

Study on International Standards Relating to Incitement to Genocide or Racial Hatred

For the UN Special Advisor on the Prevention of Genocide

Toby Mendel
April 2006

Table of Contents

<i>Introduction</i>	<i>1</i>
<i>Part I: International Provisions on Genocide, Hate Speech and Free Speech</i>	<i>2</i>
I.1 Genocide	2
I.1.1 General Genocide Provisions	2
A Comparison	4
I.1.2 Incitement to Genocide	5
Drafting History	5
Direct and Public Incitement	7
Incitement as an Inchoate Offence	8
I.2 Hate Speech	10
I.2.1 The Provisions	10
I.2.2 A Comparison	14
Advocacy of Hatred	14
Groups Covered	14
Requirement of Incitement	14
Proscribed Results	14
Form of Censure	15
I.3 Relationship Between Incitement to Genocide and Hate Speech	16
I.3.1 Textual/Interpretive Differences	17
Advocacy	17
Groups Covered	17
Incitement	18
Proscribed Results	18
Direct and Public	19
Form of Censure	19
I.3.2 Some Differences in the Case Law	20
I.4 Freedom of Expression	21
<i>Part II: Balancing the Interests</i>	<i>24</i>
III.1 Some Preliminary Considerations	24
II.1.1 What Constitutes Hatred	24
II.1.2 Understanding the Jurisprudence	26
II.1.3 Forms of Incitement	28
III.2 The Underlying Rationales: Equality and Free Speech	29
III.3 Interpretive Issues: Free Speech and Hate Speech	30
II.3.1 Internal Treaty Interpretation	31
ICCPR	31

European Convention on Human Rights _____	33
II.3.2 Reconciling Free Speech and CERD _____	34
Absence of Advocacy or Incitement Requirements _____	35
Positive Statements _____	36
II.3.3 Other Issues _____	38
Religious Groups _____	38
Incitement to a State of Mind _____	39
Historical Debate versus Hate Speech _____	40
Political Speech and the Margin of Appreciation _____	41
III.4 Incitement _____	44
II.4.1 Intent _____	45
II.4.2 Causation _____	49
Causation With Respect to Incitement to Genocide _____	50
Causation With Respect to Hate Speech _____	53
II.4.3 Context _____	56
II.4.4 Tone/Style/Balance _____	58
II.4.5 Truth _____	60
<i>Part III: Monitoring: Early Warning of Incitement _____</i>	62
III.1 Democracy and Freedom of Expression _____	62
III.2 Official Involvement _____	64
III.3 Status _____	66
III.4 Frequency/Scope _____	66
III.5 Context _____	67
III.6 Nature of the Messages _____	67
III.7 Intent _____	69
<i>Part IV: Prevention _____</i>	70
IV.1 Addressing ‘Bad’ Speech _____	70
IV.1.1 Legal Measures _____	70
IV.1.2 Non-Legal Measures _____	72
IV.1.3 Banning Groups _____	73
IV.2 Positive Measures _____	74

Introduction

This Study is an assessment of international law standards relating to incitement to genocide and racial hatred. The overriding goal, consistent with the mandate of the UN Special Advisor on the Prevention of Genocide, who commissioned the Study, is to contribute to international efforts to take preventive measures relating to genocide. The specific focus of this Study within that broad topic is on speech-related issues.

International standards relating to incitement to genocide and hatred were developed with close attention to the right to freedom of expression, a fact which is clearly reflected in the *travaux préparatoires*, as well as the application of these rules by international courts and other decision-makers. This Study reflects that tension by presenting the central analysis as a balancing of the different interests in play, namely avoiding genocide and acts of hatred, promoting substantive equality and protecting freedom of expression.

It should be noted at the outset that the international law standards in question primarily call for criminal prohibitions on inciting speech, by using terms such as ‘punishable by law’ and ‘prohibited by law’. Assessing speech for purposes of prosecution is, however, a very different exercise from assessing that same speech for purposes of monitoring for a risk of genocide (or hatred). Criminal sanctions are a very intrusive means of restricting speech and international courts have sought to limit their application as far as possible. As a result, monitoring efforts often need to focus on speech which, while failing to qualify as incitement to genocide or even hate speech still poses a risk of promoting genocide. Taking this into account, this Study also focuses on the question of monitoring speech for early warning signs of incitement to genocide.

Finally, it is one thing to monitor the risk of genocide and another to take preventive action. Criminal measures represent one form of potential preventive measure, but only one. This Study includes a final Part on other measures that may be taken to prevent or counter incitement to genocide or hatred. The focus on this Part of the Study is on measures that directly affect expression, not the broader range of preventive measures that may contribute to reducing the risk of genocide.

Part I: International Provisions on Genocide, Hate Speech and Free Speech

This Part of the Study elaborates on the key provisions in international law relevant to incitement, specifically those relating to genocide, hate speech and freedom of expression. This section is mainly restricted to textual interpretation and comparison of the various provisions. The exercise of balancing the various competing interests these provisions seek to protect is undertaken in Part II.

I.1 Genocide

I.1.1 General Genocide Provisions

Much has been written about the scope and meaning of the term genocide, particularly as it appears in the *Convention on the Prevention and Punishment of the Crime of Genocide* (Genocide Convention),¹ the terms of which other instruments on genocide have incorporated, usually verbatim, and these provisions have also been the subject of detailed interpretation by various international courts.² It is beyond the scope of this Study to elaborate in detail on the specific elements of the crime of genocide but a brief outline of the key provisions will help inform our analysis of the scope of incitement to genocide.

The *Charter of the International Military Tribunal (Nuremburg)*³ established the first legal forum (Nuremburg Tribunal) before which individuals were convicted of acts which later came to be understood and legally defined as genocide.⁴ As such, it is somehow a precursor to the subsequent treaties which specifically defined genocide. The Charter itself did not explicitly use the term ‘genocide’ but the term was used in the Indictment of 8 October 1945, in Count Three, War Crimes, specifically under the heading “Murder and Ill-Treatment of Civilian Populations of or in Occupied Territory and on the High Seas”.⁵ However, the only person specifically convicted by the Tribunal for incitement on its own was Julius Streicher, who was convicted under Court Four of the Indictment, Crimes Against Humanity, defined in Article 6(c) of the Charter as:

¹ See, for example, Ruhashyankiko, Special Rapporteur, Study of the Question of the Prevention and Punishment of the Crime of Genocide, 4 July 1978, E/CN.4/Sub.2/416; Kunz, J., “The United Nations Genocide Convention” (1949) 43 *American Journal of International Law* 739; Schabas, W., *Genocide in International Law* (Cambridge: Cambridge University Press, 2000) (Schabas, 2000a); and Robinson, N., *The Genocide Convention: A Commentary* (New York: Institute of Jewish Affairs, 1960).

² For ease of reference, all international bodies which are formally tasked with interpreting international legal provisions in the context of contentious individual appeals will be referred to herein as courts, although many are not, in fact, courts, *per se*, although they do undertake quasi-judicial functions.

³ Part of the *London Agreement of August 8th 1945* signed by the governments of France, Soviet Union, United Kingdom and United States.

⁴ The term itself had been defined earlier but not in a binding legal form. See Ruhashyankiko, paras. 15-28.

⁵ Section VIII of the Indictment.

[M]urder, 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.

There can be little doubt that the acts for which Streicher was convicted were considered to constitute incitement to genocide and the judgment specifically referred to his having ‘injected poison’ into the minds of Germans, causing them to follow the Nazi policy of “Jewish persecution and extermination.”⁶

Genocide itself was first formally defined in the Genocide Convention, adopted by the UN General Assembly in 1948,⁷ Article 2 of which states:

In the present Convention, 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.

Pursuant to Article 1 of the Genocide Convention, “The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.” Article 3 stipulates:

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.

These three articles define genocide for purposes of the Convention, the rest of which goes on to provide for individual liability and various procedural and other matters.

The *Statute of the International Criminal Tribunal for the Former Yugoslavia* (ICTY Statute), adopted by the UN Security Council in 1993,⁸ repeats Articles 2 and 3 of the Genocide Convention verbatim,⁹ as does the *Statute of the International Criminal Tribunal for Rwanda* (ICTR Statute), adopted by the UN Security Council in 1994.¹⁰

⁶ The *Streicher* decision can be found at: <http://www.yale.edu/lawweb/avalon/imt/proc/judstrei.htm>.

⁷ General Assembly Resolution 260 A (III), 9 December 1948, entered into force 12 January 1951.

⁸ Security Council Resolution 827, 25 May 1993.

⁹ Article 4.

¹⁰ Security Council Resolution 955, 8 November 1994. See Article 2.

Finally, the *Rome Statute of the International Criminal Court (ICC Statute)*¹¹ defines genocide in exactly the same language as Article 2 of the Genocide Convention.¹² Instead of including the punishable acts found in Article 3 of the Genocide Convention, however, the ICC Statute sets out various different heads of individual criminal responsibility, such as committing, ordering, soliciting or aiding and abetting the commission of the defined crimes.¹³ Specifically, and uniquely in respect of genocide, the ICC Statute provides for liability for anyone who, “directly and publicly incites others to commit genocide”,¹⁴ in this instance mirroring the language of Article 3(c) of the Genocide Convention. This is significant inasmuch as genocide is the only crime in relation to which incitement is separately punishable, even when it does not constitute another head of liability.¹⁵

A Comparison

It is clear from the above that there is very little difference between the various provisions relating to genocide as they are all based closely on the wording of the Genocide Convention.

One difference between the Genocide Convention and the ICC Statute, on the one hand, and the ICTY and ICTR Statutes, on the other, is that the latter provide both a list of punishable acts of genocide and, separately, for individual liability for anyone who “planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of” various crimes, including all punishable acts of genocide.¹⁶ This doubling of ‘punishable acts’ or provisions on ‘individual criminal responsibility’ means that, formally, these Statutes define such things as planning and/or instigating incitement to genocide as a crime, whereas the Genocide Convention and ICC Statute prohibit only incitement itself.

The jurisprudence of the International Criminal Tribunal for Yugoslavia (ICTY) suggests that this is of minor significance and that the result is that certain heads of individual responsibility overlap. In *Prosecutor v. Krstić*, for example, the Tribunal noted:

Article 7(1) entails a general provision on individual criminal responsibility applicable to all crimes in the Statute. Article 4(3) provides for heads of responsibility in relation to genocide only; it is taken *verbatim* from Article III of the Genocide Convention. Article 4(3) provides for a broad range of heads of criminal responsibility, including heads which are not included in Article 7(1), such as “conspiracy to commit genocide” and “attempt to commit genocide”. By incorporating Article 4(3) in the Statute, the drafters of the Statute ensured that the Tribunal has jurisdiction over all forms of participation in genocide prohibited under

¹¹ Adopted in Rome, 17 July 1998, entered into force 1 July 2002.

¹² Article 6.

¹³ Article 25.

¹⁴ Article 25(3)(e).

¹⁵ In contrast, the International Law Commission’s Draft Code of Crimes Against the Peace and Security of Mankind, 1996, provides for incitement to a variety of crimes, but only where those crimes in fact occur. See Article 2(3)(f). It thus rules out unsuccessful incitement, which is far more controversial than successful incitement. See section I.1.2.

¹⁶ Article 7(1) of the ICTY and Article 6(1) of the ICTR.

customary international law. The consequence of this approach, however, is that certain heads of individual criminal responsibility in Article 4(3) overlap with those in Article 7(1).¹⁷ [footnotes omitted]

In *Brđanin*, the Tribunal specifically rejected the prosecutor's submission that this was, "an incidental result of the *verbatim* incorporation of Articles 4(2) and 4(3) from the Genocide Convention". It is possible, however, that this was largely out of respect for the drafters of the Statute, a respect required by the Tribunal's mandate and the scope of its interpretive discretion.¹⁸ A more convincing argument is that this doubling up was either an oversight or an unresolved drafting complexity.¹⁹ Regardless, for present purposes what is important is that it would appear that the Tribunal was not prepared to apply 'double' rules of liability, pursuant to which unsuccessful preparatory acts towards incitement would also be considered criminal.

I.1.2 Incitement to Genocide

The following sub-sections analyse the drafting history of the provisions on incitement to genocide, which are at the very heart of the subject matter of this Study, and then discuss some key issues. A detailed analysis of the meaning of incitement as interpreted by international courts is provided below, under Incitement, Section II.4.

Drafting History

The drafting history of the Genocide Convention has been detailed elsewhere.²⁰ For present purposes, it suffices to note that three main drafts were prepared and discussed: the first was prepared by three experts under the auspices of the UN Secretary-General (the Secretariat Draft),²¹ the second by an *Ad Hoc* Committee set up by the Economic and Social Council (the *Ad Hoc* Committee Draft),²² and the third by the Sixth Committee of the General Assembly. The actual Convention was approved by the General Assembly on 9 December 1948.²³

In the original Secretariat Draft, a number of provisions governed expressive acts considered preparatory to genocide. Article II(I)(2)(a) prohibited, as a preparatory act, "studies and research for the purpose of developing the technique of genocide". Article

¹⁷ Case No. IT-98-33-T (Trial Chamber), 2 August 2001, para 640. See also *Prosecutor v. Brđanin*, Case No. IT-99-36-T (Trial Chamber), 1 September 2004, para. 726. This was confirmed on appeal. See *Prosecutor v. Krstić*, Case No: IT-98-33-A (Appeals Chamber), 19 April 2004, para. 138.

¹⁸ See *Brđanin*, footnote 1766.

¹⁹ Interestingly, the Draft Proposal for a Framework Decision on combating racism and xenophobia of the Council of the European Union, which deals with hate speech rather than incitement to genocide, specifically provides for the inclusion of aiding and abetting incitement to hatred – Article 2(1) – and even instigation of incitement in some contexts – Article 2(2). See Doc. 8994/1/05.REV 1, 27 May 2005. The status of this document is unclear but it would not appear to be anywhere near ready for adoption.

²⁰ See, for example, Ruhashyankiko, paras. 29-42.

²¹ Robinson, Appendix II, p. 122.

²² Robinson, Appendix IV, p. 131. The members were: China, France, Lebanon, Poland, the Soviet Union, the United States and Venezuela.

²³ See footnote 7.

II(II)(2), the precursor to present Article 3(c) on incitement, prohibited “direct public incitement to any act of genocide, whether the incitement be successful or not”. Finally, Article III provided as follows:

All forms of public propaganda tending by their systematic and hateful character to provoke genocide, or tending to make it appear as a necessary, legitimate or excusable act shall be punished.

Very few States provided comments on these provisions in the Secretariat draft. The United States, in its comments, suggested that all reference to ‘preparatory acts’ be excluded.²⁴

In the *Ad Hoc* Committee, the United States, out of concern for free speech, suggested that the provision on incitement be qualified by a reference to the need for a clear and present danger, although it then put forward a proposal which would simply have required a reasonable likelihood that the events would occur. The Soviet Union, at the other end of the spectrum, proposed that hate speech should be included, on the basis that it was a preparatory act to genocide. The final wording, based on a rejection of both proposals and considered to provide an appropriate balance between preventing genocide and respect for freedom of expression, was founded on the clear understanding that incitement might be a crime even when no genocide in fact took place.²⁵ The reference to incitement in public or private was included at this point.

The final *Ad Hoc* Committee draft included only one punishable act relating to preparatory expressive acts, having removed the provisions relating to preparatory acts such as research and public propaganda. Article IV(c) read as follows:

Direct incitement in public or in private to commit genocide whether such incitement be successful or not.

In the Sixth Committee, the United States opposed the inclusion of any provision which embraced unsuccessful incitement on the basis that this threatened freedom of expression. Several other delegations supported this view on the basis that incitement which constituted conspiracy, attempt or complicity would already be covered by other provisions. Other delegations opposed deleting the incitement clause on the basis that prevention was an important goal which this clause served and that freedom of speech did not extend to such statements. The US proposal was defeated on a vote. Belgium proposed the compromise solution of deleting the phrase ‘or in private’, which was supported by an argument that urging to genocide in private, which did not otherwise amount to another crime, such as conspiracy or attempt, did not present any danger. Belgium further proposed to drop the phrase ‘whether such incitement be successful or not’, essentially on the basis that it was superfluous since it was clear that the provision covered unsuccessful incitement, given that successful incitement was covered by the crime of complicity. Both Belgian proposals were adopted. The Soviet Union once again proposed to include a broad prohibition on propaganda aimed at incitement to hatred, as

²⁴ See Schabas (2000a), p. 57.

²⁵ See Schabas (2000a), pp. 267-8 and Ruhashyankiko, paras. 108-9.

well as to reinsert the provision on preparatory acts such as research, but once again this was defeated, both out of concern for free speech and also because, absent an intention to destroy a group, mere incitement to hatred did not fall within the ambit of the crime of genocide.²⁶

The final version calls on States Parties to prohibit: “Direct and public incitement to commit genocide”. This is a clear, precise and measured formulation which sought to balance the various interests at stake.

An interesting development was the exclusion of genocide of political groups from the ambit of the Convention for a variety of reasons, including that covering these groups would involve the UN in internal politics, that it could hamper action against subversive groups and that political groups could be protected by other means, including general human rights law.²⁷ Schabas has suggested that this might have influenced the definition of incitement to genocide inasmuch as that definition was adopted at a point when many delegates thought political groups would be covered, and was in part a result of particular concern with restricting political speech.²⁸ Although this idea seems reasonable, and a couple of examples are given to support it, the clear majorities by which proposals, noted above, to both expand and narrow the incitement provision were defeated, as well as the general tenor of the discussion, suggests that it is unlikely that the provision would have materially changed even if the chronology of these debates had been reversed.²⁹ In particular, it seems extremely unlikely that, even if they had been discussed after it were clear that political groups would not be covered, the provisions on preparatory acts such as research or on public propaganda would have been reinserted, or that a broader rule on incitement would have been adopted.

Direct and Public Incitement

The terms ‘direct’ and ‘public’ received very little attention during the drafting process. ‘Public’ is the less controversial of these terms. In *Prosecutor v. Akayesu*, the International Criminal Tribunal for Rwanda (ICTR) referred to both French jurisprudence holding words are public “where they were spoken aloud in a place that [is] public by definition” and to the International Law Commission, which characterises incitement as public where it is directed at “a number of individuals in a public place or to members of the general public at large by such means as the mass media, for example, radio or television.”³⁰ Presumably either characteristic – speaking in a place that is public or communicating with the public at large, for example via the mass media – would

²⁶ See Schabas (2000a), pp. 268-271; Robinson, pp. 66-69; and Ruhashyankiko, para. 118.

²⁷ See Ruhashyankiko, paras. 79-87 and particularly para. 80.

²⁸ See Schabas, W., “Hate Speech in Rwanda: The Road to Genocide” (2000) 46 *McGill Law Journal* 141 (Schabas, 2000b), p. 166.

²⁹ See Schabas (2000a), pp. 270-271.

³⁰ Case No. ICTR-96-4-T (Trial Chamber), 2 September 1998, Para. 556. The Tribunal was referring to the International Law Commission’s Commentary on its Draft Code of Crimes Against the Peace and Security of Mankind in Report of the International Law Commission on the work of its 48th session, 6 May-26 July 1996 to the General Assembly, 51 U.N. ORGA Supp. (No. 10), U.N. Doc. A/51/10 (1996), Article 2(3)(f), p. 26.

qualify.³¹ In *Prosecutor v. Nahimana, Barayagwiz and Ngeze*,³² both types of speech were found to constitute the crime of incitement.

‘Direct’ incitement is more problematical to define, in part because it goes to the heart of what constitutes incitement (see below under Incitement, Section II.4) and in part because of the ingenuity of human beings, including in the commission of heinous crimes, whereby euphemisms or implicit forms of speech may be employed to largely the same effect as clear calls to commit genocide. It should at least mean that the incitement is specifically aimed at the crime of genocide, as opposed, for example, to simply promoting hatred or discrimination.

As regards the latter, the *Akayesu* Tribunal noted, on the one hand, that direct “implies that the incitement assume a direct form and specifically provoke another to engage in a criminal act, and that more than mere vague or indirect suggestion goes to constitute direct incitement.” At the same time,

the direct element of incitement should be viewed in the light of its cultural and linguistic content. Indeed, a particular speech may be perceived as "direct" in one country, and not so in another, depending on the audience. The Chamber further recalls that incitement may be direct, and nonetheless implicit. Thus, at the time the Convention on Genocide was being drafted, the Polish delegate observed that it was sufficient to play skilfully on mob psychology by casting suspicion on certain groups, by insinuating that they were responsible for economic or other difficulties in order to create an atmosphere favourable to the perpetration of the crime.³³

To the extent that this simply stands for the proposition that communication is complex and that what might, in one context or cultural setting, qualify as direct incitement would not do so in another context, it is uncontroversial. Fairly obviously, it is the real meaning being communicated that needs to be considered. To the extent that it refers to the degree of nexus between the speech and the likelihood of genocide, it relates more to the question of how incitement is understood, which is dealt with below, under Incitement, Section II.4. At a minimum, the inclusion of the term ‘direct’ requires the establishment of a close link between the statements and the risk of genocide.

Incitement as an Inchoate Offence

The precise relationship between incitement to genocide as an inchoate offence and other punishable acts of genocide remains unclear and the literature and cases have done little to clarify the matter. It is quite clear from the drafting, from the academic literature and from the cases that incitement to genocide is an inchoate offence. Should the genocide actually occur, acts of instigation will normally be considered to be other punishable acts of genocide, for example genocide *per se* or complicity in genocide. As Schabas notes:

³¹ See also Schabas (2000a), p. 276.

³² 3 December 2003, ICTR-99-52-T (Trial Chamber).

³³ Para. 557. The Rwandan genocide amply demonstrated this phenomenon. Indeed, a Canadian immigration tribunal required expert testimony to determine the real meaning of various statements which, however, were quite clear to Rwandans. See Schabas (2000a), pp. 277-8.

“Incitement is, of course, a form of complicity (‘abetting’), and to that extent it is already covered by article III(e) [prohibiting complicity]. But as a general rule, incitement *qua* complicity, or abetting, is only committed when the underlying crime occurs.”³⁴ In the leading case on incitement to genocide, *Nahimana*, all three defendants were found guilty of both genocide *per se* and incitement to genocide for their statements promoting genocide.³⁵

An interesting question arises as to whether an act qualifies as incitement if genocide does in fact result. Much of the literature implies that it does and there is some jurisprudential support for this as well, including *Nahimana*. At the same time, there are problems with this approach. In the *Nahimana* case, the Tribunal recalled ICTR Appeals Chamber rulings to the effect that multiple convictions for distinct crimes were legitimate only where each statutory provision upon which a conviction is grounded contains a materially distinct element from the other provisions.³⁶ In *Nahimana*, the Tribunal held that this condition was met due to the fact that incitement to genocide required a public call to commit genocide whereas (successful) instigation to genocide, liable as a direct act of genocide, did not.³⁷ This overlooks the further ruling of the Appeals Chamber to the effect that distinctness needs to cut both ways.³⁸ While it is true that private urging to genocide would not qualify as incitement, successful public urging would qualify as instigation to genocide, hence an act of genocide *per se* (or complicity), leaving no distinct element for the incitement offence.

This suggests that, where the genocide does actually occur, (successful) incitement becomes an act of genocide *per se* (or complicity in genocide). It is probably also incitement, although it may not be prosecutable as such, assuming prosecution for actual genocide has also been preferred.³⁹ A separate charge may also lie in respect of specific acts of incitement which were not successful, even if genocide did take place.

Key Conclusions:

- The international provisions on genocide are substantially identical, being based on the 1948 Genocide Convention.
- The prohibition on “direct and public incitement to commit genocide” represents a careful compromise between the various competing interests.
- The requirement that incitement to genocide be public refers to either the place

³⁴ Schabas (2000a), p. 266.

³⁵ See paras. 973, 974 and 977A for the findings regarding actual genocide and paras. 1033, 1034, 1035, 1038 and 1039 for the findings regarding incitement to genocide.

³⁶ *Musema v. the Prosecutor*, Case No. ICTR-96-13-A (Appeals Chamber), 16 November 2001, paras. 361-363.

³⁷ Para. 1030.

³⁸ In the *Musema* decision, the Tribunal noted, at para. 361: “Applying this test, the Appeals Chamber in *Celebići* found that as between the Article 2 offences and Article 3 (common Article 3) offences of ICTY Statute at issue in the case, the multiple convictions entered by the Trial Chamber could not be affirmed, because while the Article 2 offences contained a materially distinct element not contained in Article 3 (common Article 3) offences, the reverse was not the case.” [footnotes omitted]

³⁹ Of course, the prosecutor could decide to lay charges only for incitement and not for actual genocide, in which case the situation would be reversed. The *Nahimana* Tribunal did recognise that complicity and actual genocide were mutually exclusive offences and convicted only for the latter offence. See para. 1056.

where the statements were made or dissemination to the public generally, such as through the mass media.

- The requirement that incitement to genocide be direct does not rule out the use of veiled language where the call to genocide is clear.
- Successful incitement to genocide becomes another punishable act of genocide – such as genocide itself or complicity in genocide – and may not then be separately punishable although it probably remains a separate offence.

I.2 Hate Speech

I.2.1 The Provisions

Whereas genocide itself is relatively clear, distinct and narrow – certainly as a legally defined phenomenon but also as an actual series of events – hate speech is far less so.⁴⁰ To some extent, this derives from the fact that hate speech normally incorporates an element of speech-related impact – often incitement – which raises complicated issues involving balance with respect for freedom of expression. In contrast, it is possible relatively neatly to separate the question of incitement as a punishable act of genocide from and what constitutes genocide *per se* and, as a consequence, to define the latter precisely, avoiding speech-related complexities. However, the definitional complexity of hate speech goes beyond issues relating to incitement. The very term ‘hate’ or ‘hatred’ is vague, in stark contrast to ‘genocide’. This is exacerbated by a lack of clarity, or at least consensus, regarding the evil sought to be avoided. Courts variously refer to ‘equality’, ‘non-discrimination’, ‘public order’ or general appeals to the ‘rights of others’. This imprecision complicates the study of hate speech provisions.

Promoting substantive equality among human beings, including freedom from discrimination, which is a central rationale for prohibiting hate speech, is a foundational one in human rights, and this is reflected in the very first article of the *Universal Declaration on Human Rights* (UDHR), adopted by the UN General Assembly in 1948,⁴¹ which states: “All human beings are born free and equal in dignity and rights.” The second article of the UDHR provides for equal enjoyment of the rights and freedoms proclaimed, “without distinction of any kind, such as race, colour, sex, ...” and several other articles refer explicitly to the equal enjoyment of various rights.⁴²

Notwithstanding the fact that it to some extent reflects a global reaction to the excesses of the Second World War, the UDHR does not specifically provide for prohibitions on hate speech or incitement to hatred. Article 7, however, provides for protection against discrimination, and also against incitement to discrimination. Article 29 refers to the duties everyone holds to the community, and recognises that certain limitations on rights

⁴⁰ Unless otherwise indicated, the term ‘hate speech’ as used herein refers generically to the various forms of xenophobic speech which are prohibited under international law. As such, and due to the differences between different instruments which define hate speech, the term lacks legal precision.

⁴¹ General Assembly Resolution 217A(III), 10 December 1948.

⁴² Article 7 provides for equality before the law, Article 10 for equality in public hearings and Article 21(2) for equal access to public service.

may be necessary and legitimate to secure, among other things, “due recognition and respect for the rights and freedoms of others”. This clearly includes possible limitations on freedom of expression, which is guaranteed by Article 19 of the UDHR, for purposes of protecting equality.

The first international treaty to deal directly with the issue of hate speech was the *International Convention on the Elimination of all Forms of Racial Discrimination* (CERD), adopted by the UN General Assembly in 1965.⁴³ Its provisions are not only the first to address hate speech but also by far the most far-reaching. Article 4 provides:

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.

The specific obligations provided for in Sub-article (a) have been analysed differently by different authors but it is probably useful to distinguish six categories of activity that States Parties are bound to declare offences punishable by law:⁴⁴

1. dissemination of ideas based on racial superiority;
2. dissemination of ideas based on racial hatred;
3. incitement to racial discrimination;
4. acts of racially motivated violence;
5. incitement to acts of racially motivated violence; and
6. the provision of assistance, including of a financial nature, to racist activities.⁴⁵

Article 4 refers variously (and inconsistently) to race, colour and ethnic origin but Article 1 clearly defines ‘racial discrimination’ as including distinctions based on “race, colour,

⁴³ General Assembly Resolution 2106A(XX), 21 December 1965, entered into force 4 January 1969.

⁴⁴ In its General Comment No. 15 of 23 March 1993, the CERD Committee refers to four categories to be banned under Article 4. See para. 3. Lerner, N., *The U.N. Convention on the Elimination of all Forms of Racial Discrimination* (Alphen aan den Rijn, The Netherlands: Sijthoff & Noordhoff, 1980), on the other hand, identifies five categories. See p. 49.

⁴⁵ See, for example, Mahalic, D. and Mahalic, J. “The Limitation Provisions of the International Convention on the Elimination of All Forms of Racial Discrimination” (1987) 9 *Human Rights Quarterly* 74, p. 93.

descent, or national or ethnic origin” so it may reasonably be assumed that other references in the Convention to ‘race’ extend to these categories as well.

Four of the six activities stipulated in Sub-article (a) are hate speech provisions, namely (1) to (3) and (5). The fourth and sixth provisions are not, and are thus beyond the scope of this Study.⁴⁶ It is clear both from the language and from the drafting history that the goal of prevention was a central rationale for these provisions.⁴⁷

Sub-article 4(b) imposes two obligations on States:

1. to declare illegal and prohibit organisations and activities which promote and incite racial discrimination; and
2. to make it an offence punishable by law to participate in such organisations and/or activities.⁴⁸

These are clearly relevant as preventive measures for genocide. At the same time, they do not assist in the elaboration of what constitutes hate speech *per se*.

It is unclear what Sub-article 4(c) adds, since the measures stipulated are already clearly covered by Sub-articles (a) and (b).⁴⁹ It does, however, serve to illustrate the particular evil of public officials and bodies engaging in racist activities, a matter which is of some relevance to the question of prevention of genocide.⁵⁰

CERD, by virtue of its specific focus on racial discrimination, does not guarantee the right to freedom of expression. However, it does require that measures taken pursuant to Article 4 have due regard for the principles set out in the UDHR – which include equality, non-discrimination and freedom of expression – and in Article 5 of CERD, which provides for equality before the law in the enjoyment of a large number of rights, including freedom of expression.⁵¹

The *International Covenant on Civil and Political Rights* (ICCPR), adopted by the General Assembly in 1976,⁵² places an obligation on States Parties to prohibit hate speech in rather different terms than CERD. Article 20(2) provides:

⁴⁶ They are also relatively uncontroversial. Acts of violence are prohibited in most societies, regardless of their motivation. Insofar as ‘racist activities’ in the sixth provision is understood to mean illegal racist activities, this provision merely prohibits aiding and abetting a crime, which is also prohibited in most States.

⁴⁷ See Lerner, pp. 44-46.

⁴⁸ Mahalic and Mahalic, p. 98, distinguish between declaring illegal and prohibiting, but the basis for this distinction is not clear in the article. Regardless, it has little relevance for purposes of this Study.

⁴⁹ Lerner suggests that it goes beyond the criminal law proscriptions of the previous paragraphs, calling on States to take other measures to bring about this result. See p. 51.

⁵⁰ Recommendation R(97)20 of the Committee of Ministers of the Council of Europe on ‘Hate Speech’, 30 October 1997, refers to the particular duty of governments, public authorities and public institutions to avoid making statements which may be understood as hate speech. Appendix, Principle 1. In commenting on the Secretariat draft of the Genocide Convention, France opined that “the crime can only take place with the complicity of the government.” See Schabas (2000a), p. 57.

⁵¹ Article 5(d)(viii).

⁵² General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 3 January 1976.

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

It may be noted that this provision employs a particular double-barrelled formulation, whereby what is to be prohibited is advocacy of hatred that constitutes incitement.

Article 19 of the ICCPR guarantees the right to freedom of expression. The UN Human Rights Committee (HRC), the body tasked with interpreting the ICCPR, has specifically stated that Article 20(2) is compatible with Article 19,⁵³ although the fact that the Committee is required to give full effect to all provisions of the treaty, as well as basic principles of treaty interpretation, require them to reach this conclusion.

All of the three regional human rights treaties – the *European Convention on Human Rights* (ECHR),⁵⁴ the *American Convention on Human Rights* (ACHR)⁵⁵ and the *African Charter on Human and Peoples' Rights* (ACHPR)⁵⁶ – provide for non-discrimination in the enjoyment of rights, respectively at Articles 14, 1 and 2, and also include various other provisions relating to equality and non-discrimination. All also guarantee the right to freedom of expression, at Article 10 of the ECHR, Article 9 of the ACHR and Article 13 of the ACHPR.

Perhaps surprisingly, only the ACHR specifically provides for the banning of hate speech, at Article 13(5), as follows:

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

Article 17 of the ECHR stipulates that its provisions may not be interpreted as granting the right to engage in any activity aimed at the destruction of any of the rights it proclaims, or at limiting them further than is provided for in the Convention. This has been relied upon by the European Court of Human Rights as justifying hate speech laws but not necessarily as requiring them.

The ACHPR takes a different approach, providing for duties as well as rights. These include requirements that rights should be exercised with due regard for the rights of others (Article 27), and to respect others and to maintain relations aimed at promoting respect and tolerance (Article 28). Again, this could be relied upon to justify hate speech laws.

⁵³ General Comment 11: Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20), 29 July 1983.

⁵⁴ Adopted 4 November 1950, entered into force 3 September 1953.

⁵⁵ Adopted 22 November 1969, entered into force 18 July 1978.

⁵⁶ Adopted 26 June 1981, entered into force 21 October 1986.

I.2.2 A Comparison

A comparison between the various hate speech provisions highlights a number of differences, some of which are discussed below.

Advocacy of Hatred

Article 20(2) of the ICCPR and Article 13(5) of the ACHR require advocacy of hatred. This anchors the requirement of intent for hate speech and suggests that incitement which was accidental, which was incidental – for example as a result of the publication of a scientific study or discussion of a controversial topic – or which resulted from an attempt to expose others’ advocacy of hatred, would not be covered. As a result, these provisions are narrower in scope than Article 4(a) of CERD, which does not require advocacy of hatred.

Groups Covered

Both Article 20(2) of the ICCPR and Article 13(5) of the ACHR cover advocacy of national, racial or religious hatred⁵⁷ whereas CERD covers race, colour, descent, or national or ethnic origin. In practice, however, the differences may be small.⁵⁸

Requirement of Incitement

Both Article 20(2) of the ICCPR and Article 13(5) of the ACHR only cover actual incitement. The question of what constitutes incitement is an extremely complex and controversial one, dealt with below under Incitement, Section II.4. It may, however, be understood very generally as imposing some requirement of nexus – causation, intent, impact – between the speech in question and the proscribed result.

Two of the four relevant provisions in Article 4(a) of CERD require incitement but the other two prohibit the mere dissemination of certain ideas, namely those based on superiority and racial hatred. For these, no nexus with a proscribed result is required. The mere dissemination of the ideas suffices to attract sanction. This was a matter of some controversy when this provision was discussed at the UN General Assembly and a motion to delete these provisions was tabled but defeated.⁵⁹ This is a very important difference which renders CERD far broader than the other instruments.

Proscribed Results

The three provisions stipulate different proscribed results. Article 13(5) of the ACHR is the narrowest, prohibiting only incitement to violence or similar illegal actions. It is not

⁵⁷ Article 13(5) is a bit confusing in this regard because it goes on to provide a quite different, and arguably broader, list of the grounds which might motivate the violence it prohibits. Given, however, that it applies only to violence or other illegal acts, its scope is still much narrower than the other provisions.

⁵⁸ CERD does not, however, cover religious groups.

⁵⁹ See Lerner, p. 46. The vote was 54 against, 25 in favour and 23 abstentions.

clear how far ‘similar’ goes, but only illegal acts are covered, rendering it far narrower in scope than the other two provisions. Both Article 4(a) of CERD and Article 20(2) of the ICCPR prohibit incitement to discrimination and violence. Article 7 of the UDHR specifically provides that everyone has the right not only to equal protection of the law without discrimination but also to be free of incitement to discrimination. Violence is a specific physical act. Discrimination, as generally understood, is also a specific act, and one which has been reasonably well-defined in other contexts, including, for example, CERD.

Article 20(2) additionally refers to hostility, and Article 4(a) of CERD to racial hatred. Hatred and hostility would appear to refer to very similar notions. Significantly, both the HRC and the Committee on the Elimination of all Forms of Racial Discrimination (CERD Committee) have understood their respective terms to include a passive state of mind rather than a specific act. In other words, the proscribed result is simply a state of mind in which hostility towards a target group is harboured, even though this is not accompanied by any urge to take action to manifest itself.⁶⁰

Furthermore, unlike violence and discrimination, hatred and hostility lack specificity. International courts, for example, routinely treat a wide range of negative stereotypes as falling within their scope, without providing any analysis of the contours of these notions.

Article 4(a) of CERD goes even further, prohibiting ideas based on superiority, a controversial provision which is not reflected in the hate speech legislation of many States Parties.⁶¹ Ironically, Article 4(a) appears to provide for more nuance in relation to negative ideas, at least requiring them to be based on hatred or to constitute incitement.⁶² Issues relating to positive statements are discussed further below, under Reconciling Free Speech and CERD, Positive Statements, Section II.3.2.

Form of Censure

Article 20(2) of the ICCPR requires that the included speech be ‘prohibited by law’, whereas Article 4 of CERD and Article 13(5) of the ACHR require included speech to be an ‘offence punishable by law’. In practice, most States have some form of criminal hate speech provisions, although many of these do not extend to all forms of speech specified in Article 4(a) of CERD. The more stringent language of CERD has led most Committee members to support a primarily criminal law approach,⁶³ although civil or administrative regimes may also be said under certain circumstances to impose punishment. General Comment No. 11 of the HRC⁶⁴ refers to a law which makes it clear that the activities are ‘contrary to public policy’ and which provides for an ‘appropriate sanction’ in case of a

⁶⁰ It is a little bit misleading to describe the prohibition in 4(a) of CERD relating to racial hatred as a proscribed result since, as noted above, no result is actually required.

⁶¹ See Mahalic and Mahalic, p. 94.

⁶² It is hard to avoid the conclusion that this article has not been drafted with the same degree of attention and care as its ICCPR counterpart, Article 20(2).

⁶³ See Mahalic and Mahalic, p. 94.

⁶⁴ Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20), 29 July 1983.

violation. Again, sanctions suggests criminal or administrative law but civil law remedies could also be understood to satisfy this standard.

A Recommendation of the Committee of Ministers of the Council of Europe calls on States to establish a legal framework consisting of civil, criminal and administrative law provisions on hate speech.⁶⁵ It is not clear, however, how this relates to Article 20(2) of the ICCPR and Article 4(a) of CERD and, in particular, which type of provisions are envisaged as providing for the prohibitions they stipulate, although it may be assumed that the criminal law is intended for this purpose. The Recommendation specifically refers to using the civil law to provide compensation and a right of reply or retraction.⁶⁶ The European Commission Against Racism and Intolerance (ECRI) has adopted a policy recommendation on legislation to combat racism which spells out quite clearly what they consider different branches of law should cover in this area. While they recognise an important role for the civil and administrative law, they also recommend that certain forms of hate speech should be subject to criminal sanction.⁶⁷

Key Conclusions:

- There are important differences between the different international law provisions relating to hate speech. The more important of these include:
 - Whether advocacy of hatred is specifically required;
 - Whether the speech in question must incite to a proscribed result or it is sufficient for it merely to fall within a category of prohibited statements; and
 - Whether a state of mind, without reference to any specific act, can serve as a proscribed result.

1.3 Relationship Between Incitement to Genocide and Hate Speech

It was noted in the early discussions on the Genocide Convention that the perpetration of genocide could, “in all cases be traced back to the arousing of racial, national or religious hatred,”⁶⁸ and this was part of the rationale for including incitement to genocide among the punishable acts of genocide. There is thus an inherent connection between ‘incitement to genocide’ in the Genocide Convention and the various provisions relating to hate speech under international human rights law.

In 2005, the CERD Committee adopted a *Declaration on the Prevention of Genocide*,⁶⁹ as well as a *Decision on follow-up to the declaration on the prevention of genocide*:

⁶⁵ Recommendation R(97)20 of the Committee of Ministers of the Council of Europe on ‘Hate Speech’, 30 October 1997, Appendix, Principle 2.

⁶⁶ *Ibid.*

⁶⁷ General Policy Recommendation N° 7: On National Legislation to Combat Racism and Racial Discrimination, adopted 13 December 2002.

⁶⁸ Ruhashyankiko, para. 109.

⁶⁹ 17 October 2005, UN Doc. CERD/C/66/1.

*indicators of patterns of systematic and massive racial discrimination.*⁷⁰ The latter draws a link between hate speech and incitement to genocide, identifying the following as indicators of genocide:

8. Systematic and widespread use and acceptance of speech or propaganda promoting hatred and/or inciting violence against minority groups, particularly in the media.
9. Grave statements by political leaders/prominent people that express support for affirmation of superiority of a race or an ethnic group, dehumanize and demonize minorities, or condone or justify violence against a minority.

At the same time, there are important differences, both textual and interpretive, between hate speech and incitement to genocide. There is clearly a difference between monitoring hate speech as an early warning sign for genocide and confusing it with incitement to genocide. Furthermore, not all hate speech is an early warning sign of genocide; indeed, most hate-mongers do not include among their active goals the destruction of other groups and most who do lack the means to put their desires into effect. Understanding the differences between these two bodies of law may be important in distinguishing between instances of hate speech which forewarn of genocide and those which do not.

I.3.1 Textual/Interpretive Differences

Advocacy

As noted above, some international hate speech provisions prohibit only advocacy of hatred whereas others call for all incitement, or even categories of statements, to be banned. The Genocide Convention does not stipulate that the speech in question must constitute advocacy of hatred. On the other hand, as noted above, intention is explicitly required for the crime of genocide, which may amount to more-or-less the same thing. It should, at least, ensure a similar level of protection for free speech.

Groups Covered

Although there is some difference in wording as to the groups covered by the different human rights instruments, the Genocide Convention, like the ICCPR, covers only incitement based on race, nationality or religion.⁷¹ In this respect, the genocide and hate speech provisions are all roughly similar, in particular inasmuch as none cover political groups.

The Genocide Convention requires the included acts to be committed with the intent to destroy the group, 'as such'. It is thus clear, at least in the context of genocide, that the acts must focus on directly on the group. Although specific acts may target individuals,

⁷⁰ 14 October 2005, UN Doc. CERD/C/67/1.

⁷¹ It does also refer to ethnicity, like CERD, but this is probably not very significant in terms of their actual scope.

they will not qualify as genocide unless they were motivated by his or her membership in a group so that, “the victim is the group itself, not merely the individual.”⁷²

Although the phrase ‘as such’ is not found in the hate speech provisions, the requirement of a link to the group is probably similar. In *Ahmad v. Denmark*, the CERD Committee considered a case in which the headmaster of a school had called a group of Pakistanis, ‘a bunch of monkeys’. The headmaster asserted that the group were misbehaving in the school, that the term was a reference to their conduct, not their race, and that he would have equally used it regarding ethnic Danes behaving in that way.⁷³ The Committee noted that it was, “a condition that the statement in question be directed at a group on the basis of its race, etc.”⁷⁴

In *Hagan v. Australia*, the same Committee considered a complaint about a sporting ground named after a famous sportsman, whose nickname included the term ‘nigger’, which probably originally referred to a shoeshine brand. The Committee recognised that the term was not intended to give offence, and that no one had objected to it for a long time. However, with changing sensitivities regarding racist terms, it had become offensive in the present context, and the Committee asked the State to ensure its removal.⁷⁵ The Committee did not directly address the question of link to race, but this requirement is implicit in their reasoning. Specifically, they accepted that while the term was not originally motivated by racism, with the passage of time it had come to have that meaning.

Incitement

The ICCPR, ACHR and Genocide Convention are all limited to cases of incitement. Two of the four hate speech provisions in CERD, however, as noted, do not require incitement.

Proscribed Results

It is here that some significant differences between the two bodies of law emerge. Under the Genocide Convention, there is only one proscribed result, namely genocide, which is itself clearly defined and which is inherently a precise and narrow criminal act. No doubt there is debate around certain aspects of the definition of genocide, as there will be around any social phenomenon, but it is nonetheless clear and narrow. Genocide is also a very extreme phenomenon and, at a practical level, this adds further clarity and precision to the scope of incitement to genocide. Every society manifests some level of discrimination and racism but instances of genocide, or even cases where it is a risk, are very uncommon.

⁷² *Nahimana*, para. 948. See also *Akayesu*, para. 521.

⁷³ 8 May 2000, Communication No. 16/1999, para. 4.5

⁷⁴ Para. 4.10. The Committee found that the investigation of the incident was insufficiently thorough to determine whether the statements were intended to disparage race or just behaviour, and hence that Denmark had failed to discharge its obligations under the Convention.

⁷⁵ 14 April 2003, Communication No. 26/2002, paras. 7.3 and 8.

All three of the hate speech provisions – in CERD, the ICCPR and the ACHR – include racially motivated violence as a proscribed result. This is broader than genocide, which is simply one type of violent racist act, but the two are related. Discrimination, another proscribed result in both the ICCPR and CERD, takes hate speech provisions another step further than incitement to genocide, although the proscribed result is still an illegal act which is relatively clearly defined in law.

Article 20(2) of the ICCPR and Article 4(a) of CERD also include incitement to hatred/hostility, understood as including a passive state of mind, as a proscribed result. This is wholly different in nature from the proscribed result under the Genocide Convention, inasmuch as it is not an act, much less an illegal one.⁷⁶

Direct and Public

Incitement to genocide is required to be public and direct, whereas these qualifiers do not apply to incitement to hate speech. It is unclear how significant these differences are. Public, as noted above, suggests either that the place where the incitement takes place is inherently public or that dissemination of the statements is to the general public, for example, via the mass media. Neither would be required in the context of hate speech, which would embrace statements made in a private meeting as well as in public.⁷⁷

Direct does not, as noted above, rule out liability for implicit incitement, for example by means of euphemism or culturally rooted meanings. Similarly, such forms of speech would, as appropriate, be covered by hate speech provisions. Direct implies that one, “specifically provoke another”⁷⁸ but this could be considered to be implicit in the term ‘incitement’. It is unclear whether the inclusion of the term ‘direct’ imposes a greater nexus between the statements and the proscribed result in the context of genocide than for hate speech more generally.

Form of Censure

Under the Genocide Convention, genocide is quite clearly recognised as a crime, which Contracting Parties undertake to ‘prevent and punish’.⁷⁹ As noted above, a range of measures, including administrative and civil law measures, can and should be employed in the struggle to contain hate speech but in practice most countries do employ the criminal law to implement their international obligations to prohibit hate speech.

⁷⁶ It may be noted that Article 19(1) of the ICCPR provides absolute protection to opinions, unlike freedom of expression, which may be restricted.

⁷⁷ Although Mahalic and Mahalic note that a number of States restrict their hate speech laws to public communications. See p. 96.

⁷⁸ *Akayesu*, para. 557.

⁷⁹ Article 1.

I.3.2 Differences Reflected in the Case Law

Some of the genocide cases provide a good illustration of the various Tribunals' appreciation of the significant differences between 'mere' hate speech and incitement to genocide. In *Fritzsche*,⁸⁰ for example, the Nuremberg Tribunal held that speeches of the accused showed "definite anti-Semitism" but that they "did not urge persecution or extermination of Jews." It is perhaps significant that Fritzsche was subsequently convicted by German courts under the de-Nazification laws, notwithstanding his Nuremberg acquittal.⁸¹

The ICTR, in *Nahimana*, also clearly distinguished between hate speech and incitement to genocide, giving as an example the statement, about Tutsis, that "they are the ones who have all the money." The tone conveyed hostility and resentment and thus demonstrated a progression from ethnic consciousness to harmful ethnic stereotyping. It could not, however, be characterised as incitement to genocide.⁸² The Tribunal also noted that certain articles identified by the prosecution as incitement to genocide were, "brimming with ethnic hatred but did not call on readers to take action against the Tutsi population."⁸³

Even more significant, in *Nahimana*, was the discussion relating to crimes against humanity (persecution). The ICTR found that the defendants were guilty of, in addition to incitement to genocide, crimes against humanity (persecution).⁸⁴ Unlike incitement to genocide, persecution can involve the targeting of a political group. More importantly, the Tribunal noted that, "persecution is broader than direct and public incitement, including advocacy of ethnic hatred in other forms."⁸⁵ The previous finding of genocidal intent meant that the lower threshold of intent to commit persecution was, *a fortiori*, present.⁸⁶ Persecution could be distinguished from incitement to genocide for being, instead of a "provocation to cause harm ... itself the harm."⁸⁷ The Tribunal held that hate speech targeting an entire population on the basis of ethnicity reached the requisite level of gravity to constitute persecution *per se*, since it was "a discriminatory form of aggression that destroys the dignity of those in the group under attack."⁸⁸

Key Conclusions:

- Although all incitement to genocide is hate speech, the reverse is not true as hate speech is a far wider concept.
- The intent requirement for incitement to genocide probably serves a similar function to the advocacy of hatred required for hate speech under the ICCPR and ACHR.
- For both incitement to genocide and hate speech, the real target must be a group,

⁸⁰ The *Fritzsche* decision can be found at: <http://www.yale.edu/lawweb/avalon/imt/proc/judfritz.htm>.

⁸¹ Schabas (2000b), p. 162.

⁸² Para. 1021.

⁸³ Para. 1037.

⁸⁴ It may be noted that this finding is problematical from the perspective of free speech.

⁸⁵ Para. 1078.

⁸⁶ Para. 1077.

⁸⁷ Para. 1073.

⁸⁸ Para. 1072.

- although specific statements may target individuals.
- The key difference between incitement to genocide and hate speech is the scope of the proscribed results. Genocide is the only proscribed result under rules prohibiting incitement to genocide whereas hate speech targets acts such as violence and discrimination, as well as hostility/hatred as a state of mind.
 - Hate speech may be private as well as public while the law on incitement to genocide targets only public incitement.
 - These differences have been recognised in the jurisprudence of the various war crimes tribunals.

1.4 Freedom of Expression

A concern about the impact of rules on incitement to genocide and hate speech on freedom of expression is redolent throughout the drafting history of the various treaties, their actual terms, the jurisprudence of the various bodies tasked with applying these treaties and the academic literature. There is no doubt that these concerns play a key role in defining the limits of incitement to genocide and hate speech under international law. To assess the appropriate limits on incitement to genocide and hate speech, it is thus necessary to have some understanding of international law on freedom of expression, as well as the interplay between this body of law and the rules on incitement to genocide and hate speech.

Article 19 of the UDHR guarantees the right to freedom of expression in the following terms:

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

The same article of the ICCPR guarantees freedom of expression in very similar terms to the UDHR:

1. Everyone shall have the right to freedom of opinion.
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.

The right to freedom of expression is not absolute and both international law and most national constitutions recognise that limited restrictions may be imposed on this right to safeguard overriding public and/or private interests. International law lays down a clear test by which the legitimacy of such restrictions may be assessed. Specifically, Article 19(3) of the ICCPR states:

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.

As noted above, freedom of expression is also protected in all three regional human rights instruments. The guarantee in the ECHR is very similar to that of the ICCPR, albeit with a slightly longer list of aims in service of which expression may be restricted. The guarantee in the ACHR is also structurally very similar, although it additionally contains a number of explicit protections for freedom of expression, such as a prohibition on prior censorship and on using indirect means to restrict expression.⁸⁹ The guarantee in the ACHPR is rather weaker on its face, allowing simply for restrictions “within the law”, although subsequent interpretation of this by the African Commission on Human and Peoples’ Rights has substantially narrowed the potential scope of this provision.⁹⁰

International courts have made it clear that the test for restrictions on freedom of expression is a very strict one which imposes a high standard of justification on States.⁹¹

First, the restriction must be provided for by law. This implies not only that the restriction finds a basis in law but also that the law is accessible and “formulated with sufficient precision to enable the citizen to regulate his conduct.”⁹² Most hate speech laws pass this part of the test.⁹³ Second, the interference must pursue one or more of the aims listed in Article 19(3). This list of aims is exclusive and it is clear that restrictions on freedom of expression serving other aims are not legitimate. Again, most hate speech laws pass this part of the test. Third, the restriction must be necessary to protect those aims. “Necessary” implies that there is a “pressing social need” for the restriction, that the reasons given by the State to justify the restriction are “relevant and sufficient” and that the restriction is proportionate in the sense that the benefits outweigh the harm.⁹⁴ It is under this part of the test that the vast majority of freedom of expression cases, including those involving hate speech, are decided.

It is significant that the right to hold opinions is not subject to restriction, Article 19(3) being applicable only to Article 19(2), and not to Article 19(1), protecting opinions. This means that everyone is free to hold any opinions they wish, even racist and genocidal opinions. It is only where opinions are articulated that international law may permit restrictions.

⁸⁹ See Articles 13(2) and (3).

⁹⁰ See *Media Rights Agenda and Others v. Nigeria*, 31 October 1998, Nos. 105/93, 128/94 and 152/96. See also the *Declaration of Principles on Freedom of Expression in Africa*, adopted by the African Commission on Human and Peoples’ Rights at its 32nd Session, 17-23 October 2002.

⁹¹ The European Court of Human Rights, for example, interpreting a similar rule in Article 10 of the ECHR, has stated: “Freedom of expression ... is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.” See *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.

⁹² See *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 49 (European Court of Human Rights).

⁹³ See notes 130-131 and surrounding text.

⁹⁴ See *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, paras. 39-40 (European Court of Human Rights), again interpreting a similar rule in the Article 10 of the ECHR.

It may be noted that freedom of expression operates to protect not only the right of the speaker, but also that of the listener to seek and receive information and ideas. Thus, to the extent that (even offensive) speech is protected, those wishing to receive it have a right to do so.

Key Conclusions:

- Rules on incitement to genocide and hate speech must take into account international guarantees of freedom of expression.
- No restrictions on the right to hold opinions are permissible under international law.
- All restrictions on freedom of expression must conform to a strict three-part test. In particular, restrictions must:
 - be provided by law;
 - serve one of the legitimate aims listed; and
 - be necessary to protect that aim.

Part II: Balancing the Interests

This Part of the Study provides some insight into how various interests engaged by rules on incitement to genocide and hate speech – equality, free speech, public order – should be balanced. It starts by outlining some preliminary matters, such as how hate speech has actually been defined by international bodies, some structural differences in the various bodies of jurisprudence and various different types of incitement. It then canvases the various underlying rationales for protecting both equality and free speech, with a view to providing background to the balancing process. The following sub-section addresses questions of interpretation faced by international courts when attempting to balance hate speech with freedom of expression. The final sub-section addresses the key question of what constitutes incitement.

II.1 Some Preliminary Considerations

II.1.1 What Constitutes Hatred

Genocide is defined very carefully and clearly in the relevant instruments. As noted above, hate speech or its close relative, hatred, is not. Indeed, the paucity of material in official documents on this is surprising. Sometimes, what poses as a definition is not. In the Council of the European Union's draft Proposal for a Framework Decision on combating racism and xenophobia, for example, defines 'hatred' in an entirely circular fashion as: "hatred based on race, colour, religion, descent or national or ethnic origin."⁹⁵

A slightly more satisfying definition of hate speech, at least in terms of explanatory power, is found in the Council of Europe Recommendation on Hate Speech, as follows:

[T]he term "hate speech" shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, antisemitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.⁹⁶

This definition too, however, is partly circular and less than illuminating. It does, however, provide a few notions that can help anchor the meaning of the term, namely 'xenophobia', 'anti-Semitism', 'intolerance', 'aggressive nationalism' and 'ethnocentrism'.

A far more powerful definition was provided by the ICTR in *Nahimana*, which defined hate speech as, "stereotyping of ethnicity combined with its denigration".⁹⁷ The combination of these two elements, stereotyping and denigration, however, do not seem

⁹⁵ Preamble, 5c.

⁹⁶ Appendix, under Scope.

⁹⁷ Para. 1021.

to be enough. Indeed, the Tribunal gives an example of an allegedly true statement – that 70% of Rwandan taxis were owned by Tutsis – which, in the context, would probably qualify as both stereotypical and derogatory but which the Tribunal itself recognised was not hate speech. More generally, much identification of stereotypical cultural characteristics of various groups, both positive and negative, is a perfectly legitimate exercise of free speech, as manifested, for example, in the jokes about cultures or races that abound in the modern world.

In the hate speech cases before the HRC, the question tends to be whether or not a particular interference with freedom of expression can be justified.⁹⁸ The focus is on the harm to the rights of others and whether or not the restriction was necessary to prevent that harm, not on defining hate speech as such. Thus, in *Ross v. Canada*, for example, the Committee focused on the impact of the statements in terms of raising anti-Semitic feeling in schools, but it did not define hatred or even anti-Semitism.⁹⁹ In *Faurisson v. France*, the Committee again looked at the impact of the statements on anti-Semitic feelings, again avoiding any definition of this term.¹⁰⁰

The European Court is not tasked with assessing whether statements qualify as hate speech since there is no obligation under the ECHR to prohibit such statements. Rather, in the relevant context, it is required to assess whether restrictions on freedom of expression are legitimate. In a series of cases, the Commission and Court have refused to protect attempts to deny the Holocaust, largely on the basis that these fuel anti-Semitism.¹⁰¹ In other cases, the Court has simply held, without providing reasons, that certain statements do not constitute hate speech.¹⁰² In none of these cases, however, has the Court sought to define either hate speech or anti-Semitism.

There have been numerous academic attempts to distinguish hate speech from merely offensive speech, which is undoubtedly protected.¹⁰³ One line of reasoning, which is helpful at least conceptually, is to distinguish between expression targeting ideas, including offensive expression, which is protected, and abusive expression which targets human beings, which may not be protected.¹⁰⁴ In *Giniewski*, the European Court of Human Rights seemed to support this approach, holding that the impugned speech was not a gratuitous attack on religion but, rather, part of a clash of ideas ('débat d'idées').¹⁰⁵

⁹⁸ There is no reason why HRC cases should not raise a failure to respect Article 20(2) of the ICCPR but, in practice, they rarely do.

⁹⁹ 18 October 2000, Communication No. 736/1997, paras. 11.5-6.

¹⁰⁰ 8 November 1986, Communication No. 550/1993, paras. 9.6-9.7.

¹⁰¹ See note 134. The Council of Europe draft Proposal for a Framework Decision on combating racism and xenophobia goes even further, calling for all condoning, denying or grossly trivialising of crimes of genocide, crimes against humanity and war crimes to be prohibited. See Articles 1(1)(c) and (d).

¹⁰² See, for example, *Dicle v. Turkey*, 10 February 2005, Application No. 34685/9, para. 17.

¹⁰³ See, for example, *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72 (European Court of Human Rights), para. 49.

¹⁰⁴ Gaudreault-DesBiens, J., "From Sisyphus's Dilemma to Sisyphus's Duty? A Meditation on the Regulation of Hate Propaganda in Relation to Hate Crimes and Genocide" (2000) 46 *McGill Law Journal* 121, p. 135.

¹⁰⁵ *Giniewski v. France*, 31 January 2006, Application No. 64016/00, para. 50.

II.1.2 Understanding the Jurisprudence

It is necessary to keep in mind certain structural issues when analysing the jurisprudence relating to incitement to genocide and hate speech. Two such issues, in particular, are important. The first is that the international jurisprudence on incitement to genocide is a response to actual and extreme genocides which have already taken place. This may be particularly important when seeking to extract lessons for preventing genocide. Second, the genocide cases, individual criminal trials, are very different from the hate speech cases, which assess whether or not States have met their human rights obligations.

The very existence of the judicial bodies hearing cases on incitement to genocide – namely the Nuremburg Tribunal, ICTY and ICTR – is, as just noted, a response to extreme cases of genocide that have already taken place. The enormity of these events inevitably exerts a significant influence on the proceedings and decisions, particularly the interpretation and application of the provisions on incitement to genocide. Intuitively, this is obvious but it is also reflected in key findings of these bodies in their jurisprudence.

For example, in *Nahimana*, the ICTR, in finding that Nahimana acted with the requisite intent, specifically relied on the fact that certain of the incriminating statements were made weeks into the unfolding genocide.¹⁰⁶ Similarly, the Nuremburg Tribunal, in convicting Streicher but finding Fritzsche innocent, relied on their holding that the former had published in the clear knowledge of the genocide actually taking place, while the latter lacked this knowledge at the relevant time.

The most problematical aspect of the various convictions in *Nahimana* was that of Ngeze for statements disseminated through *Kangura*, a newspaper, prior to the commencement of the actual genocide.¹⁰⁷ These problems are discussed below.¹⁰⁸ For present purposes, it is sufficient to note that Ngeze was also guilty of direct physical acts of genocide, as well as far more direct forms of incitement, such as using a megaphone to mobilise people to come to meetings and to spread inciting messages. It has been suggested that these clearly punishable acts may have played a role in the Tribunal's decision regarding the *Kangura* statements.¹⁰⁹

More generally, it has been observed in relation to *Nahimana* that “the Rwandan genocide’s ‘almost incomprehensible level and intensity’ [cite from para. 109 of the judgment] might anchor high expectations of the background circumstances necessary to meet [the standard for liability for incitement to genocide].”¹¹⁰

¹⁰⁶ Para. 966.

¹⁰⁷ See Recent Cases, “International Law – Genocide – U.N. Tribunal Finds That Mass Media hate Speech Constitutes Genocide, Incitement to Genocide, and Crimes Against Humanity” (2004) 117 *Harvard Law Review* 2769 (Recent Cases), p. 2774, for a critique of the Tribunal's treatment of causation for statements in *Kangura*.

¹⁰⁸ See note 225 and surrounding text.

¹⁰⁹ See Recent Cases, p. 2775.

¹¹⁰ Recent Cases, p. 2774.

This raises questions as to how the lessons of these decisions may be refracted back to pre-genocidal contexts and, in particular, what lessons they may have for prevention or early warning of genocide, which by definition applies before any genocide has taken place.

The second structural issue relates to the differences between the genocide and hate speech cases. The former are individual criminal trials, where conviction may lead to lengthy periods of imprisonment for very serious offences. These engage all of the standard criminal protections, such as placing the onus of proof squarely on the prosecutor and requiring proof of all elements of the offence to the criminal standard. The latter, on the other hand, are decisions on breaches by States of their international human rights obligations. These, quite properly, operate very differently, requiring States to present evidence that they have not breached human rights. Furthermore, at least before the HRC and European Court of Human Rights, these cases normally involve a review of restrictions on rights at the national level and the role of the international court is simply to approve or disapprove of the national decisions, often on a limited human rights basis. This does not require them to go into the details of what constitutes incitement to hatred in the same way as an individual criminal case would.¹¹¹

These differences are quite evident from a reading of the cases. At least at the ICTY and ICTR,¹¹² the cases are extremely detailed and carefully reasoned, evidence is presented meticulously and extensive legal analysis, often including comparative analysis, is provided. The *Nahimana* decision, for example, runs to some 370 pages while the *Akayesu* decision is nearly 200 pages.¹¹³ Decisions of CERD and the HRC, in contrast, are typically 10-20 pages, only a small part of which consists of reasoning, and even the European Court of Human Rights decisions are short, and their reasoning even shorter.

This problem is exacerbated, in some cases, by the failure of international courts to provide fulsome reasoning for their decisions. In *J.R.T. and the W.G. Party v. Canada*, for example, the HRC simply concluded that the impugned statements constituted advocacy of hatred, without providing any reasoning at all.¹¹⁴

One consequence of this is that it is often difficult to extract firm conclusions as to the rules governing hate speech, an extremely complex phenomenon, from the human rights decisions. Frequently, one is required to try to identify factors which come up in a number of cases rather than being able to refer to specific standards and principles

¹¹¹ Although it may be noted that these decisions do impact on criminal standards since they are effectively determining the contours of criminal hate speech provisions.

¹¹² Some of the Nuremburg decisions are rather cursory.

¹¹³ Recent Cases notes of the *Nahimana* decision, at p. 2774, that, “the careful methodology of the judgment – extensively investigating relevant principles and providing rich factual detail – might serve as a model for how similar inquiries should be undertaken.” And MacKinnon notes that “the Tribunal’s concepts and fact-thick methodology are likely to be highly influential.” See MacKinnon, C., “Prosecutor v. Nahimana, Barayagwiza & Ngeze” (2004) 98 *American Journal of International Law* 325, p. 329.

¹¹⁴ 6 April 1983, Communication No. 104/1981, para. 8(b). Indeed, the merits consideration of the admissible portion of that communication consists of a single paragraph.

articulated by the courts. The genocide cases, on the other hand, are far more likely to articulate such standards and principles.

II.1.3 Forms of Incitement

The term incitement is used in different ways and it may be useful to distinguish between three different general types of incitement. First, there is incitement to an illegal act which takes place. For present purposes, the act may be one of genocide, violence or discrimination. Such (successful) incitement becomes part of the illegal act, either directly or as conspiracy.¹¹⁵ Subject to the important question of what is deemed to constitute ‘incitement’, dealt with below, under Incitement, Section II.4, this is uncontroversial from the perspective of free speech.

Second, there is incitement to an illegal act which does not take place. This form of incitement goes to creating in the mind of those engaged the requisite desire to commit illegal acts. Again, subject to the important question of what is considered to constitute incitement, this is in principle uncontroversial from the perspective of free speech. Even in the United States, which has among the strongest protections in the world in this area, certain speech constituting (unsuccessful) incitement may be sanctioned.¹¹⁶

Third, incitement may be directed to simply creating a certain state of mind in those engaged – for example, characterised by racial hatred, racism or xenophobia – without this being linked to any particular illegal act. As noted above, international courts, and indeed most national courts, interpret hate speech laws and provisions as including this form of incitement.¹¹⁷ In particular, the HRC has quite clearly understood ‘hostility’ in Article 20(2) of the ICCPR to embrace a state of mind. This form of incitement is much more problematical from the perspective of freedom of expression.¹¹⁸

Key Conclusions:

- International standards and jurisprudence provide very little guidance as to the definition of ‘hatred’ as used in the various hate speech provisions.
- When interpreting international decisions on incitement to genocide, the fact that these are responding to specific and extreme cases of actual genocide must be

¹¹⁵ This has been recognised in the context of genocide. See notes 34-35 and the surrounding text.

¹¹⁶ The standard was set out by the United States Supreme Court in *Brandenburg v. Ohio*, 395 US 444 (1969), as prohibiting restrictions on advocacy to crime, “except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”. P. 447. See also Hoffman, P. and Martin, K, “Country Law and Practice: United States” in Coliver, S., Hoffman, P., Fitzpatrick, J. and Bowen, S., eds., *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* (Dordrecht: Martinus Nijhoff, 1999).

¹¹⁷ The United States is a significant, but rare, exception to this, holding that such forms of incitement are constitutionally protected.

¹¹⁸ In an attempt to reconcile the US and international approaches on this issue, the 2004 Internal Policy Statement on Hate Speech of the human rights NGO, Human Rights Watch (HRW), states: “‘hostility’ refers to criminal harassment and criminal intimidation”. Criminal harassment and intimidation are, of course, specific criminal acts, bringing this within the scope of the second form of incitement described above and thereby rendering the HRW definition of hostility inconsistent with clear international law on this point.

- considered.
- The important structural differences between the decisions of different international courts and, in particular, between the individual criminal cases and the human rights cases, affects their analytical weight and the conclusions that may be drawn from them.
 - There are significant differences between incitement to a specific illegal act, whether successful or not, and incitement to a state of mind, and this has important implications in terms of freedom of expression.

II.2 The Underlying Rationales: Equality and Free Speech

To appropriately balance competing claims of equality¹¹⁹ and free speech, it is helpful to understand the underlying rationales for these key human rights, as well as the interplay between them. Equality is a fundamental human right and somehow philosophically foundational to all human rights and the protection of human dignity. Freedom of expression is similarly foundational, largely due to its functional role in protecting other rights and underlying social values.

Three rationales are commonly provided for protecting free speech and these also underpin equality. First, both equality and free speech are inherent to human dignity. The former is almost too obvious to warrant explanation and is reflected in the pride of place of the term ‘equality’, alongside the term ‘dignity’, in the very first article of the UDHR. At the same time, to deprive human beings of the right to express themselves, to assert their ideas and to engage freely in communication with others, is to diminish their dignity.

Second, both equality and free speech are key underpinnings of democracy and participation. Equality is central to participation since oppressed groups’ lack of enjoyment of equal status in society extends to political involvement, as to other spheres of life. Similarly, unless citizens are informed about the actions of government and the issues of the day, they cannot participate effectively, whether this be through voting or other means. Furthermore, unless freedom to express oneself is protected, including importantly for the media, governments and officials cannot be held to account and their wrongdoing or incompetence exposed. The international human rights NGO, ARTICLE 19, has described information as “the oxygen of democracy”.¹²⁰ Courts, both national and international, frequently refer to the particular importance of, and high standards of protection for, political speech and, indeed, all speech relating to matters of public importance.¹²¹

¹¹⁹ It is recognised that this is not the only justification for hate speech rules, but it is submitted that it is the primary one.

¹²⁰ *The Public’s Right to Know: Principles on Freedom of Information Legislation* (London: ARTICLE 19, 1999), preamble.

¹²¹ See, for example, *Castells v. Spain*, 24 April 1992, Application No. 11798/85 (European Court of Human Rights), *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*,

Third, free speech has long been considered the most reliable means of discovering the truth. In his famous treatise, *On Liberty*,¹²² John Stuart Mills sets out the reasons for this. These include the obvious, namely that in the absence of protection for free speech even true views may, due to unpopularity or the political vagaries of the government, be suppressed. As Brink has noted, however, in a robust democracy we can trust enlightened censors, kept in line by checks and balances and an active civil society, to filter out only truly harmful and false speech. However, Mills also makes the far more subtle point against censorship that, if legally protected against challenge, even true views risk becoming dogma and, as a result, losing their meaning. Put differently, as progressive beings, we accept 'truth' only where it can be justified through deliberation, rather than cloistered protection.¹²³ Perhaps to a lesser extent, but still importantly, equality also contributes to truth since, if certain groups are, due to inequality, less able to contribute to social dialogue, their structural perspectives will be lost or insufficiently heard, leading to biased conclusions.¹²⁴

II.3 Interpretive Issues: Free Speech and Hate Speech

The various provisions on hate speech and freedom of expression in different treaties raise a number of interpretive issues over and above the key question of what constitutes incitement to genocide.

Those tasked with interpreting human rights treaties must do so in a way that is internally consistent. This flows from the mandates of their interpreting bodies, which are bounded by the terms of the treaty and so cannot privilege one right over another, basic rules of treaty interpretation and common sense. More complex issues arise in the context of potential conflicts between treaties. Formally, the interpreting bodies are only required to apply the law of their own treaties. At the same time, they naturally wish to do so in a manner which is consistent with the surrounding body of international human rights law. This section of the Study looks at these issues as relevant to freedom of expression and hate speech/incitement.

Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5 (Inter-American Court of Human Rights) and UN Human Rights Committee General Comment 25, issued 12 July 1996. This is also recognised by the ICTR in *Nahimana*, para. 1006.

¹²² In Lindsay, A., ed., *Utilitarianism, Liberty, Representative Government* (London: Dent, 1964).

¹²³ Brink, D., "Millian Principles, Freedom of Expression and Hate Speech" (2001) 7 *Legal Theory* 119.

¹²⁴ This also applies within groups. For example, in the context of the debate about the Danish cartoons depicting the Prophet Mohammed, published in September 2005 and which set off a flurry of violence and debate in February 2006, it has been noted that it is important for a variety of Muslim perspectives to be heard and that, in some cases, those groups claiming to represent the Muslim 'community' are anything but representative. See Ash, "Our media must give Muslims the chance to debate with each other", *The Guardian*, 9 February 2006.

II.3.1 Internal Treaty Interpretation

ICCPR

Articles 19(3) and 20(2) of the ICCPR are clearly in potential tension and even conflict with each other and they received a lot of attention during the drafting process.¹²⁵ They were, quite properly, kept separate since Article 19 guarantees freedom of expression, while permitting restrictions under certain conditions, whereas Article 20(2) imposes an obligation to restrict speech, quite different objectives.¹²⁶ However, it was decided that they should go next to each other, to emphasise the close relationship between them.¹²⁷

In *Ross*, the HRC held that a restriction on the author's freedom of expression aimed at protecting against racism had to be justified by reference to the test set out in Article 19(3) of the ICCPR.¹²⁸ This reflects the obvious conclusion that any law seeking to implement the provisions of Article 20(2) of the ICCPR must not overstep the limits on restrictions on freedom of expression set out in Article 19(3). Conversely, Article 19(3) must be interpreted in a manner that respects the terms of Article 20(2).

A law properly designed to implement Article 20(2) would automatically serve the aim of protecting the rights of others, specifically to equality, thereby satisfying the second part of the three-part test for restrictions on freedom of expression. International courts have often also held that such laws serve the aim of protecting public order, an aim which, at least, would clearly be engaged where reasonable allegations of incitement to genocide or other forms of racist violence were involved. In some cases, it has also been suggested that hate speech laws protect the reputations of groups, although this is problematical from a free speech perspective.¹²⁹

The first part of the test – the requirement of being provided for by law – would apply to laws on incitement to genocide and hate speech in the same way as any laws restricting freedom of expression. In other words, such laws must be accessible and precise. However, international courts have held that even a somewhat vague set of primary rules may be clarified by judicial interpretation.¹³⁰ In *Ross*, the HRC recognised the “vague criteria of the provisions” but held that they were nevertheless provided for by law, noting that the Canadian Supreme Court had considered all aspects of the case and found a sufficient basis for the original decision in Canadian law.¹³¹ This is potentially

¹²⁵ See Bossuyt, M., *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights* (Dordrecht: Martinus Nijhoff Publishers, 1987), pp. 398-411.

¹²⁶ See Bossuyt, p. 398.

¹²⁷ See Bossuyt, p. 406.

¹²⁸ Para. 11.1.

¹²⁹ See, for example, *Defining Defamation: Principles on Freedom of Expression and the Protection of Reputation* (London: ARTICLE 19, 2000), Principle 2(b)(v), which rules out group defamation. Available at: <http://www.article19.org/docimages/714.htm>.

¹³⁰ See, for example, *Goodwin v. United Kingdom*, 27 March 1996, Application No. 17488/90 (European Court of Human Rights), para. 33.

¹³¹ Para. 11.4. Bizarrely, the Committee also referred to the fact that the author was heard in all proceedings and had availed himself of the opportunity to appeal. The latter is more-or-less a pre-condition for a matter to come before the Committee and so cannot be considered as sufficient to meet the requirements of provided for by law. In any case, neither of these considerations has any bearing on the question of whether

problematical from a free speech perspective, since, as noted above, hate speech is in fact very poorly defined in international law. At the same time, international courts have not focused on this as a key question when assessing the compatibility of hate speech laws with the right to freedom of expression.

The primary difficulty in resolving potential incompatibility between Article 19(3) and Article 20(2) is in relation to the necessity part of test for restrictions on freedom of expression. In large part, this is a question of what constitutes incitement, dealt with below.

An interesting question is whether Article 19(3) would permit restrictions on hate speech beyond the scope of what Article 20(2) requires. Theoretically, this is possible: what States are required to ban to ensure equality is not necessarily the same as what is permissible to serve this goal without breaching the right to freedom of expression. At the same time, the drafting history of Article 20(2) suggests that there was little scope for extending its provisions within the parameters of respect for freedom of expression as defined by Article 19. While proposals to restrict Article 20(2) to incitement to violence were rejected, so were proposals to extend it, for example to include ‘racial exclusiveness’, on the basis of concern about free speech.¹³² This suggests that the obligations of Article 20(2) are extremely close to the permissions of 19(3), leaving little scope for restrictions on freedom of expression over and beyond the terms of Article 20(2).

In *Faurisson*, a case involving Holocaust denial, Evatt, Kretzmer and Klein, in a concurring opinion, state:

[T]here may be circumstances in which the right of a person to be free from incitement to discrimination on grounds of race, religion or national origins cannot be fully protected by a narrow, explicit law on incitement that falls precisely within the boundaries of article 20, paragraph 2. This is the case where ... statements that do not meet the strict legal criteria of incitement can be shown to constitute part of a pattern of incitement against a given racial, religious or national group, or where those interested in spreading hostility and hatred adopt sophisticated forms of speech that are not punishable under the law against racial incitement, even though their effect may be as pernicious as explicit incitement, if not more so.¹³³

It would seem, however, that their point really concerns the issue of how incitement is to be interpreted, rather than going outside of the boundaries of Article 20(2), *per se*. If so, then this would support the view expressed above, namely that, in the area of hate speech, Article 19(3) and Article 20(2) are legally contiguous or very nearly so. Otherwise, their

a restriction is provided for by law. The point of this condition is, as the European Court has frequently noted, that: “A norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.” See *Feldek v. Slovakia*, 12 July 2001, Application No. 29032/95, para. 56. The author being present at the appeals in no way contributes to his ability to foresee in advance the consequences of his actions.

¹³² Bossuyt, pp. 404-405, 408.

¹³³ Para. 4.

point may be understood as advocating for an extremely narrow and precise interpretation of incitement in Article 20(2), alongside a recognition that there may be special cases where statements which do not fall within the scope of this very narrow interpretation may still legitimately be prohibited because, in context and alongside other statements, they in fact constitute a pattern of incitement.

European Convention on Human Rights

Analogous issues arise in the context of the ECHR. As noted above, the ECHR does not require States Parties to adopt hate speech legislation but it does include provisions ruling out both discrimination in the enjoyment of rights (Article 14) and reliance on rights to justify actions which are aimed at the destruction or undue limitation of the human rights of others (Article 17). In a series of cases, the European Commission and Court of Human Rights relied on these provisions, operating in tandem, to rule inadmissible various appeals from national decisions imposing restrictions on hate speech.¹³⁴

Generally, there is little reasoning in these cases, including regarding the relationship between Articles 10 and 17 of the ECHR, although they base their decisions on Article 17, and they appear to recognise a wide scope to proscribe racist ideas, particularly those that may be classified as Holocaust denial. In some cases, reference was made to contextual factors, such as Austria's recent Nazi past, as providing a particular justification for the restriction.¹³⁵ In a number of these cases, the Commission went beyond references to specific rights, such as equality, and referred to larger notions set out in the preamble of the ECHR, such as 'peace' and 'justice',¹³⁶ providing a broader, if also rather general, justification for the restrictions.

In *Lehideux and Isorni v. France*, the European Court of Human Rights shed a bit more light on the precise relationship between Articles 10 and 17 of the ECHR. It noted that the Commission had, in that case, held that Article 17 could not prevent the applicants from relying on Article 10, which protects freedom of expression but permits restrictions, including to protect the rights of others. Without resolving the issue itself, the Court decided to analyse the case through the filter of Article 10, interpreted in accordance with Article 17.¹³⁷ This seems to suggest that a restriction which failed to meet the standard imposed by Article 10(2) could not be saved by Article 17, although Article 17 may inform the analysis of whether the conditions of Article 10(2) are met. This must surely

¹³⁴ See *Glimmerveen and Hagenbeek v. Netherlands*, 11 October 1979, Application No. 8406/78; *Kühnen v. Germany*, 12 May 1988, Application No. 12194/86; *B.H., M.W., H.P. and G.K. v. Austria*, 12 October 1989, Application No. 12774/87 (*B.H., M.W., H.P. and G.K.*); *Ochensberger v. Austria*, 2 September 1994, Application No. 21318/93; and *Nationaldemokratische Partei Deutschlands, Bezirksverband München-Oberbayern v. Germany*, 29 November 1995, Application No. 25992/94 (*Nationaldemokratische Partei Deutschlands*). See also *Walendy v. Germany*, 11 January 1995, Application No. 21128/92; *Remer v. Germany*, 6 September 1995, Application No. 25096/94; and *Honsik v. Germany*, 28 October 1997, Application No. 25062/94. See also *Garaudy v. France*, 7 July 2003, Application No. 65831/01, a European Court case.

¹³⁵ For example, in *B.H., M.W., H.P. and G.K.*

¹³⁶ See *Remer, Nationaldemokratische Partei Deutschlands*. See also *Garaudy*.

¹³⁷ 23 September 1998, Application No. 24662/94, paras. 34-35.

be correct, inasmuch as it is the only reasonable interpretation which preserves the internal consistency of the Convention. Similar accommodation between these two provisions may be found in the Council of Europe Recommendation on Hate Speech, which refers to instances of hate speech which do not enjoy the protection of Article 10, because they are aimed at the destruction of rights and freedoms recognised by the ECHR, that is, which breach Article 17.¹³⁸

II.3.2 Reconciling Free Speech and CERD

More difficult considerations come into play when potential conflicts arise between the texts of different treaties. All of the international bodies set up to interpret and apply international human rights law are formally restricted to applying the text of their own treaty, normally the very treaty which creates them. For fairly obvious reasons, including the fact that many countries are bound by several different treaties which are relevant to the issue of hate speech,¹³⁹ these bodies are at pains to ensure that their decisions are compatible as far as possible across all relevant treaties. In *Jersild v. Denmark*, for example, the European Court of Human Rights, holding that a journalist should not be liable for hate speech for disseminating TV interviews containing racist statements by others, was at pains to note that it believed its decision was consistent with the provisions of CERD.¹⁴⁰

At the same time, there is at least potentially scope for incompatibilities between the provisions of different treaties. Specifically, if, as suggested above, Articles 19(3) and 20(2) of the ICCPR are, in the area of hate speech, either fully contiguous or separated by only the very thinnest of gaps, it is hard to see how consistency could be achieved between Article 19(3) of the ICCPR and Article 4(a) of CERD which, as noted above, goes considerably further on its terms than Article 20(2) of the ICCPR. There was certainly extensive concern about this during the debates on CERD.¹⁴¹

The 'due regard' clause in Article 4(a) of CERD may allow for some interpretive manoeuvrability here, although there are different views on how significant this is. On the

¹³⁸ Appendix, Principle 4.

¹³⁹ The Council of Europe Recommendation on hate speech, indeed, calls on Member States to ratify CERD. See also Resolution (68) 30 of the Committee of Ministers of the Council of Europe on Measures to be Taken Against Incitement to Racial, National and Religious Hatred, 31 October 1968. All the States Members of the Council of Europe have ratified the ECHR.

¹⁴⁰ September 1994, Application No. 15890/89, para. 30. See also para. 21, where the Court quotes in substantial part the provisions of Article 4 of CERD. For systemic reasons, issues of incompatibility with guarantees of freedom of expression do not arise in communications to CERD, since, due to the nature of the Convention, such communications cannot logically relate to excessive zeal in the application of hate speech rules, which is where such incompatibility might arise. CERD has often, in the context of its Concluding Observations on regular country reports, noted concerns with the inadequacy of national hate speech legislation but these normally lack detail and certainly do not include any consideration of compatibility with other instruments. See, for example, Concluding Observations on Georgia's Second and Third Periodic Reports, 1 November 2005, CERD/C/GEO/CO/3, para. 11. The HRC appears never to have upheld a Communication complaining of a breach of Article 19 based on a hate speech provision, so the question of potential incompatibility with CERD has never arisen.

¹⁴¹ See Lerner, pp. 47-50.

one hand, as Mahalic and Mahalic point out, the CERD Committee has, quite reasonably, held that the ‘due regard’ provision cannot be read as cancelling or overriding an express clause in the Convention.¹⁴² On the other hand, both the Committee and academic writers have held that this provision does effect an accommodation between these rights.¹⁴³ Lerner goes so far as to suggest that it is open to States to resolve potential incompatibilities on the basis of their “respective political philosophy and orientation in the question of pre-eminence of rights.”¹⁴⁴ This would appear to concord with the views of States Parties, some 15 of which entered reservations or declarations in favour of freedom of expression and/or association based on the ‘due regard’ provision,¹⁴⁵ with a further 6 entering reservations or declarations based on constitutional guarantees of freedom of expression.¹⁴⁶ Notwithstanding the numerous objections to various reservations or declarations to CERD, none were entered in respect of those aforementioned relating to Article 4.

There are two key areas where CERD potentially conflicts with the right to freedom of expression, inasmuch as it does not require advocacy of hatred or incitement and inasmuch as it bans statements based on superiority.

Absence of Advocacy or Incitement Requirements

Article 4(a) of CERD would prohibit the mere dissemination of ideas based on racial hatred or superiority, regardless of any impact. Article 19(3) of the ICCPR only permits restrictions on freedom of expression which are necessary to protect an aim. Not all dissemination of statements based on racial hatred will undermine equality or promote disorder and so, to ban them all cannot be justified as a restriction on freedom of expression.

This point is illustrated clearly in the *Jersild* case, where the journalist applicant was convicted in Denmark for a television programme which included hate speech statements by racist extremists, with a view to exposing the problem and generating public debate. The European Court of Human Rights held that the activities of the applicant were protected speech and refused to second-guess the approach he had chosen to take to raise this issue.

It is clear from the decision that the actions of the journalist question would not fall within the scope of Article 20(2) of the ICCPR primarily because they did not constitute advocacy of hatred. The Court also noted that the context made it unlikely that the statements would have incited violence, discrimination or hostility.

¹⁴² P. 89.

¹⁴³ See General Recommendation 15 of the CERD Committee, 23 March 1993, para. 4, and Lerner, p. 48.

¹⁴⁴ P. 12.

¹⁴⁵ Austria, Bahamas, Belgium, Fiji, France, Ireland, Italy, Japan, Malta, Monaco, Nepal, Papua New Guinea, Switzerland, Tonga and the United Kingdom.

¹⁴⁶ Antigua and Barbuda, Barbados, Guyana, Jamaica, Thailand and the United States. Bahamas and Papua New Guinea also entered constitutional objections.

Article 4(a) of CERD requires neither advocacy of hatred nor incitement to hatred; it prohibits the mere dissemination of ideas based on racial hatred. As such, by terms, it would clearly be applicable to the actions of Jersild in disseminating the statements. It is possible that this is a case in which the 'due regard' clause in Article 4 would come into play but this would lead to the unlikely result of an express provision of Article 4 being overridden by the right to freedom of expression. Otherwise, this case represents an example of a clear conflict between the right to freedom of expression and Article 4(a) of CERD.¹⁴⁷

It may be noted that the CERD Committee itself was divided on this case. The Committee's report to the UN General Assembly noted:

Some members welcomed this decision as the clearest statement yet, in any country, that the right to protection against racial discrimination took precedence over the right to freedom of expression. Other members thought that in such cases the facts needed to be considered in relation to both rights.¹⁴⁸

Positive Statements

Article 4(a) of CERD controversially calls for the banning of all ideas based on racial superiority, something none of the other international human rights treaties do. This aspect of Article 4(a) is problematical and raises the thorny issue of when apparently positive statements about groups may constitute hate speech.

According to Mahalic and Mahalic, the UN Committee on the Elimination of Racial Discrimination has never been adverse to the dissemination of ideas which stress (positive) cultural, as opposed to racial, differences.¹⁴⁹ This distinction, however, would appear to be largely specious – or at least highly subjective – in many contexts where race and culture are largely synonymous. Furthermore, CERD defines race to include national and ethnic origin, which significantly overlap with culture, further obscuring the distinction.

This provision in Article 4(a) suffers from the free speech concerns noted above, since it is one of the two provisions that require neither advocacy of hatred nor incitement to violence, discrimination or hostility. However, it is even more problematical since superiority does not necessarily even imply racism; the other Article 4(a) provision that does not require incitement is at least restricted to ideas based on racial hatred. Indeed, it is surprising that Article 4(a) of CERD actually appears to call for the prohibition of a wider range of positive than negative statements.

¹⁴⁷ Although the European Court of Human Rights opined that its decision was compatible with CERD. See note 140.

¹⁴⁸ Report of the Committee to the General Assembly, Official Records, Forty-Fifth Session, Supplement No. 18 (A/45/18), p. 21, para. 56. This was in fact cited by the European Court of Human Rights in the *Jersild* case. See para. 21.

¹⁴⁹ P. 95.

At some point, and in certain contexts, advocacy of superiority may be tantamount to advocacy of inferiority and even of hatred. If so, it stands to be treated in the same way, and pursuant to the same provisions, as negative forms of hate speech. But, by terms, the superiority provision in Article 4(a) is not limited in this way and its language would not easily support this interpretation. Where an allegation of superiority did not incite to hatred, it would be hard to justify sanctioning it without breaching the test for restrictions on freedom of expression.

The ICTR, in *Nahimana*, distinguishes between statements which discuss ethnic consciousness and those which promote ethnic hatred,¹⁵⁰ giving as an example of the former a personal account of being discriminated against (at the hands of the group against which genocide was later committed).¹⁵¹ If statements of this sort do motivate listeners to take action, this is, according to the Tribunal, a result, “of the reality conveyed by the words rather than the words themselves.”¹⁵² This makes sense conceptually, while also highlighting the problems with the CERD prohibitions on positive statements. In practice, the difference may come down largely to intent rather than content, *per se*. In other words, a distinction may be made between statements whose real intention is positive (to express group pride or consciousness) and those which really aim to denigrate other groups.¹⁵³

Although far less explicit, some of the European Court of Human Rights decisions may be taken to stand for similar propositions. In *Incal v. Turkey*, for example, the Court recognised that the impugned statements appealed to Kurds, urging them to band together to defend their rights. But it held that there was nothing in the text that incited to “violence, hostility or hatred between citizens.”¹⁵⁴ This suggests that if racially motivated acts had followed the statement, the fault would not have been attributed to the speaker, as in the *Nahimana* example, but to the context. It may be noted that ECRI’s Recommendation 7 calls for the criminalisation of a superiority ideology only where it is expressed with a racist aim.¹⁵⁵

Mahalic and Mahalic also note that differences exist among Committee members regarding academic, scientific or serious debate on matters concerning race, with some suggesting that conclusions which support racial superiority should not be disseminated and others suggesting that they may be disseminated but only if accompanied by arguments discrediting racism and a health warning as to the fallibilities of the study or argument in question.¹⁵⁶ It is hard to see how the latter could be read into the language of Article 4(a). Both perspectives would be extremely difficult to reconcile with the right to freedom of expression. In any case, the question of serious debate is not really about superiority, since such debate might as easily reach direct conclusions of inferiority.

¹⁵⁰ Para. 1020.

¹⁵¹ Para. 1019.

¹⁵² Para 1020.

¹⁵³ There remains, of course, the further problem that CERD does not require positive statements to constitute incitement.

¹⁵⁴ 9 June 1998, Application No. 22678/93, para. 50.

¹⁵⁵ Provision 18(d).

¹⁵⁶ Pp. 95-96.

II.3.3 Other Issues

Religious Groups

The groups protected under the various hate speech provisions – mainly national, racial and religious groups – do not raise an issue *per se* from the perspective of freedom of expression. At the same time, it may be important to distinguish between immutable characteristics, such as race, and adherence to a given belief system or religion, which many individuals and most religions view as mutable.¹⁵⁷

The guarantee of freedom of expression protects criticism of religion, even very strong criticism.¹⁵⁸ Free speech may not, however, protect statements whose goal is simply to promote hatred against particular religious adherents. This would be a case of the distinction, noted above in relation to the definition of hatred, between statements targeting ideas and those targeting human beings.

This issue was raised in an interesting way in the dissent in *Gündüz v. Turkey*, with Judge Türmen expressing the view that statements referring to children of civil marriages as ‘bastards’ constituted hate speech on the basis of belief. The belief in question was not that of believers, but of those Turks who were non-believers.¹⁵⁹ Although this analysis seems clearly wrong, inasmuch as the statements clearly target an idea rather than a group, it highlights the problems of protecting beliefs, as opposed to immutable characteristics. Why protect certain sets of beliefs – the category known as religious ones – and not others?

In some cases, attacks on a religion may be used as a cover for racial attacks, and these attacks should be treated as such, rather than as criticism of an idea. It is perhaps significant that the Council of the European Union draft Proposal for a Framework Decision on combating racism and xenophobia covers incitement to religious hatred, but allows States to exclude from liability statements which refer to religion but are “not a pretext for directing acts against a group of persons or a member of such group defined by reference to race, colour, descent, or national or ethnic origin.”¹⁶⁰

A rather different issue is raised by protecting religious followers against offence, for example through blasphemy laws. The goal here is not to guard against hatred, but to ensure respect for the deeply held views of religious adherents. The European Court of Human Rights has upheld restrictions on this basis,¹⁶¹ but the limited focus has been on,

¹⁵⁷ Most religions at least envisage conversion to their own belief system, even if they do not so enthusiastically welcome conversion from it, clearly signalling their view that religious beliefs are mutable.

¹⁵⁸ See, generally, *Giniewski* and, in particular, para. 52.

¹⁵⁹ 4 December 2003, Application No. 35071/97.

¹⁶⁰ Article 8(1)(a).

¹⁶¹ See, for example, *Otto-Preminger-Institut v. Austria*, 20 September 1994, Application No. 13470/87 and *Wingrove v. United Kingdom*, 25 November 1996, Application No. 17419/90. See also *Giniewski*, para. 52.

...expressions that are gratuitously offensive to others and thus an infringement of their rights and which do not contribute to any form of public debate capable of furthering progress in human affairs.¹⁶²

This is controversial from a free speech perspective, but beyond the scope of this Study.

Incitement to a State of Mind

As noted above, incitement may be to a particular illegal act – violence or discrimination – or simply to a state of mind. Although the guarantee of freedom of expression, as construed by international courts, clearly permits certain restrictions based on the latter type of incitement, it is nevertheless controversial from the perspective of free speech for a number of reasons.

First, the very notion of ‘hatred’ is extremely vague and hence problematical from the perspective of the provided by law element of the test for restrictions on freedom of expression. As noted above, hatred is not defined remotely clearly in either international instruments or in the decisions of international courts.

Second, unlike incitement to an act, it is almost impossible to prove whether hatred *per se* is or is not likely to result from the dissemination of certain statements. Regular evidentiary techniques may be employed to assess the risk of a particular illegal act occurring but these do not work well in assessing the risk of a purely psychological outcome. International courts tend to dodge the issue and, instead, either simply conclude, perhaps after a cursory scan of the context, that the statements would be prone to have this result, or they focus on other factors, such as intent.

Third, and related to the first and second points, these provisions may be subject to abuse. The abuse of hate speech laws by the powerful to silence minorities or those espousing unpopular political causes is a very serious problem around the world.¹⁶³ A clear example of this is the case of *Incal*, before the European Court of Human Rights, where the applicant was convicted in Turkey of “attempting to incite hatred and hostility through racist words” for protesting, albeit in strong terms, against official measures he believed were aimed at oppressing the Kurds.¹⁶⁴

Fourth, the effectiveness of hate speech prosecutions in curbing the underlying concern, racial hatred, may, at least in some contexts, be doubted. Often, those convicted are viewed as martyrs rather than criminals by their fellow racists and prosecutions can provide a far more effective platform for those espousing racist views than would otherwise be available to them. Restrictions on free speech which are not effective cannot be justified; they cannot be necessary to protect a legitimate aim since, by definition, they

¹⁶² *Otto-Preminger-Institut*, para. 49.

¹⁶³ See Simon, J., “Of Hate and Genocide: In Africa, Exploiting the Past” January/February 2006 *Columbia Journalism Review* 9.

¹⁶⁴ See also *Gündüz*.

are not protecting it. On the other hand, one must be careful to avoid simplistic notions of effectiveness. As Kretzmer points out:

[T]his argument ... does not necessarily assume that the prevention of racist speech will result in fewer people subscribing to racist ideas ... it does not emphasize the indignity caused by the exposure of target populations to racist speech, rather it stresses the indignity of living in a society in which such speech is protected. The thrust of this argument is that a society committed to the ideals of social and political equality cannot remain passive....¹⁶⁵

In other words, democratic societies must condemn speech which is inherently inimical to equality to maintain their own commitment to that very value.

Historical Debate versus Hate Speech

It is clear that legitimate historical research or debate is protected speech whereas hate speech dressed up as historical research is not. This issue has arisen in a number of cases. In *Faurisson*, for example, the concurring opinion by Evatt, Kretzmer and Klein highlighted the fact that the author had gone well beyond 'simple' Holocaust denial or material that might claim to be historical research and had actually engaged in a specific attack on Jews:

The author has, in these statements, singled out Jewish historians over others, and has clearly implied that the Jews, the victims of the Nazis, concocted the story of gas chambers for their own purposes. While there is every reason to maintain protection of bona fide historical research against restriction, even when it challenges accepted historical truths and by so doing 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 restriction.¹⁶⁶

In a series of cases, the European Commission and Court of Human Rights have ruled out protecting statements that deny the Holocaust happened. In *Garaudy*, for example, the Court stated that to deny established historical facts "does not constitute historical research akin to a quest for the truth".¹⁶⁷ It is not clear how they determined that the research was not *bona fide* historical enquiry, other than because it denied the Holocaust, but motivation seems to have played a key role.

On the other hand, the European Court specifically focused on the need for open public debate about historical matters in the *Lehideux* case, which involved a prosecution for contesting the legitimacy of the conviction of the French leader Marshal Pétain for collusion with the enemy during the Second World War. The Court noted that the French courts had observed that that page of French history remained "very painful in the collective memory", that the events had occurred over 40 years previously and that to

¹⁶⁵ "Freedom of Speech and Racism" (1987) 8 *Cardozo Law Review* 445, p. 456.

¹⁶⁶ Para. 10. In *Ross*, the Committee quoted from the Board of Inquiry, which held that the writings were not scholarly and did not present their findings in an objective fashion. Para. 4.2.

¹⁶⁷ P. 29.

refrain from criminalizing such speech was, “part of the efforts that every country must make to debate its own history openly and dispassionately.”¹⁶⁸

It is difficult to reconcile these cases without reference to additional factors, such as intention. In the *Lehideux* case, the Court pointed out that the statements in question, did “not belong to the category of clearly established historical facts – such as the Holocaust – whose negation or revision would be removed from the protection of Article 10 by Article 17.”¹⁶⁹ It is unclear, however, 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 it is the only such ‘established historical fact’. Indeed, it may well be questioned whether there is any historical fact that is truly beyond legitimate debate.¹⁷⁰

Although international courts do not stipulate this expressly, it seems that a combination of intent, context, and the nature and tone of the research make the difference between what they deem to be legitimate historical debate and what they condemn as hate speech. It is perhaps significant that, in *Lehideux*, the Court stressed the fact that the statements had been made some time ago and that their aim was to promote public debate. Furthermore, the statements were not in fact racist and did not identify any particular group, even implicitly. This view is supported by the literature. McGoldrick and O’Donnell, for example, suggest that international courts do not consider historical statements in the abstract, but rather in their proper context, taking into account language, anti-Semitic allegations, and so on.¹⁷¹

Political Speech and the Margin of Appreciation

As noted above, courts have regularly held that political speech, and indeed all speech on matters of public interest, warrants a high degree of protection.¹⁷² This goes to a key underlying rationale for protecting free speech, namely as an underpinning of democracy and participation. Different international courts have, however, not presented a coherent analysis of this consideration in the context of hate speech.

At one level, it seems obvious that hate speech, whether actual or alleged, is by its very nature political speech, inasmuch as it ventures an opinion on social organisation and relations. Sometimes, it is far more overtly political in the sense of being used as a rallying call explicitly within the political arena.¹⁷³ At the same time, international courts have often given hate speech short shrift, dismissing it quickly as offensive to the rights of others and equality, belying its claim to be political speech. In *Giniewski*, the European

¹⁶⁸ Para. 55.

¹⁶⁹ Para. 47.

¹⁷⁰ Of course, one would have to be suspicious of a complete denial of the Holocaust, although in certain contexts this might be based on gross misinformation rather than racism. But the body of fact relating to the Holocaust is large and complex and it is almost inevitable that certain accepted views are in error.

¹⁷¹ “Hate-speech laws: consistency with national and international human rights law” (1998) 18 *Legal Studies* 453, p. 485.

¹⁷² See note 121 and surrounding text.

¹⁷³ Note, for example, the 2 February 2006 acquittal of British National Party leader, Nick Griffin, on charges of hate speech. See <http://www.guardian.co.uk/farright/story/0,,1700810.00.html>. See also *Glimmerveen*.

Court of Human Rights reiterated that, in the context of offence to religion, States' margin of appreciation or degree of discretion in restricting speech was wider than in other contexts, suggesting that the same would be true for hate speech as well.¹⁷⁴

The ICTR dealt with this issue in *Nahimana*, recognising the enhanced importance given to political speech. It went on to suggest that protection for political speech was designed to protect minority or oppositional viewpoints and was, as a result, not engaged in the case at hand since the speech there was articulated by the majority. As a result, the principle was reversed and the speech, rather than any restriction, needed to be subject to particular scrutiny, with a view to protecting minorities.¹⁷⁵

This analysis is flawed, inasmuch as it distorts the underlying rationale for protecting political speech. This is not to privilege minority viewpoints – it may be noted, furthermore, that hate speech often represents a minority viewpoint – but to protect the free flow of ideas in the political arena, on the understanding that certain ideas will dominate, politically, in accordance with democratic principles. Of course, it is true that speech which receives privileged protection from the government or dominant political players, the point made by the *Nahimana* Tribunal, will rarely need special judicial protection. This can in no way, however, relieve an international court of its obligation to extend appropriate protection to freedom of expression, including heightened protection for political speech.

The jurisprudence of the European Court of Human Rights is divided on this issue. In a series of cases finding a breach of the right to freedom of expression in the context of national convictions for hate speech, the Court has referred to the public interest or some related notion as a basis for its decision. In *Jersild*, for example, the Court held that it was not its role to substitute its views for those of the journalist as to what reporting technique should be used, or to question the media's appreciation of the information value of their programme, in light of the fact that they were reporting on a matter, "that was of great public concern."¹⁷⁶ To do so, "would seriously hamper the contribution of the press to discussion of matters of public interest".¹⁷⁷

In *Gündüz*, the Court held that the subject of the impugned statements, namely the notion that democracy was incompatible with Islam, was "widely debated in the Turkish media and concerned a matter of general interest, a sphere in which restrictions on freedom of expression are to be strictly construed."¹⁷⁸ In *Incal*, the Court referred to the particular importance of freedom of expression for political parties,¹⁷⁹ to the fact that the comments related to, "actual events which were of some interest to the people of İzmir,"¹⁸⁰ and to

¹⁷⁴ Para. 44. At the same time, the Court held that the speech in question there was on a matter of some public interest and hence the scope for restrictions small. See para. 51.

¹⁷⁵ Paras. 1006, 1008 and 1009.

¹⁷⁶ Para. 33. See also para. 31.

¹⁷⁷ Para. 35.

¹⁷⁸ Para. 43.

¹⁷⁹ Para. 46.

¹⁸⁰ Para. 50.

the wider limits of permissible criticism of government.¹⁸¹ In *Lehideux*, the Court noted that the aim of the statements had been to influence public opinion¹⁸² and that to allow them was part of every country's need to debate its own history openly.¹⁸³

On the other hand, in another series of cases before the Commission and Court, these factors do not appear to have warranted much consideration. In *Glimmerveen*, for example, the Commission failed to factor in as a free speech concern its own holding that the applicants represented a political party. Similarly, contribution to public debate was not mentioned in a series of cases dealing with anti-Semitic speech, Holocaust denial or the promotion of Nazi ideas.¹⁸⁴

It is not clear how to reconcile these cases. As noted above, one means of distinguishing hate speech from legitimate but possibly offensive speech is to differentiate between speech targeting ideas and speech targeting human beings (on the basis of race, nationality and so on).¹⁸⁵ It is possible to distinguish the European cases on this basis, by classifying attacks on humans as being outside the special protection otherwise allocated to political speech. At the same time, this is an inherently subjective exercise. Furthermore, as with context, it sometimes seems that the Court uses the notion of speech on a matter of public interest to support its conclusion, rather than to reach that conclusion.

Key Conclusions:

- Due in part to careful drafting, potentially conflicting provisions on hate speech, equality, the rights of others and free speech in the ICCPR and ECRT are probably legally contiguous or at least very nearly so.
- From a free speech perspective, the primary issue in determining whether or not a hate speech restriction is legitimate is whether it can be justified as necessary in a democratic society.
- There are serious, perhaps irreconcilable, conflicts between Article 4(a) of CERD and free speech guarantees, including Article 19 of the ICCPR. Article 4(a)'s lack of requirements of advocacy of hatred or incitement for some of its provisions, and its call for the banning of ideas based on superiority, are particularly problematical.
- There is a difference between protecting groups based on immutable characteristics and protecting groups based on beliefs. Care must be taken, in relation to the latter, not to prevent criticism of ideas, but only attacks on human beings.
- Hate speech incitement to a mental state, rather than an illegal act, raises particular freedom of expression concerns and restrictions of this sort should,

¹⁸¹ Para. 54.

¹⁸² Para. 48.

¹⁸³ Para. 55. See also *Dicle*, where the Court summarily rejected the State's claims and found a breach of the right to freedom of expression on the basis that the statements concerned an assessment of Turkey's policies, and were, therefore, not hate speech.

¹⁸⁴ *Kühnen, B.H., M.W., H.P. and G.K, Ochensberger, Walendy, Remer, Nationaldemokratische Partei Deutschlands and Garaudy.*

¹⁸⁵ See note 104 and surrounding text.

- therefore, be subject to particularly careful scrutiny.
- 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.
 - Hate speech is often, at least superficially, political speech. It may be that true hate speech, by targeting human beings rather than ideas, does not qualify as political speech. Identifying the true target of statements, however, is a subjective and often controversial exercise.

II.4 Incitement

A central goal of this Study is to clarify the meaning of incitement, in the context of genocide but also in the more general context of hate speech. It is the key qualifier of liability for statements that promote genocide or hatred and thus a touchstone of what may and what may not be prohibited. As a result, it is central to the question of balancing proscriptions on speech to promote equality and prevent disorder, on the one hand, and the right to freedom of expression, on the other.

During the debate on incitement to genocide as part of the discussion on the Genocide Convention in the Sixth Committee, the Swedish representative noted that the term ‘incitement’, as well as its qualifiers – namely ‘direct’ and ‘public’ – are inherently vague and also susceptible of different meanings in different languages and legal systems.¹⁸⁶ It was suggested early on that, as a result, Article 3(c) of the Genocide Convention could not be applied directly,¹⁸⁷ although subsequent international criminal tribunals and their statutes have proven this to be mistaken.

The Oxford English Dictionary defines to incite as, “to set in rapid motion”, “[t]o urge or spur on; to stir up, animate, instigate, stimulate” and ‘incitement’ as, “[t]he action of inciting or rousing to action”.¹⁸⁸ While this is helpful, it fails to provide clear guidance to decision-makers tasked with assessing whether or not particular statements constitute incitement.

From the perspective of international law, the question of what constitutes incitement to genocide or to other proscribed results recognised under hate speech provisions requires consideration of a number of issues. These include questions relating to intent, causation or nexus between the speech and the proscribed result, context, tone and truth. Each of these issues is considered in this section.

¹⁸⁶ Ruhashyankiko, para. 111. See also Robinson, pp. 69-70.

¹⁸⁷ See Kunz, p. 744.

¹⁸⁸ Simpson, J.A. and Weiner, E.S.C., eds., *Oxford English Dictionary*, 2nd Ed. (Oxford: Clarendon Press, 1989), Volume VII, pp. 796-7.

II.4.1 Intent

The definition of genocide in Article 2 of the Genocide Convention refers to a number of different acts, “committed with *intent* to destroy, in whole or in part, a national, ethnical, racial or religious group”. [emphasis added] As such, the requirement of intention is ‘hard-wired’ into the very text of the Convention.¹⁸⁹ It is also beyond any question that this element of intent applies to all punishable acts of genocide, including incitement.¹⁹⁰

The question of whether motive should also be required was debated in the Sixth Committee but was ultimately rejected, among other things on the basis that, in relation to genocide, intent and motive were so closely linked as to make separate enumeration redundant.¹⁹¹ For most punishable acts of genocide, the nature of the requisite intention is clear: it is specifically to destroy, in the physical sense, and in whole or part, the target group.¹⁹² In this case, intent and motive are effectively the same thing.

In the *Krstić* trial judgment before the ICTY, in the context of a general consideration of genocidal intent, the ICTR offers some interesting thoughts on possible differences between the individual motives of the accused and the broader intent involved in the conception and commission of the crime of genocide. In particular, the Tribunal notes that the scale of genocide implies, almost by definition, the involvement of many protagonists. While the motive of each may differ, the overall goal remains genocide. Furthermore, intent must be discernible in the criminal act itself.¹⁹³ It is unclear what, precisely, the Tribunal meant by this but it surely does not stand for the proposition that intent is not required for genocide. It may be noted that these references were to direct acts of genocide, not incitement thereto, for which the only acts are statements.

There is very little in the academic literature on what specific intent is required for incitement to genocide, although it has been addressed, explicitly or implicitly, in some of the jurisprudence. In *Akayesu*, the Tribunal defines the act of incitement as, “directly provoking the perpetrator(s) to commit genocide”.¹⁹⁴ It goes on to describe the intent requirement as follows:

It implies a desire on the part of the perpetrator to create by his actions a particular state of mind necessary to commit such a crime in the minds of the person(s) he is so engaging. That is to say that the person who is inciting to commit genocide must have himself the specific intent to commit genocide, namely, to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.¹⁹⁵

The *Nahimana* case does not specifically refer to the various elements of the offence of incitement but rather engages in a conceptual analysis. Suffice it to say that the tenor of

¹⁸⁹ See Ruhashyankiko, paras. 96-100.

¹⁹⁰ Schabas (2000a), p. 275; *Akayesu*, para. 560; *Nahimana*, paras. 957-969.

¹⁹¹ Ruhashyankiko, paras. 101-106.

¹⁹² See *Prosecutor v. Krstić*, Case No: IT-98-33-A (Trial Chamber), 2 August 2001, paras. 561, 571 and 580.

¹⁹³ *Krstić* (Trial Chamber), para. 549.

¹⁹⁴ Para. 559.

¹⁹⁵ Para. 560.

the discussion largely accords with the *Akayesu* definition of the act of incitement, although it seems to insist less on the need for direct provocation, focusing instead on the idea of persistent negative ethnic stereotyping and fear-mongering which creates a climate in which genocide could occur.¹⁹⁶ *Nahimana* fails to address the question of intent to incite separately from intent to commit genocide, simply holding that the requisite intent was manifest from the nature of the statements themselves for both crimes, as well as the acts of some of the accused.¹⁹⁷ The Tribunal did, however, note that the fact that the genocide in fact occurred is relevant to the question of whether or not the defendants intended to incite to genocide.¹⁹⁸

In *Fritzsche*, the Nuremberg Tribunal held that, although the speeches were anti-Semitic, it was, “not prepared to hold that they were *intended* to incite the German people to commit atrocities on conquered peoples”. [emphasis added]

The quotation above from *Akayesu* identifies two different intent requirements. The first is the intention to provoke in others the state of mind necessary to commit genocide. The second is the intention to see genocide actually committed. While often these will both be present in the mind of those who incite to genocide, they manifest important conceptual and evidentiary differences, and may represent the difference between intent and motive.¹⁹⁹ Conceptually, the first intent requirement aligns better with the *actus reus* of incitement.

The choice of intent requirement has implications, among other things, for causation. Specifically, the first requirement suggests that any causal link needs to be drawn to the state of mind created in third parties, rather than to actual acts of genocide or the risk thereof. This forges a more coherent link between incitement to genocide and incitement to hatred as a state of mind.²⁰⁰ Relying on the first intent requirement will also help distinguish more clearly between incitement to genocide and instigation as an act of or complicity in genocide.²⁰¹

The status of intent is a lot less clear as regards hate speech. Intent is not explicitly required in any of the hate speech provisions. However, they are far less detailed than the genocide provisions and focus on describing what must be prohibited rather than the details of how States should do this. Article 20(2) of the ICCPR and Article 13(5) of the ACHR are limited in scope to advocacy of hatred that constitutes incitement. Although ‘advocacy’ presumably goes to questions of substance – the type of speech covered – it may also imply an intent requirement. Specifically, it is hard to see how one could

¹⁹⁶ To this extent, it does not insist on the direct call to action which *Akayesu* appears to.

¹⁹⁷ Paras. 957-969. See also para. 1001.

¹⁹⁸ Para. 1029.

¹⁹⁹ For example where one incites another to attempt genocide, knowing full well that success is impossible and for some other ulterior motive.

²⁰⁰ The problems of this from the perspective of free speech have already been noted.

²⁰¹ The jurisprudence, as noted above, reflects some confusion between incitement to genocide, on the one hand, and complicity in or actual acts of genocide, on the other. Perhaps this is natural, given that all of the cases relate to serious actual cases of genocide. See Schabas (2000a), pp. 273-274 and Recent Cases, pp. 2775-5.

advocate hatred without also having the intention of promoting hatred. Put differently, the term advocacy implies a form of intention; disseminating hateful statements without any intention of promoting hate – as in the *Jersild* case – is not advocacy of hatred.

Two of the four hate speech provisions in Article 4(a) of CERD do not require advocacy of hatred or even incitement to any particular proscribed result. The mere dissemination of ideas based on racial superiority or hatred is covered. By terms, this would cover cases where there was no intent to promote hatred. The problems with these provisions from the perspective of the right to freedom of expression have already been noted. An interesting question is whether the other two hate speech provisions in Article 4(a), which require incitement but not advocacy of hatred, would require intent. There is very little case law on this but it seems a reasonable proposition.

The decisions of the CERD Committee largely relate to State failures to prosecute alleged hate speech cases and, as such, offer little insight into the question of intent or even incitement. In *Hagan*, the issue concerned a racially derogatory term in the (historic) name of a sporting ground, which the Committee asked to be renamed. No intention to promote hate was present in giving the original name, which was based on the nickname of a famous (white) sportsman. At the same time, the basis of the decision is unclear and does not involve any individual allegations of hate speech.

In the *Faurisson* case, the HRC expressed concern about the scope of the law being applied, which prohibited any contestation of the existence of the category of crimes against humanity defined in the Nuremberg Charter. In a concurring opinion, Evatt, Kretzmer and Klein specifically noted that the law as framed would cover *bona fide* research and that it did “not link liability to the intent of the author,”²⁰² and, to that extent, it was problematical from the perspective of free speech. However, on the facts of the case, they held that the author was motivated by a desire to promote racism and his statements clearly evidenced a desire to single out Jews for attack.²⁰³ In other words, although the law was potentially problematical because it did not require intent, in the particular circumstances of the case, intent was present, and so the conviction was not a breach of the right to freedom of expression. This clearly suggests that intent is required to meet the test of necessity under Article 19(3) of the ICCPR.²⁰⁴

In a series of cases, the European Commission of Human Rights ruled inadmissible complaints of a breach of the right to freedom of expression due to various interferences by the authorities based on the hateful nature of the statements in question. The Commission did not refer to intent in these cases, focusing instead on the harm that the statements caused. At the same time, nothing in these cases would rule out an intent requirement and it may have been implicit in the decisions. This conclusion is supported

²⁰² Para. 9.

²⁰³ Para. 10. See also the concurring decision of Lallah, paras. 6 and 9.

²⁰⁴ In the *Ross* case before the HRC, the Board of Inquiry, which had applied the original sanction to Ross, noted that, while the impugned writings did involve substantial research, they were motivated by a desire to attack Jews rather than to present scholarly research. The Committee, however, did not specifically pick up on this.

by the *Garaudy* case, in which the European Court held inadmissible a complaint based on a conviction for a book which the Court held was essentially revisionist rather than legitimate historical research. In that case, the Court held that the real purpose of the book – that is, the author’s intent – was, “to rehabilitate the National-Socialist regime and, as a consequence, accuse the victims themselves of falsifying history.”²⁰⁵

In *Jersild*, the European Court of Human Rights considered a case involving the conviction of a journalist for statements made in the context of a serious programme intended for an informed audience and dealing with social and political issues. The statements had been made by members of a racist group, who had all separately been convicted as primary authors. In finding that the conviction of the journalist could not be justified as a restriction on freedom of expression, the Court relied heavily on its finding that the purpose of the programme was not to promote racism. As the Court stated:

[A]n important factor in the Court's evaluation will be whether the item in question, when considered as a whole, appeared from an objective point of view to have had as its purpose the propagation of racist views and ideas.²⁰⁶

The Court held that the purpose was quite clearly not to promote racism but, on the contrary, to expose and analyse it.²⁰⁷ In that case, therefore, lack of racist intent played a key role in the Court finding a breach of the right to freedom of expression.

Similarly, in *Lehideux*, the European Court, in holding that the statements were protected speech, noted that the aim in publishing them was to change public opinion and not, for example, to justify Nazi atrocities.²⁰⁸

More complex is the question of how intent may be proven. The Nuremberg Tribunal made much of the fact that Streicher was aware of the ongoing genocide and yet continued to publish his ‘propaganda of death’. Although the point was not explicitly linked to intent, it is hard to understand its significance in any other way; it would have been irrelevant to actual incitement, which effect the statements either had or did not have. On the other hand, Fritzsche, who was found not guilty, was unaware of the genocide which was taking place, the implication being that he therefore may be presumed to have lacked the intent to promote or further it.

In practice, international courts often look to the actual language used for evidence of intent.²⁰⁹ In *Nahimana*, the ICTR relied primarily on the statements themselves in finding the requisite genocidal intent. The statements in question were often very direct, calling explicitly for the extermination of the Tutsis, referring to a war between ethnic groups, providing suggestions about the weapons to be used and even describing the media as the

²⁰⁵ P. 29.

²⁰⁶ Para. 31.

²⁰⁷ Para. 33.

²⁰⁸ Para. 48.

²⁰⁹ See 2004 Report of the OAS Special Rapporteur on Freedom of Expression, Chapter VII - Hate Speech and the American Convention on Human Rights, para. 41. See also *Nahimana*, para. 1001.

complement to bullets in the ‘war’.²¹⁰ The Tribunal also noted that other international courts looked to language as a way of evidencing the requisite intent.²¹¹ Finally, as with the Nuremberg Tribunal, the ICTR seemed to place some reliance on knowledge of the ongoing genocide, stressing that some statements had been made at a point when the killing had been going on for almost three weeks.²¹²

In *Faurisson*, the HRC looked at the nature of the statements to find the intent requirement. Specifically, these statements particularly singled out Jewish historians as having perpetrated the myth of the holocaust, although in fact many French historians have written on this issue. This historical dishonesty coupled with a clear racist bias suggested that the real intent was to promote anti-Semitism rather than to engage in historical debate.²¹³

Context may also be relevant to proof of intent. One may, for example, distinguish between statements made during a hot debate about a controversial matter and similar statements made in less extenuating contexts. Such contexts may lead speakers to make statements which are more inflammatory than intended, and these statements may promote racism or even genocide although this is not their intention.

Key Conclusions:

- Intent is required for incitement to genocide and for hate speech, at least where this is defined as advocacy of hatred that constitutes incitement to a proscribed result, as is the case for Article 20(2) of the ICCPR.
- For both, the intent may be to create the requisite state of mind in those engaged, rather than for specific acts to take place.
- Proof of intent may be indirect, for example, through the nature of the impugned statements, knowledge of an ongoing genocide or choice of language.

II.4.2 Causation

In one sense, incitement to genocide or hatred does not require causation, since the crime may be committed even in the absence of any actual act, and this was a specific finding of the *Nahimana* Tribunal.²¹⁴ At the same time, the *Nahimana* Tribunal also stated: “It is the potential of the communication to cause genocide that makes it incitement”.²¹⁵ This implies that causation is an appropriate concept in analysing incitement, if understood as the creation of the potential for genocide or hatred. More specifically incitement consists of creating in the mind of the target audience, in the context of genocide, a mental state

²¹⁰ Paras. 957-969.

²¹¹ Paras. 1001-2.

²¹² Para. 966.

²¹³ Similarly, in *Ross*, the HRC quoted statements by the Board of Inquiry to the effect that the lack of objectivity of the writings suggested that the purpose was to attack Jews.

²¹⁴ Para. 1007. None of the cases dealing with incitement to genocide present a clear conceptual distinction between instigation which constitutes incitement and that which constitutes genocide *per se* or conspiracy in genocide (see note 38 and surrounding text) and so it is sometimes difficult to distinguish between these two different punishable acts in their specific findings.

²¹⁵ Para. 1015.

desirous of committing genocide and, in the context of hate speech, a mental state known as racial hatred. In this case, causation relates to the creation of the requisite state of mind rather than genocide itself.

A key question is how proximate a causal link is required between the impugned statements and the creation of the requisite state of mind for the statements to qualify as incitement. Where this link is distant, incitement cannot be said to have taken place; where it is close, the statements may qualify as incitement. Another approach is to assess the risk of the proscribed result occurring, rather than assessing causality *per se*.

From the perspective of freedom of expression, causality in this sense is very important. As noted above, restrictions on freedom of expression which are not effective in promoting the legitimate aim they purport to serve cannot be justified. If certain statements are not likely to cause a proscribed result – whether it be genocide, other forms of violence, discrimination or hatred – penalising them will not help avoid that result and hence cannot be said to be effective. If, on the other hand, a sufficient degree of causal link or risk of the result occurring can be established between the statements and the proscribed result, penalising them may be justifiable.

Another reason why causality is a free speech concern is that, if a sufficiently close link between the statements and the proscribed result is not required, the risk of abuse of the restriction on free speech increases. In practice, the requirement of close link serves to prevent abuse of the provisions for reasons other than preventing genocide or hatred.

Causation With Respect to Incitement to Genocide

In *Akayesu*, the ICTR described incitement as creating, by one's statements, "a particular state of mind necessary to commit such a crime in the minds of the person(s) he is so engaging."²¹⁶ On the one hand, this could be seen as a relatively passive notion of incitement; having the state of mind necessary to commit a crime does not necessarily imply that there is a serious risk that the crime will in fact be committed. On the other hand, this statement seems to imply a very strong causal link between the impugned statements and the requisite state of mind, the latter having been 'created' by the former. Moreover, the facts of *Akayesu* present a strong causal link since he had engaged in direct calls for violence at a public meeting, and the violence started, and two of three people he had named were murdered, shortly thereafter.

The language of the *Streicher* decision is quite direct on this point. At one point the Nuremberg Tribunal refers to the defendant having, "infected the German mind with the virus of anti-Semitism and incited the German people to active persecution." Later, the Tribunal stated: "Such was the poison Streicher injected into the minds of thousands of Germans which caused them to follow the National Socialists policy of Jewish persecution and extermination." This suggests that Streicher was directly responsible for

²¹⁶ Para. 560.

creating the state of mind among those he engaged which in fact led them to participate in the genocide. This suggests a strong causal link between the statements in question and the creation of a state of mind whereby those engaged actually participated in the genocide.

The Tribunal in *Nahimana* largely dodges the issue analytically and does not appear to require the same causal link as the cases just noted. It does, however, address this issue through its factual holdings. It notes that both *Kangura* and RTLM, the main media outlets in the case, “repeatedly, in fact relentlessly, targeted the Tutsi population for destruction.”²¹⁷ It further states:

RTLM broadcasting was a drumbeat, calling on listeners to take action against the enemy and enemy accomplices, equated with the Tutsi population. The phrase ‘heating up heads’ captures the process of incitement systematically engaged in by RTLM, which after 6 April 1994 was also known as ‘Radio Machete’.²¹⁸

In the context of RTLM, the Tribunal also noted that radio was, “immediately present and active”, and therefore, “heightened the sense of fear, the sense of danger and the sense of urgency giving rise to the need for action by listeners.”²¹⁹ This suggests that RTLM had a direct causal effect on the minds of listeners, and that this effect instilled a sense of the need to engage in genocidal acts.

Regarding *Kangura*, the Tribunal noted that it provided, “a litany of ethnic denigration presenting the Tutsi population as inherently evil and calling for the extermination of the Tutsi as a preventive measure.”²²⁰ The Tribunal failed, however, to establish the direct causal link to the creation of the requisite state of mind among its readers that it had for RTLM. It also failed to address an issue it had itself raised, namely the differential impact of the broadcast and print media. The decision has been criticised on this basis.²²¹

Temporal Link

Most of the incitement to genocide cases rely on statements made during the period when genocidal acts were actually taking place. As such, there is inherently a close temporal link between the statements and both the creation of the requisite state of mind and actual acts of genocide. The *Streicher* and *Fritzsche* decisions both referred to the ongoing genocide as a key factor in their decision. The ICTR in *Akayesu* placed some reliance on the fact that killings started shortly after the impugned public speeches were made.²²²

In *Nahimana*, however, the ICTR also found liability for statements which had been published in *Kangura* or broadcast by RTLM prior to the genocide, which started on 6 April 1994. *Kangura* published from May 1990 to March 1994; RTLM broadcast from July 1993 until July 1994. The Tribunal held that incitement to genocide was an inchoate

²¹⁷ Para. 963.

²¹⁸ Para. 1031.

²¹⁹ Para. 1031.

²²⁰ Para. 1036.

²²¹ Recent Cases, pp. 2774-5.

²²² Para. 348.

offence that “continues in time until the completion of the acts contemplated.”²²³ As a result, to the extent that statements published or broadcast by these media constituted incitement to the genocide that occurred from 6 April, they all fell within the temporal jurisdiction of the Tribunal.²²⁴

It is difficult to distinguish which of the Tribunal’s holdings were based on RTLM statements made before the genocide started and which were based on statements made during the commission of the genocide, although the decision does specifically refer to a number of pre-genocide broadcasts. However, *Kangura* did not publish at all during the period of the genocide and yet Ngeze was found guilty of both direct acts of genocide and incitement to genocide for statements published in the newspaper. This particular aspect of the Tribunal’s decision has been criticised and it has been suggested that it must be understood in light of the fact that *Kangura* was completely controlled by Ngeze, who also committed physical acts of genocide.²²⁵ Certainly this part of the ruling is problematical from a free speech perspective. However, the newspaper did publish until just before the genocide started, so there remains a close temporal link between at least some of the inciting statements and the proscribed result.

It is clear that the Tribunal considered the statements by *Kangura* and RTLM prior to the initiation of the genocide to have created an environment which made possible the commencement of the genocide immediately upon the downing of the President’s plane on 6 April 1994. In this regard, the Tribunal stated:

The Chamber accepts that this moment in time served as a trigger for the events that followed. That is evident. But if the downing of the plane was the trigger, then RTLM, *Kangura* and CDR were the bullets in the gun. The trigger had such a deadly impact because the gun was loaded.²²⁶

In this sense, the impact upon the target audience, in terms of creating the requisite mental state for genocide to take place could be said to be immediate, although not acted upon until later.

Incitement Where the Genocide Does Not Occur

The international jurisprudence on genocide relates exclusively to genocides that have in fact occurred. It is, as a result, difficult to draw clear lessons from these cases about what causal link would be required for incitement where genocide does not take place. In particular, the fact that the genocide occurred demonstrates that the requisite state of mind had been created and so it only remains to show that it was the statements in contention that created it.

The above quote from *Nahimana* may provide some insight into this. It suggests that incitement created an environment in which a trigger could set off genocidal acts. If the

²²³ Para. 1017.

²²⁴ Which ran from 1 January 1994 to 31 December 1994. See ICTR Statute, Article 1.

²²⁵ Recent Cases, pp. 2774-5. This is another example of the decision having to be understood in light of the underlying fact of the extreme genocide.

²²⁶ Para. 953. While the cogency of the metaphor may be doubted, the meaning is clear.

trigger had not been pulled, that is to say, if something extreme had not happened, the genocide may not have occurred but the statements would still have constituted incitement to genocide.²²⁷ In this case, causality refers to having created a state of mind among those engaged which goes beyond hatred of the target group and includes a specific desire to perpetrate acts of genocide upon them. Although the evidentiary challenges of showing this absent specific acts of genocide occurring may be great, conceptually it is clear.

It remains unclear how international courts and tribunals would respond to this evidentiary challenge, since they have never been presented with it. It may be noted, however, that national courts, in analogous situations, assess the degree of risk created by the impugned statements of the proscribed result actually occurring, rather than attempting to determine causality *per se*, which would involve an assessment of psychological states of mind. Thus, in the US Supreme Court case of *Brandenburg*, the Court held that liability might ensue where the statement is intended to “produce imminent lawless action and is likely to incite or produce such action”.²²⁸ A variety of contextual and other factors may be examined to this end.²²⁹

Causation With Respect to Hate Speech

As noted above, hate speech in the various different instruments is a far less clearly defined notion than genocide. Two of the four hate speech provisions in Article 4(a) of CERD do not require any result whatsoever. It is enough if the statements are based on superiority or racial hatred. It makes little sense to talk of causation – even in the sense in which this term is defined above, that is to say of creating the requisite mental state – for these provisions. Most of the provisions – including the other two provisions in Article 4(a) of CERD, Article 20(2) of the ICCPR and Article 13(5) of the ACHR – require incitement to some result and this sub-section focuses on these provisions.

The different provisions, as noted above, refer to incitement to two quite different results. One is to create, among those engaged, a state of mind in which they wish to commit specific crimes, such as perpetrating violence or discrimination, on the basis of race or another specified group membership. This form of incitement is analogous to incitement to genocide for, although the crimes covered are broader in scope, they are still defined sets of criminal actions. Where the crime in fact occurs, it may be possible to trace it back to the inciting statements. Where it does not, as in the case of genocide, proof of causation may present serious evidentiary challenges and the focus may be more on the likelihood of the proscribed result occurring than on the psychological state of those engaged.

²²⁷ The happenstance intervention of the extreme external act could not, of itself, convert the statements into incitement to genocide and so it follows that they must already have qualified as such.

²²⁸ Note 116.

²²⁹ The famous example of crying fire in a crowded theatre provides some insight into this. It is reasonable to assume that this would be likely to create panic, even if in fact it does not.

The second is simply to create, among those engaged, a state of mind which is characterised by hatred, even though no particular action based on that hatred is envisaged. The vast majority of the hate speech cases before international courts fall into this category. In this case, the evidentiary challenges of proving causation, namely that certain statements did create a (passive) attitude of hatred in others, are almost insurmountable. As Gaudreault-DesBiens notes, requiring strict proof of causation in such cases, “forces the potential victims of hate propaganda to bear or absorb all risks,”²³⁰ which, as noted, is probably an intolerable burden. It may be possible, however, to employ the ‘likelihood approach’ here by assessing the likelihood of the requisite state of mind being created.

In some cases, international courts do look for causation-related factors when assessing measures against hate speech. *Ross*, for example, involved the removal of a teacher from the classroom for his anti-Semitic/Holocaust denial publications. The Supreme Court of Canada noted the evidence that a ‘poisoned environment’ had been created within the relevant school board and held that “it is possible to ‘reasonably anticipate’ the causal relationship” between that environment and the author’s publications.²³¹ The HRC held that this satisfied the necessity part of the test for restrictions on freedom of expression and that, as a result, there was no breach of this right.²³²

In a series of cases from Turkey involving allegations of hate speech, the European Court of Human Rights has found a breach of the right to freedom of expression on the basis that the impugned statements did not represent a call to violence or hatred.²³³ In *Dicle v. Turkey*, for example, the Court stated:

It considers, among other things, that although certain particularly acerbic passages of the article paint an extremely negative picture of the Turkish State and thus give the narrative a hostile tone, they do not encourage violence, armed resistance or insurrection and do not constitute hate speech. In the Court’s view, this is the essential factor.²³⁴

In part, these decisions reflect the abuse of these provisions by the Turkish authorities since the statements involved are quite obviously not inspired by hatred, or even a desire to promote disorder, even if they do make reference, sometimes in polemical terms, to the Kurdish situation in that country. They can also, however, be seen as low threshold causation decisions: statements which do not involve a call to violence or hatred do not create a serious risk of inciting it.

Often, however, as the *Nahimana* Tribunal noted in its assessment of international hate speech cases, international courts do not look at the matter from a direct causal

²³⁰ P. 125.

²³¹ Para. 4.6.

²³² Para. 11.6.

²³³ *Incal and Gündüz*.

²³⁴ Para. 17.

perspective: “Rather, the question considered is what the likely impact might be, recognizing that causation in this context might be relatively indirect.”²³⁵

Thus, in the *Faurisson* case, the HRC noted that the impugned statements, “were of a nature as to raise or strengthen anti-Semitic feelings”.²³⁶ Furthermore, as the concurring opinion by Evatt, Kretzmer and Klein in the same case noted, the law itself was overbroad inasmuch as it did not require a, “tendency [on the part] of the publication to incite to anti-Semitism.”²³⁷

A series of hate speech cases, rejected by the European Commission and Court of Human Rights as inadmissible, also focused on impact, although little reasoning was provided in most of these cases to substantiate the claimed impact. Instead, reference was made to either Article 14 of the ECHR, which protects the enjoyment of the rights set out in the Convention without discrimination, or Article 17, which prohibits the use of a right in a way which is aimed at destroying or limiting other rights, the conclusion being that the statements in question would be likely to undermine other rights, in particular equality.²³⁸ In some cases, the Commission or Court referred to the likelihood of the impugned statements raising anti-Semitism.²³⁹ In others, the negative impact of the statements on the underlying Convention objectives of justice and peace was noted.²⁴⁰

It must be noted that the causality or likelihood standards employed in these cases are weak, which is exacerbated by the vague nature of the aims protected – freedom from hatred, justice, peace. Thus, in *Ross*, the standard was ‘possible to reasonably anticipate’ and in *Faurisson*, ‘of a nature to raise’, whereas in other cases no specific likelihood standard was even mentioned. At the same time, it must be kept in mind that these courts were not convicting the accused but merely assessing the application by national courts of a restriction on freedom of expression.

Key Conclusions:

- Causation, in terms of bringing about the proscribed result, namely the creation of the requisite state of mind in those engaged, is an important consideration in assessing whether incitement to genocide or hatred has taken place. It is also central to achieving an appropriate balance between promoting equality and respect for freedom of expression.
- It is unclear from the cases precisely what degree of causal link between the speech and the proscribed result is required. The genocide cases appear to require a closer link than the hate speech cases.
- Close temporal proximity between the speech and the proscribed result – whether this be the creation of a state of mind or specific acts – and is evidence of a causal link.

²³⁵ Para. 1007.

²³⁶ Para. 9.6.

²³⁷ Para. 9. On the facts of that particular case, however, the statements did incite anti-Semitism. See para. 10.

²³⁸ See *Glimmerveen; B.H., M.W., H.P. and G.K; Kühnen; Ochensberger; Remer and Garaudy*.

²³⁹ See *Kühnen and Garaudy*.

²⁴⁰ See *Remer; Nationaldemokratische Partei Deutschlands and Garaudy*

- The likelihood of the proscribed result occurring is another means of showing causality, and hence incitement, and one which may present fewer evidentiary challenges. It may be more difficult to apply this approach, however, where the proscribed result is a state of mind.

II.4.3 Context

Context is clearly of the greatest importance in assessing whether particular statements are likely to incite to genocide or hatred and it may bear on both intent and/or causation. Although this is obvious, and averted to frequently in the jurisprudence, it is extremely difficult to draw any general conclusions from the case law about what sorts of contexts are more likely to promote the proscribed result, although common sense may supply some useful conclusions. Indeed, it sometimes seems as though international courts rely on a sample of contextual factors to support their decisions rather than applying a form of objective reasoning to deduce their decisions from the context. Perhaps the impossibly broad set of factors that constitute context make this inevitable.⁴⁸

As noted above, the context for all of the genocide cases was an extreme case of an actual genocide. Several of the cases place some reliance on this in their reasoning. In *Nahimana*, for example, the Tribunal specifically referred to this noting that in “a genocidal environment”, an “ethnic generalization provoking resentment” would be more likely to lead to violence and would also be an “indicator that incitement to violence was the intent”.²⁴¹

Many of the hate speech cases also refer to contextual factors. In *Faurisson*, for example, the HRC noted a statement by the, “then Minister of Justice, which characterized the denial of the existence of the Holocaust as the principal vehicle for anti-Semitism.” The concurring opinion by Evatt, Kretzmer and Klein also referred to this problem, stating:

The notion that in the conditions of present-day France, Holocaust denial may constitute a form of incitement to anti-semitism cannot be dismissed. This is a consequence not of the mere challenge to well-documented historical facts, established both by historians of different persuasions and backgrounds as well as by international and domestic tribunals, but of the context, in which it is implied, under the guise of impartial academic research, that the victims of Nazism were guilty of dishonest fabrication, that the story of their victimization is a myth and that the gas chambers in which so many people were murdered are "magic".²⁴²

Similarly, in *Ross*, the HRC, in line with decisions at the national level, was very sensitive to the fact that the author had been a teacher and that the sanction had been to remove him from his teaching position:

In the circumstances, the Committee recalls that the exercise of the right to freedom of expression carries with it special duties and responsibilities. These special duties

²⁴¹ Para. 1022. See also paras. 1004-1006, 1029 and 1073. The Nuremberg Tribunal placed some reliance on knowledge of the ongoing genocide in convicting Streicher and letting Fritzsche off, highlighting the importance of that genocide to its decision. See p. 48.

²⁴² Para. 6.

and responsibilities are of particular relevance within the school system, especially with regard to the teaching of young students.²⁴³

In *B.H., M.W., H.P. and G.K.*, a 1989 case, the European Commission of Human Rights referred to Austria's Nazi past as justifying convictions for "performing acts inspired by National Socialist ideas". Those acts included publications denying the Holocaust and promoting the idea that people should be differentiated on the basis of biological and racial distinctions. Nine years later, in 1998, the European Court held that it was time for France to come to terms with its difficult wartime history, stating:

Even though remarks like those the applicants made are always likely to reopen the controversy and bring back memories of past sufferings, the lapse of time makes it inappropriate to deal with such remarks, forty years on, with the same severity as ten or twenty years previously.²⁴⁴

In these cases, the original statements were published within approximately six years of each other, making it a little difficult to reconcile the apparent difference in sensitivity to Austria and France's respective pasts. Perhaps the decision makers felt that an important difference was that the relevant factor in Austria's past was involvement in the Nazi genocide whereas for France, the issue was collaboration with the Nazis. The legitimacy of this may be debated but it does highlight the complexity, and hence threat to objective reasoning, of relying on context. This is a concern from the perspective of the guarantee of freedom of expression since it raises the possibility of arbitrary decision-making.

In *Jersild*, the European Court, in determining that the conviction of a journalist for disseminating racist statements made by others in a TV programme was not justifiable, placed some reliance on the fact that the programme was a serious one, "intended for a well-informed audience".²⁴⁵ Similarly, in *Gündüz*, the Court, in finding that the hate speech conviction of the applicant for participating in a live television show using an exchange of views format was not legitimate, took into account the context and the programme's aim to inform the public about an issue of some public interest.²⁴⁶

In *Gündüz*, the Court also noted a number of other relevant contextual factors. The statements were made in the context of active participation in a "lively public discussion," which did not allow for retraction or refinement of offensive statements before they were broadcast.²⁴⁷ The views of the sect being represented were well-known and the applicant had been invited onto the show specifically to present those 'nonconformist' views.²⁴⁸

²⁴³ Para. 11.6.

²⁴⁴ Para. 55.

²⁴⁵ Para. 34.

²⁴⁶ Para. 44. See also para. 51

²⁴⁷ Para. 49.

²⁴⁸ Paras. 43 and 51.

Significantly, the Court distinguished the *Gündüz* case from *Refah*,²⁴⁹ although the applicants in both were convicted in part for calling for Sharia law to be reinstated in Turkey, something the Court held would be incompatible with respect for human rights. The basis for this was:

[The *Refah* case] concerned the dissolution of a political party whose actions seemed to be aimed at introducing sharia in a State party to the Convention and which at the time of its dissolution had had the real potential to seize political power. Such a situation is hardly comparable with the one in issue in the instant case.²⁵⁰ [references omitted]

In two other cases from Turkey, the European Court again distinguished otherwise arguably similar situations on the basis of context.²⁵¹ In *Zana*, the Court held legitimate a conviction for having “defended an act punishable by law as a serious crime” and “endangering public safety”,²⁵² in part based on contextual factors such as the fact that the applicant was a former mayor of a town in south-east Turkey and that the statements “coincided with murderous attacks” in the area.²⁵³ In *Incal*, the Court found a breach of the right to freedom of expression, stating that, although it was “prepared to take into account the background to the cases submitted to it ... the circumstances of the present case are not comparable to those found in the *Zana* case. Here the Court does not discern anything which would warrant the conclusion that Mr Incal was in any way responsible for the problems of terrorism in Turkey, and more specifically in İzmir.”²⁵⁴ [references omitted]

Key Conclusions:

- Context is clearly a key consideration in determining whether certain statements constitute incitement to genocide or hatred.
- It is hard to draw conclusions from the cases about what sorts of contexts are more likely to lead to incitement. One consideration is whether or not the impugned statements relate to discussions on matters of public interest, in which case they are unlikely to be deemed hate speech.
- In some cases, courts seem to use context to justify a decision rather than to ground it.

II.4.4 Tone/Style/Balance

International courts have often referred to various tone, style or balance considerations when assessing whether or not statements are hate speech. As with context, these considerations go to both intent and causation. The ICTR, in the *Nahimana* case, placed

²⁴⁹ *Refah Partisi and others v. Turkey*, 13 February 2003, Application Nos. 41340/98, 41342/98, 41343/98 and 41344/98 (European Court of Human Rights).

²⁵⁰ Para. 51.

²⁵¹ The State, at least, argued that the cases were similar. See *Incal*, para. 44.

²⁵² *Zana v. Turkey*, 25 November 1997, Application No. 18954/91 (European Court of Human Rights), para. 26.

²⁵³ Para. 59. See generally paras. 58-60.

²⁵⁴ Para. 58.

very significant reliance on tone in assessing whether a statement qualified as hate speech, stating that this was, “as relevant ... as is its content.”²⁵⁵ The *Nahimana* Tribunal also addressed claims by the defendants that their speech had been even-handed and that there was need for vigilance against the enemy in the context of a civil war. It rejected the claim of even-handedness but accepted that the media may need to disseminate hate speech or calls for violence for informative or educational purposes. In such cases, however, the media needed to distance themselves from those statements, which had not happened in that case.²⁵⁶ The Tribunal also recognised that the media may need to play a role in mobilising defence forces but, in this case, the reporting attacked an ethnic group, not a hostile force, and was therefore not directed towards defence.²⁵⁷

Reference has already been made to the series of Turkish cases at the European Court of Human Rights where convictions for hate speech were found to breach the right to freedom of expression on the grounds that they did not constitute incitement to violence or hatred.²⁵⁸ This implies that tone/style are relevant and that the particular style employed was simply not inciting. In one of these cases, *Incal*, the Court specifically stated:

[I]t cannot be ruled out that such a text may conceal objectives and intentions different from the ones it proclaims. However, as there is no evidence of any concrete action which might belie the sincerity of the aim declared by the leaflet’s authors, the Court sees no reason to doubt it.²⁵⁹

In the *Jersild* case, the Court placed some reliance on the fact that the applicant had made an attempt, while deliberately disseminating statements themselves constituting hate speech on his programme, to indicate that he did not support these statements, although he did not specifically counterbalance them. For example, he introduced the discussion as relating to recent public debate about racism, described the interviewees as “a group of extremists” and even rebutted some of the statements.²⁶⁰ The Court also placed some reliance on the fact that the applicant had not made the racist statements himself, but had merely assisted in their dissemination.²⁶¹

In the *Lehideux* case, the European Court, while noting the biased nature of the impugned statements regarding wartime France, also held that the applicants had explicitly disapproved of Nazi atrocities.²⁶²

²⁵⁵ Para. 1022.

²⁵⁶ Para. 1023-1024.

²⁵⁷ Para. 1025.

²⁵⁸ See footnotes 233-234 and surrounding text.

²⁵⁹ Para. 51.

²⁶⁰ Paras. 33-34.

²⁶¹ Para. 31.

²⁶² Para. 53.

II.4.5 Truth

The truth or otherwise of the statements concerned is relevant to whether or not they constitute incitement. There is a certain force to the argument that true statements should never be prohibited in the context of hate speech and truth is a defence in certain legal systems.²⁶³ This also accords with the underlying rationale for prohibiting hate speech, which is that it denies equality. True statements, although they may be uncomfortable, cannot themselves deny equality, although they may be presented in a biased manner, and hence may be misleading. On the other hand, the deliberate dissemination falsehoods may speak to intention.

The issue of truth is rarely addressed directly by international courts discussing hate speech cases. However, it is implicit in the Holocaust denial cases, and the assertion by international courts of the Holocaust as a clearly established historical fact, that the judges deemed the statements in question to be necessarily false and, further, the intention in disseminating them to be to incite hatred.²⁶⁴

It is not quite so self-evident that truth should be a complete defence to a charge of incitement to genocide. Public order offences, to which category the crime of genocide belongs, do not always provide for a defence of truth, although this can lead to highly anomalous situations.²⁶⁵ However, the jurisprudence stands for the proposition that truth is indeed a defence to a charge of incitement to genocide.

The Nuremburg Tribunal seems to have placed some weight on the question of truth in the *Fritzsche* decision. The Tribunal noted that Fritzsche did sometimes spread falsehoods, but that he did not know they were false. Indeed, this suggests that even false statements may be protected, as long as they were not disseminated with knowledge of falsity.

The ICTR went even further in the *Nahimana* case, holding that if a true statement generated 'resentment', this would be a result of the underlying factual situation, rather than the articulation of the statement as such, and the speech would be protected. Falsity, on the other hand, might provide evidence of the requisite criminal intent.²⁶⁶ Furthermore, the Tribunal specifically rejected both Nahimana and Ngeze's claimed commitment to the

²⁶³ For example in Canada. See section 319(3)(a) of the Criminal Code, R.S.C., 1985, C-46.

²⁶⁴ *Walendy* presents a good example of this. The applicant edited a magazine called *Historical Facts*, in which he reported on the Zundel trial in Canada, which involved a prosecution for publishing false news. He claimed, among other things, that his scientific investigation of Auschwitz and other concentration camps indicated that the installations alleged to have been used as gas chambers were never used in this capacity. He was convicted for hate speech in Germany and his application to the European Court of Human Rights, based on an alleged breach of his right to freedom of expression, was found inadmissible as manifestly unfounded. The Court was clearly unimpressed with his claims and deemed the to be palpably false.

²⁶⁵ For example, simple truth is not a defence under British criminal defamation law, whereas it is for civil defamation law.

²⁶⁶ Para. 1021.

truth, stating that truth was “subservient to their objective of ... destruction of the Tutsi ethnic group.”²⁶⁷

Key Conclusions:

- The tone and style of the impugned statements, as well as questions of balance, are all relevant to whether or not they constitute incitement. Balance is not required but some regard for balance, or statements on both sides of the issue, will help demonstrate a lack of intention to incite. This may also be relevant, in the context of disseminating statements by others, to the question of whether or not the author had adopted those statements.
- The dissemination of true statements will rarely, if ever, constitute incitement to genocide or hatred. On the other hand, the deliberate dissemination of falsehoods may signal the presence of an intention to incite.

²⁶⁷ Para. 1027.

Part III: Monitoring: Early Warning of Incitement

This Part of the Study provides some insight into factors to be taken into account when monitoring speech for purposes of identifying early warning signs of a risk of genocide. It will not suggest practical means by which such monitoring may be carried out²⁶⁸ but, rather, suggest factors which monitoring should focus on as providing more credible indications of a risk of genocide.

It is taken as a given that there is a significant difference between monitoring hate speech and monitoring for a risk of genocide. Some incidence of hate speech exists in every society and yet it is only extremely rarely that this poses any real risk of leading to genocide. Indeed, even those producing hate speech often do not intend for it to lead to genocide. Equally importantly, in most States, democratic systems, the rule of law and the ability of the State to maintain public order mean that genocide on any scale is virtually impossible. In some cases, hate speech does, however, pose a risk of genocide and this Part of the Study seeks to identify the factors that make this so.

A second given, relating to the first, is that there is a very big difference between monitoring for preventive purposes and monitoring for purposes of prosecution for breach of hate speech or incitement to genocide laws. On the one hand, prosecution of hate speech, and perhaps even of incitement to genocide, will not always constitute a preventive measure for genocide.²⁶⁹ On the other hand, much speech, while relevant from a genocide risk monitoring perspective, would not qualify as actual incitement to genocide (or even hate speech), in some cases not even remotely. As a result, in this Part, the term ‘promoting genocide’ will be used as opposed to incitement to genocide.

One consideration, linked to resources, is how early in the process of creating a risk of genocide is the monitoring aiming at. Put differently, how small a risk of genocide does the monitoring seek to identify. From the perspective of prevention, the earlier the better but, from the perspective of resources, this may be unrealistic. The analysis below assumes that the monitoring, having prevention in mind, is aimed at identifying a real, but as yet still emerging, risk of genocide.

III.1 Democracy and Freedom of Expression

It seems almost too obvious to warrant repetition that one of the most important bulwarks against genocide is the existence of a democratic framework in which the rule of law applies and human rights are, broadly speaking, respected. This is an extremely wide topic and, for the most part, goes beyond the scope of this Study, which focuses on

²⁶⁸ There are a number of guides on media monitoring, often in the context of elections. See, for example, ARTICLE 19, *Election Reporting: A practical guide to media monitoring* (London: ARTICLE 19, 1998) and National Democratic Institute, *Media Monitoring to Promote Democratic Elections, An NDI Handbook for Citizen Organizations*, available at:

<http://www.accessdemocracy.org/showdoc.asp?lang=1&id={F01555C3-BB2E-4ED2-BDCE-30BF1C4CC325}>. The latter contains a bibliography of media monitoring guides.

²⁶⁹ Prosecution may, for various reasons, actually be counter-productive.

speech as posing a risk of genocide. At the same time, an integral aspect of democracy is respect for the right to freedom of expression and this has important implications for monitoring for the risk of genocide.

Respect for free speech, and a free flow of information and ideas, are crucial tools in combating genocide. In an environment where freedom of expression is respected, the poisonous nature of genocidal ideas is more likely to be exposed and contested. Both those opposed to racism and those who are its potential targets will be able to respond to racist ideas. Articulation of voice by the targets of racism will also reduce the risk of their being characterised as a homogeneous ‘other’ which must be targeted for genocidal destruction.

On the other hand, where freedom of expression is suppressed, and the power of the truth weak, the climate of fear and distortion that is a prerequisite for genocide may be fostered. It is no coincidence that the Nazi and Rwandan genocides took place in contexts characterised by severe repression of freedom of expression. Kamatali points out that, despite the adoption of a more liberal press law in 1991 in Rwanda, independent and opposition journalists were selectively targeted with legal cases, even for infractions that had no basis in law, while the writings of racist extremists were justified as legitimate on the basis of respect for freedom of expression.²⁷⁰ The speech control policies of the Nazis are well-known.

In such a climate, hate speech laws are ineffective and may even be counterproductive.²⁷¹ Indeed, even in far less polarised contexts, such laws may be used to suppress minority viewpoints. The *Incal* case is a good example of this. Statements that the national authorities had penalised as hate speech were really minority claims of repression, characterised by the European Court of Human Rights as being relating to, “actual events which were of some interest to the people of İzmir”.²⁷²

The ways in which freedom of expression may be limited are many and it is beyond the scope of this Study to list them all. Some which may be more important early warning signs of a risk of genocide are:

- the existence of barriers, particularly those subject to political manipulation, to establishing print media outlets, and the use of these barriers to systematically limit the access of certain groups to the print media sector;
- a licensing system for broadcasters which is subject to political control and which works to undermine diversity, and the use of licensing to systematically limit the access of certain groups to the print media sector;
- the absence of media diversity – in both the print and broadcast sectors – and, in particular, an absence of minority (or majority) media;

²⁷⁰ Kamatali, J. M., “Freedom of Expression and its Limitations: The Case of the Rwandan Genocide” (2002) 38 *Stanford Journal of International Law* 57, pp. 66-67.

²⁷¹ Kamatali makes this specific point – see note 270 – but also the more general one that, in weak States, it is extremely difficult to promote an appropriate balance between freedom of expression and restrictions, given the limited capacity to apply the law and to apply it fairly. See pp. 57-58.

²⁷² Para. 50.

- broad and unclear restrictions on the content of what may be published or broadcast, including hate speech laws, along with evidence of racial or group bias in the application of these restrictions;
- the absence of criticism of government or wide-ranging policy debates in the media and other forms of communication; and
- as a particular form of the previous point, the absence of broad social condemnation of racism and racist statements, when they are disseminated.

III.2 Official Involvement

When commenting on the original Secretariat draft of the Genocide Convention, France criticised the undue focus on domestic remedies, noting that they were unlikely to be effective given that, “the crime can only take place with the complicity of the government.”²⁷³ While the absolute nature of this statement may today be debated, the involvement of authorities in anything that may promote genocide is clearly extremely worrying and an important monitoring flag.

In some cases, the relevant authorities may not be part of the State as such, for example where a part of the territory is controlled by a group which is in conflict with the State. References in this section to ‘authorities’ or ‘officials’ should be understood as references to those wielding effective control over the territory. There may also be situations where, for one reason or another, no one wields effective control over a piece of territory. For obvious reasons, the risk of genocide is much greater in these places. In this case, monitoring should focus on those playing an analogous role to more traditional authorities.

The authorities may take a wide range of actions that could promote genocide; for present purposes, only those relating to speech will be considered. Most clearly, direct statements by officials at any level that may be characterised as hate speech or even speech that involves undue or unjustified racial or other biases, should be scrutinised carefully, particularly where they are systematic or frequent. The legality of this speech is not the point; offensive statements by officials which falls well below the threshold for hate speech may still be evidence of racism at the official level.

Due to the trust and leadership with which their positions are imbued, certain officials have special social and moral obligations to avoid making statements which may be understood as supporting or promoting racism. Put differently, where they do make such statements, these will be more likely in actual fact to promote genocide than similar statements made by individuals who do not command the same degree of authority. In *Ross*, for example, the HRC specifically relied on the position of the author as a teacher with influence over students in upholding the measures against him.²⁷⁴

²⁷³ Schabas (2000a), p. 57.

²⁷⁴ Para. 11.6.

Furthermore, such statements may provide evidence of an actual desire to promote genocide. The nature of the messages, discussed below, may provide some evidence of this. Given that those in authority may be more likely to be able to put their desires into effect, this is naturally a matter of greater concern than even similar statements by ordinary citizens.

This, no doubt, is why Article 4(c) of CERD was included in the Convention. This article calls on States Parties not to “permit public authorities or public institutions, national or local, to promote or incite racial discrimination.”²⁷⁵ Similarly, Principle 1 of the Council of Europe Recommendation on ‘Hate Speech’ states:

The governments of the member states, public authorities and public institutions at the national, regional and local levels, as well as officials, have a special responsibility to refrain from statements, in particular to the media, which may reasonably be understood as hate speech, or as speech likely to produce the effect of legitimising, spreading or promoting racial hatred, xenophobia, antisemitism or other forms of discrimination or hatred based on intolerance. Such statements should be prohibited and publicly disavowed whenever they occur.²⁷⁶

It may be noted that the language of this Principle refers to officials’ ‘special responsibility’, unlike some other principles which refer, variously, to the legal framework, and criminal, civil and/or administrative law. This suggests that it covers a range of speech beyond what might legitimately be prohibited by law.

This Principle points to another important warning sign, which is the failure of officials to condemn racist statements by their colleagues when these are made.²⁷⁷ When, in a democracy, public officials do make statements which fall foul of this Principle, one should expect them to be vigorously condemned including by senior officials. Depending on the nature of the statements, some form of sanction may also be appropriate and the failure to apply available sanctions, therefore, is a possible warning sign of official promotion of hatred and/or genocide.

At the same time, some care should be applied when drawing conclusions in these cases. Officials will often need to be involved in debate about sensitive matters which involve questions of race. An example is the current debate in Europe about religious dress in schools. Open debate about such matters is crucial to their proper resolution and yet such debate may be considered by some to be likely to legitimate racism.

A second speech-related issue to be monitored is the application of rules affecting freedom of expression by the authorities. Where this appears to be biased on racial, as opposed to political, grounds, this may give cause for concern. Many governments around the world exercise varying degrees of political control over the media and

²⁷⁵ See also CERD’s *Decision on follow-up to the declaration on the prevention of genocide: indicators of patterns of systematic and massive racial discrimination*, 14 October 2005, CERD/C/67/1, Indicator 9.

²⁷⁶ Recommendation R(97)20 of the Committee of Ministers of the Council of Europe on ‘Hate Speech’, 30 October 1997.

²⁷⁷ Similarly CERD General Recommendation No. 30, 2004, para 12, calls on States to “[t]ake resolute action to counter any [racist] tendency” especially where this involves officials.

expression more generally, including through the selective application of rules restricting content, and, while this often represents a breach of the right to freedom of expression, it in no way signals a risk of genocide.²⁷⁸ Where such control shows signs of racial bias, however, this may be a warning sign of a risk of genocide.

Such bias may manifest itself in many ways. Some of these are:

- the systematic denial of access to the media – whether it be through registration/licensing/accreditation processes or other means – of certain racial groups and/or those who speak out on racism in society;
- a systematic failure to prosecute certain forms of hate speech, particularly where other forms of expression are actively prosecuted; and
- the abuse of certain types of content restrictions to deny, on a systematic basis, the articulation of the views of certain racial groups and/or those who speak out against racism.

III.3 Status

A key factor, noted above in relation to officials, is the status of those disseminating the messages. Officials have a particular obligation, due to their formally public roles, to avoid spreading hatred and the direct promotion of genocide by the authorities is of great concern, given their relative power to actually bring about genocide. At the same time, many other social actors also exercise power and hence represent a monitoring interest analogous to officials. There is a great deal of difference between a fringe group of extremists (so considered according to local norms) promoting hatred or genocide and respected members of the community doing so. The involvement of social institutions – religious establishments, youth groups and so on – in promoting hatred or genocide is also significant. A related factor is the means by which such messages are communicated to the public. Messages in the mainstream media are far more likely to create a risk of genocide than extremist websites, for example.

III.4 Frequency/Scope

Practically all of the monitoring factors described in this Part of the Study occur from time-to-time in most societies, even though there is little or no risk of genocide. When these factors reach a certain level of intensity – in terms of frequency and scope – they may, however, point to a real risk of genocide. In other words, where promotion of genocide and/or hatred is widespread and effective, it may pose a serious risk of genocide. In its *Decision on follow-up to the declaration on the prevention of genocide*, CERD noted the following as a warning sign for genocide:

Systematic and widespread use and acceptance of speech or propaganda promoting hatred and/or inciting violence against minority groups, particularly in the media.²⁷⁹

²⁷⁸ Although it might where politics and race are substantially conflated.

²⁷⁹ *Decision on follow-up to the declaration on the prevention of genocide: indicators of patterns of systematic and massive racial discrimination*, 14 October 2005, CERD/C/67/1, Indicator 8.

In *Nahimana*, the ICTR referred variously to the ‘drumbeat’ of RTLTM and the ‘litany’ of abusive statements in *Kangura*. Kamatali notes the very widespread web of hate media that flourished in Rwanda, mostly from 1991.²⁸⁰ The constant repetition of these messages makes them seem less extreme and eventually normal, even to members of society who might initially be surprised and shocked by them.

Where the frequency of racist statements is increasing, this may also be a warning sign. A CERD Working Paper on *Prevention of racial discrimination, including early warning and urgent procedures*, for example, refers to the following as an early warning concern for racism:

The presence of a pattern of *escalating* racial hatred and violence, or racist propaganda or appeals to racial intolerance....²⁸¹ [emphasis added]

A related consideration is the geographic scope of the messages and whether they are being received broadly among the (potential) target audience or just by a small subset thereof. It may be noted that the target audience may be a specific, even minority, group (for example, members of a racist club).

Where frequent statements are made by higher status social speakers, this can create a powerful cocktail which, over time, can give rise to racist tendencies even among members of society who are not normally susceptible to it. Indeed, humankind’s ability to resist the constant repetition of messages from apparently authoritative sources has frequently proven to be weak.

III.5 Context

As noted above, context is extremely important in determining whether certain statements are in fact likely to incite to hatred or genocide. A vast array of contextual factors are potentially relevant here. The more serious genocides of the past 100 years have often taken place in a context of war or the imminent threat thereof, a contextual factor that quite clearly increases the risk of genocide taking place. Another obvious consideration is the presence or otherwise of racially motivated violence. It is, however, beyond the scope of this Study to address broader contextual factors. Specific speech-related contextual factors are described primarily under other headings in this Part of the Study.

III.6 Nature of the Messages

One of the more challenging tasks for those monitoring speech for promotion of genocide is to distinguish between messages which ‘merely’ propagate hatred and those which actually stir up genocidal intentions. There is obviously no hard and fast way of doing this but a number of considerations are relevant.

²⁸⁰ Pp. 67-9. See also Schabas (2000b), pp. 145-6.

²⁸¹ September 1993, Official Records of the General Assembly, 48th Session, Supplement No. 18 (A/48/18), Annex III, para. 9(b)(iii).

The degree of directness of statements is a relevant factor to take into account. It is one thing to disseminate statements which denigrate certain groups, another to disseminate statements which call for direct but non-violent action to be taken against those groups, another to call for acts of violence against members of the group and yet another to call for acts of genocide to be committed. Each of these represents an escalation of directness and each poses a greater risk of promoting genocide.

In *Nahimana*, the ICTR stressed that the statements explicitly called for the extermination of the Tutsis and even provided direction as to how that goal was to be achieved.²⁸² It also specifically held that certain statements were not incitement to genocide on the basis that they did not represent a call to action, stating, at one point:

A Cockroach Cannot Give Birth to a Butterfly, for example, is an article brimming with ethnic hatred but did not call on readers to take action against the Tutsi population.²⁸³

Another factor that seems to run through many cases of genocide, and which provides an important motivation for genocide, is that the messages being disseminated sought to create a climate of fear specifically in relation to the target group. In other words, the messages sought not only to denigrate the target group, a defining characteristic of hate speech, according to the *Nahimana* tribunal,²⁸⁴ but also to instil among readers and listeners a sense of fear of the target group for one reason or another. Such messages seek to convince the reader or listener not only that the target group is inherently inferior but also that its very existence is a threat to the reader or listener's own group. Thus the messages promote the idea, either explicitly or implicitly, that the only solution is to get rid of the target group.

The fabled Jewish conspiracy theories of the Nazis, which sought to blame the Jews for the loss of the First World War and generally to portray them as undermining and backstabbing the German people, is a good example of this. The fear factor was equally evident in the Rwandan context. In *Nahimana*, for example, the ICTR noted:

Through fear-mongering and hate propaganda, *Kangura* paved the way for genocide in Rwanda, whipping the Hutu population into a killing frenzy.²⁸⁵

And of RTLM, the Tribunal noted the following:

In this setting, radio heightened the sense of fear, the sense of danger and the sense of urgency giving rise to the need for action by listeners.²⁸⁶

A dominant theme of the messages was that if the Hutus did not first kill the Tutsis, the latter would get them first. The Tribunal noted the presence of "a litany of ethnic

²⁸² See paras. 957-969.

²⁸³ Para. 111037.

²⁸⁴ Para. 1021.

²⁸⁵ Para. 950.

²⁸⁶ Para. 1031.

denigration presenting the Tutsi population as inherently evil and calling for the extermination of the Tutsi as a *preventive* measure.”²⁸⁷ [emphasis added]

As always, care must be taken to distinguish between statements which really do attack human beings and those which may be characterised as targeting ideas.

III.7 Intent

As noted above, intent is a prerequisite for criminal liability for incitement to both genocide and hatred. In terms of assessing the risk of genocide, intent may be a relevant factor. Although statements lacking the requisite intent for hate speech may in fact have the effect of promoting hatred, it is very unlikely that such statements on their own would create a real risk of genocide. Indeed, often, even statements made with the intent to incite to hatred would fail to create a real risk of genocide. Where intent to incite genocide is present, however, the messages will be more likely to pose a real risk of genocide.

The problem with this as a monitoring tool is that it will often be very difficult to assess the intention behind racist statements. In some cases, however, the nature of the statements may suggest an intention.

²⁸⁷ Para. 1036.

Part IV: Prevention

Prevention of genocide is a very wide topic which, for the most part, goes well beyond the scope of this Study. There are, however, a number of speech-related preventive measures which may be taken to address hate speech and these are canvassed below. These fall, broadly, into two camps: measures to address ‘bad’ speech and positive measures to promote speech which combats or counters racism. It is taken as a given that combating racism generally is a preventive measure for genocide.

IV.1 Addressing ‘Bad’ Speech

A series of measures can be taken to address ‘bad’ speech, which, as understood here, ranges from incitement to genocide to hate speech to other racist speech to speech which simply tends to perpetuate unfortunate stereotypes. These include legal measures, more programmatic efforts in the area of training and media self-regulation, and the issue of banning hate groups.

IV.1.1 Legal Measures

Obviously one legal measure to combat bad speech is criminal laws governing hate speech or incitement to genocide. These have already been discussed extensively in this Study. One issue which arises in this context is the relationship between active prosecution under such laws and prevention. The CERD Committee, while recognising that States may take broader public policy into account in deciding whether or not to prosecute, has noted that the Convention guarantees must be respected in this process, thereby limiting States’ discretion not to prosecute.²⁸⁸ It has also often criticised States for the low rate of successful prosecutions for hate speech²⁸⁹ and welcomed the active prosecution thereof.²⁹⁰

The Council of Europe Recommendation on Hate Speech, on the other hand, takes a more nuanced approach, calling on States to, “develop a co-ordinated prosecution policy based on national guidelines respecting the principles set out in this recommendation”²⁹¹ and calling on the authorities to exercise care in bringing cases, taking into account freedom of expression and the serious interference with this right that criminal sanctions represent.²⁹²

²⁸⁸ See, for example, *YilmazDogan v. The Netherlands*, 29 September 1988, Communication No. 1/1984; *L.K. v. The Netherlands*, 16 March 1993, Communication No. 4/1991; and *Ahmad v. Denmark*, 8 May 2000, Communication No. 16/1999.

²⁸⁹ See, for example, Concluding Observations on Australia’s 14th and 15th Periodic Reports, 14 April 2005, CERD/C/428/Add.2, para. 15.

²⁹⁰ See Concluding Observations on Côte d’Ivoire’s 5th to 14th Periodic Reports, 3 June 2003, CERD/C/62/CO/1, para. 5.

²⁹¹ Recommendation R(97)20 of the Committee of Ministers of the Council of Europe on ‘Hate Speech’, 30 October 1997, Principle 2.

²⁹² Principle 5.

Some academic commentary suggests that the primary role of hate speech laws is to establish clear social condemnation of racism, rather than to excise hateful speech *per se*, and that the effectiveness of actual prosecutions may be limited²⁹³ and even counterproductive as creating martyrs.²⁹⁴ Furthermore, the risk of unsuccessful prosecution, which can be very counterproductive as it appears to validate the impugned speech, must be taken into account.²⁹⁵ Also, as Kamatali points out, where prosecutorial and judicial authorities lack independence, promoting active prosecution of speech is at least as likely to deter anti-racist speech as hate speech.²⁹⁶

From the perspective of preventing genocide, the answer to this probably lies in the context. Where independent prosecutorial and judicial authorities can be expected to play a role in combating a genocidal trend through active prosecution of speech that constitutes incitement, this may be an effective preventive measure. In other contexts, however, this is not the case and urging active prosecution of speech may be counterproductive. Unfortunately, it is precisely where there is a real risk of genocide that administration of justice authorities tend to lack independence.

The criminal law is only one legal means to address bad speech and civil law remedies may also play a role here.²⁹⁷ In many countries, it is possible to bring a civil suit for compensation for discrimination, for example in the workplace, including where this propagated by means of speech. The importance of this has been recognised by international bodies. The Council of Europe Hate Speech Recommendation, for example, calls for greater attention to civil law remedies leading to compensation for hate speech.²⁹⁸ The same Recommendation refers to the possibility of providing for a right of reply and/or retraction for hate speech.

Although all legal measures rely, ultimately, on the courts for enforcement, civil law measures do at least avoid reliance on prosecutorial authorities, who may for various reasons fail to take action on such cases or prosecute in a biased fashion. Furthermore, the fact that civil law remedies tend to be less intrusive also means that they tend to be less problematical from the perspective of freedom of expression. At the same time, any such measures must also pass the test for restrictions on freedom of expression to be legitimate under international law.

²⁹³ Gaudreault-DesBiens, pp. 130-131.

²⁹⁴ Gaudreault-DesBiens, pp. 133-134.

²⁹⁵ The recent acquittal of British National Party leader, Nick Griffin, on charges of hate speech, is a good example of this. See note 173.

²⁹⁶ See note 270.

²⁹⁷ Indeed, McGoldrick, D. and O'Donnell, T., "Hate-speech laws: consistency with national and international human rights law" (1998) 18 *Legal Studies* 453, suggest that the predominant means of addressing hate speech is through civil remedies. See p. 457.

²⁹⁸ Recommendation R(97)20 of the Committee of Ministers of the Council of Europe on 'Hate Speech', 30 October 1997, Principle 2. See also the European Commission Against Racism and Intolerance's General Policy Recommendation N° 7: On National Legislation to Combat Racism and Racial Discrimination, adopted 13 December 2002.

Various administrative measures may be used to address racist speech. For example, many countries have administrative systems for addressing discrimination. Indeed, several of the cases discussed above are based on the application of measures by administrative anti-discrimination bodies at the national level.²⁹⁹ These systems allow for the application of administrative measures in response to speech that amounts to discrimination, as well, of course, as other forms of discrimination.³⁰⁰

Most States regulate broadcast content through statutory codes of programme content applied by regulatory bodies and these codes often have provisions dealing with racially offensive content. Section 2.3 of the United Kingdom Office of Communications Broadcasting Code of 25 July 2005, for example, states:

In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context (see meaning of “context” below). Such material may include, but is not limited to, offensive language, violence, sex, sexual violence, humiliation, distress, violation of human dignity, discriminatory treatment or language (for example on the grounds of age, disability, gender, race, religion, beliefs and sexual orientation). Appropriate information should also be broadcast where it would assist in avoiding or minimising offence.

Where these bodies lack independence from government, the application of such content rules can be a serious problem from the perspective of freedom of expression. Where they are independent, however, they are generally deemed to be consistent with the right to freedom of expression.³⁰¹

The *European Convention on Transfrontier Television* provides for open sharing of broadcasting among States Parties as long as programmes meet certain minimum standards, including that they, “respect human dignity and fundamental rights and, in particular, not: be likely to incite to racial hatred.”³⁰²

IV.1.2 Non-Legal Measures

These legal measures may be supplemented by a number of non-legal measures. Perhaps most important among these are self-regulatory measures by media bodies, media outlets or journalists’ associations to prevent the dissemination of harmful speech. In many countries, media sectors, in particular newspapers and journalists, have formed self-regulatory bodies to promote professional standards and in some cases to provide the public with a complaints system for reporting which fails to meet minimum standards. In many cases, these standards include rules relating to reporting on matters involving race.

²⁹⁹ See, for example, *Ross and Dogan*.

³⁰⁰ To follow the previous example, for racist speech in the workplace. See, for example, the European Commission Against Racism and Intolerance’s General Policy Recommendation N° 7: On National Legislation to Combat Racism and Racial Discrimination, adopted 13 December 2002, para. 6.

³⁰¹ There are various rationales for this, including the need to license broadcasters to ensure order in the airwaves and the highly intrusive nature of broadcasting. The European Court of Human Rights, in *Jersild*, noted that, “the audiovisual media have often a much more immediate and powerful effect than the print media.” Para. 31. See also *Nahimana*, para. 1031.

³⁰² E.T.S. 132, adopted 5 May 1989, entered into force 1 May 1993, Article 7(1).

The International Federation of Journalists, for example, has adopted a *Declaration of Principles on the Conduct of Journalists*,³⁰³ Principle 7 of which states:

The journalist shall be aware of the danger of discrimination being furthered by the media, and shall do the utmost to avoid facilitating such discrimination based on, among other things, race, sex, sexual orientation, language, religion, political or other opinions, and national or social origins.

Awareness-raising, directed at both the media specifically and the general public, is another important social means of addressing racist speech. In its General Recommendation No. 29, focusing on descent-based racism, CERD called on States Parties to:

Take measures to raise awareness among media professionals of the nature and incidence of descent-based discrimination.³⁰⁴

IV.1.3 Banning Groups

The potential preventive impact of banning hate groups has been noted above and it would appear that it was this aspect of these measures that served as the primary rationale for including them in Article 4(b) of CERD.³⁰⁵ Lerner notes that this was one of the “most difficult problems in the drafting of the Convention,”³⁰⁶ due to the potential conflict with freedom of association.

In its General Recommendation No. 15, the CERD Committee recognised that some States refuse to ban groups before their members incite racial discrimination and stated that the article “places a greater burden upon such States to be vigilant in proceeding against such organizations at the earliest moment. These organizations, as well as organized and other propaganda activities, have to be declared illegal and prohibited. Participation in these organizations is, of itself, to be punished.”³⁰⁷ In specific country observations, the CERD Committee has also insisted on the banning of racist groups and not just the subjection of their members to criminal sanctions, as appropriate.³⁰⁸ The HRC has also welcomed efforts to ban groups propagating racist views.³⁰⁹ Despite this, most

³⁰³ Adopted by the Second World Congress of the International Federation of Journalists at Bordeaux on 25-28 April 1954 and amended by the 18th IFJ World Congress in Helsingör on 2-6 June 1986.

³⁰⁴ General Recommendation 29: Article 1, paragraph 1 of the Convention (Descent), 1 November 2002, para. 20.

³⁰⁵ See Lerner, p. 50.

³⁰⁶ P. 50.

³⁰⁷ Adopted 23 March 1993, para. 6.

³⁰⁸ Concluding Observations on Luxembourg’s 10th-13th Periodic Reports, 18 April 2005, CERD/C/LUX/CO/13, para. 15.

³⁰⁹ Concluding Observations on Russia’s Fifth Periodic Report, 6 November 2003, CCPR/CO/79/RUS, para. 20. The Committee did, however, at the same time express concern about the wide definition of extremist activity in the relevant law.

States have not tended to ban groups on the grounds that they promote hatred and many do not even have the legal means in place to do so.³¹⁰

It would also appear that, in extreme situations, direct action may be taken to counter radio broadcasts and publications inciting to genocide. In 1998, the UN Security Council passed Resolution 1161, relating to Rwanda and neighbouring countries, which,

[u]rges all States and relevant organizations to cooperate in countering radio broadcasts and publications that incite acts of genocide, hatred and violence in the region.³¹¹

It has been persuasively argued that jamming the RTML broadcasts would at some point have been legitimate in the context of the Rwandan genocide.³¹²

IV.2 Positive Measures

Civil society and, in particular, the media, have an important role to play in combating racism. While such a role should not be enforced by law, it nevertheless represents an important social duty for these actors. As the three special mandates for freedom of expression – the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression – have stated:

Media organisations, media enterprises and media workers – particularly public service broadcasters – have a moral and social obligation to make a positive contribution to the fight against racism, discrimination, xenophobia and intolerance.³¹³

Public service broadcasters have a particular obligation to promote tolerance and shared values given that they are publicly owned and funded.

Giving voice to minorities is also an important way to combat racism. Racism is often based on a portrayal of minority groups as one-dimensional others who have collective shortcomings such as stupidity, ignorance, greed or whatever. Such distortions are based on ignorance about these minorities and ensuring their presence in the media, particularly the broadcast media, is an important way of combating such ignorance.

Media diversity in the sense of ensuring minority access can be promoted in a number of ways, including through the broadcast licensing process and by providing subsidies to minority print media. In South Africa, for example, Article 2(a) of the Independent Communications Authority of South Africa Act (ICASA Act) states, as one of the three

³¹⁰ See Mahalic and Mahalic, p. 99.

³¹¹ Adopted 9 April 1998, para. 5.

³¹² See Metz, J.F., “Rwandan Genocide and the International Law of Radio Jamming” (1997) 91 *American Journal of International Law* 628.

³¹³ Joint Statement on Racism and the Media, 27 February 2001.

objects of the Act, to, “regulate broadcasting in the public interest and to ensure fairness and a diversity of views broadly representing South African society”.³¹⁴

Often public service broadcasters are specifically required to give voice to minorities, an appropriate obligation given that, as public bodies, they should represent the whole population. The Canadian Broadcasting Corporation, for example, is required, among other things, to “reflect the multicultural and multiracial nature of Canada”.³¹⁵

³¹⁴ Act No. 13 of 2000.

³¹⁵ Broadcasting Act, S.C. 1991, c. 11, section 3(m)(viii). See also Hungarian Act 1 of 1996 on Radio and Television Broadcasting, Article 2(26), which requires the public broadcaster to carry minority programming.