Hate Speech

A Historical Inquiry into the Development of its Legal Status

Master Thesis
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Name: Jieskje Hollander
E-mail: jieskje.hollander@rug.nl
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Supervisors: Dr. A. de Baets and Mr. Toby Mendel
University of Groningen

“I may be wrong and you may be right, and by an effort we may get nearer to the truth”

Karl Popper

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Introduction

On 19 April 2007 the Council of the European Union (EU) stated in its Framework Decision on Racism and Xenophobia that intentional conduct of publicly inciting to violence or hatred, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin, would thenceforth be punishable in all European Union member states.[1] Furthermore, publicly condoning, denying or grossly trivializing crimes of genocide, crimes against humanity and war crimes as defined by the Statute of the International Criminal Court or the Tribunal of Nuremberg also became liable for penalty by this decision. With this resolution, the discussion within the EU on penalizing 'hate speech' that had been carried on within the European Commission since 2001, finally came to a close.

During the years between 2001 and the present, the need to make international regulations in the field of racism and xenophobia has been increasingly felt because of various incidents that shocked several European countries. The murder of the Dutch publicist Theo van Gogh in November 2004 for his extreme comments on the Islam, the Muslim outrage that broke out after the publishing of caricatures of the Prophet Mohammed in Denmark after September 2005 and the decision in October 2006 of the French parliament to penalise the denial of the Armenian genocide were all occurrences that made crystal clear that the tension between freedom of speech and so called hate speech led to serious problems that called for action.

The EU decision of April 2007 was to provide the European countries in principle with a uniform legal tool to combat forms of hate speech that form a threat to public order. Finally, the European community had succeeded in developing an unequivocal policy in dealing with people who abuse the right to freedom of speech. When the decision and the talks leading up to it are closer scrutinized, however, reasons for too great an enthusiasm disappear. During the EU debate on this subject Great-Britain and Denmark, as well as Italy made a case for the primary importance of the right of freedom

[1] Council of the European Union, 'Framework decision on Racism and Xenophobia. Press release', 19 April 2007, C/07/84.

of speech in a free and democratic society. According to the delegations of these countries a standard policy on penalising certain forms of speech would infringe too much on the right to free speech. Ultimately, their protest resulted in a compromise that countries that do not *want* to penalise hate speech offences do not *have* to.[2] Others uttered their specific concerns with regard to the Holocaust Denial part of the decision. The human rights organisation Article 19, for instance, who advocate international free speech,[3] complained about the danger that states will misapply the provision in cases of genocide denial "and will start prosecuting people who have controversial views of history that might offend a certain group, but that do not actually incite hatred."[4] They believe that it is not necessary to elevate historical events to dogma in order to prevent discrimination against minorities. The International Committee of Historical Sciences reasoned in the same line and even issued a motion against the framework decision while stating that politicians must not interfere with the work of historians: "although it [the decision] arises from the necessary and just fight against racism and xenophobia, it ends up (…) touching on issues which are the proper domain of historical research."[5] More in general, the effectiveness of laws restricting hate speech in the promotion of tolerance and non-discrimination was questioned as racism and xenophobia throughout Europe only rose, despite a variety of already existing laws restricting hate speech.[6]

At the other end of the spectrum of critics of the EU decision we find the representatives of the Armenian people. The text of the document only included crimes of genocide concerning the Holocaust or those that have been subject to UN tribunals. This meant that "denying or trivializing the mass killings of Armenians by Ottoman troops starting in 1915 will not be punishable."[7] The Baltic people were dissatisfied because

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[2] Bert Lanting, 'Maximumstraf in EU voor aanzetten tot haat of geweld', *De Volkskrant* (20-04-2007) 1.
[3] This organisation took its name from Article 19 of the Universal Declaration of Human Rights that states that everyone has the right to freedom of opinion and expression. For more on this organisation see http://www.article19.org.
[4] Tobias Buck, 'EU criminalisation of Holocaust denial leaves many dissatisfied. The new law goes too far for freedom of speech advocates but disappoints others', *The Financial Times* (20-04-2007) 8.
[5] International Committee of Historical Sciences, 'Motion adopted by the general assembly of ICHS in Beijing on 17 September, 2007 on the problem of the law and freedom of research' (17 September 2007) via: http://www.concernedhistorians.org/images/to/136.pdf.
[6] Sandra Coliver, 'Hate speech laws: do they work? In: Sandra Coliver (ed.) *Striking a balance. Hate speech, freedom of expression and non-discrimination* (London 1992) 374.
[7] Buck, 'EU criminalisation of Holocaust denial leaves many dissatisfied', *The Financial Times* (20-04-2007) 8.

their proposal to penalize the use of the hammer and sickle, to them *the* symbol of years and years of brutal communist suppression, was outvoted.[8] In conclusion, Michael Pivot, spokesman for the European Network Against Racism, stated: "We have ended up with a lowest common denominator law."[9]

The fact alone that the EU thought it necessary to regulate the penalisation of racism and xenophobia through a framework decision and the wave of criticism that followed it, were indicative of the controversy of the subject of free speech versus the criminalisation of hate speech. It is exactly this controversy that I have taken as the subject of this inquiry. To enable myself to come to clear analytical insights in this paper I have put myself the following research question: Has the international community succeeded in reaching a coherent legal approach, both on the level of principles of legislation and on the practical level of enforcing this legislation, to the problem of hate speech? The time span covered runs from the end of the Second World War, when the first jurisprudence and legal agreements on this theme were laid down in the Nuremberg trials and the first declaration on human rights came into being, to the present.

To discuss the question systematically, I have thought it necessary to start with a chapter on the historical and philosophical roots of the notion of free speech and the traditional view on whether restraining this freedom in certain circumstances is legitimate. Although not yet strictly defined, the historical and philosophical distinction between free speech and hate speech becomes visible in this chapter. The second chapter of this thesis deals with how the philosophical notions from chapter one have been translated into international human rights law treaties. It is again a chapter on the theory of the subject. A general picture of the way in which both free speech and hate speech are defined legally is presented. Subsequently, chapters three, four, and five deal with forms of freedom of expression that were carried so far that they severely damaged societies and/or individuals and were therefore considered by international courts and tribunals as criminal. These chapters deal with the practical enforcement of the theory as set out in chapters one and two. By analysing well-known case-law on this subject, I try to

[8] Mark Kranenburg, 'EU eens over straffen racisme', *NRC Handelsblad* (20-04-2007) 4.
[9] Dan Bilefsky, 'EU adopts prohibition on Holocaust denial; But national laws can take precedence', *International Herald Tribunal* (20-04-2007) 3.

discover whether a clear and unambiguous approach is followed in dealing with hate speech in these courts and tribunals.

The first hate speech trials in history, although the term 'hate speech' was not yet in use at the time, were the trials against the Nazi confederates Julius Streicher and Hans Fritzsche before the International Military Tribunal in Nuremberg.[10] Jurisprudence that resulted from these cases formed the basis for jurisprudence in later hate speech trials and, therefore, after having dealt with the Nuremberg cases in chapter three, case-law from the cases *Kordić*[11] and *Šešelj*[12] of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the *Nahimana et. al.* case [13] of the International Criminal Tribunal for Rwanda (ICTR) are discussed and interpreted. Then, in order to have variety in the corpus of sources, in the fifth and last chapter of this inquiry two renowned cases involving Holocaust Deniers, namely *D.I. vs. Germany* as settled before the European Commission of Human Rights in Strasbourg on 26 June 1996[14] and the case of Robert Faurisson versus France, that was settled before the Human Rights Committee (HRC) of the United Nations (UN) in November 1996[15], are studied.

At this point, it is enough to mention my sources in general. Inherent to the character of the subject of this thesis, all chapters of this paper constitute a critical analysis of the sources they deal with and the status of their contents. Nevertheless, I have deemed it relevant to diagnose the corpus of sources in a separate section. For that reason, before starting the first chapter, some words are dedicated to the nature of the source-material and the way I worked on it.

A few words must be said about the relevance of this inquiry. From the first part of this introduction it became already clear that, both nationally and internationally,

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[10] The International Military Tribunal (IMT) sitting at Nuremberg Germany, *The trial of German major war criminals* (London 1950).
[11] International Criminal Tribunal for the former Yugoslavia , *The Prosecutor v. Dario Kordić and Mario Čerkez. Judgement*, Case no. IT-95-14/2-A (26 February 2001).
[12] International Criminal Tribunal for the former Yugoslavia, *The Prosecutor v. Vojislav Šešelj*, Case no. IT-03-67.
[13] International Criminal Tribunal for Rwanda, *The Prosecutor v. Nahimana et.al. Judgement*, Case no. ICTR-99-52-T (3 December 2003).
[14] ECHR, *D.I. vs. Germany,* application no. 26551/95 (June 1996). It is assumed that this is the case against the famous British Holocaust denier David Irving. For matters of accurateness, tough, I will use the abbreviation D.I.
[15] HRC, *Faurisson vs. France*, Communication No. 550/1993, U.N.Doc.CCPR/C/58/D/550/1993 (November 1996).

governments are wrestling with the subject of free speech versus hate speech. Daily, new incidents follow. It was only recently, 8 August 2007, that the Dutch politician Geert Wilders asked for the prohibition of selling and possessing the Koran. According to Wilders the Koran contained hate speech and, moreover, the book was said to incite to violence. The next day, a Dutch lawyer reported Wilders to the police for incitement to hatred. This example clearly illustrates the complexity of dealing with hate speech. In today's world hate speech is widespread and assists in polarising all kinds of groups. Christian fundamentalists vs. Muslim fundamentalist, Serbs vs. Albanians, Holocaust deniers vs. Holocaust survivors are all entangled in heated discussions in which hate speech is not shunned. All this is facilitated by the growing possibilities for hate speech offenders to find a platform and a public for their offensive messages through the internet. So, where it is so easy to broadcast hate speech and where, at the same time, there is so much confusion on the boundaries of what should be tolerated and what not, I believe it would be good to go back to the roots of the discussion and draw up the balance from that point.

Some notes with respect to the sources and the way they were used

In this inquiry I have used a series of sources that are not uniform in character but still logically interconnected in that they all contribute to defining the international approach regarding hate speech. After having studied literature on the 'free speech vs. hate speech'- theme in the first chapter, the body of international agreements that deals with the right to freedom of expression and its limitations is analysed. These agreements came into being within the official contexts of the United Nations or the Council of Europe and were aimed at standardizing international conceptions and directives on human rights. Member states of these international alliances were involved in and responsible for the drafting of these treaties, previous to the formal adoption, and in that way the member states could exert influence on the contents and form of the agreements. Member states that eventually ratified the convention officially agreed to the text. In this study I used the official texts, downloaded from the official websites.

In chapters three, four and five sources of a different kind are used. In studying the way in which the international community deals with breaches of the international agreements on the limits of free speech in practice, I used several lawsuits settled before various tribunals and courts. In all these cases, individuals were charged for extreme utterances not protected by the right to free speech because they lead to great harm, or even atrocities. These tribunals and courts (IMT, ICTY, ICTR, European Commission/Court of Human Rights and the HRC) were all set up with international approval and under international statutes. Their jurisprudence is internationally recognised. We may assume that the cases settled before these tribunals and courts, have been treated with the highest degree of scrupulousness and objectivity. The particular lawsuits studied in this essay were selected because of their important and particular contribution to the development of hate speech jurisprudence.

In chapter three, where the cases against Julius Streicher and Hans Fritzsche are scrutinized, I used the indictments, the transcripts of the trial sessions and the judgements. This material was published under the authority of 'H.M. Attorney-General by his majesty's stationary office' in the publication that was entitled *The trial of German*

major war criminals. Proceedings of the International Military Tribunal (IMT) sitting at Nuremberg Germany. The complete series (transcripts of all cases) appeared in 1950 and consists of twenty-three volumes. On the cover of each volume we find the dates of the trial-days transcribed in that particular volume and the statement that the contents were "taken from the official transcript". I have been working with this publication in the supposition that all transcripts are official, complete and not corrected or censured afterwards. This idea was supported by the fact that the series was published under the authority of H.M. Attorney-General, and by the facts that I could not find any gaps or incorrect transitions in the text and that the dates of all sessions were indicated and corresponded with the indications of the judges on adjournments. The last volume of the series is the Index. This particular volume was of great help to me in finding the volumes relevant to the Streicher and Fritzsche cases. Because the judgements were not extensive and did not explain much on the course of the trial, I decided to study the presentations of the prosecutor and the defence as well in order to be able to make a clear reconstruction of the trials and to get a clearer understanding of the judgements.

In the fourth chapter, the lawsuits dealing with Dario Kordić, Vojislav Šešelj, Ferdinand Nahimana, Jena-Bosco Barayagwiza and Hassan Ngeze (*Nahimana et. al.)* are paramount. The ICTY and ICTR are international tribunals both established under international agreement by a resolution of the UN General Assembly. Both were established to combat impunity for grave international crimes committed in the 1990s; the first with regard to the territory of the former Yugoslavia, the latter with regard to the territory of Rwanda. The reason for particularly selecting the ICTY cases of Kordić and Šešelj was that it appeared from a search in the indictments available via the ICTY website, that these were the only persons directly accused of a crime based on their hate utterances. Selecting the *Nahimana et.al*. case from the ICTR case-law history was no more than logical. This case is by far the most famous in the international history of criminalising hate speech. Although more hate speech cases can be found in the history of the ICTR (for instance the case of the *Prosecutor v. Ruggiu)*, it was mainly for reasons of restrictions in time and the size of this inquiry that I confined myself to the *Nahimana et. al.* case. The material that I used from the respective lawsuits is confined to the official indictments and the judgements, available via the official websites of the ICTY

and ICTR (see footnotes and list of literature). The judgements in these cases were very extensive, and resulted in elucidating and weighed decisions of the judges. In addition, the judgements give a clear impression of the proceedings of the cases and of the arguments of both the prosecution and the defence. For that reason, I did not use the daily transcripts from the trials as I had done for the study on Streicher and Fritzsche. Although they are available on the website, the relevant transcripts cannot be systematically traced without scanning each and every one of them (there is no index) and with regard to this project, such a labour-intensive search would have taken too much time in relation to what it would have yielded. In relation to the Vojislav Šešelj case, I should note that only the indictment was used; the case finds itself still in the pre-trial stage and therefore no judgement is available.

To conclude this section on the formal characteristics of the sources, and the methods I used in approaching them, some words on the sources used in chapter five. Holocaust denial, a special form of hate speech, is discussed in this chapter in order for this paper to cover the international approach to hate speech *in its various forms.* The IMT, the ICTY and ICTR have dealt and deal with war criminals and their criminal liability under international criminal law. Much can be said about Holocaust deniers, but usually they are not war criminals liable under international criminal law. Holocaust deniers are dealt with under the domestic laws of the countries in which they publish and eventually appeals are settled in international human rights courts as the European Court of Human Rights or the HRC.[16] I selected the case of D.I vs. Germany, settled by the European Commission of Human Rights,[17] and the case of Robert Faurisson vs. France, settled by the HRC. The idea behind choosing these particular cases was, first of all, that they are two examples of cases exemplary for the way these courts have dealt with hate speech in the recent past[18] and, moreover, the decision in the Faurisson case is

[16] Maybe the HRC is not best defined by the word 'court'. On the website of the Office of the United Nations High Commissioner for Human Rights this judicial organ is defined as "The Human Rights Committee is the body of independent experts that monitors the implementation of the International Covenant on Civil and Political Rights by its States Parties." Chapter two deals with the details of this 'International Covenant on Civil and Political Rights'. See: http://www.ohchr.org/english/bodies/hrc/

[17] The European Commission of Human Rights is a former part of what is now called the European Court of Human Rights. More explanations on the institute follow in chapter five.

[18] More cases can serve as examples of how human rights courts have dealt with hate speech. For instance, the case of *Garaudy vs. France* (2003).

internationally leading.[19] Secondly, they were dealt with in two separate courts of different international institutions and therefore serve best the purpose of showing diversity of focus applied in this inquiry. In the Faurisson case a decision of the HRC was available. This in contrast to the case of D.I. where there is only a decision on the admissibility of D.I.'s application to the court.

Because of restrictions in the time available and the scope of this inquiry, I chose to focus solely on globally accepted legal principles regarding hate speech and, as far as regions are concerned, the European way of dealing with the matter. For these reasons I have left out the African and American perspective. For more information on human rights agreements for the particular continents of Africa and America, I refer to the American Convention on Human Rights (ACHR) and the African Charter on Human and Peoples' Rights (ACHPR).[20] On how these documents have been dealt with in practice, one can find more information on the website of the Inter-American Commission/Court of Human Rights[21] and the website of the African Commission on Human and People's Rights.[22]

[19] Dominick McGoldrick and Thérèse O'Donnell, 'Hate-speech laws: consistency with national and international human rights law', *Legal studies* 18 (1998) 453-485, there 454.
[20] For the full texts of these treaties see, respectively, http://www.hrcr.org/docs/American_Convention/oashr.html and http://www.hrcr.org/docs/Banjul/afrhr.html.
[21] http://www.cidh.oas.org/ and http://www.corteidh.or.cr/index.cfm?CFID=370528&CFTOKEN=59522109.
[22] http://www.achpr.org/.

1. Free Speech vs. Hate Speech: the philosophical frame

As early as 1644, the notion of free speech in modern society was publicly defended in the *Areopagitica* written by John Milton (1608-1674).[23] As will be more thoroughly discussed in the first paragraph of this chapter, Milton agitated in his pamphlet against book-censorship by the state of England. As can be concluded from the introduction, the issue of freedom of speech versus restricting this right is still, practically four centuries later, of huge relevance in the current philosophical and juridical debate on the subject.[24]

In this chapter I will briefly explore the ways in which the discussion developed between 1644 and the present. Questions that are addressed in this section are: when and where did the notion of freedom of speech have its origin? Why do people set a high value upon this principle? Where does free speech end and hate speech begin? And why are there and should there be restrictions on hate speech utterances?

The various arguments that will be discussed are clustered on the basis of how much weight and importance they ascribe to either the defending of full freedom of speech on the one hand, or its suppression in case(s) of hate speech on the other hand. At the end we will be able to draw up the balance of pro and contra arguments for both perspectives. I have to underline here that for reasons of concision I cannot be as comprehensive in my review of the historical growth of the controversy as I would like to be. By necessity, then, I was only able to incorporate the views of a selection of the most prominent

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[23] John Milton and John W. Hales, *Areopagitica. With introduction and notes by John W. Hales* (Oxford, 1904). The *Areopagitica* was originally titled *Areopagitica. A speech of Mister John Milton for the liberty of unlicensed printing to the parliament of England.* There are earlier expressions of the importance of freedom of speech in ancient Greece and Rome. This has been studied, among others, by Arnaldo Momigliano. However, for the purpose of this paper it is of no relevance at all to go back in history that far.

[24] To prevent misunderstandings it is important to say that in this inquiry the terms 'free speech', 'freedom of speech' and 'freedom of expression' are used interchangeably. The distinction that is often made between 'free speech' and 'freedom of speech' on the one hand and 'freedom of expression' on the other is, that the former notions both have a strictly oral connotation in contrast to the latter concept which includes writing, pictures, symbols, etc. Later on in this thesis we will come across utterances of hate that are not oral, but that are included both in the international philosophical as well as in the international legal debate, under the denominator of hate *speech*. Or as Frederick Schauer explained: "There are many forms of conduct that we do not consider in everyday talk to be speech but are within the concept of free speech, such as waving a flag (…) or exhibiting an oil painting. (…) What matters now is that there is no necessary connection between conduct that counts as speech in everyday talk and conduct that calls forth a principle of free speech". Frederick Schauer, *Free speech: a philosophical enquiry* (Cambridge 1982) 13. For that reason I decided to equate the terms free(dom of) speech and freedom of expression.

authors that thought and wrote about this theme and, as a consequence, this chapter cannot be anything else but a bird's-eye-view of the history of the subject of free speech.

1.1 Free Speech: the principle and why it should be defended

John Milton's *Areopagitica* was written as a pamphlet and was a reaction to an ordinance of the English Presbyterian government that ordered that no book, pamphlet or declaration should be printed without being approved in advance by representatives of the government.[25] From the text of the *Areopagitica* we can conclude that Milton's main reason to advocate against such a form of censorship has to be sought in the restraining influence that suppression of free speech would have on the development of knowledge and the finding of truth. "(…) It [book-censorship, JH] will be primely to the discouragement of all learning, and the stop of Truth, not only by disexercising and blunting our abilities in what we know already, but by hindring and cropping the discovery that might bee yet further made in both religious and civill Wisdome."[26] With regard to this vital pro free speech argument of truth and reason that we will find in practically all free speech literature up to the twenty-first century, Milton also added the following: "as good as almost kill a Man as kill a good book; who kills a Man kills a reasonable creature, Gods Image; but see who destroyes a good Booke, kills reason in it selfe."[27]

Furthermore, Milton warned against the unrest and distrust that would be released in society by measures like this ordinance of the Presbyterian government. People would be likely to wonder why the state would not let the opinion be expressed and would then show why and how it was false. Was the state afraid that the opinion was true and therefore would prevail?[28] In the line of this argument Milton pointed out the senselessness of the Licensing Order and censorship in general. A state can censor books and public utterances of unwelcome ideas, but the thoughts of the people and their private conversations are not governable, or as Milton liked to express it: "I am not able to unfold how this cautelous enterprise of licensing can be exempted from the number of

[25] Hales and Milton, *Areopagitica*, xv. This ordinance is also known as the Licensing Order of 1643.
[26] Ibidem, 5.
[27] Ibidem, 6.
[28] Ibidem 13 and Frederick Schauer, *Free speech*: *a philosophical enquiry* (Cambridge 1982) 76.

vain and impossible attempts. And he who were pleasantly dispos'd could not well avoid to lik'n it to the exploit of that gallant man who thought to pound up the crows by shutting his Parkgate.[29]

Milton's arguments fall within the category of instrumentalist theories for defending free speech. According to these theories free speech, so it is believed, will yield us something important like truth, knowledge, a stable society, etc., or, the other way around, restricting free speech will cause a great loss. A second standard work that should be mentioned when discussing instrumentalist arguments for defending freedom of speech is a text from 1859 of the well-known English economist and philosopher John Stuart Mill (1806-1873), whose liberal ideas still prove their worth in today's society. Mill's essay *On Liberty*, of which the second chapter is especially relevant for this study, deals with the value and nature of human freedom and the conflicts that occur between the citizen and the state or between the individual and society.[30] The nineteenth century thinker started his paper on liberty with a discussion on the liberty of thought and discussion. He expressed himself in robust terms on the matter and already in the first paragraph of chapter two we can read 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. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error."[31] This argument is in line with the truth argument that we saw in Milton's treatise. Both thinkers attached great value to the idea that for humankind to approach the knowledge of truth and for a society to reach progress it was of essential importance that diverse viewpoints and hypotheses could be openly discussed without any form of censorship.

Additionally, Mill's chapter on the liberty of thought and discussion is steeped in comments on the fallibility of man. How can a man be so certain on a question that he

[29] Hales and Milton, *Areopagitica*, 21. This is an early notion of what Laura Beth Nielsen described in 2004 as the 'impractibility paradigm'. Within this paradigm people express concerns about the enforcement of anti hate speech laws in the streets. Laura Beth Nielsen, *License to harass. Law, hierarchy and offensive public speech* (Princeton 2004) 119.
[30] R.B. McCallum (ed.), *On liberty and considerations on representative government. By J.S. Mill* (Oxford 1948) xi.
[31] McCallum, *On liberty. By J.S.Mill,* 14-15

assumes it legitimate to forbid others to ventilate other visions on the same problem? Or as Mill put it:

"(…) when they [people in general, JH] acknowledge that there should be free discussion on all subjects which can possibly be doubtful, but think that some particular principle or doctrine should be forbidden to be questioned because it is so certain, that is, because they are certain that it is certain. To call any proposition certain, while there is any one who would deny certainty if permitted, but who is not permitted, is to assume that we ourselves, and those who agree with us, are the judges of certainty, and judges without hearing the other side."[32]

In conclusion, according to Mill, the most important reason for defending a free speech principle would be the instrumentalist notion that only free speech and freedom of discussion could bring us to the highest obtainable degree of knowledge and truth in a society of human beings who are, inherent to their being human, fallible.

It was crucial to deal with these two influential historical free speech advocates before turning to contemporary freedom of speech theorists. The traditional instrumentalist free speech arguments of Milton and Mill are in today's literature still the starting point of the discussion. However, twentieth century theorists like Frederick Schauer and Eric Barendt added important insights to these classical reflections. Schauer, a famous name in the world of free speech theorists,[33] states that the argument of truth is useful as "it gives us one reason for treating the suppression of opinion differently from the way we treat other governmental action. (…) As individuals are fallible to error, so too are governments fallible and prone to error."[34] The argument from truth makes therefore perfectly clear why we should be very careful with restrictions on free speech.

But there are more instrumentalist arguments for defending free speech. The argument from democracy is of a more political nature: free speech is necessary in order to guarantee a democratic order. This argument is a political basis for a principle of

[32] McCallum, *On liberty. By J.S.Mill,* 19.
[33] Frederick Schauer is connected to the John F. Kennedy School of Government as Frank Stanton Professor of the First Amendment and former Academic Dean. For more see: http://ksgfaculty.harvard.edu/frederick_schauer.
[34] Schauer, *Free speech*, 34.

freedom of speech and starts from the proposition that freedom of speech is a necessary component of a society premised on the assumption that the population at large is sovereign.[35] The argument is composed of two critical elements: 1) that it is necessary to make all information available to the sovereign electorate so that they, in the exercise of their sovereign powers, can decide which proposals to accept and which proposals to reject. 2) "freedom of speech is perceived as the necessary consequence of the truism that if the people as a whole are sovereign, then governmental officials must be servants rather than rulers." So, if the government is the servant, then how can the government decide on censorship?[36] Moreover, a real risk is that a slippery slope effect will be the consequence of governing free speech. "A government that begins limiting speech takes the first step toward tyranny and thought control"[37]; something which is foreign to the idea of democracy.

After having discussed the instrumentalist arguments for defending freedom of expression, we must turn to the other category of free speech arguments. This category is filled with arguments for defending free speech that do not take as a starting point the higher purpose that will be reached through freedom of expression (as the instrumentalist arguments do), but they are based on the notion that the right to freedom of speech has *intrinsic* value in itself. To go back to the ideas of John Mill, this British philosopher also represented the conviction that freedom has intrinsic value in itself to each person and that, therefore, the state should keep aloof in constraining the freedoms of its citizens at all times. In his essay *On Liberty*, he explained this with the words: "if a man is too much constrained by society, 'there is wanting one of the chief ingredients of human happiness.'"[38] This *laisser-faire* argument in the perspective of free speech is

[35] Of course, to accept this argument, the embracement of democratic principles as the recommended organisation and governance of the state is a necessity. This argument is not applicable to dictatorial regimes, oligarchies, etc. Democracy as used here is defined as rule by the people.
[36] Schauer, *Free speech,* 35-39. We can find all the details of this argument explained in the works of Alexander Meiklejohn, but also in earlier writings as for example Kant's *Grundlegung zur Metaphysik der Sitten* (1785). Miriam Gur-Arye, Professor of Criminal Law of the Hebrew University of Jerusalem, puts also great emphasis on this argument. See: Miriam Gur-Arye, 'Can freedom of expression survive social trauma: the Israeli experience', Working paper no. 7 of the Jerusalem Criminal Justice Study Group (Jerusalem 2001). Via: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=297924.
[37] Richard Delgado and Jean Stefancic, *Understanding words that wound* (Boulder 2004) 34.
[38] Ibidem, xx.

recognisable as a classical liberal argument and corresponds with Mill's liberal thinking on other themes such as, for instance, economics.

In the fourth and fifth chapter of his survey, Schauer analyses this point of Mill. The core of Mill's argument is found in the fact that even if the free speech principle is stripped of any utilitarian value, it would be of equal worth in serving the happiness of people and their self-fulfilment. This is so because it will lead to the development of more reflexive and mature individuals and is in that way benefiting society as a whole, as Eric Barendt explained it.[39] This intrinsic argument - known as the argument from autonomy - can also be relevant if it is explained somewhat differently; in terms of the worth of the individuality, equality and general liberty of man. Schauer's quotation of Ronald Dworkin, in whose work liberalism in this form is prominent, makes this point of view even clearer (and compare this to the *laisser-faire* argument as we saw it with Mill):

"if we accept the importance of treating each person with equal respect, and of treating each person as independently valuable, then, the argument goes, we must treat each person's choices with equal respect as well. To deny a person's right to choose, especially as to what Dworkin calls 'internal' preferences, is to deprive him of his dignity by denying the respect that comes from acknowledging his choices to be as worthy as the choices of anyone else."[40]

From this premise it follows that if a state would turn to the suppression of certain expressions of a certain person, the state would insult that person and affront his dignity.

An, according to Schauer "impressive argument", of the Harvard professor in moral philosophy Thomas Scanlon, can be added in the category of intrinsic theories. Scanlon pleaded "that the powers of a state are limited to those that citizens could recognize while still regarding themselves as equal, autonomous, rational agents

[39] Eric Barendt, *Freedom of speech* (Oxford 2005) 13. Eric Barendt is Professor of Media law, teaching media law, constitutional law, and civil liberties on the university at University College, London. He writes in the area of media law, including broadcasting law, freedom of speech and is published widely. For more see: http://www.ucl.ac.uk/laws/academics/profiles/index.shtml?barendt.
[40] Schauer, *Free speech*, 62.

[argument from autonomy]."[41] Or as Barendt clarified, "a person is only autonomous if he is free to weigh for himself the arguments for various courses of actions that others wish to put before him. The government (…) is therefore not entitled to suppress speech on the grounds either that its audience will form harmful beliefs or that it may commit harmful acts as a result of these beliefs."[42] This theory may then be characterized not so much as a right to speech, but rather as a right to receive information and a right to be free from governmental intrusion into the process of individual choice.[43] It is an important argument because it draws attention to the fact that suppression of speech is wrong because it prevents free people from enjoying access to ideas and information which they need to make up their own minds.[44] The element of the argument that focuses on receiving information can be compared with the instrumentalist argument from democracy and the argument from autonomy also shows similarities with the general liberal ideas of Mill.

We can conclude that, both from an instrumentalist and from an intrinsic perspective, there is a range of pro free speech arguments. For the sake of truth finding and for the sake of preventing false judgement on true and false, inherent to the fallibility of men, free speech *is* important. Also for the sake of political considerations free speech is significant. The image of a liberal democratic world is based on the notion that the people can ventilate their ideas openly. Moreover, in a society where the right to free speech is optimally vindicated, smouldering discontent will be less likely to escalate than in a society where free speech is restricted. Furthermore, free speech is essential for the self-fulfilment of men. Nevertheless, some weak points can be detected in practically all of the above elaborated arguments. Some of them do not cover a broad free speech principle (for instance, the democracy-argument focuses solely on political speech). Others are too broad to be workable (general *laisser-faire* arguments) or have other weaknesses. In the next section of this chapter we will focus on these weak points and maybe we will conclude that restricting free speech in certain cases is not that objectionable after all.

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[41] Barendt, *Freedom of speech*, 16. This argument is based on a theory of Immanuel Kant. Autonomy consists of an external element (freedom) and an internal element (dignity).
[42] Ibidem.
[43] Schauer, *Free speech*, 79
[44] Barendt, *Freedom of speech,* 18.

1.2 Hate Speech: free speech taken to extremes and why we should prevent it

Although Schauer took the argument from truth as Milton and Mill put it, as a legitimate point of departure, he also emphasized the frailty of the argument by saying that quite a few assumptions underlie this view. For instance, to endorse this argument one has to subscribe to the idea that the goal of truth finding in itself is important: "the argument from truth is premised on the initial assumption that the quest for truth is a desirable aim" in all circumstances.[45] It is also assumed that truth makes itself known when placed side-by-side with falsity. But examples from the history of race relations have shown that false views, despite their falsity, were accepted by the public, who acted in accordance with those false views. The rise to power of the Nazis in Germany in 1933 also contradicts the view that (relatively) free (political) discourse, as it prevailed in the Weimar Republic in the 1920s, necessarily leads to better social decisions or the progress of society.[46] What is more, the argument from truth cannot last in cases of false statements. If a person feels the need to state, for instance, that 'the moon is made of green cheese' it would be ridiculous to let this person appeal to his right to free speech because of his search for truth.[47]

John Milton added another instrumentalist reason than the discovery of truth, for maintaining an unrestrained free speech principle. Milton was concerned that a people would distrust the legitimacy of their government and unrest would be created when the government would put restrictions on free speech. With regard to Milton's concern, we should take the following into consideration. It might be true that social unrest and a distrust of government develops from a restriction on certain forms of expression by the state authorities, but on the other hand, there may be certain expressions that are insulting or defamatory to certain persons or a group of persons to such an extent that much greater social unrest would be the result. Joel Feinberg, who was internationally distinguished for his research in moral, social and legal philosophy, shed light on this aspect. First of all, Feinberg explains, certain "classes of injurious expressions do harm (…) namely, by causing those who listen to them (or more rarely, read them) to act in violent or otherwise

[45] Schauer, *Free speech*, 17 and 33.
[46] Barendt, *Freedom of speech*, 9.
[47] Ibidem, 10.

harmful ways. (…) When spoken words cause panic, breach the peace, or incite to crime or revolt, a variety of important interests, personal and social will be seriously harmed. Such expressions, therefore, are typically proscribed by criminal (…) law."[48]

This thought takes us to the consideration of the importance of the circumstances or the context in which certain expressions are uttered. When there is already an atmosphere of high tension in a society, it can be in the interest of the majority to suppress certain extremist forms of expression. "Given the presumptive case for liberty in general, and especially the powerful social interest in leaving persons free to use *words* as they see fit, there can be a countervailing case for suppression on the grounds of the words' dangerous tendency [*but*] only when the danger in fact is great and the tendency immediate."[49] This is what in the literature on this subject is called the 'clear and present danger'-clause and we can find it in almost every work dealing with it.[50] We should observe, however, that this argument in favour of restricting free speech, is undermined by some ambiguities and difficulties.

First of all, Feinberg states, an individual can only be held criminally accountable for the harm caused by inciting utterances when the 'speaker'[51] *intentionally* or *recklessly* caused the harm.[52] But determining if someone acted with intent or with recklessness can be quite hard. First of all, it is difficult to prove if someone had the intent to offend or cause panic and chaos when we do not know all the intimate psychological details of that person. Secondly, if someone had the intent to insult or offend or cause riots with certain utterances, but nobody feels insulted or offended and riots do not occur: is such a person liable to punishment? And as far as recklessness is concerned, we should keep the following in mind: "for there to be recklessness there must be a substantial risk (…) A

[48] Joel Feinberg, 'Limits to the free expression of opinion' in: Joel Feinberg and Hyman Gross (ed.), *Philosophy of law* (Encino 1975) 135-152, there 142.
[49] Feinberg, 'Limits to the free expression of opinion', 143.
[50] Both Schauer and Barendt give an elaborate explanation on the 'clear and present danger'-test or the 'clear and present danger'-approach (as it is also called sometimes). But also in the works *Freedom of speech. Words are not deeds* (Westport 1994) of the philosopher Harry Bracken or David Kretzmer and Francine Kershman Hazan (ed.) *Freedom of speech and incitement against democracy* (The Hague 2000) the idea is explained.
[51] The word 'speaker' is put between quotation marks because the cartoonist that draws offensive and inciting cartoons cannot be seen as a speaker in our daily language but belongs in this context to this category. See also the explanation in footnote 17.
[52] Feinberg, 'Limits to the free expression of opinion', 143.

speaker is not being reckless if he utters words that have only a remote and speculative tendency to cause panics or riots."[53]

This leads to the next problem. In some cases it can be quite unclear if A truly caused B or more concrete, if the offending or inciting utterance caused the harm. Harry Bracken rightly states that, "the fact is that our knowledge of the causation of human behaviour remains extremely limited."[54] Therefore it is even difficult to say *when* a certain utterance becomes inciting. "If words are to be suppressed on the ground that they are provocative of violence, they must be more than merely 'provoking', else all unpopular opinion will be suppressed, to the great public loss."[55] Moreover, Feinberg adds that, "while it is conceivable that some public speech can satisfy common law test for provocation by being so aggravating that even a reasonable man could be expected to lose control of his reason when exposed to it, this can never be true of books. One can always escape the provocation of the printed word simply by declining to read it, and where escape from provocation is that easy, no 'reasonable man' will succumb to it."[56]

The purpose of dealing here with all these difficulties of the arguments for restraining free speech in order to protect people against great social unrest, is, that even if we find completely reasonable and thought-out arguments for restraining free speech in some circumstances, and if we theoretically succeed in thinking out complex 'only in clear and present danger-clauses', there will still be a lot of difficulties in the practical feasibility of these rules. It is important to keep this in mind when going through what follows in this paper because we will discover that a lot of practical problems when dealing with hate speech offences are actually rooted in these difficulties. Later on this will be extensively discussed, but first I will finish my overview of the arguments for limiting free speech.

The last of the instrumentalist arguments that we have to reconsider, is the argument of the decent functioning of democracies. Of course, we must admit, this argument is quite narrow. Whereas it gives several strong reasons for giving protection to political speech and criticism of government in the context of a democracy, it fails to

[53] Feinberg, 'Limits to the free expression of opinion', 143.
[54] Harry Bracken, *Freedom of speech. Words are not deeds* (Westport 1994) 56.
[55] Feinberg, 'Limits to the free expression of opinion', 144.
[56] Ibidem, 145. In his book *Harm to others* (Oxford 1984) Feinberg deals with the problem of causation in further detail. See pages 118-125.

provide a broad free speech principle for all forms of speech, such as artistic discourse, sexually explicit material, commercial advertising or, most relevant here, utterances that can be defined as hate speech. So, does such an argument then have validity in a debate against those who want to constrain free speech? [57] We find another interesting remark, related to the argument from democracy, in the decision of the European Commission of Human Rights on the application that was made to this commission by the Holocaust denier D.I. against Germany and which will be more fully discussed later on in this paper.[58] The commission decided that "the public interest in the prevention of crime and disorder in the German population due to insulting behaviour against Jews, and similar offences, and the requirements of protecting their reputation and rights, outweighs, *in a democratic society* [italics added, JH], the applicant's freedom to impart publications denying the existence of the gassing of Jews under the Nazi regime."[59] So, apparently, as this decision of the ECHR made clear, there are utterances that are considered as not proper in a democratic society, that are felt as a threat in such a society and that, in order to preserve democracy are considered necessary to be banned.

Just like the instrumentalist arguments for freedom of speech, the arguments from the perspective that free speech has intrinsic value have also been subject to criticism. An argument that may alter our view on the general liberal laisser-faire consideration of section 1.1 might be, first of all, that it was made clear in all previous passages of this paragraph that for a variety of reasons intervention of the government in the free speech vs. hate speech field can be good and even necessary and this notion goes counter to the idea of *laisser-faire* politics. To this can be added the equality argument of Dworkin when he pleads for "the importance of treating each person with *equal* respect" (p.5) and from which he concludes that free speech is important because we should respect all forms of expressions equally. However, there are also other possible interpretations of the equality principle: "Society (…) suffers when hate speech goes unpunished. It is a visible

[57]Schauer, *Free speech*, 44 and Barendt, *Freedom of speech*, 18.
[58] European Commission of Human Rights (First Chamber), *D.I. v. Germany. Application no. 26551/95* (June 1996).
[59] European Commission of Human Rights, *D.I. v. Germany,* 5.

and dramatic breach of one of our most deeply felt ideals, that 'all men are created equal'."[60]

Finally, John Stuart Mill feared that self-fulfilment and happiness of individuals would be thwarted if constrictions on free speech were implemented. However, the question remains whether free speech really is an integral part of human nature. [61] Moreover, it is far from clear that unlimited free speech is necessarily conducive to personal happiness or that it satisfies more basic human needs and wants than, say, adequate housing and education.[62] Or as Schauer expounded: "the argument from self-fulfilment suffers from a failure to distinguish intellectual self-fulfilment from other wants and needs, and thus fails to support a distinct principle of speech."[63] Schauer is quite right here. There are indeed other aspects important for happiness and self-fulfilment. Feinberg sees the right to privacy as one of these: "Still other expressions are neither defamatory nor false, and yet they can unjustly wound the person they describe all the same. These (…) invade (…) a special kind of interest in peace of mind, sometimes called a sense of dignity, sometimes the enjoyment of solitude, but most commonly termed the interest in personal privacy."[64] So it can be argued that the exercise of freedom of speech in some cases violates human dignity or the rights of other persons affected by the speech to be treated with equal respect and concern. Therefore there should always be a test of proportionality. When the personal interest in privacy or reputation outweighs the public interest in truth, then the personal interest must be protected.[65] Also for this reason we should seriously consider the implementation of limits on free speech.

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[60] Delgado and Stefancic, *Understanding words that wound*, 16-17.
[61] Schauer, *Free speech*, 48.
[62] Barendt, *Freedom of speech*, 13.
[63] Schauer, *Free speech*, 56.
[64] Feinberg, 'Limits to the free expression of opinion', 140.
[65] Ibidem, 139. Dr. Antoon de Baets, university lecturer in, among other things, the area of history and censorship at the university of Groningen, noted with regard to these comments of Feinberg that it is interesting that Eric Barendt differentiates privacy from reputation. According to Barendt, in balancing tests, the presumption in favour of privacy is greater than the presumption in favour of reputation. Barendt, *Freedom of speech*, 244-246.

1.3 Evaluation

Having followed these alternately pro and contra arguments for defending an unrestrained free speech principle, both from an instrumentalist as well as from an intrinsic perspective, we should ask ourselves what to take from this chapter. First of all, one should realise that both the free speech defenders and the hate speech 'preventers' hold very strong cards. The assumption that a modern western liberal democracy cannot do without a strong freedom of speech principle might be as true as the statement that a modern western liberal society would polarise without free speech restraints. This is a complex paradox to solve and I believe that we all should accept that an ultimate solution or absolute truths that satisfy everyone cannot and will not be found.

In order to manage the complex world we live in, though, defining the boundaries of the admissible is inescapable. Then, the most important thing to be concluded from this chapter is that, as a matter of principle, freedom of speech is an inalienable right of all human beings. This should be the starting point in all discussions on speech and its permissibility. All accepted exceptions to this, as can be concluded from the second paragraph of this chapter, are exceptions because the speech took a form that harms society or individuals. Although it is acknowledged that it is not always easy to recognise dangerous forms of speech (for intent, context, and causation are elusive concepts), there seems to exist general consensus in the philosophical debate on the acceptability of some limits to free speech. The moment that free speech results in a threat to public order, represents a clear and present danger, harms an individual more than it benefits the public, or damages the liberal idea of democracy, the right to free speech should be restricted. These factors are decisive in determining whether utterances are protected under the right of free speech or must be considered as hate speech. On the form of these restrictions and how they should be implemented, however, the philosophers remained silent. That is why we will now turn to chapter two.

2. Free Speech vs. Hate Speech: the legal frame

Now that we have had a close look at the development of the philosophical debate on the right of free speech and its restrictions, it is time to turn to the juridical part of the theoretical discussion. What are the legal implications of what has been said in chapter one? How has international legislation in this field developed? Is there consensus on the legislation and is the legislation unambiguous?

The main purpose of this chapter is to explore the generally accepted ideas of the international community on forms of expression that are or are not allowed and the attempts of the international community as a whole to prohibit the latter by designing rules and making them effective. This information can best be found by analysing international human rights law which consists of a number of internationally ratified declarations and conventions in which the fundamental rights of every human being are laid down. An analysis of the 'free speech vs. the criminalisation of hate speech'- debate from a human rights perspective provides us also with the necessary knowledge to understand the analysis of case-law that will follow in chapters three to five. Most of the cases that are analysed in those chapters, however, are subject to international *criminal* law and not to international *human rights* law but since international criminal law took the concept of human rights as one of the elements to define international crimes it is convenient to start with a study on international human rights law.[66]

One other remark should be made here. From the following it will be clear that some notions from the philosophical discussion of chapter one are either directly or indirectly incorporated in human rights law. Notions such as the idea that the right to freedom of speech is important for every human being and that freedom of speech is necessary in a free society are indirectly recognisable in the relevant articles. Reasons for restricting free speech, as mentioned in chapter one, can also be found. For instance, the idea that to preserve a democratic society restriction of hate speech is necessary is literally translated into articles on human rights law. It is self-evident that, for instance,

[66] In the *Kordić* and *Nahimana* judgements, for instance, explicit reference is made to the agreements discussed in this chapter when the jurisprudence applied is explained. ICTY, *The Prosecutor v. Dario Kordić and Mario Čerkez. Judgement*, 59 and ICTR, *The Prosecutor v. Nahimana et.al. Judgement*, 326-333.

an argument of a more political nature (such as the argument of *"laisser-faire"*) is not relevant in the context of human rights law because the right to live in a liberal *"laisser-faire"* society is not recognized as a human right. That is why such arguments cannot be traced in the legal discussion that follows. With this comment I want to point out that the pro and contra arguments for free speech are structured differently in this chapter than in the previous chapter. In order to create a clear picture of the legal discussion, I had to leave out some elements from the philosophical discussion in this chapter. However, where necessary and convenient I refer to the arguments that were mentioned in chapter one.

2.1 Legal considerations from international human rights law

After the horrors of the Second World War the international community put great efforts into the creation of a coherent body of international human rights law. All states that ratified the declarations and conventions that developed from this effort would be bound to these agreements and in that way the international community created a prevention mechanism against humanitarian catastrophes such as the Second World War. The key question here is of course: what is said in these declarations and conventions with regard to respectively free speech and hate speech and how to interpret it?

Before we turn to the contents of these conventions and declarations, something should be said about the legal status of human rights law documents in general. In principle, states that ratified these agreements are bound by them. This means that those states are in principle obliged to safeguard the rights of their citizens and perform their duties in accordance with the conventions that they subscribed to. If these states neglect this, and if this is noticed by either NGO's, or other states that have subscribed to the convention (so-called States Parties), or by the organisation (for instance the European Union or United Nations) within which the treaty was signed, warnings can be given and sanctions can eventually be put on them. Another option is that an individual whose rights are violated complains "to quasi-judicial bodies such as the Human Rights Committee (HRC),[67] or the Committee on the Elimination of all forms of Racial

[67] See the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), opened for signature 19 December 1966, (entered into force 23 March 1976).

Discrimination (CERD),[68] or inter-state complaints,[69] [however], there is neither a duty on, nor a right for, other states to intervene in any other relevant manner, for example by exercising universal jurisdiction over the violators. Instead, human rights treaties govern the relationship between individuals and the respective states they live in."[70] The implementation of the conventions that are discussed in this chapter thus largely depends on the goodwill of the States Parties.

2.1.1 The Universal Declaration of Human Rights (UDHR)

The first in the chronology of international human rights treaties, drafted in the wake of the Nuremberg Trials, is the Universal Declaration of Human Rights (UDHR), which was adopted in 1948. It can be seen as a starting-point for all contemporary established thinking on human rights. In it we find the following article as the one that is most relevant to our discussion:

Article 19*: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."*[71]

This article seems rather straightforward and without problematic ambiguities. It emphasises that freedom of opinion and freedom of expression belong to the most basic rights of man and that any individual, whether he is a sender or a receiver of information, should be free. Apparently, the international community agreed on the fact that freedom of expression has intrinsic value, as Mill already argued, and should be a right to all. The freedom to seek, receive and impart information is incorporated as well. This special element of the right to freedom of expression is accepted as part of the freedom of

[68] See the second part (article 8 and onwards) of the International Convention on the Elimination of all forms of Racial Discrimination (CERD).
[69] See: ICCPR Art. 41; CERD Art. 11; European Convention on Human Rights (ECHR) Art. 33.
[70] Wibke Timmermann, 'The relationship between hate propaganda and incitement to genocide: a new trend in international law towards criminalization of hate propaganda?', *Leiden Journal of International Law* 18 (2005) 257-282, there 272.
[71] United Nations (UN*), Universal Declaration of Human Rights (UDHR)* (10 December 1948), article 19. Via: http://www.un.org/Overview/rights.html. See Appendix I. Since its adoption, the UDHR has acquired the status of customary international law, see: http://www.equitas.org/english/programs/downloads/ihrtp-proceedings/23rd/Ippoliti-2-Ang.pdf.

expression, just like Scanlon proposed later (see chapter 1.1).[72] In principle there seems to be no limitations to this right for no clause of this nature is added to this article.

However, this supposition changes when we read further in the UDHR. The member states of the United Nations agreed that the right to free expression (but this applies to all other rights of the Declaration as well) should not be taken to such extremes that it would result in total ineffectiveness of the right. So, for Article 19 to be efficient as a right with positive results Article 29(2) was incorporated in the Declaration:

Article 29(2)*: " In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."*[73]

This means that a government may put restraints upon the free speech principle, but only when 1) the restrictions are determined by law; 2) the restrictions exist to secure the respect for the rights and freedoms of others and; 3) the restriction is meant for the purpose of "meeting the just requirements of morality, public order and the general welfare in a democratic society." Where the first two terms of this article define useful rules regarding the restriction of hate speech, the third provision leaves room for various interpretations and is therefore of little help to us in finding the line of demarcation between the admissible and the inadmissible in the area of free speech. For as we saw in the first chapter of this paper, what is morally good and what is morally bad in terms of free speech cannot always be easily determined. Besides, as may be concluded from the previous chapter as well, it is conceivable that restrictions on free speech may harm public order more than the prohibited utterance would have done.[74] And then there is the problem that there may be no consensus on what is necessary for a democracy to function

[72] Manfred Nowak*, U.N. Covenant on Civil and Political Rights. CCPR Commentary* (Strasbourg 1993) 340.
[73] UN, *UDHR,* article 29(2). See Appendix I.
[74] This principle is also referred to as *de minimis non curat lex.*

decently. Hence, we should continue our search for clues on how to solve the problem legally.

2.1.2 The European Convention on Human Rights (ECHR)

A European variant of the UDHR is found in the European Convention on Human Rights (ECHR). It was signed in Rome on 4 November 1950, following the example of the Universal Declaration on Human Rights. The free speech article of the ECHR, Article 10(1), shows great similarities to the free speech provision of the UDHR:

Article 10(1): *"Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. (…)"*[75]

This article seems to give a general and unrestrained plea for freedom of speech just like Article 19 of the UDHR. In commentaries on article 10(1) is stated that the article is "applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also those that offend shock or disturb the state or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no democratic society."[76] Again, also the right to receive and impart information and ideas is considered as part of the freedom to express oneself.

Scrutinizing this convention further, though, significant differences between Article 10 of the ECHR on the one hand and Article 19 of the UDHR on the other appear. A second paragraph is attached to the tenth article of the ECHR. This second clause specifies the restrictions on the right to free speech in greater detail than is the case with Article 29(2) of the UDHR and in doing so, Article 10(2) of the ECHR fills some legal gaps:

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[75] Council of Europe, *European Convention on Human Rights* (4 November 1950), article 10(1). Via: http://www.echr.info/. See appendix II. In principle all Council of Europe member states are party to the Convention and new members are expected to ratify the convention.
[76] Clare Ovey and Robin C.A. White, *Jacobs & White. European Convention on Human Rights. Third Edition* (Oxford 2002) 277.

Article 10(2*): "The exercise of these freedoms, since it carries with it duties and responsibilities, 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 and impartiality of the judiciary."*[77]

This paragraph gives us a range of reasons for which the right to freedom of speech can and should be restrained. The right to express oneself freely comes with certain special duties and responsibilities. This is so because (and this is in complete accordance with the comments of Joel Feinberg in chapter 1.2) speech and other forms of expression affect other people, and sometimes society as a whole. If speech is used recklessly or with malicious intent it will threaten the security of society in various ways, it will threaten the constitutional state and it will harm the individual. So, according to the ECHR, restrictions and penalties, *if* proscribed by law (the same requirement as prescribed by Article 29(2) of the UDHR) should be put on a person and his utterances when he, for instance, publishes information about an individual without respect for his reputation or when information received in confidence is disclosed. This is a clear example of how the ECHR gives more information on what it admits en what it forbids than the UDHR.

It is remarkable that the ECHR also contains an article similar to Article 29(2) of the UDHR: an article with general comments on restrictions that apply to all articles of the ECHR. This is Article 17 on the prohibition of the abuse of rights:

"Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."[78]

[77] Council of Europe, *ECHR*, article 10(2).
[78] Ibidem, article 17.

It has been said that this article is designed to safeguard all rights listed in the convention, by protecting the free operation of democratic institutions. "The object of Article 17 (…) is to limit the rights guaranteed only to the extent that such limitation is necessary to prevent their total subversion and it must be quite narrowly construed in relation to this object. (…)"[79] Actions aimed at spreading violence or hatred, resorting to undemocratic methods, undermining a nation's democratic and pluralist political system or pursuing objectives that are racist or likely to destroy the rights and freedoms of others do not enjoy protection under the Convention by means of Article 17. It is of special significance where an Article of the Convention contains no limitations, since in such a case Article 17 can provide the basis for a limitation on the rights protected.[80] As the right to freedom of speech can already be restrained under Article 10(2), it seems that Article 17 is of no further use for our inquiry.

Although Article 17 and, especially, Article 10(2) of the ECHR are illuminating on the legal limits of free speech, still, much is left unsaid in the provisions of the ECHR. How to determine whether an utterance is a security risk? This is not clear in all circumstances. What are exactly the limits to what can be said about an individual without violating his reputation? As has been stated earlier, such complex problems ask for careful considerations that take the context (the circumstances in which an idea is expressed) into account and balance various interests such as the interests of both the speaker and the receiver, the interest of the person about whom something is claimed or the interest of society at large. Unfortunately, the UDHR and the ECHR cannot be of further help here.

2.1.3 The International Covenant on Civil and Political Rights (ICCPR)

As far as the free speech provisions are concerned, there is another human rights law document that shows similarities with the UDHR and the ECHR. That convention is titled the International Convention on Civil and Political Rights (ICCPR). It was accepted in December 1966 with the ultimate goal of establishing a mechanism to enforce the

[79] Ovey and White, *Jacobs & White*, 362.
[80] Ibidem, 361-164.

UDHR.[81] The ICCPR came into force in March 1976. Two articles of this convention are relevant for an inquiry on the limits of free speech. After the analysis of the UDHR and ECHR provisions, the first, Article 19, is the most familiar to us. It consists of three sub provisions the first of which defines the right to freedom of *opinion*. The matters of freedom of opinion and freedom of thought, (the latter is the subject of Art. 18 of the ICCPR), are of course closely related to the idea of freedom of expression, but as freedom of thought and opinion are private matters that do not necessarily become public (as is the case with freedom of expression) and hence will not easily offend or insult others, it is not necessary to analyse this right in the context of this paper.[82] The second provision, however, is very relevant for us because it describes the free speech right:

Article 19(2): *"Everyone shall have the right to freedom of expression; this right shall include 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."*[83]

Just like Art. 10(1) of the ECHR, this article must be considered as covering a broad range of forms of speech, also including less favourably received expressions. Apart from some minor differences in the text, this article is very similar to the corresponding articles of the UDHR and ECHR and little innovative.[84] For the clause on restrictions, Article 19(3), the same can be said:

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[81] The mechanism through which the ICCPR is enforced is the UN Human Rights Committee and this organ will be discussed in chapter five in relation to the case of Robert Faurisson.

[82] For this reason the rights to freedom of thought and freedom of opinion are absolute whereas freedom of expression can be legitimately restricted.

[83] UN General Assembly, *International Covenant on Civil and Political Rights (ICCPR)* (16 December 1966) article 19(2). Via: http://www.unhchr.ch/html/menu3/b/a_ccpr.htm. See Appendix III. At the time when this thesis was written (spring/summer 2007), 160 states had ratified this convention.

[84] One thing that stands out is that the element of the freedom to *seek* information is again incorporated just like in the UDHR, but in contrast to the text of the ECHR where this is not mentioned. Furthermore, the ICCPR states that "everyone *shall* have the right" instead of "everyone has the right" as it was formulated in similar articles of the UDHR and the ECHR. There are also minor, less relevant, differences with the ECHR such as the fact that the "European Convention requires that restrictions be 'prescribed by law' while the Covenant requires that they be 'provided by law'." All these differences, however, would not seem to justify a different result. Karl Josef Partsch, 'Freedom of conscience and expression and political freedoms' in: Louis Henkin, *The international Bill of Rights. De International Covenant on Civil and Political Rights* (New York, 1981) 220.

Article 19(3): *"The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals."*[85]

This fragment, that shows another vision on the limits of free speech, is a more abstractly formulated version of Article 10(2) of the ECHR. Both Articles 10(2) of the ECHR and 19(3) of the ICCPR, though, consist of the message that freedom of expression may be limited if the expressed message has unwanted consequences for the rights of others, for collective security and/or for other important social interests. Nowak, currently the United Nations Special Rapporteur on Torture and an expert on the international covenant, concluded that:

"the dissemination of information and ideas must be distinguished from actions going beyond this that have to do with the active implementation of these ideas. For instance, the foundation of an anti-State association, as well as concrete preparations to topple the government, are criminal actions not covered by the protection of freedom of expression (…) However, States Parties may not extend this right of state security so far as to penalize and suppress mere expression of opinions, even though their contents may be highly critical."[86]

This can be interpreted as another rendering of the idea that the right to freedom of speech is inalienable only to the extent that it should never lead to actions that harm society or constitute security risks to the social order or individuals.

The second article from the ICCPR that we must discuss because more restrictions are explained in it, is Article 20:

[85] UN, *ICCPR*, article 19(3).
[86] Nowak, *CCPR Commentary,* 341-342.

Article 20(1)(2): *"1) Any propaganda for war shall be prohibited by law; 2) Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."*

Altogether, Article 20 represents an alien element in the ICCPR in that it does not set forth a subjective right, but merely establishes limitations on other rights, particularly on the right of freedom of expression and information.[87] The first provision, the prohibition of propaganda for war and racial hatred, is to be understood as a response to the incitement to war and racial hatred spurred by the propaganda machinery of the Third Reich.[88] It is relevant to our inquiry insofar that it teaches us about the one form of expression that is directly and completely prohibited by international human rights law: propaganda for a war of aggression.[89]

The second provision is also helpful in refining our knowledge on the prohibition of hate speech. It states that incitement to discrimination, hostility or violence is to be prohibited, but only "when it takes place by way of 'any advocacy' of national, racial or religious hatred."[90] This implies three things. Firstly, that incitement to violence against a group or persons not based on nationality, race or religion (for instance violence against women) does not fall under the prohibition. Secondly, "the term 'advocacy' implies that there must be a conscious *intent* [italics added, JH] to spur hatred, rather than just approval of or inadvertent contribution to hatred."[91] And thirdly, because the provision focuses solely on those forms of advocacy of national, racial or religious hatred that *incite* to violence or discrimination, States Parties are not under obligation by Art. 20(2) to prohibit advocacy of hatred that does not instigate others to actions of racial or religious discrimination."[92] Having recorded this, new problems follow from the text.

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[87] Nowak, *CCPR Commentary*, 359.
[88] Ibidem, 363.
[89] For a certain utterance to be prohibited under this Article of the Covenant it must be established that the utterance was indeed part of a *propaganda campaign* for *war*, whereby 'propaganda' must be defined as "the intentional and well aimed influencing of individuals by employing various channels of communication to disseminate (…) incorrect or exaggerated facts" and 'war' as "the use of military force against another state" (war of aggression). See: Nowak, *CCPR Commentary,* 363-364.
[90] Nowak, *CCPR Commentary,* 365-366.
[91] Dinah PoKempner, 'A shrinking realm: freedom of expression since 9/11' in: Human Rights Watch, *World Report 2007* (s.l. 2007) 63-85, there 72. Via: http://hrw.org/wr2k7
[92] Nowak, *CCPR Commentary*, 366.

First of all, the ICCPR takes the line that there is a distinction between hate speech that does incite to actions of discrimination and hate speech that does not. However, the question can be raised whether hate speech that does not incite to discrimination or violence exists. Furthermore, the UN failed to further define discrimination (what makes an act discriminative?) or the concept of incitement (When do words move people to act? When do words become deeds?). These difficulties lead to the conclusion that a lot of hate speech utterances will not be covered by this article or to put it differently, that, according to this provision, some forms of hate speech, aimed at certain persons, or uttered in certain circumstances are permissible under Article 20(2) of the ICCPR. However, it remains unclear how and if such utterances, permitted under this article, are also allowed under Article 19(3) of this covenant. It is possible that in certain instances the ICCPR contradicts itself. Moreover, and with this comment I want to close this discussion on the ICCPR, it is even controversial whether Article 20 or Art. 19(3) require criminal prohibition because "there are certain indications that it is left to States Parties to decide as to which sanctions they wish to provide as appropriate for enforcing prohibition."[93] So, even if it is clear that someone's hate speech utterances can be legally restricted under one of the articles of the ICCPR, the question whether criminal punishment should be put on this person is still left to the interpretation of the State Party. For these reasons, it can be concluded that the ICCPR text itself, offers no clear guideline in how to distinguish permissible free speech from hate speech and how to deal with it in case of the latter.

2.1.4 The Convention on the Elimination on all forms of Racial Discrimination (CERD)

Another international convention to define and specify the legal frame further, is the Convention on the Elimination of all forms of Racial Discrimination (CERD)[94], which was approved by the UN General Assembly on 12 December 1965 and entered into force in January 1969. This convention has a somewhat different character from the ones that have been discussed before because of its focus on the right not to be discriminated

[93] Nowak, *CCPR Commentary*, 365.
[94] In the literature also found as the Convention on the Elimination of all forms of Racial Discrimination (CERD).

against rather than on the right of freedom of expression. For this reason, I decided to deal with the CERD after the discussion of the UDHR, ECHR and ICCPR, which have more in common.

Only the fourth article of this convention is relevant and it is the most comprehensive anti-hate speech article known in international human rights law:

Article 4: "*States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination (…).*"[95]

To this end: "*a state shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities.*"[96]

Furthermore, according to this article, States Parties should prohibit organizations and membership of organizations that promote or incite racial discrimination. Participation in such organizations or other propaganda activities with that aim should be recognized as an offence punishable by law. To conclude, the CERD maintains that States Parties will not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.[97]

Article 4 of the CERD includes "discrimination in any form" and by means of the definition of discrimination that is given in the first article of the CERD we are able to deduce that this means that "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of

[95] UN, *International Convention on the Elimination of all forms of Racial Discrimination (CERD)* (12 December 1965) article 4. Via: http://www.unhchr.ch/html/menu3/b/d_CERD.htm. See Appendix IV. At the time when this thesis was written (spring/summer 2007), 173 states had ratified this convention.
[96] UN, *CERD,* article 4(a)
[97] Ibidem, article 4(b)(c).

nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life", is included in this provision and, thus, utterances qualified in this category are not protected under the right to freedom of expression in this international convention.[98]

When compared to Articles 19 and 20 of the ICCPR it is striking that hate speech aimed at certain persons (as, again, for instance women or religious groups) still seems admissible because only hate speech on bases of race or ethnic origin is prohibited.[99] Also worth noticing is that according to this convention not only *incitement* to racial discrimination or incitement to violence inspired by ideas of racial discrimination is punishable, but also the sole fact (and compare this to Art. 20(2) of the ICCPR) of *disseminating* "ideas based on racial superiority and hatred" can and should be punished in accordance with the CERD. This is important to realise because it means that expressions of a wider range are prohibited than is the case under Articles 19 and 20 of the ICCPR. In that way, the CERD has the ability to function as a more powerful (and less vague) instrument in combating hate speech,[100] but the danger of censorship is also considerable if we strictly follow this convention. Furthermore, it is also important to emphasise the implication that the clause "which has the *purpose* or *effect* of nullifying, etc." has on the problem of proving intent that was pointed out by Joel Feinberg and Harry Bracken in chapter 1.2. The word 'purpose' covers the fact that having the *intent* (without necessarily causing harm) is enough to be punishable, but moreover the *effect* of harm without having had the purpose (the provisions says purpose *or* effect) seems to be punishable as well. With this, an ambiguity is bypassed. The last element that contributes considerably to the clarity of this convention is that it explicitly calls for the criminalisation ("a state shall declare an offence punishable by law") of hate speech acts covered by it.

As has been pointed out already, the main difference between this provision and the declarations and conventions that we analysed earlier is that where the relevant

[98] UN, *CERD*, article 1.
[99] It must be noted that there are other treaties, conventions and agreements to protect women and religious groups.
[100] See also Miriam Gur-Arye, 'Can freedom of expression survive social trauma: the Israeli experience', 41.

articles of the latter are solely focused on the *protection* of *free speech*, Article 4 of the CERD concentrates primarily on the *prevention* of *hate speech*. And where the provisions on restrictions of the UDHR, the ECHR and the ICCPR expressed themselves in more or less moderate terms and left it to the States Parties to determine the measures, the CERD provision used much stronger wording and speaks of "offences punishable by law." With regard to this, one can read in the Human Rights Watch's World Report of 2007 that many states interpret the CERD as requiring criminal proscription of hate speech, as opposed to the other conventions that leave measures optional.[101] In the exegesis of Manfred Nowak we find a similar comment on what the CERD implies: "States Parties expressly commit themselves to provide for criminal prohibitions (…)"[102] As has been said earlier in this chapter, we come to speak about hate speech and criminal law at great length in chapters three to five. For now it is enough to remark that the CERD is the singular human rights law treaty that actually links hate speech directly to criminal law and punishment and in this way (and as we have seen also on other points) it solves ambiguities on who should be punished for what.

2.1.5 The Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention)

The last document to be discussed is the Convention on the Prevention and Punishment of the Crime of Genocide that was initiated by the United Nations and approved by its General Assembly in 1948, the same year the UDHR was adopted. In 1951 the Convention entered into force. Just like the UDHR, the convention was inspired by the ideal to prevent humanitarian catastrophes like the Holocaust in the future. Although, as far as time and chronology is concerned, it would have been logical to discuss this document earlier in this chapter, I decided to deal with this convention at the end of it. The articles of the Genocide Convention define the crime of genocide in legal terms. Therefore, the contemporary international criminal tribunals like the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the former

[101] Dinah PoKempner, 'A shrinking realm: freedom of expression since 9/11', 69.
[102] Nowak*, CCPR Commentary*, 366.

Yugoslavia took this convention as a basis for their statute.[103] Thus, the Genocide Convention cannot be seen as an agreement on human rights in the broader sense like the UDHR, the ECHR, the ICCPR and the CERD. The Genocide Convention is a special document with a very particular and narrow scope and aim and, therefore, I thought it necessary to discuss this document at the end of this chapter.

Because of its narrow scope it might not be surprising that hate speech is not explicitly mentioned in the Convention. However, the third article of the document is very relevant to this inquiry. It defines which acts in relation to genocide are punishable:

Art.3) The following acts shall be punishable:

a) *Genocide;*
b) *Conspiracy to commit genocide;*
c) *Direct and public incitement to commit genocide;*
d) *Attempt to commit genocide;*
e) *Complicity in genocide.*

Article 3(c) gives an insight into how hate speech is dealt with in relation to the crime of genocide. When free speech goes so far that it consists of a direct and public call to commit genocide it becomes one of the gravest forms of hate speech and such hate speech is seen as a criminal act, just as punishable as, for instance, physically committing genocide. In the discussions leading up to the Genocide Convention it was remarked that the genocides found their beginnings with the arousing of racial, national or religious hatred. In that regard, an inherent connection exists between the 'incitement to genocide' article of the Genocide Convention and the various provisions relating to hate speech as discussed earlier in this chapter.[104]

[103] Of course, the Genocide Convention was not the only document of reference for these tribunals. Also other international agreements as for instance the Geneva Conventions were used as documents of reference. See also chapter 4.
[104] Toby Mendel, 'Study on international standards relating to incitement to genocide and racial hatred. For the UN special advisor on the prevention on genocide' (April 2006) 16. Toby Mendel is the Law & Asia programmes director of the NGO 'Article 19'. He has worked extensively on media law and freedom of expression issues in Asia, Africa, Europe and the Middle East. For more information about Toby Mendel see: http://www.article19.org/about/staff.html.

It is noteworthy that only direct and public calls to commit genocide are mentioned as punishable. This means that only the most explicit, 'hard' forms of hate speech can be punished under the Genocide Convention. 'Softer' forms of hate speech that might implicitly invoke to genocide or contribute to a 'genocidal climate', are left out of considerations. The question remains, and we will discuss this point further when dealing with case-law of international criminal tribunals in chapter four, how to decide whether a call to commit genocide is direct and public enough to fall in this category. Thanks to the narrow focus of this agreement on (hate speech relating to) genocide and its clear wording, we do not need to discuss this document in further detail here. The Genocide Convention is only relevant to this chapter in that it gives another particular form of hate speech that needs to be punished.

2. 2 Evaluation

The conclusion of the first chapter applies to a great extent to this chapter as well. The international community seems to agree in principle with the free speech advocates of chapter one. In all human rights agreements, the principle right of freedom of expression is explicitly acknowledged (except in the case of the CERD and the Genocide Convention, where it is only implied) as an intrinsic right of every human being and as a right central to democratic societies. Broad free speech principles have been laid down that also protect more shocking expressions that dissent from generally accepted views. On the other hand, the States Parties also seem to agree on the fact that for the world to be a peaceful place where every citizen can enjoy his rights to the maximum, it would be better to ban certain extreme utterances from the public discourse. This moral split took shape in agreements where the right to free speech was declared on the one hand but where, on the other hand, States Parties were allowed or even obliged to restrict the right to freedom of expression in certain situations.

In regulating the restrictions, the international community chose more or less the line as indicated by the thinkers of chapter one: those forms of racial or ethnic hate speech that harm or are likely to harm society and individuals might be restricted. In this chapter, however, we are dealing with law and in order for rules of law to be applicable in practice, clear and explicit conditions need to be set. It is striking that as time passed

the States Parties apparently felt the urge to define the restrictions more and more in detail. The earliest human rights instrument analysed here, the UDHR, phrased the restrictions in minimal terms: speech that does not respect the right and freedom of others, does not meet the just requirement of morality or forms a threat to the general welfare and democratic society, shall be limited, provided that the limitation is determined by the law of the country. In the ECHR, adopted only two years after the UDHR, the conditions were further refined. A threat to national security, territorial integrity, the prevention of disorder or crime, disclosure of information received in confidence, endangering state authority and impartiality of the judiciary were also mentioned now as reasons for restricting the right to free speech.

This trend of refining the terms of limitation were developed further. Although article 19(3) of the ICCPR is worded in more abstract terms than, for instance, article 10(2) of the ECHR and the ICCPR might be seen, therefore, as less developed, the latter convention gives more details on what particular forms of speech should be considered hate speech. In addition to the provision of the Genocide Convention that already explicitly prohibited one particular form of hate speech, the ICCPR explicitly mentioned other forms of speech that should be restricted at any time: propaganda for a war of aggression and any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. The CERD did something similar, but eventually went further by unambiguously prohibiting propaganda that attempts to justify or promote racial hatred and discrimination (a term defined in full detail in the CERD, as opposed to the text of the ICCPR) in any form. Moreover, where the ICCPR only pleaded for an absolute restriction on *incitement* to discrimination, the CERD went as far as prohibiting the mere *dissemination* of ideas based on racial superiority or hatred, whether this dissemination was likely to lead to violence or hostility or not.

With the comprehensive Article 4 of the CERD we arrived at the most broadly-defined and detailed clause on how to deal with hate speech from the perspective of international human rights law. Some things, however, remained unclear. As many states are not only States Parties to the CERD, but also parties to the UDHR, ECHR (only European countries), the ICCPR and the Genocide Convention as well, and free speech restraints are subject to other conditions in all of these treaties, a clear and unambiguous

policy is not easily recognised. This problem is deepened by what has been said on the legal status of human rights law in the beginning of this chapter: implementation of the conventions largely depends on the goodwill of the States Parties.

As three of the five human rights treaties discussed, restricted hate speech on the basis of three elemental principles, I decided to focus on these principles in evaluating the coherence of the theoretical approach. In that way the somewhat a-typical provisions of the CERD and the Genocide Convention are left out of consideration, but it would be strange to judge the international theoretical approach as not coherent on the basis that two of the five documents deviate (in form) from the others. Therefore I conclude that the international community seems to have agreed that certain forms of racial or ethnic hate speech are allowed to be constrained, but only on condition that the restrictions are 1) provided by law; 2) permissible only for particular public ends; and 3) necessary in a democratic society.[105] Restrictions on the right to freedom of speech have to be subjected to this test on a case by case basis. This seems to be in keeping with the philosophical principles of chapter one that only when dealing with danger, or harm of society or the individual, the right to free speech should be restricted. If and how this human rights law principle is enforced in practice will become clear in the following chapters.

[105] Partsch, 'Freedom of conscience and expression and political freedoms' in: Henkin, *The international Bill of Rights,* 222. Of course, it must be noted that it is also defendable that the text of the CERD and the Genocide Convention implicitly agree with this test, as, according to these documents, States Parties are not encouraged to restrict speech randomly but only discriminatory speech that affects others (condition 2: permissible for particular ends). Moreover the form of the restriction is also prescribed in the CERD and the Genocide Convention with the words "an offence punishable by law" or "the following acts shall be punishable". Only on the condition of necessity, the CERD and the Genocide Convention give no particularities. This is probably due to the fact that the implicit consideration of the CERD and the Genocide Convention are that when racial, respectively, hate speech or incitement to genocide occurs, restriction on freedom of expression is always necessary.

3. Hate speech on trial: debut at Nuremberg

In this chapter, the focus is shifted from international human rights law to international criminal law. As the name already indicates, international criminal law sets the legal principles in dealing with grave international crimes. It serves as the basis of jurisdiction and jurisprudence of international criminal courts and tribunals. In these institutions, among other things, crimes against humanity and war crimes are tried; grave crimes that often have a close link with violations of human rights. International criminal law in the area of hate speech has developed over time since the Nuremberg trials. These were the first trials in history where individuals were charged with crimes related to hate speech.

By comparing the principles regarding hate speech in human rights law and international criminal law it will become possible to ascertain whether the fundamental principles of human rights law are incorporated and operated in international criminal law. Moreover, studying the international legal status of hate speech through the approach from international criminal law, will amplify our understanding of the international approach to the hate speech problem in practice. Wibke Timmermann, a German legal assistant, working in a defence team of the International Criminal Tribunal for Rwanda (ICTR), who wrote an outstanding thesis on the matter of criminalising hate speech, explained this as follows: "(…) most if not all countries are currently obliged to prohibit and outlaw such propaganda by virtue of several international conventions dealing with human rights. This is, however, insufficient due to the fundamental difference between human rights protected under human rights conventions and international crimes. (…) An international crime entails the *personal* criminal responsibility of individuals." [106] The enforcement possibilities of international criminal law are much greater than of international human rights law and because criminal liability and punishment is involved, tribunals should ban as many ambiguities from their statutes as possible. In this and the following chapters I will demonstrate whether international criminal tribunals have succeeded in this task.

[106] Wibke Timmermann, 'The relationship between hate propaganda and incitement to genocide: a new trend in international law towards criminalization of hate propaganda', *Leiden Journal of International Law* 18 (2005), p. 257-282, there 271-272.

3.1 The International Military Tribunal (IMT) and its hate speech criminals

History's most famous and most horrific example of hate speech and its consequences would doubtlessly be the anti-Semitic propaganda machinery that was part of Hitler's anti-Semitic policy in "*das Dritte Reich"*: "Hitler was well aware of the powers of propaganda, and, together, with Joseph Goebbels the 'master manipulator of crowds' exploited it to its fullest extent."[107] Years and years of disseminating anti-Semitic messages by the use of newspapers and radio assisted Hitler in his attempt to reach his self-formulated 'final solution'. As the Second World War ended, and as the allied countries installed the International Military Tribunal in the autumn of 1945 to try the major German war criminals, the prosecutors listed several important Nazi propagandists in their indictment. In fact, four journalists were indicted.[108] However, only Julius Streicher and Hans Fritzsche were directly sentenced on the basis of the consequences of the hateful messages they spread.[109] In the following paragraph we will have a close look at the 'how' and 'why' of the Nuremberg judgements in the cases against Streicher and Fritzsche, but in order to understand that analysis correctly it is convenient to study the technical aspects of the institute of the IMT briefly.

The IMT opened its proceedings on 20 November 1945. What preceded was the signing of the London Charter on 8 August 1945 by which the Allies agreed to the establishment of a Military Tribunal for the trial of the major war criminals of the European Axis countries. The charter consisted of seven parts, the second part of which

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[107] Wibke Timmermann, *Incitement, instigation, hate speech and war propaganda in international law. Thesis L.L.M in international humanitarian law*, 4 Via: http://www.cudih.org/formation/2006_Wibke_Timmermann.pdf.

[108] Donna E. Arzt, 'Nuremberg, denazification and democracy: the hate speech problem at the international military tribunal', 12 *N.Y.L. Sch. J. Hum. Rts*. 689, 22-23. Via: http://insct.syr.edu/Research/Publications/ProfessorsPublications/Artz/Nuremberg%20Denazification%20and%20Hate%20Speech.pdf. The full names of the journalists other than Julius Streicher and Hans Fritzsche are Alfred Rosenberg, also known as the 'philosopher of Aryan Supremacy' and editor of the official Nazi newspaper *Völkischer Beobachter* and Walter Funk, a financial journalist and newspaper editor who served in the propaganda ministry during the mid-1930s.

[109] In spite of the fact that his profession was journalism, Alfred Rosenberg was not convicted on the basis of his journalistic work because of his responsibility 'for the formulation and execution of occupation policies in the occupied Eastern territories' and for his knowledge of 'the brutal treatment and terror to which the Eastern People were subjected'. Walter Funk was convicted for his participation in the early Nazi programme of economic discrimination against the Jews and his responsibility in the economic exploitation of occupied areas. The International Military Tribunal sitting at Nuremberg Germany, *The trial of German major war criminals. Part 22* (Londen 1950) 496 and 503.

explains the jurisdiction and general principles and is therefore most relevant here. The first article of the second part, Article 6, states the acts that are considered a crime under the Charter.[110]

Article 6: *"(…)The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:*

(a) Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) War crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c)Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan."[111]

It should be noted that eventually, the Nuremberg Indictment, signed in Berlin on 6 October 1945 by the four Chief Prosecutors,[112] contained four instead of three (as summed up above) counts. Article (a), crimes against peace, was split into two parts: 1)

[110] The relevant parts from the Charter can also be read in Appendix V.
[111] The Allied countries, *Charter of the International Military Tribunal* (8 August 1945). See appendix 5. via: http://www.yale.edu/lawweb/avalon/imt/jackson/jack16.htm.
[112] The four Chief Prosecutors were Robert H. Jackson (for the United States of America), Francois de Menthon (later M. Auguste Champetier de Ribes, for the French Republic), Sir Hartley Shawcross (for Great Britain and Northern Ireland), General R.A. Rudenko (for the Soviet Union).

the common plan or conspiracy to commit crimes against peace, war crimes and crimes against humanity (Count I) and 2) crimes against peace ["the participating in the planning, preparation, initiation and waging of wars of aggression, which were also wars in violation of international treaties, agreements and assurances,"[113] JH] *per se,* which was later known as Count II.[114] Article 6(b) was called Count III in the Indictment and trial documents, and logically then, Article 6(c) became known as Count IV.

With regard to the subject of this thesis, it should be noted that hate speech or hate propaganda is not directly mentioned as a crime in the Charter.[115] As a result, it can be concluded that hate speech was not seen as a crime *per se* by the IMT. Then, of course, the next question is in what way and under what denominator the hate speech utterances of both Streicher and Fritzsche were tried. The following paragraph will bring the answer.

3.2 Two Nazi propagandists and their trial

3.2.1(a) Julius Streicher: 'Jew-Baitor Number One'

Streicher, who was born in 1885, joined the Nazi ranks in 1921 after attending a speech delivered by Hitler. Streicher became close to Hitler. Even to that extent that in the tumultuous years to come he would be one of the few that remained on familiar *'du'* terms with Hitler.[116] He started his career as a Nazi journalist and from 1923 to 1945 he was publisher of *Der Stürmer*, an important anti-Semitic weekly. Until 1933 he was editor of this newspaper as well. According to Streicher the aim of this paper was to "unite Germans and to awaken them against Jewish influence which might ruin our noble culture."[117] It is of importance to realise that although the paper fitted, as far as anti-

[113] IMT, 'Indictment', *Trial of the German major war criminals. Part 1,* 11.
[114] Arzt, 'Nuremberg, denazification and democracy: the hate speech problem at the international military tribunal', 9 and: IMT, 'Indictment', *Trial of the German major war criminals. Part 1,* 2.
[115] Note also that this Charter stems from a time when human rights treaties did not exist and, therefore, free speech rights and restrictions of these rights were not laid down in international agreements either. The first of the treaties in which the notion of free speech was recorded was the Universal Declaration of Human Rights of 1948.
[116] Arzt, 'Nuremberg, denazification and democracy: the hate speech problem at the international military tribunal', 15.
[117] Timmermann, *Incitement, instigation, hate speech and war propaganda in international law*, 10.

Semitic utterances were concerned, perfectly in the line of the official Nazi press, *Der Stürmer* remained an independent newspaper until the end of the war.

In addition to his work as a journalist, Streicher was appointed also to several more politically tinged posts by Hitler. As a consequence, Streicher became *Gauleiter* of Franconia[118] in 1925, member of the Reichstag (1933-1945) and *Obengruppenführer* in the Nazi *Sturmabteilung* (1934). However, his political career ended in 1940 when he was tried before the Nazi supreme court for criminal acts, such as, among other things, corruption. Found guilty, he was expelled from the party posts that he had held before. Still, though, "the Führer wanted the filthy rag [*Der Stürmer*] to flourish, so Streicher ran the paper by telephone until the end of the war."[119]

This so-called 'filthy rag' consisted of "obscene cartoons, gory tales of alleged ritual murders, instructions for anti-Jewish campaigns, and lists of Jewish dentists, doctors and shopkeepers, whom 'Aryans' were advised to avoid."[120] Streicher even went as far as publishing public and fervent calls for the extermination 'root and branch' of Jews. "Typical of his teachings [and it was these teachings that would ultimately yield him the widely known nickname of 'Jew-Baitor Number One', JH],[121] was a leading article in September 1938, which termed the Jew a germ and a pest, not a human being, but a parasite, an enemy, an evildoer, a disseminator of diseases who must be destroyed in the interest of mankind."[122] Apart from writing anti-Semitic articles himself, Streicher also did not hesitate to publish readers' letters that propagated similar fierce messages. An example of this can be found in an issue of *Der Stürmer* of February 1940 in which a reader "compared Jews with swarms of locusts which must be exterminated completely."[123] In the pre-war years the circulation of the newspaper reached a peak of 800.000. During the war, the rag continued to exist, although its circulation dropped considerably.

[118] In the Nazi era, Franconia was an administrative district in Middle Germany.
[119] Arzt, 'Nuremberg, denazification and democracy: the hate speech problem at the international military tribunal', 18.
[120] Ibidem,16.
[121] IMT, 'Streicher Judgement', *Trial of the German major war criminals. Part 22*, 501.
[122] Ibidem.
[123] Ibidem.

3.2.1(b) Trial and judgement

Julius Streicher's was the ninth of twenty-one cases presented by the Nuremberg prosecution.[124] In Appendix A of the Nuremberg Indictment, dated 6 October 1945, that was presented before the Nuremberg judges on 20 November 1945, the opening day of the tribunal, one can read the official indictment against Julius Streicher as drafted by the prosecutors of the IMT. According to this document, Streicher:

"promoted the accession to power of the Nazi conspirators and the consolidation of their control over Germany set forth in Count One [the Common Plan or Conspiracy, JH] *of the Indictment: he authorized, directed, and participated in the crimes against humanity set forth in Count Four of the Indictment, including particularly the incitement of the persecution of the Jews set forth in Count One and Count Four of the Indictment."*[125]

It was on basis of an indictment on Count One (individual responsibility for the common plan and conspiracy) and Count Four (individual responsibility for crimes against humanity) that the prosecution, personified by Lieutenant-Colonel Griffith-Jones, started the presentation of the Streicher-case on 10 January 1946 with the words: "It is the prosecution's case that for the course of some twenty-five years, this man educated the whole of the German people in hatred, and that he incited them to the prosecution and to the extermination of the Jewish race. He was an accessory to murder, perhaps on a scale never attained before."[126]

The prosecutor stated that Streicher called for the annihilation of Jews as early as 1925 and that his propaganda became even more inciting over the years.[127] Fortified with a series of fragments from numerous speeches of Streicher, from many issues of *Der Stürmer*, such as "Let us make a new beginning so that we can annihilate the Jews";

[124] Arzt, 'Nuremberg, denazification and democracy: the hate speech problem at the international military tribunal', 4.
[125] IMT, 'Indictment of Julius Streicher', *Trial of the German major war criminals. Part 1,* 36. Also available via: http://www.yale.edu/lawweb/avalon/imt/proc/counta.htm.
[126] IMT, 'Presenting the case against defendant Julius Streicher', *Trial of the German major war criminals. Part 4,* 153.
[127] Ibidem*,* 154-160.

"*Der Stürmer* will help to ensure that every German down to the last man will, heart and hand, join the ranks of those whose aim it is to crush the head of the serpent Pan-Juda beneath their heels"; and "Full and final victory will have been achieved only when the whole world has been rid of Jews",[128] the prosecutor concluded that "it is my submission to the tribunal that this is no longer propaganda for the persecution of Jews, this is propaganda for the extermination of Jews, for the murder not of one but of millions."[129]

Apart from high-lighting the active role that Streicher had in systematically[130] creating and disseminating anti-Semitic hate speech, Griffith-Jones also emphasized the criminality of the fact that Streicher seemed to have in-depth knowledge of the atrocities happening in the Eastern territories. "It is really the truth that the Jews, so to speak, have disappeared from Europe and that the Jewish reservoir of the East, from which the Jewish plague had for centuries beset the peoples of Europe, has ceased to exist. However, the Führer of the German people at the beginning of the war prophesised what has now come to pass."[131] With this quote from an article signed by Streicher from an issue of *Der Stürmer* of November 1943, relatively shortly after the destruction of the Warsaw Ghetto in April 1943 and in a time when hundred-thousands of Jews were killed in Dachau and Auschwitz, Griffith-Jones wanted to demonstrate "that he [Streicher, JH] knew what was happening, perhaps not the details, but that he knew that the Jews were being exterminated."[132]

The prosecutor concluded his presentation of the case with the comment that:

"*it may be that this defendant is less directly involved in the physical commission of the crimes against the Jews, of which this Tribunal has heard, than some of his co-conspirators. The submission of the prosecution is that his crime is no less worse for that reason. No Government in the world, before the Nazis came to power, could have embarked upon and put into effect a policy of mass extermination in the way in which*

[128] Quotes from: IMT, 'Presenting the case against defendant Julius Streicher', *Trial of the German major war criminals*. *Part 4,* respectively page 154, 156, 157.
[129] Ibidem*,* 161.
[130] The prosecutor pointed out the omnipresence of hate speech in the articles with the words: "his newspapers were crowded with them, week after week, day after day." IMT, 'Presenting the case against defendant Julius Streicher', *Trial of the German major war criminals*. *Part 4,* 154.
[131] Ibidem, 165.
[132] Ibidem.

they did, without having a people who would back them and support them, and without having a large number of people, men and women, who were prepared to put their hands to their bloody murder. (…) It was to the task of educating the people, of producing murderers, educating and poisoning them with hate, that Streicher set himself. (…) In the early days he was preaching persecution. As persecution took place he preached extermination and annihilation; and (…) as millions of Jews were being exterminated and annihilated, he cried out for more and more. That is the crime that he has committed. It is the submission of the prosecution that he made these things possible, made these crimes possible, which could have never happened, had it not been for him and for those like him. He led the propaganda and the education of the German people in those ways. Without him the Kaltenbrunners, the Himmlers, the General Stroops, would have had nobody to carry out their orders. And, as we have seen, he has concentrated upon the youth and the childhood of Germany. In its extent his crime is probably greater and more far-reaching than that of any of the other defendants." [133]

Basically, the prosecutor held the view that the fact that Streicher did not participate in the actual atrocities and never killed a person, did not release him from individual criminal responsibility for those killings. The systematic spreading of virulent anti-Semitic hate speech while knowing the bloody consequences made Streicher as much a perpetrator as Himmler and confederates.

In the presentation of the defence case, Streicher's defence counsel, Hanns Marx, aimed at convincing the judges of Streicher's innocence by emphasising structurally that although Streicher may have been an anti-Semitic fanatic, he functioned completely out of the official Nation-Socialist Party cadres and therefore could impossibly have had the enormous influence that the prosecution tried to impute to him.[134] Moreover, Marx pointed out the marginal character of the accused's newspaper: "It can be said that during the war *Der Stürmer* no longer attracted any attention worth mentioning. (…) The circulation figures decreased steadily and unceasingly in those years. The influence of

[133] IMT, 'Presenting the prosecution case against defendant Julius Streicher', *Trial of the German major war criminals*. *Part 4,* 171.
[134] This is a very brief summary of what can be read in the final plea of Streicher's defence counsel in: IMT, 'Presenting the defence case against defendant Julius Streicher', *Trial of the German major war criminals*. *Part 18,* 316-336, there 317.

Der Stürmer in the political sphere became non-existent."[135] Also the lack of intent of Streicher to incite the German population to commit atrocities ("His description of the Jews was merely intended to show them as a different and a foreign race and to make it clear that they live according to laws which are alien to the German conception. It was far from his intention to incite or inflame his circle of listeners and readers.")[136] and the fact that "actual hostility against the Jewish population did not exist among the people themselves"[137] (which, according to the defence, implied that Streicher had no influence whatsoever) were raised in Streicher's defence.

One of the strongest arguments of the defence was formulated by the accused himself. Streicher pleaded

"incitement means to bring a person into a condition of excitement which causes him to perform an irresponsible act. Did the contents of Der Stürmer incite, that is the question? (…) Allow me to add that it is my conviction that the contents of Der Stürmer as such were not inciting. During the whole twenty years I never wrote in this connection: 'Burn Jewish houses down; beat Jews to death.' Never once did such an incitement appear in Der Stürmer. Now comes the question: Is there any proof that any deed was done from the time Der Stürmer first appeared, a deed of which one can say that it was the result of incitement? (…) No murder took place, of which one could have said, 'This is the result of an incitement which was caused by anti-Semitic authors or public speakers.'"[138]

And indeed no evidence was presented by the prosecution that linked Streicher directly or even indirectly to the killing or abuse of any victims of Holocaust machinery that was directed by Heinrich Himmler. What is more, no witnesses were presented who linked the reading of *Der Stürmer* to any specific act or atrocity during the war years. Moreover, although Streicher did not mention this, it even would have been possible to question the basic notion on which Streicher's accusation was based. As Feinberg suggested (page 20)

[135] IMT, 'Presenting the defence case against defendant Julius Streicher', *Trial of the German major war criminals*. *Part 18,* 325.
[136] Ibidem, 321.
[137] Ibidem, 326.
[138] IMT, 'Presenting the defence case against defendant Julius Streicher', *Trial of the German major war criminals*. *Part 12,* 308-309.

it might be so that written hate speech can never be provocative, since 'one can always escape the provocation of the printed word simply by declining to read it, and where escape from provocation is that easy, no reasonable men will succumb to it.' Telford Taylor, one of the associate trial counsels of the United States, put it in his memoirs as follows: "the proof was thin." [139]

Despite these objections, Streicher was sentenced to death by hanging.[140] While the judges turned out to be of the opinion that the evidence failed to establish Streicher's connection with the Common Plan or Conspiracy to wage aggressive war and for that reason was not found guilty on Count I of the Indictment, they agreed on the fact that "in his speeches and articles, week after week, month after month, he infected the German mind with the virus of anti-Semitism and incited the German people to active persecution."[141] Furthermore, they concluded that:

"In the face of the evidence before the tribunal it is idle for Streicher to suggest that the solution of the Jewish problem which he favored was strictly limited to the classification of Jews as aliens (…) Streicher's incitement to murder and extermination, at the time when Jews in the East were being killed under the most horrible conditions, clearly constitutes persecution on political and racial grounds in connection with war crimes, as defined by the Charter, and constitutes a crime against humanity."[142]

From this first case in history of convicting someone for hate speech, some fundamental thoughts can be deduced. Streicher was convicted for his comments because these comments incited others to murder and extermination. The tribunal judged this to constitute a crime against humanity in the form of persecution on political and racial grounds in connection with war crimes. Not the speech in itself and its 'mere dissemination' was deemed punishable, but only the fact that it incited others to criminal

[139] Arzt, 'Nuremberg, denazification and democracy: the hate speech problem at the international military tribunal', 19.
[140] http://www.yale.edu/lawweb/avalon/imt/proc/judsent.htm.
[141] IMT, 'Streicher Judgement', *Trial of the German major war criminals. Part 22*, 501.
[142] Ibidem, 502.

action. The principle, agreed on in human rights law,[143] that speech should be restricted when it interferes with the rights of others (according to the judgement, Streicher was responsible indirectly for the murder of thousands), forms a threat to general welfare and public order, and/or incites to crime, was translated into international criminal law by putting Streicher's utterances under the heading of crime of persecution on political and racial grounds.

This fundamental idea seems acceptable. Some questions, however, were not addressed by the judges. The link between Streicher's incitement and the actual killing in the East seemed to establish an element of *causation* in the definition of actionable incitement, which seemed to require both inciting words and the physical realisation of their message.[144] On page 50 of this thesis, it could be read, however, that no evidence linking Streicher's words causally to war crimes was presented. Instead, the text remains rather vague and only refers to his work as poison "injected into the minds of thousands of Germans which caused them to follow the [Nazi]policy of Jewish persecution and extermination" without actually specifying this.[145] The judgement gives no further explanation on the legal requirements for utterances to become inciting. This is a serious flaw in the judgement.

3.2.2(a) Hans Fritzsche: 'His Master's Voice'

Hans Fritzsche, a radio journalist who was born in 1899, was appointed in 1932 to the function of head of the German Wireless News Service, a governmental agency. When this Wireless News Agency was incorporated into the Reich Ministry for People's Enlightenment and Propaganda (Propaganda Ministry) of Joseph Goebbels on 1 May 1933, Fritzsche became a member of the National Socialist Party and joined the Ministry. Within the Ministry, Fritzsche also got the function of head of the news section of the Press Division which he held until 1937. Subsequently, in December 1938, Fritzsche

[143] It should be kept in mind that the international human rights law treaties discussed in chapter two are of later date than this judgement. I do not want to suggest that this judgement followed from notions directly derived from those agreements on human rights.

[144] Jamie Frederic Metzl, 'Rwandan genocide and the international law of radio jamming', *The American journal of international law* 91, no.4 (1997) 628-651, there 636-637.

[145] IMT, 'Streicher Judgement', *Trial of the German major war criminals. Part 22*, 501 and Gregory S. Gordon, 'A war of media, words, newspapers and radio stations: the ICTR media trial verdict and a new chapter in the international law of hate speech', 45. *Va.J.Int'L. 139,* 1-45, there 4.

became head of the German Press Division after which he was promoted three times, respectively from Superior Government Counsel to Ministerial Counsel, then to Ministerial Assistant Director and ultimately to Ministerial Director in 1942.[146] In November of that year, Fritzsche "was relieved of his position as head of the German Press Division by Dr. Göbbels [sic] and accepted, from Dr. Göbbels, a newly created position in the Propaganda Ministry, that of Plenipotentiary for the Political Organisation of the Greater German Radio. At the same time he also became head of the Radio Division of the Propaganda Ministry. He held both these positions in radio until the Nazi downfall."[147]

Throughout the period before and after the launching of the war, Fritzsche made very popular regular radio broadcasts under the titles "Political Newspaper Review", "Political Radio Show", and later "Hans Fritzsche Speaks". Because of Fritzsche's functions as an employee of the Nazi Propaganda Ministry that had the aim to indoctrinate the nation and to spread propaganda in aid of the regime, his broadcasts reflected these purposes.[148] Moreover, as a subordinate of the Propaganda Minister Joseph Goebbels, it was clear to the German people that when they were listening to Fritzsche's broadcasts, they were actually listening to the high command of Nazi Conspirators. This yielded Fritzsche the nickname of *'Die Stimme Seines Herrn'* ("His Master's Voice").[149]

Excerpts from Fritzsche's radio speeches from between 1941 and 1945 show utterances such as "The fate of the Jewry has turned out to be as unpleasant as the Führer predicted it would be in the event of a European war. After the extension of the war instigated by Jews, this unpleasant fate may also spread to the New World, for you can hardly assume that the nations of this New World will pardon the Jews for causing this misery (…)"[150] According to the prosecution in the case against Fritzsche, that will be

[146] IMT, 'Presenting the prosecution case against defendant Hans Fritzsche', *Trial of the German major war criminals. Part 5,* 78.
[147] Ibidem*,* 78-79.
[148] Ibidem*,* 81,83, 86.
[149] Ibidem, 90.
[150] Ibidem.

extensively discussed below, "these broadcasts literally teemed with provocative libels, the only logical result of which was to inflame Germany to further atrocities (…)"[151]

Furthermore, Fritzsche aimed his arrows at the Soviet Union. Speaking about the atrocities committed by the Soviet troops in one of his broadcasts of June 1941, shortly after the invasion of the Soviet Union, Fritzsche commented "it was only the Führer's decision to strike in time that saved our homeland from the fate of being overrun by those sub-human creatures, and our men, women and children from the unspeakable horror of being their prey."[152] In his next broadcast of 10 July 1941 Fritzsche added the message that "one is compelled (…) at last to make the holy resolve to assist in the final destruction of those who are capable of such dastardly acts."[153] It has been said that by means of the broadcasting of Fritzsche's show, 'His Master's Voice' assisted efficiently in the selling of the product of the Nazi conspiracy.[154]

3.2.2(b) Trial and judgement

In the indictment against Hans Fritzsche, dated 6 October 1945 just like Streicher's, we read that the accused was indicted because he used his positions within the Nazi Propaganda Ministry and the personal influence that he possessed, owing to the notoriety of his broadcasts "to disseminate and exploit the principal doctrines of the Nazi conspirators set forth in Count One of the Indictment [the Common Plan or Conspiracy, JH], and to advocate, encourage and incite the commission of the war crimes set forth in Count Three of the Indictment and the crimes against humanity set forth in Count Four of the Indictment including, particularly, anti-Jewish measures and the ruthless exploitation of occupied territories."[155] Note that Fritzsche, just like Streicher, was not indicted for the actual physical committing of war crimes or crimes against humanity, but for his inciting and encouraging comments with regard to these crimes.

Fritzsche's trial started on 23 January 1946, two months after Streicher's first day of trial. In proving the matter, the prosecution in the person of Captain Sprecher,

[151]IMT, 'Presenting the prosecution case against defendant Hans Fritzsche', *Trial of the German major war criminals. Part 5,* 87.
[152] Ibidem, 88-89.
[153] Ibidem, 89.
[154] Ibidem, 91.
[155] IMT, 'Indictment of Hans Fritzsche', *Trial of the German major war criminals. Part 1*, 37-38.

attempted to point out, just like it was done in the Streicher-case, the connection between Fritzsche's hate utterances and the humanitarian catastrophes caused by the Nazis. Maybe, in this case, it was not so much the anti-Semitic propaganda on which the prosecution put its main focus, but more on the war propaganda that urged the German people to be ready to support the atrocities in Eastern Europe:

"representatives of [the] Nazi conspirators did not hesitate to exterminate Soviet soldiers and civilians by scientific mass methods. [The] inciting remarks by Fritzsche make him an accomplice in these crimes because his labelling of the Soviet peoples as members of a 'sub-human world' seeking to 'exterminate' the German people, and similar desperate talk, helped by these propaganda diatribes, to fashion the psychological atmosphere of utter and complete unreason, and the hatred which instigated and made possible these atrocities in the East. (…) Without these incitements of Fritzsche, how much harder it would have been for these conspirators to have effected the conditions which made possible the extermination of millions of people in the East?"[156]

And again, just like we saw earlier in the Streicher-case, the prosecutor believed that: "Indeed, the propagandists who lent themselves to this evil mission of instigation and incitement are more guilty than the credulous and callous minions who headed the firing squads, or operated the gas chambers, of which we have heard so much in these proceedings."[157]

A new aspect in this case was the official status of Fritzsche as a National Socialistic leading exponent. The prosecution emphasized this official relationship that Fritzsche had with the Nazi apparatus to underline his responsibility for the crimes committed during the war: "Fritzsche, throughout his affidavit, constantly refers to his technical and expert assistance to the colossal apparatus of the Propaganda Ministry. (…) We of the prosecution team contend that Fritzsche, one of the most eminent of Göbbels' [sic] propaganda team, helped substantially to bathe the world in the blood bath of

[156] IMT, 'Presenting the prosecution case against defendant Hans Fritzsche', *Trial of the German major war criminals. Part 5*, 89.
[157] Ibidem, 86-87.

aggressive war."[158] Because of Fritzsche's role as an official party functionary who had contacts at the highest levels in the party, and committed himself with an "open mind" to the Nazi policy, as claimed by Sprecher, Fritzsche was personally responsible for the crimes committed by the regime.

As we have seen in §3.2.1(b), the defence team of Julius Streicher opened their plea by stressing the lack of influence that Streicher had on Nazi politics and the German people, for his relationship with the party was not too close. In this line, Fritzsche's defence deemed it relevant to underline that Fritzsche's connections to the Nazi leadership were less close than the prosecution had suggested. About his relationship to Hitler, Fritzsche testified: "I never had a conversation with him. In the course of twelve years, however, I saw him, of course, several times at the Reichstag, on big occasions or receptions. (…) Otherwise, I received instructions from Hitler only through Dr. Dietrich or his representatives, or through Dr. Göbbels [sic] and his various representatives."[159] Additionally, Fritzsche noted on his contact with Goebbels "one can by no means say that we were friends. The relationship was on an official basis, reserved and to a certain extent formal."[160] This led to the statement of defence counsel Fritz that Fritzsche even in his last position as Ministerial Director and Chief of the Broadcasting Division could not have determined the propaganda policy of the Third Reich and therefore could not be held responsible as a creator of the policy; "he was only a person who carried out directives." [161]

With regard to certain quotes from Fritzsche's speeches that were presented by the prosecution as typically inciting and urging for either elimination of the Jews or atrocities against the Soviet people, Fritzsche's defence team found that the prosecution exaggerated the content and overestimated the impact of the fragments.

"The next quotation used by the prosecution refers to excerpts from your [Fritzsche's] speech of 13 January, 1945. - (…) 'Not the least result of German resistance in the field,

[158]IMT, 'Presenting the prosecution case against defendant Hans Fritzsche', *Trial of the German major war criminals*. *Part 5*, 86.
[159]IMT, 'Presenting the defence case of defendant Hans Fritzsche', *Trial of the German major war criminals*. *Part 17*, 240.
[160] Ibidem.
[161] IMT, 'Presenting the defence case of defendant Hans Fritzsche' (final plea), *Trial of the German major war criminals*. *Part 19*, 326, 328.

so unexpected to the enemy, is the fruition of a development which began in the pre-war years, the sub-ordination of British policy to far-reaching Jewish points of view. (…) This whole attempt, aiming at the establishment of Jewish world domination, now increasingly recognisable, has come to a head at the very moment when the peoples' understanding of their racial origins has been far too much awakened to promise success to the undertaking.'[162] (…) - *In these passages you mention Jewish influence on British policies. How could you [Fritzsche] state that? What were your reasons?"*[163]

Fritzsche's answer to this question of his defence counsel Dr. Fritz was: "The prosecution believe it to be possible to conclude from this quotation that it was the introduction to further persecution of the Jews, and to their complete destruction. This conclusion, however, is not justified either in words or in the sense or when seen in the light of the context. (…) I cannot see where an appeal for the destruction of the Jews is to be found."[164]

This also brought the issue of 'intent' to the courtroom again. As a reaction to the accusation of the prosecution that he had assisted Goebbels in plunging the world into the bloodbath of aggressive war, Fritzsche stated that he had never heard of any intention to wage an aggressive war, either from Goebbels or from anyone else. Furthermore, he asserted with regard to the intent with which he broadcast that he had never attempted to arouse hatred: "I never preached hatred generally or attempted to awaken it indirectly."[165] On the contrary, Fritzsche asserted that he had refused requests from Minister Joseph Goebbels to incite antagonism and arouse hatred. He also testified that he was not "noisily anti-Semitic" and that he had even expressed his concern over the content of Streicher's Newspaper, *Der Stürmer*, and that he had tried twice to have it banned.[166]

The defence proceeded with a legal consideration on intent and what instigation or incitement actually is. This he did in order to determine if Fritzsche could be held accountable in this regard.

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[162] IMT, 'Presenting the prosecution case against defendant Hans Fritzsche', *Trial of the German major war criminals*. *Part 5*, 88.
[163] IMT, 'Presenting the defence case of defendant Hans Fritzsche', *Trial of the German major war criminals*. *Part 17*, 259.
[164] Ibidem.
[165] Ibidem, 243.
[166] Ibidem, 245-246, 256-257. See also Gordon, 'A war of media, words, newspapers and radio stations', 4.

"Assistance and instigation accord again as accessorial forms of participation, in that also in the case of instigation a conscious causative connection willed by the instigator must exist between his instigation and the decision of the perpetrator. (…) The perpetration of a deed must correspond with the conception and the will [or 'intent', JH] of the instigator. The instigator is, therefore, only responsible to the extent that his intention goes. (…) Fritzsche's behaviour and utterances, however, were not dictated by criminal will."[167]

Following the Streicher case, the question of 'causality', believed to be a strong card in the hands of hate speech defenders, came up for consideration: "There is not the slightest evidence to show that he has instigated a single person to murder, cruelties, deportations, killing of hostages, massacre of Jews or other crimes mentioned in the Charter, or has caused a single crime by his speeches to the public. (…) That was not possible with public speeches anyway. The crimes which were committed were carried out by people who were completely indifferent to Fritzsche's propaganda."[168] These arguments altogether, as Dr. Fritz concluded, proved that Fritzsche was not guilty in "the sense of the Indictment brought against him before this Tribunal. I ask for his acquittal."[169]

And acquitted he was. The judges acknowledged that Fritzsche held certain high positions in the field of Nazi propaganda, but concluded in favour of the defence that Fritzsche was "merely a conduit" in the hands of others and was not a liable participant in the formulation of these propaganda policies. For this reason, he was acquitted on Count I (the Common Plan or Conspiracy). As far as incitement of hatred and atrocities against the Jews was concerned, the element most interesting in the context of this inquiry, the judges agreed that although his broadcasts were anti-Semitic in nature, they did not urge persecution or extermination. Moreover, Fritzsche did not seem to know about the extermination in the camps in the East and therefore did not know whereto his Anti-Semitism could lead. Conclusively, the Tribunal stated that:

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[167] IMT, 'Presenting the defence case of defendant Hans Fritzsche' (final plea), *Trial of the German major war criminals*. *Part 19*, 349- 351.
[168] Ibidem, 349-350.
[169] Ibidem, 351.

"It appears that Fritzsche sometimes made strong statements of a propagandistic nature in his broadcasts. But the Tribunal is not prepared to hold that they were intended to incite the German people to commit atrocities on conquered peoples, and he cannot be held to have been a participant in the crimes charged. His aim was rather to arouse popular sentiment in support of Hitler and the German war effort. (…) The Tribunal finds that Fritzsche is not guilty on this Indictment."[170]

From this judgement, again, some fundamental notions can be deduced. Fritzsche was charged with incitement to war crimes and crimes against humanity. He was acquitted for the reasons that (1) his broadcasts did not urge persecution or extermination of Jews; (2) he did not know of their extermination in the East; and (3) although unsuccessfully, he twice attempted to have publications of the anti-Semitic *Der Stürmer* suppressed. Therefore, the tribunal did not believe that Fritzsche had the intent to incite the German people to commit atrocities on conquered peoples.

In the judgement, the same ideas can be recognized as in the Streicher holding. Hate speech in itself was not considered as criminal. Only when the hate speech could be legally marked as inciting to criminal action, the speech act became punishable. In the Fritzsche-decision emphasis seemed to have been laid on the question whether Fritzsche acted with malicious intent (mens rea). The fact that he did not know of the extermination of Jews in the East and his attempt to stop two ruthless publications of *Der Stürmer* made the judges conclude that Fritzsche's broadcast were not intended to incite the German people to commit atrocities. This is notable, because the element of intent was not discussed in the Streicher judgement and now it was clarified that in order to be found guilty of incitement certain requirements regarding the intent of the accused should be proven.

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[170] IMT, 'Presenting the defence case of defendant Hans Fritzsche' (final plea), *Trial of the German major war criminals*. *Part 19,* 351. Nevertheless, following his acquittal at Nuremberg, Fritzsche was prosecuted again before a German de-nazification Court (*Spruchkammer I*). This court sentenced him eventually in January 1947 for his participation as *Hauptschuldiger* in the criminal Nazi regime to nine years of forced labor. Subsequently, Fritzsche appealed, but the appeal was rejected and the sentence confirmed. See: Wibke Timmermann, *Incitement, instigation, hate speech and war propaganda in international law,* 12.

Another remarkable element is that although Fritzsche had been responsible for virulently anti-Semitic statements in his broadcasts, which the Tribunal characterized as 'strong statements of a propagandistic nature' it found no evidence of explicit calls for the extermination of Jews.[171] His speeches apparently were not sufficiently direct or unequivocal in calling for the murder of the Jewish people.[172] This of course raised the question: what makes a hateful utterance an explicit call for extermination? The tribunal failed to answer this question; a flaw in the judgement. Certain analysts have interpreted the finding of the judges that Fritzsche's utterances were not direct enough as to set a tough standard of causality between targeted words and specific events. They concluded that this judgement implied that extermination could only be legally imputed to an inciting message if both the inciting words and the physical realization of the message were observed. To be actionable, incitement required specificity and a direct (causal) link to the actions for which it called.[173] When compared to the Streicher judgement, however, this conclusion would raise new questions as it was observed that in the latter judgement the particularities with regard to causation were ignored and nevertheless Streicher was sentenced to death.

3.3 Evaluation

When compared, the judgements of Streicher and Fritzsche teach us interesting lessons on how hate speech was dealt with in international criminal law the first time it was tried. The key-element to take from these cases is that hate speech, in the era of the Nuremberg Trials, only constituted a crime under international criminal law if it clearly and directly incited to a crime acknowledged as a crime by the international community. In my opinion this can be seen as an early notion of what would be recorded later in international human rights law, namely, the idea, that free speech should be restrained from the moment it becomes clear that it stems from a criminal intent and infringes upon the security of the individual or the general welfare. 'Softer' (although not necessarily less offending or disturbing) forms of hate speech are in this manner distinguished from

[171] Jamie Frederic Metzl, 'Rwandan genocide and the international law of radio jamming', *The American journal of international law* 91, no.4 (1997) 628-651, there 637.
[172] Wibke Timmermann, *Incitement, instigation, hate speech and war propaganda in international law,* 12.
[173] Jamie Frederic Metzl, 'Rwandan genocide and the international law of radio jamming', 637

hard-core and very grave and dangerous forms of hate speech. The former are not internationally considered as a crime, but the latter are.

On the other hand, the practical and unequivocal implementation of this principle turned out not to be that easy. Maybe it was for this reason that the case against Julius Streicher is said to have been considered as 'one of the most debatable' of the cases presented at Nuremberg.[174] Judging from the grave punishment of the death-sentence imposed on Streicher, one would expect a systematic, accurate and watertight disquisition of the judges in coming to this condemnation. However, no clear comments were made in the judgement with regard to legal requirements for utterances to be judged as inciting, and a causal link between Streicher's words and atrocities in the East was supposed without debating the lack of evidence for this. The Fritzsche judgement clarified that criminal *intent* was required, and indicated vaguely that the utterance needed to be explicit and direct to a certain extent in order for an utterance to become inciting to criminal action (although no universal testable terms on how to measure intent were given), but the judgement remained just as vague regarding the requirements concerning causation as the Streicher judgement. All this brought Telford Taylor, counsel for the prosecution at the Nuremberg trials, to conclude that "the judges could have done a better job of explaining the legal basis for their verdict" in these cases.[175]

The main problem of the judgements is that the judges seemed to apply principles of law without making them explicit. [176] With this I mean that although the prosecution of the IMT made a (according to the standards of philosophy and human rights) perfectly defendable choice in prosecuting Streicher and Fritzsche because their hate speech could be, theoretically, coupled to the atrocities of the Nazi's, the execution of the trials showed many weak spots. Difficulties in the practical dealings with questions of intent, context and causation, corresponding with the difficulties as signalled in both the philosophical and legal discussion of chapters one and two, seemed to have been felt in Nuremberg, but

[174] Arzt, 'Nuremberg, denazification and democracy: the hate speech problem at the international military tribunal', 4.
[175] Ibidem, 24.
[176] Another example of this can be found in the basic fact that the tribunal "did not deliberate over whether incitement - a word not used in the London's Charter definition of crimes against humanity – was a form of persecution, the only term in the indictment that Streicher's acts could be tied to", but convicted Streicher under precisely this term without explaining it. Arzt, 'Nuremberg, denazification and democracy: the hate speech problem at the international military tribunal', 24.

the Nuremberg judges failed to make these difficulties explicit and analyse them systematically. The result of this was two questionable judgements. Then the bottom-line of this chapter cannot but be that although the IMT implicitly acknowledged the principles regarding hate speech from the philosophical debate of chapter one and anticipated on later agreements of human rights law, the enforcement at the time of the Nuremberg trials was not yet explained in terms of that theory.

4. Systematising international criminal law regarding hate speech

The different treatment of two Nazi hate propagandists at Nuremberg was an indication of ambiguity in international law regarding hate speech offences.[177] However, in this chapter it will appear that six decennia of thinking on the matter have been fruitful since most of the questions raised in the previous chapter have been answered. Here the focus is on hate speech jurisprudence from international criminal law that, to a great extent, stems from the Nuremberg tradition of trying war criminals, but was taken a few steps further by the International Criminal Tribunals for the former Yugoslavia and for Rwanda. This chapter is divided into three parts. First, something is said about the way and to what extent the ICTY and ICTR theoretically deal with hate speech. This can be determined by an analysis of the statutes of the tribunals. I try to point out the significant theoretical development of international criminal law regarding hate speech since the Nuremberg Trials. The other two parts of the chapter consist of the practical implications of the provisions of the statutes as can be determined by an analysis of cases with a link to hate speech. All this in favour of my argument that the enforcement of hate speech law, as far as international law regarding war criminals is concerned, has dealt, to a large extent, with the flaws it contained since Nuremberg.

4.1 Hate speech and the contemporary International Criminal Tribunals

For a long time, the IMT trials against Streicher and Fritzsche remained historical precedents without successors in the area of hate speech jurisprudence. However, after two brutal genocides in the 1990s, namely the atrocities of the war in Bosnia that culminated in the slaughter at Srebrenica of more than 7000 Muslim men in the summer of 1995 and the mass slaughter of Tutsis in Rwanda in 1994, and the establishment of two renowned international criminal tribunals that followed these events, the question of criminalising hate speech in imitation of IMT came on the table again. The International Criminal Tribunal for the former Yugoslavia (ICTY) established in 1993, and the International Criminal Tribunal for Rwanda (ICTR), established in 1994, were the first

[177] Metzl, 'Rwandan genocide and the international law of radio jamming', 636.

International Criminal Tribunals to be established after the closure of the IMT and the International Military Tribunal for the Far East (IMTFE)[178] that had both tried war criminals of the Second World War.[179] In the decades between the closing of the IMT and IMTFE and the establishment of the ICTY and ICTR, international criminal law had time to develop considerably. After the Second World War tribunals, it did not take the international community long to come up with a series of agreements in order to preserve peace, respect for human dignity and human rights. As remarked earlier, the Universal Declaration of Human Rights (UDHR) of 1948, but also the Geneva Conventions of 1949 (and its additional protocols of later date) that cover the way wars may be fought,[180] and the Convention on the Prevention and Punishment of the Crime of Genocide[181] (also called Genocide Convention, see also §2.1.5) that was drafted in 1948 and entered into force in 1951, resulted from international deliberation.

At the time the statutes of the ICTY and ICTR (which are to a great extent identical) were drafted, there was general consensus within the international community regarding the possible dangers of hate speech. The major genocides of the twentieth century like the Holocaust and the genocides in Rwanda and the former Yugoslavia "were preceded and prepared by extensive hate propaganda, which employed as one of its major techniques the dehumanisation of the intended victims." [182] These genocides were heralded by a phase wherein the victim-group was by means of hate speech treated as an out-group and in that way "hate speech [built] an insurmountable wall between the victim group and those remaining in the 'ingroup'."[183]

This notion was translated into the jurisdiction of the new tribunals. Although hate speech as such was still not mentioned as a crime, there was more explicit attention for inciting words than was the case with the statute of the IMT. Where it came as a

[178] In the history of the IMTFE there were no hate speech cases.
[179] Meanwhile the world knows a variety of International Criminal Tribunals. After the establishment of the ICTY and ICTR other tribunals as the Special Court for Sierra Leone (2000), the Extraordinary Chambers in the Courts of Cambodia (2003) and the International Criminal Court (2002) were set up. However, these courts either do not have cases or do not have particular hate speech cases and therefore it was not necessary to study these courts in this inquiry.
[180] For details on the Geneva Conventions of 1949 and the additional protocols see http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/genevaconventions.
[181] For details on the Convention on the Prevention and Punishment of the Crime of Genocide see http://www.unhchr.ch/html/menu3/b/p_genoci.htm.
[182] Timmermann, *Incitement, instigation, hate speech and war propaganda in international law,* 5.
[183] Ibidem.

surprise that the IMT judges saw incitement to racial hate and incitement to extermination of a well-defined group as a form of persecution and consequently as a crime against humanity, due to the fact that the London Charter did not make explicit whether incitement was an element of the crime of persecution, the text of the statutes of the ICTY and ICTR was clearer on how the benches of the ICTY and ICTR would judge incitement. One of the remarkable new elements of the statutes, in comparison to the London Charter, was the article that covered the crime of genocide, infused by the above mentioned Genocide Convention of 1948. Article 4 of the ICTY statute[184] and Article 2 of the ICTR statute[185] state that:

*"*1. *The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.*

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
(a) killing members of the group;
(b) causing serious bodily or mental harm to members of the group;
(c) deliberately inflicting on the group conditions of life calculated to bring about its physical
destruction in whole or in part;
(d) imposing measures intended to prevent births within the group;
(e) forcibly transferring children of the group to another group.

3. The following acts shall be punishable:
(a) genocide;
(b) conspiracy to commit genocide;
(c) direct and public incitement to commit genocide;
(d) attempt to commit genocide;
(e) complicity in genocide"

With provision 3(c), the legal status of incitement became clearer. The specific forms of hate speech that directly and publicly incite to genocide became directly punishable. It should be noted here that "direct and public incitement to genocide, has been held to be

[184] UN Security Council, *Statute of the International Tribunal for the former Yugoslavia*, Resolution 827 (25 May 1993). The relevant parts from the ICTY statute can also be read in Appendix VI.
[185] UN Security Council, *Statute of the International Tribunal for Rwanda,* Resolution 955 (8 November 1994). The relevant parts from the ICTR statute can also be read in Appendix VI.

an inchoate crime."[186] This meant that "genocide clearly falls within the category of crimes so serious that direct and public incitement to commit such a crime must be punished as such, even where such incitement failed to produce the result expected by the perpetrator",[187] or to put it differently, if the inciting comments aimed at unleashing a genocide would not, eventually, lead to genocide, the inciting comments *an sich* were still punishable. On the matter how to determine whether a comment was public and direct enough to fall within this category, the Rwanda Tribunal declared that this should be determined on a "case-by-case basis".[188]

The articles in the statutes of the respective tribunals (Article 5 of the ICTY statute and Article 3 of the statute of the ICTR) that cover crimes against humanity are similar to the IMT provisions considering crimes against humanity. As in the London Charter, persecution on political, racial and religious grounds was defined as a crime against humanity in these articles:

Article 5 (respectively 3):

Crimes Against Humanity

"The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:
(a) murder;
(b) extermination;
(c) enslavement;
(d) deportation;
(e) imprisonment;
(f) torture;
(g) rape;
(h) persecutions on political, racial and religious grounds;
(i) other inhumane acts"

Whether this article was used to convict war criminals for hate speech as in the IMT cases will be seen in the next paragraph.

In conclusion, we can state that with the insertion of the article on the crime of genocide, and in particular the provision on the criminalisation of incitement to genocide,

[186] Timmermann, *Incitement, instigation, hate speech and war propaganda in international law*, 32.
[187] Ibidem, 33.
[188] Ibidem, 34.

international law had refined its conceptions concerning hate speech since Nuremberg. At first sight, however, it seems that the International Criminal Tribunals are still pursuing the policy that hate speech should only be penalised if it has a close connection with criminal *action*. Incitement to genocide has a close connection with doing physical harm to a group. It seems that in international criminal law the mere dissemination of hate speech (think of the CERD provision of chapter two) is not considered important enough to be penalised, but only the dissemination of hate speech when "clear and present" or "imminent" danger to (part of) society is or was the consequence. This would be a continuation of the legal view on hate speech as determined in Nuremberg.

Of course, from merely studying the texts of the statutes it is not possible to see how the tribunals have dealt with hate speech in practice. How are the articles of the statutes interpreted by the prosecution, the defence and the judges? Is it really so that International Tribunals penalise only forms of hate speech inciting to grave atrocities? Or have they succeeded in finding a way to judge 'softer' forms of hate speech as well? To find the answer of the tribunals to these questions, we will now turn to some examples from case-law.

4.2 Dario Kordić and Vojislav Šešelj: hate speech jurisprudence in development

The wars in the former Yugoslavia (1991-1995) were made possible and were sustained by numerous hate speech disseminators. "With the media acting as a go-between, nationalist political propaganda prepared and conditioned public opinion for the war – so fostering the worst atrocities perpetrated in furtherance of ethnic principles."[189] All parties to the conflict were active in spreading messages fuelling hate for other ethnic groups, however, "Serbia's propaganda machine covered the largest area, influenced the largest number of people, and finally, used the technically best organised and equipped medium – television."[190] No information of any importance reached the public without

[189] Renaud de la Brosse, *Political propaganda and the plan to create a 'State for all Serbs'. Consequences of using the media for Ultra-Nationalist ends*. Expert-witness report in the ICTY-case against Slobodan Milošević. See also the transcript of the trial session in this case of 19, 20 and 26 May 2003 via http://www.un.org/icty/transe54/030519IT.htm, http://www.un.org/icty/transe54/030520ED.htm, http://www.un.org/icty/transe54/030526IT.htm.

[190] Velimir Curgus Kazimir, 'Noise and silence', in: Various authors, *The war started at Maksimir* (Belgrade 1997), 157-193, there 164, 172 and 159-160.

comment or interpretation, and propaganda aimed at installing fear ("once the stories about the sufferings of the Serbian people had started – e.g. the media-friendly story about the removal of bones from mass graves – (…) fear became the dominant feeling") was widespread. Messages frequently used by (Bosnian-)Serb-led media were that the Serbs faced a historical threat to their existence in Bosnia-Herzegovina, that 'fundamentalist' or *'Jihad'* Muslims and 'fascist' Croats were determined to commit genocide against the Serbs, and that "the gravity of the threat facing the Serbs justified in advance any measures that they might take against their putative enemies."[191] Moreover, influential politicians called in public speeches for actions against the other ethnic groups. Biased reports full of fear mongering and virulent speeches contributed to the polarisation of the conflict. High political officials supported this policy of disseminating hate.

Although hate speech was quite widespread in the former Yugoslavia of the 1990s, it turned out not to be easy to find hate speech jurisprudence in the history of the tribunal's case-law. From a search in the ICTY indictments it appeared that none of the indicted of this tribunal has been charged with incitement. None was charged with incitement to war crimes or crimes against humanity as Streicher and Fritzsche had been, nor was anyone charged with incitement to genocide under the newly designed article 5 of the ICTY statute. Nevertheless, I eventually found two cases related to hate speech and relevant for this study on the international legal approach. The Croat Dario Kordić, vice-president of the Croatian Democratic Union of Bosnia-Herzegovina between 1991 and 1993 and president of this party since July 1994, was indicted for "encouraging, instigating and promoting hatred, distrust and strife on political, racial, ethnic or religious grounds, by propaganda, speeches and otherwise" and the Serb Vojislav Šešelj was indicted in the modified amended indictment of 15 July 2005 for the "direct and public denigration through 'hate speech'" of certain ethnical groups. [192]

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[191] Mark Thompson, *Report on media,* expert-witness report in the ICTY-case against Momčilo Krajišnik. See also the transcript of the trial session in this case of 30 June 2005 via: http://www.un.org/icty/transe39/050630IT.htm.

[192] ICTY, *The Prosecutor v. Dario Kordić and Mario Čerkez. Judgement*, Case no. IT-95-14/2-A (26 February 2001) 59 and *The Prosecutor v. Vojislav Šešelj. Modified Amended Indictment* (15 July 2005)/ *The Prosecutor v. Vojislav Šešelj. Reduced Modified Amended Indictment* (29 March 2007) Case no. IT-03-67. The cases against Kordić and Šešelj involve additional charges, but as the charges of 'encouraging and

4.2.1 Trials and judgements

The case against Dario Kordić can be considered as innovative in the field of the criminalisation of hate speech. Dario Kordić was the first to be indicted in the history of the ICTY for persecution as a crime against humanity because of his role in encouraging and instigating ethnic hatred. In fact, he was also the first in history to be prosecuted for speech acts falling short of incitement; Kordić was not accused for 'inciting people to active persecution' or 'incitement to murder and extermination' like Streicher.[193] According to the prosecution not only hate speech directly and explicitly inciting should be considered criminal. No, encouraging hatred *was a crime* even if it did not directly or explicitly incite or lead to criminal action. As can be concluded from §4.1, this legal idea was not explicitly recorded in the statute of the tribunal and could only be recognized when the judges would be willing to accept that the mere act of encouraging hatred could be legally interpreted as a form of persecution on political, racial and religious grounds.

On the course of this trial and the success of the prosecution in broadening the hate speech regulations in international criminal law, I do not need to dwell. The allegations of the prosecution were supported by witness-testimonies, although not many examples of this can be found in the judgement. Kordić was said to have made inflammatory speeches on several occasions and one witness testified that the public attending one of his speeches saluted him using the 'Hitler Salute'[194] The defence contested the allegations by stating that Kordić never used derogatory terms with regard to Muslims, and that his speeches were never racially inflammatory and therefore could not have incited hatred. As will be seen, for technical reasons alone, however, the historical attempt of the ICTY prosecution to get Kordić sentenced for persecution on political, racial or religious grounds (Art. 5(h) of the statute) on the basis of his hateful speech failed.

The Trial Chamber in the Kordić-case acknowledged that the crime of persecution under Article 5(h) of the Statute had never been comprehensively defined: "Neither

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instigating hatred' and 'denigration through hate speech' were the only relevant charges in the context of this paper, I focus solely on those ones.

[193] ICTY, *The Prosecutor v. Dario Kordić and Mario Čerkez. Judgement,* §209, footnote 272.

[194] Ibidem, §655(a).

international treaty law nor case law provides a comprehensive list of illegal acts encompassed by the charge of persecution, and persecution as such is not known in the world's major criminal justice systems." [195] This implied that in order to judge if 'encouraging and instigating hatred' was an illegal act 'encompassed by the charge of persecution', the Chamber needed to develop its own standards of requirement regarding the crime of persecution. And so they did.

The Chamber stated that persecution was constituted by 1) a gross and blatant denial, 2) on discriminatory grounds, 3) of a fundamental right laid down in international customary or treaty law, 4) reaching the same level of gravity as the other crimes against humanity enumerated in Article 5 of the statute [emphasis original].[196] Especially, this last provision had important consequences as it resulted in the exclusion of some acts from the realm of persecution because "not every denial of a human right may constitute a crime against humanity."[197] Eventually, this led the judges to conclude that acts such as "murder, imprisonment, and deportation", attacks on property as would constitute "a destruction of the livelihood of a certain population" or the "destruction and plunder of property, unlawful detention of civilians and the deportation or forcible transfer of civilians" constituted persecution.[198] However, 'encouraging and promoting hatred on political etc. grounds', the hate speech act for which the prosecution wished to convict Kordić, *did not* by itself constitute persecution as a crime against humanity in the eyes of the judges. Mainly, for the reasons that it did not rise to the same level of gravity as the other acts enumerated in Article 5 and that the criminal prohibition of this act had not attained the status of customary international law. "Thus to convict the accused for such an act as is alleged as persecution would violate the principles of legality."[199] It was in this manner that the attempt of the ICTY prosecution division to force a breakthrough in international criminal law regarding hate speech broke down.

It was not until July 2005 that a new indictment with a hate speech charge emerged. During the war, in almost daily rallies, Vojislav Šešelj, the president and founder of the Serbian Radical Party and from June 1991 onwards a member of the

[195] ICTY, *The Prosecutor v. Dario Kordić and Mario Čerkez. Judgement,*, §192.
[196] Ibidem, §195.
[197] Ibidem, §196.
[198] Ibidem, §198.
[199] Ibidem, §209.

Assembly of the Republic of Serbia, called for Serb unity and war against Serbia's "historic enemies" such as the ethnic Croat, Muslim and Albanian populations that lived in the territories of the former Yugoslavia. By espousing and encouraging the creation of a homogeneous 'Greater Serbia' by violence, he engaged in war propaganda and incitement to hatred towards non-Serb people.[200] For these reasons, Šešelj was indicted for the crime against humanity of persecutions on political, racial and religious grounds which included according to the prosecution "the direct and public denigration through 'hate speech' of the Croat, Muslim and other non-Serb populations in Vukovar, Zvornik and Hrtkovci on the basis of their ethnicities."[201] Unfortunately, it is only possible to speculate on the future judgement in this case as the trial against the Serbian radical politician started only in November 2006 and was already considerably delayed. The trial was suspended in December 2006 because Šešelj went on a hunger strike. In light of the increasingly worse medical situation of the accused, the appeals chamber "nullifie[d] the opening of the proceedings in this case and order[ed] that the trial restart" when Vojislav Šešelj "is fully able to participate in proceeding as a self-represented accused."[202] Therefore little can be concluded from this case yet.

What *can* be said, however, is that this was the first ICTY indictment in which the term 'hate speech' was literally used. Furthermore, it is remarkable that the Prosecution chose the same strategy as in the Kordić case. Why should the dissemination of hate speech lacking incitement now be accepted as a form of persecution rising to the same level of gravity as the other acts enumerated in Article 5 of the statute? This approach failed in the Kordić case and why should it succeed now? One possible explanation lies in the development of international criminal law on hate speech between the drafting of the Kordić verdict (26 February 2001) and the drafting of the indictment against Šešelj (15 July 2005). So it was not the ICTY that accomplished a breakthrough in international law concerning hate speech. This breakthrough came with the release of the ICTR verdict of 'the Media Trial' on December 3, 2003.

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[200] International Criminal Tribunal for the former Yugoslavia, *The Prosecutor v. Vojislav Šešelj. Modified Amended Indictment*,(15 July 2005)/ *The Prosecutor v. Vojislav Šešelj. Reduced Modified Amended Indictment* (29 March 2007) Case no. IT-03-67, §4 and §10(c).
[201] ICTY, *The Prosecutor v. Vojislav Šešelj (Reduced). Modified Amended Indictment*, 17(k).
[202] http://www.un.org/icty/cases-e/index-e.htm

4.3 Nahimana, Barayagwiza, Ngeze and 'the Media Trial'

As Gregory Gordon put it, the ICTR case against Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze, also known as the *Nahimana et.al* case or 'the Media Trial', was epoch-making for several reasons: "Beyond its importance in bringing three key perpetrators of the Rwandan genocide to justice, the case stands as a landmark in the jurisprudence of hate speech. (…) The importance of *The Prosecutor v. Nahimana* becomes apparent when one considers the dearth of international precedent regarding media hate speech leading up to it."[203] A body of law, serving as example for this trial, was mainly derived from the cases against Streicher and Fritzsche. In its own turn, the *Nahimana et.al.* case has the ability now to function as a precedent in itself for later cases involving human rights and free expression because of its renewed and updated legal explanation of "how instruments of mass media can be responsible for using words to commit genocide."[204] The judgement was said to provide analytical criteria to understand how certain words, their purpose, context, speaker, and target can be examined to determine when the exercise of free speech corrodes into illegal advocacy."[205]

Ferdinand Nahimana, who was born in 1950, was (after an academic career as, successively, lecturer of history at the National University of Rwanda, Dean of the Faculty of Letters of this University, and President of the Administrative Committee of an annex campus of this University) eventually appointed Director of the Rwandan Office of Information in 1990. In this post he remained until 1992. In the same year, Nahimana joined a *comité d'initiative* to set up the broadcasting company known as *Radio Télévision Libre des Milles Collines* (RTLM). In addition, he was also a member of the political faction *Mouvement Révolutionnaire National pour le Développement* (MRND). The lawyer Jean-Bosco Barayagwiza was born in 1950 as well and just like Ferdinand Nahimana he was a member of the founding committee of RTLM. Additionally, he was a founding member of the extremist political *Coalition pour la Défense de la République* (CDR) and held the post of Director of Political Affairs in the Ministry of the Foreign Affairs of Rwanda in the first half of the 1990s. Hassan Ngeze

[203] Gordon, 'A war of media, words, newspapers and radio stations', 3.
[204] Ibidem, 26.
[205] Ibidem, 26.

was born in 1957 and worked from 1978 onwards as a journalist. In 1990, he founded the newspaper *Kangura* and became its editor-in-chief. Like Barayagwiza, he was a founding member of the CDR.[206]

On 1 October 1990, a bloody civil war commenced in Rwanda between the Rwandan government and Tutsis of the Rwanda Patriotic Front (RPF). During the years between 1 October 1990 and early April 1994 the Hutu population targeted the Tutsi population as suspected RPF accomplices, which included a number of violent attacks that resulted in the killing of Tutsi civilians. However, during this period the Tutsi-led RPF also engaged in attacks on Hutu civilians.[207] On 6 April 1994, though, after the shooting down of the plane carrying Rwanda's President Habyarimana and his death as a consequence of the attack, the already outrageous situation culminated into the widespread and systematic attack of radical Hutu on the Tutsi population of the country.[208] More then 800.000 thousand people were killed in only three months' time in what would go down into history as the 'Rwandan genocide'. It was in this hostile context that the recently established radio station *Radio Télévision Libre des Milles Collines* (RTLM) that had started in July 1993, broadcast radio shows full of ethnic hate speech directed against the Tutsi people. The issues of *Kangura*, published between 1990 and 1995, were also filled with hateful messages regarding the Tutsi. It was because of these facts that Nahimana, Barayagwiza and Ngeze were indicted for their responsibility for the atrocities in Rwanda.

4.3.1 Trial and judgement

The ICTR trial chamber decided to a joint trial of the three men as "their alleged acts formed part of a common scheme."[209] Like Barayagwiza, Nahimana stood accused mainly in relation to his work for the radio station *Radio Télévision Libre des Milles Collines* (RTLM), although the former stood charge for his CDR activities as well. In November 1999 Nahimana was indicted with seven counts: conspiracy to commit genocide, genocide, direct and public incitement to commit genocide, complicity in

[206] International Criminal Tribunal of Rwanda (ICTR), *The Prosecutor v. Nahimana et.al. Judgement*, Case no. ICTR-99-52-T (3 December 2003), §5, §6 and §7.
[207] ICTR, *The Prosecutor v. Nahimana et.al. Judgement*, §120.
[208] Ibidem, §118.
[209] Ibidem, §34.

genocide, and crimes against humanity (persecution, extermination and murder), "pursuant to Articles 2 and 3 of the Statute"[210] (see §4.1 and appendix VI). In respect to these counts he was charged with individual responsibility under Article 6(1) of the Statute and with superior responsibility under Article 6(3)[211] with regard to the direct and public incitement to commit genocide and the crime against humanity of persecution.[212]

In the indictment of Barayagwiza of April 2000, we can read that Barayagwiza was indicted for the same counts as Nahimana, although he was indicted for two other crimes as well, namely the two of serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II of the Geneva Conventions (which are not relevant to be discussed here and of which he was acquitted in September 2002 anyway).[213] Next to being charged with individual responsibility under Article 6(1), Barayagwiza was also charged with superior responsibility under Article 6(3) of the Statute in respect of all the crimes, except for the crime of conspiracy to genocide.[214] Like Nahimana and Barayagwiza, Hassan Ngeze was indicted with the seven counts of conspiracy to commit genocide, genocide, direct and public incitement to commit genocide, complicity in genocide, and crimes against humanity (persecution, extermination and murder), pursuant to Articles 2 and 3 of the Statute. And again, just like the others, Ngeze was charged with individual responsibility for these crimes under Article 6(1) and with superior responsibility under Article 6(3) "in respect of all but one of the crimes – conspiracy to commit genocide." The charges against Ngeze mainly related to his work for the newspaper *Kangura*.[215] Of all the charges against the three men as summed up above, only the treatment of the charges of direct and public incitement to commit genocide and the crime against humanity of persecution (the charges directly relating to hate speech) are discussed here.

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[210] ICTR, *The Prosecutor v. Nahimana et.al. Judgement*, §8 and §9.
[211] Article 7(3) of the ICTY Statute (or Article 6(3) of the ICTR Statute): " The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."
[212] ICTR, *The Prosecutor v. Nahimana et.al. Judgement*, §8.
[213] Ibidem,§9.
[214] Ibidem.
[215] Ibidem, §10.

With regard to the charges against Nahimana and Barayagwiza and the broadcasts of RTLM, several hundreds of tapes were introduced as evidence by the prosecution. Many of them, especially the ones that raised the issue of ethnicity and that called for action, were discussed in court.[216] The dissemination of hateful messages by RTLM from 1993 onwards in a time of regular hostilities was said to have contributed considerably to the atrocities. Not in the last place because many witnesses testified that the radio played a significant role in the lives of the Rwandans. The broadcasts of RTLM were a common topic of conversation in homes, offices and in the streets in the Rwanda of the early ninety-nineties and in that way the broadcasts could have substantial influence in the process of encouraging the population to kill, commit acts of violence and persecutions against the Tutsi population.[217]

Next to ethnic stereotyping in reference to physical characteristics ("the mere fact of seeing a Tutsi strolling about forces you to say he has a beautiful nose"),[218] RTLM engaged in ethnic stereotyping in economic and political terms as well.[219] Thus, it happened that the prosecution presented an item of 25 October 1993 in which the 'unfair' economic relations were pointed out by stating that "the Tutsi who own taxis are 70% of all who own taxis in this country (…) no one can prevent these statistics from being known where they exist in the world. The richest in the world are written of in books while one mentions the poorest of the world and calls them tramps."[220] In the radio show of 23 March 1994 the RTLM journalists warned the listeners that "the *Inkotanyi*[221] still have the single objective: "to take back the power that the Hutus seized from them the Tutsis in 1959; take back the power and keep it for as long as they want."[222] Concerning

[216] ICTR, *The Prosecutor v. Nahimana et.al. Judgement*, §344.
[217] Ibidem, §342 and §343. And Frederic Metzl, 'Rwandan genocide and the international law of radio jamming' 650.
[218] ICTR, *The Prosecutor v. Nahimana et.al. Judgement,* §368.
[219] Ibidem, §363.
[220] Ibidem.
[221] The name *Inkotanyi* was (just like *Inyenzi*, see also footnote 230) widely used by Hutus during the war to refer to the Tutsi. The name springs from the name of a 19th century Tutsi militia of feudal kings who forced the Hutus into submission. In that way the term was used to remind the Hutus of the past Tutsi oppression.
[222] ICTR, *The Prosecutor v. Nahimana et.al. Judgement*, §361. This fragment (just like many other fragments in the RTLM and Kangura history) refers to an episode from contemporary Rwandan history. During large parts of the twentieth century the Hutu were dominated by the Tutsi in Rwanda which led, for instance, to an overthrow of the Tutsi government by a Hutu revolt in 1959 (the end of the Belgian mandate period that ran from 1918 to 1962). Contemporary Rwandan history has known several of these revolutions

the quote referring to the distribution of economic means, expert witness Alison Des Forges, called by the prosecution, stated that "this attempt to portray the Tutsi as unjustifiably wealthy in a country of enormous poverty contributed to hostility against the Tutsi."[223] On the more politically coloured fragment of 23 March 1994 another expert-witness, Jean-Pierre Chrétien, remarked that the fragment was aimed at emphasizing and enforcing the fear to be felt by the Hutu who had been subjugated by the Tutsi.[224] According to the prosecution more 'heating up heads' was done by calling the public to arms. In an RTLM broadcast of 16 March 1994 the public was encouraged to rise against the Tutsi: " 'We shall be behind our army and, if need be, we shall take up any weapon, spears, bows. (…) we shall also rise up. (…) the Inkotanyi must know that whatever they do, destruction of infrastructure, killing of innocent people, they will not be able to seize power in Rwanda.'"[225]

After 6 April 1994, the day that the presidential plane was shot down and the genocide started, the broadcasting of hate-spreading messages by RTLM continued and the virulence increased. The prosecution even presented evidence of explicit calls for the killing of Tutsi civilians by RTLM presenters: "At all costs, all *Inkotanyi* have to be exterminated, in all areas of our country."[226] Other examples of this blunt call for aggression could be found in the broadcast of 13 May 1994, "wipe them from human memory",[227] or in the broadcast of 29 May 1994 in which the Hutu radio host "advised listeners to identify the enemy by his height and physical appearance. 'Just look at his small nose and then break it.'"[228] Moreover, in the months leading up to the genocide and also after 6 April, RTLM explicitly mentioned the names of 'suspect' Tutsis in its

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and coups. For a brief overview of the twentieth century history of Rwanda, have a look at, for instance, the Encyclopaedia Brittanica 2007.

[223] ICTR, *The Prosecutor v. Nahimana et.al. Judgement*, §365. Alison Des Forges is a historian and advisor for the NGO Human Rights Watch. She is widely known for her knowledge of Rwandan history.

[224] ICTR, *The Prosecutor v. Nahimana et.al. Judgement*, §362. Jean-Pierre Chrétien is a historian, specialized in the history of the African Great Lakes region. He is also a director of the French *Centre National de la Recherche Scientifique* (CNRS).

[225] Ibidem, §370 and §371.

[226] Ibidem, §425.

[227] Ibidem, §483.

[228] Ibidem, §396.

shows. With regard to this, various prosecution witnesses testified that "individuals referred to in RTLM were subsequently killed as a result of the broadcasts."[229]

It was the innumerable examples of hard evidence in the form of tapes, amplified by testimonies, that led the judges to accept as a fact that:

"RTLM broadcasts engaged in ethnic stereotyping in a manner that promoted contempt and hatred for the Tutsi population. RTLM broadcasts called on listeners to seek out and take up arms against the enemy. The enemy was identified as the RPF, the Inkotanyi, the Inyenzi[230] and their accomplices, all of whom were effectively equated with the Tutsi ethnic group by the broadcasts. After 6 April 1994, the virulence and the intensity of RTLM broadcasts propagating ethnic hatred and calling for violence increased. These broadcasts called explicitly for the extermination of the Tutsi ethnic group. Both before and after 6 April 1994, RTLM broadcast the names of Tutsi individuals and their families, as well as Hutu political opponents. In some cases, these people were subsequently killed, and the Chamber finds that to varying degrees their deaths were causally linked to the broadcast of their names."[231]

Although the presentation of the broadcasts was mostly in the hands of others,[232] the Tribunal held Nahimana and Barayagwiza responsible for above mentioned facts. The Chamber found that:

"from the time of its creation onwards through April 1994 Nahimana and Barayagwiza, through their respective roles on the Steering Committee of RTLM, which functioned as a board of directors, effectively controlled the management of RTLM. (…) Nahimana was, and was seen as, the founder and director of the company, and Barayagwiza was, and was seen as, his second in command. Nahimana and Barayagwiza represented RTLM

[229] ICTR, *The Prosecutor v. Nahimana et.al. Judgement*,§445.
[230] "*Inyenzi*, or cockroach, was a term coined in the 1960s by some of Rwanda's governing Hutus to refer to rebel fighters of Rwanda's minority ethnic group, the Tutsi. In the early 1990s, *Inyenzi* became a slur applied to any Tutsi" as explained by Susan Benesch in 'Inciting genocide, pleading free speech', *World Policy Journal* 11 no.2 (2004) via: http://www.worldpolicy.org/journal/articles/wpj04-2/Benesch.html.
[231] ICTR, *The Prosecutor v. Nahimana et.al. Judgement,* §486 and §487.
[232] Of the broadcasts mentioned in the judgement a great number was hosted by Kantano Habimana, Noël Hitimana, Gaspar Gahigi and Valerie Bemeriki.

externally in an official capacity. Internally, they controlled the financial operations of the company and held supervisory responsibility for all activities of RTLM, taking remedial action when they considered it necessary to do so. Nahimana also played an active role in determining the content of RTLM broadcasts, writing editorials and giving journalists texts to read."[233]

Despite Nahimana's testimony that after 6 April 1994 he was no longer in contact with the RTLM broadcasting company and that the Steering Committee no longer existed[234] and that for this reason Nahimana and Barayagwiza carried no longer responsibility for the broadcasts, the Chamber concluded that also after 6 April 1994 Nahimana and Barayagwiza held at least *de jure* authority over RTLM and for that reason could be held responsible with regard to the broadcasts after this date as well.[235]

Turning to the case of Ngeze and to the written hate speech published in *Kangura*, the trial showed a similar course. The factual findings section of the judgement started with some general findings concerning *Kangura*. It was said to have been the best-known paper in Rwanda.[236] The first issue of the newspaper was published in May 1990, the last in 1995. From the first to the last issue Hassen Ngeze was its editor-in-chief. The overall direction of the paper and "all authority connected with the newspaper remained in his hands throughout all of its publications."[237] From examples of *Kangura* articles, brought in by the prosecution and studied by the Trial Chamber of the ICTR, it appeared that Ngeze, just like his RTLM colleagues, did not eschew writing and/or publishing virulent speech. In general "the Hutu were portrayed as generous and naïve, while the Tutsi were portrayed as devious and aggressive."[238] In doing so it made mention of examples of ethnic unrest from history as an aide in the effort to inflame ethnic resentment.[239] As early as December 1990, Ngeze published an article in *Kangura* entitled "Appeal to the conscience of the Hutu". Firstly, the readers were urged to "be prepared to defend

[233] ICTR, *The Prosecutor v. Nahimana et.al. Judgement,* §567.
[234] Ibidem, §538.
[235] Ibidem, §568.
[236] Ibidem, §122.
[237] Ibidem, §123.
[238] Ibidem, §176.
[239] Ibidem §184.

themselves against this scourge. (…) cease feeling pity for the Tutsi!"[240] Then the, so-called, 'Ten Commandments' followed, of which, for instance, the fourth is quite typical, as far as tone is concerned:

"Every Hutu male must know that all Tutsis are dishonest in their business dealings. They are only seeking ethnic supremacy. (…) Shall be consequently considered a traitor, any Hutu male:

- *who enters into a business partnership with Tutsis;*
- *who invests his money or State money in a Tutsi company;*
- *who lends to, or borrows from, a Tutsi;*
- *who grants business favours to Tutsis"*[241]

Several witnesses testified to the impact of the publication of the 'Ten Commandments' in *Kangura.*[242] These witnesses perceived a link between the 'Commandments' and the perpetration of violence against the Tutsi population. One witness in the case against Ngeze testified that "for me that was incitement to hatred. The Hutus were being asked to rise up against the Tutsis. (…) I think this was meant to prepare the killings."[243]

Another issue of *Kangura*, scrutinized in depth during the trial against Ngeze, was no. 26, published in November 1991. The cover of this issue opened with the header "What weapons shall we use to conquer the Inyenzi once and for all?"[244] A machete was pictured next to the text; according to prosecution Expert Witness Mathias Ruzindana, a refined way of spelling out the answer to the question imposed.[245] François-Xavier Nsanzuwera, the former prosecutor of the court in Kigali, testified that this cover of *Kangura* issue 26 was distributed free of charge in February 1992 and played an important role in the Bugesera massacre of Tutsis in the same month: "if there had not been wide distribution of this cover, the numbers killed would not have been

[240] ICTR, *The Prosecutor v. Nahimana et.al. Judgement*, §139.
[241] Ibidem.
[242] Ibidem, §158.
[243] Ibidem, §141.
[244] Ibidem,, §160.
[245] Ibidem, §161. Mathias Ruzindana is a linguistic expert in the language of Rwanda. He studied the oral tradition of the country extensively.

significant."[246] Furthermore, the publication of the article 'A cockroach cannot give birth to a butterfly' (*Kangura* no. 40, 1993) was discussed to the further incrimination of Ngeze. In it was the publication of lists of names, comparable to the naming of 'suspect' Tutsis in the RTLM broadcasts and a portrayal of the Tutsi as biologically distinct from the Hutu, mean and vengeful as snakes, and as "innately evil" with the weapons of money and women.[247] The judges concluded that "By generating fear, providing names, and advocating this kind of pre-emptive strike, *Kangura* clearly intended to mobilize its readers against the individuals named."[248]

In the last part of the judgement (part IV) these findings were combined in a well-balanced judgement on the extent to which the three accused could be held guilty for the crimes indicted. After a careful consideration all three were found guilty by the ICTR judges of direct and public incitement to genocide and the crime against humanity of persecution.[249] As a consequence, Nahimana, Barayagwiza and Ngeze were sentenced to prison for the remainder of their life.[250] The interesting thing about the judgement is that the conviction of the three hate speech disseminators consisted of two elements. On the one hand they were convicted for their incitement to criminal action (think of the Streicher and Fritzsche cases). On the other hand they got convicted for the dissemination of hate speech; a conviction contemplated by the ICTY prosecution in the Kordić case that failed on the basis that this would have violated 'the principles of legality'.

How the judges came to this innovative conclusion becomes clear from considered judgement of the general principles that, according to them, could be deduced from the international agreements regarding hate speech.[251] These general principles define, for instance, the elements of 'direct and public incitement to genocide'. So, with this set of principles it can be established whether a certain hate speech utterance actually

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[246] ICTR, *The Prosecutor v. Nahimana et.al. Judgement*,§168.
[247] Ibidem, §187 and §188.
[248] Ibidem, §206.
[249] Ibidem, §1092, §1093 and §1094. Except for the counts for which Barayagwiza was acquitted earlier in the trial, all accused were convicted for all indicted counts. For the purpose of my thesis, though, only the conviction for direct and public incitement to genocide and crimes against humanity (persecution) are relevant.
[250] Ibidem, §1105, §1106 and §1108. It should be mentioned that through a decision of the Appeals Chamber of 31 March 2000 Barayagwiza was entitled to a reduction of his sentence because of earlier "violation of his rights". Therefore, Barayagwiza was eventually sentenced to "twenty-seven years, three months and twenty-one days."
[251] These international agreements are discussed in chapter two of this thesis.

incited the criminal act of genocide. A test consisting of three elements was established. First of all the, judges pointed out that the *purpose* of the message had to be analysed. Was the language used, intended to inflame or incite to violence? [252] By determining the intent of the author, publisher or broadcaster the scope of his responsibility could be verified. To what extent there was intent could be found out by determining the content of the message, as well as the tone. A message consisting of the text "'that they are the ones who have all the money' differs from the statement about taxi ownership[253] in that it is a generalization that has been extended to the Tutsi population as a whole."[254] The Chamber considered that it was critical to distinguish between the discussion of ethnic consciousness and the promotion of ethnic hatred.[255] The tone of the broadcast, for instance, was different in the latter case and conveyed the hostility and resentment of the journalist. Although this broadcast did not consist of direct incitement (it did not call directly for action), it demonstrated that ethnic consciousness developed over time to harmful ethnic stereotyping. Eventually this resulted in broadcasts like that of 4 June 1994 in which the radio host told his listeners to "look at his small nose and then break it"; a message that does not hide much as far as intent is concerned.

The Chamber ended its discussion on 'how to measure intent' with the comment that "in determining whether communications represent an intent to cause genocide and thereby constitute incitement, the Chamber considers it significant that in fact genocide occurred." In addition, the Chamber added that "the media intended to have this effect is evidenced in part by the fact that it did have this effect."[256] With this statement the court provided insight into its views on intent. It can be observed in hindsight: if the crime occurred, there must have been intent to effectuate that crime.

The next element that should be closely scrutinized in determining if incitement was the case is the *context*: "The context is taken into account in determining the potential impact on national security and public order. (…) A statement of ethnic

[252] ICTR, *The Prosecutor v. Nahimana et.al. Judgement*, §1001.
[253] The quote referred to is: "The Tutsi who own taxis are 70% of all who own taxis in this country (…) no one can prevent these statistics from being known where they exist in the world. The richest in the world are written of in books while one mentions the poorest of the world and calls them tramps." ICTR, *The Prosecutor v. Nahimana et.al. Judgement*, §363.
[254] Ibidem, §1021.
[255] Ibidem, §1020.
[256] Ibidem, §1029.

generalization provoking resentment against members of that ethnicity would have a heightened impact in the context of a genocidal environment. It would be more likely to lead to violence. At the same time the environment would be an indicator that incitement to violence was the intent of the statement."[257] So if a hateful message is disseminated in an environment full of tension, a hate crime will be more likely to occur and, as a consequence, the disseminator of the hate message carries a higher level of responsibility for the crime.

Subsequently, *causation* was considered. From the Streicher and Fritzsche cases it was clear that whereas the defence teams had thought it very relevant, this point remained (just as the element of *intent)* underexposed during the Nuremberg trials. As could be read in the third chapter, critics of the Streicher and Fritzsche judgements all commented on the lack of explanation regarding supposed causal links (or in the case of Fritzsche, the supposed lack of such a causal link) between the words of Streicher and Fritzsche and atrocities that followed. The ICTR Trial Chamber acknowledged this lack of a specific causation requirement in international jurisprudence.[258] With regard to the inchoate act of incitement to genocide the Chamber concluded though, that a causal relationship between the speech of a defendant and ensuing massacres is *not requisite* to a finding of incitement: "It is the *potential* [italics added, JH] of the communication to cause genocide that makes it incitement."[259] And even more in general, the ICTR stated that eventually causation does not have to be proven in cases focusing on hate speech offences because "incitement is a crime regardless of whether it has the effect that it intends to have."[260] When hate speech is inciting to a crime, it can be quite simply tried because incitement to a crime is a crime *per se*. This, as has been discussed, does not apply to milder forms of hate speech that can not be considered inciting. For that reason the ICTR also specified its decision concerning that other crime, not related to incitement: the crime against humanity of persecution on political, racial and religious grounds.

[257] ICTR, *The Prosecutor v. Nahimana et.al. Judgement*, §1004 and §1022.
[258] Ibidem,§1007.
[259] Ibidem, §1015.
[260] Ibidem, §1029.

The Chamber explained that the crime of persecution required, just like the crime of direct and public incitement to genocide, a finding of malicious *intent* (said differently, there should be an illegal *purpose*). To be more accurate, for persecution to be determined, this intent should be discriminatory on racial, religious or political grounds.[261] The Chamber concluded that RTLM and *Kangura* "as has been shown by the evidence essentially merged political and ethnic identity, defining their political target on the basis of ethnicity and political positions relating to ethnicity. In these circumstances, the Chamber considers that the discriminatory intent of the Accused falls within the scope of the crime against humanity of persecution on political grounds of an ethnic character."[262]

With regard to the nature of the utterances and *causation* it is important to note that in order to judge the dissemination of hate speech as 'persecution on political, racial and religious grounds' their need *not* be a *call to action* as is the case with the crime of incitement: "Unlike the crime of incitement, which is defined in terms of intent, the crime of persecution is defined also in terms of impact. It is not a provocation to cause harm. It is itself the harm."[263] From this argument it can be concluded that causation, as was the case with the crime of incitement, is of no relevance when judging certain forms of hate speech as persecution. In contrast to the crime of incitement, however, the wording of hate speech does not need to be inciting here.

Furthermore, the Chamber emphasized that according to earlier ICTR jurisprudence considering persecution, the crime requires "*a gross blatant denial of a fundamental right*".[264] The tribunal held that the broadcasts of RTLM and the issues of *Kangura* "in singling out and attacking the Tutsi ethnic minority, constituted a deprivation of the fundamental rights to life, liberty and basic humanity enjoyed by members of the wider society."[265] This is so because "hate speech is a discriminatory form of aggression that destroys the dignity of those in the group under attack. It creates a lesser status not only in the eyes of the group themselves but also in the eyes of others

[261] ICTR, *The Prosecutor v. Nahimana et.al. Judgement*, §1071.
[262] Ibidem,.
[263] Ibidem, §1073. For this reason incitement to genocide is an inchoate crime and persecution is not.
[264] ICTR, *The Prosecutor v. Nahimana et.al. Judgement,*§1072.
[265] Ibidem. §1072.

who perceive and treat them as less than human."[266] In that manner, a basal human right namely the right to equality in dignity and rights[267], was denied and in that way the condition of a 'gross denial of a fundamental right' was satisfied.

By disentangling these principles from which it can be relatively systematically determined whether incitement to genocide and/or persecution was the case, the ICTR contributed considerably to the development of jurisprudence in dealing with hate speech cases. Questions regarding the importance of content and causation, not addressed in IMT judgements, were answered in *Nahimana et.al.* From this judgement clearly appeared, moreover, that different forms of hate speech should and can be tried differently. Grave forms of hate speech that incite to a criminal act (whether this is incitement to genocide, incitement to crimes against humanity as murder and extermination, or incitement to war crimes) can be tried under the statutes of international criminal tribunals because incitement to these crimes is recognized as a crime (see paragraph 4.1 and appendix VI). For this crime to be established the intent to incite to a certain crime must be proven, and the context in which the hate speech was disseminated counts in determining the degree of responsibility of the perpetrator. Other, softer, not-inciting forms of hate speech can be tried as persecution on condition that a discriminatory intent on political, racial or religious grounds formed the basis for the hate utterances is found, and the requirement of a gross denial of a fundamental right is satisfied. Causation is of no relevance in proving incitement to genocide as this is an inchoate crime and in case of persecution causation is not required either because when hate speech constitutes persecution, this is the harm itself.

However, the *Nahimana* verdict has not been wholly favourably received by everyone. Diane Orentlicher, an expert on international law and professor in this field at the Washington College of Law, published her criticism on the judgement in 2005 in an issue of the New England Journal of International and Comparative law.[268] The fact that the ICTR judges only used the precedent of the IMT cases of Streicher and Fritzsche and the less relevant ICTR case of the *Prosecutor v. Ruggiu* in coming to their conclusions,

[266] ICTR, *The Prosecutor v. Nahimana et.al. Judgement*, §1072.
[267] See the first article of the Universal Declaration of Human Rights.
[268] Diane Orentlicher, 'Criminalizing hate speech in the crucible of trial: Prosecutor v. Nahimana' New Eng.J.Int'l &comp. L. Vol 12 No 1(2005) 17-50.

while completely ignoring the Kordić decision of the ICTY that had been come to barely three years earlier, makes up one of her strongest comments. "While ignoring *Kordić* and placing excessive reliance on *Ruggiu* the Nahimana judgement downplayed and misconstrued the leading precedent concerning incitement as a basis for the charge of crimes against humanity/persecution – the judgement of the International Military Tribunal [IMT] convened at Nuremberg following World War II."[269] This is very relevant because on the basis of the precedent of the Kordić case, in which the ICTY judges concluded that promoting hatred without inciting to violence did not constitute persecution under international criminal law, the conviction of Nahimana and confederates for persecution on basis of their hate speech utterances would not have been easy to defend. Moreover, Orentlicher blamed the ICTR for re-interpreting the international legal standards to such an extent that the juridical connection with the precedents of the IMT got lost:

"Yet, it is difficult to see how the Streicher verdict could support a conclusion to the effect that 'communications that constitute persecution' need not a call to action, let alone a call to violence. (…) its [IMT's] conviction of Streicher and acquittal of Fritzsche strongly suggest that the Tribunal was prepared to judge a defendant guilty of persecution as a crime humanity based upon his expressive activity only when he intentionally urged listeners to commit atrocities."[270]

Although I agree with Orentlicher on her criticism that it is somewhat strange that the ICTR judges did not even mention the case of Dario Kordić, I have some remarks, however, on her second point of criticism. As we have seen in the third chapter of this thesis, the IMT judgments were vague and left far too much space for interpretation; in their original form it was impossible to use them as a clear guideline for current hate speech cases. It was high time that one of the contemporary international criminal tribunals devoted itself to the task of drafting clearer boundaries within the traditional framework that the IMT outlined six decennia ago. It might be true that the pioneer work

[269] Orentlicher, 'Criminalizing hate speech in the crucible of trial: Prosecutor v. Nahimana', 38.
[270] Ibidem, 38-39.

of the ICTR has led to principles that need further evaluation, but this tribunal has at least succeeded in bringing the question of trying hate speech, in both its harder and softer varieties, to the table again; a thing wanted by the international community as can be concluded from the many international human rights law treaties and the indictments for 'merely' encouraging hatred of men like Kordić and Šešelj.

I believe that the *Nahimana et.al.* judgement has been rightly said to be a "blueprint for future courts to engage in such analysis."[271] It produced clear points of analysis, i.e. intent, context and causation and showed, moreover, a new way in trying hate speech not constituting incitement. It took the accepted principles of international human rights law and the IMT judgements as the point of departure and developed these principles further. The ICTR judges have structurally paid attention in this judgement to the fundamental idea that in order for hate speech to become a crime, the utterances need to be of a certain gravity (must have a connection with disorder, crime, or danger) and must meet requirements of intent, context, and (with regard to inchoate crimes) causation. It is true, of course, that proving the intent behind speech and determining the extent to which the context is indicative of the intent remains difficult, and in that sense, critics have been able to find imperfections in the judgement. These difficulties, however, are inherent to the administration of justice and probably will be so for ever. In any case, for the purpose of this inquiry it mainly matters that *Nahimana et.al.* has, after more than sixty years, yielded the world a clearly explained and elaborate new criminal law-approach to hate speech that is coherent with the theoretical principles.

4.4 Evaluation

The achieved progress in defining the restrictions on free speech in international criminal law between 1946 and 2005, as can be concluded from a comparison between this and the previous chapters, is substantial. Not only have the ICTR judges explained and refined the jurisprudence of the Nuremberg trials against Julius Streicher and Hans Fritzsche, they have also succeeded in discovering and defining a legal approach from a criminal law perspective to try forms of hate speech that, despite lack of incitement to a criminal

[271] Gregory S. Gordon, 'A war of media, words, newspapers and radio stations: the ICTR media trial verdict and a new chapter in the international law of hate speech', 26.

act, can be seen as criminal. It was as if it was necessary to develop more effective jurisprudence regarding hate speech, because only convicting the Streichers of the world when knowing that the Fritzsches contributed greatly to atrocities as well, did not meet the international sense of justice any longer. The *Nahimana et. al*. judgement might, in this regard, be highly valuable for the future trying of hate speech criminals.

Some remarks, however, should be made as well. The historical *Nahimana et.al*. judgement dates from December 2003. The judgement in the Kordić case, that still categorically rejected the suggestion of the prosecution to try 'encouraging hatred' as a form of persecution that exactly corresponded with the legal notion accepted with *Nahimana et.al*, dates from only three years earlier. This indicates that although there is clearly development and discussion on this theme within the field of international criminal law, it is far too early to speak of a uniform coherent approach. It is far from clear, that the notions and the proposed analytical touchstones from the *Nahimana et.al.* judgement will be practised in future hate speech cases. This all the more since the appeal in the *Nahimana et.al.* case is still running (although it should be noted that the Appeal Chamber also observed on 18 January 2007 that in the case of Nahimana and confederates, hate speech *per se* can constitute persecution because such speech denies people a fundamental right - the right to equality).[272] Perhaps it would be good to draw up the balance again when the verdict of the *Nahimana et. al*. appeal and the decision in the case against Vojislav Šešelj have been published.

[272] ICTR, 'Press Release. Appeals Chamber concludes hearing in media case', (19 January 2007). Via: http://69.94.11.53/ENGLISH/PRESSREL/2007/510.htm.

5. Human Rights Courts: complexities in dealing with Holocaust denial

In the last chapter of this inquiry, a form of hate speech of a different category is discussed. Here, it is not hate speech with regard to war criminals and large scale atrocities that is put up for debate, but the seemingly less dangerous, but to certain groups of people very offending act, of 'Holocaust denial'. By the denominator of Holocaust denial not only the total denial of the Holocaust is understood, but also trivializing certain aspects of the Holocaust and sometimes even denying crimes against humanity as defined by the IMT or other courts are included (see e.g. the formulation of the EU framework in the general introduction of this thesis).[273] With the provision on Holocaust denial of the EU framework decision of 19 April 2007 the penalisation of this special form of hate speech became part of the official anti-hate speech policy of the EU. In doing so, the European Union followed the example of several European countries that already criminalised Holocaust denial in their so-called domestic 'Holocaust denial laws'.

Holocaust denial and its criminalisation, however, have been a greatly debated issue. The hate speech utterances discussed in relation to the lawsuits against Streicher, Fritzsche, Kordić, Šešelj and Nahimana and confederates, all had in common that they were associated with brutal atrocities. The Second World War, the genocide in Srebrenica and the Rwandan genocide all were preceded by a phase of dissemination of virulent hate speech in which the above mentioned accused were active. In hindsight, it was relatively easy for the judges to conclude that the hate speech utterances were done in an unstable context and that a 'clear and present danger' existed. The Holocaust deniers discussed in this chapter, on the other hand, were active in liberal, relatively stable, Western democracies and although their expressions can be seen as beside the truth, offending and undesirable, it cannot be said that they incited directly to (mass)violence. Still, as will appear from this chapter, international judicial bodies, to wit the European Court of Human Rights and the Human Rights Committee, support the banning of this form of speech from public discourse. What problems are met in the practical implementation of this policy is observed below.

[273] Dominic McGoldrick and Thérèse O'Donnell, 'Hate-speech laws: consistency with national and international human rights law', 457.

Before starting my analysis of the cases of D.I. and Robert Faurisson, it must be noted that this chapter cannot be a systematic and exhaustive inquiry on how the European Court of Human Rights and the Human Rights Committee have dealt with hate speech; in that case, analysing a sample of only two cases would not be sufficient. Moreover, in that case, I should have gone into other cases dealing with other forms of hate speech than Holocaust denial as well. The purpose of this chapter is only to give an indication of how these courts have dealt with this type of hate speech. I did so in order to complete the picture of how the international community has tried to deal with the problem.

5.1 The European Court of Human Rights and the Human Rights Committee

The European Court of Human Rights and the Human Rights Committee are judicial bodies with a particular way of functioning. They both are meant to be judges of policy, which means that they both judge on the juridical policy as applied in the courts of States Parties. With the signing of the European Convention on Human Rights (ECHR) in 1950 and the coming into force of that document in 1953 the foundations for the European Court of Human Rights were laid. Eventually, the court was established in 1959. It was set up to enforce State Parties to stick to the agreements made in the ECHR. Under Article 34 of that Convention, it was specified that "the court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."[274] The European Court of Human Rights is to judge in such cases whether the rights of the plaintiff are violated by the judicial institutions of his country or not.

Initially, the European Convention on Human Rights provided for the establishment of two organs: 1) the European Commission of Human Rights; and 2) the European Court of Human Rights. From 1959 until 1998 the Commission first considered and issued a decision on admissibility of an application. When the application was declared admissible, the Commission started an investigation into whether the

[274] Council of Europe, *European Convention on Human Rights*, article 34.

agreements as laid down in the ECHR had been violated. Eventually, this resulted in a report of the Commission in which it stated its opinion on whether there had been a violation. Such opinions were not binding and during the procedure it was attempted to reach a friendly settlement between the applicant and the State Party complained against. When such a friendly settlement was not achieved, the case was referred to the European Court of Human Rights or the Committee of Ministers (the political organ of the Council of Europe). Only those cases important to the interpretation and application of the ECHR were referred to the Court. For these cases, a full judicial procedure, resulting in a binding judgement, followed.[275]

By the end of the 1990s, however, due to a growing amount of applications, a new procedural system was needed. In November 1998, the Commission and the Court were replaced by a new permanent European Court of Human Rights. The complete procedure, from decisions on admissibility, to seeking friendly settlements, or the passing of final judgements (which are, since the reformation of the court, always binding) is executed now by this court.[276] The institutional history of the European Court is only to that extent important that it explains why the application of *D.I. vs Germany*, that I will discuss in the next paragraph, was dealt with before the European Commission on Human Rights (the admissibility decision in this case stems from 1996) and the judgment in the case of *Lehideux and Isorni vs France* (September 1998), that I will discuss briefly, was passed by the European Court of Human Rights (old style).

The Human Rights Committee (HRC) of the United Nations grossly works in the same way as the European Court of Human Rights, but under a different mandate. The establishment of the Human Rights Committee was laid down in Article 28 of the International Covenant on Civil and Political Rights (ICCPR). The rules of procedure were described in the First Optional Protocol to this Covenant. Like the Covenant, this protocol was adopted on 16 December 1966 and entered into force on 23 March 1976.[277] It became the duty of the Committee to evaluate and judge complaints of citizens of State Parties to the ICCPR on violations of their fundamental rights as recorded in that

[275] Ovey and White, *Jacobs & White*, 6-8 and see also the Master thesis of Claire Boonzaaijer: Claire Boonzaaijer, *De geschiedenis volgens Straatsburg. Het Europees Hof voor de Rechten van de Mens en de grenzen van de vrije meningsuiting bij zaken met een historisch karakter* (May 2005, not published) 29-31.
[276] Ovey and White, *Jacobs & White*, 8-9 and Boonzaaijer, *De geschiedenis volgens Straatsburg,* 30-31.
[277] http://www.unhchr.ch/html/menu3/b/a_opt.htm.

Covenant. The Committee meets during three sessions each year to discuss the communications received. Given the global application of the ICCPR, the work of HRC has developed something akin to global human rights jurisprudence[278] and in the same way the European Court of Human Rights can be said to have developed European human rights jurisprudence. In the analysis below the cases of two plaintiffs that held that their right to freedom of expression was violated, are studied.

5.2 Holocaust deniers and their trials

5.2.1 D.I. vs. Germany

The British historian D.I. was born in 1938.[279] On 5 May 1992 the *Amtsgericht* (District Court) in Munich convicted D.I. for stating in a speech in April 1990 that no gas chambers had ever existed and that the gas chambers put on exposition nowadays in Auschwitz were fakes, built in the post-war period. He had added that the German tax-payers had thus paid about sixteen million German marks for fakes. Referring to case-law of the *Bundesgerichtshof* (Federal Court of Justice) in which that court stated that "it is true that (…) a presumption exists in favour of free speech. But this presumption does not apply if the utterance constitutes a formal criminal insult or vilification, or if the utterance is based on factual assertions that have been proven untrue,"[280] it was considered "that anybody denying the killing of Jews under the Nazi regime committed the offences of insult as well as blackening the memory of the killed Jews."[281] The District Court also

[278] McGoldrick and O'Donnell, 'Hate-speech laws: consistency with national and international human rights law', 471.
[279] There are clear indications that D.I. stands for David Irving; the famous British Holocaust denier who sued the American historian Deborah Lipstadt in the UK in the year 2000 for her characterization of him as a Holocaust denier in her book *Denying the Holocaust* (New York 1993). From the admissibility decision of the European Commission in his case, it becomes clear that D.I. is a British national, born in 1938 and a historian. All this information is in line with the biographical data of David Irving. (For information on David Irving see also his biographical note that can be traced on his website: http://www.fpp.co.uk)In order to prevent false conclusions, however, I decided to only use the official name of the case and to leave the identity of the accused undecided.
[280] Winfried Brugger, 'The treatment of hate speech in German constitutional law (part II)', *German Law Journal* Vol. 4 No.1 (January 2003). Via: http://www.germanlawjournal.com/pdf/Vol04No01/PDF_Vol_04_No_01_01-44_Public_Brugger.pdf, p. 34-35.
[281] European Commission of Human Rights, *D.I. vs. Germany*. *Decision on admissibility*. Application no. 26551/95 (June 1996) 2.

observed that the persecution of Jews under the Nazi regime was a historical fact and following the Federal Court, denying historical facts was not protected by the right to freedom of expression. For these reasons the court convicted D.I. of insult and blackening the memory of the deceased pursuant to Articles 185,189 and 194 of the German penal code.[282]

D.I., however, appealed to the *Landgericht* in Munich (Regional Court) on 13 January 1993. The Regional Court confirmed the findings of the District Court. This court referred to the case-law of the Federal Court as well and observed that "the gassing of Jews in Auschwitz between 1941 and 1944 was an '*eindeutige feststehende historische Tatsache'* which was common knowledge and did not require any further proof."[283] The appeal was dismissed and the fine imposed on D.I. by the District Court was increased by the Regional Court. Subsequently, the *Oberlandesgericht* (Bavarian Court of Appeal) dismissed the applicant's appeal on 30 November 1993; again for the reason that the systematic murder of Jews in the concentration camps was common knowledge that did not require any further evidence taking. The last appeal of D.I. with the Federal Constitutional Court on 11 February 1994 was refused.[284]

It was with this history that on 16 August 1994 D.I. appealed to the European Commission of Human Rights. The applicant complained under Article 6 of the ECHR that he had not been given a fair trial in Germany, but more important, he complained that his conviction amounted to a breach of his right to freedom of expression. He invoked Article 10 of the Convention (see Appendix II). In the methodological section of its decision of July 1996 the European Commission on Human Rights considered "that the impugned measure was an interference with the applicant's exercise of his freedom of expression."[285] Such interference is according to Article 10(2) of the ECHR only justified when 1) the interference is prescribed by law; 2) the interference pursues a legitimate aim;[286] and 3) the interference is "necessary in a democratic society."[287] Central to the

[282] European Commission of Human Rights, *D.I. vs. Germany*, 1-2.
[283] Ibidem, 1-2.
[284] Ibidem, 2
[285] Ibidem, 4.
[286] Under the European Convention on Human Rights legitimate aims were: the interests of national security, territorial integrity or public safety, the prevention of disorder or crime, the protection of health or morals, the protection of the reputation or rights of others, preventing the disclosure of information received in confidence, or maintaining the authority and impartiality of the judiciary. See Appendix II.

determination whether these requirements were satisfied in specific cases was the *proportionality* of the interference in securing the legitimate aim. The current European Court of Human Rights (and the same applied to the European Commission and Court of Human Rights of before November 1998) only permits the *minimum interference* with the right which secures the legitimate aim.[288] The Court moreover emphasised that with respect to the third requirement, the adjective 'necessary' implied the existence of a 'pressing social need'. In assessing whether this pressing social need is the case, however, the States Parties have a 'certain margin of appreciation'. This is so because "by reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them."[289] In practice, all this means that the restrictions on freedom of speech taken on the national level must be justifiable in principle and proportionate to the expected consequences of the utterances. D.I.'s application would be regarded in this light.

The restriction of D.I.'s utterances was prescribed by the German penal code. Besides, the restriction was aimed at 'the prevention of disorder and crime' and the 'protection of the reputation or rights of others'; legitimate aims as mentioned in Article 10(2). Thus, the court decided, requirements one and two as set out in Article 10(2) were met. The question whether the condition of necessity was satisfied, as we will also see in the analysis of the Faurisson case in the next paragraph, is often more difficult to answer. Whereas it has been widely accepted that Holocaust denial is hurtful to victims and relatives of victims of the Holocaust, Holocaust denial does not directly *incite* to violence or hatred; it rarely leads to clear and present danger. Therefore, it is exactly this *necessity* of restricting the freedom of speech of Holocaust deniers that can most easily be questioned. If violence or danger is not the consequence, why prohibit Holocaust denial?

In the case of D.I. it is remarkable that in answering the question of necessity, the commission did no longer refer to Article 10(2), but to the seemingly less well-defined and more general Article 17 (see Appendix II). As we have seen in chapter two (p.28-29),

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[287] European Commission of Human Rights, *D.I. vs. Germany*, 4.
[288] Ovey and White, *Jacobs & White,* 201.
[289] Ibidem, 210.

Article 17 prohibits speech contravening the fundamental ideas of the Convention. As the expressions of D.I. reflected racial and religious discrimination, the commision stated, his utterances ran counter to fundamental ideas of the Convention, namely that of peace and justice, and thus violated Article 17. On the other hand, the provisions of the German penal code at issue were aimed to secure the peaceful coexistence of the population of the Federal Republic Germany; an aim in complete accordance with ideas of peace and justice. The commission found that "the public interests in the prevention of crime and disorder in the German population due to insulting behaviour against Jews, and similar offences, and the requirement of protecting their reputation and rights, outweigh, in a democratic society, the applicant's freedom to impart publications denying the existence of the gassing of Jews under the Nazi regime."[290] It was for this reason that the European Commission of Human Rights concluded that there were relevant and sufficient grounds for the applicant's conviction. The interference with his freedom of expression could be considered as "necessary in a democratic society."[291] Thus the application of D.I. to the European Commission of Human Rights for a reconsideration of his case was unanimously declared inadmissible.[292]

It is noteworthy that it appeared to be relatively simple for judges in the commission to conclude that the first two conditions were met. The restriction of D.I.'s freedom of speech was prescribed by the German penal code and was, moreover, aimed at the prevention of disorder and crime, the protection of the rights and reputation of others (the Jews) and even at the protection of the fundamental values of the ECHR, namely peace and justice. The considerations became vaguer, however, at the point where 'necessity' was at stake. The commission decided that the restriction put on D.I.'s right to freedom of expression was necessary as the content of his speech ran counter to the fundamental ideas of the ECHR, and actions contravening these fundamental ideas were not protected under the Convention as laid down in Article 17.

The reasoning of the commission contained obscurities. First of all, the judges failed to explain in what way the statements of D.I. undermined the fundamental principles of the ECHR. Although it was observed that restricting D.I.'s statements was

[290] European Commission of Human Rights, *D.I. vs. Germany*, 5.
[291] Ibidem.
[292] Ibidem.

necessary for protecting the rights and reputation of others - a legitimate reason to apply Article 17 (see chapter two, p. 29.-30) - it remains fully unclear how the commission reached the conclusion that the statements of D.I. could be placed in the category of discriminating and insulting comments that violate the rights of others (not protected by the Convention, see chapter two, p 29) and not in the category of 'merely' shocking or offending comments (protected by the Convention, see p.28).[293] In the decision, no attention was paid by to the nature of the statements of D.I. and, thus, the positive answer of the commission to the question whether the restriction was necessary remains doubtful. Furthermore, questions of the intent of D.I., the context and possible consequences of his utterances were fully left aside. As far as 'necessity' was concerned, this could have been illuminating.

Another remarkable point of the decision is that there is no explanation of the commission's decision to apply in particular Article 17 to declare the application of D.I. inadmissible. As stated in chapter two, Article 17 is of significance mainly where an article of the Convention contains no limitations since in such a case Article 17 can provide the basis for a limitation on the rights protected. Why did the court not use Article 10(2), the Article specifically designed to define the limits of free speech, as a basis for reaching the decision of inadmissibility? Would that have led to different conclusions?[294]

Lastly, it is striking that the commission made no comments on those articles of the German penal code that prohibit the denial of the Holocaust categorically. The European Commission of Human Rights does not seem to mind the existence of such laws. The lack of concern of the commission on this matter was an early sign of an attitude to historical facts which the European Court of Human Rights was to develop and which it officially adopted with the decision in the case *Lehideux and Isorni vs. France* in 1998, two years after the decision in *D.I. vs. Germany*.[295] In that decision the court stated that the negation or revision of clearly established historical facts, such as the Holocaust,

[293] See also the analysis of the settling of the cases of Holocaust denial before the European Commission/Court of Human Rights in the Master thesis of Claire Boonzaaijer. Claire Boonzaaijer, *De geschiedenis volgens Straatsburg. Het Europees Hof voor de Rechten van de Mens en de grenzen van de vrije meningsuiting bij zaken met een historisch karakter* (May 2005, not published) 63-65.
[294] Claire Boonzaaijer raised these questions as well. Boonzaaijer, *De geschiedenis volgens Straatsburg*, 63 and 94.
[295] European Court of Human Rights, *Lehideux and Isorni vs. France. Judgement* (September 1998).

would be removed from the protection of Article 10 by Article 17. Since 1998, Holocaust denial *per se* (so without an analysis on whether the restriction imposed on the author/speaker falls legally within Article 10 (2) or without considering the intent of the offender or the context of his utterances) has been judged by the European Commission/Court of Human Rights as a violation of the ECHR. From this it can be concluded that Holocaust denial laws are seen by the European Court of Human Rights as legitimate and desirable. However, it remained unexplained by the Court what specific qualities the historical fact of the Holocaust possesses that place it in a different category than other types of historical debate or whether the Holocaust is the only clearly established historical fact. Besides, is there really any historical fact that is truly beyond legitimate debate?[296]

5.2.1 Robert Faurisson vs. France

Robert Faurisson, born in 1929, was a professor of literature at Sorbonne University in Paris until 1973 and at the University of Lyons until 1991, when he was removed from his chair. As one of the most famous Holocaust deniers he had become a notorious figure in French academic and political circles.[297] In his work he had sought proof for the methods of killing during the Holocaust. He openly doubted the existence of gas chambers for extermination purposes at Auschwitz and in other Nazi concentration camps and also generally challenged the infallibility of the Nuremberg records.[298]

When on 13 July 1990 the so-called 'Gayssot Act', which amended the French law on the Freedom of Press of 1881, by adding a provision that made it an offence to contest the existence of the category of crimes against humanity as defined in the London Charter of 8 August 1945 (and which per definition included the Holocaust) was adopted, the publication of doubts concerning elements of the Holocaust, like Faurisson had done, became criminal. Shortly after the enactment of the new law, the monthly magazine *Le Choc du Mois* published in its 32 issue of 1990 an interview with Faurisson. Next to

[296] Mendel, 'Study on international standards relating to incitement to genocide and racial hatred', 41.
[297] McGoldrick and O'Donnell, 'Hate-speech laws: consistency with national and international human rights law', 471.
[298] Human Rights Committee, *Faurisson vs. France*, Communication No. 550/1993, U.N.Doc.CCPR/C/58/D/550/1993 (1996) § 2.1 an §2.3 and McGoldrick and O'Donnell, 'Hate-speech laws: consistency with national and international human rights law', 474.

expressing his concerns that the Gayssot Act formed a threat to freedom of research and freedom of expression, the author reiterated his ideas on the non-existence of gas chambers for the extermination of Jews in Nazi concentration camps.[299] In response to the publication of this interview eleven associations of French resistance fighters and of deportees to German concentration camps filed a private criminal action against Faurisson and the editor of the magazine *Le Choc du Mois*. On 8 April 1991 both were convicted of having committed the crime of '*contestation de crimes contre l'humanité'* and fines and costs were imposed on them.

This conviction was based, *inter alia*, on statements made by Faurisson such as:

"… No one will have me admit that two plus two make five, that the earth is flat, or that the Nuremberg Tribunal was infallible. I have excellent reasons not to believe in this policy of extermination of Jews or in the magic gas chamber…"

"I would wish to see that 100 per cent of all French citizens realize that the myth of the gas chambers is a dishonest fabrication, endorsed by the victorious powers of Nuremberg in 1945-46 and officialized on 14 July 1990 by the current French Government, with the approval 'of the court historians.'"[300]

On appeal, the conviction was upheld by the Court of Appeal of Paris. This court examined the facts also in the light of Articles 6 (right to a fair trial) and 10 (freedom of expression, see also appendix II) of the European Convention on Human Rights (ECHR) and "concluded that the trial court had correctly evaluated them."[301]

In his communication to the HRC of January 1993, Faurisson predictably claimed to be victim of violations of his human rights by France. And although he did not invoke specific provisions of the ICCPR, his claim was centred on an alleged violation of Art. 19 (the right to hold opinions without interference and, especially, the right to freedom of

[299] HRC, *Faurisson vs. France*, §2.3 and §2.5.
[300] Ibidem, §2.6.
[301] McGoldrick and O'Donnell, 'Hate-speech laws: consistency with national and international human rights law', 473.

expression, see appendix III) of that Covenant.[302] Faurisson contended that the Gayssot Act curtailed his right to freedom of expression and academic freedom in general. He complained "that the incriminated provision constituted unacceptable censorship, obstructing and penalizing historical research."[303] The author stated that the desire to fight anti-Semitism could not justify any limitations on the freedom of research on a subject which is of obvious interest to Jewish organizations; to him no law should be allowed to prohibit the publication of studies on any subject, under the pretext that there was nothing to research on it. Furthermore, Faurisson emphasized that the State Party (France) had failed to provide elements of proof with regard to its statements that his writings constituted a "subtle form of contemporary anti-Semitism" or incited people to anti-Semitic behaviour.

In his submissions to the HRC, he also reiterated his comments on the 'accepted' version of the extermination of the Jews, and explained that a decree ordering the extermination had never been found, that it had never been proven how it was technically possible to kill so many people by gas-asphyxiation, and that although authorities knew that the existing gas chamber at Auschwitz was a reconstruction, built on a spot different from the original, this was not told to visitors to it.[304] To conclude, Faurisson pleaded that the Gayssot Act should be replaced by legislation "specifically protecting all those who might become victims of incitement to racial hatred and in particular to anti-Semitism."[305]

As a response to Faurisson's complaints, the French government explained that the Gayssot Act had been introduced because it filled a gap in the "panoply of criminal sanctions".[306] Previously, 'revisionist' theses, a "subtle form of contemporary anti-Semitism" according to the government, had escaped criminal qualifications; they could not be subsumed under the prohibition of (racial) discrimination, of incitement to hatred,

[302] McGoldrick and O'Donnell, 'Hate-speech laws: consistency with national and international human rights law', 472.
[303] HRC, *Faurisson vs. France,* §3.1.
[304] Ibidem, §8.2, §8.3 and §8.9 and McGoldrick and O'Donnell, 'Hate-speech laws: consistency with national and international human rights law', 475.
[305] HRC, *Faurisson vs. France*, §2.8 and McGoldrick and O'Donnell, 'Hate-speech laws: consistency with national and international human rights law', 475.
[306] HRC, *Faurisson vs. France*, §4.1.

or glorification of war crimes or crimes against humanity.[307] The legislator had thus sought to fill a legal vacuum, the necessity of which was clear because every time racism was allowed to express itself publicly, public order was immediately and severely threatened.

France pointed out, while summarizing similar cases from international human rights jurisprudence, that Faurisson could not invoke Art. 19 as he was "claiming this right in order to exercise activities contrary to the letter and the spirit of the Convention [ECHR]."[308] By challenging the reality of the extermination of Jews during the Second World War, Faurisson incited his readers to anti-Semitic behaviour contrary to the Covenant and other international conventions which had been ratified by France. The government stated that in the light of Art. 20 of the ICCPR (see appendix III) and to Art. 4 of the CERD (see appendix IV) it could be concluded that France merely complied with its international obligations by making the (public) denial of crimes against humanity a criminal offence.[309] Besides, the government added, the law of 13 July 1990 was even noted with appreciation by the International Committee on the Elimination of Racial Discrimination in March 1994.[310]

In its decision on the *Faurisson* case of November 1996, the HRC pointed out that the task of the Committee was confined to judge whether there had been violations of the rights of the plaintiff as laid down in the ICCPR. Therefore, in general, it was not part of the task of the HRC to criticise in the abstract laws enacted by States Parties. In spite of this, the HRC did not omit saying that "the application of the terms of the Gayssot Act might lead, under different conditions than the facts of the instant case, to decisions or measures incompatible with the Covenant."[311] McGoldrick and O'Donnell state in their analysis of the Faurisson case that this comment was clearly intended as a warning to states that the Committee's view should not be interpreted as a general validation of such

[307] HRC, *Faurisson vs. France*, §4.1 and §7.2.
[308] Ibidem, §7.4.
[309] Ibidem §7.7.
[310] Ibidem.
[311] Ibidem, §9.3.

laws. The specific facts of each case would be considered in terms of Art. 19.[312] And a consideration of the facts in terms of Art. 19 was exactly what followed.

Without discussing whether racist or anti-Semitic speech was included in the right to freedom of expression, the Committee immediately started its reflection on whether the restrictions on freedom of expression imposed by France satisfied the conditions laid down in Art. 19 of the ICCPR.[313] Any restriction on the right to free speech, the HRC stated, must cumulatively meet the following conditions (comparable to the procedure of the ECHR): 1) it must be provided by law; 2) it must address one of the aims set out in paragraph 3 (a) and (b) of Article 19 (respect for the rights and reputation of others; protection of national security, public order or the health of public morals); and 3) must be necessary to achieve this legitimate purpose. As the restriction on the author's freedom of expression was indeed provided by law (the Gayssot Act), the Committee concluded that the first condition was met.[314] With regard to the second condition (the restriction must serve a legitimate purpose), the HRC came to the conclusion that this condition was met as well. French law had been applied in compliance with the provisions of the Covenant (Faurisson's conviction did not encroach upon his right to hold and express an opinion in general but proceeded from his violations of the rights and reputations of others) and "since the statements made by the author, read in their full context, were of a nature as to raise or strengthen anti-Semitic feelings, the restriction served the respect of the Jewish community to live free from fear of an atmosphere of anti-Semitism. The Committee therefore concludes that the restriction of the author's freedom of expression was permissible under Article 19, paragraph 3(a), of the Covenant."[315]

Finally, the Committee got into the deliberation whether the third condition (the condition of necessity) was met:

"The Committee noted the State party's argument contending that the introduction of the Gayssot Act was intended to serve the struggle against racism and anti-Semitism. It also noted the statement of a member of the French government (….) which characterized the

[312] McGoldrick and O'Donnell, 'Hate-speech laws: consistency with national and international human rights law', 477.
[313] Ibidem, 478.
[314] HRC, *Faurisson vs. France*, §9.4 and §9.5.
[315] Ibidem, §9.6.

denial of the existence of the Holocaust as the principal vehicle for anti-Semitism. In the absence in the material before it of any argument undermining the validity of the State Party's position as to the necessity of the restriction, the Committee is satisfied that the restriction of Mr. Faurisson's freedom of expression was necessary within the meaning of Article 19, paragraph 3, of the Covenant."[316]

With having found all three conditions satisfied, the Committee concluded that the facts as found by the Committee did not reveal a violation of France of Faurisson's right to freedom of expression.

Five members of the Committee felt the need to add their individual opinion to the decision, as some points of this verdict asked for further explanation. In terms of the requirements of necessity, for instance, the HRC's view does not give much detail: "The Committee regarded itself as having evidence of the French justifications for the restriction but that there was an absence of material which undermined the validity of the State Parties' position as to the necessity of the restriction."[317] In the second individual opinion, the one most relevant to my inquiry, that was signed by the Committee members Elizabeth Evatt (Australia) and David Kretzmer (Israel), and co-signed by Eckart Klein (Germany), the difficulty of necessity as the weak spot of the decision was recognized and explained:

"The crime for which the author was convicted under the Gayssot Act does not expressly include the element of incitement, nor do the statements which served as the basis for the conviction fall clearly within the boundaries of incitement, which the State Party was bound to prohibit, in accordance with Art. 20, paragraph 2 [see appendix III, JH]. *However, there 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, in a particular social and historical context, statements that do not meet the strict legal criteria of incitement can*

[316] HRC, *Faurisson vs. France*, §9.7.
[317] McGoldrick and O'Donnell, 'Hate-speech laws: consistency with national and international human rights law', 479.

be shown to constitute part of a pattern [emphasis original] *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."*[318]

The individual opinion stated that in the conditions of "present-day France", the notion that Holocaust denial might constitute a form of incitement to anti-Semitism could not be dismissed. This was a consequence not of the mere challenge to well-documented historical facts, "but of the context, in which it was implied, under the guise of impartial academic research, that the victims of Nazism were guilty of dishonest fabrication."[319] It was this broader implication beyond the challenge to generally accepted historical facts that created the 'particular context' for the statements.[320]

But was imposing liability for Faurisson's statements necessary in order to protect the rights and reputation of the Jewish community? According to the three Committee members this was a matter of *proportionality*, a term also mentioned in the procedure in the D.I. case: the scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect. The opinion acknowledged that the Gayssot Act, in abstract terms, did not meet the proportionality test. The Act was phrased in the widest language. It seemed to prohibit any publication of *bona fide* research connected with matters decided by the Nuremberg Tribunal and because such restrictions do "not link liability to the *intent* of the author, nor to the tendency of the publication to incite to anti-Semitism," the Act, considered *in abstracto*, went too far.[321] However, the writers of the individual opinion concluded that "while there would be every reason to maintain protection of *bona fide* historical research against restriction, even when it challenged historical truths and by doing so offends people, anti-Semitic allegations of the sort made by the author, which violate the rights of others in the way described, do not have the same claim to protection against

[318] HRC, *Faurisson vs. France*, §C.4.
[319] Ibidem, §C.6.
[320] McGoldrick and O'Donnell, 'Hate-speech laws: consistency with national and international human rights law', 481.
[321] HRC, *Faurisson vs. France,* §C.9.

restriction."[322] The restrictions placed on the author were intimately linked to the value they were meant to protect (the right to be free from incitement to racism or anti-Semitism) and protecting that value could not have been achieved by less drastic means. Therefore the authors of this opinion joined the Committee in concluding that the restriction on the author's freedom of speech met the proportionality test: the restrictions were deemed necessary.[323]

In the individual opinion of Prafullachandra Bhagwati (India), the last of the five individual opinions attached to the decision of the HRC, Bhagwati confirmed the findings of Evatt, Kretzmer and Klein. His reasoning was centred on the necessity of the restrictions as well. According to Bhagwati, the statement made by Faurisson, read in the context of its necessary consequence, was calculated or was at least of such a nature as to raise or strengthen anti-Semitic feelings and create and promote hatred, hostility or contempt against the Jewish community.[324] This led the Committee member to state that "if the restriction on freedom of expression in the manner provided under the Gayssot Act had not been imposed and statements denying the Holocaust and extermination of Jews by asphyxiation in the gas chamber had not been made penal, the author and other revisionists like him could have gone on making statements similar to the one which invited the conviction of the author and the necessary consequence and fall-out of such statements would have been, in the context of the situation prevailing in Europe, promotion and strengthening of anti-Semitic feelings, as emphatically pointed out by the State Party in its submissions."[325] Bhagwati concluded that the restrictions imposed by France had been necessary in order to secure "respect for the rights and interests of the Jewish community to live in a society with full human dignity and free from an atmosphere of anti-Semitism."[326]

The decision of the Committee and the attached individual opinions reflected the perception that "there is a core right to freedom of expression which it would be very difficult to justify restrictions on, and more peripheral aspects where the nature, content [and intent, JH] and context are taken into account and so restrictions become easier to

[322] HRC, *Faurisson vs. France,* §C.10.
[323] Ibidem*,* §C.8 and §C.10.
[324] Ibidem, §F.
[325] Ibidem.
[326] Ibidem.

justify in terms of the necessity test."[327] According to the HRC, statements should not be considered in the abstract, "but rather in their context and in the light of an assessment of their true nature, for example, when historical statements that are accompanied by racist and anti-Semitic allegations of fabrications, myth making and extortion."[328] According to the Committee, the restriction of freedom of speech put on Faurisson by France was legitimate on the basis of Article 19(3) of the ICCPR. The restriction put on him by France was provided by law, was imposed because of concern for the rights and reputation of others, and was believed to be necessary and proportional. This last condition of necessity was satisfied not because Faurisson's finding proof of the non-existence of the Holocaust was simply *bona fide* research that should not be undertaken, but because Holocaust denial was the 'principle vehicle of anti-Semitism'.[329] Establishing a lack of inciting comments in Faurisson's work, he could not be convicted for a violation of Article 20(2). That article would have only covered advocacy of national, racial or religious hatred that constituted direct incitement to discrimination, hostility or violence. But as his work was published in a 'particular social and historical context' and was considered as part of a pattern of incitement against a given racial, religious or national group, a prohibition of his work on the grounds of respect of the rights or reputations of others (Article 19.3(b) of the ICCPR) was possible and necessary, thus decided the HRC.

Similar to the text of the decision of the European Commission of Human Rights, the reasoning of the Human Rights Committee appears most complex when dealing with the necessity of the restriction. The Committee stated that the necessity-condition was met in absence of any proof that the restriction was *not* necessary; a not very satisfying argument. On this point, the individual opinions are not that illuminating either. Bhagwati stated that 'in the context of the situation prevailing in Europe' the 'necessary consequence' of statements such as those of Faurisson, would be promotion and strengthening of anti-Semitic feelings. On how and why these statements would have necessarily that effect, Bhagwati remained silent. Evatt, Kretzmer and Klein concluded as well that protecting the rights of the Jewish community of being free from incitement to

[327] McGoldrick and O'Donnell, 'Hate-speech laws: consistency with national and international human rights law', 483.
[328] Ibidem, 485.
[329] Ibidem, 474.

racism or anti-Semitism, could not have been achieved by less drastic means, but other means "reasonably available and less intrusive on freedom of expression"[330] and the possible effectiveness of these means were not discussed in their opinion. On the other hand, the Committee did a better job in considering factors as the nature of the statements, the context and the consequences. Although not substantiated with examples of the statements or an analysis of the factual consequences, it is at least indicated that these factors need to be considered, something omitted by the European Commission on Human Rights.

Another point of the decision that needs to be noted is that although the application of the law was accepted in the case of Faurisson, the Committee and several individual members in their opinions warned against the use of laws such as the Gayssot Act that penalise denial of certain historical facts, and also claimed that, *in abstracto*, such a law was not proportional to the aims it intended. Evatt, Kretzmer and Klein even stated that in principle there would be every reason to maintain protection of *bona fide* historical research against restriction. In essence, this notion is incompatible with the policy of the European Court of Human Rights that established historical facts, such as the Holocaust, are removed from the protection of Article 10 on the basis that their denial is contravening with the fundamental ideas of the European Covenant on Human Rights.

5.3 Evaluation

What should be concluded from this analysis on how international judicial bodies deal with hate speech? It can be clearly observed from the cases I have discussed that the judges have tried to stick as precisely as possible to the literal text of respectively the European Convention on Human Rights and the International Covenant on Civil and Political Rights. Their approach to the complaints of D.I. and Faurisson corresponds with the conclusion of chapter two in that the three conditions for legitimate restrictions (restrictions must be prescribed by law, must be aimed at a legitimate purpose and must be necessary) are the focus in dealing with these cases. Besides, both institutions agree that the restrictive measure should be proportionate to the protected right. This far the

[330] Article 19, 'Policy statements' 'in: Coliver (ed.) *Striking a balance,* 316-317.

approach of these institutions is coherent with their mandate. As the approach seems rather straightforward and unambiguous, the more remarkable it is that vagueness remains characteristic of the decisions.

Both institutions have struggled with the practical execution of the theoretical principles in the course of which especially the condition of necessity is difficult to deal with. In the case of D.I., the European Commission of Human Rights failed to explain the way in which D.I.'s statements denied the fundamental principles of the ECHR. Were D.I.'s statements really harming the rights and reputation of the Jews? In failing to answer this question, the commission failed in my opinion to explain the necessity of the restriction placed on D.I. clearly. The HRC tried to dismiss the question in an even simpler way by saying that the restriction placed on Faurisson was necessary as no proof undermining the necessity was brought in. In that way France practically had fulfilled its burden of proof,[331] but theoretically this was quite a non-satisfying explanation. Evatt, Kretzmer, Klein and Bhagwati must have been aware of this as well as their individual opinions discussed the matter thoroughly. All these Committee members believed, just as the judges of the European Commission of Human Rights, that Holocaust denial was a vehicle of anti-Semitism and that protecting the rights and reputation of the Jewish community could not have been attained by less drastic means than the restriction imposed. However, this assumption is not made self-explanatory as it is again not explained in the Faurisson judgement how the statements of denying the Holocaust actually hurt the Jewish people. [332]

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[331] McGoldrick and O'Donnell, 'Hate-speech laws: consistency with national and international human rights law', 479.

[332] It must be noted, however, that the question of explaining how the statements of denying the Holocaust actually hurt the Jewish people has been clarified in the mean time by the European Court of Human Rights in the admissibility decision of the case *Garaudy vs. France* of 2003: "There can be no doubt that denying the reality of clearly established historical facts, such as the Holocaust, as the applicant does in his book, does not constitute historical research akin to a quest for the truth. The aim and the result of that approach are completely different, the real purpose being to rehabilitate the National-Socialist regime and, as a consequence, accuse the victims themselves of falsifying history. Denying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incitement to hatred of them." So, in judgements and decisions from that year onwards, blaming the European Court of Human Rights for not explaining how Holocaust denial constitutes hate speech has no validity. However, with regard to the decision on admissibility in the case of D.I. the argument that this issue was ignored is still valid, for the *D.I.* case was of an earlier date.
European Court of Human Rights, *Garaudy vs. France. Decision on admissibility,* Application no. 65831/01 (June 2003) 14. For the text of the decision on admissibility see:

In comparing the decisions of the European Commission of Human Rights and HRC, the one of the HRC stands out positively in that the individual members of the Committee have taken the effort in the attached opinions to state explicitly their considerations regarding intent, context and the consequences of the utterances of the plaintiff. This approach is more in line with the procedures as laid down in human rights law and applied in criminal law. The judgement in the *Nahimana et. al.* case taught us that also in international criminal law a way was found to penalise forms of hate speech not constituting incitement to violence (Holocaust denial is such a form), on the condition that a discriminatory intent is found and the speech clearly infringes on one or more basic rights of people. The approach of the HRC of judging the necessity of the restriction corresponds most clearly with the considerations on persecution of the ICTR.

It seems that, in essence, the European Commission of Human Rights agrees to the same ideas but fails in the systematic execution of the test. An indication for this is also found in the fact that the commission apparently saw the need to resort to the use of Article 17 to reach its conclusion in the case of D.I.[333] Apparently, Article 10 did not offer enough grips to come to the conclusion on inadmissibility of the application of D.I. In 1998, the European Commission/Court of Human Rights found a new way in dealing with the problem of Holocaust denial. It was decided that discussing Holocaust denial in terms of Article 10 of the ECHR was no longer necessary. Holocaust denial was removed from the protection of Article 10 by Article 17. The result was that discussing whether Holocaust denial was protected within the right to free speech or whether restricting Holocaust denial was necessary, became redundant for the judges of the European Court of Human Rights. In effect, the court had created its own Holocaust denial law; a development in contradiction with the opinion of the HRC that such general acts are undesirable as they do "not link liability to the *intent* of the author, nor to the tendency of the publication to incite to anti-Semitism." (see page 102) And in that way, this new policy of the European Court of Human Rights, although very much in line with the EU

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http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=65831/01&sessionid=3228327&skin=hudoc-en.

[333] From the in-depth study of Claire Boonzaaijer on how the European Commission/Court of Human Rights have dealt with Holocaust denial appeared, for that matter, that declaring the application of Holocaust deniers inadmissible under Article 17 was the standard policy in all cases concerning Holocaust denial settled in the history of the commission and the court. Boonzaaijer, *De geschiedenis volgens Straatsburg*, 94.

framework decision on racism and xenophobia, discussed in the introduction of this thesis, clashes with the policy of its fellow-institution of the United Nations and with the generally agreed international principles in dealing with hate speech as laid down in human rights law and applied in criminal law.

Conclusion

In this inquiry I have tried to find an answer to the question whether the international community has succeeded in developing a coherent legal approach to the problem of hate speech after six decennia of thinking on relevant legislation and its enforcement by international courts, tribunals and judicial monitoring bodies.

Both on the philosophical level and on the level of international human rights (treaty) law, there has always been consensus about the principle that freedom of speech should be given as much space as possible. It was agreed that not only expressions favourable to the majority or generally accepted would be protected by the right to freedom of expression, but also more dissenting or shocking forms of free speech. Eventually, the traditional philosophical notions that freedom of speech should be a fundamental right to all because this right enables people to express their identity and therefore contributes to their self-fulfilment, and the notion that democracy can only exist when people have the right to say what they think, were translated into all human rights treaties dealt with in this thesis.

On the other hand, it has also been acknowledged in the theoretical discussion that those forms of speech dangerous to a democratic society and/or infringing upon the rights of others should be prohibited in the interest of a peaceful and just world. Therefore, international human rights law included provisions that prohibited certain forms of speech under certain conditions. States Parties of the human rights treaties were allowed, and in certain cases even obliged, to forbid propaganda for wars of aggression, speech inciting directly and publicly to genocide, speech inciting to violence or discrimination, but also less specifically definable forms of expression constituting a risk to, or harming (parts of) society. It was remarkable that with every new human rights treaty more and other forms of hate speech were explicitly defined as being out of the scope of protected speech. The culmination of this process was visible in the CERD, ratified in 1965, in which the mere dissemination of discriminative speech (and not only inciting comments) was prohibited for the first time.

Structural development of thinking on the matter, which was the product of historical circumstances, made it difficult to discover universally accepted principles on

the restriction of hate speech. However, on the basis of the majority of the documents, a three-part test could be deduced from the international human rights agreements, that summarized the internationally accepted way on how hate speech should be dealt with. Restrictions on the right to free speech were allowed, but only on condition that the restriction would 1) be provided by law; 2) pursue a legitimate aim (as laid down in the various treaties such as, for instance, prevention of disorder and crime, protection of the rights and reputation of others, etc.); and 3) be necessary to attain that aim. From this, it can be concluded that already in December 1966, when the last human rights treaty on this subject was opened for ratification (ICCPR), the international community had succeeded in reaching an international coherent approach in dealing with hate speech *in theory.*

However, applying these general principles *in practice* when individuals and states were on trial for violating human rights turned out not to be that simple. It was in international criminal law that the difficulties of implementing measures against hate speech offenders were felt first. In this field of law, the focus had traditionally been, as could be concluded from the Streicher and Fritzsche holdings of 1946, on the gravest forms of hate speech: those forms inciting to violence. In fact, this implied that also in criminal law, hate speech would be only penalised in cases of disorder, crimes or clear violations of the rights of others in the form of aggression (comparable to the legitimate aims mentioned in international human rights law). Streicher was convicted because the IMT judges considered it proven that with his hate utterances published in *Der Stürmer*, the 'Jew-baitor number one' had incited the German people to atrocities against the Jews. Fritzsche, on the other hand, was considered not guilty, mainly because his broadcasts did not incite to persecution, but also because he did not seem to have had a criminal intent. It was a pity though, that the Nuremberg judges did not expatiate in these historical hate speech judgements on the legal definition of incitement. The IMT failed to explain the importance of factors as intent, context and causation in cases of hate speech. In that way, the judges failed to clarify the legal 'necessity' of Streicher's death sentence and Fritzsche's acquittal. These were flaws that led to a lot of criticism and were indicative of the difficulties of dealing with hate speech legally. The IMT judgements have functioned as the beginning of a legal discussion that has not ended yet.

The international criminal tribunals set up in the 1990s have tried to solve the legal difficulties not clearly worked out at Nuremberg. Especially the judgement in *Nahimana et.al*. in 2003 was helpful as it clearly defined the legal requirements for hate speech to be marked as inciting to criminal acts, and, moreover, it defined a set of principles that could serve as an analytical tool in dealing with hate speech. In correspondence with the earlier developments in international human rights law, in the second half of the 1990s, possibilities were sought in international criminal law to try persons for hate speech that does not incite to violence but 'merely' insults. The ICTY prosecution team, in the case against Dario Kordić, were the first to venture upon this new path of indicting hate speech offenders. This Croat was indicted for the encouragement of racial hatred lacking incitement. As we have seen in chapter four, however, the time turned out not to be ready for this yet. Also for this problem, the breakthrough came with the ICTR verdict of *Nahimana et.al.* It became the first international criminal tribunal to convict individuals for hate speech that did not clearly incite to violence or necessarily lead to danger or further harm. As hate speech interfered *by definition* with the equality and dignity rights of the group aimed at, the trial Chamber argued, it could be seen (under certain conditions) as the harm itself and, in criminal terms, as persecution. Therefore, thus went the new line of thought, hate speech could be penalised regardless of the fact whether it incited to violence.

In solving the legal problems left by Nuremberg, the ICTR found a way in practically dealing with hate speech from a criminal law perspective that was coherent with the international agreements as laid down in the human rights law treaties. The ICTR stated that certain forms of hate speech were to be considered as belonging within the framework of criminal law. This could be concluded from the intent of the accused, the context in which the speech was uttered and the consequences. This, in fact, is a criminal law-explanation of the requirement of necessity as we saw it in human rights law. For the necessity condition is aimed at making sure that the hate speech utterance is indeed of such a dangerous character that putting restrictions on the author/speaker is defendable. Besides, the search of the ICTY and ICTR for a way to criminalise also softer forms of hate speech that do not incite to violence is in line with the development that we saw earlier in human rights law. Between the drafting of the first human rights

treaty (UDHR) and the last (ICCPR) more and more forms of speech became considered for restriction (think especially of the CERD). This development was adopted in criminal law with, for the time being, the *Nahimana et.al.* verdict as the end-result. In this respect too, human rights law and international criminal law followed a coherent and parallel path.

With regard to the other human rights law enforcement institutions, the international judicial bodies that have the task to monitor the international performance of human rights treaties, it could be observed that these institutions encountered serious difficulties in dealing with hate speech. Although the fundamental approach of the European Commission of Human Rights and the HRC was in accordance with human rights law (the appeals of Holocaust deniers were in theory considered in the light of the three-fold test taken from human rights treaties), the practical analyses of the cases left much to be desired. It proved to be difficult to explain if and how Holocaust denial infringes upon the rights of the Jewish community. It was not until the case of *Garaudy vs France* (2003) that the European Court of Human Right succeeded in explaining this. Therefore, in the time of *D.I.* (1996) the question whether Holocaust denial should be necessarily prohibited could be raised. Also after Garaudy, however, the question remains whether utterances should be prohibited when the nature of the utterances, the intent of the disseminator, and the consequences of the utterances are not extensively analysed in each individual case. Several members of the HRC have tried their best to explain the not very elaborate decision of the Committee in the Faurisson case. But a systematic analysis of the relevant elements of necessity comparable to what the judges offered us in the *Nahimana et.al.* case, was not given. Again, in my opinion, also for these institutions to act in coherence with the general international approach, such an analyses should have focused on the elements of intent, context and consequences: "Freedom of expression protects historical debate but not hate speech disguised as historical debate. The intent of the author, sometimes as evidenced by the statements themselves, and the context are key factors to be considered when distinguishing between these two categories of speech."[334]

In this light, also the European Commission of Human Rights' decision of inadmissibility of D.I.'s application was remarkable for 1) the commission used a vague

[334] Mendel, 'Study on international standards relating to incitement to genocide or racial hatred', 44.

method in choosing article 17 (and not article 10(2)) of the ECHR to underpin its reasoning, and 2) the commission asserted that if his free speech was not restricted, D.I.'s statements would harm the Jewish community. This reasoning of the commission was done, however, without considering D.I's intent, the context of his utterances and an indication of the consequences. Such incomplete reasoning violates, in my opinion, 'the principles of legality', to use the words of the ICTY judges in the Kordić case. The European Commission/Court of Human Rights deviated even further from the international coherent legal approach to hate speech as it exists in human rights law treaties and on the practical level of jurisprudence as applied in criminal tribunals. In 1998 the court removed Holocaust denial from the protection of the right to freedom of expression, *regardless of its form*. In that way all difficult factors, such as necessity, intent, context and consequences, can be systematically ignored. This way of dealing with the matter seems to stem from the firm will to eradicate any attempt to start the quagmire of discussions on the reality of the Holocaust again. Of course, it is an efficient manner for banning as many insulting comments as possible, but it is also a way that does not do justice to all the complexities inherent to the discussion of free speech vs. hate speech as it has been going on since the time of Milton and Mill. This is a worrying development as in order to guarantee the free exchange of ideas and opinions as needed in a democratic society "speech should never be censored based on its content alone. Any restrictions on expressions should be justified only by reference to its *impact.*"[335]

Summarizing all this, we can conclude that, at this point in time, the international community seems to have succeeded in reaching a coherent legal approach to the problem of hate speech on the theoretical level of international human rights treaty law and on the practical level of dealing with hate speech in international criminal courts and tribunals. Both in international human rights law and in international criminal law all the difficulties of dealing with hate speech and all the relevant conditions are taken into account. This approach does justice to all the traditional paradoxes of the classical discussion of free speech vs. hate speech.

The practical policy of the international judicial bodies that have the task to monitor the implementation of the human right law treaties, however, deviates from the

[335] Frances D'souza, 'Introduction' in: Coliver (ed.) *Striking a balance,* viii.

legal approach. No systematic analysis of the relevant conditions for an utterance to be judged as criminal hate speech is applied. The HRC seems to find itself at the same point as the IMT judges at the time of the Streicher and Fritzsche case; the Committee members fail to systematise their reasons and make them explicit. The European Court of Human Rights, on the other hand, while claiming to apply the principles as laid down in the ECHR, has created its own approach and deleted certain forms of speech as, for instance, Holocaust denial completely from the legal debate. It is an approach not in correspondence with the concerns of the European Convention on Human Rights. And it is out of step with what the rest of the international community has been doing in this field. Is it not rather strange that the EU has adopted the approach of the European Court of Human Rights with its framework decision of April 2007 by also categorically prohibiting the denial of certain historical facts without considering all the relevant nuances? The decision of the Council of the European Union seems to be a deviation from the course which its members, together with the rest of the signatories, once agreed to take when ratifying human rights conventions and treaties.

Appendices

- **Appendix I: Relevant article(s) of the Universal Declaration of Human Rights (UDHR)**

- **Appendix II: Relevant article(s) from the European Convention on Human Rights (ECHR)**

- **Appendix III: Relevant articles of the International Convention on Civil and Political Rights (ICCPR)**

- **Appendix IV: Relevant article(s) of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)**

- **Appendix V: relevant article(s) of the Charter of the International Military Tribunal (IMT)**

- **Appendix VI: relevant article(s) of the statutes of the ICTY and ICTR**

Appendix I: Relevant article(s) of the Universal Declaration of Human Rights (UDHR) from 1948

Preamble

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now, therefore,

The General Assembly,

Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

(…)

Article 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

(…)

Article 29(2)
In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

NB. For the full text of the UDHR see: http://www.unhchr.ch/udhr/

Appendix II: Relevant article(s) from the European Convention on Human Rights (ECHR) from 1950

Preamble

The governments signatory hereto, being members of the Council of Europe,

Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948;

Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared;

Considering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms;

Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend;

Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration,

Have agreed as follows:

(…)

Article 10 . Freedom of expression

1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2 The exercise of these freedoms, since it carries with it duties and responsibilities, 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 and impartiality of the judiciary.

Article 17. Prohibition of abuse of rights

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of

the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

NB. For the full text of the ECHR see: http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf

Appendix III: Relevant articles of the International Convention on Civil and Political Rights (ICCPR) from 1966

Preamble

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

(…)

Article 19

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include 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.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
(a) For respect of the rights or reputations of others;
(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 20

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

NB. For the full text of the ICCPR see: http://www.ohchr.org/english/law/ccpr.htm

Appendix IV: Relevant article(s) of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) from 1965

Preamble

The States Parties to this Convention,

Considering that the Charter of the United Nations is based on the principles of the dignity and equality inherent in all human beings, and that all Member States have pledged themselves to take joint and separate action, in co-operation with the Organization, for the achievement of one of the purposes of the United Nations which is to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion,

Considering that the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set out therein, without distinction of any kind, in particular as to race, colour or national origin,

Considering that all human beings are equal before the law and are entitled to equal protection of the law against any discrimination and against any incitement to discrimination,

Considering that the United Nations has condemned colonialism and all practices of segregation and discrimination associated therewith, in whatever form and wherever they exist, and that the Declaration on the Granting of Independence to Colonial Countries and Peoples of 14 December 1960 (General Assembly resolution 1514 (XV)) has affirmed and solemnly proclaimed the necessity of bringing them to a speedy and unconditional end, Considering that the United Nations Declaration on the Elimination of All Forms of Racial Discrimination of 20 November 1963 (General Assembly resolution 1904 (XVIII)) solemnly affirms the necessity of speedily eliminating racial discrimination throughout the world in all its forms and manifestations and of securing understanding of and respect for the dignity of the human person,

Convinced that any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination, in theory or in practice, anywhere,

Reaffirming that discrimination between human beings on the grounds of race, colour or ethnic origin is an obstacle to friendly and peaceful relations among nations and is capable of disturbing peace and security among peoples and the harmony of persons living side by side even within one and the same State,

Convinced that the existence of racial barriers is repugnant to the ideals of any human society,

Alarmed by manifestations of racial discrimination still in evidence in some areas of the world and by governmental policies based on racial superiority or hatred, such as policies of apartheid, segregation or separation,

Resolved to adopt all necessary measures for speedily eliminating racial discrimination in all its forms and manifestations, and to prevent and combat racist doctrines and practices in order to promote understanding between races and to build an

international community free from all forms of racial segregation and racial discrimination,

Bearing in mind the Convention concerning Discrimination in respect of Employment and Occupation adopted by the International Labour Organisation in 1958, and the Convention against Discrimination in Education adopted by the United Nations Educational, Scientific and Cultural Organization in 1960,

Desiring to implement the principles embodied in the United Nations Declaration on the Elimination of All Forms of Racial Discrimination and to secure the earliest adoption of practical measures to that end,

Have agreed as follows:

(…)

Article 1

In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

(…)

Article 4

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;
(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

NB. For the full text of the CERD see: http://www.ohchr.org/english/law/pdf/cerd.pdf

Appendix V: relevant article(s) of the Charter of the International Military Tribunal (IMT) from 1945

Article 6:
The Tribunal established by the Agreement referred to m Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) CRIMES AGAINST PEACE: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) WAR CRIMES: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c)CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

NB. For the full text of the Charter see:
http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm

Appendix VI: relevant article(s) of the statutes of the ICTY and ICTR, respectively from 1993 and 1994

ICTY

Article 4: Genocide
1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
(a) killing members of the group;
(b) causing serious bodily or mental harm to members of the group;
(c) deliberately inflicting on the group conditions of life calculated to bring about its physical
destruction in whole or in part;
(d) imposing measures intended to prevent births within the group;
(e) forcibly transferring children of the group to another group.

3. The following acts shall be punishable:
(a) genocide;
(b) conspiracy to commit genocide;
(c) direct and public incitement to commit genocide;
(d) attempt to commit genocide;
(e) complicity in genocide

Article 5: Crimes Against Humanity
The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:
(a) murder;
(b) extermination;
(c) enslavement;
(d) deportation;
(e) imprisonment;
(f) torture;
(g) rape;
(h) persecutions on political, racial and religious grounds;
(i) other inhumane acts.

NB. For the full text of the statute see: http://www.un.org/icty/legaldoc-e/index.htm

ICTR

Article 2: Genocide
1. The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this Article or of committing any of the other acts enumerated in paragraph 3 of this Article.

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.

3. The following acts shall be punishable:
(a) Genocide;
(b) Conspiracy to commit genocide;
(c) Direct and public incitement to commit genocide;
(d) Attempt to commit genocide;
(e) Complicity in genocide.

Article 3: Crimes Against Humanity
The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:
(a) Murder;
(b) Extermination;
(c) Enslavement;
(d) Deportation;
(e) Imprisonment;
(f) Torture;
(g) Rape;
(h) Persecutions on political, racial and religious grounds;
(i) Other inhumane acts.

NB. For the full text of the statute see: http://69.94.11.53/ENGLISH/basicdocs/statute.html

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