their occurrence. In most cases, atrocity speech requires a causal connection with its harmful effects in order to establish liability. A distinction must necessarily be made between genuine harmful outcomes and sub-negative experiences i.e. annoyance or disappointment.<sup>57</sup> Depending on the interpretation of hate speech adopted by the society in question, some consequence would render a person prosecutable. Once the causal relations have been identified, what must be determined is under which circumstances are hate-speakers held responsible and answerable for the subsequent harm that arises.

Hart in his work ‘Acts of Will and Responsibility’,<sup>58</sup> distinguishes between four classes of responsibility; casual responsibility, capacity-responsibility, liability-responsibility and rule-responsibility. If causal responsibility applies, the question remains as to what are the circumstances under which such responsibility can be attributed.

Notwithstanding the outcomes of factual causation, the perpetrator might be deemed liable or released from liability following the determination of legal (proximate) cause. Proximate cause refers to the cause which the law admits to be the primary cause of injury. This may not be the initial event that sets in motion a sequence of events that led to an injury, and it may neither be the very last event before the actual harm occurs. However, it is an action that produces

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<sup>55</sup> *R.A.V v. City of St. Paul*, (1992) 505 U.S. 377, Appeal, Judgement, 22 June 1992; *R.A.V v. City of St. Paul*, (1992) 505 U.S. 377, Appeal, Brief for the Respondent [U.S.], 28, 32, and 26.

<sup>56</sup> Richard Delgado and Jean Stefancic, *Must We Defend Nazis?: Why The First Amendment Should not Protect Hate Speech and White Supremacy* (New York: New York University Press, 2018).

<sup>57</sup> Robert Mark Simpson, ‘Harm and Responsibility in Hate Speech’, (PhD thesis, Somerville College, 2013), 16,25. Amal Clooney and Philippa Webb, ‘The Right to Insult in International Law’, *Columbia Human Rights Law Review* 48, no. 2 (2017): 1-55.

<sup>58</sup> Herbert Lionel Adolphus Hart, ‘Acts of Will and Responsibility’ in *Punishment and Responsibility Essays in the Philosophy of Law*, (Oxford: Oxford Scholarship Online, 2009)

foreseeable consequences without intervention from anyone else.<sup>59</sup> This denotes that it must be proven that without such proximate cause, the harm would not have ensued. However, there may be instances where the connecting factor between the putative cause and the outcome is interrupted by an interfering, voluntary action of another agent. When this inference does not constitute a simultaneous effect, then it is regarded that the temporally posterior action continues the proximate cause.<sup>60</sup>

Applying this understanding of causation and liability to hate speech, liability attribution is complicated as in most cases, the harmful effects of animosity speech involve some form of analytic intervention; intellectual, emotional, doxastic or otherwise, on the part of the audience. Certainly, the content expressed by the hate-monger stimulates via perception to some extent the consciousness of the listener. However, the fact remains that individuals are themselves the originators of their beliefs and actions. Reference must be made to the definition of responsibility as expressed by Gardner, i.e. ‘the ability to explain oneself, to give an intelligible account of oneself, to answer for oneself, as a rational being.’<sup>61</sup> Based on this rationale, Gardner argues that the law holds people responsible as such, by upholding the idea that people are agentially responsible.

To some degree it seems *prima facie* credible that hate-mongers should not be held responsible for harms which arise as a result of the identity-prejudicial workings of society at large. Rather since society is made up of individuals who are influenced by hate speech, then they should remain accountable for how they are influenced. Alternatively, if such hate speech is not a mere influence but conditions people into identity-prejudicial attitudes, then the hate-monger ought to be the legitimate liability-bearer for the damage done. Albeit this conflict remains unresolved, the preferred approach in relation to atrocity speech has been the latter – the hate-monger is believed to be liable for that harm which is endured in consequence of his speech. However, this entirely depends on whether such actions within the given context and given the expected reactions on the part of the utterer’s audience could have reasonably be expected to have harmful consequences on others.

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<sup>59</sup> JUSTIA, ‘Actual and Proximate Cause’, <https://www.justia.com/injury/negligence-theory/actual-and-proximate-cause/> (accessed 25 July 2017)

<sup>60</sup> Robert Mark Simpson, ‘Harm and Responsibility in Hate Speech’, (PhD thesis, Somerville College, 2013), 16, 83

<sup>61</sup> John Gardner, ‘The Mark of Responsibility’, *Oxford Journal of Legal Studies* 23, no. 2 (2003): 161

## 2.5 Hate Speech from a Comparative Perspective

Societies, influenced by historical accounts, tend to take diverging stands and adopt different regulations to respond to hate speech. As a result of World War II and the Holocaust, European laws tend to be more vigilant against the consequences of unleashed dialogue.<sup>62</sup> On the other hand, motivated by the historical oppression on American colonies by the King of England, the U.S. categorically safeguards freedom of speech asserting that hate speech is the price society has to pay for such a right. Hence, this contrast between European and American measures should not be merely understood in terms of the necessity to maintain democratic legitimation, but also in terms of sustaining their respective community identity.<sup>63</sup>

The First Amendment of the U.S. Constitution stipulates that ‘Congress shall make no law [...] abridging the freedom of speech.’<sup>64</sup> In fact, the First Amendment pressures the state to be neutral with regards to the contrasting perspectives of competing communities. Referencing the landmark case of *Cantwell v. Connecticut*,<sup>65</sup> Robert Post avers that the American philosophy hinges on the idea that these freedoms shield the development of dissimilar opinions and beliefs, from obstructions. This robust approach was aptly summarised by Judge Brennan in *Texas v. Johnson*, who argued that underlying principle of the First Amendment is that ‘the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.’<sup>66</sup> As rightly argued by Jim Whitman, norms of individualism seem to be deeply embedded within the U.S. model as American law is downplayed to allow ‘free and aggressive display of disrespect’ which reflects ‘the political constitution of [the American] form of egalitarian society.’<sup>67</sup> Hence, the idea is that public discourse conflict over fundamental cultural values should be determined without legal interference. This American hostility towards state-enforcement measures stems from a narrow conception of ‘viewpoint neutrality’<sup>68</sup> and the significance of fair play i.e. ensuring that different communities are not being denied equal treatment insofar as dialogue is concerned. Restrictions cannot apply to the

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<sup>62</sup> Onder Bakircioglu, ‘Freedom of Expression and Hate Speech’, *Tulsa Journal of Comparative and International Law* 16, no. 1 (2008) 13

<sup>63</sup> John Gardner, ‘The Mark of Responsibility’, *Oxford Journal of Legal Studies* 23, no. 2 (2003): 123,137

<sup>64</sup> U.S. Senate, *U.S. Constitution*, (1787) First Amendment (1791), art 1

<sup>65</sup> *Cantwell v. Connecticut*, (1940) 310 US 296

<sup>66</sup> *Texas v. Johnson*, (1989) 491 U.S. 397, 491

<sup>67</sup> James Q. Whitman, ‘Enforcing Civility and Respect: Three Societies’, *Yale Law Journal* 109, no. 6 (2000): 1279, 1397

<sup>68</sup> Robert Mark Simpson, ‘Harm and Responsibility in Hate Speech’, (PhD thesis, Somerville College, 2013). 16, 17

right to expression and public discourse merely on the rebuttal that such speech may cause future detriment. Rather under the U.S. framework, for hate speech to be prosecuted the stringent requirement of ‘substantive evil that arises far above public inconvenience, annoyance or unrest’<sup>69</sup> is to be satisfied. Any other debauched speech remains unfettered as the nexus between such dialogue and its effects would be too attenuated to pass constitutional muster.

Thus, the American civilian-libertarian ideal protects free speech to the extent that many might find disturbing. Indeed, the U.S. was the chief advocate against Article 20(2) of the ICCPR.<sup>70</sup> Consequentially, upon ratification of the Convention in 1992, the U.S. included a reservation which asserts that such provision ‘does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States.’<sup>71</sup> The implication is that although the American Supreme Court may endorse domestic legislation as specified within the ICCPR, it is not obliged to do so. Accordingly, U.S. courts foist rigorous and heavily-codified burdens of justification on legislatures who urge the censorship of extreme speech.

Hate speech bans outside the U.S. are likewise constrained by routine legislative checks and balances, but they are not exposed to onerous constitutional tests to the extent which hinders the development and enforcement of such restrictions in America. According to the ECHR, restrictions on freedom of expression must necessarily be prescribed by law. However, this does not suggest that hate speech prohibitions should be used as an instrument of political pressure by the authorities. In reality, this is contrary to the legislative and enforcement practice of many countries, but very few of these countries are willing to openly argue in favour of their ‘right’ to persecute pacific dissidents under the guise of the ban on hate speech. Much of EU hate speech regulations act as pragmatic balancers. Consideration is given to the havocs and dangers of hate speech as well as the repercussions of constraints of the freedom of expression.

Whitman contends that contrary to the American perspective, European law ‘levels up’ by expanding ‘historically high-status norms throughout the population’ whereby the legal protection of dignity which was once guaranteed only to certain persons, now applies to

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<sup>69</sup> *Terminiello v. Chicago*, (1949) 337 U.S. 1, 4

<sup>70</sup> ‘Any Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility, or Violence shall be Prohibited by Law’

<sup>71</sup> Eric Heinze, ‘Wild-West Cowboys versus Cheese-Eating Surrender Monkeys: Some Problems in Comparative Approaches to Hate Speech’ in *Extreme Speech and Democracy*, (Oxford: Oxford University Press 2009), 182, 185

*everybody* – even minorities, prison inmates, etc.<sup>72</sup> Nonetheless, European hate speech bans have also been the subject of criticism. Post and Heinze remind how governmental regulations of public discourse can be potentially problematic in societies whose governmental and legislative legitimacies depend upon an open and transparent system of participatory democracy.<sup>73</sup> However, the American attitude, where regardless of the consequences, there is no criminalization of public incitement as such, is also considered to be extreme.<sup>74</sup>

### **3. The Impact of International and Regional Standards**

The core common standards of human rights for all peoples and all nations were primarily specified in the milestone document of the Universal Declaration of Human Rights (UDHR). Nevertheless, subsequent international and regional human rights instruments were created as to provide protection of the rights laid down in the former. Albeit treaties recognise that freedom of expression is intrinsically valuable for the healthy functioning of society, such right is not absolute.<sup>75</sup> This implies that states may lawfully interfere with freedom of speech in certain delineated circumstances.<sup>76</sup> This principle of criminalising hate speech was initially outlined in the International Convention on the Elimination of all Forms of Racial Discrimination (CERD), however other widely-ratified international instruments nowadays echo this obligation. Hence, this paper proceeds to explore the various conditions for restricting the right to expressive assessed in the context of the main provisions in widely-ratified covenants and assessing the relevant case law of enforcement bodies, which suggests that realistically the U.S. latitudinarian attitude is pitted not merely against the contrasting approach in Europe but effectively the rest of the world.<sup>77</sup> Most countries recognise that in a multicultural society, the diversity of cultural groups is to be appreciated and protected. Therefore, it might be argued that hate speech bans developed as a result of the deeper understanding of the role of the government in protecting and promoting egalitarianism. However, legislation that seeks to suppress hatred does not do

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<sup>72</sup> James Q. Whitman, 'The Two Western Cultures of Privacy: Dignity Versus Liberty', *Yale Law Journal* 113, no. 6 (2004): 1151, 1166

<sup>73</sup> Eric Heinze, 'Wild-West Cowboys versus Cheese-Eating Surrender Monkeys: Some Problems in Comparative Approaches to Hate Speech' in *Extreme Speech and Democracy*, (Oxford: Oxford University Press 2009), 182, 195

<sup>74</sup> Alexander Verkhovsky, *Criminal Law on Hate Crime, Incitement to Hatred and Hate Speech in OSCE Participating States*, (The Hague: SOVA Centre, 2016), 12

<sup>75</sup> Mohamed Elewa Badar, 'Basic Principles Governing Limitations on Individual Rights and Freedoms in Human Rights Instruments', *International Journal of Human Rights* 7, no. 4 (2003): 63-92

<sup>76</sup> *Ibid.*

<sup>77</sup> Eric Heinze, 'Wild-West Cowboys versus Cheese-Eating Surrender Monkeys: Some Problems in Comparative Approaches to Hate Speech' in *Extreme Speech and Democracy*, (Oxford: Oxford University Press 2009), 182



so because hate speech *per se* ought to be condemned. Rather because hatred when expressed in exceptional circumstances.<sup>78</sup> But what are these circumstances?

Traditionally, legislation condemned speech which intended to ‘bring into hatred and contempt the administration of justice’<sup>79</sup> or defamatory discourse. But following a century of attempted genocides, bans have developed in a manner where expression of hatred directed towards specific groups on the basis of religion, race or ethnicity *inter alia* is condemned and punished. On an international plane, prevention of incitement to hatred has been explored in the context of human rights as well as international criminal law. From a human rights perspective, international human rights instruments particularly the Genocide Convention, CERD and the ICCPR impose a positive obligation on signatory states to prohibit incitement to hatred and ensure that its citizens do not engage in it. Moreover, an individual who believes that his rights have been violated is given redress by having the possibility to bring an action in court provided that the state in question is a signatory to the relevant convention. In such a way, the international law encourages states to adopt regulations that penalise hate speech when it incites criminal behaviour, however within certain limits. Indeed, certain jurisdictions respond to extreme speech with specially crafted legislation, whilst others employ broader-scope legislative instruments to police it. What is paramount when contemplating the sanctions imposed for violations of restrictions, is that as stressed by the United Nations Human Rights Committee states must give adequate importance to the principle of proportionality,<sup>80</sup> by taking into account the nexus between the relevant statement and the risk of harm.

### **3.1. International Human Rights Instruments**

The main international human rights instruments including prohibitions of certain incitements to hatred are the Convention on the Prevention and Punishment of the Crime of Genocide, the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). In the case of the ICCPR, Article 20(2) imposes a duty on states parties to prohibit incitement to discrimination, hostility

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<sup>78</sup> Robert Post, ‘Hate Speech’ in Ivan Hare and James Weinstein (ed.), *Extreme Speech and Democracy*, (Oxford: Oxford University Press, 2009), 123,124

<sup>79</sup> Thomas Starkie, *A Treatise on the Law of Slander, Libel Scandalum Magnatum and False Rumours*, (London: W. Clarke and Sons, 1813), 535

<sup>80</sup> Wibke K. Timmermann, ‘Incitement in International law’ (New York: Routledge Research, 2015), 107

or violence. The Human Rights Committee (HRC) of the ICCPR has derived from this duty the ‘right to be free from or protected against incitement’, however this right cannot be invoked by a potential applicant against their state.<sup>81</sup> In terms of ICERD, its Committee offers a more robust protection to the right to be free from racist incitement as States are to instigate a complete and proper criminal investigation into each incident that engages Article 4 of ICERD, however cases covered by the Committee need to have an element of racism and thus do not qualify when based solely on religion.<sup>82</sup>

### *3.1.1. International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)*

Adopted by the United Nations General Assembly in 1965<sup>83</sup> and ratified by 181 states parties, the provisions of the ICERD are not merely the first to address animosity speech but also by far the most far-reaching. Consisting of an opening paragraph and three operative clauses, Article 4 ‘was the outcome of a difficult compromise after hours, and even days, of discussion, drafting and redrafting.’<sup>84</sup> Under Art. 4, ‘States parties have not only to enact appropriate legislation but also to ensure that it is effectively enforced.’<sup>85</sup> Aware that threats and acts of racial violence certainly lead to other such acts and generate an atmosphere of hostility, the Committee on the Elimination of All Forms of Racial Discrimination (the CERD Committee), emphasised that ‘only immediate intervention can meet the obligations of effective response.’<sup>86</sup>

Particularly, the provision references hate speech and hate crimes as it distinguishes between four different aspects of the hate speech to be prohibited (a) dissemination of ideas based on racial superiority, (b) dissemination of ideas based on racial hatred, (c) incitement to racial discrimination and (d) incitement to acts of racially motivated violence. Interestingly, Art. 4(c) of the ICERD calls for the prohibitions on public authorities or institutions promoting or inciting

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<sup>81</sup> Jeroen Temperman, *Religious Hatred and International Law: The Prohibition of Incitement to Violence or Discrimination* (Cambridge: Cambridge University Press, 2016). 370

<sup>82</sup> *Ibid.*

<sup>83</sup> U.N.G.A., ‘Resolution 2106A(XX), International Convention on the Elimination of All forms of Racial Discrimination’, 1406<sup>th</sup> plenary meeting, 21 December 1965

<sup>84</sup> U.N.G.A., ‘Resolution 2106A(XX), International Convention on the Elimination of All forms of Racial Discrimination’, 1406<sup>th</sup> plenary meeting, 21 December 1965 by the delegate of Ghana, Mr. Lamptey, A/PV.1406, 7

<sup>85</sup> CERD Committee, ‘General Recommendation 15 on Article 4 of the Convention’, 42<sup>nd</sup> session, 1993, 2.

<sup>86</sup> CERD Committee, ‘General Recommendation 15 on Article 4 of the Convention’, 42<sup>nd</sup> session, 1993, 2.

racial discrimination, elucidating the particular evil of public officials and bodies engaging in racist activities.<sup>87</sup>

As it stands today, the provisions condemn propaganda and societies that are founded on the notion of racial supremacism or that attempt to defend discrimination. Correspondingly, the provision obliges signatories to endorse ‘immediate and positive measures’ which aim to eliminate these forms of incitement and discrimination. The CERD Committee has interpreted this provision to be a mandatory obligation. Hence, states are bound not only to proscribe extreme speech but also to penalise such misconduct by adopting criminal law sanctions. These sanctions must also be enforced on public authorities or institutions which either incite racial discrimination or exemplify the unethical behaviour of public officials and bodies. For such reason, the CERD Committee has steadily criticised states parties for failing to abide by it. This is because discrimination requires instant intervention while acts of racial violence or threats thereof can indisputably lead to other crimes or generate an atmosphere of hostility.<sup>88</sup>

Hence, to some extent Article 4 envisages broader obligations on member states than those specified in other international legal instruments, particularly the ICCPR. Nevertheless, several member states have ratified the ICERD subject to certain reservations on Article 4, meaning that the national application of its requirements is subject to the state’s own norms and views surrounding free speech and its prohibitions.

Although the ICERD, by virtue of its particular emphasis on racial discrimination, does not consider free speech *per se*, all measures necessary to implement Article 4 must have ‘due regard’ for the ideals espoused by the UDHR and Article 5 of the ICERD. This was the clear language of the CERD Committee after the ruling of the European Court of Human Rights (ECtHR) in the Case of *Jersild v. Denmark*, a case which appeared before the CERD Committee as well as the ECtHR.<sup>89</sup> The CERD Committee affirmed that ‘the “due regard” clause of Article 4 of the Convention requires due balancing of the right to protection from racial discrimination against the right to freedom of expression.’<sup>90</sup>

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<sup>87</sup> Toby Mendel, ‘Hate Speech Rules Under International Law’, Centre for Law and Democracy, (2010) <http://www.law-democracy.org/wp-content/uploads/2010/07/10.02.hate-speech.Macedonia-book.pdf> (accessed 30 September 2018), 3.

<sup>88</sup> Wibke K. Timmermann, *Incitement in International Law* (New York: Routledge Research, 2015), 131

<sup>89</sup> *Jersild v. Denmark*, App. No. 15890/89, ECtHR, Judgment, 23 September 1994. The applicant was a television journalist who was convicted by the national courts of aiding and abetting the dissemination of racist statements by racist extremists, although the purpose of the programme was to expose racism in Denmark.

<sup>90</sup> CERD Committee, ‘Concluding Observations of the Committee on the Elimination of Racial Discrimination (Denmark)’, UN Doc. CERD/C/304/Add.2, 52<sup>nd</sup> session, 28 March 1996, 2

As for the *mens rea* requirement, the early official position of the CERD was that the extreme speech prohibitions as provided for in Article 4 ‘should be enforced regardless of the precise *intentions* of the person responsible for the alleged racist hate speech.’<sup>91</sup> This position was subject to criticism and Amnesty International has requested the CERD Committee to ‘clarify that Article 4 (a) requires an intention to disseminate ideas that advocate racial hatred before that dissemination is punishable by law.’<sup>92</sup> Notably, the CERD Committee was among the few monitoring bodies which welcomed the conviction of a television journalist by Danish Courts for aiding and abetting the dissemination of racists statements by racist extremists, although the purpose of the programme was merely to expose racism in Denmark.<sup>93</sup> However, the ECtHR held that the conviction by the Danish Courts was a breach of the applicant’s right to freedom of expression due to the fact that the journalist lacked the purpose or intent of promoting racism but, on the contrary, tried to expose and analyse it. The ECtHR stated that: ‘An important factor on 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.’<sup>94</sup>

Year 2013 witnessed a dramatic shift regarding the CERD Committee’s position on the question of *mens rea* in relation to Article 4. In its General Recommendation on racial hate speech and in a paragraph specifically dedicated to the crime of ‘incitement’ the Committee postulates that State parties should recognise as ‘important elements’ of this offence ‘the intention of the speaker and the imminent risk or likelihood that the conduct desired or intended by the speaker will result from the speech in question.’<sup>95</sup>

There is a consensus among the jurisprudence of the CERD Committee that the Convention does not require the criminal prosecution of all bigoted and offensive statements. In *Zentralrat Deutscher Sinti und Roma v. Germany*, for example, the Committee found no violation of the

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<sup>91</sup> Jeroen Temperman, *Religious Hatred and International Law: The Prohibition of Incitement to Violence or Discrimination* (Cambridge: Cambridge University Press, 2016). 221, emphasis added.

<sup>92</sup> Amnesty International, *Written Contribution on Racist Hate Speech*, (28 August 2012) <https://www.amnesty.org/download/Documents/24000/ior420022012en.pdf>, (accessed 23 July 2019), 4.

<sup>93</sup> CERD Committee, ‘Concluding Observations of the Committee on the Elimination of Racial Discrimination (Denmark)’, UN Doc. CERD/C/304/Add.2, 52<sup>nd</sup> session, 28 March 1996, 3.

<sup>94</sup> *Jersild v. Denmark*, App. No. 15890/89, ECtHR, Judgment, 23 September 1994, 33

<sup>95</sup> CERD Committee, ‘General Recommendation 35: Combating Racist Hate Speech’, UN Doc. CERD/C/GC/35, 83<sup>rd</sup> session, 12-30 Aug 2013, 16

Convention even though the State party had declined to prosecute statements that the Committee found to be “discriminatory, insulting and defamatory.”<sup>96</sup>

As for cases related to incitement to hatred, the CERD Committee has made it clear that in order to constitute “incitement,” there must at least be a reasonable possibility that the statement could give rise to the prohibited discrimination.<sup>97</sup> It is open to question whether the term “racial superiority” as provided for in Art. 4(a) of the ICERD encompasses statements of superiority on the basis of nationality or ethnicity. Hate speech that contains discrimination based on religious background is not covered by the ICERD though there are recent voices who advocate for its inclusion.

### 3.1.2. *International Covenant on Civil and Political Rights (ICCPR)*

Forming part of the International Bill of Human Rights, the ICCPR binds its parties to respect the civil and political rights of individuals, including freedom of speech. All such rights are to be safeguarded without distinction as to sex, colour, race or religion but rather national or social origin, birth or other status and ethnic, religious and linguistic minorities are to be protected.<sup>98</sup> Reiterating the fundamental definition of free speech expressed in Article 19 UDHR, Article 19(2) ICCPR defines the right as encompassing the “freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.”<sup>99</sup> However, the version in the ICCPR further adds to this provision by averring that the exercise of such rights implicates “special duties and responsibilities” and thus, when necessary “[f]or respect of the rights or reputation of others” or “[f]or the protection of national security or of public order (order public), or of public health or morals”, may be “subject to certain restrictions”.<sup>100</sup>

Nonetheless, not all restriction may be invoked under this provision. Article 19(3) establishes a three-fold test that must be satisfied for restriction on free speech to be legitimate.

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<sup>96</sup> CERD, ‘Opinion, Zentralrat Deutscher Sinti und Roma v. Germany, CERD Comm. No. 38/2006’, U.N. Doc. CERD/C/72/D/38/2006, Annex I, 3 March 2008, 8.

<sup>97</sup> *Erbakan v. Turkey*, App. No. 59405/00, ECtHR, Judgment, 6 July 2006,

<sup>98</sup> Ivan Hare and James Weinstein, *Extreme Speech and Democracy*, (Oxford: Oxford University Press 2009), 63

<sup>99</sup> U.N.G.A., ‘Resolution 2200A (XXI), International Covenant on Civil and Political Rights’, 19 December 1966, art 19(2)

<sup>100</sup> U.N.G.A., ‘Resolution 2200A (XXI), International Covenant on Civil and Political Rights’, 19 December 1966, art 19(3)

Accordingly, interference must be provided by law; for the protection of one of the legitimate interests listed; and necessary to protect that interest. Having asserted the right of free speech in Article 19, the ICCPR further limits its effects through the subsequent article. In particular, Article 20(2) sets a standard which is more radical than the limitation set out in Article 19(3)(b) and in different terms than the ICERD. This provision obliges states to prohibit by law liberal expression which advocates “national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”.<sup>101</sup>

Article 20 concerns itself with the prohibition of ‘propaganda for war’ as well as ‘advocacy of national, racial or religious hatred’ and has thus been described as one of the strongest condemnations of hate speech.<sup>102</sup> While it requires that such advocacy constitute ‘incitement to discrimination, hostility or violence’ it is hard to imagine a situation in which it would not do so.<sup>103</sup> Thus the provision could be read as a broad restriction on hate speech. Importantly, however, the drafting history of Article 20(2) shows that suggestions for extending the provision to include for example ‘racial exclusiveness’ were rejected on the basis of a potential breach of freedom of expression.<sup>104</sup>

Mendel concludes that the obligations of Article 20 (2) are either identical or extremely close to the permissions of Article 19(3).<sup>105</sup> Indeed, diverging from the reasoning adopted in decisions such as *JRT and WG v. Canada*, the HRC in *Ross v. Canada* affirmed that Article 20 may be considered as a *lex specialis* with regards to Article 19. This is because Article 19(3) and Article 20(2) are legally contiguous and such nexus cannot be overlooked, as restrictions must necessarily also derive from the principles established in Article 20(2).

In the HRC assessment of the *Faurisson v. France* case, Evatt, Kretzmer and Klein wrote in a concurring opinion:

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<sup>101</sup> U.N.G.A, ‘Resolution 2200A (XXI), International Covenant on Civil and Political Rights’, 19 December 1966, Article 20(2)

<sup>102</sup> Eric Heinze, ‘Viewpoint Absolutism and Hate Speech’, *Modern Law Review* 69, no. 4 (2006), 543, 544; Nazila Ghanea, ‘Proposals to the UN Committee on the Elimination of Racial Discrimination’, *Human Rights Quarterly* 35, (2013): 935, 937

<sup>103</sup> Manfred Nowak, (2<sup>nd</sup> ed.), *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, (Kehl am Rhein: Engel Publishers, 2005), 475

<sup>104</sup> Marc Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights*, (Dordrecht: Martinus Nijhoff Publishers, 1987), 404-405, 408

<sup>105</sup> Toby Mendel, ‘Hate Speech Rules Under International Law’, Centre for Law and Democracy, (2010) <http://www.law-democracy.org/wp-content/uploads/2010/07/10.02.hate-speech.Macedonia-book.pdf> (accessed 30 September 2018), 4.

[T]here may be circumstances in which the right of a person to be free from incitement to discrimination on grounds of race, religion or national origins cannot be fully protected by a narrow, explicit law on incitement that falls precisely within the boundaries of article 20, paragraph 2. This is the case where ... statements that do not meet the strict legal criteria of incitement can be shown to constitute part of a pattern of incitement against a given racial, religious or national group, or where those interested in spreading hostility and hatred adopt sophisticated forms of speech that are not punishable under the law against racial incitement, even though their effect may be as pernicious as explicit incitement, if not more so.<sup>106</sup>

Notwithstanding the prominence of international jurisprudence along with universal legal norms, these do not affect lawmakers and experts enforcing the law directly. For such reason, the UN attempts to systematise rules relating to hate speech as well as its incitement by issuing several recommendations. Differing from directives or regulations, the function of a recommendation is to offer guidance and to prepare legislation in member states.<sup>107</sup> Thus, although recommendations are not binding and do not have legal force, they have a prominent political weight. Of direct concern to this paper, the UN Human Rights Council has recently approved the Rabat Action Plan,<sup>108</sup> which contains vital recommendations for lawmakers when implementing legislation and policies concerning atrocity speech. Particularly, the Rabat Plan avows that following the aforementioned international standards, States should adopt legislation which directly prohibits incitement to hatred using the same terminology, and in harmonization with the balance established in Article 19 and Article 20 of the ICCPR.<sup>109</sup>

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<sup>106</sup> U.N.O.H.C.H.R., 'Views of the Human Rights Committee under Article 5 paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights', Communication No. 550/1993, 8 November 1986, 4.

<sup>107</sup> E.U., *Consolidated version of the Treaty on the Functioning of the European Union*, (1958), Article 288

<sup>108</sup> U.N.O.H.C.H.R., 'Rabat Plan of Action on the Prohibition of Advocacy of national, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence', 22<sup>nd</sup> session, UN Doc. A/HRC/22/17/Add.4, 11 January 2013: The Rabat Plan of Action, adopted by experts following a consultative process under the auspices of OHCHR, provides authoritative guidance to States on the prohibition of "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence".

<sup>109</sup> Alexander Verkhovsky. *Criminal Law on Hate Crime, Incitement to Hatred and Hate Speech in OSCE Participating States*, (The Hague: SOVA Centre, 2016), 18

As for the *mens rea* requirement particularly within the text of Article 20(2) ICCPR, a study conducted by Jeroen Temperman on the travaux préparatoires of the ICCPR as well as independent experts and scholarly works reveals the following findings:

- The travaux préparatoires is far from clear on the point of intent.
- There is an emerging consensus that Article 20(2) requires strong degrees of *mens rea*, including at a minimum (1) the intent to advocate hatred, (2) the intent to target a specific group, and arguably also (3) an oblique intent or knowledge requirement in relation to the consequences of the incitement.
- Lower standards of guilt such as ‘negligence’ and ‘recklessness’ are problematic from the perspective of freedom of speech.<sup>110</sup>

The Rabat Plan of Action also supports an intent requirement in relation to the incitement offence: ‘Negligence or recklessness are not sufficient for an article 20 situations which requires “advocacy” and “incitement” rather than mere distribution or circulation. In this regard, it requires the activation of a triangular relationship between the object and subject of the speech as well as the audience.’<sup>111</sup> Arguments in favour of a high threshold of *men rea* standard have been canvassed by a range of important players at the international level emphasising that ‘no one should be penalized for the dissemination of “hate speech” unless it has been shown that they did so with the intention of inciting discrimination, hostility or violence’.<sup>112</sup>

### 3.2. Regional Human Rights Instruments

Beginning with the enactment of the European Convention on Human Rights (ECHR) in 1950, the trend to elaborate regional standards was followed by the subsequent ratification of the American Convention on Human Rights (ACHR) in 1967, and later the African Charter on Human and Peoples’ Rights (ACHPR) in 1981. These regional human rights legal instruments have been introduced in an effort to render the security of civil and political rights, as well as

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<sup>110</sup> Jeroen Temperman, *Religious Hatred and International Law: The Prohibition of Incitement to Violence or Discrimination* (Cambridge: Cambridge University Press, 2016), 213-14

<sup>111</sup> U.N.O.H.C.H.R., ‘Rabat Plan of Action on the Prohibition of Advocacy of national, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence’, 22<sup>nd</sup> session, UN Doc. A/HRC/22/17/Add.4, 11 January 2013, 6.

<sup>112</sup> Council of Europe, ‘Recommendation No. R (97) 20 of the Committee of Ministers to Member States on “Hate Speech”, Joint statement of the UN Special Rapporteur on Freedom of Opinion and Expression, the OAS OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression’, 607<sup>th</sup> meeting, 30 October 1997



of economic, social and cultural rights, more effective. Notwithstanding such added protection, however, regional regulations fail to provide clarity on concerns, particularly as to what is considered criminal or otherwise, which were left undetermined in the regional instruments.

### 3.2.1. *European Convention on Human Rights (ECHR)*

Undoubtedly, the most significant regional instrument for the purposes of this paper is the ECHR. Enacted as the result of the two world wars, the ECHR was the first comprehensive human rights treaty in the world, protecting a broad-spectrum of rights. Whilst there is no established formal hierarchy amongst the protected rights, jurisprudence is proof of the European ideal that freedom of expression is the overriding underpinning of democracy, and consequently essential for the general protection of the other rights and freedoms set out in the Convention.<sup>113</sup> The right to freedom of speech is guaranteed in Article 10, which characterises the right as broad as to include almost every form of expressive activity. Indeed, this provision does not merely protect information and ideas which are favourably received but also those which may shock, offend or disturb society.<sup>114</sup> Hence, albeit the right is most commonly assumed to refer to the right to impart information and ideas, recent case law has indicated that the right under Article 10 also encompasses the right to receive information.<sup>115</sup>

Notwithstanding this capacious understanding, certain limitations are justifiable as freedom of expression is not deemed to be an absolute right.<sup>116</sup> Consequently, state parties may legitimately enact prohibitions to protect other rights or overriding interests. This test detailing the nature of such limitations is outlined in Article 10(2) and has been applied austere by the ECtHR. As per such test, free speech “may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority

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<sup>113</sup> *Lingens v. Austria*, App. No. 9815/82, ECtHR, Judgment, 8 July 1986, 41

<sup>114</sup> *Sunday Times v. The United Kingdom*. App. No. 6538/74, ECtHR, Judgment, 26 April 1979, 245, 65

<sup>115</sup> *Khurshid Mustafa and Tarzibachi v. Sweden*, App. No. 23883/06, ECtHR, Judgment, 16 December 2009, 41

<sup>116</sup> Clare Ovey & Robin C.A. White, Jacobs & White, *European Convention On Human Rights*, (Oxford: Oxford University Press, 2002), 278

and impartiality of the judiciary”.<sup>117</sup> This qualification may be divided into a three-part criterion, requiring the limitation to be prescribed by law, constituting a legitimate aim and necessary in a democratic society.<sup>118</sup> Such formulation of ‘prescribed by law’ suggests that the restriction may only be imposed if it is based on a previously established rule as it must be clear to the potential perpetrator to assume that his actions will be sanctioned. Moreover, such a restriction must obviously be imposed to safeguard any of the purposes listed in para. 2 of Article 10. The last criterion is perhaps the most crucial, as it refers to the concept of “margin of appreciation” and measures whether the governmental reaction is in accordance with their unique legal and cultural tradition to achieve the protection of the specific interest involved without flouting the ultimate objective and purpose of the ECHR.

Hence, analogous to the international standards the ECHR places a primary obligation on state parties to protect the rights and liberties established therein,<sup>119</sup> by adopting measures which satisfy the aforementioned test. This has been reiterated by the European Court of Human Rights (ECtHR) as early as 1976.<sup>120</sup> The Convention does not prescribe any specific modalities but rather leaves the states free to safeguard the right in conformity with their respective domestic legal system and other influential circumstances. However, the ECtHR retains its role as an overseer and to give the ultimate ruling on whether the limitation imposed is reconcilable with expressive liberty as protected under Article 10.<sup>121</sup>

Additionally, there are certain circumstances where speech does not even warrant protection in the first place. This kind of speech is defined in Article 17 of the same Convention as “to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.” Once the dialogue in question falls within this scope, there is no need for the restriction be justified under the terms established in Article 10(2). Hence, as observed in *Norwood v. United Kingdom*,<sup>122</sup> once the action falls within the ambit of Article 17 it no longer enjoys the

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<sup>117</sup> Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, (European Convention on Human Rights, as amended) (ECHR) (1953) art 10(2)

<sup>118</sup> Elena Mihajlova, Jasna Bacovska, Tome Shekerdjiev, *Freedom of expression and hate speech* (Skopje: OSCE, 2013), 12

<sup>119</sup> Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, (European Convention on Human Rights, as amended) (ECHR) (1953) art 1

<sup>120</sup> *Handyside v. The United Kingdom*, App. No. 5493/72, ECtHR, Judgment, 7 December 1976, 48

<sup>121</sup> *Hertel v. Switzerland*, App. No. 59/1997/843/1049, ECtHR, Judgment, 25 August 1998, 46

<sup>122</sup> *Norwood v. The United Kingdom*, App. No. 23131/03, ECtHR, Judgment, 16 November 2004

protection afforded by Article 10. Predominantly, the ECtHR has mainly referred to Article 17 in the milieu of racist speech cases, which subvert the core values of tolerance and non-discrimination embedded in the Convention. Such decisions apply the theory of the paradox of tolerance: an absolute tolerance may lead to the tolerance of ideas promoting intolerance, and the latter could then destroy the tolerance.<sup>123</sup>

The “abuse clause” in Article 17 has been subject to criticism as ‘it allows a case to be struck out without examination of the merits’<sup>124</sup>, ‘undermines the admissibility of [any] complaints by hate speech offenders’<sup>125</sup> and ‘has the effect of a guillotine’.<sup>126</sup>

The jurisprudence of the Court has not produced a clear-cut test of which speech can be proscribed. For example in *Sürek v. Turkey*, where the impugned articles described Turkey as “the real terrorist” and as “the enemy”, the ECtHR argued that the public has the right ‘to be informed of a different perspective on the situation in south-east Turkey, irrespective of how unpalatable that perspective may be for them.’<sup>127</sup> The Court concluded that the conviction and sentencing of the applicant were contrary to Article 10. Equally, in *Karataş v. Turkey*, the Court found that:

even though some of the passages from the poems seem very aggressive in tone and to call for the use of violence ... the fact that they were artistic in nature and of limited impact made them less a call to an uprising than an expression of deep distress in the face of a difficult political situation.<sup>128</sup>

On the other hand in the *Leroy v France*<sup>129</sup> case the ECtHR found that the conviction for complicity in condoning terrorism of a cartoonist in France was not disproportionate to the legitimate aim pursued. The cartoon represented the attack on the twin towers of the World Trade Centre, with the caption: “We have all dreamt of it... Hamas did it.” Despite recognizing

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<sup>123</sup> Dominika Bychawska-Siniarska, *Protecting the Right to Freedom of Expression under the European Convention on Human Rights: A Handbook for Legal Practitioners* (Council of Europe, 2017), 12.

<sup>124</sup> Amal Clooney and Philippa Webb, ‘The Right to Insult in International Law’, *Columbia Human Rights Law Review* 48, no. 2 (2017): 1-55.

<sup>125</sup> Jeroen Temperman, *Religious Hatred and International Law: The Prohibition of Incitement to Violence or Discrimination* (Cambridge: Cambridge University Press, 2016), 149

<sup>126</sup> Hannes Cannie and Dirk Voorhoof, ‘The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An added Value of Democracy and Human Rights Protection?’ *Netherlands Quarterly of Human Rights* 29 no. 1 (2011): 58.

<sup>127</sup> *Sürek v. Turkey (No. 4)*, App. No. 24762/94, ECtHR, Judgment, 8 July 1999, 58.

<sup>128</sup> *Karataş v. Turkey*, App. No. 23168/94, ECtHR, Judgment, 8 July 1999, 52.

<sup>129</sup> *Leroy v. France*, App. No. 36109/03, ECtHR, Judgment 2 October 2008

that the expression was artistic and that cartoons are by nature a social commentary aimed at exaggeration, distortion of reality, satire and provocation, the Court considered that in this case it went beyond mere criticism of American imperialism by supporting and glorifying the latter's violent destruction and in the context in which it was issued was capable of stirring up violence.

Since the ECHR does not include a provision dealing with extreme speech *per se* the ECtHR jurisprudence on such speech is unsurprisingly unpredictable. While sometimes cases are assessed on the merits employing Art. 10(2), at other times Article 17 is used to throw out the complaints. Furthermore, the *Aksu* case has established that incitement victims may employ Article 8 on respect to private life as a legal weapon against hateful incitement.<sup>130</sup> There is also confusion regarding the necessary *mens rea* in instances of prohibiting hate speech. While Article 17 requires intent in that it addresses activity aimed at the destruction of any of the rights and freedoms enshrined in the Convention,<sup>131</sup> the jurisprudence on Art. 10(2) produced mixed results on the matter. In the *Jersild* and *Lehideux and Isorni v. France* intent was considered to be a necessary element, whereas in *Leroy v. France* and *Fèret v Belgium* it was regrettably considered irrelevant. The Court has also permitted highly problematic restrictions on political commentary and artistic expression, such as in the case of *Leroy* and on speech acts that may have been offensive but did not amount to 'incitement'.<sup>132</sup> All these instances restrict freedom of expression beyond what is necessary and even beyond what is constructive in the quest for a peaceful coexistence and mutual understanding of different groups. Repression of the freedom to speak one's mind inevitably leads to resentment and even hatred which may not have been previously present.

Importantly, the Court has found that for a State party to legitimately combat extreme speech, it is not required that the hate speech in question includes an express aim of inciting to violence or to particular criminal acts.<sup>133</sup> Deliberately spreading hatred that amounts to 'incitement to discrimination' may be sufficient to incur criminal liability.<sup>134</sup>

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<sup>130</sup> Jeroen Temperman, *Religious Hatred and International Law: The Prohibition of Incitement to Violence or Discrimination* (Cambridge: Cambridge University Press, 2016), 371

<sup>131</sup> *Glimmerveen and Hagenbeek v. The Netherlands*, App. No. 8348/78 and 8406/78, ECtHR, (inadmissibility decision of 11 October 1979), 10

<sup>132</sup> Jeroen Temperman, 'Blasphemy, Defamation of Religions and Human Rights Law', *Netherlands Quarterly of Human Rights* 26, no. 4, (2008): 517-45.

<sup>133</sup> *Fèret v Belgium*, App. No. 15615/07, ECtHR, Judgment, 16 July 2009, 73

<sup>134</sup> *Fèret v Belgium*, App. No. 15615/07, ECtHR, Judgment, 16 July 2009, 73

### 3.2.2. *The American Convention on Human Rights (ACHR)*

The ACHR broadly qualifies the right of freedom of thought and expression under Article 13 as the right to “seek, receive and impart information and ideas of all kinds.” Such freedom is safeguarded by bans on censorship or any kind of indirect restrictions. Nonetheless, under the ACHR free speech is also not an absolute right. In fact, the paragraph 5 of the Article 13 imposes a prohibition on

‘Any propaganda of war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.’

Commenting on this provision, the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights (IACHR) at the Organization of American States in conformity with the above-discussed international and regional standards reiterated the importance of the restriction to be ‘provided by law, serve a legitimate aim as set out in international law and be necessary to achieve that aim.’<sup>135</sup>

However, giving to the lack of Inter-American jurisprudence, unlike the equivalent provisions found in international treaties, the basic framework of hate speech under Article 13(5), have yet to be construed or developed in depth by the Inter-American Court.

### 3.2.3. *The African Charter on Human and Peoples’ Rights (ACHPR)*

Established in Article 9 of the ACHPR, the right to expressive liberty is subject to the other duties listed within the same Convention. Such duties aim to identify which speech falls outside the bounds of protected speech. Of particular importance to this debate is Article 28 which stresses that “every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.” The African Court on Human and Peoples' Rights

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<sup>135</sup> Dunja Mijatović, *Joint Declarations of the representatives of intergovernmental bodies to protect free media and expression*, (Vienna: OSCE, 2001)

has shed light on the topic in the ground breaking judgement of *Lohé Issa Konaté v Burkina Faso*.<sup>136</sup> This judgment was primarily concerned with whether the integral restrictions on free speech in the Information Law and Penal Code of Burkina Faso could be legitimately justified with reference to the ACHPR and the ICCPR. Hence, the Court was left to decide whether these limitations were provided by law, served a legitimate purpose, and were necessary to attain a set objective. Undoubtedly, the restrictions were "provided by law" as they formed part of the Information Law and Penal Code. With regards to the legitimate purpose, the Court found that the only reason for limiting the right is to be ascertained from Article 27(2) which stipulates that rights "shall be exercised in respect of the rights of others, collective security, morality and common interest." However, Burkina Faso failed to prove the necessity of the restriction i.e. how the penalty of imprisonment was a compulsory limitation to protect the rights and reputations of the members of the judiciary. Accordingly, the Court concluded that the pertinent provisions of the Information Law and Penal Code were not compatible with Article 9 of the ACHPR and Article 19 of the ICCPR. This decision has had a considerable impact on the development of the right to freedom of expression in Africa, as it offers an authoritative interpretation of the regional human rights law on the issue.<sup>137</sup>

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<sup>136</sup> *Lohé Issa Konaté v. The Republic of Burkina Faso* (2014) App. No. 004/2013, African Court in Human and People' Rights, 5 December 2014

<sup>137</sup> Duke Law Scholarship Repository, 'Criminalising Speech In Africa: What Did The African Court On Human And Peoples' Rights Actually Say About Defamation Law?', (2015) <https://mediabelf.wordpress.com/2015/01/16/criminalising-speech-in-africa-what-did-the-african-court-on-human-and-peoples-rights-actually-say-about-defamation-law/> (accessed 18 June, 2018)

#### 4. Incitement to Hatred as a CAH-Persecution

Having analysed the present situation of the hate speech field, in light of the general protection of free speech and the limitations imposed the present section deals with how subcategory of CAH-persecution became a vehicle through which hate speech, not explicitly calling for violence, can be prosecuted.

##### 4.1 . The development of Persecution as a CAH

Although the origin of the offence of CAH can be traced back to World War I, it was a result of the Holocaust and Nazi crimes and was introduced in 1945 in the Nuremberg Charter. The definition in Article 6(c) of the Charter considered that CAH was made up of inhumane acts and persecution on discriminatory grounds.<sup>138</sup> However, the Charter required what came to be known as the “war nexus” i.e. a CAH has to be linked with another principle crime in order to be prosecutable.<sup>139</sup> Whilst this nexus was removed by the Control Council Law (CCL) No.10,<sup>140</sup> it was reimposed as a jurisdictional requirement by the statutes of the ICTR and ICTY. Yet, possibly the most predominant development with regards to CAH was Article 7 of the Rome Statute of the ICC. This article delineated the main characteristics of CAH, namely the prerequisites of a “widespread and systematic attack against any civilian population”<sup>141</sup> and expanded the scope of the offence.

The introduction of Article 7 of the ICC Statute was particularly significant with regards to persecution. It refers to persecution as “intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectively”<sup>142</sup>, which can be committed together with any other act mentioned in the article. Furthermore, it modernised the classes of people that may be subject to CAH-persecution by a “catch-all”

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<sup>138</sup> Beth Van Schaak, ‘The Definition of Crimes Against Humanity: Resolving Incoherence’, *Columbia Journal of Transnational Law* 37, no. 3 (1999): 787, 797

<sup>139</sup> U.N., ‘Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis’ (London Agreement), 8 August 1945

<sup>140</sup> Allied Control Council, ‘Nuremberg Trials Final Report Appendix D: Control Council Law No. 10’, 20 December 1945

<sup>141</sup> U.N.G.A., ‘Rome Statute of the International Criminal Court’, U.N. Doc. A/CONF.183/9, 17 July 1998, art 7

<sup>142</sup> U.N.G.A., ‘Rome Statute of the International Criminal Court’, U.N. Doc. A/CONF.183/9, 17 July 1998, art 7(g)

provision which includes discrimination on any grounds that are universally recognised as forbidden under international criminal law.

Notwithstanding some evident overlap with genocide, persecution and genocide differ in that their legal elements as they protect different societal interests. Whereas genocide is a forthwith crime which aims to destroy groups, persecution is a results-based offence targeting discrimination against individuals on discriminatory grounds.<sup>143</sup> Unlawful discrimination must necessarily be the offender's objective as a mere certainty that discrimination will occur or that his actions may have a discriminatory effect does not suffice. Although not an essential element of the crime of persecution, a discriminatory plan or policy may act as evidence to prove that the required intent existed at the time of the offence.<sup>144</sup>

As will be set forth below, persecution was originally included as a CAH in the integral instruments of the International Military Tribunal (IMT). The boundaries of what constitutes persecution continued to expand by the interpretation of CCL No. 10 adopted by American judges in judgements such as *United States v. Ernst von Weizaecker*.<sup>145</sup> Persecution charges were common in judgements concerning Nazi criminals' however, contrary to genocide, up until this point there had not been a precise definition of persecution and its scope had not been developed. Albeit jurists such as M. Cherif Bassiouni and a commentary published by the International Law Commission provided important guidance, the creation of the ICTY and its decisions stimulated the refinement of CAH-persecution.

The foundational requirements were initially introduced in *Prosecutor v. Tadić*;<sup>146</sup> there must be the occurrence of a discriminatory act or omission based on any of the listed grounds such as race, religion or politics with the intent to impinge on one's fundamental rights. Building on this, the *Kupreškić* Trial Chamber's articulation of the elements of CAH-persecution was as follows;<sup>147</sup> apart from satisfying all the elements required to constitute a CAH as per the ICTR

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<sup>143</sup> Beth Van Schaack, 'Atrocity Crimes Litigation: 2008 Year-In-Review', *Northwestern University Journal International Human Rights* 7, no. 2 (2009): 170

<sup>144</sup> David L. Nersessian, 'Comparative Approaches to Punishing Hate: The Intersection of Genocide and Crimes against Humanity', *Stanford Journal Internationriminal Law* 24, no. 2 (2007): 221, 243

<sup>145</sup> *U.S. v. Ernst von Weizsaecker (Ministries Case)*, IMT, 14 April 1949

<sup>146</sup> *Prosecutor v. Duško Tadić a.k.a. "Dule"*, Case No. IT-94-1, ICTY, Trial Chamber, Opinion and Judgement (incl Separate and Dissenting opinion of judge McDonald), 7 May 1997, 715

<sup>147</sup> *Prosecutor v. Kupreškić*, Case No. ICTY-IT-95-16-T, ICTY, Trial Chamber, Judgement, 14 January 2000, 567



statute, it must be a crime that denies a group, based on discriminatory grounds, its fundamental rights reaching the same gravity as all other misconducts. With respect to the *mens rea*, the Chamber established that the perpetrator must be aware of the context of his act.<sup>148</sup> In formulating such four-part test, the court concluded that a narrow definition is incompliant with the customary international law and thus such offence may be a multitude of discriminatory acts, generally not a single act but a pattern of acts, ranging from attacks on general political, social and economic rights to direct attacks on people.<sup>149</sup> In fact, building on such precedent in *Prosecutor v. Brđanin*<sup>150</sup> the denial of the right to proper judicial process and medical care also constituted persecution.

#### **4.2 Hate Speech as an *Actus Reus* for Persecution**

The conventional belief is that atrocity speech law developed from the CAH conviction of Nazi newspaper editor Julius Streicher, and the acquittal of Chief Hans Fritzsche by the International Military Tribunal (IMT) at Nuremberg.<sup>151</sup> Although Streicher was initially Hitler's rival, their ideological affinities made them join forces and Streicher became a loyal lieutenant. In the judgement, the court concluded that his speeches and articles incited the Germans to active persecution on political and racial grounds against the Jews, which constitutes CAH.<sup>152</sup> Similarly, Fritzsche was accused of CAH-persecution as a result of broadcasts he hosted as head of the Radio Division of the Propaganda Ministry. In court, it was argued that these aroused passion in Germans which compelled them to commit atrocities. Yet, the Tribunal acquitted Fritzsche on account that his diatribes against the Jews did not directly urge persecution. Albeit the IMT did not explicitly identify the elements required for persecution to be considered as a crime against humanity, both judgements hinted that the Tribunal was inclined to convict the defendants guilty of CAH-persecution on the basis of the hateful expression when it was intentionally urging listeners to commit murders.

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<sup>148</sup> *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, ICTR, Trial Chamber, Judgement, 21 May 1999, 133–134

<sup>149</sup> *Prosecutor v. Kupreškić*, Case No. ICTY-IT-95-16-T, ICTY, Trial Chamber, Judgement, 14 January 2000, 222

<sup>150</sup> *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Trial Chamber, Judgment, 1 September 2004, 1029.–1031

<sup>151</sup> Gregory S. Gordon, 'The Forgotten Nuremberg Hate Speech Case: Otto Dietrich and the Future of Persecution Law', *Ohio State Law Journal* 75, no. 3 (2014): 571, 571

<sup>152</sup> *U.S. v. Goering et al*, (1946) 6 F.R.D. 69

Contemporary case law indicates that both the ICTY and ICTR have echoed the same understanding; for persecution to be considered a CAH it requires ‘a gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity’<sup>153</sup> as the other conduct that constitutes CAH. This position has expressly been endorsed by the *Ruggiu* Trial Chamber<sup>154</sup> which picked up on the pattern set in the Nuremberg judgements that hate speech could serve as the *actus reus* for CAH-persecution convictions. Referring to the *Kupreškić* judgement,<sup>155</sup> the ICTR concluded that the atrocity words in the broadcasts in themselves attacked the victims and did not serve only as a medium of encouragement to perpetrate acts of violence independently from the words.<sup>156</sup>

Addressing this point, the ICTY in *Prosecutor v. Kordić et al*<sup>157</sup> ruled otherwise and concluded that Dario Kordić could not be convicted for persecution as mere encouragement and promotion of hatred did not satisfy the *actus reus* test set in *Kupreškić*.<sup>158</sup> In its ruling the court argued that it is essential that for the accused to be indicted under persecution, his acts must be crimes under international law at the time of commission.<sup>159</sup> Yet, this does not imply that the *actus reus* for persecution must be tied to any other crime listed in the Statute. Considering preceding cases, the Chamber observed that the acts usually consisted of physical assaults on victims and their property.<sup>160</sup> Nonetheless, the court argued that persecution encompasses both bodily and mental harm that impinges on individual freedom.

Disregarding this judgment and contradicting the pre-established jurisprudence<sup>161</sup>, the ICTR delivered an innovative decision whereby it criminalised hate-speech that constitutes incitement to racial discrimination but not incitement to violence through an expansive interpretation of

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<sup>153</sup> Diane F. Orentlicher, ‘Criminalizing Hate Speech: A Comment on the ICTR’s Judgment in The Prosecutor v. Nahimana, et al.’, *Human Rights Brief* 13, no. 1 (2003): 4 and see also *Prosecutor v. Ruggiu*, Case No ICTR 97-32-I., Trial Chamber, Judgement, 1 June 2000, 21

<sup>154</sup> *Prosecutor v. Ruggiu*, Case No ICTR 97-32-I., Trial Chamber, Judgement, 1 June 2000, 22, 24

<sup>155</sup> *Prosecutor v. Kupreškić*, Case No. ICTY-IT-95-16-T, Trial Chamber, Judgement, 14 January 2000

<sup>156</sup> Gregory S. Gordon, ‘Hate Speech and Persecution: A Contextual Approach’, *Vanderbilt of Transnational Law* 46, no. 2 (2013): 304, 322

<sup>157</sup> *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-T, Trial Chamber, Judgement, 26 February 2001,

<sup>158</sup> *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-T, Trial Chamber, Judgement, 26 February 2001, 209

<sup>159</sup> *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-T, Trial Chamber, Judgement, 26 February 2001, 192

<sup>160</sup> Gregory S. Gordon, ‘Hate Speech and Persecution: A Contextual Approach’, *Vanderbilt of Transnational Law* 46, no. 2 (2013): 304, 329

<sup>161</sup> Diane F. Orentlicher, ‘Criminalizing Hate Speech in the Crucible of Trial: Prosecutor v. Nahimana’, *American University International Law Review* 21, no. 4 (2005): 557, 559

CAH-persecution. A landmark judgment is that of *Prosecutor v. Nahimana, et al (Media Case)*<sup>162</sup> which dealt with the defendant's responsibility for provocative radio broadcasts and newspaper articles. Referencing *Streicher* as a starting point for considering hate speech outside the context of violence as a basis for conviction,<sup>163</sup> the Trial Chamber noted that unlike the crime of incitement which is characterised by intent, persecution is defined in terms of impact.<sup>164</sup> Applying this test to the case in point, the Chamber argued that incitement to hatred is not a provocation to cause harm but rather the harm itself. Citing the position taken in *Ruggiu*,<sup>165</sup> the Chamber asserted that it is evident that when animosity speech is aimed towards a population on discriminatory grounds, this reaches the same level of gravity as any other CAH and constitutes persecution as implied in Article 3(h) of the ICTR Statute.<sup>166</sup> A recent attempt to answer this question was made by the Canadian Supreme Court in the immigration case of a Rwandan refugee *Mugesera v. Canada*.<sup>167</sup> Analysing the split precedent set by the ad hoc tribunals, the court concluded that a speech could amount to CAH-persecution if a link can be demonstrated between the act and the attack i.e, the speech act must either further the attack or fit its pattern but need not constitute a vital part of it.<sup>168</sup> However, the Trial Chamber in the *Media Case*, ignored the underlying reasoning went beyond the *Ruggiu* judgement. In the latter case, the Trial Chamber argued that the aim behind such discrimination had to be death and removal of the victims from society and to some extent from humanity itself.<sup>169</sup> Hence, this judgement did not go as far as implied in *Nahimana* as it did not draw a distinction between encouraging racial hatred and speech promoting racial violence. In pronouncing the judgment in *Nahimana* the court sought to justify its verdict by labelling such speech as 'a discriminatory form of aggression that destroys the dignity of those in the group under attack'<sup>170</sup> which denigration may cause irreversible harm.<sup>171</sup>

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<sup>162</sup> *Prosecutor v. Nahimana*, Case No. ICTR-99-52-T, ICTR, Trial Chamber, Judgement, 3 December 2003

<sup>163</sup> Gregory S. Gordon, 'Hate Speech and Persecution: A Contextual Approach', *Vanderbilt of Transnational Law* 46, no. 2 (2013): 324

<sup>164</sup> *Prosecutor v. Nahimana*, Case No. ICTR-99-52-T, ICTR, Trial Chamber, Judgement, 3 December 2003, 1072–1073

<sup>165</sup> *Prosecutor v. Nahimana*, Case No. ICTR-99-52-T, ICTR, Trial Chamber, Judgement, 3 December 2003

<sup>166</sup> U.N.S.C., 'Resolution 955, The Statute of the International Criminal Tribunal for Rwanda', 3454<sup>th</sup> meeting, UN Doc. S/RES/955, 8 November 1994, art 3(h)

<sup>167</sup> *Mugesera v. Canada* (2005) 2 S.C.R. 100, 65–73

<sup>168</sup> *Mugesera v. Canada* (2005) 2 S.C.R. 100, 156-158

<sup>169</sup> *Prosecutor v. Ruggiu*, Case No ICTR 97-32-I., Trial Chamber, Judgement, 1 June 2000, 22

<sup>170</sup> *Prosecutor v. Ruggiu*, Case No ICTR 97-32-I., Trial Chamber, Judgement, 1 June 2000, 1072

<sup>171</sup> Diane F. Orentlicher, 'Criminalizing Hate Speech: A Comment on the ICTR's Judgment in The Prosecutor v. Nahimana, et al.', *Human Rights Brief* 13, no. 1 (2003): 4

Whilst affirming that speech targeting a civilian population on the basis of any discriminatory grounds infringes the fundamental human rights and thus constitutes “actual discrimination”,<sup>172</sup> the Appeals Chamber in the *Media Case* was not satisfied that such speech alone amounts to CAH-persecution. The underlying argument was that before violations to the rights to life, freedom and physical integrity can occur, other persons must intervene as speech cannot in itself kill, imprison or physically injure members of a particular group.<sup>173</sup> Nonetheless the ICTR in its articulation of the judgement made a significant remark. Refraining from determining whether hate speech outside the genocidal context is in fact of the same level of gravity as the other CAH, the court explained that it is not necessary that every individual act amounting to persecution is of the same level of gravity; but rather the underlying acts should be considered cumulatively.<sup>174</sup> Hence, it is the cumulative effect of the acts, which can be determined by the context in which that action takes place, that should correspond to the gravity of the conduct listed in Article 3 of the ICTR Statute.<sup>175</sup> Furthermore, the ICTR contradicted the statement made by the ICTY in *Kordić* that the underlying acts of persecution must inevitably amount to crimes in international law. It is worthwhile to point out that judge Shahabuddeen in his dissenting opinion referred to the *Ministries Case* and noted that the acts which were considered to constitute prosecution did not involve violence but rather mistreatment.<sup>176</sup>

Notably, both tribunals have completely an equally noteworthy judgement, which still holds weight today in relation to CAH-persecution law. The judgement delivered by the United States Nuremberg Military Tribunal dealt with a CAH-persecution charge against *Press Chief Otto Dietrich*.<sup>177</sup> Dietrich, who was known as the ‘poisoned pen’, was charged with persecution based on speech activity which conditioned the public through his disseminated and inflammatory teachings,<sup>178</sup> despite not directly calling for violence. Dietrich’s persecution

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<sup>172</sup> *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*, Case No. ICTR-99-52-A, Appeals Chamber, Judgment, 28 November 2007, 986

<sup>173</sup> *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*, Case No. ICTR-99-52-A, Appeals Chamber, Judgment, 28 November 2007, 986

<sup>174</sup> *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*, Case No. ICTR-99-52-A, Appeals Chamber, Judgment, 28 November 2007, 987

<sup>175</sup> *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*, Case No. ICTR-99-52-A, Appeals Chamber, Judgment, 28 November 2007, 975

<sup>176</sup> *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*, Case No. ICTR-99-52-A, Appeals Chamber, Judgment, 28 November 2007, 13, (Shahabuddeen, J., partly dissenting); Gregory S. Gordon, ‘The Forgotten Nuremberg Hate Speech Case: Otto Dietrich and the Future of Persecution Law’, *Ohio State Law Journal* 75, no. 3 (2014): 304, 314

<sup>177</sup> *U.S. v. Ernst von Weizsaecker (Ministries Case)*, IMT, 14 April 1949

<sup>178</sup> Gregory S. Gordon, ‘The Forgotten Nuremberg Hate Speech Case: Otto Dietrich and the Future of Persecution Law’, *Ohio State Law Journal* 75, no. 3 (2014): 571, 574

conviction was not based on specific calls to engage in a particular action. Rather, as discussed by the judges, it was a ‘furnishing’ of ‘excuses and justifications’ to ‘subdue any doubts which might arise as to the justice of measures of racial persecution to which Jews were to be subjected.’<sup>179</sup> Hence this case suggests that the notion that persecution as a CAH can be prosecuted outside the genocidal context, existed as early as 1949.

A case tried by the ICTY dealing with persecution in war crimes, was that of the Serbian politician Vojislav Šešelj. The prosecution alleged that Šešelj directly committed certain crimes, particularly public incitement and denigration of the non-Serbian populations in speeches inciting hatred.<sup>180</sup> The Trial Chamber once again missed an opportunity to clarify the status of incitement to hate speech as CAH-persecution outside the genocidal framework. The dissenting judge, Judge Lattanzi argued that Šešelj discourse on the expulsion of Croats, if taken separately from the further underlying acts of persecution, would amount to persecution due to the grave conflict context in which it was made.<sup>181</sup> Yet, the Chamber by a majority argued that the scale and modus operandi of the speeches did not satisfy the standards established in Article 5 of the ICTY Statute. Similarly, in the recent case of *Prosecutor v. Ratko Mladić*,<sup>182</sup> the ICTY convicted Mladić of persecution *inter alia*, through which he contributed to achieving the common objective of permanently removing Muslims and Croats from the Serb-claimed territory. Echoing the test established in *Kupreškić*, the tribunal stated that although the underlying acts need not necessarily be a crime in international law, not every denial of human rights is serious enough to constitute a CAH.<sup>183</sup>

Notwithstanding these recent pronouncements, in April 2018 the International Residual Mechanism for Criminal Tribunals (MICT) Appeals Chamber<sup>184</sup> overturned the decision of the ICTY and convicted Šešelj on the charge of instigation of CAH as well as on the charge of CAH-persecution *per se*, both for the same speech delivered at a rally in Hrtkovci on the 6<sup>th</sup> of May 1992. The finding of CAH-persecution in the case of the particular speech rested on two

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<sup>179</sup> *U.S. v. Ernst von Weizsaecker (Ministries Case)*, IMT, 14 April 1949, 475-76

<sup>180</sup> *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, ICTY, Trial Chamber, Judgement Volume I, 31 March 2016

<sup>181</sup> Wibke K. Timmermann, ‘Inciting Speech in the former Yugoslavia: The Šešelj Trial Chamber Judgment’, *Journal of International Criminal Justice* 15, no. 1 (2017)

<sup>182</sup> *Prosecutor v. Ratko Mladić*, Case No. ICTY-IT-09-92-T, Trial Chamber, Judgement, 22 November 2017

<sup>183</sup> *Prosecutor v. Ratko Mladić*, Case No. ICTY-IT-09-92-T, Trial Chamber, Judgement, 22 November 2017, 3229

<sup>184</sup> *Prosecutor v. Vojislav Šešelj*, Case No. MICT-16-99-A, Appeal Chamber, Judgement, 11 April 2018

findings, a) that said speech violated the right to security of the Croatians since Šešelj's instigation of their forcible expulsion incited violence that violated this right b) and that said speech denigrated the Croatians of that town on the basis of their ethnicity, in violation of their right to respect for dignity as human beings.<sup>185</sup> Thus the finding of commission of persecution as CAH was at least partly based on initially finding the same speech as instigating deportation, persecution (forcible displacement) and other inhumane acts (forcible transfer) as CAH. While mentioned in the judgment, the violation of the right to dignity does not seem to have been considered as standalone ground for a finding of CAH-persecution. Rather one can conclude that neither instigation nor CAH *per se* would have been established had the Chamber not considered that there was a causal link between that particular speech and the subsequent ethnic cleansing in that area.

Pursuant to the approach adopted in the Media Case, Gregory S. Gordon<sup>186</sup> concludes that an in-depth analysis of related case-law would suggest that hate speech not directly calling for action may indeed qualify as persecution. He argues that such a position would be logical as it follows the precedent set forth by the Nuremberg trials. Yet, this does not imply that any verbal conduct amounts to CAH-persecution. Moreover, it is unlikely that isolated or intermittent hate speech could be considered as satisfying the *chapeau* element of CAH. This is because a charge of a CAH presupposes that the speech is intentionally and knowledgeably uttered as part of a widespread and systematic attack against a civilian population.<sup>187</sup> Thus, although the core characteristics of what classifies atrocity speech as a CAH are not clear cut, they can be identified on a case-by-case analysis as context is key.<sup>188</sup> Conversely, Diane F. Orentlicher,<sup>189</sup> whilst appreciating the importance of the *Media Case* as a measure of justice, disagrees with the conclusion reached by the Appeals Chamber. Orentlicher argues that by convicting the defendants of CAH-persecution founded upon speech that constituted incitement to racial hatred but unaccompanied by violence, the ICTR departed from its jurisdiction.<sup>190</sup> This is

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<sup>185</sup> *Prosecutor v. Vojislav Šešelj*, Case No. MICT-16-99-A, Appeal Chamber, Judgement, 11 April 2008, 163.

<sup>186</sup> Gregory S. Gordon, 'Hate Speech and Persecution: A Contextual Approach', *Vanderbilt of Transnational Law* 46, no. 2 (2013)

<sup>187</sup> Charles Chernor Jalloh, 'What Makes a Crime against Humanity a Crime against Humanity', *American University International Law Review* 28, no. 2 (2013): 381, 438

<sup>188</sup> Gregory S. Gordon, 'Hate Speech and Persecution: A Contextual Approach', *Vanderbilt of Transnational Law* 46, no. 2 (2013): 304

<sup>189</sup> Diane F. Orentlicher, 'Criminalizing Hate Speech: A Comment on the ICTR's Judgment in The Prosecutor v. Nahimana, et al.', *Human Rights Brief* 13, no. 1 (2003): 557

<sup>190</sup> Diane F. Orentlicher, 'Criminalizing Hate Speech: A Comment on the ICTR's Judgment in The Prosecutor v. Nahimana, et al.', *Human Rights Brief* 13, no. 1 (2003): 557, 559

because the Trial Chamber decision in the *Media Case* ignored the rationale behind *Kordić* and placed excessive reliance on *Ruggiu*, which downplayed and misconstrued the leading custom concerning incitement as a basis for the charge of CAH-persecution in the International Military Tribunal judgments.<sup>191</sup> She further debates whether the decision for criminalizing hate speech as CAH-persecution without a direct call for action, has resulted in atrocity speech laws being misused in a way that critical media is suppressed. Yet, Orentlicher concludes that although the Nahimana Trial Chamber's arguments had compelling foundations as they reflect the poisonous power or animosity speech, a criminal trial is not an adequate opportunity to revise the law.

### 4.3 Limitations on Hate Speech as a CAH-Persecution

Historically in CAH offences, hate speech and mass atrocity have gone hand in hand, in view that the latter is not possible without the other.<sup>192</sup> Yet, keen free speech advocates have consistently argued that hate speech not explicitly calling for violence as persecution should not be criminalised as it will impinge on freedom of expression. The importance of freedom of expression has also been recognised by the *ad hoc* tribunals. In *Prosecutor v. Brđanin*<sup>193</sup> the ICTY emphasised that the media has the essential role of a watchdog in democratic societies due to the public's right to receive information.<sup>194</sup> Therefore, analogous to the laws advocated by international and regional standards, for hate speech to be prosecuted as persecution the misconduct must satisfy the pre-established conditions.

The modern international legislation allows the prosecution of animosity speech but only if it satisfies the *chapeau* of a conscious widespread or systematic attack against a civilian population.<sup>195</sup> This qualification is fundamental, else governments would exploit their power to criminalise perpetrators and impose unnecessary legal restrictions.<sup>196</sup> In order to understand better what would render an individual liable, the features of widespread and systematic are to

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<sup>191</sup> Diane F. Orentlicher, 'Criminalizing Hate Speech: A Comment on the ICTR's Judgment in The Prosecutor v. Nahimana, et al.', *Human Rights Brief* 13, no. 1 (2003): 581

<sup>192</sup> Alexander Tsesis, 'Inflammatory Speech: Offense Versus Incitement', *Minnesota Law Review* 97, no. 4 (2013): 101

<sup>193</sup> *Prosecutor v. Brđanin*, Case No. IT-99-36-AR73.9, Appeal Chamber, Decision on Interlocutory Appeal, 11 December 2002

<sup>194</sup> Diane F. Orentlicher, 'Criminalizing Hate Speech in the Crucible of Trial: Prosecutor v. Nahimana', *American University International Law Review* 21, no. 4 (2005): 557, 594

<sup>195</sup> Gregory S. Gordon, *Atrocity speech Law*, (Oxford: Oxford University Press, 2017) 307, 318

<sup>196</sup> Joel Simon, 'Of Hate and Genocide: In Africa, Exploiting the Past', *Columbia Journalism Review* (2006) <https://cpj.org/2006/01/of-hate-and-genocide.php> (accessed 22 July 2019) 9

be dissected as atrocity speech should not be view monolithically. This suggests that the act is not an isolated or sporadic event, but part of an extensive or regular practice of atrocities which either forms part of a governmental policy or are tolerated, condoned, or acquiesced in by a government or a *de facto* authority. Accordingly, Timmermann argues that incitement to hate speech should be recognised as a CAH-persecution, where it is utilised within a system of persecutory measures by the state or a similar powerful organization.<sup>197</sup> In this context, it becomes relevant whether the hate-monger belongs to a minority group or the country's majority. In the case of the former, it is highly unlikely that hate speech satisfies these requirements and therefore the speaker will be exempted from criminalization as persecution.<sup>198</sup> Needless to say, such speech is not the kind of expression that the First Amendment or the ECHR<sup>199</sup> seeks to protect. This is because vigorous free speech protections do not apply to the socio-political setting which exists in the context of CAH.

As argued by Judge Meron, the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable,<sup>200</sup> as free speech is the overriding principle behind a democratic government. Yet, hate speech as a widespread and systematic attack on a group of people does not aim to promote collective democracy or self-actualization but is rather used to spur or justify violence.<sup>201</sup> Empirically in persecution cases and the speech in question must be intimately linked to the attack. However, this formula might vary depending on the nature of the *chapeau* attack and the speech is evaluated on a case-by-case basis. As pointed out by Pocar, the stringent requirements for CAH warrants that offensive and disagreeable speech will most often not be a sufficient basis for a CAH-persecution conviction.<sup>202</sup>

## 5. Conclusion

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<sup>197</sup> Wibke K. Timmermann, *Incitement in International law* (New York: Routledge Research, 2015).

<sup>198</sup> Wibke K. Timmermann, *Incitement in International law* (New York: Routledge Research, 2015) 217

<sup>199</sup> Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, (European Convention on Human Rights, as amended) (ECHR) (1953), art 10

<sup>200</sup> *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*, Case No. ICTR-99-52-A, Appeals Chamber, Judgment, 28 November 2007, 11.–12 citing *Texas v. Johnson*, (1989) 491 U.S. 397

<sup>201</sup> Gregory S. Gordon, 'The Forgotten Nuremberg Hate Speech Case: Otto Dietrich and the Future of Persecution Law', *Ohio State Law Journal* 75, no. 3 (2014): 595

<sup>202</sup> *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*, Case No. ICTR-99-52-A, Appeals Chamber, Judgment, 28 November 2007, 3



Free speech is essential for a free society. It is the essence of any change in societal structures as it allows for the challenge to entrenched attitudes and ideas. As such it is vital for any human progress and indispensable for the expansion of freedoms and human rights and the principles of democracy. It is furthermore essential for each individual's ability to live a life true to his or her own findings, beliefs, emotions and political convictions, without fear of governmental or societal repression or discrimination. Without freedom of expression little is left of the freedom of thought. It is for these reasons that any exaggerated restriction on speech sends worrying signals to those who value democracy, freedom and the overall well-being of society. While such intrusions are on the rise and deserve the most severe of condemnations, they are not the focus of this paper. Rather this paper has sought to find in the existing law and principles on freedom of expression the theoretical basis for the criminalization of speech acts which destroy the very values enumerated above. That is, speech which serves to effectively deny the freedom, equality or even essential human rights such as the right to life to members of an out-group, be it on the basis of their race, nationality, beliefs or any other such characteristic by which they self-identify or are identified by others. History is proof that large-scale human rights violations are impossible without prior and simultaneous verbal conditioning and encouragement of the population through elaborate propaganda. It has been recognized that expression inciting or promoting racial hatred, discrimination, violence and intolerance is harmful and it often accompanies or precedes crimes against humanity.<sup>203</sup> A very recent report by the Independent International Fact-Finding Mission on Myanmar reiterated that some of the extreme forms of hate speech, namely, the use of derogatory, discriminatory and exclusionary language against the Rohingya Muslim community amounts to the crime against humanity of persecution.<sup>204</sup>

Perhaps the biggest concern regarding criminalization of such speech acts is that clear cut rules are hard to set in advance and there is a need for case by case analysis which threatens the *nullum crimen sine lege* principle, yet the alternative would be to neglect an essential driving force behind the worst international crimes, including genocide.<sup>205</sup> Certain contexts indicate

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<sup>203</sup> Council of Europe, 'Recommendation No. R (97) 20 of the Committee of Ministers to Member States on "Hate Speech"', Joint statement of the UN Special Rapporteur on Freedom of Opinion and Expression, the OAS OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression', 607<sup>th</sup> meeting, 30 October 1997

<sup>204</sup> U.N.H.R.C., 'Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar', 39<sup>th</sup> session, U.N. Doc A/HRC/39/CRP.2, 17 September 2018, 1319.

<sup>205</sup> See Mohamed Badar and Polona Florijančič, 'The Cognitive and Linguistic Implications of ISIS Propaganda: Proving the Crime of Direct and Public Incitement to Genocide' in Predrag Dojčinović (ed.) *Propaganda and International Criminal Law: From Cognition to Criminality* (Routledge, 2020) (forthcoming); See also Mohamed

situations which undoubtedly warrant the removal of protection from prosecution for speech acts. Such contexts include governmentally driven hate narratives, or those of individuals or groups with disproportionate societal power coupled with an erosion of effective protection from discrimination or violence of the targeted out-group. A further safeguard against over-criminalization is the necessity to take into account the intent or knowledge of the speaker that their words would lead to the elimination, expulsion or other mass violations of human rights of the targeted out-group.

The current scope of international criminalization does not indicate an overly intrusive attitude to hate propaganda; rather it is too restrictive, if anything. The jurisprudence of the *ad hoc* tribunals has confirmed that purely speech acts can constitute CAH-persecution *per se* or can amount to secondary participation in any CAH through for example incitement or instigation. Applying the test set out in *Tadić* for CAH, such speech has to take place in the context of an armed conflict. Unfortunately this excludes by default hate propaganda preceding armed conflict and does not allow for the preventative function of the law. Furthermore it is still unclear whether according to current jurisprudence hate speech without a direct call for violence could amount to CAH-persecution. Such a possibility has to exist if criminalization is to cover all hate propaganda leading to mass crimes in the entirety of its complex manifestations and not merely specific parts of it.

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Badar and Polona Florijančič, 'The Case of Vojislav Šešelj: A Symptom of the Fragmented International Criminalisation of Hate Propaganda' *New Criminal Law Review* (forthcoming)